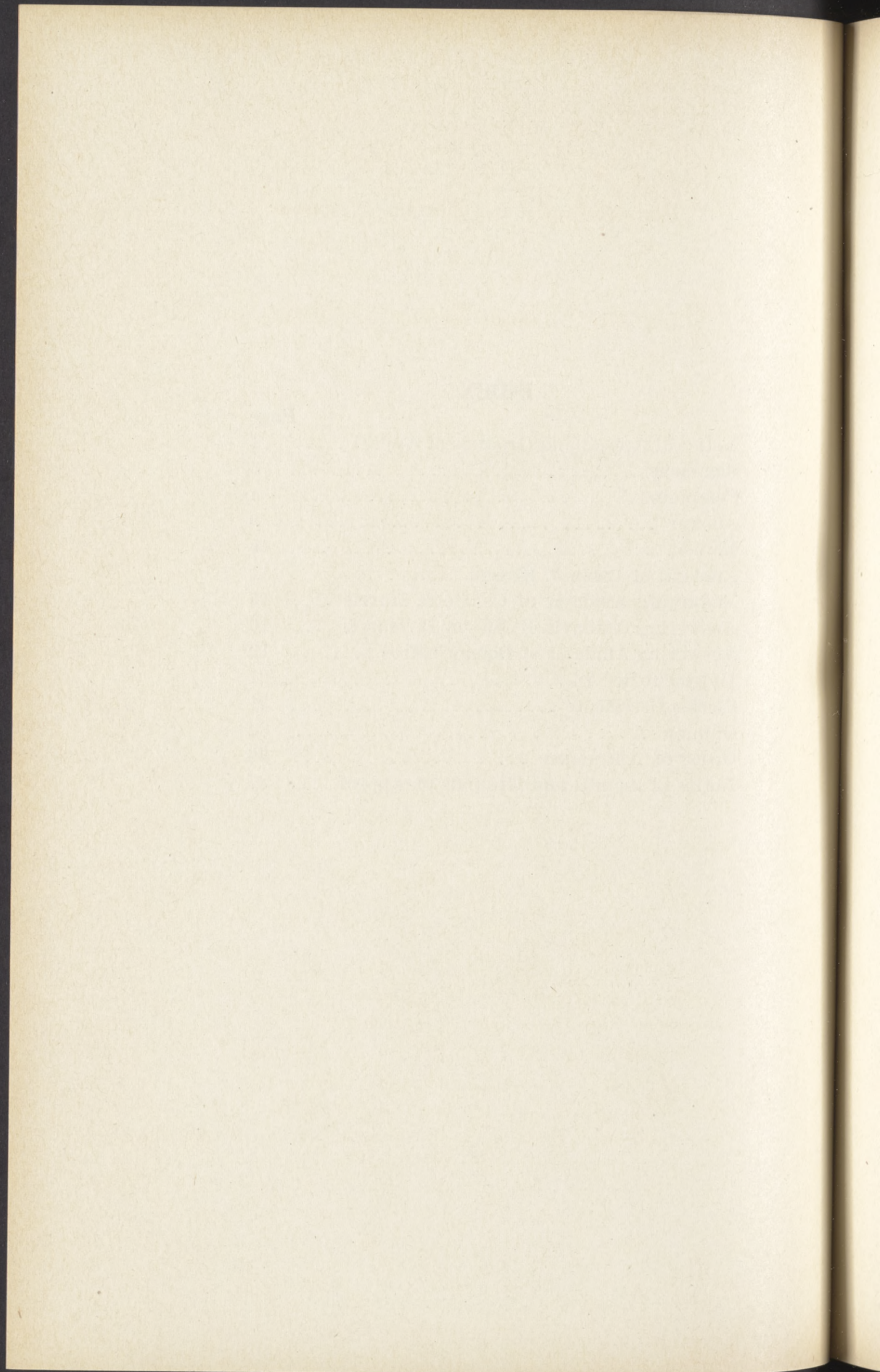


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Notice of Appeal and Grounds of Appeal.

Filed Nov. 26, 1929.

Passaic County Circuit Court.

S. KOSSON & SONS, a corporation,
Plaintiff,

vs.

MARTIN D. HARRIS,
Defendant.

Action at Law.

Notice of
Appeal and
Grounds
of Appeal.

10

To HELLER & BOSS, ESQS.,
Attorneys of Plaintiff,
Passaic, New Jersey.

20

Gentlemen :

Take Notice that the defendant in the above entitled cause appeals to the New Jersey Supreme Court from the whole of the judgment entered in this cause, on the following ground, to wit :

1. Because the Passaic County Circuit Court erred in giving judgment to the plaintiff instead of the defendant, in that :

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(a) There was no consideration of any kind given by the plaintiff to the defendant or by any other person to the defendant, for his promise and/or his contract of guarantee.

(b) When the defendant signed the contract, guaranteeing payment of the amount of money to become due on the contract in question, plaintiff had already entered into a valid and binding con-

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Notice of Appeal and Grounds of Appeal.

tract prior thereto, with Roman Realty and Construction Co., whereby plaintiff bound itself to do for Roman Realty and Construction Co., all the work required of it by its contract with Martin D. Harris. There was thus no consideration for the promise of Martin D. Harris in that plaintiff was already bound to do all of said work for Roman Realty and Construction Co.

10

(c) There was no detriment suffered by the plaintiff as consideration for its contract with Martin D. Harris, in that it had already bound itself to Roman Realty and Construction Co. prior to the making of its contract with Martin D. Harris, to do all the work guaranteed.

(d) The contract or guarantee in this cause was executed and signed two days after the contract between plaintiff and Roman Realty and Construction Co. was signed and executed.

20

(e) Plaintiff knew that it had not entered into a valid contract of guarantee with the defendant, in that it subsequently offered an additional contract of guarantee for the defendant to sign, knowing that the contract of guarantee, on which judgment was given in this cause, was invalid and without consideration.

30

(f) There were controverted questions of fact raised by the affidavits of the defendant, in answer to the motion to strike out the answer filed herein, which controverted questions of fact set up an issue to be decided by a jury.

Dated November 16, 1929.

Respectfully yours,

40

FILBERT L. ROSENSTEIN,
Attorney of Defendant.

Summons.

Passaic County Circuit Court—Martin D. Harris.

(L.S.) You are Summoned to answer
the annexed complaint of S. Kos-
son & Sons, a corporation, in an
action at law in the Passaic Coun-
ty Circuit Court.

And Take Notice that unless you file your answer
to the said complaint with the Clerk of the Pas-
saic County Circuit Court, at Paterson, within
twenty days after the service upon you of this writ
and the annexed complaint, the plaintiff may pro-
ceed in said suit and judgment may be entered
against you.

Witness, CLIFFORD L. NEWMAN, Esq., Judge of
the Passaic County Circuit Court, at Paterson,
this twenty-fifth day of February, 1929.

LLOYD B. MARSH,

Clerk.

HELLER & BOSS,
Attorneys.

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30

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Complaint.

PASSAIC COUNTY CIRCUIT COURT.

10	S. KOSSON & SONS, a corporation, Plaintiff, vs. MARTIN D. HARRIS, Defendant. } Action at Law. Complaint.
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Plaintiff, a corporation, having its principal place of business in the City of Passaic, County of Passaic, and State of New Jersey, says:

20

FIRST COUNT.

1. On or about the fifth day of April, 1928, one Roman Realty & Construction Co. entered into a contract with the plaintiff under the terms of which the said plaintiff was to furnish certain glass on a job owned by the said Roman Realty & Construction Co. at Springfield Avenue and 42d Street, Irvington, New Jersey.
- 30 2. On said date the said defendant Martin D. Harris guaranteed in writing the payment of the full amount of said contract.
3. A true copy of said contract and guarantee are hereto annexed and made part hereof.
4. Thereafter on July 5, 1928, the said Martin D. Harris authorized the plaintiff to change part of the work in the contract, which authorization
40 was given in writing to the plaintiff and under the

Complaint.

terms of which the said Roman Realty & Construction Co. was to receive a credit of \$100.00 upon the contract.

5. A true copy of said authorization signed by the defendant is hereto attached and made a part hereof.

10

6. After the signing of the contract and written guarantee the said plaintiff proceeded to do the work mentioned in the contract and did as a matter of fact complete all the work on or before the tenth day of September, 1928.

7. Said written contract also provided that the defendant Martin D. Harris, after the completion of the work, was to pay for the same by giving the plaintiff a ninety day note made by the Roman Realty & Construction Co. and endorsed personally by the said defendant Martin D. Harris.

20

8. Said defendant neglected and refused to furnish said note or to make payment.

9. Said plaintiff has demanded payment from the Roman Realty & Construction Co. and from the defendant Martin D. Harris but payment was refused.

30

Wherefore judgment will be demanded on the first count in the sum of \$1750.00 with interest from September 10, 1928 and costs.

SECOND COUNT.

1. All the allegations of the first count are made a part of this count.

2. On September 5, 1928 the said Martin D. Harris ordered extra work for the job in question, which extra work amounted to the sum of \$20.00.

40

Complaint.

3. Plaintiff has provided said work but the defendant refused to pay.

Wherefore judgment will be demanded in the sum of Twenty (\$20.00) Dollars on the second count plus interest from September 10, 1928 and costs of suit.

10 Wherefore judgment will be demanded in the sum of Seventeen Hundred Seventy (\$1770.00) Dollars on both counts plus interest from September 10, 1928 and costs of suit.

HELLER & BOSS,
Attorneys for Plaintiff.

20

S. KOSSON & SONS
149 Second St.
Passaic, N. J.

GLASS CONTRACT

April 5, 1925.

30 I, the undersigned, hereby order set for the job at Springfield Avenue and 42nd St. Irvington, N. J. the following: Plate glass for store fronts, returns and store entrance doors, copper prismatic glass for upper fronts, inside set Kalemin copper frames with sills, also copper panels below show windows with grill in each window for the sum of \$1850.00 to be paid after completion of work by

40

Complaint.

90 day note with interest. Endorsed by me personally.

ROMAN REALTY & CONSTRUCTION CO.

384 E. 37th St. Paterson

Roman Effros by M. D. H.

Accepted

S. Kosson & Sons

By I. J. Kosson

10

For value received, I hereby personally guarantee payment of the amount of the within contract.

MARTIN D. HARRIS

S. KOSSON & SONS

20

GLASS CONTRACT

July 5, 1928

I, the undersigned, hereby order change made for job at Springfield Avenue and 42nd Street, Irvington, N. J. the following: Put in Florentine glass in upper fronts instead of Prismatic Glass and deduct the sum of \$100.00 from the original contract. 3 mirrors in medicine cabinets and lights of glass to be installed at S. Kosson & Son's expense, 18 lights of breakage and doors in entrance.

30

ROMAN REALTY & CONSTRUCTION CO.

Roman Effros, Pres.

Change authorized by Martin D. Harris.

Accepted

S. Kosson & Sons

By I. J. Kosson

40

Complaint.

S. KOSSON & SONS

GLASS CONTRACT

September 5, 1928

10 I, the undersigned, hereby order set for job at
corner Springfield Avenue and 42nd St. Irvington
the following 30 lts. Ber Plate Glass for hall en-
trance doors for the sum of \$20.00 to be paid upon
completion of work.

ROMAN REALTY & CONSTRUCTION CO.

By Roman Effros, Pres.

By M. D. Harris, Authorized Agent.

Accepted

20 S. Kosson & Sons
By I. J. Kosson

30

40

Answer.**PASSAIC COUNTY CIRCUIT COURT.**

S. KOSSON & SONS, a corporation,
Plaintiff,

vs.

MARTIN D. HARRIS,
Defendant.

Action at Law.

Answer.

10

The answer of the defendant, Martin D. Harris, residing in the City of Paterson, County of Passaic and State of New Jersey, respectfully shows as follows:

20

ANSWER TO FIRST COUNT.

1. He admits the allegations of paragraph one.
2. He denies the allegations of paragraph two.
3. As to the allegations in paragraph three, he neither denies nor admits the truth of the same, but leaves the plaintiff to prove the same at the trial of this cause.

30

4. He admits the allegations of paragraphs four and five.

5. He denies the allegations of paragraphs six, seven and eight.

6. He admits the allegations of paragraph nine.

ANSWER TO SECOND COUNT.

1. All the answer of the first count is made part of this count.

40

Answer.

2. He denies the allegations of paragraphs two and three.

FILBERT L. ROSENSTEIN,
Attorney of Defendant, Martin D. Harris.

Notice.

10

PASSAIC COUNTY CIRCUIT COURT.

S. KOSSON & SONS, a corporation,
Plaintiff,

vs.

ROMAN REALTY & CONSTRUCTION
Co., *et als.*,
Defendants.

20

Notice.

To PHILBERT L. ROSENSTEIN,

Sir:

30

Please taken notice that we shall apply to the Honorable William B. Mackay on June 10, 1929 at the Court House, Paterson, New Jersey, at ten o'clock in the forenoon (daylight saving time) or as soon thereafter as counsel can be heard, for an order striking out the answer filed by the defendant, Martin D. Harris, in the above matter upon the ground that the same is sham and frivolous and merely filed for the purpose of delay.

Attached hereto and made a part hereof are the affidavits which will be used on the argument in this motion.

40

HELLER & BOSS,
Attorneys for Plaintiff.

Affidavit of Irwin J. Kosson.

PASSAIC COUNTY CIRCUIT COURT.

S. KOSSON & SONS, a corporation,
Plaintiff,

vs.

ROMAN REALTY & CONSTRUCTION
Co., *et als.*,
Defendants.

} Affidavit.

10

State of New Jersey, }
County of Passaic, } ss.:

Irwin J. Kosson of full age, being duly sworn according to law upon his oath deposes and says: 20

That he is a member of the plaintiff company and in charge of the plaintiff's records especially of the account for which this suit was brought.

Said deponent company entered into a written contract with the defendant Roman Realty & Construction Co. a copy of which is on file in the County Clerk's Office of Essex County, and said plaintiff has fully performed the terms of his contract for the furnishing and delivery of the materials referred to. The agreed price was the sum of \$1850.00 of which \$100.00 was credited on account as a result of change in specification, which left a balance of \$1750.00. 30

Deponent Knows that there was \$20.00 extra glass work and this sum was agreed upon between the plaintiff and defendant hereof, as a result of which there is now due to the plaintiff the sum of \$1770.00.

The defendant Martin D. Harris called upon the 40

Affidavit of Irwin J. Kosson.

plaintiff and requested that the plaintiff sign a postponement of its lien to a mortgage affecting the property.

10 This the plaintiff refused to do and as a result of said refusal, said defendant, Martin D. Harris offered to personally guarantee payment to obtain such release.

As a result, the plaintiff signed a release and in consideration therefor secured the written guarantee of Martin D. Harris, guaranteeing the payment of plaintiff's bill, to wit: the sum of \$1770.00.

Plaintiff further avers that he is informed that the defendant Martin D. Harris filed an answer in this case and deponent verily believes that the same was filed merely for delay.

20 Attached hereto and made a part hereof, is a copy of the guarantee agreement.

IRWIN J. KOSSON.

Sworn to and subscribed before me
this 3rd day of June, 1929.

Louis J. Heller,
A Notary Public of N. J.

30

S. KOSSON & SONS
149 Second St.
Passaic, N. J.

GLASS CONTRACT

April 5, 1925.

I, the undersigned, hereby order set for job at Springfield Ave. and 42nd St. Irvington, N. J. the following:

40

Affidavit of Irwin J. Kosson.

Plate glass for store fronts, returns and store entrance doors, copper prismatic Glass for upper fronts, inside set Kalemin copper frames with vent. sills, Also copper panels below show windows with grill in each window for the sum of Eighteen Hundred Fifty (\$1850.00) Dollars to be paid after completion of work by 90 day note with interest. 10
Endorsed by me personally.

It is expressly agreed that this order cannot be countermanded by me and that this contract covers all agreements between the parties hereto.

ROMAN REALTY & CONSTRUCTION CO.

Address 384 East 37th St. Paterson

Roman Effros by M. D. H.

Accepted

S. Kosson & Sons

20

By I. J. Kosson

For value received, I hereby personally guarantee payment of the amount of the within contract.

MARTIN D. HARRIS

S. KOSSON & SONS

149 Second St.

Passaic, N. J.

30

GLASS CONTRACT

July 5, 1928

I, the undersigned, hereby order change made for job at Springfield Avenue and 42nd Street, Irvington, N. J. the following:

Put in Florentine glass in upper fronts instead of Prismatic glass and deduct the sum of One Hundred (\$100.00) Dollars from the original contract, 40

Affidavit of Irwin J. Kosson.

3 mirrors in medicine cabinet, 18 lights of breakage and doors in entrance.

It is expressly agreed that this order cannot be countermanded by me and that this contract covers all agreements between the parties hereto.

384 E. 37th St. Paterson

10 ROMAN REALTY & CONSTRUCTION CO.

Roman Effros Pres.

Accepted

S. Kosson & Sons

By I. J. Kosson

Change authorized by Martin D. Harris.

S. KOSSON & SONS

20

149 Second St.

Passaic, N. J.

GLASS CONTRACT

Sept. 5, 1928

I, the undersigned, hereby order set for job at cor. Springfield Avenue and 42nd St. Irvington, the following:

30 30 lbs. Bev. Plate Glass for hall entrance doors, for the sum of Twenty dollars additional (\$20.00) to be paid upon completion of work.

It is expressly agreed that this order cannot be countermanded by me and that this contract covers all agreements between the parties hereto.

ROMAN REALTY & CONSTRUCTION CO.

By Roman Effros Pres.

By M. D. H. Authorized Agent.

Accepted

S. Kosson & Sons

40 By I. J. Kosson

Answering Affidavit of Charlotte Harris.

PASSAIC COUNTY CIRCUIT COURT.

S. KOSSONS & SONS,

Plaintiff,

vs.

MARTIN D. HARRIS,

Defendant.

Action at Law.

Answering
Affidavit.

10

State of New Jersey,)
County of Passaic,) ss.:

Charlotte Harris, of full age, being duly sworn according to law, upon her oath, deposes and says: 20

1. I am the wife of the defendant, Martin D. Harris. The contract between S. Kosson and Sons and Roman Realty & Construction Company was signed and executed at my home on April 5, 1928. My husband, Martin D. Harris, was the agent of Roman Realty & Construction Company.

2. I recall that two days after the contract was signed, that is, on April 7, 1928, on a Saturday afternoon, the agent of the plaintiff corporation, came to my home and without changing the original contract one iota, had my husband sign the guarantee on the back of the original agreement. 30

CHARLOTTE HARRIS.

Sworn to and subscribed before me,
this 3rd day of July, 1929.

Saul M. Mann,

M. C. C. of N. J.

40

Answering Affidavit of Martin D. Harris.

PASSAIC COUNTY CIRCUIT COURT.

10	S. KOSSONS & SONS, Plaintiff, vs. MARTIN D. HARRIS, Defendant. } Action at Law. Answering Affidavit.	
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State of New Jersey, {
County of Passaic, {ss.:

20 Martin D. Harris, of full age, being duly sworn according to law, upon his oath, deposes and says.

1. I am one of the defendants in the above entitled action. I admit that the plaintiff substantially performed its contract with Roman Realty Company, but say that it failed to set a grill in each window of the building as provided by its contract, but instead placed a grill in each alternating window. To install the grills which the plaintiff wrongfully failed to install would cost at least Three Hundred Dollars (\$300.00). To this extent
30 the plaintiff failed to perform its contract.

2. I deny that the plaintiff called upon me and requested me to sign the guarantee mentioned on the day mentioned. I deny that I called upon the plaintiff and requested it to sign a postponement of its lien to a mortgage which was placed on the property of Roman Realty and Construction Company, or a postponement to any mortgage of any kind whatsoever.

40 3. I deny that plaintiff refused to sign any

Answering Affidavit of Martin D. Harris.

postponement and that as a result thereof and to obtain such postponement I personally guaranteed payment of plaintiff's account.

4. I deny that as a result of any such promise to plaintiff, it signed a release and secured a written guarantee from me.

5. I deny that the answer interposed by me was thus filed to delay this cause and that its intentions are not honorable. 10

6. The true facts are that after the plaintiff executed its contract with Roman Realty and Construction Company, it refused to proceed with its work and insisted that I guarantee the contract, even though, it had already been signed by plaintiff and the Roman Realty and Construction Company. What guarantee I did sign, was signed two days after the original contract was signed, and hence without any consideration whatsoever. 20

7. The affidavit of Irwin Kosson has annexed to it a copy of what purports to be the guarantee contract. I deny that same is a copy of the contract of guarantee. I have annexed hereto and do hereby make part hereof, a certified copy of the true contract of guarantee between plaintiff and myself, and which contract shows no date whatsoever. The copy of the contract annexed to plaintiff's affidavit showing a date, April 5, 1928 is false as shown by the annexed certified copy of the contract of guarantee. 30

8. On the afternoon of April 7, as will appear on the affidavit of Charlotte Harris, made in this cause, Irwin Kosson came to my home and asked me to sign the contract of guarantee. This was after the contract between Roman Realty and the plaintiff had been fully drawn, agreed and signed. 40

Answering Affidavit of Martin D. Harris.

If the contract of plaintiff shows my guarantee as being dated April 5, 1928, said date was filled in after the contract was filed and is not the true date.

10 9. Said contract of guarantee having been signed on April 7, 1928, two days after the original contract was fully executed, and no consideration of any kind whatsoever moving to the defendant, Martin D. Harris, for said guarantee, it is charged by this defendant, that said defendant cannot be held on said contract of guarantee due to the utter lack and failure of any consideration to be given to him. Plaintiff gave nothing whatever to Martin D. Harris for signing said guarantee after the execution of the original contract of guarantee.

20 10. When said original contract was negotiated between plaintiff and Roman Realty & Construction Company, I acted as agent of the said Roman Company, which fact was known to plaintiff.

11. The plaintiff knowing that I had never guaranteed legally the contract with the Roman Realty Company, did on April 27, 1928, offer to enter into a contract of guarantee with me on which I was to guarantee said original contract and for which I was to receive a nominal consideration.

30 12. I deny that I became at any time whatsoever indebted to plaintiff on any account stated or book account, no merchandise having ever been sold to me by plaintiff at any time.

13. Approximately the same complaint as this one was filed in the Essex County Circuit Court, together with approximately the same answer by the defendant. The plaintiff did in that cause also file affidavits similar in content and form to those filed in this cause. I, the defendant, Martin D.

40

Answering Affidavit of Martin D. Harris.

Harris, filed affidavits in that cause, similar to the one I am now filing. After listening to the reading of the affidavits and the arguments thereon, Circuit Court Judge Nelson Y. Dungan refused to strike out the answer, and dismissed the plaintiff's motion to strike.

MARTIN D. HARRIS. 10

Sworn to and subscribed before me,
this 3rd day of July, 1929.

Saul M. Mann,
M. C. C. of N. J.

Answering Affidavit of Roman Effros.

PASSAIC COUNTY CIRCUIT COURT.

20

S. KOSSONS & SONS, Plaintiff, vs. MARTIN D. HARRIS, Defendant.	}	Action at Law. Answering Affidavit.	30
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State of New Jersey, }
County of Passaic, } ss.:

Roman Effros, being duly sworn according to law, upon his oath deposes and says:

1. I know that a contract was signed between S. Kosson & Sons and Roman Realty & Construction Co. on April 5, 1928. I recall also that two 10

Affidavit of Roman Effros.

10 days after the contract was signed, that is, on April 7, 1928, on a Saturday afternoon, I was returning from Irvington, New Jersey, with Dr. Martin D. Harris to the home of Martin D. Harris. I was present at his home when Mr. Irwin Kosson, whom I know and who is the agent of the plaintiff corporation, offered a guarantee agreement to Dr. Martin D. Harris for signing. I know that said guarantee was signed a few days after the original contract was fully signed and executed, and I know that no change was made in the original contract when the guarantee was signed.

2. To my knowledge nothing was given to Dr. Harris to sign said guarantee, and as a result thereof, no change was made in the original contract.

20

ROMAN EFFROS.

Sworn to and subscribed before me,
 this 3rd day of July, 1929.
 Saul M. Mann,
 M. C. C. of N. J.

30

40

Judgment Record.

IN THE PASSAIC COUNTY CIRCUIT COURT.

S. KOSSON & SONS, a corporation,

vs.

MARTIN D. HARRIS,

Judgment
Record.

10

Martin D. Harris, the Defendant in this cause, was summoned to answer unto S. Kosson & Sons, a corporation, the Plaintiff therein, in an action at law, upon the following complaint.

Plaintiff, a corporation, having its principal place of business in the City of Passaic, County of Passaic, and State of New Jersey, says:

20

FIRST COUNT.

1. On or about the fifth day of April, 1928, one Roman Realty & Construction Co. entered into a contract with the plaintiff under the terms of which the said plaintiff was to furnish certain glass on a job owned by the said Roman Realty & Construction Co. at Springfield Avenue and 42d Street, Irvington, New Jersey.

30

2. On said date the said defendant Martin D. Harris guaranteed in writing the payment of the full amount of said contract.

3. A true copy of said contract and guarantee are hereto annexed and made a part hereof.

4. Thereafter on July 5, 1928, the said Martin D. Harris authorized the plaintiff to change part of the work in the contract, which authorization

40

Judgment Record.

was given in writing to the plaintiff and under the terms of which the said Roman Realty & Construction Co. was to receive a credit of \$100.00 upon the contract.

10 5. A true copy of said authorization signed by the defendant is hereto attached and made a part hereof.

6. After the signing of the contract and written guarantee the said plaintiff proceeded to do the work mentioned in the contract and did as a matter of fact complete all the work on or before the tenth day of September, 1928.

20 7. Said written contract also provided that the defendant Martin D. Harris, after the completion of the work, was to pay for the same by giving the plaintiff a ninety day note made by the Roman Realty & Construction Co. and endorsed personally by the said defendant Martin D. Harris.

8. Said defendant neglected and refused to furnish said note or to make payment.

30 9. Said plaintiff has demanded payment from the Roman Realty & Construction Co. and from the defendant Martin D. Harris but payment was refused.

Wherefore judgment will be demanded on the first count in the sum of \$1750.00 with interest from September 10, 1928 and costs.

SECOND COUNT.

1. All the allegations of the first count are made a part of this count.

40 2. On September 5, 1928 the said Martin D.

Judgment Record.

Harris ordered extra work for the job in question, which extra work amounted to the sum of \$20.00.

3. Plaintiff was provided said work but the defendant refused to pay.

Wherefore judgment will be demanded in the sum of Twenty (\$20.00) Dollars on the second count plus interest from September 10, 1928, and costs of suit. 10

Wherefore judgment will be claimed in the sum of Seventeen Hundred seventy (\$1770.00) Dollars on both counts plus interest from September 10, 1928 and Costs of suit.

HELLER & BOSS,
Attorneys for Plaintiff.

20

S. KOSSON & SONS
149 Second St.
Passaic, N. J.

GLASS CONTRACT

April 5, 1925.

I, the undersigned, hereby order set for the job at Springfield Avenue and 42nd St. Irvington, N. J. the following: Plate glass for store fronts, returns and store entrance doors, copper prismatic glass for upper fronts, inside set Kalem copper frames with sills, also copper panels below show windows with grill in each window for the sum of \$1850.00 to be paid after completion of work by 30

40

Judgment Record.

90 day note with interest. Endorsed by me personally.

ROMAN REALTY & CONSTRUCTION CO.

384 E. 37th St. Paterson

Roman Effros by M. D. H.

Accepted

10 S. Kosson & Sons

By I. J. Kosson

For value received, I hereby personally guarantee payment of the amount of the within contract.

MARTIN D. HARRIS

S. KOSSON & SONS

GLASS CONTRACT

20

July 5, 1928

I, the undersigned, hereby order change made for job at Springfield Avenue and 42nd Street, Irvington, N. J. the following: Put in Florentine glass in upper fronts instead of Prismative Glass and deduct the sum of \$100.00 from the original contract. 3 mirrors in medicine cabinets and lights of glass to be installed at S. Kosson & Son's expense, 10 lights of breakage and doors in entrance.

30

ROMAN REALTY & CONSTRUCTION CO.

Roman Effros Pres.

Change authorized by Martin D. Harris.

Accepted

S. Kosson & Sons

By I. J. Kosson

40

Judgment Record.

S. KOSSON & SONS

GLASS CONTRACT

September 5, 1928

I, the undersigned, hereby order set for job at
corner Springfield Avenue and 42nd St. Irvington
the following 30 lts. Ber Plate Glass for hall en-
trance doors for the sum of \$20.00 to be paid upon
completion of work. 10

ROMAN REALTY & CONSTRUCTION CO.

By Roman Effus Pres

By M. D. Harris, Authorized Agent.

Accepted

S. Kosson & Sons

By I. J. Kosson

20

The answer of the defendant, Martin D. Harris,
residing in the City of Paterson, County of Pas-
saic and State of New Jersey, respectfully shows
as follows:

ANSWER TO FIRST COUNT.

1. He admits the allegations of paragraph one. 30
2. He denies the allegations of paragraph two.
3. As to the allegations in paragraph three, he
neither denies nor admits the truth of the same,
but leaves the plaintiff to prove the same at the
trial of this cause.
4. He admits the allegations of paragraph four
and five.
5. He denies the allegations of paragraphs six, 40
seven and eight.

Judgment Record.

6. He admits the allegations of paragraph nine.

ANSWER TO SECOND COUNT.

1. All the answer of the first count is made part of this count.

10 2. He denies the allegations of paragraphs two and three.

FILBERT L. ROSENSTEIN,
Attorney of Defendant, Martin D. Harris.

MACKAY, J.

20 This is a motion to strike out the answer filed by the defendants on the grounds that the same does not present a legal defense to plaintiff's action. Plaintiff sues on a written guaranty signed by defendant. The guaranty is attached to the contract and both read as follows:

S. KOSSON & SONS

GLASS

Jobbers and Contractors

Copper Store Front Construction

30

149 Second Street

Passaic, N. J.

GLASS CONTRACT

Note—All prices subject to change without notice.
Subject to delay by Fires, Strikes or other causes beyond our control.

We are not responsible for breakage of glass after some is set and leaves our control.

40

Judgment Record.

Date April 5, 1928

I, the undersigned, hereby order set for job at Springfield Ave. & 42nd St., Irvington, N. J. the following: Plate Glass for store fronts, returns & store fixture doors. Copper Prismatic Glass for upper fronts, Inside set Kalemien copper frames with vect. sills. Also copper panels below show windows with grill in each window. For the sum of eighteen Hundred Fifty (\$1850.00) Dollars, to be paid after completion of work by 90 day rate with int. endorsed by me personally.

10

Signed

ROMAN REALTY & CONSTRUCTION CO.

Address 384 East 37th St.,

Paterson, N. J.

Roman Effros, by MDA.

20

Accepted

S. Kosson & Sons

By I. J. Kosson

(On Reverse Side)

(No date)

For value received, I hereby personally guarantee payment of the amount of the within contract.

MARTIN D. HARRIS

Filed April 9, 1928

John H. Scott, Clerk

30

The plaintiff claims and defendant agrees that a change was made whereby there was a reduction of one hundred dollars (\$100.00) so that plaintiff's claim on the first count is seventeen hundred fifty dollars (\$1750.00) with interest from September 10, 1928. Second count is for extra work ordered by defendant Harris, amounting to twenty dollars (\$20.) but it is admitted that Harris was the agent of the Roman Realty & Construction Co. and there

40

Judgment Record.

appears to be no guarantee so far as this amount is concerned, and defendant in his answer denies the same. Defendant in his answer and in the answering affidavits in addition to denying the twenty dollar item sets up two reasons why summary judgment should not be entered. That plaintiff
10 wrongfully failed to install grills which would cost at least three hundred dollars (\$300). This of course, plaintiff denies, but it is agreed that this amount can be litigated at a later date.

This leaves the main consideration to be considered on this case, to wit: the validity or effect of the written guarantee. In the first place it will be observed that the contract is dated April 5, 1928. It is further admitted that after the contract was dated and signed the agent of plaintiff
20 took the contract together with the guarantee endorsed thereon to the defendant, Martin D. Harris, for signature. The defendant, Martin D. Harris, in his affidavit, paragraph 6 says:

“6. The true facts are that after the plaintiff executed its contract with the Roman Realty & Construction Company it refused to proceed with its work and insisted that I (Harris) guarantee the contract, even though, it had already been
30 signed by the plaintiff and the Roman Realty & Construction Company.”

The plaintiff claims that even though the guarantee was signed on April 7th the fact that plaintiff refused to act under the contract unless the guarantee was signed by Harris makes the guarantee binding and for a valuable consideration. Defendant contends that after the signing on April 5th the signing on the part of the defendant on
40 April 7th, two days later, was without consideration and therefore of no legal effect. In the short

Judgment Record.

time I have taken to look into this matter I find no cases in New Jersey exactly in point. On the case of *Garland vs. Gaines* (Conn.) 49 Atlantic Reporter, page 19, plaintiff sued on a guaranty annexed to a lease, which reads as follows:

"I hereby guaranty the payment of said rent and the performance of the agreement of the lessee for the full term of the lease." 10

The court held this was an absolute undertaking, and not a conditional guarantee; and hence the guarantor became liable immediately on default of the lessee, and the lessor was entitled to sue thereon without showing diligent efforts to collect from the lessee. The court further held that where plaintiff refused to lease certain premises to defendant's son unless defendant would guarantee payment of rent, the letting of the premises to the son was a sufficient consideration for the father's guaranty. And further: 20

"Where a contract of guaranty is annexed to a lease, and a lessor refuses to allow the lessee to occupy the premises until such guaranty is executed, its execution will be deemed to be contemporaneous with that of the lease, though it was in fact executed subsequently." *Garland vs. Gaines*, 49 Atlantic Reporter p. 19. 30

"Where a contract for the sale of goods is made, the seller declines to deliver them unless security for their payment is furnished, and a third person thereupon guarantees payment and the goods are furnished, the contract of guaranty must be regarded as having been made contemporaneously with the contract. *Hirsch vs. Chicago Carpet Co.*, 82 Ill. p. 234.

Summary judgment will be entered in this case 40

Judgment Record.

for the sum of one thousand four hundred fifty dollars (\$1,450.) with interest from September 10, 1928, and the three hundred dollars (\$300.00) in dispute may be litigated by the parties when court re-convenes in September. The twenty dollar item mentioned in the second count may be litigated at the same time.

10

This matter being opened to the Court by Heller and Boss, Attorneys for Plaintiff upon motion to strike out the answer and enter summary judgment, in the presence of Saul Mann of the firm of Filbert L. Rosenstein, Attorney for the Defendant and the Court having heard and considered the arguments of Counsel and having considered the briefs and the Court having filed a memoranda:

20

Whereupon, it is adjudged that the Plaintiff, S. Kosson & Sons, a corporation, recover of the defendant, Martin D. Harris, the sum of Fifteen Hundred and Forty-four Dollars and Twenty-five Cents, (\$1544.25), and its costs, which are taxed at the sum of Eighty-nine Dollars and Twelve Cents, (\$89.12), making in the whole the sum of Sixteen Hundred and Thirty-three Dollars and Thirty-seven Cents, (\$1633.37).

30

Judgment entered and signed October 25th, A. D. 1929, at 2:49 P. M.

Action No. 12923, Docket L, page 200.

W. B. MACKAY,
Judge.

Clerk's Certificate.

State of New Jersey, {
County of Passaic, {ss.:

I, Lloyd B. Marsh, Clerk of said County and Clerk of the County Courts thereof, Do Hereby Certify, that the foregoing is a transcript of the Judgment Record, in re: S. Kosson & Sons, a corporation, Plaintiff vs. Martin D. Harris, Defendant, 'as the same is taken from and compared with the original entry thereof in Book "B-2" of Circuit Court Judgments, for said County and now remaining of record in my office. 10

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Courts and County at Paterson, this Sixth day of December, A. D. Nineteen Hundred and Twenty-nine. 20

LLOYD B. MARSH,
Clerk.

By FLOYD E. JONES,
Deputy Clerk.

Opinion.**NEW JERSEY SUPREME COURT,**

No. 72 January Term, 1930.

10 S. KOSSON & SONS, a corporation,
 Plaintiff-Appellee,
 vs.
 MARTIN D. HARRIS,
 Defendant-Appellant.

Submitted January Term 1930; decided June, 1930.

20 Appeal from Passaic County Circuit Court.
 Before Chief Justice GUMMERE and Justice
 CAMPBELL.
 For Appellant, FILBERT L. ROSENSTEIN.
 For Appellee, AARON HELLER.

Per Curiam:

This is an appeal from a summary judgment for \$1633.37 entered upon the striking out of an answer.

30 The plaintiff-appellee brought suit against the defendant-appellant for \$1770. The action was based upon a written contract between the plaintiff-appellee and the Roman Realty and Construction Company under which the former furnished glass in a building being erected by the latter at Springfield Avenue and 42nd Street, Irvington. The payment of the consideration under this contract by the Roman Realty and Construction Com-

Opinion.

pany was guaranteed by the appellant in a written undertaking.

We can pass by the issues raised, or attempted so to be, by the pleadings.

Upon the motion to strike out the answer the following facts were brought forth.

The plaintiff-appellee asserted that it had fully performed its contract by furnishing the materials called for; that the agreed price was \$1850, against which \$100. was credited as the result of a mutually agreed change, leaving a balance of \$1750 and that there was an agreed upon extra item of \$20. making the total amount due and demanded \$1770. Further, that appellant requested the appellee to sign a postponement of its right of lien against the lands to the lien of a mortgage, which appellee refused to do until appellant guaranteed its claim of \$1770, which he thereupon did. 10 20

The appellant admitted that the appellee had substantially performed its contract except that it had omitted to place certain grills, the installing of which would cost \$300. and denied that the appellee was requested to execute a postponement of its lien and that to secure such postponement, he, the appellant had guaranteed the account. But, asserted the appellant, "The true facts are that after the plaintiff executed its contract with Roman Realty and Construction Company it refused to proceed with its work and insisted that I guarantee the contract although it had already been signed by plaintiff and the Roman Realty and Construction Co. What guaranty I did sign was signed two days after the original contract was 30 40

Opinion.

signed and hence without any consideration whatsoever."

10 Appellant further asserted in his affidavit that the copy of the contract and guaranty as annexed to the appellant's affidavit was not correct in that the date of the guaranty as April 5, 1928 was false but that the truth was that Irwin Kosson of the appellee company came to his home on the afternoon of April 7 and requested him to sign the guaranty, which was after its contract with the Roman Realty and Construction Company had been signed.

20 The circuit court judge before whom the matter was heard ordered the entry of summary judgment against the appellant for \$1450. and interest from September 10, 1928, this being the full amount of the claim of \$1770, less the extra item of \$20, admittedly not covered by the guaranty and the sum of \$300. asserted by the appellant as the cost of installing certain grills which it is said should have been but were not installed by the appellee.

30 This order of the learned trial judge is based upon the admission of the appellant that his guaranty was given when the appellee refused to perform its contract unless and until the consideration was guaranteed and secured.

While the appellant urges a reversal of this judgment in a rather voluminous brief, under several points the gist of the argument is that the guaranty of the appellant was without consideration and therefore nudum pactum.

The theory or principle upon which the learned circuit court judge based his order was that where an executory contract exists which before perform-

Opinion.

ance the contractors refuse to perform unless the consideration thereof is secured or guaranteed by a third party, such a contract of guaranty is to be regarded as made contemporaneously with the main contract and is supported by the consideration of the principal contract. Citing *Garland vs. Gaines* (Conn) 49 Atl. Rep. 19 and *Hirsch vs. Chicago Carpet Co.*, 82 Ill. 234. 10

In this conclusion we concur and to the authority cited by the court below may be added 28 C. J. (Title Guaranty) pages 917 &c.,

The Judgment below is affirmed, with costs.

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Order Affirming Decision.

NEW JERSEY SUPREME COURT.

72—JANUARY TERM, 1930.

10

S. KOSSON & SONS,
Plaintiff-Appellee,

vs.

MARTIN D. HARRIS,
Defendant-Appellant.Order
Affirming
Decision.

20

This matter being opened to the court by Heller and Boss attorneys for the plaintiff appellee upon briefs which were submitted in the January Term, 1930 and the Court having rendered a written opinion in the June Term of 1930 affirming decision of the Passaic County Circuit Court.

30

It is on this 8th day of July, 1930, ORDERED that the judgment of the Passaic County Circuit Court be and the same is hereby affirmed with costs to be taxed, and that the record be remitted to the Court below to be proceeded with in accordance with this judgment and the practice of said court.

Entered: July 8, 1930.

On motion of

HELLER & BOSS,
Attorneys for Plaintiff-Appellant.

40

Notice of Appeal and Grounds of Appeal.

NEW JERSEY SUPREME COURT.

S. KOSSON & SONS, a corporation, Plaintiff-Appellee, vs. MARTIN D. HARRIS, Defendant-Appellant.	}	Action at Law. Notice of Appeal and Grounds of Appeal.	10
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To HELLER & BOSS, ESQ.,
Attorneys of Plaintiff-Appellee,
51 Lexington Avenue,
Passaic, New Jersey.

Gentlemen: 20

Take Notice that the appellant, Martin D. Harris, 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 on the following grounds:

1. That the Supreme Court affirmed the judgment of the Passaic County Circuit Court, although there was error in doing so. 30
2. Because the Supreme Court affirmed the judgment of the Passaic County Circuit Court, although there was no evidence to support said judgment.
3. Because the Supreme Court affirmed the judgment of the Passaic County Circuit Court, although there were disputed questions of fact, which required the determination of a jury, the Circuit Court Judge erring in deciding the disputed questions of fact himself. 40

Notice of Appeal and Grounds of Appeal.

4. Because the Supreme Court affirmed the judgment of the Passaic County Circuit Court, although there was no consideration of any kind given by the plaintiff to the defendant, or by any other person, to the defendant, for his promise and or his contract of guarantee.

10 5. Because the Supreme Court affirmed the judgment of the Passaic County Circuit Court, although there was no evidence tending to show that the contract of guarantee signed by the defendant, was executed contemporaneous with the principal contract.

20 6. Because the Supreme Court affirmed the judgment of the Passaic County Circuit Court, although there was no evidence or law indicating the execution of a valid contract by this appellant.

7. Because the Supreme Court affirmed the judgment of the Passaic County Circuit Court, although there was undisputed evidence that the contract of guarantee entered into by the defendant was executed and signed two days after the principal contract between plaintiff and Roman Realty & Construction Co.

30 8. Because the Supreme Court affirmed the judgment of the Passaic County Circuit Court, although there were controverted questions of fact raised by the affidavits of the defendant, in answer to the motion to strike out the answer filed by him, which controverted questions of fact set up an issue to be decided by a jury.

Dated: July 16, 1930.

Respectfully yours,

40

FILBERT L. ROSENSTEIN,
Attorney of Defendant-Appellant.

New Jersey Court of Errors and Appeals

S. KOSSON & SONS, a corporation,
Plaintiff-Appellee,

vs.

MARTIN D. HARRIS,
Defendant-Appellant.

Action at Law.

On Appeal
from
Judgment of
Supreme
Court.

BRIEF OF DEFENDANT-APPELLANT.

Statement of Facts.

This is an appeal from the judgment of the New Jersey Supreme Court, affirming a judgment of Passaic County Circuit Court, granting a motion to strike out the Answer of defendant-appellant in the above entitled suit, and entering summary judgment in favor of the plaintiff-appellee, in the sum of *One Thousand Six Hundred Thirty-three Dollars and thirty-seven cents* (\$1,633.37).

The Complaint alleged the making of a contract between the plaintiff and Roman Realty & Construction Company for the performance of certain work by plaintiff, on a certain building which said corporation was erecting. This contract was dated April 5, 1928. After the making of this contract between plaintiff and Roman Realty & Construction Company, several days elapsed, when plaintiff, without any legal or just cause, arbitrarily refused to perform its contract, unless the same

was guaranteed by defendant, *Martin D. Harris*. Accordingly, on April 7, 1928, defendant, *Martin D. Harris*, endorsed the contract as follows:

“For value received, I hereby personally guarantee payment of the amount of the within contract.

(Signed) MARTIN D. HARRIS”

The Complaint filed by the plaintiff, alleged the making of the contract between plaintiff and the Roman Realty & Construction Company, and the above guarantee by the defendant, *Martin D. Harris*. The Answer set up a want of consideration to support the alleged guarantee of the defendant since the guarantee was not contemplated or mentioned when the principal contract was executed. These admitted facts raised the issue of whether the defendant, having signed the guarantee several days after the plaintiff and the Roman Realty & Construction Company had already completely executed their contract, without receiving any benefit or without plaintiff suffering any new detriment, had received consideration for his own promise of guarantee. The learned trial court held that there was a consideration for the promise of defendant, and was affirmed by the New Jersey Supreme Court, from which order of affirmance defendant appeals.

GROUND S OF APPEAL AND ARGUMENT.

POINT I.

The performance of what one is already bound to perform is no consideration for a new promise by another person.

It is elementary law that consideration consists of either a benefit to the promisor or a detriment suffered by the promisee. Consequently, if the defendant, *Martin D. Harris*, is to be held liable on his promise of guarantee, it must be shown that he received a benefit, or that the plaintiff, the promisee, suffered a detriment. The defendant, in his answering affidavit, denied that he received any benefit for his promise. (Page 16, State of Case) and the plaintiff admitted this at the argument before the Circuit Judge on the motion to strike. Likewise, it is apparent, that the plaintiff suffered no detriment, in return for defendant's guarantee, because it was already under legal contract to do the same construction work for the Roman Realty & Construction Company (See Contract, page 6 *et seq.* State of Case).

Professor Parsons, in his treatise on Contracts, adopts the rule followed by Chief Justice Ruger, of New York, in the following manner:

"In speaking for the Court of Appeals, Ruger, Chief Justice, at page 401, says, Pollock states the rule as follows: 'Neither the promise to do a thing, nor the actual doing of it, will be a good consideration if it is a thing which the party is bound to do by the general law, or by a subsisting contract with the other party', Pollock on Principles of Contracts, 161, *Crosby v. Wood*, 6 N. Y., 369.

Nor is the performance of that which the party was under a previous valid legal obligation to do a sufficient consideration for a new contract."

2 *Parsons on Contracts*, 437.

Professor Page states the principles to be:

"Where a man has, by his own contract, become morally and legally bound to do an act, he can not maintain an action on the promise of a third person * * *"

1 *Page on the Law of Contracts*, page 1013.

"On the whole the law seems to be following the strictly logical course of holding that the second promise to do what one is already bound to do is not sufficient consideration, whether it is made to the original party on the first contract or to a new party."

Principles of the Law of Contracts, Sir William R. Anson, (Turck Edition) 1929 Callaghan & Co.

"Nor is the performance of that which the party was under a previous valid legal obligation to do a sufficient consideration for a new contract." 2 *Parsons, Cont.* 437.

Appeal of Charles M. Lukens et al.
Re: Henry Kesler's Estate, 13 L. R. A., 582.

"According to the weight of authority in this country a promise to perform an existing contract with a third person or the performance of it does not constitute a valuable consideration.

"The rule stated must obtain where the promise is made by a third party to induce

the promisee to carry out an existing contract which he has with another." *McDevitt v. Stokes*, 174 Ky. 515, 519, 192 SW 681."

13 *C. J.*, 356, 357.

"Where a party is under a duty created or imposed by law to do what he does or promises to do, his act or promise is clearly of no value and is not a sufficient consideration for a promise given in return"

13 *Corpus Juris*, 351.

"The promise of a person to carry out a subsisting contract with the promise or the performance of such contractual duty is clearly no consideration, as he is doing no more than he was already obliged to do, and hence has sustained no detriment, nor has the other party to the contract obtained any benefit."

13 *Corpus Juris*, 353.

This rule as established is well-settled law in New Jersey.

"By virtue of the prior obligation, the promisee is bound to do precisely that which he does or stipulates to do by the subsequent contract, and for the doing of which he has already received a sufficient consideration. *Cabot v. Haskins*, 3 Pick. 83; 1 *Parsons on Contracts*, Book II., chap. 1, Paragraph 3, and cases cited in note s.s."

Conover v. Stillwell, 34 N. J. Law Reports, 62.

"So a party to pay increased compensation for services which the party was under a prior legal obligation to render, is not valid. *Stilk v. Myrick*, 2 Camp. 317; *Harris v. Carter*, 3 E. & B. 559; *Voorhees v. Wood-*

hull's ex'rs, Court of Errors, March Term, 1869, 4 Vroom 494."

Conover v. Stillwell, 34 N. J. Law Reports, 57.

"Of course, it is elementary as therein pointed out, but a consideration for one contract will not support a distinct and independent contract" * * *

V. C. Bentley in *Gordon v. Schellhorn*, 95 N. J. Eq. 702, 123 Atl. Rep. 555.

In *Schaus v. Henry*, 89 N. J. Law 607, 99 Atl. page 188, a note had been delivered between the parties, after which a third party wrote in an endorsement, promising to pay the debt of the maker. The Court held that this promise required a new consideration to support it, and that the defendant's written promise to pay the debt of another has no legal validity, if there was no evidence of consideration outside of the promise itself. Among other things, Mr. Justice Trenchard, speaking for the Court of Errors and Appeals, on page 189, says:

"It was made after the delivery of the note—after the contract creating the debt was fully consummated. It was, in fact, a promise to pay the debt of another, and required a new consideration to support it. *Hayden v. Weldon*, 43 N. J. Law, 128, 39 Am. Dec. 551.

"Now there was no evidence before the trial judge of a new consideration. The engagement of the defendant's intestate was entirely gratuitous. There is no evidence of any benefit to him, or detriment to the plaintiff, or to any other person. In short, we have nothing but the written promise of the defendant's intestate to pay the debts of another, and that has no legal validity since there is no evidence of consideration outside

of the promise itself. *Pike v. Van Riper*, 57 N. J. Law, 290, 30 Atl. 529."

In the case of *Pike v. Van riper*, 57 N. J. Law 290, 30 Atl. Rep., page 529, defendant promised to pay the debt of the plaintiff, said promise being evidenced by a writing, but not setting forth how the debt accrued. Holding that there was no consideration to support the promise in this case, Mr. Justice Dixon, expressing the view of the Supreme Court, says:

"Under these circumstances, the court should have decided that the "contract" was without legal force. If the certificate means that there was no consideration for the defendant's contract, except such as might be implied in his written promise to pay, then his contract was nudum pactum; for, outside of commercial paper, unsealed promises do not imply any legal consideration. If it means that what the state of demand described as the debt of another was merely the written promise of that person to pay, then this was a nudum pactum, and could not form a legal consideration for the defendant's contract; neither of these promises affording any evidence of benefit to the promisor or detriment to the promisee, or to any other person, without which such promises have no legal vitality."

Even in the case of a promissory note, the words, "For value received" only import a consideration so as to relieve the party from proving it in the first instance; and it is well-settled that the consideration may be inquired into, and if a want of consideration is shown, the plaintiff cannot recover.

Conover v. Stillwell, 34 N. J. Law, page 56.

POINT II.

Where at the time of defendant's promise, plaintiff was already under contract with another to perform his contract, such performance or promise of performance is no consideration for defendant's promise.

Consideration by its very definition must be given in exchange for the promise, or at least in reliance upon the promise. Accordingly, something which has been given before the promise was made and therefore without reference to it cannot, properly speaking, be legal consideration.

1 Williston on Contracts, Sec. 142, *et seq.*

The general rule is stated in Encyclopedia of & Procedure, as follows:

According to the weight of authority in this country a promise to perform an existing contract with a third person or the performance of it does not constitute a valuable consideration.

9 Cyc. of Law and Proc., 353, 354.

Views in other jurisdictions follow:

A complaint alleging in substance that simultaneously with the plaintiff's contract to serve as clerk of a corporation at a fixed salary, the defendant who was president, stockholder and director thereof, promised to give him 50 shares of stock "in consideration of the faithful compliance by the plaintiff with the terms of the aforesaid contract between the said corporation and the plaintiff", which promise he failed to perform, does not state a cause of action, as the de-

fendant's contract was without consideration.

"The Court by Gaynor, *J.*, says further that if both contracts were contemporaneously made, there would have been a consideration, but where one is subsequently made to the main contract, a new consideration must be expressed.

Petze v. Leary, 117 N. Y. App. Div., 829.

"As stated by other cases, a promise to pay one for what he is obliged to render has no consideration to support it. *Peelman v. Peelman*, 4 Ind. 612; *Ford v. Garner*, 15 Ind. 298; *Reynolds v. Nugent*, 25 Ind. 328.

Beaver v. Pulp, 136 Ind. 595, 36 Northeastern Rep., 418.

In *Johnson v. Sellers*, 33 Ala. 265, the plaintiff contracted with a school board to teach school, but denied that he had agreed that his wife should teach. Thereafter defendant, a trustee, promised plaintiff \$2500.00, if he would bring his wife to assist in teaching. The court, assuming that the plaintiff had originally contracted to bring his wife, says:

"The promise of defendant to pay him for doing what he had already contracted with a third party to do, was not valid consideration. A similar result was reached in *Pielman v. Pielman*, 4 Ind., 612, *Havana Co. v. Ashhurst*, 148 Ill., 715."

In *Putnam v. Woodbury*, 68 Maine 58, plaintiff was a postmaster and bound by contract with the U. S. A. to deliver certain mails. Defendant agreed to pay plaintiff certain monies for carrying mails, which mails plaintiff was already bound to carry under his contract with U. S.

Held, that defendant would not be liable upon

his promise to pay the plaintiff for carrying mail in accordance with his contract with the postmaster general.

In *Reynolds v. Nugent*, 25 Indiana 328, A signed a written contract by which he agreed to enter the military service of the U. S. to the credit of Tobin township. In consideration of the payment of a bounty of \$100.00, B, the agent of the Township, accompanied A to the mustering officer to procure his muster in, and to pay him the bounty promised. While there, A was offered by others, a bounty of \$350.00 and refused to perform his contract, unless the Township would pay him that amount, and B thereupon, to induce A to perform his contract, promised that he would be responsible that A should receive that amount from Tobin Township.

Held, that as A was already bound by his contract to enter the military service for a bounty of \$100.00, there was no consideration for the promise to pay him more.

And again in *Teele v. Mayer* (1916) 173 App. Div. 869, 160 N. Y. Supp. 116, where public accountants had contracted to audit the books of a railroad corporation, and after they had entered upon the performance of their duties and were under legal obligation to complete the same, the president of the corporation agreed to become personally responsible for the work, it was held that such agreement was unenforceable because of a lack of consideration, the court saying that the accountants did no more after such promise than they had already agreed to do, and that "nothing is better settled than that the doing of an act which a party is under legal obligation to perform cannot constitute a consideration for a new contract."

L. R. A. 1917 D, 1104.

POINT III.

Although there are some decisions contrary to the foregoing, such decisions are wrong on principle and contrary to the great weight of authority.

Professor Williston, in a well-considered article in 8 Harvard Law Review, page 32 *et seq.* shows that it is almost universally held in this country, a promise to perform an existing contract when under legal obligation to complete the same, the something which one was, at the time, bound to perform by contract with a third person is not a sufficient consideration. At page 38, he says:

The rule, at once logical, readily understood and applied and as just in its operation as any hard and fast rule can be, is that neither performance, nor promise of performance of what one is already bound to perform is a valid consideration.

8 Harvard Law Review, p. 38.

Although it is sometimes said that the rule in England is opposite to the American rule, as stated in Points I and II hereinabove, Professor Page in his celebrated work on The Law of Contracts, shows that such view lacks authority in the adjudicated cases.

The statement, so frequently made, that B's performance of his contract with X is consideration for A's promise to B at English law, seems to lack authority in the adjudicated cases.

Of the cases decided in the United States, which can be claimed to support the opposite

rule, by far the greater number do not involve this question at all, as some substantial consideration was present over and above the performance of the contract with the third party.

1 Page on the Law of Contracts, page 1019.

It is generally said that the English courts hold the performance of such contract to be a consideration for a promise by a third person. Few of these cases cited as supporting this rule really involve this question. In the greater number of cases in which such performance is said to be a consideration, the promise was really incurring a detriment, and his performance of his contract to a third person was a mere incident.

1 Page on the Law of Contracts, page 1016.

According to the weight of authority in this country a promise to perform an existing contract with a third person or the performance of it does not constitute a valuable consideration.

National Electric Signaling Co. vs. Fessenden, 207 Fed. 915, 125 CCA 363; John v. Seller, 33 Ala. 265; Harris v. Harris, 9 Colo. A. 211, 47 P 841; Merrick v. Giddings, 12 D. C. 394; Havana Press Drill Co. v. Ashurst, 148 Ill. 115, 35 NE 873; Beaver v. Fulp, 136 Ind. 595, 36 NE 418; Brownlee v. Lowe, 117 Ind. 420, 20 NE 301; Harris v. Cassady, 107 Ind. 158, 8 NE 29; Ritenour v. Matthews, 42 Ind. 7; Reynolds v. Nugent, 25 Ind. 328; Ford v. Garner, 15 Ind. 298; Peelman v. Peelman, 4 Ind. 612; Schuler v. Myton, 48 Kan. 282, 29 P 163; McDevit v. Stokes, 174 Ky. 515, 192 SW 681; Putnam v. Woodbury, 68 Me. 58; Ecker v. McAllister, 54 Md. 362, 45 Md. 290; Gor-

don v. Gordon, 56 N. H. 170; Arend v. Smith, 151 N. Y. 502, 45 NE 872; Robinson v. Jewett, 116 N. Y. 40, 22 NE 224; Vanderbilt v. Schreyer, 91 N. Y. 392; L'Amoreaux v. Gould, 7 N. Y. 349, 57 AmD 524; Alley v. Turck, 8 App. Div. 50, 40 NYS 433; Snyder v. Schardt, 29 Oh. Cir. Ct. 714; Hanks v. Barron, 95 Tenn. 275, 32 SW 195; Kenigsberger v. Wingate, 31 Tex. 42, 98 AMD 512; Davenport v. First Cong. Soc. 33 Wis. 387.

13 Corpus Juris, page 356.

If the act which B performs or promises to perform is one which he is bound to do under a contract which he has already entered into with X, we find again a divergence of authority as to the sufficiency of such act or promise, on the part of B, as consideration for a promise made by A to B, to induce B to perform his contract with X.

Here, again, the great weight of authority is that such act or promise is not a consideration, since B is doing only what he is already bound to do by his contract with X, although he has also attempted to bind himself by a promise to A to perform such contract with X.

1 Page on the Law of Contracts, page 1012.

(1) Where plaintiff simultaneously contracted with a corporation to render it certain services and with an officer thereof to perform the other contract, the contract with the officer was without consideration. Petze v. Leary, 117 App. Div. 829, 102 NYS 960. (2) A promise of a third person to pay the driver of a race horse a specified amount if he could win the race where the driver is already legally bound to drive un-

der a contract with the master, is without consideration. *McDevitt v. Stokes*, 174 Ky. 515, 192 SW 681. (3) An agreement of a minority stockholder to remain in the company's employ is not a sufficient consideration for its assumption of an indebtedness due him from majority stockholders which was to be paid out of profits, where he had already agreed to remain in its employ in consideration of an agreement with a majority stockholder. *National Electric Signaling Co. v. Fessenden*, 207 Fed. 915, 125 CCA 363.

13 *Corpus Juris*, 356, 357.

The weight of authority in the American Courts, however, seems to reject the view that either a promise to perform or actual performance when made by A in response to B's promise to pay him therefor can be regarded as consideration when A was already under obligation by virtue of a contract with C to perform the same acts. (Citing cases)

Principles of the Law of Contracts, Sir Wm. R. Anson (Turck edition) 1929, Callaghan & Co.

In *Corpus Juris*, the rule is stated as follows:

Where one party to a valid contract refuses to perform the same, and the other promises him some additional consideration in order to induce him to perform, it has been held by some authorities that, since a party to a contract has the right to elect whether he will perform the contract or abandon it and pay damages, the giving up of this right of election furnished a consideration for the new promise; *but this rule has been said to be not only contrary to the weight of authority but wrong on principle.*

13 *Corpus Juris*, 354.

POINT I V .

A guaranty of an already existing contract requires a new consideration to be binding on the guarantor.

The promise and guaranty of the defendant, Martin D. Harris given to the plaintiff, was not founded upon a valid consideration. In the case at bar the contract of guaranty of the defendant with the plaintiff was made two days after the contract of plaintiff with Roman Realty and Construction Co. was executed. The defendant's contract was not contemporaneously made with the principal contract nor was it contemplated at the time of the making of the principal contract. (Pages 17 & 18, State of Case).

The contract of defendant having been made subsequent to the principal contract, it required a new consideration to give it validity and legality. Since it is admitted that no benefit of any kind was conferred upon the defendant, and since plaintiff suffered no detriment if having thereafter done only what it had already bound itself to Roman Realty and Construction Co. to do, it is submitted with the support of overwhelming authority that defendant's promise of guaranty was void lacking in consideration.

A promise by A to guaranty payment of the price of certain buildings to be erected by B, under a contract with X, on consideration that B would complete the performance of such building contract, was held to be without consideration * * * According to the great weight of authority in the United States, therefore, B's performance of

his contract with X is not consideration for A's promise to B.

1 Page on the Law of Contracts, page 1015.

The general rule sustained by the great weight of authority is that the undertaking of one not a party to the original transaction, who, in pursuance of some subsequent arrangement, signs as surety, guarantor, or indorser after the original contract has been fully executed and delivered, is a new and independent contract, and to be binding must be supported by a new and independent consideration from that of the original contract. *Jackson v. Jackson*, 7 Ala. 791; *Savage v. First Nat. Bank*, 112 Ala. 508, 20 So. 398; *Kissire v. Plunkett-Jarrell Grocer Co.* —Ark.—, 145 S. W. 567, *Hazeltine v. Larco*, 7 Cal. 32; *Lagomarsino v. Giannini*, 146 Cal. 545, 146 Pac. 698, *Lewin v. Barry*, 15 Colo. App. 461, 63 Pac. 121; *Klein v. Currier*, 14 Ill. 237; *Harwood v. Johnson*, 20 Ill. 367; *Parkhurst v. Vail*, 73 Ill. 343; *Ives v. McHard*, 2 Ill. App. 176, affirmed on other grounds in 103 Ill. 97; *Blanchard v. McCuller*, 7 Ill. App. 431; *Cassell v. Morrison*, 8 Ill. App. 175; *Anderson v. Norvill*, 10 Ill. App. 240; *Martin v. Stubbings*, 20 Ill. App. 381; *Edwards v. Trustees of Schools*, 30 Ill. App. 528; *Grier v. Cable*, 45 Ill. App. 405; *Holmes v. Williams*, 69 Ill. App. 114, reversed on other grounds in 177 Ill. 386, 53 N. E. 93; *Bullen v. Morrison*, 98 Ill. App. 669, *Richner v. Kreuter*, 100 Ill. App. 548; *Davidson v. King*, 51 Ind. 224; *Crossan v. May*, 68 Ind. 242; *Clodfelter v. Hulett*, 72 Ind. 137; *Fovorite v. Stidham*, 84 Ind. 423; *Bridges v. Blake*, 106 Ind. 332, 6 N. E. 833; *Brownlee v. Lowe*, 117 Ind. 420, 30 N. E. 301 (dictum); *Owens v. Tague*, 3 Ind. App. 245, 29 N. E.

784; Wipperman v. Hardy, 17 Ind. App. 142, 46 N. E. 537; Briggs v. Downing, 48 Iowa, 550; Snowden v. Leight, 6 Ky. L. Rep. 118; Ware v. Adams, 24 Me. 177 Gillingham v. Boardman, 29 Me. 80 (dictum); Howe v. Merrill, 5 Cush. 80; Mecorney v. Stanley, 8 Cush. 85; R. L. Polk Printing Co. v. Smedley, 155 Mich. 249, 118 N. W. 948; Clopton v. Hall, 51 Miss., 482; Glenn v. Lehnan, 54 Mo. 45 (dictum); McMahan v. Geiger, 73 Mo. 145, 39 Am. Rep. 489; MacFarland v. Heim, 127 Mo. 327, 48 Am. St. Rep. 629, 29 S. W. 1030; Hartman v. Redman, 21 Mo. App. 124; Messenger v. Vaughan, 45 Mo. App. 15; Burris v. Davis, 67 Mo. App. 210 (dictum); Lowenstein v. Sorge, 75 Mo. App. 281; Gieseke v. Vollmer, 88 Mo. App. 462; Ford v. McClain, 164 Mo. App., 174, 148 S. W. 190; Barnes v. Van Keuren, 31 Neb. 165, 47 N. W. 848; Badger v. Barnabee, 17 N. H. 120; Leonard v. Vredenburg, 8 Johns. 29, 5 Am. Dec. 317; Farnsworth v. Clark, 44 Barb. 601; Kratenstein v. Bikoff, 127 App. Div. 72, Ill. N. Y. Supp. 250; Greer v. Jones, 52 N. C. (7 Jones L.) 581; Standard Supply Co. v. Finch & Person, 147 N. C. 109, 60 S. E. 904; First Nat. Bank v. Cecil, 23 Or. 58, 31 Pac. 61, 32 Pac. 393; Birge v. Armour, 37 Pa. Super. Ct. 470; Partin v. Prince, —N.C.—, 75 S. E. 1080 (dictum); Clark v. Small, 6 Yerg. 418; Jones v. Ritter, 32 Tex. 717; Baker v. Wahrmund, 5 Tex. Civ. App. 268, 23 S. W. 1023; Simmang v. Farnsworth, —Tex. Civ. App.—, 24 S. W. 541; Bluff Springs Mercantile Co. v. White, —Tex. Civ. App.— 90, S. W. 710; Armstrong v. Cache Valley Land & Canal Co., 14 Utah, 450, 48 Pac. 690; Beers & Co. v. Spooner, 9 Leigh, 153; Bank of Commerce v. Ross, 91 Wis. 320, 64 N. W. 993; First Nat. Bank

v. Bean, 141 Wis. 476, 135 Am. St. Rep. 50, 124 N. W. 656.

Bank of Carrollton v. Latting, 44 L. R. A. 482.

Professor Williston in 1 Williston on the Law of Contracts, Section 142, at page 318, says:

"Similarly a guaranty made after the obligation guaranteed has been entered into is invalid without new consideration."

In support of his views, Professor Williston cites among others, the following cases:

Richardson v. Felds, 124 Ala. 535, 26 So. 981; *Summers v. Heard*, 66 Ark. 550, 50 S. W. 78, 51 S. W. 1057; *Teele v. Mayer*, 173 N. Y. App. D. 689, 160 N. Y. S. 116; *In re Goddard's Estate*, 66 Vt. 415, 29 Atl. 634.

"Where after a lease of premises has been fully executed and delivered to the lessee, one executes a separate and distinct contract to guarantee the payment of the rent under the lease, there must be a new and independent consideration from that of the lease to sustain the promise of guaranty. *Bullen v. Morrison*, 98 Ill. A. 669.

"A guaranty made after the execution of the principal contract which is not based upon any new consideration is not obligatory and putting it in writing, if not under seal, will not help it. *Green v. Thornton*, 49 N. C. 230.

28 *Corpus Juris*, 918, 919.

The same rule has been followed in virtually all other states. In the paragraphs that follow, several cases of the many in point, are briefed.

"A promise made to induce another to comply with his contract to transfer shares of corporate stock to the promisor to pay certain claims against the corporation, is a nudum pactum where it is without other consideration. *Schneider v. Heinsheimer*, 26 Mis. 11, 55 Supp. 630.

"A promise by an employer to pay an employee a bonus if he will stay in the former's employment during the term of the contract is a nudum pactum where it is made simply to keep the employee from quitting the service. *Price v. Press Pub. Co.*, 117 App. Div. 854, 103 N. Y. Supp. 296.

Linz v. Schuck, 11 L. R. A. (N.S.) 791, 792; 106 Md. 220.

In *Vanderbilt v. Schreyer*, 91 N. Y. 392, the plaintiff contracted for the erection of a building and agreed to accept in part payment, a bond and mortgage held by defendant, Schreyer, but he afterwards refused to receive them unless Schreyer would guarantee their payment, and upon Schreyer's refusal to do so, he stopped work, whereupon Schreyer executed the guarantee aforesaid. Held, that the plaintiff had no right to demand the guaranty by the terms of the contract, that the guarantee was a separate obligation although incorporated into the assignment and required some new additional consideration to make it binding.

In *Green v. Thornton*, 49 North Carolina, 230, one Nathan Green, on Dec. 12, 1851, entered into an agreement with William Broadwell, whereby he bound himself to work for Broadwell for twelve months for the sum of \$103.00. On March 2 following, the agreement between Green and Broadwell was reduced to writing, the defendant, A. G.

Thornton, at the same time guarantying performance of the contract.

Upon failure of Broadwell to pay, Green sued Thornton, the guarantor, recovering judgment in the Superior Court. The Supreme Court reversing the judgment, held that there was no consideration for the promise of Thornton and hence there could be no recovery. The court, by Battle, *J.*, said:

"It is not, and cannot be denied, that a guaranty in writing made at the time of a contract between two or more persons, is binding upon the guarantor because it is founded upon the consideration which exists between the principal parties. But if it be made afterwards, without any new consideration, then it is not obligatory, and putting it in writing, if not under seal, will not help it. *Rann v. Hughes*, 7 Term. Rep., 350."

* * * The plaintiff had been working for Broadwell somewhat more than two months and a half upon the contract, when it was reduced to writing and we cannot presume, from the instrument, that the suretyship of the defendant, was stipulated for in the original contract. If it were, the defendant would be bound, but if not, then he could not be held liable without proof of some new consideration.

POINT V.

The Trial Court erred in holding and the Supreme Court erred in affirming, that there was consideration for the defendant's promise of guarantee.

The learned trial judge, at the Circuit rested his decision and based his reasons for striking the Answer and entering summary judgment for the plaintiff on the authority of *Hirsch v. Chicago Carpet Co.*, 82 Ill. App. Div. 234. (See page 29, State of Case). This was a case in the lower Appellate Court and as pointed out by Professor Page, on page 1021 of Volume I of the Law of Contracts, was later ignored when the higher Illinois Court arrived at the conclusion urged by the defendant.

Discussing the effect of later decisions in Illinois on *Hirsch v. Chicago Carpet Co.*, supra, Professor Page, at page 1021, in his learned treatise on the Law of Contracts, sets forth the following:

In *Hirsch v. Chicago Carpet Co.*, 82 Ill. App. 234, X was a corporation and A and D were its chief officers. Considerable stress was laid on this point. *Four years later the Supreme Court of Illinois decided the same general question the other way without referring to Hirsch v. Chicago Carpet Co.*, 82 Ill. App. 234. See *Havana Press Drill Co. v. Ashhurst*, 148 Ill. 115, 35 N. E. 873.

In *Havana Press Drill Co. v. Ashhurst*, 148 Ill. 115, 35 N. E. 873, a promoter of a corporation gave it a license to use a patent owned by him, because another promoter declared that, unless this was done, he would not pay his subscription to the cap-

ital stock. The Supreme Court of Illinois held that the license was without consideration, since the other promoter merely promised to do what he was legally bound to do.

The learned trial court and the Supreme Court further relied upon *Garland v. Gaines*, 49 Atl. Rep. 19, a Connecticut case. A perusal of that case will clearly show that the Court treated the guarantee as having been executed contemporaneously with the lease; that the principal contract looked forward to the execution of the guarantee and the parties treated it as part of the initial contract.

Assuming the execution of the guarantee in the case at bar to have been contemporaneous with the execution of the principal contract is to beg the question. In that case the findings of fact clearly show that plaintiff being unwilling to rent the rooms to defendant's son without the guaranty of the defendant father, plaintiff signed the lease in duplicate, and sent it to the son, to be signed by the son and guaranteed by the father at the same time. The father being out of town at the time, signed the guarantee some days after the son had signed the lease. The Court in its findings of fact distinctly said that plaintiff "being unwilling to rent the rooms to the son without the guarantee of his father for the payment of the rent, the plaintiff did, on the 15th of June, send the lease to the son to be executed by him and to have the guarantee signed by his father." The Court correctly treated the guarantee as having been signed contemporaneously with the lease, one consideration being sufficient for both.

The facts in the case at bar, however, are so radically different as to make this case inapplicable. In the case at issue, the guarantee was never mentioned or contemplated at the time the principal

contract was executed. Two days after the principal contract was executed plaintiff awoke to the advisability of defendant's guarantee and obtained same. (State of Case, pp. 16 and 17). The answering affidavits having set up these facts, the Court cannot by any construction decide these facts and say that the guarantee was contemplated when the contract was signed and is therefore contemporaneous with it. The best the Court could do under the circumstances is to submit to a jury for determination the issue of whether or not the guarantee was contemplated when the principal contract was executed.

The affidavits showing that the original contract was executed on April 5, and the guarantee on April 7, two days later, and the defendant's affidavit setting forth that he at no time ever thought of the guarantee until two days after the principal contract had been executed, at best it can become a question of fact for a jury to determine whether or not the guarantee was considered by the parties to be contemporaneous with the principal contract.

Plaintiff may argue that the defendant, having promised in writing, to guarantee the principal contract, ought to stand by his promise and be forced to fulfill it.

To sustain this contention, the Court will be obliged to throw completely overboard and absolutely ignore the entire theory of consideration as laid down over years of constructive legal development and substitute for this well reasoned and highly organized theory a hopeless confusion based upon whim rather than logic.

In *C. H. Davis v. Morgan*, a Georgia case, reported in 61 L. R. A. 148, the question is succinctly reviewed, Justice Lamar saying:

"At one time Lord Mansfield was quoted as having said that all promises deliberately made should be held binding, but Lord Denman, in *Eastwood v. Kenyon*, 11 Ad. & El. 438, attempts to show that this was either a misquotation, or that, if such a doctrine could have been deduced from whatever he said, the court had refused to follow it in *Littlefield v. Shee*, 2 Barn. & Ad. 811. The cases holding in conformity with Lord Mansfield's supposed statement, while set out in *Hargroves v. Freeman*, 12 Ga. 342, are not adopted as law, because the court says that the principle to be adduced from the general current of authorities is that, for a moral obligation to constitute a sufficient consideration to support an express promise, it must be founded upon an antecedent valuable consideration."

Professors Langdell, Williston, Parsons, Page, and most legal writers, and the prevailing opinion of the courts of a great majority of jurisdictions, hold that a promise ought not to be enforced merely because of a man's given word; that a consideration must support the promise and that a man cannot make an enforceable gift of his promise the consummation of which would be executory. All hold and agree that an empty promise or a mere moral consideration are worthless as support of the consideration necessary to the validity of a contract.

That strong moral obligation, which some authorities hold to be sufficient for consideration, is held by all writers and authorities in law to be no obligation, unless founded upon some antecede-

ent legal obligation unenforceable at the time the promise is made, or upon other similar equities.

"While all courts recognize the obligation arising from any undertaking, they are, from the necessity of the case, forced to hold that naked promises must depend for their performance solely upon the will of the promisor, and not upon the tribunals which are organized to perform the "duty of government to protect person and property," and in pursuance thereof to award money damages for breaches of contracts. But they cannot enforce promises binding on the conscience except in those cases where some pecuniary damages flows from the breach, or where, in addition to the moral obligation, the promise is also supported by a consideration. When one receives a naked promise, and such promise is broken, he is no worse off than he was. He gave nothing for it, he has lost nothing by it, and on its breach he has suffered no damage cognizable by courts. No benefit accrued to him who made the promise, nor did any injury flow to him who received it. Such promises are not made within the scope of transactions intended to confer rights enforceable at law. They are lightly made, dictated by generosity, courtesy, or impulse, often by ruinous prodigality. To enforce them by a judgment in favor of those who gave nothing therefor would often bring such imperfect obligations into competition with the absolute duties to wife and children, or into competition with debts for property actually received, and make the law an instrument by which a man could be forced to be generous before he was just. Both under the civil and the common law, courts were prohibited from enforcing contracts without consideration, and relegated the performance

of such promises solely to those who made them.

C. H. Davis & Company vs. Morgan, 61
L. R. A. 150.

This court in the case at bar ought not to depart from the fixed and well-established principles of the theory of consideration, as applied to the law of contracts.

Conclusion.

It is conceded that the contract of guarantee in this case was not contemplated when the principal contract, which contract was valid and binding, was made. It is further admitted that the defendant received no benefit for signing the contract of guarantee, nor did the plaintiff suffer any detriment thereby, it having ultimately performed and done only that which it had already bound itself to do under the principal contract with Roman Realty & Construction Company.

It has been shown in the foregoing brief, by full and ample authority in this state and in the majority of jurisdictions, and it is elementary law that the performance of what one is already legally bound to perform, is no consideration for a new and independent promise by another person. It has been further set forth at length in this brief that although there are some decisions contrary to the foregoing, such decisions are wrong on principle and contrary to the great weight of authority of jurisdictions in this country and of leading legal writers.

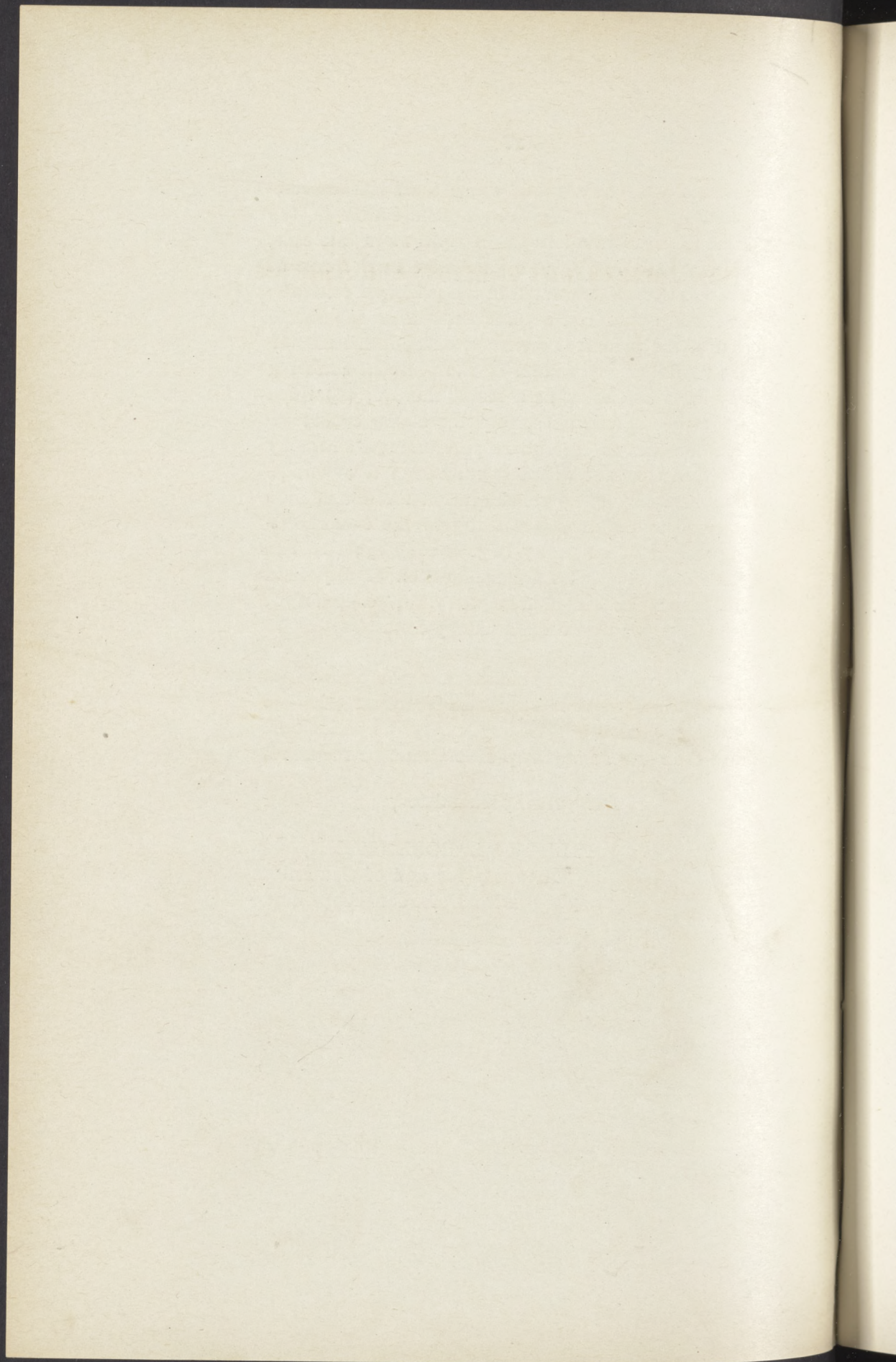
It has furthermore been shown that the Circuit Court and Supreme Court erred in coming to their conclusions and in relying upon cases in foreign

jurisdictions, the effect of which cases has been negated by later rulings and higher courts in the same foreign jurisdictions. It follows in this case, therefore, that: (1) The guarantee in the case at bar was not contemplated in the principal contract, and hence executed several days after the execution of the principal contract, without the defendant receiving any benefit or the plaintiff suffering any legal detriment as a result thereof; (2) Such a contract of guarantee requires a new consideration and that the plaintiff's performing its already executed contract with Roman Realty & Construction Company is no consideration for defendant's promise to plaintiff, according to the overwhelming weight of authority in this country; (3) The defendant received no consideration of any kind whatsoever and therefore no valid contract of guarantee was ever executed by him.

For the foregoing reasons and the authorities relied thereon, it is respectfully urged that the judgment of the Passaic County Circuit Court and the New Jersey Supreme Court be reversed.

Respectfully submitted,

FILBERT L. ROSENSTEIN,
Attorney for and of Counsel
with Defendant-Appellant.



New Jersey Court of Errors and Appeals

S. KOSSON & SONS, a corporation,
Plaintiff-Appellee,

vs.

MARTIN D. HARRIS,
Defendant-Appellant.

Action at Law.
On Appeal
from Judgment of
Supreme Court.

BRIEF OF PLAINTIFF-APPELLEE.

Statement of Facts.

This appeal comes before the court in the following manner:

The plaintiff instituted a suit out of the Passaic County Circuit Court against the defendant to recover the sum of \$1770.00, together with lawful interest thereon from September 10, 1928 and costs of suit. The action was based upon a written contract between the plaintiff and a company known as the Roman Realty & Construction Company, the payment of which was guaranteed in writing by the defendant, Martin D. Harris (State of Case, p. 7, ll. 13-16). *The guarantee agreement was signed before any materials were delivered or work commenced, the plaintiff having refused to enter upon the work called for in the contract unless the same was guaranteed by the defendant* (State of Case, p. 17, ll. 13-22).

The contract was dated April 5, 1928 and was

executed by the defendant Harris for and on behalf of the Roman Realty & Construction Company (State of Case, p. 7, l. 9) as their authorized agent (State of Case, p. 8, l. 17; p. 18, ll. 19-22). The contract of guarantee appears on the back of the contract, undated and reads as follows:

"For value received, I hereby personally guarantee payment of the amount of the within contract.

(Signed) MARTIN D. HARRIS"

It also appeared that the appellant requested the appellee to sign a postponement of its right of lien against the lands to the lien of a mortgage, which appellee refused to do until appellant guaranteed its claim of \$1770.00, which he thereupon did (State of Case, p. 12, 1-15).

For the purpose of this case, we have assumed that the contract of guarantee was endorsed two days after the signing of the original contract. The defendant, Harris, filed an answer in the form of a general denial. Application was then made to strike out the answer and enter a summary judgment. The only question presented to the trial court was as to the legal sufficiency of the guarantee agreement. Under these circumstances, the trial court struck out the answer and awarded the entry of judgment in favor of the plaintiff for the sum of \$1450.00 plus interest from September 10, 1928 and costs of suit, amounting to the total sum of \$1633.37. As to another item of \$320.00, the parties agreed to litigate, so that this phase of the case is not before the court (Case, p. 28, ll. 11-13).

From this judgment the defendant appealed to the New Jersey Supreme Court which learned tribunal affirmed the trial court. (See opinion, Case, p. 32).

Foreword to Argument.

The defendant contends, in effect, that the contract of guarantee lacks consideration sufficient in law to bind the defendant and in support of his theory argues in his brief:

First: That the performance of what one is already bound to perform is no consideration for a new promise by another person.

Second: That at the time of the defendant's promise, plaintiff was already under contract with another to perform his contract, such performance or promise of performance is no consideration for defendant's promise.

Third: A guarantee on an already existing contract requires a new consideration to be binding on the guarantor.

The points are set down in the defendant's brief as Point One, Two and Four. We do not quarrel with the propositions of law, thus laid down but we shall endeavor to show that they are not applicable to the case at bar.

Before taking up the argument as outlined in the brief of the defendant, we desire to call the court's attention to the fact that counsel for the defendant has failed to comment upon what, we believe, is the most important part of the contract in question, and that is, that after the main contract was signed, *the plaintiff refused to recognize it unless the defendant would guarantee payment of it; and because of the plaintiff's refusal to recognize the contract, the defendant signed the guarantee.* Counsel for the defendant also does not comment upon that part of the main contract

wherein reference is made to payment of the amount of contract by promissory note of 90 days with interest together with a personal endorsement (Case, p. 7, l. 1). With these two added features, we come the question presented.

Consideration is defined in the early case of *Conover vs. Stillwell*, 34 N. J. L. 54 at page 57: "The consideration to support a promise, may be either a benefit accruing to the promisor or a loss or disadvantage to the promisee.

"A consideration emanating from some injury or inconvenience to the one party, or from some benefit to the other party, is a valuable consideration. Story on Contracts, section 429; 1 Parsons on Contracts 431."

Anson on Contracts, page 116, defines "consideration" as follows: "A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other."

"Any damage or suspense or forbearance of a right would be sufficient to sustain a promise (Kent Vol. 2, page 465, 12 Ed)".

It is an elementary proposition of law that mutual promises between the parties is sufficient consideration to support an action. 13 Corpus Juris page 328: "Where mutual promises are made, that one furnishes a sufficient consideration to support an action on the other. Illustrations of this rule are found in the consideration afforded by the exchange of notes or checks, or in mutual promises to share or divide profits and losses, or to sell and to purchase, or to cancel existing contracts, or to modify them".

From a reading of the various definitions of "consideration", it is quite obvious that there was consideration for the main contract between the plaintiff and Roman Realty & Construction Company. We can now come to the only question argued by the defendant and that is "What consideration was there for the signing of the guarantee?"

POINT ONE.

We respectfully urge that the contract of guarantee was supported by a legal construction for the following reasons:

- a. Because the plaintiff was induced to make delivery and perform the work called for under the main contract in view of the written guaranty of the defendant.
- b. Because the main contract and the guarantee agreement were signed contemporaneously.
- c. Because there was a new consideration for the guarantee agreement.

We shall briefly take up the argument under subdivision (a) of Point I.

Here, the defendant, Harris, was the authorized agent for the Roman Realty Co. He signed the main contract for his company on April 5, 1928. Two days later, according to the defendant, the plaintiff called on him and stated that he would refuse to recognize the contract unless payment was guaranteed. Up to this time, no material had been delivered on the job. Accordingly, Harris guaranteed payment. On July 5, 1928, Harris ordered a change from the original contract. (Case,

p. 7, ll. 22-35) On September 5, 1928, he ordered an extra item (Case, p. 8, ll. 8-15.) His conduct in signing the various contracts for the Roman Realty & Construction Co. indicates his interest in the outcome of the venture. It is conceded by the affidavit of Harris, that, had he not guaranteed payment, the plaintiff would not recognize the contract.

Hirsch vs. Chicago Carpet Co., 82 Ill. A. 234.

*"A dealer sold goods to a party but refused to deliver them unless payment thereof was secured. Upon execution and delivery of the guaranty sued upon, he agreed to and did deliver the goods. Held, the consideration for the contract of guaranty was sufficient * * ** Where the contract of guaranty is entered into concurrently with the principal obligation, a consideration which supports the principal contract supports the subsidiary one also."

We might add that the Hirsch case is exactly parallel with the case at bar, and although the defense was similar to the one raised here, the plaintiff prevailed.

Another case, almost identical with the situation at bar was determined in favor of the plaintiff.

Garland vs. Gaines, a Connecticut case, reported in 49 Atl. at page 19.

In this case the plaintiff leased certain premises to the defendant's son, but refused to allow the son to take possession, unless the rent was guaranteed. The defendant thereafter guaranteed the rent. He was held responsible.

28 Corpus Juris, page 919 under note 55 (a):
"A guaranty for the payment of goods for which

a contract of sale is made, although executed subsequently to the agreement of sale, is supported by a sufficient consideration if the goods are not delivered until after the guaranty. Leonard vs. Vredenburg, 8 Johns, (N. Y.) 29, 5 Am D. 317; Fales, etc. Mach. Co. vs. Browning, 68 S. C. 13, 46 S. E. 545, etc.

28 Corpus Juris 917: "Where the contract of guaranty is made before or at the same time as the principal contract, and both contracts form parts of the same transaction, one consideration is sufficient for both the principal and the collateral contract and there need not be any consideration than that moving between the guarantee and the principal obligor under the principal contract, and in some jurisdictions the rule is prescribed by statute. In accordance with this rule, where a guaranty of payment of a note is made before or at the same time of the execution of the note, the consideration for the note is the consideration for the guaranty, and no further consideration is necessary. So, also the delivery of property to a third person on the faith of a guaranty of payment is a sufficient consideration for the guaranty."

B.

The main contract and guarantee agreement were signed contemporaneously.

Citing 28 Corpus Juris 918, "Although a contract of guaranty is executed subsequently to the principal contract, it is regarded as being made at the same time so as to constitute a part of the same transaction and be supported by the same consideration, and not to require a new consideration where it is executed pursuant to an understanding had before and is an inducement to the execution of the principal contract."

28 Corpus Juris 919 under note 58 (a) citing *Klosterman vs. United Electric Light etc. Co.*, 101 Md. 29, 60 A. 251: "Where a guaranty was endorsed on the same paper and referred expressly to the guaranteed contract, which showed the consideration to be the connection of an electric system with certain premises, *the guaranty was a part of the original contract, made with the same understanding even though the contract may have been signed prior in time to the guaranty.*"

Again referring to *Garland vs. Gaines*, 49 Atl. 19: "Where a contract of guaranty is annexed to a lease, and the lessor refuses to allow the lessee to occupy the premises until such guaranty is executed, its execution will be deemed to be contemporaneous with that of the lease, *though it was in fact executed subsequently*".

C.

The guarantee agreement was supported by a consideration.

Kesselman vs. Cohen et al., 5 N. J. Mis. 31, 135 Atl. 348: "The first point raised in the brief of appellants is that the guaranty of Aaron Cohen was without consideration, and that it was signed after the execution of the lease. This is not in accordance with the testimony. The signing of both was contemporaneous and the court was justified in finding that the making of the lease was sufficient consideration for the guaranty".

In the Garland case cited in this brief, the court pointed out the consideration as follows:

"Where plaintiff refused to lease certain premises to defendant's son unless defendant would guaranty the payment of rent, the letting of the premises to the son, was a sufficient consideration for the father's guaranty".

In the Hirsch case, cited supra: "Any consideration moving from a buyer to a seller contemporaneous with or subsequent to the promise of a guarantor, is sufficient as between the buyer and such guarantor, to support a contract of guaranty".

We have previously attempted to show that the guarantee agreement was signed before any indebtedness arose under the main contract. We would be inclined to agree with the defendant if the facts were that after the contract was performed, the agreement had been signed. But such is not the case.

In the New Jersey case of Grob vs. Gross, 88

N. J. L. 430 (84 Atl. 1064), our Supreme Court was dealing with a situation where the guarantee (verbally) was made after the indebtedness arose. The court, speaking through Mr. Justice Kalisch, held that there was no consideration for the guarantee, the promises to pay having been made after the delivery of the goods.

"The guaranty having been revoked by the defendant, the plaintiffs, after notice of such revocation, continued to furnish goods to Mrs. Bier, and now seek to hold the defendant liable because subsequently to the incurred indebtedness, it appears that the defendant made a verbal promise to pay and said he would live up to his guaranty... *This promise made, as it was, after the goods had been furnished to Mrs. Bier, was the promise to pay the debt of another, and was without any consideration.*"

From a careful reading of this case, we are led to the conclusion, that, had the promise been made before the goods were delivered, it would be one supported by a consideration and the defendant would be liable on the guaranty.

Laing vs. Lee, 20 N. J. L. 337: "The promise will be binding on the defendant, notwithstanding the consideration moves from the original debtor, and not from the plaintiff; and notwithstanding the original debtor remains liable."

The defendant argues that since the agreement to guarantee was executed after the main contract, there was no consideration. We have endeavored to show that the agreements were executed contemporaneously, and hence, consideration for the one was the consideration for the other.

We shall now assume that the guarantee was signed subsequent to the main contract.

It is undisputed that the plaintiff had a right to refuse to perform. If he refused, the Roman Company, would have a right to sue. This right was given up for the guaranty, and hence, the consideration.

Conover vs. Stillwell, 34 N. J. L. at p. 62: "I am aware that there are cases which hold that the prevention of litigation is a sufficient consideration to support assumpsit, and such is undoubtedly the law."

Munroe vs. Perkins, 9 Pick. 298, 20 A. D. 475: "The plaintiff having refused to perform the contract, as he might do, subjecting himself to such damages as the other party might show they were entitled to recover, he afterward went on upon the faith of the new promise and finished the work. This was a sufficient consideration."

United & Globe Rubber Co. vs. Conrad, 80 N. J. L. 286, 78 A. 203, Ann. Cas. 1912 A. 412.

"The mutual promises were in themselves legal and adequate consideration."

Stilk vs. Myrick (Court of Common Pleas 1809 2 317).

Here, certain seamen agreed to make a voyage for a certain price. While in mid-ocean, the captain agreed to pay more. Upon a suit based on the new promise, the court held that there was no consideration, but held, "If they had been at liberty to quit the vessel, the case would have been quite different."

13 Corpus Juris 354. Where one party to a valid contract refuses to perform the same, and the other promises him some additional consideration in order to induce him to perform, it has been held by some authorities, that since a party to a con-

tract has the right to elect whether he will perform the contract or abandon it and pay damages, the giving up of this right of election furnishes a consideration for the new promise; (followed in Connecticut, Illinois, Indiana, Massachusetts, New York, Vermont, Washington, Virginia.)

It will be observed that in the case at bar, the plaintiff did not hold out for more compensation. He merely desired to protect the debt which would arise by the performance of the contract.

POINT TWO.

We urge that the defendant is legally and morally responsible; that the Supreme Court properly affirmed the decision of the trial court.

The defendant has failed to comment upon the terms of payment as recited in the main contract.

Case, p. 13, ll. 9-18: * * * to be paid after completion of work by 90 day note with interest. *Endorsed by me personally* * * *

(Signed) Roman Realty & Construction Co.

Roman Effros by M. D. H.

There is no dispute about the fact that Martin D. Harris, the defendant, signed the contract as above stated. This being so, he agreed to endorse the note for payment. Had there been no further guarantee, and no note having been given would he not be morally and legally responsible to the plaintiff?

It is most significant that counsel for appellant fails to comment upon the fact that the defendant

agreed to endorse a note, which was the means of payment, provided for in the main contract. This, in itself, is tantamount to a guaranty. Moreover, it indicates conclusively that the parties contemplated a guaranty of payment by the defendant. The general rule of law was properly upheld by the Supreme Court. The rule is set forth in 28 Corpus Juris 918, under the heading of "Guaranty After Principal Contract".

"Although a contract of guaranty is executed subsequently to the principal contract, it is regarded as being made at the same time so as to constitute a part of the same transaction and be supported by the same consideration, and not to require a new consideration, where it is executed pursuant to an understanding had before and is an inducement to the execution of the principal contract; or where it is delivered before any obligation or liability is incurred under the principal contract, or where it is made pursuant to some provision in the principal contract; or where the principal does not become operative until the execution of the guaranty; or where the contract of guaranty expressly refers to a previous agreement between the principal debtor and the creditor which is executory in its character and embraces prospective dealings between the parties."

The subsequent guarantee should not and does not change his liability.

The conduct of the defendant in engineering the contract, with its changes, and its extras, indicates that the plaintiff relied upon the defendant, for payment and therefore, under these circumstances the defendant ought to be held strictly to his bargain.

We also desire to call the court's attention to

the fact that there is a conflicting affidavit as to the circumstances surrounding the signing of the guarantee agreement, which, if true, would undoubtedly render the defendant responsible. We assume that counsel for the defendant would even admit this. However, since this appeal brings up for review, a judgment secured on a motion to strike the defendant's answer, we have conceded the facts as alleged by the defendant.

For these reasons, we urge that the judgment of the Passaic County Circuit Court and New Jersey Supreme Court be sustained, with costs.

Respectfully submitted,

HELLER & BOSS,
Attorneys of Plaintiff-Appellee.

AARON HELLER,
Of Counsel.



