

surety thereupon ceased to exist, it disappeared forever, and the plaintiff's remedy was confined thereafter to the express contract: Sedgewick on Damages, vol. 2, s. 784. The date of that note would govern so far as the statute of limitations might be involved, no matter when the plaintiff paid the notes. The change in the plaintiff's position was, therefore, a material one.

One of the remedies which the plaintiff had up to the time of the making of the new bargain which resulted in the demand note, was the right to compel the creditors, the holders of the notes, to sue for and collect them from the defendant. By that arrangement, and by taking an express contract of indemnity and by expressly assuming their payment, and relieving the defendant therefrom, he lost the right first mentioned.

There was nothing to prevent the parties to this action from changing their relations with each other at any time, and such change would in itself be a sufficient consideration for any promise founded upon or springing from such change. The debt guaranteed was overdue, and the plaintiff had a right to say to the defendant: "you must put me in a position where I can as against you compel you to put me in funds to pay it." I have already adverted to the fact that there was no privity of contract between the plaintiff and the defendant in the original transaction, and that the contract of the former was with the payees of the notes, the defendant's creditors, alone. The mere fact that they were parties to the same instrument could not in this case affect this because that fact did not and could not, as between themselves, alter or affect the relation of principal and surety which alone at that time subsisted between them. This is all the more apparent when it is remembered that the plaintiff could not sue the defendant upon the notes, but would be forced to rely upon payment and the implied promise arising therefrom to recover.

Even at the risk of repeating myself I may say that I regard the situation as reduced to this—if the new contract had not been made then payment by the plaintiff would have given rise to an implied promise by the defendant to repay him. But once the plaintiff himself contracted with the defendant that he would himself pay the notes and would absolve the defendant from the obligation to pay the holders, the whole situation became changed. Payment after that by the plaintiff could only, so far as the defendant was con-