

1929

Vitagraph, Inc. v. American Theater Co. and Theatres Operating Co. : Brief of Appellant

Utah Supreme Court

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Allen T. Sanford; attorney for appellant.

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4924

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

October Term, 1929.

VITAGRAPH, INCORPORATED,
a Corporation,
Respondent,
vs.
AMERICAN THEATRE COM-
PANY, a Corporation,
Appellant,
and
THEATRES OPERATING COM-
PANY, a Corporation,
Defendant.

4924

APPELLANT'S BRIEF

ALLEN T. SANFORD,
Attorney for Appellant.

CENTURY PRINTING CO.

In the Supreme Court of the State of Utah

October Term, 1929.

VITAGRAPH, INCORPORATED, a Corporation.	}	Respondent,
vs. AMERICAN THEATRE COM- PANY, a Corporation,		Appellant,
and THEATRES OPERATING COM- PANY, a Corporation,	}	Defendant.

APPELLANT'S BRIEF.

STATEMENT OF CASE.

The trial court gave judgment against the defendant, American Theatre Company, and it has appealed on the judgment roll. The defendant, Theatres Operating Company, was not served with a summons in the action; and it did not make an appearance therein.

In the complaint, the plaintiff states the corporate character of all the parties and then refers to a contract between the plaintiff and the American Theatre Company, dated July 21, 1927, and known as Contract No.

2112. It is then alleged: That on or about the 9th day of September, 1927, the defendant, American Theatre Company, entered into an agreement in writing with the plaintiff, modifying and amending said contract, dated the 21st day of July, 1927, and known as Contract No. 2112. That a copy of the contract dated on or about the 9th day of September, 1927, is marked Exhibit "A" and attached hereto and made a part of this complaint." (This contract is marked No. 2171.) It is then alleged that "the defendants, American Theatre Company and the Theatres Operating Company, made and entered into a contract in writing, known and described as an assignment contract, on or about the 20th day of September, 1927. A copy of said assignment contract is marked Exhibit "B", attached hereto and made a part hereof."

The complaint continues, that plaintiff furnished to *defendants* the photoplay referred to in said contracts, entitled, "When a Man Loves," and fully performed all its part of said contracts specified to be performed, and *defendants* used and exhibited said film or moving picture in said American Theatre in Salt Lake City, Utah, from the 26th day of October, 1927, to the 3rd day of November, 1927, both dates inclusive; "that is to say, that defendants exhibited said picture under the terms of said contract for a period of nine days." It is then alleged that the gross receipts from the exhibition of said picture, for the first 7 days, was \$3,045.25, and that the

gross receipts from such exhibition for the last 2 days, amounted to \$532.01. That 50 per cent of the total receipts for the first 7 days of the exhibition, and 25 per cent of the 8th and 9th days, amounted to a total of \$1,655.64. It is then alleged that said amount is less than \$4,000.00, and that the same or any part thereof has not been paid to the plaintiff, and: "That said contracts provide that in the event the *defendants* shall fail to perform any part or any provision of the said agreements herein described, the defendants shall pay to plaintiff the sum of \$4,000.00 as a film rental for said attraction. That *defendants* failed to use an orchestra during both matinees and nights during the running of said picture and failed to spend a minimum of \$1,000.00 in advertising of said picture film, both of which *defendants* promised and agreed to do under the terms of said contracts." The plaintiff prays judgment for \$4,000.00.

A rider attached to and forming a part of said Exhibit "A," provides: (1) That the exhibitor agrees to pay the distributor a sum equal to 50 per cent of the gross box-office receipts without any deduction whatever. (2) That the exhibitor agrees to run said attraction for a minimum of 7 consecutive days. (3) That the exhibitor agrees to use an orchestra during both matinees and nights, and to spend a minimum of \$1,000.00 in advertising and exploitation of said attraction. (4) "In the event the exhibitor fails to comply with any or all of

the terms of this contract, the exhibitor then guarantees to pay to the distributor a film rental for said attraction in the amount of Four Thousand Dollars (\$4,000.00).” (5) “If the gross receipts total Seven Thousand Dollars (\$7,000.00) for the first five days, the exhibitor agrees to increase the run to nine days, and will pay to the distributor a sum equal to twenty-five per cent (25%) of the gross box office receipts for the two additional days.” (6) That insofar as the provisions of this contract (Exhibit “A”) conflicts with those of the contract of July 21, 1927, and known as contract No. 2112, the latter are superseded.

The printed contract, of which the foregoing typewritten rider is a part, contains numerous stipulations to be performed by the exhibitor; and, among them, the following: To furnish daily to the distributor an itemized statement of the gross receipts; to make payments daily; to return each positive print with reels and containers to distributor’s exchange; not to assign contract without written consent of distributor and the written acceptance of the assignee; not to permit the positive print to leave its possession.

The assignment of contract, marked Exhibit “B,” in the printed parts, contains the following, among other, provisions: (1) “Purchaser assumes and agrees from date hereof to perform each and all of the terms and provisions of said agreements above described, therein

agreed to be performed by said Exhibitor.” (2) “It is mutually agreed that if the Purchaser shall fail or neglect to perform or shall breach any of the terms and provisions of any of said contracts hereby agreed to be performed by said Purchaser, *the said Exhibitor as well as the said Purchaser, shall be liable jointly and severally to Vitagraph, Inc., or its assigns, for any loss occasioned thereby.*” And the typewritten rider attached to and made a part of said Exhibit, contains the following, among other, provisions: “It is further mutually understood and agreed by each and all of the parties therein, that, either, until such time as Theatres Operating Company exercises its option to and does in fact surrender its leasehold contract and supplemental agreement, or, in the event Theatres Operating Company shall not exercise its option as hereinabove stated, *the Exhibitor herein shall assume the status of guarantor to Vitagraph, Incorporated, conditioned upon the proper, faithful, and complete fulfillment of each and all of the conditions of the within Film contracts.*” The complaint contains the allegation, which is admitted by the answer, that defendant, Theatres Operating Company, did not exercise its option to surrender, and did not surrender, its lease of the American Theatre, until after the photoplay, “When a Man Loves,” had been completely shown.

We shall admit, for the purpose of this argument, that the American Theatre Company is the Exhibitor re-

ferred to in the above mentioned contracts, although the contracts leave great doubt on that score. We also admit that the plaintiff, Vitagraph, Inc., is the Distributor, and Theatres Operating Company, the Purchaser, referred to in said contract.

The findings of fact merely follow the complaint; and the judgment contains the statement, without foundation in the pleadings or decision, that, as between themselves, Theatres Operating Company is principal, and American Theatre Company is surety. Respondent's counsel will probably admit that this provision of the judgment was included by the trial judge, as a concession to appellant, and over respondent's counsel's vigorous objection. It is conceded that this does not appear from the record.

All the italics in the preceding statement were inserted by appellant's counsel.

ARGUMENT.

The complaint is fatally defective, and does not support the judgment.

The contract marked Exhibit "A," attached to the complaint, is apparently a complete contract; and, although its rider assumes the persistence of any provisions in the contract of July 21, 1927, not in conflict with it, the last named contract, was apparently referred to

merely by way of inducement. It is certainly not pleaded; nor is it attached to the complaint as an exhibit.

It would be difficult to imagine a complaint more defective and unscientific than the complaint in this action. If the appellant is liable at all, it is as guarantor; and yet, in the complaint there is not the allegation of any fact which is peculiar and essential to the statement of a cause of action on a guaranty. Always, it has been the rule, that a contract must be pleaded as modified (Daley v. Russ, 86 Cal. 114, 24 Pac. 867), and, also, that a contract must be pleaded either *in haec verba* or according to its legal effect. It is not sufficient to merely attach a contract to a complaint as an exhibit, and refer to it as such, for this would be no more than filing the contract alone with the Clerk of the Court. The pleader must construe the contract, and state what he conceives to be his rights under its provisions. (See the excellent opinion of Ingraham, P. J., in DeCordova v. Sanville, 150 N. Y. Supp. 709, which was approved on appeal by the Court of Appeals.) And in Los Angeles Humane Soc. v. Adler, 46 Cal. App. 35, 188 Pac. 827, citing many previous cases, it was said:

“Matters of substance must be alleged in direct terms, and not by way of recital or reference, much less by exhibits merely attached to the pleading. Whatever is an essential element to a cause of action must be presented by a distinct averment, and cannot be left to an inference to be drawn from the construction of a document attached to the complaint.”

In the complaint in this action, the plaintiff was content to allege that on certain dates certain agreements in writing were entered into, which are attached to the complaint as Exhibits "A" and "B," and made a part thereof. It does not even allege that it was a party to Exhibit "B," but, by implication, excludes that idea. Indeed, we are to infer from the complaint that Exhibit "B" was a contract between American Theatre Company and Theatres Operating Company only; and that is why, perhaps, the plaintiff has, during all the proceedings from complaint to judgment, ignored the guaranty provision of that contract.

The complaint in this case, as in the case of *Potter v. Gronbeck*, 117 Ill. 404, 7 N. E. 586, was framed on the theory that the so-called film contracts and the guaranty constituted a single agreement; and it is treated as the joint and several obligation of the defendants. This is a mistaken theory, for, as was said in *Maury v. Waxelbaum Co.*, 108 Ga. 14, 33 S. E. 701, "there is no instance in the books of a guarantor contracting jointly with his principal." The fact that the film contract and the guaranty were given at the same time, and were on the same piece of paper, does not make them one contract. This principle is illustrated in *Brewster v. Silence*, 8 N. Y. 207, respecting a note and guaranty, as follows: "The note is the debt of the maker—the guaranty is the engagement of the defendant, that the maker shall pay the

note when it is due. * * * They are not the same, but different and distinct contracts." See, also, *Northern State Bank v. Bellamy*, 19 N. D. 509, 125 N. W. 888, 31 L. R. A. (N. S.), 149; *Otto v. Jackson*, 35 Ill. 349.

Statements of causes of action upon guaranties may vary somewhat according to the character of the guaranty and the time and manner they were given, but the general rules of pleading are correctly stated, we think, in the following quotations from 28 C. J. 1016, 1018, 1019. There, it is said:

"In accordance with such rules the declaration, complaint, or petition, must allege every material fact which constitutes plaintiff's cause of action, but need not negative matters of defense. The declaration or complaint should allege, inter alia, the terms of the principal contract, and show that it is valid and binding, and that its obligation corresponds to that of the guaranty. It should also allege the existence of the contract of guaranty and set it out either in terms or according to its legal effect. * * * Acceptance of, and reliance upon, the guaranty should be alleged. * * * The declaration, or complaint, should allege the consideration for the guaranty; but, where the guaranty is a part of the original transaction, no new consideration need be alleged. * * * The declaration or complaint * * * must allege non-performance of such contract by the principal obligor, and nonperformance of the contract of guaranty by the guarantor; and a declaration which merely avers the principal's default is not sufficient as the guarantor's breach should be specially alleged."

The mode of stating a cause of action in a case

like this is illustrated in numerous cases. In *Snyder v. Click*, 112 Ind. 293, 13 N. E. 581, the plaintiff, in his complaint, alleged that on a certain day, he, by a written lease, a copy of which is herewith filed, demised and let to one William S. Delaney a certain mill, at and for the rental of \$187.50, payable each six months; that, as a part of the consideration of such demise, and before and at the time of the execution of said lease, the defendants indorsed on said written lease, and executed their written guaranty as follows: "We, the undersigned, guaranty the fulfillment of the within contract. January, 1881;" that, by virtue of said written lease, and such guaranty thereon, plaintiff delivered possession of the demised premises to the lessee, who held and occupied the same until a certain time, at which time the sum of \$175.00 of rent was due under and by virtue of said lease, etc. The court held that notice of acceptance of guaranty was not necessary, and need not be alleged, because it was a conclusive guaranty; but the court did not hold that an allegation of acceptance was not necessary.

In *Stephens v. Daugherty*, 33 Cal. App. 733, 166 Pac. 375, the court said:

"The complaint alleges that as a condition of entering into said contract of lease, plaintiff required of said lessees that they should furnish to plaintiffs a guaranty or bond to the effect above stated. Thereupon, in order to comply with that

condition and at the request of said lessees, and at the same time and place and as a part of the same transaction and of said indenture of lease, the defendants, for the benefit of the plaintiffs and in consideration of the execution of said lease, made, executed, and delivered to the plaintiffs an undertaking, which is set forth in the complaint. * * * The guaranty was accepted by the plaintiffs, who thereupon executed and delivered the lease, relying upon the security of said bond, and if said bond had not been furnished plaintiffs would have refused to execute said lease."

The plaintiff must allege, among other things, consideration and acceptance of the guaranty, although not in terms; and this, whether the guaranty is absolute or conditional. (*Armour & Co. v. Blumenthal*, 9 Ga. App. 707, 72 S. E. 168.) Of course, we concede that the considerations may be various, as, in this case, it might have been alleged that the consideration of the guaranty, (if such it is), was the release of the American Theatre Company as principal in the film contract. But the consideration must, in some form, be alleged, even though it may be said that the consideration for the lease and guaranty is the same, where they go into effect at the same time. (*Murphy v. Schwaner*, 84 Conn. 420, 80 Atl. 295; *Dodd v. Vucovich*, 38 Mont. 188, 99 Pac. 296.) If the contract is set out in full in the pleading, and it purports

to have been made for a valuable consideration, it is a sufficient averment of consideration. (Lefkovits v. First Natl. Bank, 152 Ala. 521, 44 So. 613.) But if the instrument does not purport consideration, the facts showing consideration, must be alleged. (Kingan & Co. v. Orem, 38 Ind. App. 207, 78 N. E. 88.) We shall repeat, that, in the present case, the contract or guaranty is not set out at all, either in terms or legal effect.

Likewise, the plaintiff must allege acceptance of the guaranty, although not in terms. If the complaint avers execution and delivery of a bond, execution implies acceptance. (Tapper v. New Home, Etc. Co., 22 Ind. App. 313, 53 N. E. 202; Kent v. Silver, 108 Fed. 365.) And in Goff v. Janeway, 30 Ky. L. Rep. 705, 99 S. W. 602, it was held:

“An allegation that a guaranty sued on was executed and delivered to plaintiff, and that in consideration of the guaranty the credit was extended to the principal debtor, was sufficient allegation that the guaranty was accepted by plaintiff.”

In the present case, however, there is no allegation of acceptance, nor is there any allegation that the guaranty was executed and delivered to the plaintiff; in fact, the complaint assumed that Exhibit “B” was a contract between American Theatre Company and Theatres Operating Company, to which the plaintiff was not a party.

See, for proper mode of pleading a guaranty, the following cases: Delaware County Nat. Bank v. King, 95 N. Y. Supp. 957; E. H. Chase & Co. v. Cox, 68 Ark.

648, 44 S. W. 222; *Adams v. Georgian Co.*, 19 Ga. App. 654, 91 S. E. 1005; *Armour & Co. v. Blumenthal*, 9 Ga. App. 707, 72 S. E. 168; *A. B. Small Co. v. Clayton*, 1 Ga. App. 83, 57 S. E. 977.

In the case of *Mast v. Lehman*, 100 Ky. 464, 38 S. W. 1056, which was an action on a guaranty, the court said:

“The petition was fatally defective upon demurrer, as the petition is certainly wanting in all these usual and necessary allegations, and evinces great carelessness and lack of skill on the part of the pleader.”

The same may be said of the complaint in this action; and it cannot be denied that the complaint fails to state facts sufficient to constitute a cause of action. The trial court erred, therefore, in over-ruling the appellant's demurrer to the plaintiff's complaint. The complaint is not aided by appellant's answer; and its defects are not cured by the judgment. (*Chesney v. Chesney*, 33 Utah 503, 94 Pac. 989; 31 Cyc. 770.)

The plaintiff framed its complaint and sought to recover \$4,000.00 on the theory that this provision of the contract was either an alternative stipulation for the payment of rent or liquidated damages. We think it is neither; and that the trial court properly held that provision a penalty. The provision is:

“In the event the exhibitor fails to comply with any or all of the terms of the contract, the exhibitor then guarantees to pay the distributor a film rental for said attraction in the amount of Four Thousand Dollars (\$4,000.00).”

In 17 C. J. 933, Sec. 232, it is said:

“Where the agreement contains several distinct and independent covenants upon which there may be several breaches and one sum is stated to be paid upon breach of performance, that sum will be considered a penalty and not liquidated damages.”

And see: In re Sherwoods, 210 Fed. 754, Ann. Cas. 1916A, 940; Stimpson v. Minsker Realty Co., 164 N. Y. Supp. 465; Feinsot v. Burstein, 138 N. Y. Supp. 185; Sledge v. Arcadia Orchards Co., 77 Wash. 477, 137 Pac. 1051; Wilhelm v. Eaves, 21 Or. 194, 27 Pac. 1053, 14 L. R. A. 297; 1 Sutherland, Damages (3d Ed.), Secs. 282, 288; Western Macaroni Mfg. Co. v. Fiore, 47 Utah, 108, 151 Pac. 984.

II.

The guaranty pleaded and found is conditional.

In the District Court, and alway, it has been the appellant's contention, that the provision contained in the rider attached to Exhibit “B” is a contract of indemnity, and not one of performance. The provision reads:

“It is further mutually understood and agreed by each and all of the parties herein, that, either, until such time as Theatres Operating Company exercises the option to and does in fact surrender the leasehold contract and supplemental agreement, or, in the event Theatres Operating Company shall not exercise the option, as hereinabove stated, *the Exhibitor herein shall assume the status of guarantor to Vitagraph, Incorporated, conditioned upon the proper, faith-*

ful, and complete fulfillment of each and all of the conditions of the within film contracts."

The foregoing is typewritten. The printed portion of the assignment contract, Exhibit "B," contains the following provision:

"It is mutually agreed that if the Purchaser shall fail or neglect to perform or shall breach any of the terms and provisions of any of said contracts hereby agreed to be performed by said Purchaser, the said Exhibitor, as well as the said purchaser, shall be liable jointly and severally to Vitagraph, Inc., or its assigns, for any loss occasioned thereby."

Assuming that the first quoted provision is sufficient under the statute of frauds, it is our contention that if it provided merely that the Exhibitor "shall assume the status of guarantor to Vitagraph, Incorporated," it would be a contract of indemnity; in which case it must be shown that the principal, in this case the purchaser, is unable to perform—in other words, the guarantee must have exhausted his remedy against the principal. (Spencer, Suretyship, secs. 107-109; 12 R. C. L. 1090-1091, secs. 43, 44). "Usually," it is said in the case of *Furst & Bradley Mfg. Co. v. Black*, 111 Ind. 308, 12 N. E. 504, "the contract of the guarantor is to answer for the default of his principal, if by the use of due diligence loss results from such default, while the surety is responsible at once upon his direct engagement to pay." See, also, *Maury v. Maxelbaum*, 108 Ga. 14, 33 S. E. 701; *Musgrove v. Luther Pub. Co.* 5 Ga. App. 279, 63 S. E. 52; 28 C. J. 971.

In a note to the last cited authority, citing *Smeidel v. Lewellyn*, 3 Phila. (Pa.) 70, it is said:

“A guaranty for the faithful performance of a lease is *prima facie* a restricted engagement to indemnity against such losses only as the creditor cannot avert by his own efforts or an engagement that the debtor is solvent and that the debt may be secured by a resort to legal process.”

And see, *Ward v. Wilson*, 100 Ind. 52, 50 Am. Rep. 763. Such guaranties are subject to the rules applicable to guaranties of collection. (*McMurray v. Noyes*, 72 N. Y. 523, 28 Am. Rep. 180; *Harper v. Pound*, 10 Ind. 32; *Ridpath v. Clausin*, 88 Wash. 185, 152 Pac. 711.)

The provision in question, after stating that the exhibitor shall assume the status of guarantor to Vitagraph, Inc., reads, “conditioned upon the proper, faithful, and complete fulfillment of each and all of the conditions of the within film contract.” What is it that is conditioned upon such fulfillment of the conditions of the contract? Is it the assumption of the status of guarantor, or is it, like the condition or defeasance of a bond, the statement of the terms on which the exhibitor can exonerate himself from the obligation of the guaranty? See *Douglas v. Hennesy*, 15 R. I. 272, 7 Atl. 1, 10 Atl. 583.

It is reasonable to assume that the parties intended to make some change from the printed provision in the contract, that for failure to perform, or for a breach of any of the terms of the contracts, the exhibitor and purchaser

should be jointly and severally liable to Vitagraph, Inc. or its assigns for any loss occasioned thereby; but, if the words **under consideration**, that is, "conditioned upon the proper, faithful, and complete fulfillment of each and all the conditions of the within film contracts", are the equivalent of "The exhibitor hereby guaranties the performance of said film contracts," or that "The undersigned exhibitor hereby guaranties the faithful performance of all the terms of said film contracts," there would be no change from the printed provision. Such guaranties would be absolute, the guarantor's liability would be fixed by the principal's default, and he would be liable the same as the principal. (Miller v. Northern Brewery Co., 242 Fed. 164; Storm v. Rosenthal, 141 N. Y. Supp. 339; Murphy v. Hart, 107 N. Y. Supp. 452; DeReszke v. Duss, 91 N. Y. Supp. 221.)

"A contract must be construed as a whole, and the intention of the parties is to be collected from the entire instrument and not from detached portions, it being necessary to consider all of its parts in order to determine the meaning of any particular part as well as the whole. Individual clauses and particular words must be considered in connection with the rest of the agreement, and all parts of the writing, and every word in it, will, if possible, be given effect." (13 C. J. 525.)

See, also, Blyth-Fargo v. Free, 46 Utah 233, 148 Pac. 427. Also,

"Where, as in the case of printed forms a contract is partly printed and partly written, and there

is a conflict between the printing and the writing, the writing will prevail. Handwriting will under the same rule prevail over typewriting, and typewriting over printing. But where the antagonism is merely apparent, the difference should be reconciled, if possible, by any reasonable interpretation. The rule that effect must be given, if possible, to all terms of a contract applies to instruments partly written and partly printed as well as those wholly written or wholly printed." (13 C. J. 536.)

If the printed and typewritten provisions above mentioned are reconciled, we believe the court will construe the typewritten provision as a conditional guaranty against loss as the result of the purchaser's nonperformance of its contract. In the case of *Burton v. Dewey*, 4 Kan. App. 589, 46 Pac. 325, a case often cited, the court said that it was familiar law that the liability of a surety or guarantor is not to be extended beyond the precise terms of his contract; and, regarding conditional guaranties, said:

"There is a well understood difference between a guaranty of payment, and a contract of indemnity against loss, as the result of the nonpayment of a debt. In the first case the liability of the guarantor is fixed by the failure of the principal debtor to pay at maturity, or at the time when payment is guaranteed. In the second the contract partakes of the nature of a guaranty of collection, no liability being incurred until after by the use of due and reasonable diligence, the guarantee has become unable to collect the debt from the principal debtor. A guaranty of collection, or a guaranty against loss as the result of the failure to collect a debt places upon the one for whose ben-

efit the guaranty is made the duty of making a reasonable effort to collect the debt from the principal debtor; and a cause of action does not accrue thereon until after such effort has been made and proved unavailing. There is no right of action upon such contingent liability immediately upon the failure of the principal to perform."

See, also, *Miller v. Northern Brewery Co.*, 242 Fed. 164.

The case of *Bosworth v. Pearce*, 28 Ky. L. Rep. 1160, 92 S. W. 277, would not support the claim that the guaranty in this case was absolute, as there the language was that the undersigned had signed the contract "as guarantors, and promised and agreed and guaranteed to G. M. Bosworth the payment of the money mentioned in said contract upon the terms and conditions therein set forth," etc. Neither does the case of *Mead v. Winslow*, 53 Wash. 638, 102 Pac. 753, 132 Am. St. Rep. 1092, 23 L. R. A. N. S. 1197, and note, aid us in the construction of the present contract.

III.

Guarantor discharged by change in mode of performance.

The contract provided specifically that the Exhibitor (the Theatres Operating Company) should furnish to the Distributor (plaintiff) daily during the exhibition of this picture a complete statement of the receipts for each day and that the Exhibitor (the Theatres Operating Company) should pay to the plaintiff each day the por-

tion of the receipts to which the plaintiff was entitled. There was a radical departure by the Theatres Operating Company and the plaintiff in the method of the execution of this contract and no attempt was made to collect daily any portion of the receipts; and, further, the plaintiff contended and the court found that it was not necessary for the plaintiff to endeavor to collect its portion of the receipts daily. This shows a radical alteration in the mode of performance of the contract and which releases the American Theatre Company from its guaranty contract.

“Nothing is better settled than that the contract of a guarantor or surety is *strictissimi juris* and that he has a right to stand upon the strict terms of his undertaking. * * * * It follows from this that any material change in the contract between principal and creditor, whether (1) by a material alteration of its written terms, or (2) by any modifying agreement, or (3) by a material departure by mutual consent of the principal and creditor or obligee from the mode of performance originally contemplated and provided for, without the consent of the surety or guarantor, will in general discharge the latter.”

Spencer on Suretyship, Sec. 209.

Also the case of *Sherman vs. Pedrick*, 54 N. Y. Sup. 467, clearly sustains this rule. In this case the defendants guaranteed the amount of an indebtedness payable in five years, interest payable annually. The plaintiff did not attempt to collect interest until the last year, when the principal became due, when he demanded both principal and interest for the five years. Held, that because of the fail-

ure to collect interest when due yearly, the guarantor was not liable for any of the interest, except the interest for the last year.

IV.

Guarantor discharged by change in Contract.

There can be no doubt that the American Theatre Company, viewed as exhibitor, and even as an absolute guarantor, is not liable to the plaintiff for any portion of the proceeds for the last two days the picture "When a Man Loves" was exhibited. The contract provides that the picture shall be shown for 7 days, *but if the gross proceeds for the first 5 days amount to \$7,000*, the picture, shall be shown for two more days. The entire record shows that the gross proceeds for the first 5 days, did not amount to \$7,000.00; and when, nevertheless, the picture was shown for two additional days, and, by agreement, express or implied, entitling the plaintiff to 25 per cent of the gross proceeds, was a change of the contract, discharging the guarantor. *Warren v. Lyons*, 152 Mass. 310, 25 N. E. 721, 9 L. R. A. 353; *American Bonding Co. v. Pueblo Inv. Co.*, 150 Fed. 17, 9 L. R. A. N. S. 557, 10 Am. Cas. 357; *Cushing v. Cable*, 48 Minn. 3, 50 N. W. 891; *Chandler Lumber Co. v. Randke*, 136 Wis. 495, 118 N. W. 185, 22 L. R. A. N. S. 713.

We believe all the foregoing questions are properly raised on the judgment roll.

“No objection or exception is required to present to an appellate court the legal issue whether or not a special finding of fact made by the court upon the trial of an action at law warrants the judgment, because, like the question whether or not a verdict sustains the judgment upon it, this is an issue of law which arises upon the face of the record.”

(Guaranty Trust Co. v. Koehler, 195 Fed. 669).

It is respectfully submitted that the judgment in this action should be reversed.

ALLEN T. SANFORD,
Attorney for Appellant.