

possession of the prolongation of this ditch; but the result of the action will not determine the right of the defendants to take water therefrom, nor prevent the defendants from lowering the willow dam which they have constructed below the old dam of the plaintiff's which they have partially removed, by which means they can draw off all the water that enters said prolongation, and not allow any of it to enter the ditch leading to Mill creek.

The demurrer is overruled.

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UNITED STATES *v.* BACKLAND.

(*Circuit Court, D. South Carolina. December 12, 1887.*)

RECOGNIZANCE—RELEASE OF SURETY.

The surety on a recognizance, the condition of which is that the defendant shall personally appear before the circuit court in April, 1887, to answer, etc., and to do and receive what shall be enjoined by the court, and not to depart the court without license, is discharged where the defendant appears, and the court takes no action whatever in the case, although an agreement is made between the defendant and the commissioner, for the benefit of the former, without the consent of the surety, that the case shall not be sent up until the April term, 1888.

Motion to Discharge the defendant Kressel, as the surety on a recognizance.

*H. A. De Saussure*, Asst. Dist. Atty., for the United States.

*J. P. K. Bryan*, for defendant.

SIMONTON, J. The defendant was brought before a commissioner of this court, charged with an offense against an act of congress. He waived an examination, and on twenty-ninth March, 1887, was bound over under recognizance, having F. Kressel, Jr., as his surety. The condition of the recognizance is, "if the said Backland shall personally appear before the circuit judges of the United States of America at the next circuit court of the United States for the district of South Carolina, to be held at the usual place of judicature in Charleston, on the first Monday of April next, then and there to answer," etc., "and to do and receive what shall be enjoined by the court, and not to depart the court without license." The circuit court met on the first Monday in April, 1887, and the grand jury was discharged. This case was not presented at that term; nor were the general orders taken as is usual. Mr. J. P. K. Bryan, of counsel for the defendant, says that he and his client were both in court when the grand jury were discharged. The next term of the circuit court began on fourth Monday in November, (this term.) The grand jury have been discharged. This case has not been presented. Mr. Bryan says that he has been represented in court during this term.

A motion is now made for the discharge of the surety on this bond. Evidence has been offered and admitted, subject to exception, going to show that there was an understanding between the defendant Backland and the commissioner, for the convenience of the former, that the case should not be sent up until April term, 1888. If this understanding was made before the recognizance was executed, evidence of it cannot be admitted to vary or contradict the written contract. If it were made after the recognizance was signed, there is no evidence that Kressel was present, or that he assented to it. Although a recognizance is peculiar in some respects, it is governed by the rules governing contracts, in this, at least: "Any change in the contract made by the principal parties to it, without the consent of the sureties, will discharge the latter." *Reese v. U. S.*, 9 Wall. 13. The contract here was that Backland should be and appear before the circuit court in April next, to answer, etc., "and to do and receive what shall be enjoined by the court, and not to depart the court without license." He did appear. The court took no action whatever with regard to the case.

In *Swank v. State*, 3 Ohio St. 433, it is held that when a defendant is bound over for trial, and appears at the trial term, although the cause be continued on his motion, the surety on his recognizance is discharged, and a new bond should be taken. *Keefhaver v. Com.*, 2 Pa. St. 241, is quoted, and sustains the position. 1 Bish. Crim. Proc. 264g, states the same doctrine as supported by abundant authority. But he says that the rule varies in the different states. In South Carolina this is not the practice. *State v. Haskett*, Riley, 97. At the end of the term certain general orders are passed, and among these one providing "that all recognizances which have not been specially discharged be continued over to the next regular term." This is also the practice of the courts of the United States in this district. Had this been done here, there would be little question. The practice seems to be justified by the terms of the recognizance, "to do and receive what shall be enjoined by the court." It was not done. Under the circumstances, this case is disposed of by the ruling in *Reese v. U. S.*, *supra*. The condition of a recognizance providing for the appearance of a defendant at the next regular term, and at any subsequent term, an agreement between the district attorney and the accused, superseding the condition of the bond, without the consent of the surety, will discharge the latter. Let the surety in this case be discharged. No conclusion shall be drawn respecting the principal.

CHURCH *v.* SPIEGELBERG *et al.*

(Circuit Court, S. D. New York. October 8, 1887.)

## 1. PLEADING—BILL OF PARTICULARS—SUFFICIENCY.

In an action by one partner against his copartners, the complaint set out that, in the absence of the plaintiff, without his consent or approval, the defendants maliciously wrote letters to four consignors of the firm, naming them, "and others," repudiating contracts already made, and that the effect of the letters was that "one or more of said consignors" thereupon withdrew their consignments, to plaintiff's damage, etc. The plaintiff was required to serve a bill of particulars in explanation of the phrases, "and others," and "one or more of said consignors." He did so by naming some manufacturers, and stating that the persons referred to were all customers of the firm, and that their names would appear from the books which were in the possession of the defendants. *Held*, that the bill was sufficient.

## 2. SAME.

The plaintiff alleged that he had been injured by such conduct of the defendants to the amount of \$25,000, "independent of any alleged loss or profit shown by the books of the firm, as resulting from said business," (of the firm.) He was required to serve a bill of particulars specifying the items of damages. The bill, as served, set out that the damages were made up of a certain percentage of "business" for a certain time. *Held*, that the bill was not sufficiently certain; the "business" upon which the percentage was calculated not being indicated with clearness.

At Law. On motion for further bill of particulars.

Action by Edward F. Church against Emanuel and Charles S. Spiegelberg, to recover damages for breach of contract. The complaint set out that the defendants and the plaintiff had agreed to go into the commission business, the defendants furnishing the capital and the plaintiff the trade, a large amount of which he controlled; that the firm was duly formed, and the business commenced, when he was called away, and the defendants maliciously, and without authority, wrote letters to manufacturers, whose custom formed the most valuable part of the business of the firm, repudiating contracts already made, to his damage \$25,000, etc. See 31 Fed. Rep. 601. The defendants moved for a bill of particulars, and the motion was granted; the order calling for "a bill of particulars specifying in detail (1) the names of the persons designated by the phrase 'and others,' in the sixth line of folio 7 of the complaint herein, to whom defendants are therein alleged to have written letters repudiating contracts alleged to have been made with the firm of E. F. Church & Co.; (2) the names of the persons designated by the phrase, 'one or more of said manufacturers,' in the first and sixth lines of folio 9 of the complaint herein, who are therein alleged to have withdrawn their accounts from the said firm of E. F. Church & Co.; (3) the items of the damages of \$25,000, alleged in folios 16 and 17 of the complaint herein to have been sustained by plaintiff." The parts of the complaint referred to in the order were to the following effect, respectively: *First*, that the defendants wrote letters, as charged, "to each of said manufacturers, consignors of plaintiff, and said firm, as aforesaid, viz., [naming four,] *and others*;" *second*, that said letters "were duly received by each of said man-