PRESTON *vs.* DAVIS AND NOTREBE.

A joint action cannot be maintained against the obligor, and a person who signs a guaranty on the back of the obligation: the undertakings are distinct.

Appeal from the Desha Circuit Court.

Debt, determined in the Desha Circuit Court. Declaration:

"Whitley Preston complains of Samuel H. Davis and Frederic Notrebe, of a plea," &c. &c.

"For that, whereas, the said Samuel H. Davis, heretofore, to wit: on the 21st day of June, 1841, at the county aforesaid, made his certain writing obligatory, sealed with his seal, and now here to the court shown, the date whereof is the same day and year aforesaid, by which he promised, sixty days after date, to pay to Whitley Preston, his heirs or assigns, four hundred and ten dollars and thirty-three

cents, in gold or silver, for value received; and then and there by his memorandum in writing, and then on said note written, agreed with the said plaintiff, that if the said sum of money in said note (writing obligatory) was not paid at maturity, the same was to bear interest at the rate of ten per cent. per annum until paid. And on which said writing obligatory, the said Frederic Notrebe, afterwards, to wit: on the 15th day of July, 1841, by his written endorsement made on the back thereof, and which endorsement bears date the same day and year last aforesaid, at the Post of Arkansas, did agree and obligate himself jointly with the said Samuel H. Davis, as his security, for the payment of said sum of money in said writing obligatory mentioned—said endorsement written: 'I, Frederic Notrebe, of the Post of Arkansas, do join with Captain Samuel H. Davis, as his security, for the performance of the agreement mentioned in the present note:' and which said endorsement was also signed by said Notrebe, and is now here to the court shown, dated as aforesaid; and said defendants then and there, to wit: on the day and year last aforesaid, delivered said writing obligatory, with said memorandum, and said endorsement on the back thereof, to said plaintiff; by means whereof said defendants then and there became liable to pay said sum of money in said writing obligatory mentioned, and the interest thereon, as aforesaid, and said plaintiff avers that said sum of money has long since been due and payable."

"And, whereas, the said Samuel H. Davis, afterwards, to wit: on the 21st day of June, 1841, at, &c., made his certain other writing obligatory, sealed with his seal, and now here to the court shown, the date whereof is the said 21st day of June, 1841, in the words and figures following, to wit:

'Sixty days after date, I promise to pay Whitley Preston, his heirs or assigns, four hundred and ten dollars and thirty-three cents, in gold or silver, for value received: witness my hand and seal, this 21st day of June, 1841. SAM'L H. DAVIS [seal.]

According to an express understanding between the two above parties that if the note above is not paid at maturity, it is to bear ten per cent. interest until paid: given under my hand the date above written.

SAM'L H. DAVIS.

And that the said Frederic Notrebe afterwards, to wit: on the 15th day of July, 1841, at the Post of Arkansas, to wit: at the county aforesaid, by his written endorsement made on the back of said writing obligatory, bearing date on the said 15th day of July, 1841, and also now here to the court shown, in the words and figures following, to wit:—'I, Frederic Notrebe, of the Post of Arkansas, do join with Captain Sam'l H. Davis, as his security, for the performance of the agreement mentioned in this present note: Post of Arkansas, July 15th, 1841. FREDERIC NOTREBE,'

Acknowledging himself jointly bound with the said Samuel H. Davis, and indebted to said plaintiff in the said sum of four hundred and ten dollars and thirty-three cents, with interest on said sum from the time the same became due and payable according to the tenor and effect of said writing obligatory. And said plaintiff avers that said sum of money has long since been due and payable; yet the said defendants, although often requested so to do, have not, nor hath either of them, paid," &c. &c.—Usual breach.

The defendant, Notrebe, craved over of the obligation sued on, and of his endorsement thereon, which was granted by filing a copy. The instrument and endorsement are correctly set out in the second count of the declaration.

Notrebe then demurred to the declaration on the following grounds: 1st. There is a misjoinder of parties, for if Notrebe is liable at all, it is as guarantor and not as co-obligor: 2d. The endorsement of Notrebe is a *nu. pact.* 3rd. Notrebe is not liable as endorser, because no notice of non-payment by Davis is alleged. The court sustained the demurrer, and plaintiff appealed.

WATKINS & CURRAN, for appellants. We submit that Notrebe's liability is the same as if the writing had originally been executed by Davis as principal, and Notrebe as security; that Notrebe is liable and may be sued as co-obligor.

Where a person writes on a note that he acknowledges himself holden as security, he thereby becomes jointly liable with the makers, and may be sued as an original promiser. *Hunt* v. *Adams, 5 Mass.*

Rep. 558. *Hunt* v. *Adams,* 6 *Mass. Rep.* 519. *Hunt* v. *Adams,* 7 *Mass. Rep.* 518.

So where he promises by writing on the note to pay the contents of it. *Cover* v. *Warren,* 5 *Mass. Rep.* 545.

This is a much stronger case than either of those cited, because in this Notrebe expressly "joins with Davis as his security." The only plausible objection that can be taken is, that in the cases cited the endorsement was made at the time, and this was made after the inception of the note, and that consequently it was without consideration; but this objection is answered and obviated by the case of *Moses* v. *Bird* (11 *Mass. Rep.* 436), in which it was held that where the endorsement is made after the inception of the note, the presumption of law, in the absence of proof to the contrary, is, that it was made in pursuance of the original agreement between the parties at the time the note was executed by the principal or original maker, which is a sufficient consideration, and renders the obligation valid and binding. This objection is untenable for another reason, which is, that notwithstanding Notrebe's endorsement bears date after the note, it is alleged in the declaration and admitted by the demurrer that the writing was made and endorsed by Notrebe before it was delivered to the plaintiff. This of itself brings the case within the rule in the cases where the endorsement is made at the inception. The delivery and not the date must govern, but it was not the note of, or binding upon either, until after it was delivered. A note takes effect from the delivery and not from the date. *Woodford et al.* v. *Darwin,* 3 *Vermont Rep.* 82. *Kilgour* v. *Finlyson,* 1 *H. Blk.* 155. *Jansing* v. *Gaines & Ten Eyck,* 2 *John. Rep.* 301.

But no question as to the consideration can arise upon the demurrer. The instrument sued upon imports a consideration. *Story on prom. notes* 7, 187. *Chitty on Bills* 78, 85. *Collins* v. *Martin,* 1 *Bos. & Pul. Rep.* 651. *Holliday* v. *Atkinson,* 5 *Barn. & Cresw. Rep.* 501. And as it is made the foundation of the action, its consideration can only be impeached by plea under oath. *Rev. Stat.* 629, *sec.* 75.

Where a person not a party to a note payable on demand, or on

time, puts his name on the back of it, he thereby becomes liable as an original promiser or security, not as an endorser or guarantor, and may be sued jointly with the maker. *Baker* v. *Briggs,* 8 *Pick. Rep.* 122. *Sumner* v. *Gray,* 4 *Pick. Rep.* 411. *Chaffer* v. *Jones,* 10 *Pick.* 260. *Austin* v. *Boyd,* 24 *Pick. Rep.* 64. *White v. Howland,* 9 *Mass. Rep.* 314.

By an absolute guaranty the party becomes jointly bound with the maker; he is not entitled to notice; the undertaking is unconditional: he stands in the situation of a security, and may be sued jointly with the maker. *Dean* v. *Hall,* 17 *Wend.* 214. *Hough* v. *Gray,* 19 *Wend.* 202. *Butler* v. *Wright,* 20 *John. Rep.* 365. *Comaston* v. *McNair,* 1 *Wend.* 457. *Lequeer* v. *Prosser,* 1 *Hill Rep.* 256.

Where a note was drawn by E. and A. payable to W. or bearer, and previous to the delivery to the latter, P. endorsed thereon "For value received I guaranty the payment of the within note:" it was held that P. could be treated as a joint and several maker of the note. *Prosser* v. *Lequeer,* 4 *Hill Rep.* 420.

PIKE & BALDWIN, contra. If Notrebe is at all liable, it is either as endorser, guarantor, or an original obligor.

He cannot be held as an endorser for the reason that there is no demand or notice.

That he cannot he held a guarantor, or original promiser, the cases abundantly establish. The cases of *Hunt* v. *Adams,* 5 *Mass.* 358, and in 6 *Mass.* 519, *and* 7 *Mass.* 518, are all cases between the same parties, and upon precisely a similar undertaking. They amount to nothing in this investigation, not being in point; but if in point, are most effectually overruled in *Mills* v. *Wyman,* 3 *Pick.* 207.

Notrebe's undertaking was collateral. The debt from Davis subsisted 21 June, and Notrebe did not promise till 15 July following; clearly then the undertaking was subsequent, and therefore, collateral. *Fish* v. *Hutchinson,* 2 *Wils.* 94.

Davis first binds himself under seal to pay money, then he promises under his hand only, to pay 10 per cent. interest on that money.

Here are two distinct contracts; distinct in their nature and their objects. *Bertrand* v. *Byrd,* 4 *Ark.* 195. *Dardenne* v. *Bennett, id.* 458. *Jeffry* v. *Underwood,* 1 *Ark.* 108. *Cross & Bizzell* v. *State Bank,* 5 *Ark.* 525. Which contract did Notrebe intend to make good, the one for the payment of the money, or that for the payment of interest, or both?

But being security only, he is favored by the law. *Hempstead* v. *Watkins,* 1 *English,* 317.

But so far as Notrebe is concerned, the contract is nud. pact, and void.

It was a bargain without consideration, which is a contradiction of law and cannot exist. *Rann* v. *Hughs,* 7 *T. R.* 346. *Slade* v. *Halstead,* 7 *Cow.* 322. *Jackson* v. *Delaney,* 4 *Cow.* 427. *Wain* v. *Walters,* 5 *East* 10, which is a leading case of very high authority. *Sears* v. *Brink,* 3 *J. R.* 210. *Leonard* v. *Vredenburgh,* 8 *J. R.* 29. *Cook* v. *Bradley,* 7 *Conn.* 57 *(vol.* 2, *second series),* and *Mills* v. *Wyman,* 3 *Pick.* 207, are all strongly and conclusively in point.

OLDHAM, J. The liability of the defendant, Davis, is upon a writing obligatory, for four hundred and ten dollars and thirty cents; that of Notrebe as guarantor upon the back of the writing obligatory. Their undertakings were distinct and different, and did not create a joint liability.

A joint action cannot be maintained against the principal debtor, and a mere guarantor, either at common law or by statute. There is clearly a misjoinder of parties, and the Circuit Court for that reason properly sustained the demurrer to the declaration. Affirmed.