WASHUM *v.* LESTER.

Opinion delivered February 23, 1931.

1. CONTRIBUTION—SUMMARY REMEDY.—The summary remedy for contribution given by Crawford & Moses' Dig., §§ 8294, 8295, in favor of a joint judgment debtor is cumulative and not exclusive.
2. CONTRIBUTION—JURISDICTION OF EQUITY.—The statute (Crawford & Moses' Dig., §§ 8294-5) authorizing a summary judgment for contribution in favor of a joint judgment debtor did not oust the chancery jurisdiction to enforce contribution by independent action.
3. CONTRIBUTION—DEFENSE.—The fact that notes and accounts of an insolvent corporation were in the hands of one of several coindorsers of its paper did not impose any obligation on him to collect same, in absence of agreement on his part to do so, nor deprive him, to the extent of his failure to make collection, of the right to contribution from coindorsers.
4. FRAUDS—ORAL GUARANTY.—An oral guaranty is within the statute of frauds.

Appeal from Lawrence Chancery Court, Eastern District; *A. S. Irby,* Chancellor; modified and affirmed.

G. M. Gibson, for appellant.

E. H. Tharp and *W. P. Smith,* for appellee.

HUMPHREYS, J. This suit was brought on January 15, 1930, by appellee against appellant in the chancery court of Lawrence County, Eastern District, for contribution on account of having paid a judgment in favor

of William R. Moore Dry Goods Company for $6,174.81, which it obtained against Sam Ellis, J. H. Washum and himself on May 21, 1928, in the United States District Court, Eastern District, Jonesboro Division. The transcript of the judgment, duly verified, was filed in the office of the clerk for the Eastern District of Lawrence County, and appellee paid the judgment to avoid the levy of an execution issued thereon and caused the judgment to be satisfied of record. The prayer of the complaint was for judgment against appellant for one-third of the amount paid by him in satisfaction of the judgment, less credits, in the total sum of $166.29, leaving a balance of $2,047.65.

Appellant filed an answer interposing the defenses of the statute of limitations and estoppel.

The cause was submitted to the court upon the pleadings and testimony, resulting in a decree in favor of appellee for $1,410.22, from which is this appeal.

The facts, in substance, are as follows: The Wilson Mercantile Company was a corporation and appellant, appellee and others were stockholders therein. In the years of 1924 and 1925 its financial condition was such that it became necessary for its stockholders, either severally or jointly, to personally indorse its notes and guaranty the larger part of its accounts in order for it to carry on. The indorsements and guaranties made by them severally and jointly amounted to over thirty thousand dollars when the corporation failed in the year 1926, at which time appellee had indorsed and guaranteed through himself or jointly with some of the others over $30,000 of the corporation's indebtedness, and appellant had indorsed and guaranteed $7,000 of the amount. In order to secure the stockholders for their indorsements and guaranties of the corporation's indebtedness the board of directors passed a resolution that the manager assign notes and accounts belonging to said corporation to said stockholders. At the time of the failure of the corporation, notes and accounts amounting to $16,938.30 belonging to the corporation had been assigned to T. J.

Wilson for himself, J. M. Lester (appellee), J. L. McKamey and J. H. Washum (appellant), all of whom were stockholders in the corporation. Appellee had guaranteed orally $2,996.05 of said accounts and notes on account of the corporation having furnished his tenants with supplies and J. G. Richardson, a solvent planter, had guaranteed orally $3,070.29 of said notes and accounts on account of supplies which had been furnished his tenants by said corporation. The testimony was to the effect that each had agreed to pay for the amounts furnished to said tenants, if the tenants themselves did not pay same. The goods were charged on the books to their several tenants and not to appellee or Richardson. After the notes were pledged to the four as security for their respective indorsements and guaranties and the corporation failed, there remained with the trustee in bankruptcy accounts totaling $8,545.41 which were sold to J. M. Lester for $150 by the trustee in bankruptcy. During the progress of the proceedings in bankruptcy against the said corporation all the notes were released by the referee in bankruptcy to T. J. Wilson, J. L. McKamey, J. H. Washum and J. M. Lester, who were the only stockholders who had indorsed or guaranteed the accounts aforesaid, to protect their indorsements and guaranties, and all of the notes and accounts were delivered to J. M. Lester (appellee), except such as had been pledged as collateral security to the People's Bank of Imboden, totaling about $2,890. Appellee collected $192.20 out of the notes assigned to them before the failure of the corporation, and $482.05 out of those delivered to them by the trustee in bankruptcy. The testimony was in conflict as to whether appellee made every reasonable effort to collect the notes and account. He testified that he did the best he could with the notes and accounts. Appellant offered to assist him if he was remunerated for his services, but appellee refused to allow him to retain a per cent. on collections. Appellant made no further effort to get any of the notes and accounts and no attempt whatever to collect same in order to protect his indorse-

ments and guaranties. Several witnesses testified that in their opinion eighty-five per cent. of the notes and accounts were collectable at the time they were delivered to appellee. Both appellant and appellee, together with Sam Ellis, indorsed and guaranteed the claim of the William R. Moore Dry Goods Company upon which it obtained the judgment against the three of them in the Federal court. When the William R. Moore Dry Goods Company obtained judgment against the three of them in the Federal court, appellee did not request or move for a summary judgment for one-third of the amount against appellant. It seems fairly certain from the testimony that appellee paid $30,124 and appellant $2,317.80 out of their own pockets on their respective indorsements and guaranties of the indebtedness of the Wilson Mercantile Company.

Appellant's first contention for a reversal of the decree is that appellee's claim for contribution was barred by his failure to move for a summary judgment against appellant in the United States District Court where the judgment was rendered in favor of the William R. Moore Dry Goods Company against them, in the time and manner required by §§ 8294 and 8295 of Crawford & Moses' Digest. The remedy provided in the sections referred to in behalf of sureties who pay joint obligations is not exclusive but cumulative. In the enactment thereof the Legislature did not intend to oust the chancery court of its ancient jurisdiction to enforce contribution between joint judgment debtors by an independent action. In 13 C. J., p. 833, the rule is announced in the following language:

"Summary proceedings provided by statute for the enforcement of contribution constitute a cumulative remedy. They do not bar an independent action."

Appellant also contends for a reversal of the decree upon the ground that appellee estopped himself from claiming contribution from appellant by his neglect to collect the notes and accounts which had been delivered to him. These notes and accounts were assigned to the

four stockholders mentioned above, including appellant and appellee, in equal proportion. That is, each was to have 25 per cent. of the amount of the notes and accounts, when collected, to apply upon his liability as indorser and guarantor. We find nothing in the record to indicate that the duty of collecting the notes and accounts was imposed upon either one of the indorsers or guarantors. The fact that they were in the manual possession of appellee did not impose any duty upon him to collect them and there was no agreement that he should do so. So far as the record reflects, appellant might have collected any of the notes and accounts himself. In view of this fact, he cannot say in good conscience that appellee is responsible to him for neglect or failure to collect any part of said notes and accounts. It is also argued that appellee should be required to account to appellant for at least 25 per cent. of the accounts he orally guaranteed totaling $2,996.05 on account of purchases made by his tenants from the corporation. This guaranty was oral and within the statute of frauds. It amounted to nothing more on the part of appellee than a moral obligation. He failed to collect the amounts from his tenants just as he did from the other debtors of the corporation. A court of equity cannot enforce obligations which are of no binding effect on the parties interested.

Under our view of the law and the facts reflected by the record, appellant is entitled to a total credit of $435.48 on appellee's claim of $2,214.21, including interest, leaving a balance due appellee of $1,778.73 instead of $1,410.22, the amount of the decree rendered in his favor.

The decree of the trial court is therefore modified to conform to this finding, and, as modified, is affirmed.