such an agreement may be inferred from a simple declaration of the creditor that he had given time (which we do not admit,) it is not to be inferred by the Court as *presumptio juris et de jure*. Whether the jury were at liberty to draw such an inference need not now be considered; how they could certainly is not manifest, for giving time, and a contract to give time, are distinct and independent things. Proof of the existence of a subject matter about which a contract may be made would seem to have no tendency to prove that one in fact had been made. Indeed, the learned Judge of the Common Pleas does not appear to have rested the defendant's case upon either of these grounds. His view was that the defendant was discharged, because the language of the plaintiff, alleged to have been proved, would lull him into security, and prevent his taking any action for his own indemnity, and because it would be a fraud upon the surety for the plaintiff afterwards to call upon him for payment. The simple meaning of this is that the plaintiff was estopped, not by matter of record or by deed, but by matter *in pais*. The objection to it is, that there was nothing in the evidence to warrant the conclusions that the defendant had been injured by the declarations of the plaintiff, or that he was in any worse condition than he would have been in had those declarations never been made. Certainly it was not for the Court to say as a matter of law that he had been injured. But it is essential to an equitable estoppel by matter *in pais*, that he who sets it up should show that he had been misled or hurt. (*Dezell* v. *Odell*, 3 Hill, 215; *Patterson* v *Little*, 1 Jones, 53; *Hill* v. *Epley*, 7 Casey, 334.) It never yet has been held that a declaration of the creditor that the principal debtor was good enough, that the surety was in no danger, and that the debt would be collected from the principal, without more, was sufficient to estop the creditor from proceeding against the surety. Such declarations are exceedingly common. They are often made to induce the surety to go into the contract, and they are repeated afterwards without any design to mislead, or without being understood as a waiver of any rights. They are made and received as expressions of opinion. They neither invite confidence, nor is confidence often reposed in them. Standing alone, they will not discharge the surety. *Bank* v. *Klingensmith*, 7 Watts, 523, does not sustain the charge of the Court in this case. There the creditor held a judgment against the principal and surety. The surety called upon the creditor, and requested that an execution might be issued, to seize the principal's property about being removed. He stated that he wished to be released, and that the principal had property sufficient within reach of an execution to pay the debt. The creditor refused compliance, stated that the principal was good enough, and that he would give the defendant clear of his endorsement No execution was issued. There is no similarity between that case and the present. There the surety was in motion to secure himself. He had a right to insist that execution should be issued and he did insist. There was proof of actual injury in not holding the execution, an execution to which the surety was entitled on his request, and the case was put upon the ground, both in the Court below and in this Court, that he had sustained injury not from the declaration of the creditor, but from the withholding of the execution. The case of *Harris* v. *Brooks*, 21 Pick. 196, relied upon by the defendant in error, is not unlike *Bank* v. *Klingensmith*. There the surety was also in motion. He called upon the creditor, stated that if he had to pay the debt he wished to attend to it soon, as he then could get security of the principal. The creditor assured him that he (the creditor) would look to the principal for payment, and that he (the surety) need not give himself any trouble about the note, for he should not be injured. The case was put to the jury with the instruction, that if in consequence of this assurance of the creditor the surety omitted to take up the note and secure himself out of the property of the principal debtor, he was discharged. The defence, therefore, as in *Bank* v. *Klingensmith*, rested not on the declarations of the creditor alone, but on them and superadded evidence that there had been actual harm resulting from them to the defendant. This essential to estoppel *in pais* was therefore not wanting, as it is in the present case. The language of Chief Justice Shaw is to be understood as applicable to the case he then had in hand, a case in which the jury had found that injury had resulted from the declarations of the creditor, and the only question therefore was, whether they were such as to warrant his relying upon them, and guiding his action by them. Surely without having been the occasion of injury to the defendant, the creditor cannot be guilty of a fraud upon him by calling upon him to pay a debt which he has promised to pay, and no declaration which has not in fact influenced his conduct can have done the surety any harm. In losing sight of this consists the error of the charge, and for this reason, pointed out in both the assignments of error, the judgment must be reversed.

Judgment reversed and a *venire de novo* awarded.

MONTHLY REPERTORY.

COMMON LAW.

EX. C. GENERAL STEAM NAVIGATION CO. v. ROLT. *Feb.* 2.

Principal and surety—Action against surety—Prepayments to principal a defence—Leave reserved to enter a verdict—Evidence—Constructive notice.

In an action against the defendant as surety to recover damages for penalties incurred by his principal for not finishing a ship for the plaintiffs within the time specified in the contract, it appeared that the plaintiffs had paid part of the contract price prior to the principal before it became due.

Held, that such prepayments were *prima facie* a prejudice to the defendant and a defence to the action.

Upon motion by leave reserved to enter a verdict for the plaintiffs the court will only consider whether upon the evidence and finding of the jury the verdict ought to be so entered, but will not regard the way in which the case has been left to the jury.

The jury, in answer to the Judge, negatived any knowledge by the defendant of the prepayments referred to above having been made, but the Judge did not ask whether by such prepayments the defendant had been prejudiced.

Held, that an objection, if any, upon this ground was the subject of a bill of exceptions, but could not be raised upon motion to enter a verdict.

C. P. May 7, June 27, Nov. 11.

WALMSLEY AND ANOTHER (ASSIGNEES, &C.) v. MILNE.

Mortgagor and Mortgagee—Fixtures.

M. the owner of land, in 1853, mortgaged it in fee to O, who in August, 1858, sold it to the defendant. M. became bankrupt in September, 1858. After the mortgage and before the sale, M., who had always continued in possession, erected buildings on the land, and set up a steam engine and boiler used for supplying with soft water the baths which had been erected on the premises, also a hay cutter and malt mill or corn crusher and grinding stones; all (except the grinding stones) being secured with bolts and nuts, or otherwise firmly affixed to the buildings, but in such a manner as to be removable without damage to the buildings or to the things themselves. The upper millstone lay in the usual way upon the lower grinding stone. All the fixtures were put up for the purpose of trade. They were all firmly annexed to the freehold, for the purpose of improving the inheritance and not for any temporary purpose.

Held, in an action by the bankrupt's assignees to recover the articles so affixed, that when the mortgagor, after the date of the mortgage, annexed the fixtures for a permanent purpose and for the better enjoyment of his estate, he thereby made them part of the freehold which had been vested by the mortgage deed in the mortgagee, and that consequently the assignees of M., the mortgagor, could not maintain the action.

The relationship existing between mortgagor and mortgagee was discussed as to what denomination of tenant he (the mortgagor) was, at all events not such a tenant as would so operate. The fixtures should be considered as chattels. Next day, however, one of the Judges requested to have stated that he entertained serious doubts as to whether the articles were chattels or not.