THE
AMERICAN LAW REGISTER.

FOUNDED 1852.

UNIVERSITY OF PENNSYLVANIA
DEPARTMENT OF LAW.

SUBSCRIPTION PRICE, $3.00 PER ANNUM. SINGLE COPIES, 35 CENTS.

Published Monthly for the Department of Law by A. CULVER BOYD, at S. W. Cor. Thirty-fourth and Chestnut Streets, Philadelphia, Pa. Address all literary communications to the EDITOR-IN-CHIEF; all business communications to the BUSINESS MANAGER.

STATUTE OF FRAUDS—PROMISE TO PAY DEBT OF ANOTHER.—*Hartley* v. *Sandford,* 50 Atl. 454 (Court of Errors and Appeals of New Jersey, November 15, 1901). It is a curious commentary upon the completeness of modern jurisprudence to discover in a state as old as New Jersey the declaration, made recently in its highest court of appeal, that the true character of an indemnity promise, given by a third party to a surety, was *res nova* and that the question must be decided purely upon principle. The case in which this matter at last presented itself to the New Jersey courts for adjudication is worthy of notice, not only because it involves a legal problem which, after more than a century's existence, still lacks a complete and final interpretation, but because it touches upon one of the most common occurrences in everyday business life.

Perhaps no portion of the famous Statute of Frauds has elicited such profound and profuse discussions or been the source of so many fine distinctions as that section which declares that "no action shall be brought to charge the defendant upon any

special promise to answer for the debt, default or miscarriage of another unless the agreement upon which the action is brought is in writing and signed by the party to be charged therewith."

This section constituted the defense in the present case and the court was called upon to decide whether or not a promise to indemnify a person for becoming surety for another was within the terms of the statute. The facts were simple. A creditor of the defendant's son required additional security, the defendant thereupon requested the plaintiff to become surety for the son, promising to reimburse him in case he should be called upon to meet the debt. The plaintiff, relying upon this parol promise, became surety for the son and having been compelled later to pay the entire debt brought this action against the father. The court finally held that recovery was impossible because the promise had not been reduced to writing. In the exposition, however, of its reasons for drawing this conclusion, the failure to make more than a mere reference to what is practically the crucial test in the matter leads to considerable misapprehension as to the true ground upon which the decision was made to rest.

To bring a promise within the statute certain elements have long been universally recognized as essential. Of these the first and most important is the existence of an obligation by a third person to the promisee. The liability assumed by the promisor must be merely collateral to this original obligation. It will be observed particularly that the obligation of the principal debtor as well as that of the promisor exists in favor of the same person, the promisee. Are these requirements satisfied in the case of an indemnity promise? Under the facts before us a promise by the father to the creditor himself to pay the debt, if his son should fail, would clearly have been within the rule. But as it was, the defendant did not promise the plaintiff to pay him a debt due *to* him, but rather to reimburse him for a sum which might be paid *by* him to an outside party. The obligations of the principal debtor and the promisor apparently therefore fail to meet in the same individual and the one can scarcely be considered as collateral to the other. This is the view which now seems to prevail in England and a majority of the American jurisdictions, including the United States Supreme Court, all the New England states, New York, Indiana, Iowa, Wisconsin, Kentucky and Georgia: *Guild* v. *Conrad*, 2 Q. B. 885 (1894); *Tormsley* v. *Sumrall*, 2 Peters, 170 (1829); *Jones* v. *Bacon*, 145 N. Y. 446 (1895); *Anderson* v. *Spence*, 72 Ind. 315 (1880); *Smith* v. *Delaney*, 64 Conn. 264 (1894); *Barth* v. *Graf*, 101 Wis. 27 (1898); *Deweritt* v. *Bickford*, 58 N. H. 523 (1879).

The implication of a promise on the part of the principal debtor to repay all moneys advanced on his behalf by his surety and the weight attached to this promise seem to mark the parting of the ways for the two lines of cases. It must be admitted

that some confusion exists among those which hold the promisor upon his oral promise. In *Holmes* v. *Knights,* 10 N. H. 175 (1839), it was said that the existence of an implied promise would not prevent the surety from proceeding against the parol promisor who was bound by an express agreement. Elsewhere the very existence of the implied promise is denied on the ground that the mere assent of the principal debtor to another, acting as his surety, as distinguished from any request or promise, is insufficient to raise an implied promise, especially when there was an express promise by a third party in consideration of the suretyship. Indeed, as was suggested, it is perfectly possible that the surety had been applied to first by the debtor himself and had refused to act. His change of position, based entirely on the promise received from the promisor, indicated clearly an original undertaking in spite of the debtor's assent, which the circumstances rendered necessary. The leading text-book writers also accept the doctrine that a promise to indemnify for becoming surety for a person, other than the promisor, is not within the statute: 3 *Parsons' Contracts,* 6th Ed. 21 n.; *Roberts on Frauds,* 223; *Throop's Verbal Agreements,* Sec. 361.

In spite of the authorities with which this view of the question is supported, other jurisdictions do not hesitate to arrive at an absolutely different conclusion. The promise of the principal debtor to reimburse his surety is implied at all times and an absolute presumption is raised that the promise made by the promisor was in contemplation of this contingent obligation between the principal and the promisee. This doctrine is presented with remarkable clearness in the case of *May* v. *Williams,* 61 Miss. 126 (1883). The court there said that, at the moment the bond is executed, the implied contract of the principal to indemnify his surety springs up and the obligation of the promisor immediately becomes collateral thereto. This was, in spirit, the reasoning pursued by the New Jersey court in the case now under discussion. Pennsylvania, Illinois, Missouri, Alabama and the Carolinas are in accord: *Nugent* v. *Wolfe,* 111 Pa. 471 (1886); *Hurt* v. *Ford,* 142 Mo. 283 (1897); *Spear* v. *Farmers Bank,* 156 Ill. 555 (1895); *Martin* v. *Black,* 20 Ala. 309 (1852).

Where there is such a hopeless conflict in the authorities, a reconciliation is scarcely possible, yet the suggestion made by Mr. Parsons that the court should look always at the intentions of the parties and the expressions used by them to decide whether the promise is original or collateral, contains much merit.

If followed, when practical, it would frequently eliminate many of the hardships flowing from the ironclad rule just adopted in New Jersey. Certainly in this case the decision would have been different. The promisor may be looked upon as having said to the promisee, "In case you are called upon to pay this

debt, come at once to me. I promise to reimburse you." No thought of any other intervening liability existed for a moment in the mind of either party. In spite of this fact the court implied the obligation of the principal to his surety as a matter of law and, proceeding upon the old maxim that all men are presumed to know the law, this obligation was deemed to have formed an integral part of the promisor's contemplations. Perhaps this is theoretically correct, but its adoption must inevitably mean in a great number of cases a triumph of logic at the expense of justice.

A. A., Jr.

WOMEN—RIGHT TO ADMISSION TO THE BAR—REFUSED.—*In re Maddox,* 50 Atl. 457 (Court of Appeals, Maryland), Nov. 21, 1901). The decision in this case amounted to a refusal of the Court of Appeals of the State of Maryland to admit a woman to the state bar. The application was based on two grounds: first, that the right to practice law is a natural right inherent in all and cannot be abridged by legislation; second, that under the Code the word male included female, and therefore any woman possessing the specified qualifications must be admitted.

The court answers the first contention by citing the cases of *In re Taylor,* 48 Md. 28, and *Bradwell's Case,* 16 Wall. 142, in which it was held that the right to practice law is not one of the privileges and immunities guaranteed by the Fourteenth Amendment of the Constitution to citizens of the United States. The power to regulate the admission of attorneys is one belonging to the state, not to the Federal Government. This belongs to the police power of the state. The previous status of women at common law has made it evident that the profession of law has never been one of their natural rights.

The authorities are too clear to require any comment and however much we may say as to the ability of women to practice law at the present day, we cannot criticise Mr. Justice Bradley's opinion that in the past the profession of law has not been regarded, by society or at common law, a natural occupation for the sex.

The second ground for application is under the Code of Maryland, which provides that any male citizen possessing the specified qualifications shall be admitted to practice law. Another article of the Code declares that the masculine gender includes all genders except where such construction would be absurd or unreasonable.

The question then becomes this, whether it would be absurd and unreasonable to construe the word male to include female when applied to attorneys-at-law.

The court takes the ground that it would; because women were

not allowed to practice law at common law, and had been allowed to hold the public offices only of queen and overseer of the poor, without express authority by statute.

It is submitted in objection to this view that though the fact is established that no woman ever was admitted to practice at the English bar, yet it does not appear that any woman ever asked permission to practice there. It can hardly be of weight as an argument that no woman was ever permitted to practice when the question has never even been raised nor passed on one way or the other.

In America, however, there are many instances where different conditions have given rise to a different growth of the common law. In this country women have been admitted to the bar and have been practicing successfully for many years, which so alters the case that the condition of affairs in England can hardly be cited with fairness. In connection with this view we may cite an Indiana case, *Re Leach,* 21 L. R. A. 701, in which the court said, "Whatever the objections of the common law of England, there is a law higher in this country, and better suited to the rights and liabilities of American citizens, that law which accords every citizen the natural right to gain a livelihood by intelligence, honesty and industry in the arts, the sciences, the professions or other vocations."

We may also cite an extract from a very able opinion by Judge Thayer, of the Common Pleas Court of Philadelphia County, *In re Kilgore,* 14 W. N. C. 470.

"If there is any longer such thing as what old-fashioned philosophers and essayists used to call the sphere of woman it is, it must be admitted, a sphere with an infinite and indeterminable radius. . . . It is to me surprising that any one should speak with apprehension of an impending social change by which women are to seek fortune and fame in fields which were formerly denied them. Such persons should awake from their slumbers. The revolution is over. It was so gradual that perhaps you did not observe it, or note the several steps of its progress. But it is over."

It is submitted that in view of the fact that women were in 1886 admitted to practice in Iowa, Missouri, Michigan, Utah, District of Columbia, Maine, Ohio, Illinois, Wisconsin, Indiana, Kansas, Minnesota, California, Connecticut, Massachusetts, Nebraska, Washington, Pennsylvania, Colorado, New York, the Supreme Court of the United States and now are admitted in New Jersey, and probably would be in other states where no test case has arisen, that it would not be a forced construction of the Code to hold it to include females as applied to attorneys.

The learned judge has cited to support his opinion *Robinson's Case,* 131 Mass. 376, which was decided under a statute admitting "citizens" to practice if properly qualified. This case was

decided in 1881 and before any woman had been admitted in any state under a direct decision of the highest tribunal of the state.

He also cites *In re Goodell,* 39 Wis. 232, which was decided as early as 1875, and *In re Lockwood,* 154 U. S. 116, decided in 1873, and *In re Stoneman,* 53 Am. Rep. 323, not later than 1885, a New York case in which the statute using the word male was held not to include female.

The question has always been one of interpretation, and interpretation which must be guided by the sentiment of the community at the time of rendering the decision. As a number of judges have remarked, the pronoun "he," when used in criminal statutes, has always been held to apply equally to women, for women have always been considered as liable to prosecution and conviction for crime as are men, so in constitutions and general statutes the pronoun is invariably used to include both sexes, and even the word male is often so held.

The first woman was admitted to the bar in Iowa in 1869, but there were very few women attorneys until about 1890, when the number began to increase rapidly. It follows from this fact that the early decisions have very properly held that in the case of attorneys the word male, or even the word citizen, did not include women.

But even in the earlier days, in California, *Foltz* v. *Hoge,* 54 Cal. 28 (1879), in Connecticut *In re Hall,* 50 Conn. 131 (1882), and in Pennsylvania *In re Kilgore,* 14 W. N. C. 466 (1883), the statutes concerning the admission of attorneys were held to include women.

The question has always been a debatable one until within the last few years; but we can but feel, with Judge Thayer, that at the present day it is no longer open for dispute; and the fact that women are practicing law in the majority of states in the Union should be taken into account in construing any statute relating to the matter.

In conclusion the Maryland court decides that it being the case that women cannot be admitted to the state bar as citizens, they cannot for the same reason be admitted though they be practicing lawyers in another state. This seems a fair conclusion from the prior argument, and the only logical way to carry out the views of the court.

The whole opinion is an illustration of the conservatism of the Maryland bench and we can but feel that it will not be long before the legislature will alter the statute and so fall in line with the other states, which, when there has been a decision adverse to the admission of women, have invariably and without delay (in the case of Massachusetts within a year), made an alteration in the statute, which would admit women on an equal footing with men.

F. A. K.