or interest, which would have rendered the witness incompetent, has been discharged by the operation of law, as for example, by the bankrupt law or insolvent law, or by the statute of limitations, his competency is restored. Greenl. on Ev. 477; 6 Cow. 484; 2 Serg. & R. 119; 4 Day, 121; 3 H. & I. 249; 2 Hay. 290; 9 Eng. Com. Law, 177; 22 Id. 321, 319, 290.

Green, J., delivered the opinion of the court.

The only question in this case is whether a party to a note may be a witness to prove the contract to have been usurious after he has been discharged in bankruptcy.

[303] The authorities cited for the defendants in error establish, beyond doubt, that such party is a competent witness; and, if there had been no authority, this court would have had no doubt as to the correctness of the judgment of the circuit court.

"The rules and principles of evidence are founded in a peculiar degree upon practical good sense." Carroll v. State, 3 Humph. 321.

These witnesses could not possibly have any interest in the event of the suit, as it regarded the other parties, after they had pleaded their bankruptcy and had a verdict in their favor.

And the technical objection to their competency, on the ground that they were parties to the action, did not apply, because, after the verdict and judgment in their favor, they ceased to be parties.

Affirm the judgment.

WOODSON v. MOODY.

NASHVILLE, DECEMBER, 1843.

VERDICT CURES DEFECTIVE STATEMENT OF TITLE. The verdict of a jury upon a plea to the merits cures the defective statement of a good cause of action in the declaration. (Acc. Read v. Memphis Gayoso Gas Co., 9 Heisk. 550 citing this case.)

DECLARATION—PROMISE TO PAY—GUARANTY. Where an action of *assumpsit* brought upon an instrument which itself contains a promise or undertaking to pay, or some expression equivalent to a promise to pay, it is not necessary formally to set forth another promise resulting from legal liability.

GUARANTY OF COLLECTION—NOTICE. Where the guaranty is of the collection of a note, and the maker is solvent when it falls due, the guarantor is entitled to notice within a reasonable time after the failure to collect by due diligence, and will be released to the extent of injury sustained by the failure to give such notice.

Woodson sold a tract of land to James G. Moody, and Moody delivered to him, in part payment of the consideration, several claims; and amongst others, a note for $144.-16, executed by John W. Oliver, on the 2d day of February, 1842, and payable to R. H. Moody, and by him endorsed and delivered to James G. Moody. This note was dischargeable in notes of any of the banks of Tennessee. J. G. Moody, at the time of the delivery of the note aforesaid, executed and delivered to Woodson an instrument of writing, in which he used the following language: "I do hereby guaranty the collection of all said notes to said Woodson in case they can not be collected from the makers or from said Moody."

[304] Woodson sued Oliver on the note, and R. Moody on the endorsement, and obtained judgment against Oliver, and the endorser as discharged. Oliver was solvent at the time of the execution of the guaranty, but not when the execution issued. The money was not made.

Having failed to collect the money from Moody or Oliver, Woodson instituted this action on the case, in the circuit court of Montgomery county, against James G. Moody, and his declaration set out the guaranty and a breach thereof, and the case was submitted to a jury, Judge Martin presiding, at the July term, 1843. The judgment, *fieri facias* return, were introduced, and much proof in regard to the solvency of the maker of the note, which it is not necessary here to exhibit. It did not appear that notice had been given to the guarantor of the failure to collect the money.

The jury, under the charge of the presiding judge, rendered a verdict in favor of the plaintiff. The defendant moved the court to set aside this verdict. The motion was overruled. A motion was then made in arrest of judgment. This motion prevailed, and the plaintiff appealed.

Johnson, for plaintiff.

Garland, for defendant. The questions presented by this record are:

1st. Did the circuit judge err in arresting the judgment?

The declaration sets out the guaranty upon which the action is brought, and charges the breach without averring any promise. It is a declaration in assumpsit. It is stated in 1 Chitty's Pleading, 265, that a declaration in assumpsit on a bill of exchange need not expressly aver a promise, because the promise is presumed in such a case; and the doctrine to be gathered from Mr. Chitty is that when the undertaking depends upon a contingency, so that the promise to pay does not directly and legally flow from the written contract declared upon, a promise must be averred in the declaration. And although this doctrine would amply sustain the judgment of the court below, yet the American authorities go farther, and leave no doubt that the judgment [305] should have been arrested, as will be seen by reference to 2 Call. 39; 1 Call. 83; 3 Munf. 566; 6 Munf. 506; 10 Wend. 488; Gould's Pl. 942, 44.

This is not a case in which a good title is defectively set out, and so cured by a verdict. 3 Marsh, 169; 1 N. H. 246.

2d. Was notice to the defendant of the failure of plaintiff to collect the note of Oliver Moody necessary?

What is the reasonable meaning of this guaranty? It can not be doubted that the defendant meant "to bind himself to pay the money called for in the note, provided the plaintiff could not, by due diligence, enforce the collection of the note from either the maker or endorser." Can it be doubted that this, by its express terms, is a conditional undertaking on the part of the defendant, he agreeing to pay after a failure by plaintiff to collect from the parties to the note? Here was something to be done before his liability began, and that not to be done by himself, or yet by a stranger, but by the plaintiff in this action. This was to take legal steps to enforce the payment of the note; all control of the note, and consequently all legal knowledge of the facts connected with its collection, having been parted with by the defendant. If this act had to be performed by the defendant, he was bound to know its result; if by a stranger, he had as good right and as perfect means to know it as the plaintiff; and in either case defendant would not be entitled to notice; but in the case at bar the defendant's liability did not commence until certain acts had been performed by the plaintiffs, which acts were be-

yond his control and knowledge; and, according to every principle of common justice, he was entitled to prove when his liability did commence, either by notice in the usual way or in the nature of a special request.

The ground upon which an endorser is entitled to notice is that his undertaking is a conditional one. He does not expressly contract for notice, but the law makes that a part of his contract; and I hold it to be incontrovertibly true that when this contract is established to be a conditional one, notice becomes a necessary part of it.

The cases in 3 Yerg. 330, 487, 4 Yerg. and 3 Humph. all decide that the guarantors of a bill or notice in the cases then before [306] the court were not entitled to notice, expressly upon the ground that the undertakings were positive and unconditional. All these cases are founded upon a case in 20 Johns. 366, which is also decided upon the ground that the undertaking was absolute; none of them conflict with the doctrine here contended for, but by implication recognize it. I know no case in which the question has been raised upon a guaranty, corresponding so exactly in terms and in meaning with the one now under discussion as the case of Grice v. Ricks, 3 Dev. 62, where it is decided that "notice in a reasonable time and before suit is indispensably necessary."

The doctrine of notice to guarantors is recognized in many cases not distinguishable in principle from the present. 7 Pet. 113; Chitty on Bills, 8th Am., from 8th Lond. ed., 321-4; 7 Cranch, 69.

The proposition is universally admitted that, if the maker of a note is good when the note falls due and afterwards becomes insolvent, a presumption of damage to the guarantor will arise, and must be rebutted by proof. Mr. Justice Story discusses this doctrine with great ability in his work on Bills, 305-373, and note. In the case at bar it is amply proved that Oliver was perfectly good when the note fell due, eight days after the guaranty was made.

Reese, J., delivered the opinion of the court.

This is an action of assumpsit brought by the plaintiff against the defendant upon a guaranty. In the declaration it is set forth that, in consideration the said James G. Woodson had sold a tract of land therein mentioned to

the defendant, he made and executed his instrument of writing, etc., in which he "guaranteed" the "collection" of a note executed by John W. Oliver for $154.10, due 1842, which was transferred to the plaintiff by R. W. Moody, in case it should not be collected from the maker, John W. Oliver, or the said R. W. Moody; and the declaration averred that the "amount due upon said note could not be collected from the maker or the endorser, and that the amount had never been paid by the maker or endorser; nevertheless, [307] the defendant, not regarding his said promise and undertaking, etc., has not paid, etc., although often requested, etc."

The defendant pleaded the general issue, upon which a trial was had, and the jury found a verdict for the plaintiff. The defendant moved in arrest of judgment, and the circuit court arrested the judgment.

The action of the circuit court was based upon the ground, as we understand, that the declaration, after stating the non-collection of the note from the maker and endorser, and the non-payment by them, should have alleged a promise, on the part of the defendant, to pay, and that the omission of such an allegation is fatal even after verdict. Of the instrument of guaranty we know nothing in this aspect of the question, except as it is set forth in the declaration. The defendant, according to that, guarantees the collection of the note in case it is not collected from the maker or endorser that is, he promises and binds himself to pay the amount of the note if it can not be collected from the maker and endorser; and the plaintiff avers it could not be collected, was not paid, and that the defendant had broken the promise obtained in the guaranty.

Do these circumstances and facts constitute only a defective title; or do they constitute a title which at the worst can be said to be only defectively stated? If the latter were the case, then the plea and the verdict would cure such defective statement. But we do not suppose that the statement of title to recover is even defectively set forth. For, where an action of assumpsit is brought upon an instrument which itself contains a promise or undertaking to pay, or some expression equivalent to a promise to pay, it is not necessary formally to set forth another prom-

ise resulting from the legal liability. See Chitty on Bills, 7th Am. ed., 352, 490, n. q. s.; 4 Term Rep. 149; Salk. 128; Stra. 214.

We see no just ground, therefore, for arresting the judgment.

2. The next question arises upon a bill of exceptions taken in the case, and is whether a new trial should be granted to the defendant for anything erroneous in the charge of the court. The court charged the jury that, to entitle the plaintiff to recover, he must show after the use of reasonable diligence on his part the amount of the note on J. W. Oliver could not be collected.

[308] The plaintiff was not bound to use the greatest possible diligence, but such as a prudent and vigilant man would bestow on his affairs. That the note not being negotiable, the endorser was not liable at all; and that, as to notice, the defendant was not entitled thereto, unless it appeared that he was prejudiced for the want of it. But, if the maker of the note guaranteed was solvent when the note fell due, the law would infer that the defendant was prejudiced; that such inference must be rebutted by proof showing that the defendant suffered no injury by not being notified; in which event no notice was necessary. That the point of time at which the defendant was entitled to notice, if Oliver was solvent when the note fell due, was within a reasonable time after the failure of the endorser to collect the note from Oliver and Moody was known, and not at the time the note fell due. In this charge we think there is no error of which the defendant can complain. In the case of Wilds v. Savage, 1 William W. Story, Justice Story, in one of those elaborate judgments, which reviews all the cases and exhausts the subject, sums up the matter involved in the above charge thus: "I take the doctrine to be well settled that, upon a guaranty to discharge the guarantor, there must not only be a want of notice within a reasonable time, but there must also be some loss or damage sustained by the guarantor, and that if there be a loss or damage, that the guaranty is not totally discharged, but only *pro tanto* to the amount of the loss or damage. The case is constantly distinguished in the authorities from

that of an endorser to negotiable paper. The latter is entitled to strict notice. The guarantor is entitled only to notice where he is or may be prejudiced by the want of it. If the debtor is solvent when the money becomes due and no notice is given to the guarantor, and the debtor afterwards, and before notice, becomes insolvent, the guaranty is discharged." The last expression in the above extract has relation to a case where the payment of the note, when it becomes due, is guaranteed, and does not apply to a case like that before us, where the guarantor does not become liable to pay at the time the note falls due in default of payment by the maker, but only becomes liable after a failure to collect by suit; then, if the maker be solvent [309] when the note falls due, the guarantor is entitled to notice within a reasonable time after the failure to collect by the use of due diligence has been ascertained; and that was the charge of the circuit court. In this part of it, therefore, or in any other, we see no just ground for reversal.

The judgment of the circuit court, therefore, in arrest, will be overruled; a new trial will be refused, and judgment be given upon the verdict.

DOYLE *et al.* v. GLENN.

NASHVILLE, DECEMBER, 1843.

EXECUTION—FAILURE TO RETURN—ISSUANCE OF ALIAS NOT A WAIVER OF RIGHT TO MOTION. The issuance of another execution is not a waiver of the right of motion against an officer for failing to return a previous execution, and is certainly no ground for coming into equity after a judgment by motion at law for the defeult. (Acc., upon the general principle of waiver, Barnes v. White, 2 Swan, 443; Wright v. Johnson, 3 Sneed, 410; Dunnaway v. Collier, 2 Heisk. 10; Smith v. Van Bibber, 1 Swan, 115, all citing this case. See, also, Kirkmans v. Rice, 4 Humph. 267.)

SUBROGATION—DEFAULTING OFFICER. A defaulting officer, in not making a proper return of an execution, has no equity to be subrogated to the rights of the creditor in the original judgment. (But his sureties are now by statute entitled to such subrogation after payment. Code, sec. 2994.)

[Cited in: 11 Heis., 756; 11 Pickle, 429.]

This bill was filed in the chancery court at McMinnville,