O. S. Miller, for plaintiff.

F. L. Milner, for defendant.

MEAGHER, J.:—The plaintiff, being a joint and several maker with the defendant, for the latter's accommodation, of two notes amounting to $1,500 which were outstanding in the hands of third parties, took from the defendant a note for $1,500, being the note sued on.

It was given upon the plaintiff's promise to him that he would retire the other notes forthwith. The agreement covered two aspects. First that the plaintiff would pay the outstanding notes in acquittance and discharge of the defendant's liability thereon, and secondly, that the defendant would give the plaintiff a demand note for $1,500 to recoup him to that extent for his outlay in discharging these notes.

It was done apparently at the defendant's instance. He was then about to abscond from the province, and he may have feared that the holders of these notes, or one of them, would arrest him therefor and thus defeat his project of getting away, and that his uncle, the plaintiff, would not be at all likely to take such a step against him.

The plaintiff paid both notes on the 27th of October, 1900, but began his action a few days before then. He, no doubt, paid the holders all arrears of interest. That fact was not directly proven, but interest was due on them, and the holders, no doubt, insisted on getting it. The plaintiff's promise contemplated the payment of all that was due on them. To the extent, therefore, of the excess of interest beyond the $1,500 for which the note sued on was given, the plaintiff was prejudiced and the defendant correspondingly benefited by the arrangement between them. The $1,500 note carried interest from its date, but if the sum paid by plaintiff to retire the notes was $1,550 (and whatever it was he was bound by his arrangement with defendant to pay) he can never recover back that $50 from the defendant, because by agreement they made this note the measure of the plaintiff's protection, and because, having undertaken with the defendant absolutely to pay the notes, the relations were so changed thereby that he could not thereafter invoke the relationship of principal and surety and sue the defendant for money paid, upon the implied promise which springs from that relation when the surety pays money in discharge of his liability. See Toussaint v. Martinnant, 2 T. R. 105, Rowlatt on Principal and Surety, p. 176. These notes