deems advisable at any time before the maximum period for which the defendant might originally have been sentenced has expired.

Another possible construction which may be put upon the statute is that which the court in the instant case adopted. See page 570: "The provisions of the act were exhausted when probation was revoked and 'such sentence imposed as might originally have been imposed.' " The court felt that the twelve months' sentence was final in the same way that all criminal sentences were before the probation act and that the court had, therefore, no power to change the sentence after the term at which it was imposed had elapsed. *Ackerson v. United States*, 15 F. (2d) 268 (C.C.A. 2d 1926); *Scalia v. United States*, 62 F. (2d) 220 (C.C.A. 1st 1932).

A third possible interpretation of the language of the act is that contended for by the government in *United States v. Antinori*, 59 F. (2d) 171 (C.C.A. 5th 1932), to wit, that although the act gave the court the power to revoke probation and impose execution of sentence after the term had expired, still the court could not alter the sentence which it had originally imposed. Due to the fact that much of the effectiveness of the probation proceedings depends on the sentence hanging over the head of the defendant and that for this reason the courts impose heavier sentences than they would if the defendant were not to be put on probation, this would work a hardship on the defendant or would hamper the effectiveness of this remedy as administered by the court. Because this is remedial legislation and entitled to liberal interpretation and because this view would seriously prejudice the effective achievement of the purpose of the statute, it is believed that such a construction would be undesirable and palpably inconsistent with the general purposes of the act.

The middle ground of the possible constructions mentioned herein (the one which the court in the instant case adopts) would seem to be the best. The words of the statute do not lend themselves very happily to the construction that the court is empowered to change the sentence when the defendant is no longer on probation, unless the words are expressive of very general powers, but such an interpretation seems to be at least a strain on the language employed by Congress. The salient effect of probation, however, depends so greatly on the indefinite and intimate phenomena of which the trial court is exclusively cognizant that much may be said for the contention that the trial court should be able to control the prisoner up to the time when he is either discharged or actually incarcerated, expiration of terms notwithstanding. The writer feels, however, that such power must come from supplementary legislation and that the court took the most reasonable and most easily justified of the possible constructions available.

CHARLES GRAYDON MEGAN

Suretyship—Liability for Default of Infant Principal—Damages—[Indiana].—Infant vendee of an automobile disaffirmed his conditional sales contract, returned the chattel, and recovered the amount paid to the vendor, who now claims against the sureties on the vendee's purchase note. *Held*, that the vendor should recover the amount of the note (which was substantially the contract price) and that title to the car should pass to the sureties when the note or judgment is paid. *McKee v. Harwood Automotive Co.*, 183 N.E. 646 (Ind. 1932) affirming 162 N.E. 62 (Ind. App. 1928).

Where a person *sui juris* guarantees the obligation of, or becomes surety for a minor, the surety is bound although the principal is not. *Keokuk County State Bank v. Hall,* 106 Iowa 540, 76 N.W. 832 (1898); *Winn v. Sanford,* 145 Mass. 302, 14 N.E. 119 (1887); *Perkins Goodwin Co. v. Hart,* 83 N.J.L. 471, 83 Atl. 877 (1912). This exception to the general rule that the release or discharge of a principal releases the surety is because the defense of incapacity to contract is personal; the validity of the contract is not affected thereby; and because of the basic reason that the creditor required a surety to assure performance in case the principal disaffirmed. *International Text Book Co. v. Mabbott,* 169 Wis. 423, 150 N.W. 429 (1915); Arant, Suretyship (1931), 170, § 47; 11 Iowa L. Rev. 394 (1926). A number of courts, however, qualify that position. If the infant principal returns the consideration on disaffirmance the surety is not liable to the creditor, they say, for the latter is put in *statu quo,* the consideration of the promise has failed, and the contract under which the surety is liable is at end. *Nations v. Gregg,* 290 Fed. 157 (1923); *Lungequist v. Bakers Bond and Mtg. Co.,* 201 Iowa 430, 205 N.W. 977 (1925); *Baker v. Kennett,* 54 Mo. 82 (1873); *Evants v. Taylor,* 18 N. M. 371, 137 Pac. 583 (1913); *Kyger v. Sipe,* 89 Va. 507, 16 S.E. 627 (1892).

But it would seem that there is no failure of consideration since the creditor's promise to convey or deliver property to the infant is consideration for the surety's promise. Furthermore the creditor has usually performed, and although the infant returns all that he received under the contract the creditor is not only deprived of the benefit of his contract, but ordinarily is not, because of depreciation, placed in *statu quo.* Arant, *op. cit.;* 11 Iowa L. Rev. 394 (1926). Releasing the surety from liability is contrary to the intent of the parties and to business practice.

There is a modern tendency among the courts to hold that an infant who rescinds a contract for personal property and sues to recover payments must be charged for depreciation or use of the property while in his possession. *Meyers v. Hurley Motor Co.,* 273 U.S. 18, 47 Sup. Ct. 277 (1927); *Murdock v. Fisher Finance Corp.,* 79 Cal. App. 787, 251 Pac. 319 (1926); *Sparandera v. Staten Island Garage,* 193 N.Y.S. 392, 117 Misc. Rep. 780 (1921); *Gaither v. Wallingford,* 101 Ore. 389, 200 Pac. 910, 50 A.L.R. 1187 (1921); contra *Rice Auto Co. v. Spillman,* 280 Fed. 452 (1922); *Creer v. Active Auto Exchange,* 99 Conn. 266, 121 Atl. 888 (1923); *Utterstrom v. Kidder,* 124 Me. 10, 124 Atl. 725 (1924); *Godfrey v. Mutual Finance Corp.,* 242 Mass. 197, 136 N.E. 178 (1922); *Greensboro v. Palmer,* 185 N.C. 109, 116 S.E. 261 (1923); *Mast v. Strahan,* 225 S.W. 790 (Tex. 1920). Under the first view the creditor would always be placed in *statu quo* and the surety would be released since the chattel and the amount paid for depreciation or use by the infant would equal the original article. If the court refused to require the infant to deduct for depreciation or use, then the surety could be required to pay the difference between the present value of the chattel at the time of the rescission and the contract price. But requiring the infant or the surety to pay the depreciation does not compensate the creditor for the loss of performance of the contract which is the purpose of requiring a surety. This objection is a very pertinent one and if considered weighty enough is sufficient in itself to warrant a court holding that a surety should pay the creditor the contract price and minimize his loss by selling or using the article which he would obtain by subrogation. 2 Calif. L. Rev. 337 (1914). In this manner the creditor would receive full performance of the contract. This is the position taken by the principal case.

However, to require the surety to take the chattel seems an unnecessary and undesirable hardship. In the main case the creditor was in the business of selling automobiles. He not only knew of people desiring to purchase cars, but prospective purchasers sought him. He was in a far more advantageous position to sell the car than the surety would be. Though it may be a burden for the creditor to re-sell the automobile, this works much less hardship than requiring the surety to attempt to dispose of it. The creditor should sell the car, at a forced sale if necessary, and then recover the difference between the sale price and the contract price from the surety. If the surety objects to this result he may pay the creditor the contract price and receive the chattel in return. Otherwise the chattel is disposed of within a reasonable time and the entire transaction reduced to an element of damages. If the article is held for a period of time (in the main case it was six years), the article may greatly depreciate or even become practically worthless. If the creditor sells the chattel soon after the repudiation by the infant he eliminates the loss without any injury to himself, by recovery from the surety of the difference, if any. The burdens of the complicated situation are apportioned and a result most equitable to all parties is reached. Cf. 4 Ind. L. Jour. 206 (1928).

CARL S. POMERANCE

Suretyship—Pro Tanto Subrogation—[Indiana].—Intervenor as surety for *X* bank, a public depository, gave bond for $10,000 which provided that if, on the principal bank's default, the amount paid by the surety did not equal the full amount of the principal's obligation to the obligee, then the surety should not participate in dividends out of the assets of the principal bank until the balance of the obligee's claim was fully satisfied out of such dividends. The *X* bank became insolvent. The plaintiff township board had $11,481.26 on deposit. Intervenor paid its full bonded liability to the plaintiff who assigned in writing to intervenor the plaintiff's claim against the bank to the extent of $10,000. The plaintiff filed a claim in the *X* bank receivership for $1,481.26, and the surety filed an intervening petition in said receivership asserting a right to share proportionately with other creditors in the distributive dividends to the extent of its claim. The trial court upheld the claim of intervenor. *Held*, on appeal, reversed. *Washington Township Board of Finance v. American Surety Company of New York et al.*, 183 N.E. 492 (Ind. App. 1932).

The overwhelming weight of authority states as a general proposition that a surety has no right of subrogation until the claim upon which he is surety has been paid in full or the creditor is completely satisfied. 2 Williston, Contracts (1920), 2306, § 1269; 9 A.L.R. 1596–1607; 25 R.C.L. 1318, § 6; 37 Cyc., Subrogation, 408–409; 60 C.J., Subrogation, 719–721, §§ 28, 29; Sheldon, Subrogation (1893) 190, § 127; Arant, Suretyship (1931), 359, § 79; see also 29 Mich. L. Rev. 753–757 (1931); 37 Harv. L. Rev. 392–393 (1924).

Except for the written assignment following the payment by the surety on its bond, the present case is similar to many other applications of the general rule. *Board of Health v. Teutonia Bank and Trust Company et al.*, 137 La. 422, 68 So. 748 (1915), Ann. Cas. 1916B, 1251; *Banking Commissioners v. Chelsea Savings Bank*, 161 Mich. 691, 125 N.W. 424 (1910), affirmed on rehearing, 161 Mich. 704, 127 N.W. 351 (1910); *Knaffl v. Knoxville Banking and Trust Company*, 133 Tenn. 655, 182 S.W. 232 (1915), Ann. Cas. 1917C, 1181, see also note on 1183; *Blair v. Board of Education of Prairie Township*, 38 Ohio App. 303, 176 N.E. 99 (1930).