RELEASE OF SURETIES

Applicability of English Law

The perennial problem with the application and interpretation of the Contracts Act has always been the extent to which English decisions and English principles may be resorted to. Though the long title to the Act says it is to "define" and "amend" the law of contract it does not say in what respects and what law it defines and in what respect of what law it amends. It has always been thought, despite the absolute of lack of mention in the text, that it adopts with modifications in some instances the rules of English law.

The Contracts Act deals with many aspects of the law of contracts — general principles as well as of particular contracts. This paper deals with guarantees[1] and in particular the release of liability and loss of rights and benefits by unilateral action. The traditional rule has been that the Act is not a code and, therefore, not exhaustive.[2] The Courts had from time to time exhorted that in dealing with statutes incorporating common law principles it is the text of the statute that must ultimately prevail and not the decisions at common law.[3]

The question whether the provisions of the Act relating to guarantees can be contracted out or not has been decided authoritatively. The Federal Court in *Heng Cheng Swee* v. *Bangkok Bank*[4] upheld as valid the provisions in a guarantee providing for variation of the terms of the contract between the principals without notice to the guarantor following English decisions. The Privy Council too has accepted that view in *Ooi Boon Leong* v. *Citibank*.[5] There it was argued that the provisions in the Act cannot be contracted out. The Board adverted to the conflicting position in India[6] and the rule that the Contracts Act did no more than enact particular general principles of the common law and those applicable to particular contracts. It permitted contracting out except where it was expressly prohibited — such as those relating to illegality.[7] This point had

[1] Sections 77-100, Contracts Act 1950.

[2] See Sinnadurai, *The Law of Contract of Malaysia & Singapore, Cases And Commentary* 14-15 (O.U.P).

[3] *Graham* v. *Krishna* (1924) LR 52 I.A., 90, 92, per Lord Sumner. See also *Satyaboota Ghose* v. *Mugnueram Baugur* AIR 1954 SC 44, 47, and *Kapurchand Godha* v. *Mir Nawab Himayatoli Khan of Zamjeh* AIR 1963 SC 250, 254.

[4] [1976] 1 MLJ 267 (FC).

[5] [1984] 1 MLJ 222 (PC).

[6] *Ibid.* 225 per Lord Brightman.

[7] *Ibid.* 226.

been raised in the course of arguments in *Pratapsingh Moho Lebhai* v. *Keshavlal Harilal Setalwad*[8] in 1934 but Lord Atkin who delivered the judgment avoided the issue. But the board had decided in an earlier Indian appeal, *Hodges* v. *Delhi & London Bank*[9] that Section 133 of the Indian Contracts Act (corresponding to Section 86 of the Malaysian Act) had imported the English rule without qualifications. In *Mahant Singh* v. *U Ba Yi*[10] Lord Porter declared that S. 134 and S. 139 of the Indian Act were "merely declaratory of what the law of England was and is".[11] These dicta undoubtedly forestall any argument that the Act is exhaustive, and cannot be contracted out.

Departures From English Law

Nevertheless there are two fundamental distinctions:

(a) The contract of guarantee under the Act, unlike in English law, need not be in writing; it can be oral. More often than not the guarantees are in writing. When the parties voluntarily adopt writing as a means of contracting then they are deemed to have adopted the English rules applicable to such instruments, however much they disliked them or did not intend them to apply.[12]

(b) The liability on a joint guarantee, unless otherwise specifically provided, is joint and several and, therefore, Section 91 of the Contracts Act provides that a release of a joint-guarantor does not release the co-guarantors. This is a necessary consequence of Section 45 of the Act which departs from the rule of the common law as to joint-contractors in *Kendall* v. *Hamilton*[13]. MacIntyre J. in *Sing Bok Yoong* v. *Ho*

[8](1934) LR 62 I.A. 23. Jinnah, counsel for the creditor argued at 25: "The English decisions with regard to the liability of a surety cannot be applied; it cannot be assumed that the Indian legislature intended to adopt the law of England without alteration." For the surety, Mr. (later Lord) Upjohn, K.C. argued (at 26): "The Indian Contract Act is not exhaustive even in respect of the classes of contracts it deals. In the absence of any provision to the contrary, the well established rule of English law that a variation of a contract between the principal debtor and creditor discharges the security applies in India."

[9](1939) LR 66 I.A. 198, 208.

[10](1900) LR 27 I.A. 168.

[11]Corresponding to Sections 87 and 92 Contracts Act, 1950.

[12]This principle extends also to the decisions in relation to renunciation of rights on a bill of exchange — Sec. 62 Bill of Exchange Act 1882 (UK) (Corresponding to S. 62 of the Malaysian Act, 1949). The rule was held applicable where parties resorted to the use of cheques in family arrangements. "It seems unjust that the law of commerce and bill of exchange should apply to such private non-commercial transactions but if people choose to employ the practice of commerce they must accept the law that goes with it": *Macmillan* v. *Macmillan* [1975] 2 W.W.R. 156 (Sask. Q.B.; per Macpherson J.) affirmed (1977) 76 DLR (3d) 760 (Sask. CA). See also *Re George* (1890) 44 Ch.D. 627, 631-32 per Cotton L.J.; *Edwards* v. *Walters* [1896] 2 Ch. 157, 172 per Kay L.J. In a more recent decision, Fox L.J. dealt with a similar problem in terms of benefit and burden in another context. "If persons choose to take advantage of the benefits of incorporation with limited liability they must accept its disadvantages": *Williams & Humber* v. *W&H Trade Marks*, [1985] 2 All E.R. 619, 628 (CA).

[13](1819) 4 App. Cas. 504 (HL).

Kim Poui[14] expressed surprise that Section 91 was not referred to at all at the trial in that case. However, it is open to the parties to provide for or adopt expressly the English rules.

Definition of Guarantee

The definition both in English law and under the Contracts Act remains the same. A surety or guarantor assumes liability to answer for the debt or default or miscarriage of another i.e. secondary and not primary liability.[15] The distinction has been made in two local cases. In *P.K.N.S.* v. *Public Bank*[16] Azmi J. said following an Indian case[17]

> . . .the guarantee is not given for the plaintiffs' as alleged by the defendant, but for the benefit of the principal debtor [Beton] because without it Beton would not be able to commence work and would be deprived of the benefit of the contract. . .
>
> . . .the guarantee is in the nature of a collateral engagement to answer for the default or miscarriage of another as distinguished from an original and direct engagement for the parties own act.

A chargor who secured the payment of the debt of another was held to be primarily liable and not as a guarantor in *Kong Ming Bank* v. *Leong Ho Yuen*[18]by the Federal Court. The question was one of construction. The court adopted the language of Section 79 of the Act.

> . . .A contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in the case of his default. . . The respondent by the charges is not in the position of surety or in the second degree for default of the company. The promise to pay is made by the respondent in consideration of the bank granting accommodation to the company.[19]

The object of a person becoming a surety was to provide the principal debtor a service.[20]

[14][1968] 1 MLJ 56.

[15]The distinction was first made in *Pool* v. *Tatlock* (1799) 1 Bos. & Pul. 419; 126 E.R. 987 (. . . the defendant was not bound to pay the money in case Goodrich should not pay it; but was bound absolutely to pay for his deficiency. . .). *Clarke* v. *Henty* (1838) 3 Y & C Exch. 187; 188; 160 E.R. 667, 668 ("in the nature of things the father was surety for his son"; the father had promised to pay the son's debt).

[16][1980] 1 MLJ 172, 175 affirmed [1980] 1 MLJ 214 (FC).

[17]*Ram Narain* v. *Harisingh* AIR 1964 Raj. 76.

[18][1982] 2 MLJ 111 (FC).

[19]*Ibid.* at 112, per Syed Othman F.J.. The Court added "All indications are that the respondent is related to the company. The address of the respondent is the same as that of the company". With respect, these observations are irrelevant and cannot establish that the respondent undertook the primary liability. They are equally, if not more, consistent with he being a guarantor.

[20]*Piddock* v. *Bishop* (1825) 3 B & C 605; 612; 107 E.R. 857; 860, per Littledale J.

The Origins of Suretyship

The problem arose originally with bills of exchange which were held to be accomodation bills. These had been litigated before the court of law and equity. Ultimately the rule in equity prevailed — that notwithstanding what was on the face of the document a joint debtor or drawer could claim that he was a surety. So the problems became common to both equity and law. To provide certainty common answers were desirable and necessary.

From the late 18th century the opinion has been that the rules of law and equity were the same as to the discharge of a surety,[21] a view that has been upheld by the Privy Council.[22] The doctrine originated in equity and was imported into the common law both according to the cases at law[23] and equity.[24] The courts had adopted a different principle largely because the common law had never recognized parol agreements as to time thus forcing the debtors to the Chancery.[25] Equity decisions in these matters were respected.[26] The adoption by the common law of this equitable principle did not extinguish the jurisdiction of the courts of equity.[27]

The doctrine and its application were of importance to the mercantile world.[28] Equity proceeded on the basis of justice and certainty.[29] This was

[21] *Jackson* v. *Duchaire* (1790) 3 T.R. 551, 552; 100 E.R. 727, 728 *per* Ashhurst J., *Strong* v. *Foster* (1855) 17 C.B. 201; 215; 139 E.R. 1043, 1053 *per* Jervis C.J.

[22] *Black* v. *The Ottoman Bank* (1862) 6 L.T. 763 (PC); an appeal from the then newly constituted court at Constantinople.

[23] *Orme* v. *Young* Holt N.P.C. 84, 86 "this defence is borrowed from a court of equity" *per* Gibbs C.J.; *Philpot* v. *Briant* (1828) 4 Bing. 717; 720; 130 E.R. 946, 947, "This equitable doctrine in courts of law have applied to cases arising on bills of exchange" *per* Best C.J.; *Bailey* v. *Edwards* (1864) 4 B. & Sm. 761, 772; 122 E.R. 645, 650, "The principle has been imported from the courts of equity into those of law" *per* Blackburn J.

[24] *Samuel* v. *Howarth* (1817) 3 Merr. 272; 36 E.R. 105 ". . . now adopted in courts of law — I say *now* because the Court of Common Pleas formerly held a different doctrine. But at present it is established that the same principles which have been held to discharge the surety will operate to discharge him also at law," *per* Lord Eldon.

[25] *Combe* v. *Woolf* (1832) 8 Bing. 151, 161, 132 ER 360, 362. "Where a surety had entered into such a bond, and by parol agreement time has been given to the principal, the surety is compelled to resort to a Court of equity because by rules of law a parol agreement cannot be pleaded in discharge of an instrument under seal" *per* Tindal C.J.

[26] In *Phillips* v. *Foxall* (1872) L.R. 7 Q.B. 666, 682, Blackburn J. said of the judgment of Malins V.C. in *Burgess* v. *Eve* (1872) L.R. 13 Eq. 450: "what he says is not. . . strictly binding upon us. . . But it seems to me consistent with justice. . . we should follow the opinion of the Vice-Chancellor on a subject with which he is so much more familiar than we are."

[27] *Hawkshaw* v. *Parkins* (1819) 2 Swan. 539, 546; 36 E.R. 723, 735. ". . . the recent adoption of that doctrine, by courts of law will not exclude the concurrent jurisdiction of the court," *per* Lord Eldon; Eyre v. *Everett* (1826) 2 Russ. 381, 382; 38 E.R. 379, 380: The jurisdiction of the court of equity was not ousted "because a court of law happens to fall in love with the same or similar jurisdiction" *per* Lord Eldon L.C.

[28] *Peel* v. *Tatlock* supra at 421 (E.R. 988) *per* Erle C.J.

[29] *Ex p. Smith* (1789) 3 Bro. C.C. 1, 4; 29 E.R. 370, 372 ". . .it is much better and more convenient in practice, to have a precise rule to go by; and justice will, in general, be better done to all parties," *per* Lord Thurlow, L.C.

adopted as the basis at common law too;[30] but there were doubts expressed on the 'justice' of the principle when a surety is discharged even where no injury or injustice was done to him.[31] Such doubts did not prevail.[32] The surety became the subject of favour both of law and equity;[33] probably because he derived no benefit from the action of the creditor and the principal debtor.[34]

The theoretical analysis and justification for the doctrine has not been uniform or identical. That must be so. Both equity and the common law were applying the doctrine within the framework of their respective principles. In equity the doctrine originated from the mortgages — that there can be no clog on the equity of redemption[35]: by postponing the date of payment the redemption was prevented. This was true only of third party mortgages for they were in substance guarantees.

There was also a related principle in equity — a party can apply to the court to prevent injury being done to him; the *quia timet* proceeding.[36] By that the surety can come to court to compel the debtor to pay up.[37] He was by rules of equity entitled to be subrogated to the rights of the creditor, that is by paying the debt he stands in the position of the creditor. Therefore he can compel the creditor to sue the principal debtor, a right very seldom exercised because of its practical limitations.[38] As between co-sureties

[30] *Tybus* v. *Gibbs* (1856) 7 El. & B. 902, 914; 119 E.R. 1100, 1104. ". . . seems to depend on broad principles of justice" *per* Coleridge J.; *The Guardian of Portsea Island Union* v. *Whillin* (1860) 6 Jur. N.S. 887, 889 *per* Cockburn C.J. ". . .in justice and law his responsibility ceases."

[31] *Pollak* v. *Everret* (1876) 1 Q.B.D. 669, 674 *per* Blackburn J.

[32] *Ibid.* 671 *per* Mellor J. ("not sure if rule does not proceed upon high grounds of policy and convenience"); 677, *per* Quain J. ("it is a thoroughly sound and safe principle").

[33] *In re Sherry, London & County Banking* v. *Terry* (1884) 25 Ch. D. 692, 703 *per* Lord Selborne L.C.

[34] *Ex p. Wilson* (1805) 11 Ves. Jun. 410, 411; 32 E.R. 1145, 1146 "that if the drawer could come upon the acceptor afterwards, the acceptor does not receive any benefit by the composition."

[35] *Ranelaugh* v. *Hayes* (1683) 1 Vern. 190; 23 E.R. 405; 1 Eq. Ab. Cas. 79; 21 E.R. 892. ("unreasonable that a man should always have a cloud hang over him").

[36] *Mitford on Pleadings* (5th Edn.) 171-72: "A court of equity will also prevent injury in some cases by interposing before actual injury has been suffered by a bill sometimes has been called a *quia timet* in analogy to proceedings at law. Thus a surety may file a bill to compel the debtor on a bond in which he has joined to pay the debt when due, whether the surety has actually been sued for it or not."

[37] *Ibid., Acherson* v. *Treadgar Dock & Wharf Co. Ltd.* [1909] 2 Ch. 401; 406. "It has been the law of the court for very many years that a surety is entitled to come into equity to compel the principal debtor to pay what is due from him to the intent that the surety may be relieved" *per* Swinfen-Eady J.

[38] *Bailey* v. *Edwards* (1864) 4 B. & Sm. 761, 776-77; 122 E.R. 645; 649. "The principle upon which the courts of equity have proceeded appear to be this: a surety. . . has a right in equity to call upon the creditor to enforce all his, the creditor's remedies against the principal debtor for the surety's benefit and at the surety's risk and expense. No doubt a court of equity would put the surety under terms to give indemnity to the creditor before it would enforce this right, and consequently the right which the surety has is of very little practical value, and is seldom, if ever, exercised. Still the surety has the right, and if the creditor wilfully deprives the surety of this right he so far alters the surety's position" *per* Blackburn J.

there was the right to contribution,[39] another exclusive preserve of equity[39a] though a claim has been asserted faintly that it was also part of the jurisdiction at law.[40] These rights were vested in the surety.[41]

The Variation Principles

It was argued in equity that the giving of further time operated as a variation of the contract between the creditor and the principal debtor — resulting in a new contract.[42] Lord Thurlow agreed that it was a new bond and he put it on the basis that the creditor had by his conduct *disabled* himself from bringing an action agaisnt the debtor. In actual fact none of the other equity cases had proceeded on this principle. The fraud-based theory originated at common law. Common lawyers had attributed fraud as the basis for equitable intervention.[43]

At common law, the fraud-based theory, flowed from the fact that the composition agreements with creditor had just been recognized as valid and that it was a fraud on the part of such creditor to proceed against the

[39]The right to contribution among sureties is not founded in contract, but is the result of general equity on the ground or equality of "burthen and benefit": *Deering* v. *Lord Winchelsea* (1787) 1 Cox 318; 29 E.R. 1184. Lord Eldon was counsel in this case (he acknowledged it in *Croythorne* v. *Swinburne* (1807) 14 Ves. Jun. 160; 33 E.R. 482). The right to contribution was said to have been established by *Deering* — see *Ward* v. *National Bank of New Zealand* (1883) 8 App. Cas. 755, 765. "The principle established by *Deering* is universal, that right and duty of contribution is founded in doctrines of equity; it does not depend on contract. If several persons are indebted, and one makes the payment the creditor is bound in conscience, if not in contract, to give the party paying the debt all his remedies against the other debtors. The cases of average in equity rest upon the same principle. It would be against equity for the creditor to exact and receive payment from one, and to permit, or by his conduct to cause, the other debtors to be exempt from payment. He is bound, seldom by contract, but always in consicience, so far as he is able, to put the party paying the debt upon the same footing with those who are equally bound." *Stirling* v. *Forrester* (1821) 3 Bli. N.S. 575, 590-91; 4 E.R. 712, 717 *per* Lord Redesdale.

[39a]In a recent case before the Privy Council, *Scholfield Goodman & Sons* v. *Zyngier* [1985] 3 All E.R. 105, (1985) 135 N.L.J.R. 985 Lord Brightman said that the right of a surety to claim contribution from another surety "is found upon equitable principles, and exists independently of whether the sureties are bound by some or different instruments and whether one surety became bound with or without the knowledge of his co-sureties". *Deering and Craythorne* were referred to. The Privy Council held that in the absence of a clear intention to the contrary, a guarantor of a third party's current account at a bank was not a co-surety with a drawer of a bill of exchange which had been accepted by a third party and discounted by the bank, and if the third party defaults in paying the bill of exchange and the bank obtains payment from the drawer, the latter then cannot claim contribution from the guarantor. *D & J Fowler (Australia)* v. *B.N.S.W.* [1982] 2 N.S.W.L.R. 879 was doubted.

[40]In *Deering, supra* at 321 (E.R. 1185) Eyre C.J. after referring to *Sir William Herbert's case* (1584) 3 Co. Rep. 11b; 76 E.R. 647 said that "the doctrine of equality operates more effectually in this court, than in a court of law." Common law recognized it as money had and received: *Exall* v. *Partridge* (1799) 8 T.R. 308, 310; 101 E.R. 1405, 1406 *per* Lord Kenyon C.J.

[41]*Bailey* v. *Edwards, supra.*

[42]Nisbet v. *Smith* (1785-89) 2 Bro. Ch. Ca. 579; 29 E.R. 217. The argument of Mansfield was based on *Ranelaugh* v. *Hayes, supra.*

[43]In *Bailey* v. *Edwards* (1864) 4 B. & Sm 761; 122 E.R. 645 in answer to the question, "what is the equitable effect?" put by Cockburn C.J., counsel, Coleridge and Gray, replied: "The reason for the rule in equity is that it is a fraud if a creditor proceeds against a surety. . ."

debtor.[44] The conduct of the creditor was treated in the same way.[45] Such conduct was termed fraudulent because it defeated the object of suretyship;[46] and that it might have had the effect of a variation.[47] There was some justification for the common law view of equity because relief seems to have been based on fraud in equity.[48]

The leading case on the subject, *Rees* v. *Barrington*[49] proceeded on the disablement principle that the creditor had "disabled himself to do that equity to the surety which he has a right to demand." He acted differently from the bond.

The reason for this approach was that the creditor was acting *inconsistently* from the surety bond, or acting in a manner that altered the circumstances under which the bond was provided and contemplated to continue; by such action the surety has been prejudiced. Equity thought that such conduct was against the faith of the contract.[50] Sometimes the consequences or the effect has been given greater importance with the result that such consequence or effect has been held to be the basis of rather than what led to such consequence. In *Oakley* v. *Pasche*ller[51] the surety was discharged from liability because he was placed in a new situation or exposed to a new risk. Tindal C.J. in certifying his opinion to the Master of Rolls was of the view that the reason for the discharge was that the remedy of the surety might have become uncertain.[52] In another and later judgment he placed emphasis on the surety being "placed in a worse situation" and that such "alteration" amounted "to a legal fraud."[53]

[44] *Cockshutt* v. *Bennett* (1788) 2 T.R. 763; 100 E.R. 411.

[45] *Jackson* v. *Duchaire* (1790) 3 T.R. 551; 100 E.R. 727. Ashurst J. applied the principle in *Cockshutt, ibid.* Buller J. proceeded on the maxim, *ex dolo malo non oritur actio.* (553; E.R. 729).

[46] *Pidduck* v. *Bishop* (1825) 3 B. & C. 605; 107 E.R. 857; "effect of increasing the responsibility of the surety," *per* Holroyd J. at 611; E.R. 859; ". . .effect of a private bargain. . . would be to defeat the object of the surety," *per* Littledale J.

[47] *Ibid.* 609, E.R. 859; "may have the effect of varying the degree of responsibility" *per* Abbot C.J.

[48] *Davies* v. *Steinbank* (1855) 6 De. G.M. & G. 679, 696, 43 E.R. 1397, 1404. "It is, in the eye of this court, a fraud in the creditor to proceed to law against a surety after he has agreed with the principal debtor to enlarge the time for the payment of the debt; and this court relieves against the fraud," *per* Turner L.J. One has to bear in mind that by this time fraud at common law had not developed and *Derry* v. *Peek* (1889) 14 App. Cas. 337 had not then been decided.

[49] (1795) 2 Ves. Jun. 540; 30 E.R. 765.

[50] *Samuel* v. *Howarth* (1817) Merr. 272, 279; 36 E.R. 105, 107. "The creditor has no right — it is against the faith of his contract — to give time to the principal," *per* Lord Eldon L.C.

[51] (1836) 10 Bli. (NS) 548, 590; 10 E.R. 202, 217-18 *per* Lyndhurst L.C. "Where a creditor gives time to the principal, there being a surety, without any communication with the surety, and without consent of the surety, it discharges him from liability, because it places him in a new situation, and exposes him to risk and consequences; which he would not be liable to. . ."

[52] *Browne* v. *Carr* (1831) 7 Bing. 508, 514, 131 E.R. 197, 199.

[53] *Bell* v. *Banks* (1841) 2 Man. & G. 258, 264; 133 E.R. 1140, 1142.

The alteration argument appealed to and fitted with the traditional contractual principles in contracts as to variation and modification. The principle has been restated by the Privy Council in *Pratapsingh Moholebai* v. *Keshavlad Harilal Setalwad*[54]

> . . .the sureties cannot be held liable in respect of this performance, which was not what they contracted to guarantee.

Termination or Exclusion of Liability

However there are certain preliminary matters, which though operate in effect as a discharge of a surety, are not really discharges brought about by a modification or variation.

(a) *Beyond The Scope of Guarantee*

First, that the gurantee, as it stands, does not cover the situation. In the words of Lord Atkin in *Pratapsingh Moholebhai, supra* "[the] principle is that the surety, like any other contracting party cannot be bound for something for which he has not contracted."[55] A guarantee against a risk of the minor repudiating the transaction when he attained majority did not extend to or include the risk of loss caused by a failure of the purchaser.[56] This would also cover cases where the guarantee has expired e.g. it was limited in time, say, for a period of 5 years, no liability will arise after the expiry of the period.[57] So also the guarantee, limited to a particular place, will not extend to performance in another.[58] It is otherwise where the parties have expressly agreed to extend the scope of the original contract.[59]

The courts adopt a strict construction. But they do not limit the application to *de jure* situation or event which is the subject of the guarantee. In *Debendra Nath Dutt* v. *Administrator-General Bengal*[60] the appellant had guaranteed the due performance of the acts and defaults of the administrator. The grant to him was later revoked for fraud. The appellant argued that the revocation for fraud rendered the grant void *ab initio* so far as he was concerned as a surety. That he as surety had undertaken to

[54](1934) LR 62 I.A. 23, 33.

[55]*Idem*. A bond given for one purpose cannot be used for another: *Smith* v. *Knox* (1799) 3 Esp. 46, 170 E.R. 533, Lord Eldon C.J.

[56]*Sri Raja Velugoti Sarvagna Krishna Yachendra Bahadur Garu* v. *Sri Raja Sobhaadari Appa Rao Bahadur Zamindari Garu* (1949) LR 76 I.A. 120.

[57]*Small* v. *Currie* (1854) 5 De G.M. & G. 141; 43 E.R. 824. The partnership the subject matter of the guarantee, was limited for 5 years. The guarantee did not extend to it after the expiry of the 5 years even though the partners continued the partnership. *Kitson* v. *Julian* (1855) 4 El & B 854; 119 E.R. 317, the limitation could be implied from surrounding circumstances.

[58]*Lord Abinger* v. *Merricke* (1670) 2 Wm. Saund. 411; 85 E.R. 1221.

[59]*Pratap Singh Moholebhai, supra.*

[60]*(1908) LR 35 I.A. 109.*

be the responsible for a real administrator and not for a person *assuming to act* in a capacity which he never possesed and which the court could not have conferred on him. The Privy Council held[61] that there was "no substance in [that] contention."

> So long as the letters of administration remained unrevoked, Cowie [the administrator] though a rogue and an impostor was to all intents and purposes the administrator. As administrator he collected the assets belonging to the deceased. . . and he misappropriated the assets which he so collected. For his acts and defaults as administrator the appellant and his co-surety became and must remain liable.

(b) *Non-Joinder of Another*

Secondly, where a guarantee is executed by one on the faith that another or others would also join in and the latter have refused or not joined in, the one who signed will not incur any liability unless it is shown that he consented to sign it severally.[62] The one who signed can also apply to the court of equity to be relieved of liability under it because the obligee intended to be joint or joint and several surety but not a sole or single surety.[63] The reason for this is that it interfered with the right to contribution in the case of default.[64] The fact that it was intended to be a joint and several bond may be proved by the information in the document to be executed — places and columns for others to sign.[65] The fact that the person who was to sign could not do so because death had overtaken him was not an answer or excuse — there was no liability.[66] The rule was recently applied in *James Graham & Co. (Timber) Ltd.* v. *Southgate Sands*.[67] In consideration of the plaintiffs not taking proceedings against the debtor a deed of guarantee was drawn up and it was to have been signed by the 3 directors of the debtor company as a joint and several guarantee. The guarantee purported to have been signed by the three was delivered

[61] *Ibid.* at 117 per Lord Macnaughten.

[62] *Leaf* v. *Giffs* (1830) 4 C & P 467; 172 E.R. 785. Tindal C.J. directed the jury: "If you think that the defendant, knowing all the circumstances, waived the objection, then you will find your verdict for the plaintiff; if you do not think so, then you will find for the defendant."

[63] *Evans* v. *Brembridge* (1855) 2 K & J 174; 69 E.R. 741. A fuller report of this case appears in 25 L.J. Ch. 334.

[64] *Ibid.* 185, E.R. 745 "This court. . . will look at the original agreement between the parties to see if it appears that they all intended that the obligation should be joint and several between the co-sureties." *Hansard* v. *Lethbridge* (1892) 8 T.L.R. 346, 347: "each had a right to the signature of the other for the purpose of contribution" *per* Esher M.R.

[65] *Hansard* v. *Lethbridge, supra.* "Knowledge that all were to sign might be communicated either by words or by the form of the instrument itself. The form showed that all the directors had to sign it and the knowledge must therefore be assumed." *per* Fry L.J.

[66] *The National Provincial Bank* v. *Brackenbury* (1906) 22 T.L.R. 797 (K.B.); It was a hard case for the bank and a curious result of the equitable doctrine but he was afraid it was a result he did not sell his way out of, *per* Walton J. at 798.

[67] [1985] 2 WLR 1044; [1985] 2 All ER 344 (CA).

to the plaintiffs. After judgment in default had been signed against one defendant it was discovered that the signature of another guarantor was a forgery. The plaintiff abandoned the proceedings against the director whose signature was a forgery and sought to proceed against the remaining director. The evidence disclosed that the defendants contemplated a joint and several guarantee and that one did not intend to be liable without the others. Nevertheless the county court had given judgment against the particular director whose signature was genuine. The Court of Appeal reversed the judgment and held that there was no liability in these circumstances. The contract of guarantee was entered into by the particular director on the basis that all the three co-sureties would be bound by it and the effect of allowing the plaintiff's claim would be to charge the particular director with a contract into which he had not entered; at law there could be no binding contract unless all the anticipated parties had been bound.

In so doing the court followed the *Evans* v. *Bembridge*[68] but disapproved the views of Wood V.C. that there may be relief in equity[69] and his analysis of *In re Semple*.[70] There the Lord Chancellor had refused to disturb the verdict at law that unless the deed was signed "by an influential overpowering of creditors" it was not intended to take effect. The court followed the remarks of Knight Bruce L.J.[71] and Turner L.J.[72]

Browne Wilkinson L.J. explained why equity's aid had been sought in such cases:[73]

> . . .the researches of O'Connor L.J. . . .satisfy me that the equitable doctrine was established in *Evans* v. *Bembridge* purely because of a pleading problem in the common law courts which might have led to the signing surety being held liable at law. The cases referred to. . . satisfy me that at law, there is no contract at all unless all the anticipated parties to the contract in fact become bound. It follows that in this case there is no contract on which the plaintiff can found its claim against the defendant.

The principles have also been extended to cases where the surety signed on the condition that the principal debtor would but did not provide the counter-indemnity.[74] The rule does not apply to the failure by one or more

[68] See note 39.

[69] (1855) 25 L.J. Ch. 102, 104.

[70] (1846) 3 Jo & Lat. 488.

[71] ". . . the defendants seek to charge the plaintiff with a contract into which he did not enter" (1855) 25 LJ Ch. 334, 335.

[72] ". . . the plaintiff having entered upon the obligation on the faith of having a co-surety, he ought to be relieved in equity."

[73] [1985] 2 WLR at 1057.

[74] *Bonser* v. *Cox* (1841) 4 Beav. 379; 49 E.R. 385. A agreed to become surety for B in a joint and several bond to C, and B was to give a counter bond of indemnity to A. The bond to C was executed by A only; B had only executed the bond to C but not the counter bond to A.

principal debtors to sign the agreement because the surety is still liable whether one or more debtors had signed.[75] The position might be different if the surety had insisted as a condition that certain named persons must sign or be the principal debtors. On the same principle guarantees given on conditions will lapse if the conditions are not fulfilled e.g. to postpone a sale which was not postponed for lack of consent of another.[76]

The most extreme illustration is to be found in the South Australian case, *McNamara & Others* v. *Commonwealth Trading Bank of Australia*[76a] delivered before *James Graham*. Section 44 of the Consumer Transactions Act 1972 — 80 provides that where the guarantor enters into an agreement of a type specified in the section, it must be executed in the presence of a legal practitioner instructed and employed independently of the lender or the mortgagee. Non-compliance with this provision rendered the transaction void. A memorandum of mortgage, an agreement within the meaning of that section, was executed by two of three join-owners of the house in the presence of a legal practitioner. The third owner signed the mortgage later but in the absence of a legal practitioner. The question was: was the mortgage void as against all there or just the third joint-owner. The Court held that the entire mortgage was void and applied the rule set out in the English and Irish cases already mentioned.[76b] King C.J. used language similar to that in *James Graham*.

> In the present case the intended co-surety never became bound by reason of failure to execute the guarantee with the formalities required by law to bind him. The guarantee was void as against the intended co-surety *ab initio* and he never became liable under it. The case is indistinguishable in substance . . . in which the intended co-surety did not sign at all.[76c]

(c) *Unauthorised Alterations*

Thirdly, the unauthorized alteration of documents. At common law such a document was void and of no effect. The rule is aimed at penalising the attempted fraud.[77] That rule also applied to surety bonds. Such unauthorized alterations entitle the other sureties to avoid liability because it would not be enforceable against the other parties. For this reason an addition of another name to a joint and several bond rendered it void.[78]

[75] *Cooper* v. *Evans* (1867) LR 4 Eq. 45.

[76] *Cooper* v. *Joel* (1859) 1 De. G.F. & J. 240, 45 E.R. 350.

[76a] (1984) 37 S.A.S.R. 232.

[76b] *Evans* v. *Brembridge* (1855) 2 K & J 174, 69 E.R. 741, on appeal (1856) 8 De G.M. & G. 100; 144 E.R. 327, *Hansard* v. *Lethbridge (1892) T.L.R. 346, Fitzgerald* v. *McGowan* (1892) 2 Ir. R. L.; *National Provincial Bank* v. *Blackenbury* (1906) 22 T.L.R. 797.

[76c] (1984) 37 S.A.S.R. at 238-39.

[77] *Hongkong Shanghai Banking Corp.* v. *Lo Lee Ghi* [1928] AC 188 (PC); *Prince* v. *Oriental Bank* (1878) 3 App. Cas. 375.

[78] *Re Cowardin* (1901) 86 L.T. 261.

Though fraud was the basis a party guilty of fraud was entitled to take advantage of the fraud. In *Ellesmere Brewery Co.* v. *Cooper*[79] there was a joint and several bond already executed by 3 persons. The 4th person wrote below his signature limiting his liability to £25 when in fact he was on the face of the bond to be liable for £50. He was allowed to rely on it to plead a discharge. In truth the others would have been discharged and a discharge of one co-obligor in a surety bond enures for the others as well as the debt was a joint-debt. This may be an occasion when a party was able to take advantage of his own wrong.

(d) *Avoidance For Non-Disclosure*

Fourthly, there are those guarantees which require disclosure or where there has been positive misrepresentation in procuring them. The fidelity guarantees fall within the former category even though guarantees are not contracts *uberrimae fidei*. An employer who knowingly conceals dishonest conduct of his servant from the surety will not be able to enforce the guarantee.[80] Though at one time it was thought applicable to all guarantees[81] the duty, in fact, was confined and limited to fidelity guarantees.[82] It did not apply to guarantees to secure overdrafts or debts.[83]

[79][1896] 1 Q.B. 75.

[80]*Smith* v. *Bank of England* (1813) 1 Dow. 272; 3 E.R. 697.

[81]See e.g. *Piddock* v. *Bishop* (1825) 3 B & C 605, 610; 107 E.R. 857, 859 *per* Bayley J.

[82]*Railton* v. *Matthews* (1844) 10 Cl. & F 934; 8 E.R. 993. Counsel (943; E.R. 996) attempted to assimilate the contract of insurance with that of a guarantee. It was for the surety to find out the circumstances material to him ". . .to say that his obligation shall depend upon that which was passing upon the mind of the party requiring the bond, appears to me preposterous; for that would make the obligation of the surety depend on whether the other party has a good memory or whether he was a person of good sense or whether he had a motive in his mind or whether he was aware that the facts ought to be disclosed." *per* Lord Compbell. This case marked the turning point of the duty to disclose. The later cases upheld and followed it: *Hamilton* v. *Watson* (1842) 12 Cl. & F. 109; 8 E.R. 1339 (If the surety wants to know about a particular matter he ought to make it the subject of a distinct inquiry); *Espey* v. *Lala* (1852) 10 Ha. 260; 68 E.R. 923; *North British Insurance* v. *Lloyd* (1854) 10 Exch. 523; 156 E.R. 545. On the question whether previous defaults ought to have been disclosed produced different answers in *Lee* v. *Jones* (1864) 17 CBNS 482; 44 E.R. 195. The majority Crompton J., Channell B., Blackburn J. and Shee J. held in favour of disclosure; the failure to do so was a deceit or fraud. Of the minority, Pollock C.B. and Bramwell B, the former held that there was no need for disclosure because the guarantee was expressed to be retrospective. Bramwell B. (509; E.R. 205) could not regard carelessness as fraud. Non disclosure of embezzlement already committed discharged the surety: *Phillip* v. *Foxall* (1872) L.R. 7 Q.B. 666, 674; *Burgess* v. *Eve* (1872) L.R. 13 Eq. 450, 457. These decisions proceed on the basis that when obtaining the bond the obligee was proceeding on the basis that the employee was trustworthy and honest. Where fiduciary relationship was involved the duty to disclose was recognized: *Davies* v. *London & Provincial Marine Insurance* (1877) 8 Ch. D. 469; *London General Omnibus* v. *Holloway* [1912] 2 KB 72; *Byrne* v. *Muzio* (1881) L.R. Ir. (Ex) 387. Absence of suspicion of dishonesty and knowledge of dishonesty are different; disclosure was essential in the latter situation: *The Mayor, Aldermen & Citizens of Durham* v. *Fowler* (1889) 22 Q.B.D. 394, 421.

[83]*London General Omnibus* v. *Holloway*, *supra* at 82 ("legitimate and usual for a man to carry on his business on borrowed money, including money borrowed from the bankers by way of overdraft, and the surety knows this and becomes surety for this very purpose), 83 ("No surety asked

The reason is self-evident — customer's credit. Even if the bank suspects fraud on the part of the customer there is no duty of disclosure.[84] The surety should ensure by inquiry.[85] Where the question is asked want of knowledge of the fraud will not excuse it. If a third party answers the question falsely or provides false or inaccurate information the surety will be excused if the creditor was present or aware that such information had been given.[86]

These are matters that do not relate to the performance of the contract but affect the scope in the first case and as to the creation of liability or formation of the contract of suretyship in the other cases. The attempt that is made here is to analyse the inconsistent conduct in the performance of the contract and the effect of such inconsistent conduct.

Alteration In Performance

This alteration or departure has been classified in various ways. Bramwell B summarised it as three ways:[87]

(i) time given to the debtor;
(ii) alteration in the contract between the principals;
(iii) principals dealing together to affect the position of the surety to his prejudice.

Later it was brought down to two:[88] that a creditor must not

(i) act in a manner inconsistent with the contract under which the obligation of suretyship was incurred;
(ii) do anything to prejudice the right of contribution between the sureties.

It is clear that not *every* alteration will have the effect of depriving the creditor of his right of recourse against the surety.[89]

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to guarantee a banking account is entitled to assume that the customer of the bank had not been in the habit of overdrawing; the proper presumption in most instances is that he has already done so and wishes to do so again") per Farwell L.J. Kennedy L.J. at 87 approved the statements in Pollock, *Principles of Contract* (8th Edn.) p. 568 (13th Edn. at 435) that it was no part of the suretyship to disclose any information about the customer.

[84] *National Provincial Bank* v. *Glanusk* [1913] 3 K.B. 335, per Horridge J., *Bank of Scotland* v. *Morrison* (1911) S.C. 593, 605 ". . .no authority for the view that it is the duty of the bank, whenever it becomes aware of any circumstances seriously affecting the credit of a customer to communicate at once with any of the customer's friends who may have signed cash credit on his behalf or guarantees for his primay obligations; *per* Lord Salveson.

[85] *Owen* v. *Homan* (1853) 4 HLC 987; 10 E.R. 752.

[86] *Blest* v. *Brown* (1862) 3 Giff. 450, 462; 66 E.R. 486, 491.

[87] *Croydon Gas Co.* v. *Dickinson* (1876) 2 C P D 46, 49.

[88] *Re Wolmerhausen* (1890) 62 L.T. 541.

[89] *County Council for the County of Donegal* v. *Life & Health Association* [1909] 2 Ir. R. 700, 716 *per* Fitz Gibbon L.J.

The cases all deal with what one may call a "departure" so that it is not confused with the contractual concept of variation. The departure can take any one of the following forms:

(a) alteration in the subject matter of the principal contract;
(b) alteration in the mode of performing it;
(c) positive variation;
(d) substituted contracts;
(e) release of the debtor or a surety.

It would be shown that the cases all fit into one or more of the above categories and that the underlying principle is conduct either inconsistent with the contract or with the rights of the creditor done behind the back of the surety. These cases could properly be called waiver of the creditor's rights because they are all gone. Except in one case they are all brought about by the act of the parties; the exception is where the alteration in (e) is brought about by statutes.

Thus the equitable principles are given effect within the contractual mould thus enabling distinctions to be drawn between mere indulgence and binding variation.[90] The surety is entitled to have the original contract performed and nothing else — that is how the common law understood the position.

(a) *Subject matter*

Where a surety guarantees the performance by the principal under a certain contract or for the performance of duties in a certain office, the contract or the office is expected or contemplated to remain in the same position — *rebus sic stantibus*. If any changes occur to that position the materiality of the change becomes important. If that change is material the liability or the risk accepted by the surety becomes different. In some circumstances, it may become a new contract or a variation of an existing contract. Though in the majority of cases a different performance from the original contract was due to a variation the underlying principle is that a surety like any other party cannot be bound by what he has not contracted.[91] These are dealt with separately.

The addition of new duties to a contract of employment had the effect of altering it.[92] Lord Campbell put the test as: Whether the nature and functions of the office or employment are changed?[93] In that case the bond was executed to secure the misdemeanours of a bailiff. Later another statute had been passed increasing the jurisdiction of the court in which he was a bailiff. The risk was increased or varied to the "possible disasdvan-

[90] *Beckett* v. *Addyman* (1882) 9 Q.B.D. 783, 789 per Field J.

[91] *Pratapsingh Mohalobhai* v. *Keshavlal Harilal Setalwad* (1939) LR 62 I.A. 23, 33, *per* Lord Atkin.

[92] *Pyubs* v. *Gibbs* (1856) 6 El & B. 902, 119 E.R. 1100.

[93] *Ibid.* 911; E.R. 1103.

tage of the surety."[94] A bond that was provided by the vendor to the railway company to become void upon the opening of a railway was avoided by subsequent changes made to that railway line by an Act of Parliament.[95] The intention of Parliament was brushed aside; the question was as to the rights of the parties and the rule as to discharge operated no matter how the change occurred.

On the other hand where the change was contemplated by the parties in the instrument then there can be no discharge; there is no inconsistency or departure from the original contract. A bond that indemnified a treasurer appointed to a Board by election provided that the bond was to apply "during the said election or under any annual or other election." It was argued, unsuccessfully, that the bond was limited to the first election. As the law then stood there could only be an annual election. The law was changed to make the election at the pleasure of the Council.[96] 'There could be no other election than an annual one, except by virtue of an alteration in the law. The law has been altered."[97] The bond continued. Similarly, a mere alteration of the duration, from fixed term to one of pleasure, with no change in or alteration of the powers, duties and functions did not render void the surety bond.[98] A father, who executed a fidelity guarantee for his son, employed by a bank, was held liable when the son had taken for himself as a customer of the bank, without disclosing to the bank the proceeds of certain promissory notes which had been tendered as security to the bank.[99] The fact that the son committed the dishonest act in his right or capacity as a customer was irrelevant as it was so closely connected with and directly facilitated by his employment.

(b) *Alteration in the mode of performance*

Here the matter proceeded both in equity and at law on the simple basis "no performance, no guarantee." The real problem was that the common law wanted nothing but literal performance — the very thing that was promised. When the original contract provided for the hire of 30 cows, 28 would not do.[1] This was an entire contract.[2] Substantial performance

[94] *Ibid.* 915, 918; E.R. 1105, 1106 *per* Wightman J.

[95] *Finch* v. *Jukes* (1877) WN 211.

[96] *Oswald* v. *The Mayor, Aldermen and Burgesses of the Borough of Berwick-Upon-Tweed* (1856) 5 HLC 856; 10 E.R. 1139.

[97] Ibid. 872; 1146 *per* Lord Chancellor.

[98] *The Mayor, Aldermen and Burgesses of the Borough of Clifton, Dartmouth Hardness* v. *Pilly* (1857) 7 El & B 97; 119 E.R. 1184.

[99] *Sen* v. *Bank of Bengal* (1913) LR47 I.A. 64.

[1] *Whitcher* v. *Hall* (1826) 5 B & C 269; 108 E.R. 101.

[2] The distinction between entire and divisible contracts applies not only as to performance but also as to the extent of discharge and termination of guarantees. In *Whitcher* there was disagreement as to whether it was entire or divisible. Both Bayley J. (at 275; E.R. 103) and Holroyd J. (at 276; E.R. 103) thought that it was entire. Littledale J. dissented and ruled that the *de minimis* rule would

of the contract will not save the surety bond. A surety was held released when an employee, whose fidelity he had guaranteed, had been promoted and given a higher salary; the fact that substantial liability had already been incurred was irrelevant.[3]

The failure by the creditor or employer to obtain a policy of insurance as provided in the principal contract led to the discharge of the surety when loss occurred through a fire.[4] The liability was essentially that of the principal but the employer had undertaken to effect the insurance and deduct the premium from payments due to the principal. The surety had undertaken to be responsible for an insured principal; not one who was uninsured. The departure from the mode of payments under the principal contract released the surety when more had been paid before the stated time.[5] The provision or supply of goods of inferior quality than that specified for the fulfilment of a particular contract was not any performance, let alone literal performance to enforce the guarantee.[6] To do so was contrary to the intention of the parties.[7]

The alteration may in some cases result in the variation of the principal contract or have the effect of increasing the burden or responsibility of the surety. In these cases too the surety is discharged. The former will be dealt with under variation, below.

There was no liability where the person, whose duties as an agent were the subject of the guarantee, had been appointed partner. The liability of the surety had become different.[8] It was there argued that if a person could receive money by a clerk he could also do so through a partner; the surety would not, therefore, be affected at all. That argument was unsound.

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apply. A fidelity guarantee was held to be an entire contract: *Gordon* v. *Calvert* (1828) 4 Russ. 581; 38 E.R. 924. The reason was given in *Lloyds* v. *Harper* (1888) 16 Ch. D 291, "that consideration is given once and for all just as in the case of the guaranteeing of the lease . . .the father undertakes that if the son is admitted to the *status* of an underwriting member, he, the father, will guarantee all the son's engagements as a member. . . ." *per* James L.J. "That is a thing done once and for all, and if the guarantee was recalled or put an end to, the son could not under any of the rules of Lloyd be turned out," (*per* Cotton L.J. at 317) Contracts guaranteeing overdraft or bankers advances and for sale of goods are divisible contracts. ". . .each discount to be a separate transaction creating a liability on the defendant till it is repaid; after repayment leaving the promise to have the same operation that it had before any discount was made, and no more": *Offord* v. *Davies* (1862) 12 CBNS 748, 757; 142 E.R. 1336. 1340 *per* Erle C.J. So also a contract for the payment by instalments: *The Croydon Gas Co.* v. *Dickinson* (1876) 2 CPD 46, 49 *per* Kelly C.B. (. . .although in one sense it was one contract, yet, in effect, it was as much as three several contracts as if it had been created by three separate instruments"). As to a continuing guarantee Bowen L.J. said it was "divisible as to each advance, and ripens as to each advance into an irrevocable promise or guarantee only when the advance is made": *Coulthard* v. *Clementson* (1879) 5 Q.B.D. 42, 46.

[3] *Bonar* v. *MacDonald* (1850) 3 HLC 226; 10 E.R. 87.

[4] *Watts* v. *Shuttleworth* (1861) 7 H & N 353; 158 E.R. 510.

[5] *Calvert* v. *The London Dock Co.* (1838) 2 Keen 638; 48 E.R. 774.

[6] *Blest* v. Brown (1862) 3 Giff 450; 66 E.R. 486. This was an action to cancel the bond. "The Plaintiff is not bound for anything but those matters mentioned in the bond." (Ibid 463; E.R. 491)

[7] *Beckett* v. *Addyman, supra* at 791 *per* Lord Coleridge C.J.

[8] *Montefiore* v. *Lloyd* (1863) 15 CBNS 203; 143 E.R. 761.

The powers of a partner are more extensive than that of a clerk and receipt by the two could not be put on the same footing.[9] By that action the property and chose in action would not devolve on the estate if the agent predeceased but on his partner; that deprived the surety of his remedies.[10]

Similarly a person appointed as a clerk and for which position the surety provided a bond, was later promoted and instead of a fixed salary was paid a commission. The surety was held not liable.[11] The surety's position had been affected; the employee at a fixed salary became one at an uncertain salary[12] and it altered the relation between the principal and the surety.[13] The actual crediting of the account of the customer even without advancing the money was prejudicial to the surety because the customer could draw upon it at once with the consequence that they could immediately demand upon the surety.[14] So also the opening of a second account at the same bank by the debtor without the knowledge and consent of the surety. By allowing the customer to open such an account the bank prejudiced the position of the surety. The funds could be kept out of the first account which would otherwise have gone to reduce the overdraft.[15] The facts in *In Re Darwen & Pearce*[16] best illustrate the principle. The surety had guaranteed the payment of the shares. That meant that the surety would have a lien on them if he had paid. The articles also provided that the shares could be forfeited and the allottee liable to pay the amount. The Company, on default by the allotee, forfeited the shares and brought an action against the surety for the non-payment. That claim failed. The Company could not enforce the bond because it did not have the shares to give to the surety. By proceeding to forfeit it had deprived the surety of his rights. The claim under the article failed because it was a liability under a new contract following or consequent upon the forfeiture.

The alteration in the mode of dealing between one co-surety and the creditor can also work a release of the other co-sureties. In *Smith* v. *Wood*[17] several sureties deposited their title deeds with the creditor to secure the debts due from the principal debtor. The creditor allowed one of the co-sureties to create a prior charge in favour of a third person. Though there was no release of the charge the creation of the further prior

[9] *Ibid.* E.R. 767 *per* Erle C.J.

[10] *Ibid.* at 219; E.R. 768. *per* Erle C.J.

[11] *The North Western Railway Co.* v. *Whinray* (1854) 10 Exch. 77, 156 E.R. 363.

[12] *Ibid.* at 82, E.R. 365 per Platt B.

[13] *Ibid.* at 83, E.R. 365 *per* Martin B.

[14] *Archer* v. *Hudson* (1844) 7 Beav. 551, 564; 49 E.R. 1180, 1185, *per* Lord Langdale M.R.

[15] *National Bank of Nigeria* v. *Awolesi* [1964] 1 WLR 1131 (PC)

[16] [1927] 1 Ch. 176.

[17] [1920] 1 Ch. 14.

charge affected the right of the co-sureties to have recourse to that property. Since the performance of the obligations of the sureties *inter se* was altered all were discharged.

Variation

This deals with the existing contract with modifications. The difference between a variation and a new contract is thin — in one the original contract remains; it is at least identifiable whereas in the case of the substituted contract it is not. There can be a unilateral variation brought about by mutual consent. A new contract is always bilateral. The alteration or variation by mutual consent does not *per se* result in a new contract. Bilateral consent is not variation. There are some circumstances when the same set of facts could both constitute a variation and a new contract. For the present purpose it matters little because the result is the same, the surety is released. Sometimes 'variance' is used as synonymous to alteration.[18]

Most of the cases that fall under this head are those cases in which the principal has been given time by the obligee. It would be convenient to deal with these separately.

(i) *Non-Time Variations*

An advance of more money by a mortgagee without the knowledge of the surety is a variation of the principal contract.[19] The cases under the alteration of the subject matter could also come under this description. What is required is a binding contract — i.e. an enforceable variation.[20] It is essential to show some prejudice under this type of variation. In a divisible contract, the reduction under the principal contract is no alteration; but in an entire contract however small the modification it would be an alteration.[21]

Whether what had occurred was a mere indulgence or variation was considered in *Burnes* v. *Trade Credits*.[22] The contract of guarantee provided that unless the guarantors gave notice to the contrary the mortgagee was entitled to grant any other indulgence or consideration without obtaining the guarantors' consent. When the mortgage fell due the mortagagor and mortgagee entered into a memorandum of variation and increased the rate of interest. The consent had not been obtained from the guarantor. The Privy Council held that the extension of time was an indulgence but the increase in the rate of interest was a variation. The purpose of the clause

[18]See *Ward* v. *National Bank of New Zealand* (1888) 8 App. Cas. 755, 763; "A long series of cases has decided that a surety is discharged by the creditor dealing with the principal or the co-surety in variance with the contract, the performance of which the surety has guaranteed."

[19]*Bolton* v. *Salmon* [1891] 2 Ch. 48.

[20]*Creighton* v. *Rankin* (1844) 7 Cl. & F 325; 7 E.R. 1092.

[21]*Eyre* v. *Everett* (1826) 2 Russ. 381; 38 E.R. 379, per Bayley J. at 274; E.R. 103, *per* Littledale J. at 281, E.R. 105.

[22][1981] 2 All E.R. 122 (PC).

in the guarantee was merely to protect the mortgagee (the creditor) if an indulgence was granted by him to the mortgagor which would otherwise have released the guarantor from liability vis-a-vis the mortgagee, and did not enable the mortgagee and the mortgagor by agreement between themselves to impose an additional liability on the guarantors without their consent.

(ii) *Time Variations*

Discharge on account of the grant of time to the principal debtor is an exemplification of the rule in *Rees* v. *Barrington*.[23] This is a separate head of discharge from that of the alteration of the contract or the impairment of the rights of the surety.[24] No injury or prejudice to the surety need be proved; nor is the absence of injury to the surety relevant.[25] The mere giving of time presupposes injury to the rights of the surety; it is deemed to cause injury.[26] That is because the surety is prevented from suing the debtor or calling upon the creditor to enforce the payment.[27] The suspension of a right even for an hour or a day causing no damage to the surety — not even that of a farthing was still effective in equity.[28]

The time given must be pursuant to a binding contract — that which is supported by consideration and enforceable.[29] That means mere forbearance or indulgence was not enough — e.g. allowing time to enter into a composition.[30] Nor the plea that the plaintiff waited sometime before suing would be of any avail.[31] The promise by a creditor to wait

[23](1795) 2 ves. Jun. 540; 30 E.R. 765.

[24]*The Croydon Gas Co.* v. *Dickinson* (1876) 2 C.P.D. 46, 49.

[25]*Samuel* v. *Howarth* (1817) 3 Merr. 272; 30 E.R. 105.

[26]*Maingay* v. *Lewis* (1870) 5 Ir. R (CL) 229; 235, per Morris L.J. ("The equity is the same, because it arises from the inequitable act of a creditor voluntarily giving time to a principal, and thereby altering the position of the surety.")

[27]*Bell* v. *Banks* (1841) 3 Man. & G 258, 266; 133 E.R. 1140, 1143 *per* Erskine J. ("In the case of giving time, the surety may be prejudiced, because he may be deprived of the power of immediately suing the debtor").

[28]*Pollak* v. *Everett* (1876) 1 Q.B.D. 669, 774 *per* Blackburn J.

[29]*Philpot* v. *Briant* (1828) 4 Bing. 717, 130 E.R. 945. "If the creditor had received from his debtor a consideration for the engagement to give the stipulated delay of payment of the debts, it would be injustice to force him to pay it to any one before the day given (719, E.R. 946) . . . A creditor by giving time to the principal debtor in equity, destroys the obligation of the sureties. The time of payment must be given by a contract that is binding on the [creditor] . . . a contract, without consideration, is not binding on him" (720, E.R. 946) *per* Best C.J. *Creighton* v. *Rankim*(1840) 7 Cl. & F 325, 7 E.R. 1092; *Rouse* v. *Bradford Banking Co.* [1894] AC 586, 594 ". . . that time is only given within the meaning of the rule . . . if there is a binding agreement arrived at for good consideration" *per* Lord Herschell, L.C.

[30]*Brickwood* v. *Annis* (1814) 5 Taunt. 614, 128 E.R. 830 ("The plaintiff by remitting his legal diligence does not bar the bail from surrendering their principal at any moment, the plaintiff has never disarmed himself, he has never put himself in such a situation, that he might not all times proceed with his action").

[31]*Clarke* v. *Wilson* (1838) 2 M & W 208, 150 E.R. 1118.

for 18 months if arrears were paid was not a binding extension because there was no consideration; it was a voluntary forbearance.[32] This is also part of the rule that mere acquiescence or omission is not a voluntary act and is dealt with separately. It remains to be considered to what extent this rule has been modified by the principle of promissory estoppel in the *High Trees* case.[33] There a promise made, intended to be and was acted on prevented the enforcement of the strict legal rights of the landlord. If he was prevented from suing the rent underpaid would that not have a binding effect? Applying the *High Trees* rule to suretyships would amount to a grant of time in a negative sense. The rule that promissory estoppel or any estoppel is not a cause of action, but a shield, though weakened by recent developments, would not preclude its assistance being sought as a part of a cause of action. Unless any equitable limitation could be placed upon its application as in *D & C Builders* v. *Rees*[34] it is submitted that to some limited extent the operation of the principle of promissory estoppel would supplant the want of consideration in these cases and produce a discharge of the surety. In principle there is no reason why this should not be so. After all if the creditor wanted to preserve his position he could have done so with reservation of his rights.[35] By the failure to do so he must be taken to have intended or suffer the consequences that flow from his action.

The contract granting time need not be express, it can be implied or inferred from what the parties have said and done. The question whether it is a binding contract or a contract at all is a question of law. A release signed by one creditor of a joint debt but not by the other was given effect in equity; it was treated as a case of grant of time to the principal debtor.[36] The estate of the surety was discharged when, the son, the person guaranteed, became the heir and gave a new bond to pay the debt by instalments.[37] Time was deemed to have been given to the son.[38] And the taking of a new mortgage from the debtor constituted giving time to the debtor.[39] So also the taking of a security from the debtor's wife on condition that the bank would not sue the borrower or either surety. The Privy

[32] *Tucker* v. *Laing* (1856) 2 K & J 745; 69 E.R. 982.

[33] *Central London & Property Trust* v. *High Trees House* [1947] KB 130.

[34] [1966] 2 Q.B. 617 (CA).

[35] *Webb* v. *Hewitt* (1857) 3 K & J 438; 69 E.R. 1181.

[36] *Hackshaw* v. *Parkins* (1819) 2 Swans. 539; 545-46; 36 E.R. 723, 724, *per* Lord Eldon. The law always treated such release as ineffective. In equity they were treated as release of the releasor's portion; the joint debt being accorded the status of a tenancy-in-common.

[37] *Clarke* v. *Henty* (1838) 3 Y & C. Ex. 187; 160 E.R. 667.

[38] *Ibid.* 189, E.R. 668.

[39] *Ewin* v. *Lancaster* (1865) 13 W.R. 857, 858. "Has not the creditor tied up his own hands?" *per* Crompton J.; "time was given to him by the creditor" per Shee J.

Council in *Hodges* v. *Delhi & London Bank*[40] disagreed with the High Court and held it was giving of time to the debtor. The bank had "effectually precluded itself from suing."

The obtaining of a bill of exchange, even for a small sum is a discharge because it was good consideration[41]: it was not for [the court] to estimate whether the bargain is good or not.[42] This would still hold good — that acceptance of a bill is a good consideration, the basis upon which *Sibree* v. *Trip*[43] was upheld in *D.C. Builders* v. *Rees*. The acceptance of a new or additional security unaccompanied by the grant of any time by the creditor would not discharge the surety.[44]

Before the maturity of the surety's bill the bank took a mortgage to secure a larger sum (including the amount of the bill) and a clause in the mortgage deed provided a date for payment — 3 months after its date which was later than the maturity date of the surety's bill. This was a grant of time;[45] it implied a contract that the bank would not sue for three months.[46] Even where the mortgage deed recited the prior debt and the deed was expressed to be taken "with full benefit" of the earlier covenants the surety was released.[47] The covenant in the second deed implied that the principal could not be sued for earlier debt and to that extent it was a grant of time to the debtor. A composition agreement whereby time was given had produced a discharge of the surety.[48]

The grant of time in certain circumstances will not discharge the surety particularly where his rights are not affected.[49] Where a suit was pending to recover the debt, the grant of time to enable an arrangement to be arrived at before judgment, the surety was not released.[50] There is a distinction: whether the creditor and the debtor agreed to the grant of the extension and then the suit was brought or the arrangement was arrived at after the commencement of the suit. There is a discharge in the former; not in

[40](1900) LR 27 I.A. 168, 178-79 ". . . having taken Mrs. Oldham's security, as a result of the correspondence with her husband, in consideration of forbearance from suing the 3 debtors the bank had effectually precluded itself from suing between July 1888 and May 1889" *per* Lord Hobhouse.

[41]*Moss* v. *Hall* (1850) 5 Exch. 46, 49, 155 E.R. 20, 22.

[42]*Ibid. per* Parke B.

[43](1846) 15 M & W 23.

[44]*Bell* v. *Banks* (1841) 2 Man & G 258; 133 E.R. 1140.

[45]*Munster & Leinster Bank* v. *France* (1892) 24 Ir. R (Q.B.) 82.

[46]*Ibid.* at 88 *per* Fitz Gibbon L.J.

[47]*Bolton* v. *Buckenham* [1890] 1 Q.B. 278.

[48]*Wilson* v. *Lloyd* (1873) L.R. 6 Eq. 60.

[49]*Prendergast* v. *Derey* (1821) 6 Madd. 124; 56 E.R. 1039; *Bell* v. *Banks, supra* ("Had it even distinctly appeared that delay had taken place in enforcing payment from the principal debtor, such forbearance would not have effected the rights of the parties").

[50]*Whitfield* v. *Hodge* (1836) 1 M & W 679; 150 E.R. 607.

the latter because it is concerned with the execution of the decree.[51] The rights of the surety are not affected. When time is given after the judgment had been obtained the rule does not apply.[52]

Termination or Cancellation

The termination of the contract by the creditor or employer for the breach of the debtor does not release the surety. He is still liable under the guarantee. In *Hyundai Shipbuilding & Heavy Industries* v. *Papadouplous*[53] the purchase price of a ship was payable in 5 instalments and the contract provided that in the event of non-payment of the 2nd instalment the shipowners could in addition to any other rights (e.g. recovery of damages) rescind the contract. As the second instalment was not paid the contract was cancelled. The guarantors were held liable. The object of the guarantee was that the shipbuilders should be able to recover irrespective of their position. The liability had already accrued.[54]

Substituted Contract

This deals not with the variation of an existing contract but with the creation of new rights and liabilities in replacement of the old. It is no doubt true that a substituted contract varies the rights of the parties; but it also extinguishes the old contract which does not occur with the variation of an existing contract.

A variation that resulted in the abandonment of the old is illustrated. by *Warre* v. *Calvert*.[55] The surety had guaranteed the performance of a contract by the contractor; he was to have been paid specific amounts at specific times. The contractor was in breach. They both negotiated and arrived at new arrangements whereby the employer advanced more money. The contractor was in breach again and the employer brought an action against the surety — the breach arising out of the advance was a new contract. The surety was held liable only for nominal damages because the contractor had committed an earlier breach.

The appointment as assistant overseer by the vestry was substitute when he was appointed by or under the authority of the Poor Law Commissioners for a wider area. The surety was discharged even though the default com-

[51] *Jenkins* v. *Robertson* (1854) 2 Drew. 351, 352; 61 E.R. 755, per Kindersley V.C. There will be no discharge where the extension of time was granted at the request of the surety even where there was no reservation: *Davidson* v. *MacGregor* (1841) 8 M & W 755, *Poole* v. *Williams* (1869) LR 1 Q.B. 630.

[52] *In re A. Debtor* [1913] 3 K.B. 11.

[53] [1980] 2 All E.R. 29 (HL).

[54] *Chatterton* v. *Haslam* [1951] 1 All E.R. 761; *Brooks* v. *Beirnstein* [1909] 1 K.B. 98, 102, *Hyundai Shipbuilding & Heavy Industries* v. *Paurnaras* [1978] 2 LL.R. 502, 508; *Moshi* v. *Lep Air Services* [1973] AC 331 (HL).

[55] (1837) 7 Ad. & E. 143.; 112 E.R. 425.

plained of was within the terms of the bond. The original appointment was inconsistent and incompatible with the subsequent appointment.[56]

Employment contracts involving the alteration of duties have also been held to be substituted contracts; a promotion with an increment in wages with liability to answer for one-fourth of the losses was different from the old contract of employment; the effect was the substitution of the old contract.[57] Instead of utilising half the book debts collected to pay for the redemption of the shares (the payment whereof was guaranteed by the surety) the creditor had accepted payment partly in cash and partly by the shares. The book debts were released. The alteration deprived the surety of the security he would have been entitled to, namely, the book debts. It was rendered impossible to carry into effect the original contract.[58]

Tenancies provide the other examples. In *Tayleur* v. *Wildin*[59] a surety guaranteed the performance of convenants of the tenant. The landlord terminated the tenancy by a notice to quit to the tenant. Later the parties agreed to withdraw the notice and proceeded with the tenancy. The tenant defaulted a second time. An action was brought against the surety on the bond for this breach. The court held that he was not liable. The notice to quit, once given, could not be withdrawn without the consent of the parties. That consent gave rise to a new agreement; that new tenancy took effect upon the expiration of the old one. The same happens when the landlord allows the tenant to remain in occupation after the termination by a notice to quit.[60] The notice terminated the tenancy; the continued occupation was under a new contract.[61] This is correct; equity also recognized it. Even when equity granted relief against forfeiture of a lease it required the parties to execute a fresh lease on the basis that the old one was gone.[62] An invalid notice could not however terminate a tenancy and subsequent arrangements to withdraw it do not result in the creation of a new tenancy.[63]

The acceptance of new security from the debtor discharges the surety;[64] it is the giving of new credit inconsistent with the old contract. But it has

[56] *The Guardians of the Malling Union* v. *Graham* (1870) L.R. 3 C.P. 201.

[57] *Bonar* v. *MacDonald* (1850) 3 HLC 226, 232; 10 E.R. 87, 92, *per* Lord Cottenham.

[58] *Pollack* v. *Everrett* (1876) 1 Q.B.D. 669, 624 *per* Blackburn J; 667-78 *per* Quain J. ("where the act is voluntary and deliberate the creditor altering the contract and rendering it impossible that it should be carried out in the original form").

[59] (1868) L.R. 3 Ex. 303.

[60] *Giddins* v. *Todd* (1866) 4 W.R. 377.

[61] *Ibid.* at 378, "serving the notice did in fact put an end to the lease; and whatever subsequent arrangements was made by which, notwithstanding the notice [the lessee] should hold under the very lease, it operated to put an end to the lease" *per Kindersley V.C.*

[62] e.g. *Bowser* v. *Colby* (1841) 1 Ha. 109, 130; *Dendy* v. *Evans* [1910] 1 KB 263 (CA).

[63] *Holme* v. *Brunskill* (1877) 3 Q.B.D. 495.

[64] *English* v. *Darley* (1800) 2 Bos. & Pul. 61, 62, 126 E.R. 1156, 1157, Lord Eldon C.J.

been explained that the mere giving of additional security will not discharge the surety unless the security was consideration for the grant of time.[65] The giving of time to and obtaining new security from the surety do not discharge him even though it is a new contract whereby the surety assumed primary liability.[66] The giving of another bond for the same debt conditioned to be paid at a different time is a new contract which discharges the surety.[67] The claim by a creditor for non payment was refused when he had accepted on discount bills of third parties provided by the debtor which he did not indorse.[68] By the acceptance of the bills for discount he had entered into a new contract with the debtor for which the surety was not answerable. There was a difference between a claim for dishounoured bill given in payment and discounting bills.

Novation

This is the same as a substituted contract with the introduction of a new party into the contract. There can be no novation between the same parties to the contract. Any discharge that occurs between the same parties would be on the basis of substituted contracts.

An agreement to discharge for a lesser sum and taking a security from a third person discharges the surety.[69] The acceptance of the third party as debtor releases the surety.[70] The surety guaranteed the debt of the original debtor, not of the new one.

The composition cases properly fall under this category because the assignment is to the trustee who satisfies the debts or the amount of the composition. Where the creditor releases the debt or enters into a composition with the debtor the surety is discharged.[71] Secret agreements between the principal debtor and the creditor would not be upheld and the indorser of any bill or provision of security by any third person would be void as a fraud on the creditors.[72]

Release

This was just the application of the general rule that a release of the debtor or co-surety would operate as the release of the surety or other co-

[65] *Overend Gurney* v. *Oriental Financial Corpn.* (1874) LR 2 HL 348.

[66] *Jeffries* v. *Smith* (1862) 10 W.R. 1.

[67] *Clarke* v. *Henty* (1838) 3 Y & C Ex. 187, 160 E.R. 667.

[68] *Evans* v. *Whyle* (1829) 5 Bing. 485; 130 E.R. 1148.

[69] *Lewis* v. *Jones* (1825) 4 B & C 506; 107 E.R. 1148.

[70] *Commercial Bank of Tasmania* v. *Jones* [1893] AC 314 (PC).

[71] *Ex. p. Smith* (1789) 3 Bro. C.C.1; 29 E.R. 370. The assignee of the indorser is prevented from coming on to the indorser. *Ex. p. Wilson* (1805) 11 Ves. Jun 419; 32 E.R. 1145.

[72] *Mayhew* v. *Bayes* (1910) 103 LT 1 (CA). "There was not only an alteration of time, but of the terms of the contract" *per* Kennedy L.J. at 4.

sureties. Acceptance of part of a debt from one party to a joint and several surety bond would operate to release the others[73] On the other hand acceptance of money from the debtor in satisfaction and later avoidance by the trustee in bankruptcy of that payment would not operate as a satisfaction to discharge the surety.[74] The creditor's acceptance cannot operate against him; there is nothing inconsistent in his conduct; he had no right to refuse but was bound to accept the money.[75] Where a surety causes the release of the debtor by his own mistake, he cannot rely on that release for his own discharge.[76]

Nature of the Act

(a) *Voluntary*

After commencing a suit against the debtor and the surety, the withdrawal of the proceedings against the debtor alone would not release the surety even if a fresh suit could not be brought against the debtor. The debt has not been discharged.[77] The surety can still sue the debtor to recover. There is no contract in such a case between the creditor and the debtor.

> Under Section 139 [S. 192 in Malaysia] the surety is discharged if, and only if, a contract has been entered into by which the debtor is released or if there has been any act or omission on the part of the creditor the legal consequences of which has been to discharge the principal debtor.[78]

In order to constitute an alteration what has been done must be a voluntary act of the creditor. It must be his own act which the surety has no mode of preventing by paying the debt.[79] The erasing of a name of a co-obligor would release the others.[80] Continuing to employ the principal after he was guilty of embezzlement and dishonesty would effect a release because the representation that he was honest and trustworthy is a continuing one.[81]

The creditor may voluntarily place himself in such a position that he cannot sue the principal[82] or injure the interest of the surety in which case

[73] *Nicholson* v. *Revil* (1836) 4 Ad. & E 675; 111 E.R. 941; *Cheetham* v. *Ward* (1797) 1 Bos. & Pul. 635, 126 E.R. 1102; *R.* v. *John Bayley* (1824) 1 C&P 435, 171 E.R. 1262.

[74] *Petty* v. *Cooke* (1871) LR 6 Q.B. 790. Forbes, for the creditor argued (at 793-94): "A payment, which at the time it is made, contains the seeds of avoidance, and is subsequently avoided, is not a valid payment."

[75] *Ibid.* at 295 per Lush J, 796 *per* Hannen J.

[76] *Scholefield* v. *Templer* (1859) 5 Jur. NS 619, Wood V.C.

[77] *Mahant Singh* v. *U. Ba Yi* (1939) LR 66IA 198.

[78] *Ibid.* at 208 per Lord Porter.

[79] *Brown* v. *Carr* (1831) 7 Bing. 508; 514; 131 E.R. 199.

[80] *Nicholson* v. *Revil* (1836) 4 Ad. & E 675; 111 E.R. 941.

[81] *Phillips* v. *Foxall* (1872) L.R. 7 Q.B. 666.

[82] *Price* v. *Kirkham* (1864) 3 H & C 437, 159 E.R. 601.

there is a discharge. Entering into a new consolidation deed without the knowledge of the surety with a new covenant to pay is such a voluntary act of the creditor which would discharge the surety.[83]

The creditor should not do any act which would affect the security; if he did so the surety is released. A landlord levying distress against the goods, the security, without reference to the surety destroyed the security which the surety may have had recourse to.[84] Sending the vessel, the security to a surety, to a war zone, was exposing the security to grave risk.[85] Other instances are allowing the principal to operate a second account whereby the funds would be kept out of the account guaranteed,[86] the failure to proceed with the execution of a judgement assigned to the creditor out of which he could have recouped his debt;[87] where a debt was assigned and by the wilful default of the creditor it had become irrecoverable.[88] The surety's rights are also effected where the creditor has voluntarily placed himself in a situation where he cannot sue the debtor;[89] the surety cannot then compel him to sue the debtor. The failure of the creditor to perfect or complete the security deprives him of the right to proceed against the surety.[90]

(b) *Effect of Bankruptcy*

If the creditor is disabled not by his own act but by operation of the law then there is no discharge. The creditor had no option. These all arise under the bankruptcy legislation. In *Lee Wah Bank* v. *Joseph Eu*[91] the Federal Court held that a release in bankruptcy of the debtor did not discharge the surety because the discharge was not by the act of the creditor but by the operation of the bankruptcy legislation. It applied the statement of principle by Bigham J[92] The surety remains liable even if the position of the surety is altered.[93] The debtor is not discharged by the act

[83] *Bolton* v. *Salmon* [1891] 2 Ch. 48.

[84] *Pearl* v. *Deacon* (1857) 1 De G & J 461; 44 E.R. 802.

[85] *Burke* v. *Rogerson* (1866) 12 Jur N.S. 635 (CA).

[86] *Ward* v. *The National Bank of New Zealand* (1883) 8 App. Cas. 755.

[87] *Williams* v. *Price* (1824) 1 Sm. & St. 581, 587, 57 E.R. 229, 232. By the assignment the creditor had taken possession or control of the judgment to the exclusion of the debtor.

[88] *Ibid.*

[89] *Strong* v. *Foster* (1857) 17 C.B. 201, 219, 139 E.R. 1047, 1054; *Price* v. *Kirkham* (1864) 3 H & C 437, 441, 159 E.R. 601, 603 *per* Pollock C.B.

[90] *Watson* v. *Allcock* (1853) 4 De G M & G 242; 43 E.R. 499.

[91] [1981] 1 MLJ 11 (FC).

[92] *In re Fitzgeorge, ex p. Robson* [1905] 1 KB 462, 464 "The principal debt is gone no doubt, but not by any act of the creditor. It is gone by operation of law. The principal debt will never be repaid, but in my opinion, the obligation of the debtor to pay interest under his guarantee remains."

[93] *Ex. p. Jacobs* (1875) L.R. 10 Ch. 111.

of the creditor.[94] The principle underlying the bankruptcy legislation has always been that the release in bankruptcy of a debtor would not discharge the solvent co-debtor.[95] It applied to every mode of discharge of the debtor under the bankruptcy legislation, be it on petition, composition or deed of arrangement.[96] The grant of an extension of time to pay the instalment with the consent of the plaintiff by the court is a judicial act.[97]

Acquiescence or Inaction

The act to bring about the alteration of rights of the surety must be a positive act except in the case where the omission was in relation to the security. A failure to sue or recover promptly the debt or to suspervise the person guaranteed or the account of the customer of a bank did not cause the surety to be released.[98] Even if prejudice was caused to the surety by the failure to sue such failure would not discharge the surety.[99] Acquiescence in the violations of the conditions of the bond would not operate as a release.[1] There was a difference between the affirmative and negative conduct.[2] The position might be different where the employers in the case of a fidelity bond were aware of the dishonest acts of the employee and continued in him his employment.[3] Mere acquiescence in the irregular mode of accounting would not be connivance or fraud.[4] Nor will the failure to supervise the employee discharge the surety.[5] Non-compliance with the directory provision of a statute[6] or mere negligence[7] was insufficient. Nor did the non-compliance of the rules of a society for they are not part of the contract.[8]

[94] *Ibid.* at 214, *per* James L.J.

[95] *Megrath* v. *Gray* (1874) L.R. 9 C.P. 216, 230 *per* Lord Coleridge C.J.

[96] *Ellis* v. *Willmot* (1874) L.R. 10 Exch. 10.

[97] *Provincial Bank* v. *Cussen* (1886) 18 LR Ir. 282 (CA).

[98] *The Trent Navigation Co.* v. *Harley* (1808) 10 East 34, 103 E.R. 688.

[99] *Polak* v. *Everett* (1876) 1 Q.B.D. 669, 676 *per* Blackburn J.

[1] *The Mayor, Alderman & Citizens of Durham* v. *Fowler* (1889) 22 Q.B.D. 394.

[2] Ibid. 419, per Charles J.; *English* v. *Darley* (1800) 2 Bos & Pul 61, 62; 126 E.R. 1156, 1157.

[3] The power to suspend was different from dismissal; the failure to suspend did not discharge: *Byrne* v. *Muzio* (1881) LR 7 Ir. R (Ex) 396.

[4] *Caxton & Abingdon Union* v. *Dew* (1890) L.J. 68 Q.B. 380, 382, Bruce J.

[5] *The Mayor, Aldermen & Burgesses of Kingston-Upon Hill* v. *Harding* [1892] 2 Q.B. 495, 507, *per* Bowen L.J.

[6] *County Council of the Country of Donegal* v. *Life & Health Assurance Association* [1909] 2 Ir. R. 200.

[7] *Ibid.* at 716.

[8] *Price* v. *Kirkham* (1864) 3 H&C 437; 159 E.R. 601. The Rules of the Society required that notice of default be given to the surety which was not done in this case. Pollock C.B. at 441, E.R. 603 ruled that the creditor was not bound to do so; "provided he does not preclude himself from pro-

The failure by the creditor to detect the fraud does not work a discharge.[9] This was so also in equity.[10] Nor is the failure to ensure punctual performance by the principal; the surety could not be said to have been exposed to greater risk or placed in a different situation; it was the surety's duty to see that the principal performs his obligations.[11] The mere failure to call on the principal debtor to deliver his accounts within reasonable time is mere passive inactivity; not positive conduct.[12] The failure to demand payment does not discharge[13] the surety as his situation has not changed. The failure to disclose an embezzlement during the employment under the bond did not relieve the surety.[14] Active diligence is not expected or required.[15] Non-disclosure to the surety of the unsuccessful attempts made to recover the debt from the principal did not help the surety.[16]

In *Stewart* v. *McKeen*[17] there was a disagreement among the judges as to whether a particular default went to a mere mode of accounting. The employee was to collect money and submit returns and pay over the money collected. After sometime the employer took bills from the employee, for amounts larger than the sums that may be collected. These were post-dated to 4 months. The employer discounted them with his bankers. When these were dishonoured the employer sought to recover against the surety. The majority held that this was a mere mode of accounting. Pollock C.B. dissented. He regarded this conduct as fraudulent on the part of the creditor.[18]

Further, the failure to sue cannot be regarded as the giving of time.[19] The obligation to ensure prompt payment rests with the surety. Where the creditor swears that he did not intend to give up the security there can be no discharge.[20]

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ceeding against the principal he may abstain from enforcing any right he posseses." He followed *Brown* v. *Langley* (1842) 4 Man. & G. 466; 134 E.R. 192. The court here also adopted the parol evidence rule as precluding the terms of the rules being incorporated into the bond.

[9] *MacTaggart* v. *Watson* (1835) 3 Cl & F 525, 6 E.R. 1534.

[10] *Ibid.* at 541, E.R. 1540 ". . . the Courts of Equity have never, to my knowledge, given a discharge to the surety merely on the ground of the creditor, the obligee, not having called on the debtor so early as he ought or not having given early notice of his failure or non-payment to the surety" *per* Lord Brougham.

[11] *Creighton* v. *Rankin* (1840) 7 Cl & F 325, 7 E.R. 1092, 347-48 1101.

[12] *Black* v. *Ottoman Bank* (1862) 6 L.T. 763 (PC).

[13] *Perfect* v. *Musgrave* (1818) 6 Price 111, 146 E.R. 757.

[14] *Shepherd* v. *Beecher* (1725) 2 P.Wms. 288; 24 E.R. 733.

[15] *Wright* v. *Simpson* (1802) 6 Ves. Jun. 715, 734; 31 E.R. 1272, 1282 *per* Lord Eldon.

[16] *Goring* v. *Edmonds* (1829) 6 Bing. 94; 130 E.R. 1215.

[17] (1855) 10 Exch. 675; 156 E.R. 610.

[18] *Ibid.* 697; E.R. 620.

[19] *Eyre* v. *Everett (1826) 2 Russ. 381, 384; 38 E.R.* 379, 380.

[20] *Gordon* v. *Calvert* (1828) 4 Russ. 581, 583, 38 E.R. 924, 925.

Negligence or laches can work a discharge where such conduct amounts to connivance of the surety to getting the funds improperly or wilful shutting of eyes to a fraud. These were first suggested in *MacTaggart* v. *Watson*.[21] It was later explained that such connivance must be active connivance amounting to a fraud.[22] Negligence where it amounts to a fraud can relieve the surety.[23] But laches, however extreme, amounting to fraud is unlikely.[24]

Where there was an express obligation to sue, the failure to do so or delay in doing so has caused prejudice such failure or delay will operate as a discharge.[25] This would be a breach of the contract on the part of the creditor. The creditor must perform the conditions upon which the liability is to arise; if the conditions precedent to liability are not complied with there can be no liability.[26] The creditor in such a case deprives himself of this right.[27] The delivery of a blank bill of exchange to be filled in would not discharge the surety because the creditor can fill it at anytime.[28]

Prejudice

The prejudice spoken of is the disadvantage to the surety which is inconsistent with or harmful to his right as a surety.[29] As already seen in the alteration cases the disadvantage could be an increase of the liability or the interference with the security. This is a settled rule in equity.[30] An indorser of a promissory note who pays the holder is also entitled to the benefit of the security given by the maker which is in the hands of the holder at the time of such payment and upon which the holder has no claim except for the note itself.[31] Where any act has been done by the obligee that may injure the surety the court would readily hold it in favour of the surety.[32]

[21] *Note 58 above.*

[22] Dawson v. *Lawes* (1880) Kay 280, 301; 69 E.R. 119, 128 *per* Pagewood V.C.

[23] *Black* v. *Ottoman Bank, supra.*

[24] *Goring* v. *Edmonds supra* at 98-99, E.R. 1217 *per* Tindal C.J.

[25] *Bank of Ireland* v. *Beresford* (1818) 6 Dow. 233, 239, 3 E.R. 1456-1458 ("Whether the commissioners being under an obligation by the Act to sue without delay, could take the benefit even of passiveness as against the surety." *per* Lord Eldon).

[26] *Hall* v. *Hadley* (1835) 2 Ad & E 758; 111 E.R. 292.

[27] *Carter* v. *White* (1883) 25 Ch. D. 666, 670 *per* Cotton L.J.

[28] *Ibid.*

[29] *Beckett* v. *Addyman* (1882) 9 Q.B.D. 783, 791, *per* Cotton L.J. ("If the creditor deprives the surety of his rights that may put an end to liability").

[30] *Duncan Fox & Co.* v. *North and South Wales Bank* (1880) 6 App. Cas. 1.

[31] *Aga Khan Isphany* v. *Judith Emma Crisp.* (1891) LR 19 I.A. 24.

[32] *Law* v. *East India Co.* (1799) 4 Ves. Jun. 824, 833; 31 E.R. 427, 432 *per* Arden M.R.

The question of materiality is not a question for the creditor or the debtor; it is for the surety. If it is self-evident that there could be no substantial alteration then it would not have any effect; if, however, it is not so self-evident then the surety becomes the judge of the prejudice.[33] This is a modification of the older view; that it was vain to argue that there was any disadvantage to the surety, the court would not take notice of the advantage.[34] "In almost every case where the surety has been released either in consequence of time being given to the principal debtor, or of a compromise being made with him, it has been contended, that what was done was beneficial to the surety — and the answer has always been that the surety was the judge of that. . ."[35] The recovery of a part of the debt in execution[36] or the acceptance of a cognovit (i.e. a certificate of acknowledgement of liability) when execution to recover would have been futile was not a discharge.[37]

When the creditor puts himself in a position in which he cannot be compelled to sue the debtor that deprives the surety's right to demand the bond to be put in suit.[38] The giving of time puts the creditor in that position, because once time is given to the debtor, the surety can demand immediately to sue him but the creditor has pledged that the very person shall not be sued.[39]

One of the remedies the surety can exercise is the dismissal of the servant for whom he has given a fidelity bond. He can demand that the employee be dismissed. The creditor who had condoned the default would not be able to dismiss because he has by his own act of condonation put it outside his power to do so. This is prejudice to the surety.[40] If the creditor has no power to dismiss but is vested in someone else then the obligee would not be in a position to dismiss and so would not work a discharge.[41]

Interference with the legal remedies of the surety would be prejudice.[42] The security in the hands of or available to the creditor enures for the benefit

[33] *Holme* v. *Brunskill* (1877) 3 Q.B.D. 495, 505 *per* Cotton L.J. Brett L.J. dissented.

[34] *Boultbee* v. *Stubbs* (1810) 18 Ves. Ju. 20, 21, 34 E.R. 225, *per* Lord Eldon L.C.

[35] *Calvert* v. *The London Dock Co.* (1838) 2 Keen 638, 644; 48 E.R. 714, 776-77, *per* Lord Langdale M.R.

[36] *Stevenson* v. *Roche* (1829) 9 B & C 707, 109 E.R. 262.

[37] *Joy* v. *Warren* (1824) 1 C & P 532, 171 E.R. 1304. In the later case of *Price* v. *Edmunds* (1830) 10 B & C 578, 109 E.R. 566 it was said that if time was given while accepting a cognovit there would be a discharge. It is submitted that this is no longer good law; the giving of time after judgment has been held not to come within the rule.

[38] *Calvert* v. *The London Dock Co.*, *supra*.

[39] *English* v. *Darley* (1800) 2 Bos. & P 61, 62, 126 E.R. 1156, 1157 *per* Lord Eldon C.J.

[40] *Phillips* v. *Foxall* (1872) L.R. 7 Q.B. 666, 680 *per* Blackburn J.

[41] *Caxton & Abington Union* v. *Dew* (1890) L.J. 68 Q.B. 380, 383, *per* Bruce J.

[42] *Tucker* v. *Laing* (1856) 2 K & J 745, 69 E.R. 982.

of the surety. The loss of it by means of a distress by the landlord deprived the surety even though it may have been used to reduce the debt.[43] The sale by a mortgagor in possession to reduce the debt is not a deprivation of the security by the creditor and does not come within the rule.[44] Similarly the sale of the shares pursuant to the articles of a company following forfeiture.[45] The duty also extends to the perfection of the security in the hands of the mortgagee or creditor so that they will be complete and available for the surety should the latter pay up.[46] If the benefit of it is lost or is not perfected through the neglect of the creditor, the surety is released.[47]

Extent of Discharge

The surety is wholly discharged where there has been a variation or the grant of time. If what was done was only prejudicial to the security or affected part of it then the discharge operates only to the extent the surety's rights were affected. A compromise by the creditor with a co-surety's trustee in bankruptcy operated as a release *pro-tanto* — to the extent the trustee would have paid when called upon.[48] Similarly a loss caused by the creditor to part of the securities released the sureties up to the value thereof.[49] In *W.R. Simmons* v. *Meek*[50] the guarantee was for the payment of the goods supplied to the debtor. No credit terms had been agreed. The Plaintiffs, without the sureties' knowledge and contrary to previous practice accepted from the debtors in respect of part of the debt bills of exchange for £150. At that time less than £150 was due. Subsequently the plaintiff sued the defendant on the guarantee. The defendant as a surety was not released from the whole amount of the guarantee but his release was limited only to the value of the bills of exchange. The discharge is not prevented by adding a clause that the release would take effect as in a bankruptcy[51] — the act of a party cannot be converted into or treated as one that was produced by the operation of law.

[43] *Pearl* v. *Deacon* (1857) 1 De G & J 461; 44 E.R. 802.

[44] *Taylor* v. *Bank of New South Wales* (1886) 11 AC 596.

[45] In re *Durwen & Pearce* [1927] 1 Ch. 176.

[46] *Wulf* v. *Jay* (1872) L.R. 6 Q.B. 756, 762, *per* Cockburn C.J.

[47] *Strange* v. *Ffooks* (1863) 1 Giff. 408, 412, 66 E.R. 765, *per* Stuart V.C.

[48] *Re Wolmerhausen* (1890) 62 L.T. 541 (CA).

[49] *Ex p. Mure* (1788) 2 Cox. 63, 10 E.R. 30; *Capel* v. *Butler* (1825) 2 Sm & St. 457, 462, 57 E.R. 421, 423, Leach V.C.

[50] [1939] 2 All E.R. 445.

[51] *Cragoe* v. *Jones* (1873) L.R. 8 Exch. 81.

Reservation of the Sureties

A creditor can preserve his rights against the surety, even though he acts in a manner inconsistent with the rights of the surety. The surety's right to plead a waiver is taken away. By reserving the rights against a surety the operation of a release is prevented and parol evidence was held admissible to prove it.[52] The surety will not be discharged.[53] There is no intention to release the surety.[54] If there is no such reservation the surety is discharged.[55]

When the right is reserved the character of the act is no longer inconsistent with the surety's rights.[56] The release contained in the document was not treated as an absolute release but as a mere covenant not to sue;[57] this does not preclude the operation of the rule that the creditor can abstain from suing but should not allow the statute of limitation to set in.[58] It also operates in effect as an implied representation that the creditor does not intend to give up the surety and would want to have recourse to him.[59]

Any reservation of rights must be by the use of express and distinct language.[60] When at the time of the release there was no reservation it cannot be imported or incorporated by a subsequent deed.[61] The legal effect of a release could not be modified by evidence of verbal negotiations prior to the release for the purpose of showing an agreement to reserve the rights.[62] There can be no covenant to sue of a partial debt only, and any expression of a partial discharge takes effect in reality as an absolute release.[63]

Circumstances, however, may prevent the reservation of rights from taking effect — where prejudice is caused to the surety.[64] There can be no discharge if there is an absolute release to the debtor, for the remedy at

[52] *Wykes* v. *Rogers* (1852) 1 De G M & G 408, 42 E.R. 609.

[53] *Bateson* v. *Gosling* (1871) L.R. 7 C.P. 9.

[54] *Payleur* v. *Homersham* (1815) 4 M & S 423, 105 E.R. 890.

[55] *Bolton* v. *Salmon* [1891] 2 Ch. 48, 53, *per* Chitty J.

[56] See e.g. the position adopted against the debtor when the surety was released by the creditor in *Webb* v. *Hewitt* (1857) 3 K & J 438, 442, 69 E.R. 1181; 1182-83.

[57] *In re Whitehouse* (1857) 37 Ch. D. 683, 694, *per* Stirling J.

[58] *Henton* v. *Paddison* (1893) 68 L.T. 405 (Ch. D.).

[59] *Kearsley* v. *Cole* (1846) 16 M & W 120, 136; 153 E.R. 1128, 1131, *per* Parke B.

[60] *Overend Gurney & Co.* v. *Oriental Financial Corporation* (1874) L.R. 2 HL 348.

[61] *Wilson* v. *Lloyd* (1873) L.R. 16 Eq. 60.

[62] *Mercantile Bank of Sydney* v. *Taylor* [1893] AC 317 (PC). In the light of this case the view expressed in *Payleur* v. *Hommersham*, *supra*, note 98 may no longer be good.

[63] *Commercial Bank of Tasmania* v. *Jones* [1893] AC 314, 316 (PC).

[64] *Owen* v. *Homan* (1853) 4 HLC 997, 10 E.R. 752.

law is gone.[65] The use of the words "without prejudice" has no effect where the creditor enters into new arrangements with and takes new security from the debtor.[66] The extinguishment of the original debt releases the surety.[67] The covenant not to sue was used to cut down the effect of a release at law; the claim against the sureties would have been barred; it was really an equitable plea.[68] But the payment of a part of a debt and provision of additional security for the balance is clear evidence of an intention not to release the surety.[69] It is basically one of construction: where the deed clearly reserved rights as to some and not the others, the former were not released.[70]

The reason for the existence of these rules were criticised. Coleridge J. disliked it so much that he would have paused long before upholding any such rule; but he was bound by the authorities that established it.[71] The reason why this should prevent the release of the surety is difficult to understand. It is said that by reserving the rights the debtor agrees that the surety could go against him; the securities are intact; the remedy is gone between the debtor and the creditor, in as much as the creditor cannot sue the debtor but as against all other persons the rights of the creditor are reserved.[72] The surety has a right to call upon the creditor to sue; if the creditor cannot because he has disabled himself by the giving of time or by the covenant not to sue would that not be an interference with the rights of the surety? This is not a theoretical objection. The creditor could of course, insist that he be provided his debt and costs before he sues, if the surety complies with it he cannot refuse but would still not be able to do so. It is up to the surety in what manner he wants to exercise his rights and with what remedies he wants to enforce them. The surety could not be forced to accept an assignment of the debt and the securities.

Where a release has been given in a composition agreement it has been held to be effective.[73] Allowing a debtor under a composition deed to carry on business and incur more liabilities operated as a discharge of the surety despite the reservation of rights; normal rules as to discharge applied.[74] Composition deed with a reservation proved effective when time

[65] *Webb* v. *Hewitt, supra.*

[66] *Boultbee* v. *Stubbs, supra.*

[67] *Lewis* v. *Jones* (1837) 4 B & C 506, 514, 107 E.R. 1148.

[68] *Keyes* v. *Elkins* (1864) 5 B & S 240, 122 E.R. 820. See the argument of Mellish, for the defendant at 251, E.R. 825, Cotman J. at 254, E.R. 826.

[69] *Hall* v. *Hutchons* (1833) 3 My & K 426, 40 E.R. 1162.

[70] *North* v. *Wakefield* (1849) 13 Q.B. 536, 541, 116 E.R. 1368, 1370, *per* Patteson J.

[71] *Price* v. *Barker* (1855) 4 El & B 760, 778-79, 119 E.R. 281, 288.

[72] *Green* v. *Wynn* (1869) L.R. 4 Ch. App. 204, 206, per Lord Hatherlly L.C.

[73] *Walker* v. *Brookes* (1866) 4 W.R. 347.

[74] *Bailey* v. *Edwards* (1864) 4 B & Sm 761, 774; 122 E.R. 645, 651.

was given to the debtor to pay by instalments.[75] A necessary consequence of the reservation of the rights in a composition deed is the continuance of the liability of the surety.[76]

Taking a new bond after the death of the surety from two others to replace it is no discharge, the liability of the estate continues.[77] A new covenant giving more time to pay, in the absence of reservation of rights will operate as a discharge.[78] The reservation clause does not operate where the security is destroyed.[79]

Waiver of Rights by Surety

The surety can waive or relinquish the rights he is entitled to as a surety. He does this by consent. The consent can be inferred or can be express. Section 135 of the Indian Act (corresponding to S. 88 of the Malaysian Act) can be avoided by a clause in the contract that the dealings between the creditor and the debtor shall not affect the surety. It would have the effect of avoiding the rule whereby a surety would be released.[80] The consent can be given in advance or after the event.

There is a conceptual difficulty about consent in advance. It has been argued how could a party consent to something that has not happened because he would not have the requisite knowledge.[81] A party can enlarge the terms of his liability and give a blank cheque to the obligee. If he wants any restrictions imposed it is for him to do so. He can consent in advance by the terms of his suretyship to be liable notwithstanding any variations or modifications.[82] If the bank or obligee chose to exercise the wide discretionary power the surety cannot complain.[83] He can waive his rights of subrogation[84] and be answerable to pay the full amount of his debt notwithstanding the excess of the limit.[85] His contract to be answerable for

[75] *Nichols* v. *Norris* (1831) 3 B & Ad. 41, 110 E.R. 15. Lord Tenterden C.J. (42, E.R. 16) thought that such deeds should be prevented being against the interest of all parties. Littledale J. *(idem)* said that the surety could still proceed against the debtor.

[76] *Close* v. *Close* (1853) 4 De G M & G 176, 43 E.R. 474.

[77] *In re Ennis* [1983] 3 Ch. 238.

[78] *Bolton* v. *Buckenham* [1891] 1 Q.B. 278.

[79] *Watson* v. *Alcock* (1853) 4 De G M & G 242, 247, 43 E.R. 499, 502, *per* Turner L.J.

[80] *Hodges* v. *Delhi & London Bank* (1900) LR 27 I.A. 168, 177.

[81] *Heng Cheng Swee* v. *Bangkok Bank* [1976] 1 MLJ 267 (FC); the guarantee as the actions complained of were permitted by the terms in *Ooi Boon Leong* v. *Citibank* [1984] 1 MLJ 222. The provisions of the Contracts Act were not such as to prevent parties from entering into contracts as they thought fit except as to the provisions dealing with illegality.

[82] *Perry* v. *National Provincial Bank* [1910] 1 Ch. 464 (CA).

[83] *Barclays Bank* v. *Thienel* (1978) 122 S.J. 472.

[84] *Fernandes* v. *Hope* (1844) 8 Jur. 1128.

[85] *Re Porter* (1848) De G 623.

the ultimate balance of the debt without taking into account any payments already made has been upheld.[86] If the instrument makes the surety liable for the full amount irrespective of any payment made by him the debtor or third parties, the creditor can prove for that amount.[87] The surety disabled himself by express and distinct terms the advantages he had as a surety.[88]

Subsequent promise stands on a different footing. Originally such promises were declared ineffective for want of consideration.[89] It was later held that the objection for lack of consideration was unfounded. The promise was valid "not as a constitution of but the revival of an old debt."[90] This probably was to meet the objection that may have been based on the Statute of Frauds for the absence of writing. It is clear that a subsequent oral promise to continue a guarantee after its expiry is uneforceable by reason of the statute.[91]

However it is established that the liability of a surety may be revived[92] and this could be by conduct e.g. permitting the security to be deposited with the creditor for the debt led to a revival of the suretyship;[93] the failure to give notice upon the death of a joint guarantor and allowing a newly formed company with the same directors to draw on the facility continued the sureties' liability.[94] The consent by becoming a party to a deed with reservation of rights against himself precluded the plea of discharge.[95] Such consent was inferred from the close relationship of the parties which would provide the knowledge of the events giving rise to the discharge.[96] Solicitors, who were the sureties, had acted for the parties in the original transaction as well as in the subsequent transactions were held bound because their failure to raise any objection was consent.[97] The argument was that "they knew only in the character of solicitors"[98] and

[86] *Midland Banking* v. *Chambers* (1869) L.R. 4 Ch. App. 398, *Ex. p. Hope* (1844) 3 Mont. D and De G. 720, 723.

[87] *In re Houlder* [1929] 1 Ch. 205, 214.

[88] *Ex. p. National Provincial Bank* (1881) 17 Ch. D 98, 102-03, per James L.J. ("the surety has chosen to contract himself out of that possible equity in the plainest and most distinct terms"), 103, *per* Cotton L.J. ("The proviso clearly points out. . . that the surety is not to take advantage of any payments made from time to time by the principal debtor").

[89] *Jackson* v. *Duchaire* (1790) 3 T.R. 727.

[90] *Mayhew* v. *Crickett* (1818) 2 Swans. 185, 36 E.R. 585.

[91] *Kitson* v. *Julian* (1855) 4 El & B 854, 859, 119 E.R. 319 *per Crompton J.*

[92] *Phillips* v. *Foxall* (1872) L.R. 7 Q.B. 666, 676 (*per* Cockburn C.J., Lush and Quain J.J.)

[93] *Smith* v. *Winter* (1838) 4 M & W 454, 467, 150 E.R. 1507, 1513, *per* Parke B.

[94] *Ashby* v. *Day* (1886) 54 L.T. 408. Lopez L.J. (411) found liability on estoppel by conduct.

[95] *Kearsley* v. *Cole* (1846) 16 M & W 128, 153 E.R. 1128.

[96] *Cuxton & Abington Union* v. *Dew* (1890) L.J. 68 Q.B. 380.

[97] *Woodcock* v. *Oxford & Worcester Ry. Co.* (1853) 1 Drew 521, 61 E.R. 551.

[98] *Ibid.* at 527, E.R. 554.

not as sureties. There must be clear evidence of knowledge where acquiescence is alleged against the surety.[99] On the other hand it is not sufficient for the surety to allege that he was not informed by the creditor; he should allege and prove the igorance of the facts.[1]

Conclusion

The modern law on release of sureties proceeds upon the simple principle that the inconsistency of conduct produces or provides the consent to renounce or not to rely on rights or benefits solely to one's favour. This presumed consent defeats any subjective reservations not manifested and promotes certainty. This was achieved by the rules developed and devolved by the old courts of equity and later adopted by the common law and now fused into a single principle. Thus the decisions which solved the problems of the mercantile community arising out of the use of bills and promissory notes now apply generally to the release of all forms of suretyship.

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[99] *Small* v. *Currie* (1854) 3 De G M & G 141, 160, 43 E.R. 824, 831 *per* Turner L.J.

[1] *Caxton & Abington Union, supra*, 383 *per* Bruce J.