

of risk, delay and expense." The same principle has been affirmed by the Court of Appeals of this state, in the case of *Sasscer vs. Young & Kemp*, 6 *Gill & Johns.*, 243, and has been sanctioned by the Court of Errors of New York in 17 *Johns. Rep.*, 384. See also 1 *Story's Equity*, section 327, and 2 *Story's Equity*, section 849, and *King vs. Baldwin*, 2 *Johns. Ch. Rep.*, 561, 562.

In the case of *Sasscer vs. Young & Kemp*, the Court of Appeals, in speaking of the privileges of sureties, and the mode by which they may protect themselves from loss, say, that after they become chargeable by a forfeiture of the contract or its non-performance by the principal, in the manner and at the time agreed upon, may ensure a prompt prosecution, either by discharging the obligation and becoming by substitution entitled to all the remedies possessed by the creditor, or they may cause the creditor to proceed by an application to a court of equity. But the bond upon which the surety in this case rests his right to the interposition of the court in his favor by compelling the principal debtor to pay the debt, is not a bond for the payment of money at all. It is a bond with a collateral condition, and until the condition is shown to be broken, and the damages by the breach ascertained, nothing can be said to be due upon it. It is very true that the record in the case in which Durkee was appointed trustee does not show a compliance on his part with his duty as such, but it may, nevertheless, be, that he has paid the money received by him to the persons who were entitled to it, and the fact that they have never complained, although five years have elapsed since the sale, is a circumstance not without weight in speculating upon the subject. It cannot readily be supposed, that these parties would have waited for five years if they had received nothing from the trustee for the property sold by him. That a part of the money, at least, has been paid, is fairly inferrible from the petition filed in 1849, for the appointment of trustees to complete the trust, it being in that petition stated, that Durkee had died without paying over *all* the money received by him as trustee.