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Notice of Appeal
Filed August 30, 1928

Monmouth Common Pleas Court

MONMOUTH PLUMBING SUPPLY Co., body corporate, *Plaintiff*, vs. ROMEO MACDONALD and JEREMIAH MACDONALD, *Defendants.*	***NOTICE OF APPEAL***

NOTICE OF APPEAL.

Service Acknowledged Aug. 28, 1928.

Filed August 30, 1928.

To Durand, Ivins and Carton, Esqs.,
Attorneys of Defendant, Jeremiah MacDonald.

Sirs:

Please take notice that the plaintiff in the above entitled cause appeals to the Supreme Court of the State of New Jersey from the whole of the judgment entered in this cause on the following grounds, to wit:

1. Because the Monmouth County Common Pleas Court erred in giving judgment to the defendant instead of the plaintiff, in that

a. The guarantee given by Jeremiah MacDonald to the plaintiff was a continuing guarantee and continued in full force and effect until same was cancelled.

b. That said guarantee was not exhausted by the mere voluntary payment made by said Jeremiah MacDonald to the plaintiff as agent for Romeo MacDonald or otherwise.

c. That the said guarantee continued in full force and effect and the plaintiff, the Monmouth Plumbing Supply Company, had the right to rely on the same until such time as default was made by said Romeo MacDonald and the said plaintiff had called upon said Jeremiah MacDonald to make good on his said guarantee.

d. Defendant Jeremiah MacDonald did not pay to the plaintiff the sum of Two Hundred and Sixty-eight Dollars and Ninety Cents in accordance with the guarantee made by the said defendant Jeremiah MacDonald by agreement dated October 24, 1921.

e. Defendant Jeremiah MacDonald did not cancel his said agreement dated October 24, 1921, nor did he notify the plaintiff that he would not be responsible for or guarantee any further debts of the defendant, Romeo MacDonald.

Respectfully yours,
CHARLES F. SEXTON,
Attorney of Plaintiff.

JUDGMENT RECORD.

Jeremiah MacDonald, one of the defendants in this case, was summoned to answer unto Monmouth Plumbing Supply Co., body corporate of New Jersey, the plaintiff therein, in an action at law upon the following complaint:

Bill of Complaint.
Served Sept.16,1926

MONMOUTH COUNTY COMMON PLEAS COURT

MONMOUTH PLUMBING SUPPLY Co., body corporate of New Jersey, *Plaintiff*, vs. ROMEO MACDONALD and JEREMIAH MACDONALD, *Defendants.*	***ACTION AT LAW*** ***SUMMONS AND COMPLAINT***

COMPLAINT.

Served upon Jeremiah MacDonald

Sept. 16, 1926.

Monmouth Plumbing Supply Co., a corporation of the State of New Jersey, having its principal office in the City of Long Branch, New Jersey, says that:

FIRST COUNT.

1. It sues for the sum of $532.76, the price of goods sold and delivered to the defendant, Romeo MacDonald, upon a book account, a copy of which is hereto attached and the whole of which is due and unpaid.

SECOND COUNT.

1. It sues for the price of goods sold and delivered to the defendant, Romeo MacDonald, at his request, said goods and chattels so sold and delivered being the same as set forth in the copy of the book

account hereto attached. The price of said goods and chattels being $532.76, no part of which has been paid.

THIRD COUNT.

1. The plaintiff herein sold and delivered to Romeo MacDonald goods and chattels in the sum of $250.00, for which said goods so sold and delivered to said Romeo MacDonald, the defendant, Jeremiah MacDonald became surety for the payment thereof up to the value of $250.00 by written agreement bearing date the 14th day of October, 1921, a copy of which guaranty or agreement is hereto attached, wherein and whereby said defendant, Jeremiah MacDonald, agreed to pay said sum of $250.00.

2. The said Romeo MacDonald has not paid for said goods and chattels sold and delivered to him by said Monmouth Plumbing Supply Co., payment for which was guaranteed by agreement in writing as aforesaid by the said defendant, Jeremiah MacDonald, and the said Romeo MacDonald owes plaintiff said sum of $250.00 guaranteed, and by virtue of said guaranty in writing, as aforesaid, said Jeremiah MacDonald is indebted to the plaintiff in the sum of $250.00.

WHEREFORE, plaintiff demands of the defendants, Romeo MacDonald and Jeremiah MacDonald, the sum of $250.00 with interest thereon from June 30th, 1926, to date of judgment and costs of suit.

Plaintiff demands of the defendant, Romeo MacDonald, the further sum of $282.76 with interest thereon from June 30th, 1926, to date of judgment and costs of suit.

CHARLES F. SEXTON,
Attorney for Plaintiff.

Statement annexed to
Bill of Complaint

MONMOUTH PLUMBING SUPPLY CO., INC.

Long Branch, N. J.

In Account with

Romeo MacDonald.

1923				
Nov. 2	To Mdse.	21.72		
6		26.35		
8		235.48		
8		11.28		
12		16.77		
12		33.37		
12		29.93		
14		18.45		
15		8.93		
19		2.68		
20		147.50		
20		16.86		
24		12.51		
30		.96		
Dec. 1		59.38		
17		3.25		
1924				
Feb. 23		25.40		
29		78.00		
Mar. 6		9.00		
25		22.75		
Apr. 11		19.00		
18		17.00		
		——	816.57	

Credits.

1924			
Jan. 14.	Cash	200.00	
Feb. 16	Cash	100.00	
Mar. 14	C. M.	8.35	

Apr.	8	C. M.	9.00	
	12	C. M.	35.00	
			——	352.35
				464.22
Interest to June 30th, 1926				68.54
				532.76

Long Branch, N. J.,

Oct. 24th, 1921.

Monmouth Plumbing Supply Co.,
Long Branch, N. J.

Gentlemen:

Kindly extend credit to R. MacDonald, 600 Grand Ave., Asbury Park, N. J., for plumbing and heating material to the amount of $250.00, and I hereby become security for same, and will see that same is paid within sixty (60) days from date of invoice, or discount the bill on the 10th of each month.

Yours very truly,
JEREMIAH MACDONALD,
600 Grand Ave.,
Asbury Park, N. J.

Affidavit of Merits
Filed September 18,1926

MONMOUTH COUNTY COMMON PLEAS COURT

MONMOUTH PLUMBING SUPPLY Co., body corporate of New Jersey, *Plaintiff*, vs. ROMEO MACDONALD and JEREMIAH MACDONALD, *Defendants.*	***ACTION AT LAW*** ***AFFIDAVIT OF MERITS***

AFFIDAVIT OF MERITS.

Filed Sept. 18th, 1926.

STATE OF NEW JERSEY: }
COUNTY OF MONMOUTH: } SS.

FORMAN T. BAILEY, being duly sworn, according to law, on his oath says, that he is a member of the firm of Durand, Ivins & Carton, Attorneys for Jeremiah MacDonald, one of the defendants in the above stated action and that this affiant believes that the said defendant has a just and legal defense to the said action on the merits of the case.

Subscribed and sworn before me,
this seventeenth day of
September, 1926.
Samuel Y. Hampton,
Attorney at Law
of New Jersey.

Forman T. Bailey.

Answer of Jeremiah MacDonald
Filed September 24,1926

MONMOUTH COUNTY COMMON PLEAS COURT

MONMOUTH PLUMBING SUPPLY Co., body corporate of New Jersey, *Plaintiff,* vs. ROMEO MACDONALD and JEREMIAH MACDONALD, *Defendants.*	***ACTION AT LAW*** ***ANSWER OF DEFENDANT,*** ***JEREMIAH MACDONALD***

ANSWER.

Filed Sept. 24th, 1926.

The defendant Jeremiah MacDonald answered as follows:

The defendant, Jeremiah MacDonald, residing in the City of Asbury Park, County of Monmouth and State of New Jersey, answering the complaint herein, says:

1. He has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in the First Count of said complaint and therefore denies the same.

2. He has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in the Second Count of said complaint and therefore denies the same.

3. He denies so much of the first paragraph of the Third Count as alleges that the defendant, Jeremiah MacDonald, became surety for the payment up to the value of Two Hundred Fifty ($250.00) Dollars of said goods and chattels and states that said defendant became a guarantor to the extent of Two Hundred Fifty ($250.00) Dollars.

4. He denies so much of the second paragraph of the Third Count as alleges that the defendant, Jeremiah MacDonald, is indebted to the plaintiff in the sum of Two Hundred Fifty ($250.00) Dollars.

DEFENSE TO THIRD COUNT.

1. Defendant, Jeremiah MacDonald, says that heretofore he paid to the plaintiff herein the sum of Two Hundred Sixty-eight Dollars and Ninety Cents ($268.90) in accordance with the guarantee made by the said defendant, Jeremiah MacDonald, by agreement dated October 24, 1921.

FIRST SEPARATE DEFENSE.

1. Defendant, Jeremiah MacDonald, says that upon the payment of said Two Hundred Sixty-eight Dollars and Ninety Cents ($268.90) to said plaintiff in accordance with the guarantee made on October 24, 1921, he told the said plaintiff that he would not be responsible for or guarantee any further debts of the defendant, Romeo MacDonald.

DURAND, IVINS & CARTON,
Attorneys for Defendant,
Jeremiah MacDonald.

Reply
Filed Oct.5,1926

MONMOUTH COMMON PLEAS COURT

MONMOUTH PLUMBING SUPPLY Co., body corporate of New Jersey, *Plaintiff,*	***ACTION AT LAW***
VS.	***REPLY***
ROMEO MACDONALD and JEREMIAH MACDONALD, *Defendants.*	

REPLY.

Filed Oct. 5th, 1926.

The plaintiff replied as follows:

In reply to the defense set forth in the answer of Jeremiah MacDonald; to the "DEFENSE TO THIRD COUNT" and to the "FIRST SEPARATE DEFENSE," plaintiff denies each and every allegation therein contained and plaintiff joins issue in the said action with the defendant, Jeremiah MacDonald.

CHARLES F. SEXTON,
Attorney for Plaintiff.

This action was tried before Judge Jacob Steinbach, Jr., with a jury at the Monmouth Common Pleas Court on May 17th, 1928.

On motion of the defendant, Jeremiah MacDonald, the Court granted a judgment of non-suit.

Whereupon it is adjudged that the defendant, Jeremiah MacDonald, recover of the plaintiff his costs which are taxed at the sum of Sixty-nine Dollars and Ninety-five Cents ($69.95).

Judgment entered May 17th, 1928.

Judgment
Filed May 17, 1928

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MONMOUTH COMMON PLEAS

18094-25-56 APRIL TERM, 1928

MONMOUTH PLUMBING SUPPLY Co., body corporate of New Jersey, *Plaintiff*, vs. ROMEO MACDONALD and JEREMIAH MACDONALD, *Defendants.*	***ACTION AT LAW*** ***JUDGMENT BY NON-SUIT*** ***Judgment Entered May 17, 1928 Costs, $69.95***

Durand, Ivins & Carton, Attys.

Judgment in the above entitled action was entered on the seventeenth day of May, A. D. One Thousand Nine Hundred and Twenty-eight, in favor of the defendant, Jeremiah MacDonald, and against the plaintiff, Monmouth Plumbing Supply Co., body corporate of New Jersey, Action at Law; Judgment by a Nonsuit, for the sum of Sixty-nine Dollars and Ninety-five Cents, costs of suit.

Judgment entered and signed May 17, 1928, 4:40 P.M.

STATE OF NEW JERSEY: }
COUNTY OF MONMOUTH: } SS.

I, JOSEPH MCDERMOTT, Clerk of said County, do hereby certify, that the foregoing copy of complaint, answer, and proceedings, in the case of Monmouth Plumbing Supply Co., body corporate, vs. Romeo MacDonald and Jeremiah MacDonald, is true and correct as the same remains on file in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said County, this fifth day of September, A. D. Nineteen Hundred Twenty-eight.

JOSEPH MCDERMOTT,
Clerk.

MONMOUTH COMMON PLEAS COURT

MONMOUTH PLUMBING SUPPLY CO., *Plaintiff,* vs. ROMEO MACDONALD and JEREMIAH MACDONALD, *Defendants.*	***ACTION AT LAW***

Freehold, N. J., May 17, 1928.

JACOB PERRI, Sworn for Plaintiff.

Direct Examination by MR. SEXTON:

Q. Mr. Perri, you reside where?

A. Long Branch.

Q. And are you connected with the Monmouth Plumbing Supply Company?

A. Yes, sir.

Q. They do business in Long Branch?

A. Yes, sir.

Q. A corporation?

A. Yes.

Q. In what capacity are you connected with this corporation?

A. Bookkeeper.

Q. Were you connected with the Monmouth Plumbing Supply Company in 1921?

A. Yes, sir.

Q. And are you still bookkeeper?

A. Still do bookkeeping.

Q. Of the same company?

A. Yes.

Q. And have been since that time?

A. Yes.

Q. Are you familiar with the account of Romeo MacDonald and Jeremiah MacDonald?

A. Yes, sir.

Q. Were you familiar with that account at the time it was opened in 1921?

A. Yes, sir.

Q. Have you the books of the company?

A. I have.

Q. With you?

A. Yes, sir.

Q. Will you produce them?

(Witness produces loose leaves, which are submitted to Mr. Carton.)

Q. I show you two sheets marked pages 1, 2, 3 and 4, "R. MacDonald," and ask you what they are.

A. This is the ledger account of Romeo MacDonald.

Q. And the ledger is what kind of a ledger?

A. Double entry ledger.

Q. And the character of the book is what?

A. Customer's ledger.

Q. Yes, but you only have two sheets before you.

A. Yes, and this is the sheets taken from the transfer ledger.

Q. And the ledger itself contains what kind of sheets?

A. Well, they are charge tickets.

Q. Well, I can't lead you, but it is a loose leaf ledger, isn't it?

A. It is a loose leaf ledger, yes, sir.

Q. And these are original sheets from it?

A. They are.

Q. And they show the account of whom?

A. R. MacDonald.

Q. And the balance due on that account as disclosed by that ledger is what?

A. $464.22.

(Sheets marked Exhibit A for identification.)

Q. I show you some yellow sheets fastened to-

gether with a pin and ask you what they are.

A. These are items of charges, invoices.

Q. They are the original invoices?

A. Original copies of invoices, the one that goes to the customer.

Q. And posted from there into the sheets of the ledger?

A. Into the ledger sheets, yes, sir.

Q. And they have relation to what account?

A. Of R. MacDonald.

Q. And they cover what period of time?

A. Well, these yellow sheets, they cover from November, 1923, to April, 1924, as the unpaid charges.

Q. And they amount to the sum as given before?

A. Yes, sir.

Q. In your ledger sheet?

A. Yes, sir.

(Papers marked Exhibit B for identification.)

(It is admitted that the letter of October 24, 1921, to the Monmouth Plumbing Supply Company, signed by Jeremiah MacDonald, is a true copy of the letter and that it is the true signature of Mr. MacDonald and that the same may be offered in evidence.)

(Letter marked Exhibit P 1.)

Q. I show you a paper marked Exhibit P 1, Mr. Perri, and ask you if you know what that is.

A. This is a guaranty by Jeremiah MacDonald.

Q. And do you recall when that was given?

A. Yes, sir.

Q. That was given when as to time of the opening of the account?

A. October 24, 1921.

Q. Both the—

A. Both the same date.

Q. Has any part of the balance due of $464.22 been paid?

A. No, sir.

MR. SEXTON: I will read this to the jury:

October 24, 1921.

Monmouth Supply Company,
Long Branch, N. J.

Gentlemen:

Kindly extend credit to R. MacDonald, 600 Grand Avenue, Asbury Park, N. J., for plumbing and heating material to the amount of $250 and I hereby become security for the same and will see that same is paid within sixty days from date of invoices or discount the bill on the 10th of each month.

Yours truly,
Jeremiah MacDonald,
Grand Avenue,
Asbury Park, N. J.

Q. Were you ever notified by Mr. MacDonald or anyone that that guaranty had been revoked?

A. No, sir.

Q. And do you know of your own knowledge whether this account was carried by the Plumbing Supply Company on the strength of the guaranty of Jeremiah MacDonald?

A. It was.

Q. Do you find any notation on the books of the company to that effect?

A. Yes, it is marked—

Q. Is that in your handwriting?

A. Yes, sir. "Credit limit security $250."

Q. It appears on it?

A. Yes, sir.

CROSS EXAMINATION.

By MR. CARTON:

Q. How much is the total that is due?

A. $464.22.

Q. Why did you bring suit for $532 against Romeo MacDonald?

A. It must have been interest added on to the account.

Q. Interest from July 26th?

MR. SEXTON: I see it is.

Q. I show you two checks and ask you if you have ever seen those.

A. It has our endorsement on it.

Q. This one also?

A. Yes, sir.

Q. Did your office receive those checks?

A. Yes.

MR. SEXTON: I will have them marked for identification.

(Checks marked Exhibit C and D for identification.)

Q. This so-called guaranty here signed by Mr. MacDonald states that he will become security to the extent of $250?

A. Yes, sir.

MR. SEXTON: Read the whole thing.

MR. CARTON: You have already read it.

Q. You kept these books in your own handwriting?

A. Yes, sir.

Q. What credits do they show?

A. What credits?

Q. Or strike that out. That is all at this time.

MR. SEXTON: I offer the original entries and the leaves from the account in evidence, if your Honor please.

MR. CARTON: If your Honor please, I don't want to appear technical, but it is my understanding that with book accounts they must have the complete book here, and sheets from a loose leaf system are not admissible. I assume these accounts are all right, but they are asking us to pay for something, and here are sheets out of a loose leaf ledger system, which I understand are not admissible to prove a book account.

MR. SEXTON: But we have the original entries here.

THE COURT: The original entries of what?

MR. SEXTON: Of the whole account.

THE COURT: Who made them?

By MR. SEXTON:

Q. Who made these?

A. Mr. Stout. He is right here.

MR. CARTON: I will withdraw the objection.

THE COURT: Let them be marked then.

(Leaves marked Exhibits P 2 and P 3.)

By MR. CARTON:

Q. Will you turn to your books and tell me what credits they show on this account?

A. Do you want to know the credits from the beginning of the account?

Q. I want to know the credits since 1921. I am particularly interested in those during the months of July and September, 1923.

A. July, 1923?

Q. Yes.

A. There is a credit for $50 on July 23rd and there is a credit memorandum on July 31st for $10 and show cash for $71.80.

Q. And do your books show who paid that?

A. No, sir.

Q. If I call your attention again to this check does that refresh your memory as to who paid that?

A. Yes, sir.

Q. Can you tell us now who paid it?

A. By the signature of the check Jeremiah MacDonald paid it.

Q. That is $71.80. Now will you turn to your September credits?

A. July 12, $197.10.

Q. No, September, 1923. September 12th?

A. Yes, sir.

Q. You said July. How much is that?

A. $197.10.

Q. Do you know who paid that?

A. I saw a check there with Jeremiah MacDonald.

Q. And Jeremiah MacDonald paid that?

A. Yes, sir.

RE-DIRECT EXAMINATION. Jacob Perri

By MR. SEXTON:

Q. Just an omitted question. Was this account continued on the guarantee after the checks in question, namely, the two checks referred to by Mr. Carton?

MR. CARTON: Objected to.

THE COURT: Objection sustained.

MR. SEXTON: Well, it is a question of fact whether or not the company—

THE COURT: I don't think it is a question what this witness thinks or knows about it.

Q. Do you know it was continued?

A. It was.

MR. CARTON: I object and move to—

THE COURT: What was continued?

Q. Do you know whether or not the account of Romeo MacDonald was continued—

THE COURT: Is there an account on the books showing that there was an account against Romeo MacDonald?

MR. SEXTON: Yes, the original account was Romeo. Whether or not that was continued on the books.

MR. CARTON: The books speak for themselves.

THE COURT: Yes, objection sustained.

Q. Do you know whether or not the guaranty of Jeremiah MacDonald was continued by the company after the checks were paid?

MR. CARTON: That is objected to.

THE COURT: Sustained. There is no foundation for showing any such knowledge on this man's part.

Q. You are the bookkeeper?

THE COURT: There are no facts shown that show there was any such matter.

Q. You are the bookkeeper of this corporation, Mr. Perri?

A. Yes.

Q. And you are familiar with this account?

A. I am.

Q. You were familiar with it when the credits were given for these two checks?

A. Yes, sir.

Q. And who had charge of the guaranty?

A. I did.

Q. And was the guaranty in your possession?

A. Yes, sir.

Q. Still is in your possession or was in your possession until this suit was brought?

A. Yes, sir.

Q. At the time the checks were paid do you recall whether they were paid to you or not?

A. No, I don't know whether they came in the mail, but they came through me.

Q. Was anything said to you that the guaranty was revoked?

A. No, sir.

Q. Or that Mr. MacDonald would be no longer responsible on the guaranty?

A. No, sir.

Q. Was the guaranty continued as part of this account?

MR. CARTON: Objected to.

THE COURT: Objection sustained.

Q. Do the books show that the guaranty was continued as part of this account?

MR. CARTON: Objected to.

THE COURT: Objection sustained. You have got the books there, haven't you?

MR. SEXTON: Yes.

THE COURT: Well, let them show.

Q. Do you know of your own knowledge of the opening of this account?

A. Yes, sir.

Q. And at the time that the account was opened do you know of your own knowledge as to what credit was to be extended to Romeo, if any?

A. I don't know what you mean by that.

Q. I will repeat it. At the time the account was opened do you know whether any credit was to be extended to Romeo MacDonald?

A. There was not.

Q. And why not?

MR. CARTON: Objected to as immaterial.

THE COURT: Objection sustained. He can state what was done and what was said.

Q. Who was present at the time that the account was opened?

A. I don't recall that.

Q. Were you present at the time that the guaranty was signed?

A. Yes, sir.

Q. And at that time what was said if anything as to this guaranty of his son's account?

MR. CARTON: Objected to. Here we have the guaranty. Any oral statements made leading up to it are immaterial. The final paper speaks for itself.

THE COURT: I think that is so, that the conversation cannot vary it; but yet I think the court will admit it. I overrule your objection.

(Objection noted for defendants as ground of appeal.)

THE COURT: With the distinct understanding that it is not to be continued.

A. I remember Mr. Jeremiah said that he would like to help his son and put him on his feet and start him in business, that he would guarantee his account up to $250 for which he signed the guaranty.

RE-CROSS EXAMINATION.

By MR. CARTON:

Q. He signed a guaranty to the extent of $250?

A. That he would guarantee the account.

Q. And your books show that he has paid $250 upon that?

A. It was a continuous guaranty.

Q. I am not asking you that.

A. It shows that he has paid that much.

RE-DIRECT EXAMINATION. Jacob Perri

By MR. SEXTON:

Q. The books don't show that Jeremiah paid $25?

A. It doesn't show who paid that, no.

By MR. CARTON:

Q. But in answer to my question, when I showed you the two checks you stated that it refreshed your memory to the extent that Jeremiah MacDonald paid them?

A. It shows by those checks.

Q. Just show me what there is in there that says it is a continuing guaranty. (Paper shown witness.)

A. It says, "or discount the bills on the 10th of each month."

Q. Does that say it is a continuing guaranty?

A. Well, the 10th of each month would be the 10th of one month if it was only for one month.

Q. What does it say before that?

A. "I hereby become security for the same and will see that the same is paid within sixty days from date of invoices."

Q. Read it from the beginning."

A. "Kindly extend credit to R. MacDonald, 600 Grand Avenue, Asbury Park, N. J., for plumbing and heating material to the amount of $250, and I hereby become security for the same and will see that the same is paid within sixty days from date of invoices or discount the bill on the 10th of each month."

MR. SEXTON: Plaintiff rests.

MR. CARTON: I move at this time for a non-suit.

(Counsel and the court retire to chambers.)

MOTION FOR NON-SUIT.

MR. CARTON: I move for a non-suit on two grounds: first, that the guaranty which is in evi-

dence reads to the effect that "if credit is extended to R. MacDonald for plumbing and heating material to the amount of $250 I will become security for the same." There is no evidence before the court at this time of what those materials sold to the said R. MacDonald consist of. The only evidence we have is that there is an account of which there is some four hundred and odd dollars due at this time. And the guaranty is very strict. Nothing can be read into it. There is nothing before the court at this time as to what those materials were.

The second ground is this: The guaranty in question is for the sum of $250. The plaintiff's own witness on the stand testified that they have received the sum of $250 or more since the guaranty was signed. And it is our contention that there is nothing more due on the thing. We signed a guaranty and we have lived up to our obligations under it.

MR. SEXTON: Now the first proposition is that there is all the evidence in the case, because the original book accounts have the items, every item—

MR. CARTON: I looked at them and I couldn't tell.

MR. SEXTON: We could have them read to you. But every one of them is written out.

THE COURT: You will have to satisfy Mr. Carton on that.

MR. CARTON: I will take Mr. Sexton's word for that. If Mr. Sexton says so I will withdraw that.

(Counsel and the court return to the court room.)

(The case was reopened for further testimony.)

JACOB PERRI, Recalled for Plaintiff.

DIRECT EXAMINATION.

By MR. SEXTON:

Q. Mr. Perri, when was the first, if you know, that Jeremiah MacDonald was called upon to make good his guaranty?

A. I don't know.

Q. Well, can you tell by the account?

A. No, sir.

Q. Do you know whether it was before or after the four hundred and some odd dollars was due?

A. I can't tell anything by that.

MR. CARTON: If the Court please, he has testified that he didn't know of the account at all from his books.

By THE COURT:

Q. Is there anything in your book, in your handwriting, to remind you of that?

A. Nothing says here but what is due on the account.

Q. You don't know?

A. No, sir.

By MR. SEXTON:

Q. Do you know whether at the time the account was due, the last items on the account there, namely —what is the last item in the account?

A. April 18, 1924.

Q. Do you know whether Mr. MacDonald had been called upon at that time to make any payments on the $250 guaranty?

A. I don't know. I believe we wrote several letters.

Q. Was that before or afterwards?

A. I don't know. I haven't anything to show about that.

Q. Do you remember at the time that the credits were given for $71.80 and $197.10 whether Mr. Jeremiah MacDonald had been called on at that time to make payments on account of his guaranty of $250?

A. Well, he made several payments after that.

Q. Mr. Jeremiah MacDonald had?

A. There are credits here but I don't know who made the payments.

MR. CARTON: I move that be stricken out.

THE COURT: I direct that that be stricken out.

A. At the time that these two payments, namely, $71.80 and $197.10, were made had Jeremiah Mac-

Donald been called upon to make good under his guaranty?

A. No, sir.

Q. At the time that the $71.80 was paid was anything said to you by Jeremiah MacDonald or anyone in his behalf that this check was on account of his guaranty of $250?

A. No, sir.

Q. At the time that the check for $197.10 was paid was there anything said to you that that check was on account of his guaranty of $250?

A. No, sir.

Q. Was anything said to you by Jeremiah MacDonald or anybody on his behalf that having paid the two checks of July 31, 1923, and September 12, 1923, that he had paid the full amount of his guaranty and was released from it?

A. No, sir.

CROSS EXAMINATION.

By MR. CARTON:

Q. You don't remember this transaction when you got these checks very well, do you?

A. No, sir.

Q. You don't even know how they came there, do you?

A. No, sir.

Q. So you don't remember whether anything was said or not?

A. If anything was said I would have made a note of it.

Q. But you can't actually tell this court and this jury whether or not anything was said at the time these checks were brought it, can you?

A. I know there wasn't anything said.

Q. You get several checks?

A. I get several checks. I can't recall all of them.

Q. You get thousands of checks? Do you recall everything that is said when checks come in?

A. Anything definite that would be said of that kind.

Q. You did receive those checks, though, didn't you?

A. Yes.

Q. From Jeremiah MacDonald?

A. Well, they are his checks.

Q. I didn't ask you that.

A. I don't know how I received them, whether they came in the mail or whether he brought them in personally; I can't say.

Q. But anyhow the checks of Jeremiah MacDonald came in to you?

A. Yes, sir.

Q. And were applied on account?

A. Yes, sir.

By MR. SEXTON:

Q. Did you ever receive any other checks from Jeremiah MacDonald, do you know?

A. I don't know.

BOTH SIDES REST.

MOTION FOR NON-SUIT.

MR. CARTON: If the court please, I now move for a non-suit on the ground that there is no evidence to go before the jury as the case now stands, that the testimony shows that a written guaranty was signed to the extent of $250, and the testimony of the plaintiff's own witness is to the effect that the sum of $250 has been received from the party who is liable under the guaranty; that there is no further obligation on the part of this defendant under his guaranty.

MR. SEXTON: If your Honor please, the answer to that is that the guaranty by its terms discloses that it was a continuing guaranty of the account of

exceptions

Romeo MacDonald for the sum of $250; that Jeremiah MacDonald had not been called upon to make good his guaranty; that while it does appear that two checks were received by the plaintiff company, one bearing date July 31, 1923, for the sum of $71.80, the other bearing date September 12, 1923, for the sum of $197.10, that there is nothing in the record that discloses or shows either affirmatively or negatively that those sums of money were paid on account of this guaranty.

THE COURT: But they were paid on account of the bill, were they not?

MR. SEXTON: They were paid on account of the bill.

THE COURT: By check of Jeremiah—

MR. SEXTON: The checks were both Mr. Jeremiah MacDonald; that irrespective of the fact that these checks were paid by Jeremiah MacDonald, that the guaranty still continued. They may have been voluntary payments, for all the record discloses; they may have been paid on another transaction by Jeremiah MacDonald for the benefit of his son, Romeo MacDonald. There may have been numerous ways in which the credit of Jeremiah MacDonald could have been loaned for Romeo MacDonald; and unless it was brought affirmatively to the attention of the corporation or in such a way that the payment of these checks was to work a revocation of the guaranty, which was, we claim, to be a continuing guaranty, if these checks should not be credited on the amount set forth in the guaranty, and therefore the guaranty would continue, even though those checks were made and the plaintiff company did continue on the strength of that guaranty, which was not revoked—there is no testimony that it was revoked, and they extended the credit and should be entitled to a verdict for the $250.

THE COURT: The court will grant the motion for non-suit. You may note your exception.

(Objection noted for plaintiff as ground of appeal.)

Exhibit

Exhibit P 1.

Monmouth Plumbing Supply Co.,
Long Branch, N. J.

Gentlemen:

Kindly extend credit to R. MacDonald, 600 Grand Avenue, Asbury Park, N. J., for plumbing and heating material to the amount of $250.00, and I hereby become security for same, and will see that same is paid within sixty (60) days from date of invoice, or discount the bill on the 10th of each month.

Yours very truly,
Jeremiah MacDonald,
600 Grand Avenue,
Asbury Park, N. J.

Exhibit

Exhibit P 2.

MONMOUTH PLUMBING SUPPLY CO., INC.

Long Branch, N. J.

In Account with

Romeo MacDonald.

1923				
Nov.	2	To Mdse.	21.72	
	6		26.35	
	8		235.48	
	8		11.28	
	12		16.77	
	12		33.37	
	12		29.93	
	14		18.45	
	15		8.93	
	19		2.68	
	20		147.50	
	20		16.86	
	24		12.51	
	30		.96	
Dec.	1		59.38	
	17		3.25	
1924				
Feb.	23		25.40	
	29		78.00	
Mar.	6		9.00	
	25		22.75	
Apr.	11		19.00	
	18		17.00	
			——	816.57

Credits.

1924			
Jan. 14.	Cash	200.00	
Feb. 16	Cash	100.00	
Mar. 14	C. M.	8.35	

Exhibit P 2.

Apr.	8	C. M.	9.00	
	12	C. M.	35.00	
			——	352.35
				464.22
	Interest to June 30th, 1926			68.54
				532.76

Exhibit P 3.

MONMOUTH PLUMBING SUPPLY COMPANY, INC.

To R. MacDonald:

Nov. 2nd, 1923—				
1 Excelso Water Back		4.00		
1 8 Sec. 38″ 3 Col. Hot Water Radiator		17.60		
6 ¾″ Plugs	.02	.12		
		——	21.72	
Nov. 6, 1923—				
1 Bundle ½″ Galv. Pipe 250′8″ @ 6.12		15.34		
1 Bundle ¾″ Galv. Pipe 147′4″ @ 7.47		11.01		
		——	26.35	
Nov. 8, 1923—				
1 3-22-W Ideal Arco Water Boiler		115.03		
4 16 Sec. 32″ 2 Col. H.W. Radiators 250″				
1 11 Sec. 32″ 2 Col. H.W. Radiators 250″		120.45		
		——	235.48	
Nov. 8, 1923—				
5 ¾″ Galv. Ells	.24	1.20		
5½ ½x⅜″ Galv. Ells	.33	1.82		
6 ½″ Galv. Unions	.19	1.14		
6 ¾″ Galv. Unions	.24	1.44		
1 Excelsior Water Generator		4.00		
2 1x¾″ Bushings	.04	.08		
1 1″ Plug		.04		
12 ½″ Galv. Asst. Nipples	.06	.72		
12 ¾″ Galv. Asst. Nipples	.07	.84		
		——	11.28	
Nov. 12, 1923				
3 2x1″ Blk. Cast. Red Tees	.47	1.41		
2 2x1¼″ Blk. Cast Red Tees	.47	.94		

	2 2x1½x1¼" Blk. Cast Red Tees	.47	.94	
	2 1½x1¼" Blk. Cast Red Tees	.33	.66	
	2 1¼x1¼x1" Blk. Cast Red Tees	.27	.54	
	2 1½x1¼" Blk. Cast Red Ells	.23	.46	
	2 1¼" Black Cast Tees	.23	.46	
	12 1¼" Black Cast 45°	.19	2.28	
	12 1" Black Cast 45°	.12	1.44	
10	12 1" Black Cast Ells	.10½	1.26	
	12 1¼" Black Cast Ells	.16	1.92	
			12.31	
	20%		9.85	
	12 1¼" Black Asst. Nipples	.17	2.04	
	12 1" Black Asst. Nipples	.13	1.56	
	12 2" Black Asst. Nipples	.27	3.24	
			6.84	
20	50%		3.42	
	1 Altitude Gauge		2.25	
	1 H.W. Thermometer		1.25	
				16.77
	Nov. 12, 1923—			
	2 Lengths 2" Black Pipe 42'	20.35	8.55	
	1 Radiator Spud Wrench		1.25	
	1 4" Radiator Wrench		4.00	
	1 24" Stillson Wrench		3.25	
	4 1¼" H.W. Radiator Valves	5.75		
30	4 1" H.W. Radiator Union Ells	2.50		
	4 1" H.W. Radiator Union Valves	4.50		
		12.75		
	68%	51.00	16.32	
				33.37
	Nov. 12, 1923—			
	1 Bundle 1" Black Pipe	9.35	9.70	
40	1 Bundle 1¼" Black Pipe	12.65	7.80	

1	Length 1½" Black Pipe	15.13	3.18		
1	10 Gal. Exp. Tank & Trimming		9.25		
			——	29.93	
Nov. 14, 1923—					
2	Lengths 1¼" Black Pipe 42'	11.96	5.01		
1	Length 1" Black Pipe 20'	9.35	1.96		
2	1¼x1" Black Cast Ells	.13	.26		
12	1" Blk. Asst. Nipples to 4"	1.56			
	50%		.78		10
1	1" H.W. Radiator Valve	4.50			
1	1" H.W. Radiator Union Ell	2.50			
		7.00			
	65%		2.45		
2	3" Plugs	.19	.38		
1	Mueller Ratchet Reamer		6.75		
1	Box Jack Chain		.85		
			——	18.45	
Nov. 15th, 1923—					20
½	Gallon Aluminum Bronze		.75		
12	1" Black Cast Ell	.10½	1.26		
1	1" Black Cast Tee	.15	.15		
4	1¼" Black Cast Ell	.16	.64		
		2.05			
	25%		1.52		
1	Length 1¼" Blk. Pipe 21'	12.16	2.66		
1	Excelsior Water Back		4.00		30
			——	8.93	
Nov. 19, 1923—					
2	Joints 9" Galv. Smoke Pipe	.75	1.50		
1	9" Galv. Smoke Ell		.60		
2	1" Plugs	.04	.08		
1	½" Boiler Drain Off Cock		.50		
			——	2.68	
1	20x30" P-6706 Comp. w. Comb. Bibb & Full "S" Trap				
1	L.D. Imperial Closet Comb. w. Mah. Seat & Cover				40

Exhibit

	1 18x21″ P-2405 with Supply & Cock			
	1 5′ P-1993 26″ Bath Complete			
	1 Excelso Fire Pot Generator			
			——	147.50
	Nov. 24, 1923—			
	1 Enameled Tray Cover		2.75	
	1 Comb. Sink Faucet with Soap Dish, "United"		6.85	
	1 1½″ N.P. Plain "S" Tube Trap		2.50	
10	2 ¾″x½″ Bushings	.04	.08	
	2 ½″ Galv. Tees No. 1			
	1 ⅜″ Street Elbow, No. 1		.33	
	1 18x24″ Wood Drainboard (No Charge)			
			——	12.51
	Nov. 30, 1923—			
	3½ 1x1¼″ Blk. Caps	.24	.84	
	1 2x1¼″ Bushings		.12	
			——	.96
	Dec. 1, 1923—			
20	2 18 Sec. 22″ 3 Col. H.W. Radiators			
			108′ @ 54.99	59.38
	Dec. 11, 1923—			
	2 22″ 3 Col. H.W. Leg Sec. 6′		54.09	3.25
	Feb. 16, 1924—			
	3 4½″ Enamel Bath			
	3 N.P. C.W. & Overflow			
	3 N.P. Comb. Double Bath Cocks			
	2 18x21″ P-4205 Enamel Lavatories			
	4 1½″ N.P. N.Y. Reg. "P" Trap			
30	6 N.P. Chain Stays			
	2 1½″ N.P. Full "S" Trap			
	6 Pr. N.P. Boston S/C Basin Cocks			
	2 Pr. ⅜″ N.P. Basin Supply & Esc.			
			A/C Estimate—Cash Sale	
	Feb. 21, 1924—			
	6 L.D. Vit. Tanks			
	6 10″ Roughing Bowl			
	6 Mahogany Seats & Covers			
	6 Set Screws and Washers			
40			Cash Sale	

Feb. 23, 1924—

1	L/D Bowl with 2″ Spud	12.50	
1	18x21″ P-4205 Lavatory	9.05	
1	1½″ N.P. "S" Trap	2.50	
1	Pr. ⅜″ N.P. Supplies	1.35	
		——	25.40

Feb. 29, 1924—

1	5′ Essex Bath on Feet Complete	
1	W.D. Closet Comb. Complete	
1	18x21″ P-4205 Lavatory Complete	10
1	4x2 Medium Y	
10	Ft. 1½″ No. 3 Lead Pipe	
1	2″ Brass Ferrule X.H.	
1	4″ Brass Ferrule X.H.	
1	4″ 5½x10″ Lead Bend No. 8	
40′	½″ Galv. Pipe	
	——	78.00

March 3, 1924—

3	P-4985 Corner Lavatories (Delivery Only)	20

March 6, 1924—

	To Extra Charge on 3 Apron Corner Lavatories	3.00	9.00

March 10, 1924—

48	17x19″ P-4045 Lavatory	
2	18x21″ P-4305	
2	P-4985 Enameled Lavatory	
52	N.P. Chain Stays and Chains	
52	Prs. N.P. Brookside S/C Basin Cocks	
52	1½″ N.P. N.Y. Reg. "P" Traps w. P.O. Plugs & Esc.	30

Cash Sale

March 13, 1924—

1	Drinking Fountain	
1	P-4985 Cor. Lavatory (Delivery Only)	

March 15, 1924—

12	17x19″ P-4045 Apron Lavatory	
2	18x21″ P-4205 Lavatory	
2	16″ P-4985 Corner Lavatory	40

9 17x19″ P-4045 Del. 3/11/24
(Delivery Only)

March 17, 1924—
1 20x24″ P-6800 8″ Deep Sink
(Delivery Only—No Charge)

March 25, 1924—
1 18x24″ P-6800 Sink with Strainer 11.00
1 Pr. ½″ Fin. Comp. Bibb & Hose
2 ½″ Fin. Bibb Flanges 2.25
1 No. 25 Sands Gas Water Heater 9.50
—— 22.75

April 11, 1924—
2 Cold Index S/C Basin Cocks
1 Hot Index S/C Basin Cocks
1 Hanger for Lavatory
(Due No Charge)
1 20x16x12″ Slop Sink with Strainer
1 Pr. ½″ Fin. Sink Bibb
1 1½x3″ Lead "P" Traps
1 Pr. Gal. Sink Brackets
—— 19.00

April 18, 1924—
1 Enameled Drinking Fountain 17.00

799.71

Nov. 20, 1923—

36	2″ 3 Ply Covering	.36	12.96	
15	1½″ 3 Ply Covering	.33	4.95	
81	1¼″ 3 Ply Covering	.30	24.30	
24	1″ 3 Ply Covering	.27	6.48	
			48.69	
	70%		14.61	
1	Bag Asbestos Cement		2.25	
			——	16.86
				816.57

CREDITS

Jan. 14, 1924	Cash	200.00	
Feb. 16, 1924	Cash	100.00	

Mar. 14, 1924	C/M	8.35	
Apr. 8, 1924	C/M	9.00	
Apr. 12, 1924	C/M	35.00	
		——	352.35
	Balance		$464.22

(1924)

Mar. 14	1 18x21" P-4205 Lavatory	8.35	
Apr. 8	To Cancel Charge on Ticket 13943 (Stratford Inn Job)	9.00	
Apr. 12	I Porc. Urinal Stall & Trimmings	35.00	
		——	52.35

REASONS
Filed Nov. 8, 1928

NEW JERSEY SUPREME COURT.
No. 34, May T., 1929.

MONMOUTH PLUMBING SUPPLY COMPANY	*Appeal from Monmouth Common Pleas.*
vs.	
JEREMIAH MACDONALD.	

Appeal from Monmouth Common Pleas.

Argued before Gummere, Chief Justice, and Justices Kalisch and Campbell.

For the appellant, Charles F. Sexton.

For the respondent, James D. Carton.

The opinion of the Court was delivered:

GUMMERE, C. J.

This is an appeal of the plaintiff from a judgment of non suit directed against it by the Trial Court. In the year 1921 the defendant's son Romeo desired to obtain a credit account from the plaintiff who was in the business of selling plumbing and heating materials. The plaintiff being unwilling to extend credit to Romeo without security, the latter applied to his father, the defendant, to guarantee his account with the plaintiff and the defendant thereupon wrote the following letter to the plaintiff company: "Gentlemen: Kindly extend credit to R. McDonald, 600 Grand Avenue, Asbury Park, N. J., for plumbing and heating materials to the amount of $250; and I hereby become security for the same and will see that the same is paid within sixty days from the date of invoice, or discount the bill on the

tenth of each month." On the strength of this guarantee the plaintiff for several years succeeding its making furnished to Romeo McDonald, as ordered by him, plumbing and heating materials. In July, 1923, the son having failed to pay the amount due from him to the plaintiff for materials furnished, the defendant gave his check to the latter for $71.80 to be applied upon the son's indebtedness. Later and in September, 1923, the son then being indebted to the plaintiff for a considerably larger amount, the defendant paid to the plaintiff on account of this indebtedness the sum of $197.10. The plaintiff continued to extend credit to the son after the making of these payments by the father, and in April, 1924, the son's indebtedness to the plaintiff for materials supplied amounted to some $464.22. The plaintiff called upon the son for payment of this amount, and he having failed to make such payment upon demand, the present suit was brought against the father upon his contract of guarantee, the claim of the plaintiff being that he was obligated by the terms thereof to pay on account of the indebtedness of his son as it existed in April, 1924, the sum of $250. The defendant refusing to recognize any liability to make this payment, the present suit was brought, and all of these facts having appeared in the proofs submitted by the plaintiff, a judgment of non suit was thereupon entered, the basis of which was that the two payments above referred to discharged the father from any further obligation on account of the indebtedness of his son to the plaintiff.

The plaintiff contends that the direction of a non suit against it was erroneous for the reason that the contract of guarantee covered not only materials furnished to the son shortly after the giving of the guarantee contract, but also all materials

subsequently furnished by it to the son from time to time; in other words, that it was a continuing contract and that the liability of the guarantor thereunder covered the items of the account upon which the son defaulted in payment. This contention seems to us to be unsound. We concede that the guarantee is a continuing one within the meaning of that term; that is, that it was a guarantee which was not limited to a single transaction, but which contemplated a future course of dealing covering a series of transactions for an indefinite time; but the fact that it was of such a character does not impose a continuing liability upon the guarantor after he has made good upon his guarantee. The accepted rule is that the payment by the guarantor of the principal debt to the extent that it is covered by the contract of guarantee discharges him from any further liability thereon. C. J., Vol. 26, Sec. 164, p. 1003. The effect of the payment of the son's indebtedness to the extent of $71.80 in July, 1923, and the further payment on that account in September of the same year in the amount of $197.10, a total exceeding the limit fixed by the contract of guarantee, wiped out any further obligation on the part of the defendant with relation to the payment of his son's debt to the plaintiff. This being so, we conclude that the direction of the non suit was proper and that the judgment under review should be affirmed.

ODDER OF AFFIRMANCE.

Filed August 7th, 1930.

NEW JERSEY SUPREME COURT.

MONMOUTH PLUMBING SUPPLY COMPANY, *Plaintiff-Appellant,*	***ON PLAINTIFF'S APPEAL***
VS.	
JEREMIAH MACDONALD, *Defendant-Appellee.*	***Order of Affirmance***

ORDER OF AFFIRMANCE.

This cause having been duly argued at the May Term, 1929, at this Court, by CHARLES F. SEXTON, of counsel for appellant, and by DURAND, IVINS & CARTON, of counsel for the appellee, and the Court having considered the same and finding no error in the records or proceedings in the Court below;

IT IS, on this 7th day of August, Nineteen Hundred and Thirty, ADJUDGED that the appeal taken in this cause be dismissed and the judgment under review be affirmed, and record be remitted to the Court below to be proceeded with according to law and the practice of said Court.

Entered August 7th, 1930,
on Motion of

DURAND, IVINS and CARTON,
Attorneys for Defendant-Appellee.

NOTICE OF APPEAL.

Filed August 13, 1930.

NEW JERSEY SUPREME COURT.
MONMOUTH COUNTY

MONMOUTH PLUMBING SUPPLY COMPANY, body corporate, *Appellant-Plaintiff*,	***ACTION AT LAW***
VS.	
ROMEO MACDONALD AND JEREMIAH MACDONALD, *Respondent-Defendants.*	***Notice of Appeal***

NOTICE OF APPEAL.

To Durand, Ivins and Carton, Esqs.,
Attorneys for Defendant, Jeremiah MacDonald.

SIRS:—

Please take notice that the plaintiff in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause.

Because the Supreme Court erred in giving judgment to the defendant, Jeremiah MacDonald, instead of the plaintiff, Monmouth Plumbing Supply Co., body corporate.

Respectfully yours,

CHARLES F. SEXTON,
Attorney of Appellant-Plaintiff.

New Jersey Court of Errors and Appeals

MONMOUTH PLUMBING SUPPLY COMPANY, body corporate, Plaintiff-Appellant, —vs.— JEREMIAH MacDONALD, Defendant-Appellee,	Action at Law. ON APPEAL FROM NEW JERSEY SUPREME COURT.

Brief of Defendant-Appellee.

This case is before the Court on an appeal from a judgment of the Supreme Court affirming a judgment of non-suit rendered in the Monmouth County Common Pleas Court on May 17th, 1928, in favor of the Defendant-Appellee for the sum of $69.95 costs of suit.

STATEMENT

This is an appeal from an action brought by the plaintiff-appellant against the defendant for the sum of $250.00 on a written guaranty embodied in a letter, a copy of which letter is as follows:

October 24, 1921.

Monmouth Supply Company,
Long Branch, N. J.

Gentlemen:—

Kindly extend credit to R. MacDonald, 600 Grand Avenue, Asbury Park, N. J., for plumbing and heating material to the amount of $250.00, and I hereby become security for the same and will see that same is paid within sixty days from date of invoices or discount the bill on the 10th of each month.

Yours truly,

Jeremiah MacDonald,

Grand Avenue,

Asbury Park, N. J.

(S. C. 30)

One Romeo MacDonald, the son of the defendant was endeavoring to secure credit from the plaintiff corporation and at the commencement of said Romeo MacDonald's account, the defendant Jeremiah MacDonald turned over to the plaintiff corporation the letter embodying the guaranty (S. C. 17). Thereafter the plaintiff supplied plumbing and heating materials to Romeo MacDonald to the value of upwards of $250.00, at which time the defendant paid the plaintiff with two checks, one in the sum of $71.80, dated July 31st, 1923, and one in the amount of $197.10, under date of September 12th, 1923, which checks were credited by the bookkeeper of the plaintiff corporation to the account of the said Romeo MacDonald (S. C. 20).

There is no testimony whatsoever to show that there was any course of dealings or account between Jeremiah MacDonald, the defendant, and the the plaintiff.

The bookkeeper of the plaintiff corporation testified that his books showed credits for these checks and that the sum of upwards of $250.00 was paid by checks of Jeremiah MacDonald, and credited to the account of the son.

POINT I.

The first point raised by the plaintiff in its brief is that the guaranty given by the defendant to the plaintiff was a continuing guaranty and unlimited as to time.

Under this point the plaintiff seems to rely on the cases of Columbia Electrical Supply Company -vs.- Kennett, reported in 67 N. J. Law, 18, and Paskusz, et al -vs.- Bodner, reported in 75 N. J. Law, 447. A reading of these cases, however, will show that the facts contained therein are not applicable to the

case at bar, in that in neither case was there evidence of a payment being made under the guaranty, and even though the contention of the plaintiff that the guaranty in question is a continuing guarantee and was not limited to a single transaction but contemplated a future course of dealings, nevertheless, here, assuming all this to be true, we have a payment by the guarantor (or the defendant in this case) to the plaintiff of the full amount of his guaranty, and the contention of the plaintiff that because the guaranty was a continuing one, does not, it is submitted, continue upon the defendant a liability to pay after he has made good upon his guaranty. The general rule being that the payment by the guarantor of the principal debt to the extent of his guaranty discharges him from any further liability thereon. Corpus Juris, Volum 26, Section 164, page 103.

POINT II.

In point two the plaintiff argues that the guaranty remained operative until the defendant revoked same.

The defendant has no quarrel with the law as set forth in Point Two of the plaintiff's brief, but it is respectfully called to this Honorable Court's attention that the plaintiff has lost sight of the fact that there is another manner of cancelling a guaranty, as happened in this case, namely, payment.

While it is true that a guaranty guaranteeing an account for an indefinite period, is generally operative until revoked, yet it is not true that the guaranty is operative after payment in full has been made thereunder, and it is respectfully submitted that in the case at bar the payment of the two checks by the defendant cancelled any liability under the guaranty.

The undisputed evidence in the case shows that the two checks of the defendant Jeremiah MacDonald,

namely, one for $71.80 and one for $197.10, the aggregate of which is slightly more than the full amount of the obligation under the guaranty, were paid by Jeremiah MacDonald, (S. C. 20 and S. C. 23, line 30 to 40), and there is no evidence whatsoever in the case that there was any account or obligation or business dealings of any type or nature whatsoever between the plaintiff and the defendant with the exception of the guaranty in question.

The general rule laid down by Corpus Juris is as follows:

> "A guarantor is discharged by the operation of law from further liability by any act on the part of the guarantee which extinguished the principal contract, or by payment of the principal obligation by the guarantor." 28 Corpus Juris, Section 152, page 995.

POINT III.

Under point three plaintiff quotes from the printed case to the effect that at the time the payments were made by the defendant in the amount of his guaranty and above that, that the defendant had not been called upon to make good under his guaranty and infers and suggests from this that there may have been some other dealings between the plaintiff and defendant, or that perhaps the debtor had borrowed the money from the guarantor and upon borrowing it, the debtor had turned the check over to the plaintiff on his account, or that the guarantor voluntarily furnished his check for the use of the debtor to be applied to the debtor's account, or that the debtor, desiring to pay his monthly account, has cash and keeps no checking account, and therefore exchanges the cash with the guarantor for his check, and the debtor uses the check of the guarantor on his (the debtor's) account.

These are simply assumptions upon the part of the plaintiff and are not borne out in any way by the evidence in the case, and since we are dealing with assumptions and probabilities it is contended that it is much more within the realm of reasonable probability that the defendant Jeremiah MacDonald, instead of any of the assumptions suggested by the plaintiff, simply made payment to the plaintiff of the amount due and the amount for which he was liable under his guaranty, and upon the payment by the defendant to the plaintiff of a sum slightly in excess of his guaranty, he was discharged therefrom.

Again, the plaintiff contends that any payments made by the guarantor on behalf of the debtor, were mere voluntary payments and that the plaintiff had no knowledge other than the receipt of same. Here it seems it is only proper that when a check was turned over to the plaintiff by the defendant, the guarantor, in payment of another's account for whom he had rendered himself liable by means of a guaranty, that it would seem that the prudent and reasonable thing for the bookkeeper of the plaintiff upon receiving such a check, to note that the payment was made, not by the debtor himself, but by the party upon whom there was a liability to pay same as guarantor, and the suggestion that the first time the guarantor raised the question of having paid the account for which he was liable, was some years afterwards, is unreasonable, in view of the fact that there is no testimony whatsoever to the effect that any demand was made by the plaintiff upon the guarantor until the institution of this suit, and it is most unreasonable to assume that the guarantor would raise any question with the plaintiff company of his liability upon the guaranty, particularly after having paid his full obligation thereunder, until the plaintiff called upon him or brought suit against him to pay same. Then, and only then, would the defendant raise the issue that he had met any and all obligations thereunder.

The case of Thiensville Creamery Company -vs.- Hickcox, reported in 165 Wisconsin, page 537, and relied upon by the plaintiff, is distinguishable from the present case in that the principal point in the Hickcox case was whether or not the letter sent by the defendant, or guarantor, Hickcox, to the plaintiff was ever accepted or not. The contention of the defendant Hickcox, being that he had no notice of the acceptance of his offer by the plaintiff, and as far as we are able to determine there was no question raised by the defendant that the check given by the defendant, Hickcox to the plaintiff, was in payment of the guaranty, and therefore it is submitted, that the case rests on an entirely different principle, namely, whether or not there had ever been an acceptance of the guaranty by the plaintiff, and the case is not authority for a situation raised in the case at bar.

The principal case relied upon by the plaintiff is the case of William Filenes, Sons Company -vs.- Lothrop, reported in 243 Massachusettes, page 214, which case we shall discuss somewhat briefly at this time.

In the first place, the contention of the plaintiff that the court held in this case that the guaranty was a continuing guaranty and continued until revoked, is not parallel or similar to the case at bar in that the guaranty given in the Lothrop case expressly stated that,

"This is intended to be a continuing guaranty," and therefore the cases are not similar on the question of continuing guaranty. In the case at bar nothing was said about the same being a continuing guaranty, as contrasted with the Lothrop case, which expressly stated so.

Again, in his somewhat complete discussion of the Lothrop case, the plaintiff does not call to the

court's attention the fact that the Lothrop case stated that the guaranty was to remain in affect until the same was revoked in writing by the guarantor, and this point alone, it is respectfully submitted, differentiates the Lothrop case from the case at bar.

Under the exact wording of the contract in the Lothrop case, the defendant, in his guaranty which he gave the plaintiff, stated that the guaranty was to be continuing and was to remain in affect until he revoked same, and our present case does not contain either of these facts.

Furthermore, the facts in the Lothrop case are not similar in that there was no payment by the defendant to the plaintiff of the amount of the guaranty, the facts being that one Mrs. Sterns, for whose benefit the defendant gave the guaranty, was given a check for $300.00 by the defendant, and signed by the defendant, and payable to her, (Mrs. Sterns') order. Mrs. Sterns then asked the clerk of the plaintiff to cash the check and was informed that the check would be cashed if she, (Mrs. Sterns) would make a payment out of the proceeds, on account of her obligation to the plaintiff. Upon Mrs. Sterns consenting to do this, the plaintiff company cashed the check for the benefit of Mrs. Sterns and Mrs. Sterns then paid $75.00 to the plaintiff to be applied on her account. Here, we have the real debtor and not the guarantor making a payment herself to the plaintiff, in cash, the only connection or similarity at all between the cases, being that the check which Mrs. Sterns, or the real debtor, used to obtain the cash was the check of the defendant, or the guarantor. In the case at bar, however, the payment was made directly to the plaintiff by the defendant with his check, and there is no similarity in the situation where the defendant in the case at bar gave his check to the one to whom he was obligated, and the Lothrop case where the real debtor, and not the guarantor, makes a cash payment to the plaintiff.

The court in its opinion in the Lothrop case states:

"A discharge of the obligation of the defendant would have resulted as claimed by the defendant, if the defendant had given Mrs. Sterns the money which the plaintiff applied to the account, with the direction that it should be paid to the plaintiff to be applied on her account, and the plaintiff had knowledge of such a direction when the money was received. In the case at bar there is no evidence that the defendant gave the check to Mrs. Sterns with any direction as to her use of it, and there is no evidence that the plaintiff had knowledge of the receipt, and that the defendant intended that Mrs. Sterns should act as his agent in cashing the check or in making the payment, which she made upon the guaranteed account."

For these reasons the court rightly held that the payment by Mrs. Sterns of cash obtained from a check of the defendant, which check was some four times the amount of the defendant's obligation, would not discharge the defendant, and for this reason and the reasons above suggested, it is respectfully urged that the cases are not similar, and that the Massachusetts, or Lothrop case, cannot be held as authority for the proposition urged by the plaintiff in the case at bar.

To summarize, we have a situation here where the defendant guarantees the account of another in the sum of $250.00. The defendant pays the full amount of the guaranty which is the amount under which he obligated himself, when he wrote the letter containing the guaranty, and it is respectfully submitted that it is not fair to contend that it was necessary for the defendant, after the payment of the obligation in full, to notify the plaintiff that the guaranty was paid and should not continue in the future. The plaintiff, just as well as the defendant, knew that the entire liability of the defendant under the guaranty was in the sum of $250.00 and when plumbing

and heating materials were delivered to the party for whose benefit the guaranty was given in that amount and were paid for by the guarantor, Jeremiah MacDonald, then it is contended that any and all liabilities under the guaranty ceased.

The well accepted rule in this and other states is that the payment by the guarantor of the principal debt to the extent that it is covered by the contract or guaranty, discharges him from any further liability thereon, and the payments of $71.80 in July, 1923, and of $197.10 in September, 1923, making a total exceeding the limit fixed by the contract of guaranty, wipes out any further obligation on the part of the defendant with relation to the payment of Romeo MacDonald's debt to the plaintiff.

For these reasons, it is respectfully urged, that the decision of the New Jersey Supreme Court should be affirmed.

Respectfully submitted,

DURAND, IVINS & CARTON,
Attorneys for Defendant-Appellant.

JAMES D. CARTON,
Of Counsel.

New Jersey Supreme Court

MONMOUTH PLUMBING SUPPLY CO., body corporate, *Appellant-Plaintiff*, vs. ROMEO MACDONALD and JEREMIAH MACDONALD, *Respondent-Defendants.*	***ACTION AT LAW***

BRIEF OF APPELLANT-PLAINTIFF.

This action is brought against defendant, Jeremiah MacDonald, for the sum of Two Hundred and Fifty Dollars, based on a written guaranty, guaranteeing the account of Romeo MacDonald to that amount.

(Copy of guaranty is found at page 18, Printed Case.)

This guaranty was given by Jeremiah MacDonald to plaintiff at the time of the opening of the account of plaintiff with Romeo MacDonald.

(Line 30, page 17, Printed Case.)

At the time the account was opened no credit was to be extended to Romeo MacDonald,

(Line 1, page 23, Printed Case.)

and the defendant, Jeremiah MacDonald, wanted his son, Romeo MacDonald, to obtain goods and merchandise from the plaintiff and gave the guaranty in question to the plaintiff. At the time of giving this guaranty, Jeremiah MacDonald said:

> "That he would like to help his son and put him on his feet and start him in business, that

he would guaranty his account up to $250 for which he signed the guaranty."

(Lines 22-30, Printed Case, page 23.)

The account was a running account and at the time suit was brought Romeo MacDonald owed plaintiff $464.22.

The written guaranty given by Jeremiah MacDonald to plaintiff was never revoked and the account of Romeo MacDonald was carried on the strength of this guaranty.

(Lines 16-30, page 18, Printed Case.)

During the trial checks of Jeremiah MacDonald for more than $250 were offered, which were credited by plaintiff on Romeo MacDonald's account.

(Lines 20-40, page 20, Printed Case.)

At the time these checks were received the guaranty was not revoked nor was anything said by Jeremiah MacDonald that he would no longer be responsible on the guaranty.

(Lines 10-20, page 22, Printed Case.)

And the account was continued after the payment of the checks.

At the time the said checks were paid nothing was said that payment was made on account of guaranty or that they were in payment of guaranty.

(Lines 5-20, page 27, Printed Case.)

The checks which were introduced in evidence as being checks of Jeremiah MacDonald were two checks, one for $71.80 dated July 31, 1923, and the other for $197.10 dated September 12, 1923, and

Jeremiah MacDonald paid several checks on the account of Romeo MacDonald after the payment of these two checks.

(Line 33, page 26, Printed Case.)

Plaintiff was non-suited on the ground that guaranty was for $250.00; this $250.00 had been paid from the funds of Jeremiah MacDonald, which extinguished the guaranty.

This appeal was then taken for the reasons set forth in the Notice of Appeal.

POINTS.

POINT I.

THE GUARANTY GIVEN BY JEREMIAH MACDONALD TO THE PLAINTIFF WAS A CONTINUING GUARANTY AND UNLIMITED AS TO TIME.

Hereafter are set forth citations upon the authority of which it is urged that the guarantee in this case was a continuing guaranty:

Columbia Electrical Supply Co. v. Kemmet, et al (Supreme Court of New Jersey, Nov. 30, 1901), Dixon, J., 67 N. J. L. 18 (50 Atl. 663.)

> In an action upon a contract in the following form: "We, George Kemmet & Bro., herewith guaranty the account of Mr. Paul Dreher, of 813 High St., West Hoboken, to the amount of $500.00. We are willing to make monthly settlement for the electrical supplies purchased by him; such payments to be made every 15th of the month for the month previous. (Signed) Geo. Kemmet & Bro." Held: (1) That the signer thereby became a guarantor of payment; (2) That the guaranty was a continuing one; (3) That its continuance was not dependent upon punctual payment being made by the principal debtor on the 15th of each month; (4) That the guaranty was not conditioned upon the sales being limited to $500; and (5) That the guaranty was not released by the creditor's omission to notify the guarantor that

a check given on account by the principal debtor had been dishonored.

Paskusz, et al, v. Bodner, et al (Supreme Court of New Jersey, Nov. 11, 1927), Trenchard, J., 75 N. J. L. 447 (67 Atl. 1040.)

> The following guaranty: "We, the undersigned, do guarantee you to trust Bodner, Berkman & Co. three hundred (300) dollars worth of material to be credited to them at the rate of ten or fifteen days terms for a term of five months from date," is a continuing guaranty, and extends to all moneys due for materials purchased within five months, the amount of the credit only being limited to $300.

See also Newcomb, et al, v. Kloeblen (Court of Errors and Appeals of New Jersey, Nov. 15, 1909), Vroom, J., 77 N. J. L. 791 (74 Atl. 511.)

Also Endicott Johnson Corporation, Respondent, v. Samuel Binder, Appellant, 101 N. J. L. 122, Minturn, J.

POINT II.

A GUARANTEE FOR AN INDEFINITE PERIOD IS OPERATIVE UNTIL REVOKED.

A guaranty based on no consideration moving to the guarantor, which contemplates future credit to be extended to another and which is thus continuing in character, is subject to revocation by the guarantor, and he is not liable for credit extended to the principal debtor after the creditor has received notice of the revocation.

12 R. C. L. 1088.

Where guaranty is rendered effective by actual acceptance manifested by extension of credit, it remains effective until revoked when neither the terms of the writing nor surrounding circumstances evince a contrary intention.

Guggenheimer & Co. v. Gilmore, 116 S. E. 67—29 Ga. App. 540.

An instrument guaranteeing an account up to a certain amount for an indefinite period is, when accepted, operative until revoked.

Thiensville Creamery Co. v. Hickcox, 162 N. W. 660, 165 Wis. 537.

See also Corpus Juris, Vol. 28, page 928.

There is no evidence in the case that Jeremiah MacDonald ever gave notice of the revocation of the guaranty which he had given to the Monmouth Plumbing Supply Company.

In fact, the testimony is uncontradicted that Mr. MacDonald had not revoked this guaranty.

> Q. Were you ever notified by Mr. MacDonald or anyone that the guaranty had been revoked?
>
> A. No, sir.
>
> (Line 16-18, page 18, Printed Case.)

POINT III.

THE MERE PAYMENT OF MONEY OR CHECKS BY THE GUARANTOR IS NOT IN ITSELF AN EXTINGUISHMENT OR REVOCATION OF THE GUARANTY.

In this case in defense of the claim of plaintiff upon this guaranty and upon the cross examination of the plaintiff's witness two checks were produced; one for $71.80 dated July 31, 1923, the other for $197.10 dated September 12, 1923, both made by Jeremiah MacDonald, the guarantor. These checks were credited upon the account of Romeo MacDonald, the debtor. There is no evidence as to who actually delivered these checks to the plaintiff but the evidence is undisputed (bottom page 26, top page 27, Printed Case) that

"At the time the two payments, namely, $71.80 and $197.10, were made, Jeremiah MacDonald had not been called upon to make good under his guaranty," and

"At the time the $71.80 was paid nothing was said by Jeremiah MacDonald or anyone on his behalf that the check was on account of his guaranty of $250," and

"At the time the check of $197.10 was paid nothing was said that that check was on account of the guaranty of $250," and

Nothing was said by Jeremiah MacDonald or anyone in his behalf that having tendered these two checks on July 31, 1923, for $71.80 and September 12, 1923, for $197.10 that he, Jeremiah MacDonald, had paid the full amount of the guaranty and was released from it, and plaintiff company was not advised by Jeremiah MacDonald or anyone in his behalf that there was any intention to revoke the guaranty.

A non-suit in this case was then granted upon the sole ground that these checks, which happen to be those of Jeremiah MacDonald, had been applied on account of the debt of Romeo MacDonald and extinguished the liability of the guarantor on his guaranty.

IN VIEW OF THE CHARACTER OF THE GUARANTY IN QUESTION, AND UNDER THE CIRCUMSTANCES OF THIS CASE, IT IS EARNESTLY URGED THAT IT WAS ERROR TO NON-SUIT PLAINTIFF, THAT THE PLAINTIFF WAS ENTITLED TO SOME NOTICE OF THE INTENTION OF GUARANTOR TO REVOKE OR DISCHARGE HIS GUARANTY AND AT MOST ANY QUESTION OF THE REVOCATION OR DISCHARGING OF SAID GUARANTY WHEN DISPUTED WAS FOR THE JURY.

While it may appear that the plaintiff-appellant in this matter is taking up time of an already overburdened court upon a matter in which only $250 is involved, nevertheless the principle is one which is more important to have decided than the amount involved.

As an illustration, take any ordinary corporation or business firm which is so fortunate as to have a large business and during the course of its business it accepts a guaranty such as the one in question, and on the strength of this guaranty extends credit. The guaranty of this credit is one which is to continue on the books of the company and one which continues until revoked.

The account may be an active one, as in the case in question, settlements made each month (and in this connection it will be noted that the checks produced appear to be in payment for some part of the account which was due prior in time to the actual amount due, upon which this suit was brought).

Now let us further assume that during the continuance of this account in order to satisfy one of the monthly balances the debtor borrows some money from the guarantor for which the guarantor gives the debtor his check which is used by the debtor to be applied on the account; or the guarantor voluntarily furnishes his check for the use of the debtor which is applied on this account; or the debtor desiring to pay his monthly account has cash and keeps no bank account exchanges the cash with the guarantor for his check and pays the account by the check of the guarantor; in all these instances the plaintiff company would have received the check of the guarantor, yet it is not the money of the guarantor that is being paid on the debtor's account, nor can the guarantor in any manner whatsoever be said to have paid these checks on account of his guaranty.

Any one of these situations could be present in the instant case. In fact, it would seem that is just what did happen.

It is again repeated and called to the court's attention that at the time of the production of the check in question nothing was said or notice given to the plaintiff corporation that the checks were to be applied in discharge of the guaranty.

IF THE GIVING OF THE GUARANTY AND ITS ACCEPTANCE MUST BE MUTUAL TO MAKE IT A VALID CONTRACT, IT WOULD SEEM TO BE SOUND LAW AND IN ACCORDANCE WITH JUSTICE AND SOUND LEGAL PRINCIPLE THAT THE REVOCATION OR SATISFACTION OF THE GUARANTY SHOULD ALSO BE MUTUAL. In other words, the plaintiff company had accepted the guaranty and extended the credit, the credit to the debtor was extended only on the strength of the act of the guarantor in furnishing the guaranty, and it was therefore the duty of the guarantor if any check of his was to be turned over to pay the debt or any portion of the debtor's account to so notify the plaintiff company that that check or amount of money was being paid in satisfaction of his liability upon the guaranty and the plaintiff company would thereby be enabled to limit or cancel the line of credit extended to the debtor.

In further support of the contention that these checks were not furnished in satisfaction of the debtor's liability it should be noted that they were drawn for odd amounts and the total of the two checks alone was more than $250, the limit of the guarantor's liability.

Furthermore it should be borne in mind the plaintiff company had not called upon the guarantor, Jeremiah MacDonald, to make good on his guaranty and that any payments made or checks applied by

the guarantor upon the debtor's account were mere voluntary payments by the guarantor on behalf of the debtor of which the plaintiff company had no knowledge other than the bare receipt of the same.

May we not revert to the practical working of the situation by discussing it from the bookkeeper's point of view.

The guaranty in question is accepted and credit extended, and, as in this case, a ledger account with the debtor is opened with a notation thereon as to the limit of the debtor's credit.

Through the sales department, collection department or other department a payment or collection on the account was received; this is entered, we'll say, upon a cash book as cash received, so much money on such an account. Nothing would appear as to whether or not the payment was by check or whose check, or, if the payment was by cash, what the character of the cash would be, whether it is five or ten dollar bills or any other denomination; the entry is simply the receipt of cash to be applied on the account. This entry in turn will be posted by the bookkeeper and he will give proper credit to the debtor's account. If nothing was stated by the guarantor or anyone in his behalf when the check or payment is made that it was the guarantor's intention to extinguish the guarantee or revoke it then the debtor's account is good for additional credit under the terms of the guaranty.

In the instant case this is what occurred and the debtor was extended a credit from month to month as called for by the guaranty and it was only after the account had run along for several years when the debtor defaulted and the guarantor was asked to make good on his guaranty to the amount of $250 that any question is raised that any checks paid on account of the running account were given in satisfaction of the guaranty.

In the case of Thiensville Creamery Co. vs. Hickcox, et al, reported at 165 Wis., page 537, 162 N. W. Rep., page 660, the facts in that case as stated in the report of the same are as follows:

> This is an action by the plaintiff to recover from J. Gilbert Hickcox (hereinafter designated the "defendant") $197 damages and $103.33 costs, on an alleged contract of guaranty whereby the latter is alleged to have guaranteed the plaintiff against loss through the failure of Fred Turner to pay them for butter sold to him. Fred Turner, not having been served, makes no appearance in person or by attorney in the action.
>
> Fred Turner did business under the name of the Farm Products Company. He applied to the plaintiff, engaged in the manufacture and sale of butter, to purchase butter from it on credit. He was informed by its officers that he could purchase butter from it on credit only if he brought a written guaranty from a responsible guarantor.
>
> On July 29, 1913, the defendant Hickcox gave to Turner the following letter, which Turner delivered to the plaintiff:
>
> "Thiensville Creamery, Thiensville, Wis. Gentlemen: I hereby guarantee your account with Fred Turner up to $250. My understanding being that settlements will be made on the first and fifteenth of each month.
>
> "Yours truly, J. Gilbert Hickcox."
>
> The plaintiff made no formal reply of acceptance to this letter, but after inquiring as to Hickcox's financial condition shipped butter to Turner from July 30, 1913, to September 2, 1913. On August 16, 1913, the account up to and including August 15, 1913, then amounted to the sum of $197, was paid by a check which

had the name of J. Gilbert Hickcox as signer. On September 2, 1913, Hickcox wrote to the plaintiff withdrawing the guaranty for the account of Fred Turner, and no more shipments of butter to Turner were made by the plaintiff. The unpaid balance of the account for deliveries of butter to the last of August amounted to $197.24. The defendant alleges that his letter of July 29, 1913, was merely an offer of guaranty, and that no acceptance of the proposal was ever made by the plaintiff, and that he at no time considered himself bound by the offer.

A trial by jury was waived, and the court found that a valid contract of guaranty existed between the plaintiff and the defendant, and that the defendant was indebted to the plaintiff for the balance of the Turner unpaid account with interest. Judgment for recovery of this amount with costs of action was entered against the defendant Hickcox.

In this case it will be noted that check received on the account was a check of the guarantor, J. Gilbert Hickcox, the same as in the instant case; the checks received are checks of the guarantor, Jeremiah MacDonald, and in the Wisconsin case the guarantor paid the bill of debtor for the month preceding the same as in this case. The guarantor, Jeremiah MacDonald, paid on account of the debtor's account and in the Wisconsin case the court held the guarantor was still liable.

The Court held,

"A promise to guarantee an account up to a certain amount upon the understanding that settlements be made semi-monthly held a guaranty of payment up to the specified amount, regardless of previous semi-monthly payments.

> An instrument guaranteeing an account up to a certain amount for an indefinite period is, when accepted, operative until revoked."

And this case holds that when the guarantor attempted to set up the fact that he did not have notice of the acceptance of the guaranty by plaintiff, the payment by the guarantor of the account of his debtor was held to give him notice; and that when he attempted to revoke in writing after the second month's credit had been extended it was held that that revocation was received after additional credit had been extended and he, the guarantor, was liable on his guaranty.

This case is in a great many respects parallel with the instant case and the reasons and principles involved in this case would seem it is respectfully urged to support the contention of the appellant herein that the court erred in granting a non-suit at the trial.

Another case in point that I find to be that of William Filene's Sons Co. vs. Lothrop, reported in 243 Mass., page 214, 137 Northeastern 255:

> "This was an action by the William Filene's Sons Company against Thorton K. Lothrop, Jr., on a written contract of guaranty. From a final order of the appellant division of the municipal court, dismissing the report made by the trial justice, defendant appeals. Affirmed.
>
> The guaranty is quoted in the opinion. Defendant offered a letter written by him to plaintiff, calling attention to the fact that the guaranty was only for $75, and was not to be payable until March 15th, and stating that he hoped the purchaser of the goods would be able to pay for those obtained on the guaranty before that date. There was also evidence that the purchaser had paid plaintiff $75 from the proceeds of a check given her by defendant."

The opinion of the Supreme Judicial Court of Massachusetts, December 1, 1927.

Pierce, Justice, who states in his opinion:

"This is an action of contract brought in the municipal court of the city of Boston upon a written contract of guaranty, signed by the defendant and addressed to the plaintiff, which reads as follows:

'Please sell to Mrs. Frances E. Stearns on your usual credit terms such goods, wares and merchandise as she from time to time may select, and in consideration thereof I hereby guarantee and hold myself personally responsible for the payment at maturity of the purchase price of all such goods, wares and merchandise so sold and delivered, whether evidenced by open account or note. I hereby waive notice of acceptance thereof, amount of sales, dates of shipment or delivery, and notice of default in payment. I further waive the requirement of legal proceedings against the said purchaser; this guarantee is limited to seventy-five dollars ($75). This is intended to be a continuing guarantee applying to all sales made by you to Mrs. Frances E. Stearns from this date until the same is revoked by me in writing (up to $75), no payment to be made before March 15th, 1920. Witness my hand and seal this twentieth day of January, 1920.'

The answer of the defendant was a general denial, payment and denial of signature. The municipal court found for the plaintiff and made a report of its findings and rulings to the appellate division of that court. The appellate division ordered the 'report dismissed,' and the case is here on appeal from the final order of the appellate division."

This case is on all fours with the instant case. The court held that the guaranty was a continuing guaranty and continued until revoked, and this case, as also in instant case, money of the guarantor had been paid to the creditor on debtor's account and in respect to that payment the court in this case says:

> "The defendant further contends that the obligation under the contract was extinguished by the payment of $75 of money which came from the defendant and was applied to the account of Mrs. Stearns by the plaintiff. A discharge of the obligation of the defendant would have resulted as claimed by the defendant, if the defendant had given Mrs. Stearns the money which the plaintiff applied to the account with a direction that it should be paid to the plaintiff to be applied on her account, and the *plaintiff had knowledge of such a direction when the money was received.*"

and the Court continues and states:

> "In the case at bar there is no evidence that the defendant gave the check to Mrs. Stearns with any direction as to her use of it, and there is no evidence that the plaintiff had knowledge that the defendant intended that Mrs. Stearns should act as his agent in cashing the check or in making the payment which she made upon the guaranteed account. In these circumstances the continuing obligation of the defendant to the plaintiff was not discharged by the payment of Mrs. Stearns on her account of an amount of money received by her from the defendant, which equalled the amount of defendant's obligation. Reed v. Boardman, 20 Pick. 441, 446; Bayer v. Lugar, 106 App. Div. 522, 94 N. Y. Supp. 802, affirmed in 186 N. Y. 569, 79 N. E. 1100, Burke v. Taylor, 46 U. C. Q. B. 371."

This latter case very distinctly sets forth the law to be that even though payment made from money of the guarantor, nevertheless the creditor must have knowledge that it is being applied for the purpose of extinguishing the guaranty.

It is therefore respectfully submitted that the Supreme Court erred in sustaining the judgment of non-suit entered by the Court of Common Pleas and the judgment of the Supreme Court should be reversed for the reasons herein set forth.

Respectfully submitted,

CHARLES F. SEXTON,
Attorney for and of Counsel with
Appellant-Plaintiff,