

delivery of the document." 1 Whart. Ev. § 625; and Code Civil Proc. (§ 778) says the same: "The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution or making, in a part material to the question in dispute, shall account for the appearance or alteration."

The attestation of Stephens was made at the request of Owens, and this authorized him to attest the same, so far as Owens' signature is concerned. But the attestation being unqualified, the reasonable inference is that it included the signature of the other obligors, as well as Owens, and so it was doubtless intended.

Weaver and his co-obligors who signed this bond and left it with the principal therein to deliver to the plaintiffs, thereby constituted the latter their agent for that purpose. *Belloni v. Freeborn*, 63 N. Y. 389. Before the delivery was made this alteration took place. It consisted of an attestation which, for aught that appeared, was authorized and genuine. So far as the plaintiffs are concerned it was the act of Weaver and his co-sureties acting through the agent and co-obligor, Owens, prior to the delivery to them of the writing.

To hold that the value or admissibility of the writing as an item of proof or an instrument of evidence is thereby impaired or affected in the hands of the plaintiffs, would be simply monstrous.

The motion for a new trial is denied.

HECHT *et al.* v. WEAVER.

(Circuit Court, D. Oregon. February 19, 1888.)

PRINCIPAL AND SURETY—BOND TO SECURE ADVANCES—DEATH OF SURETY.

The death of a surety in a bond conditioned for the repayment of money advanced to the principal within a definite period or before notice to the obligee of withdrawal therefrom, does not terminate his liability, and his estate in the hands of his administrator is liable for advances made after his decease. (Syllabus by the Court.)

At Law. On motion for new trial.

L. B. Cox, for plaintiffs.

Edward B. Watson, for defendant.

DEADY, J. A motion for a new trial in this case was argued and submitted with the one in the foregoing case.

The action was commenced by the plaintiffs, who are citizens of Massachusetts, against the defendant, as administrator of the estate of Hans Weaver, deceased, to recover the sum of \$4,475.90 on a bond executed to the plaintiffs by Philip Peters, Hans Weaver, Robert Phipps, as sureties, and W. F. Owens, as principal, on October 24, 1884, in the penal sum of \$15,000, conditioned that if Owens shall pay on demand the

sums of money advanced to him by the plaintiffs, then the obligation to be void, and otherwise to remain in full force. The bond also contains a stipulation to the effect that its duration might be terminated on notice to the obligee, after all liabilities thereunder were discharged. The bond purported to be signed by the obligors, "in the presence of Lafayette Owens and T. C. Stearns;" and the former, when called as a witness by the plaintiffs, testified that he signed the bond as a witness at the request of Owens, but the other parties thereto were not present, nor did he see them sign the same. Stearns was not called.

Weaver and Owens died, as stated in the foregoing case, and due demand was made upon their administrators for the balance due the plaintiffs, with similar results. The answer of the defendant was confined to a denial of any knowledge or information of the matters in controversy. On the trial the jury found a verdict for the plaintiffs for the sum of \$3,975.90, on which they had judgment.

The motion for a new trial is based on the same grounds as the one in the *Hall Case*, ante, 104, with the addition of the following:

It appears that some of the advances to Owens were made after the death of Weaver, and that no notice was given by the administrator to terminate the undertaking of the deceased. The court instructed the jury that Weaver's estate was liable in the hands of his administrator for these advances, and this instruction is claimed to be erroneous, and a new trial asked therefor.

On a careful examination of the authorities I have concluded that whenever the undertaking of the surety is for a definite period, as for the conduct of an officer during his term of office, or for the repayment of advances made to the principal in the bond until notice is given the obligee that the liability is terminated, the estate of the surety in the hands of his administrator is answerable for any default of the principal occurring after his death; and this is especially so where, as in this case, the surety bound himself, his "heirs, executors and administrators" for the performance of his undertaking. *Insurance Co. v. Davies*, 40 Iowa, 469; *Green v. Young*, 8 Greenl. 14; *Knotts v. Butler*, 10 Rich. Eq. 143; *Moore v. Wallis*, 18 Ala. 458; *Hightower v. Moore*, 46 Ala. 387; *Mowbray v. State*, 88 Ind. 327. The motion is denied.

BEALL *et al.* v. CITY OF LEAVENWORTH.

(Circuit Court, D. Kansas. February 29, 1888.)

JUDGMENT—ACTIONS ON—DEATH OF OWNER—LIMITATIONS.

In Kansas a judgment does not become dormant at the death of the owner, and an action brought thereon by his executor, more than one year after his death, but within one year after it became dormant, is not barred by Code Civil Proc. § 440, which provides that a judgment can only be revived, or made the basis of an action, within one year after it becomes dormant.

At Law. Action on judgment.

Rossington, Smith & Dallas, for plaintiffs.

Wm. C. Hook, for defendant.

FOSTER, J. This is an action brought by John A. Beall and Charles W. Sloane, executors of Henry W. Benham's estate, on two judgments recovered by their testator in this court against the city of Leavenworth. The first judgment was recovered on the 1st day of December, 1877, for \$586.20 and costs, which judgment was revived on the 29th day of November, 1882. The second judgment was recovered on the 30th day of November, 1880, for \$3,159.11 and costs. Benham died about the 9th day of June, 1884, and shortly thereafter letters testamentary were issued to his executors, and they brought this suit on the 18th day of December, 1885. Defendant sets up as answer to plaintiffs' claim that it is barred by the limitation of the statute for reviving or instituting suit on a judgment.

At the time of Benham's death, neither judgment had become dormant, under section 445 of the Civil Code of Kansas, but it seems the latter judgment had become dormant 20 days before this suit was brought, unless proceedings in *mandamus* had the effect to save it, as would the issuing of an execution. However that is not material. If the testator were alive, and had instituted this suit, there could be no question but he could maintain it. *Burnes v. Simpson*, 9 Kan. 658; *Kothman v. Skaggs*, 29 Kan. 6; *Baker v. Hummer*, 31 Kan. 325, 2 Pac. Rep. 808. In the cases above cited, the supreme court has repeatedly held that a judgment creditor may, if he choose, make his judgment the basis of an action, (within the time limited for a reviver of the same,) instead of reviving by motion and notice under the Code. It appears from the terms of the statute, as well as decided cases, that this can only be done within a year, without the consent of the opposite party. *Scroggs v. Tutt*, 23 Kan. 181; *Angell v. Martin*, 24 Kan. 334. Now, let us see what may be done in case of the death of a party to a judgment. Section 439, Civil Code, reads as follows:

"If either or both parties die after the judgment and before satisfaction thereof, their representatives, real or personal, or both, as the case may require, may be made parties to the same in the same manner as prescribed for reviving actions before judgment, and such judgment may be rendered and execution awarded, as might or ought to be given or awarded against the representatives, real or personal, or both, of such deceased party."