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mortgagee for the loss of the mortgaged property, I accede to the *vakíl's* application to state a case for the opinion of the High Court, and pass a decree in favour of the defendant, contingent on the decision of the Honorable the Judges of the High Court."

The reference came on for disposal before GIBBS and MELVILL, JJ.

Bhairavnáth Mangesh, for the plaintiff:—According to Hindú law the suit is maintainable, as by law a mortgagee can recover the debt due to him, the pledge being lost without any default on his part.

Cur. adv. vult.

20th Sept. PER CURIAM:—The Court considers that, in the absence of any express agreement to the contrary, a creditor in whose hands a pledge has perished by accident, and without negligence on his part, is entitled to proceed against his debtor for recovery of the debt. The rule of Hindú law in this matter is in accord with that of the English and Roman laws. (Vyavahár Mayukha, Chap. V., Sec. II., cl. 4.*)

* Stokes' Hindú Law Books, p. 114.

Special Appeal No. 155 *of* 1870.

Sept. 27.

NA'RA'YAN GOVIND OK, for himself and as Administrator and Guardian of Gangádhar and Dámodhar Sakhárám .....*Appellant.*

GANESH A'TMA'RA'M FADKE *et al.* .....*Respondents.*

Surety—Mortgage Bond—Relinquishment by Mortgagee of Mortgaged Property.

Where a creditor sued his principal debtor and two sureties upon a mortgage bond, and in his plaint formally relinquished his claim against part of the mortgaged property, *it was held* that after such relinquishment the sureties were no longer bound, their position being altered for the worse by reason of such relinquishment.

THIS was a special appeal from a decree of the Acting District Judge of Thána, confirming, on appeal, the decree of the Subordinate Judge of Kalyán.

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The suit was filed by the appellants on a mortgage bond, dated the 25th of November 1862, against the representatives of the obligor, and the respondents in this appeal as his sureties. The Subordinate Judge who tried the cause dismissed it as against the respondents, holding that, as they were sureties only to the extent of Rs. 1,017-8-0, and as the plaintiff had given up his lien over part of the mortgaged property which was found to be worth that amount, the sureties were discharged from their liability. He, however, decreed the claim as against the representatives of the principal debtor. This decision having been confirmed by the District Judge, the plaintiffs preferred a special appeal, which was argued before LLOYD and KEMBALL, JJ.

Nánábhái Haridás (with him *Vishvanáth Náráyaṇ Mandlik*) for the appellant.

Shántárám Náráyaṇ for the respondents.

Cur. adv. vult.

27th Sept. LLOYD, J.:—The only question we have to determine in this case is whether the sureties are discharged from their liability, by reason of the plaintiffs having neglected to enforce their claim against the whole of the property mortgaged.

The facts of the case are these:—Rámchandra Mahádev Fadke mortgaged certain property to Sakhárám Govind Ok for the sum of Rs. 1,017-8-0. A'tmárám Ballál and Vásudev Náráyaṇ also became sureties for this amount, which they engaged to pay off, "jointly and severally, with interest at one per cent., without making any excuse on the ground of the absence of one another."

The heirs of Sakhárám Govind Ok brought this action against the heir of Rámchandra Mahádev, and the above-named sureties, for the recovery of the money, but in the plaint they formally relinquished all claim to a portion of the mortgaged property, namely, "a moiety of the field 'Badhan,'" without assigning any reason for so doing, though it has been stated by their *vakíl* that it was because the field was not accurately described in the bond.

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The Subordinate Judge of Kalyán, who tried the suit, found the value of the land so omitted from the plaint to be equal to the amount for which the sureties had bound themselves, namely, Rs. 1,017-8-0, and, considering that the sureties were prejudiced in consequence of the plaintiffs having given up their lien on the said property, held that they were discharged from their liability, and threw out the claim as against them; and this decision has been upheld by the District Judge of Thánáá on appeal.

It does not appear that, amongst the Reports of the High Courts in India, any case precisely touching on this point is to be found, and the only argument urged on behalf of the special appellants is that, as no new contract has been entered into between the creditor and the principal, there has been no arrangement altering the terms of the original mortgage, and the position of the sureties has been in no way affected; but the formal abandonment by the creditor of his claim against valuable property must of necessity prove injurious to the sureties, since it precludes their reimbursing themselves by obtaining a decree against the property so omitted from the plaint, and this is, under the rulings of the courts in England, sufficient for their discharge.

On this subject a learned authority has said that the rule is undoubted, and it is one founded on the plainest principle of natural reason and justice, that the surety paying off a debt shall stand in the place of a creditor, and have all the rights which he has for the purpose of obtaining his reimbursement (Story, Equity Jurisprudence, para. 499).

I am of opinion that the decision of the lower court is an equitable one, and should be upheld.

KEMBALL, J.:—I also am of opinion that the decree of the lower court should be affirmed, upon the equitable principle that where a surety's indemnity against his principal in respect of any security has become lost, the surety is entitled to be relieved to that extent. In support of this appeal, our attention has been directed to a ruling of this court in the case of *Lachman Joharimal* v. *Bápu Khandu* (*a*) to the effect

(*a*) 6 Bom. H. C. Rep. A. C. J. 241.

that "a creditor is not bound to exhaust his remedy against the principal debtor before suing the surety." No doubt. But the general principle there laid down does not touch the question as to the right of a surety extending to all the equities which the creditor whose debt he has discharged could have enforced.

Here the mortgagee has instituted proceedings at one and the same time to recover his debt from the mortgaged property and from the sureties, and it is admitted on the face of the plaint that the sureties do not stand, as regards the securities, as they did at the time of the original contract. Assuming, therefore, that the mortgagee had succeeded in obtaining a decree in accordance with the prayer contained in his plaint, it is clear that he could not, on proceeding to execution, have availed himself of one of the remedies which the sureties stipulated should be held by him against the principal debtor, and that, therefore, to the extent of that one remedy, the sureties ought to be discharged, on the well-established doctrine that the surety, having a most material interest in the rights and remedies which the creditor has against the principal debtor, cannot be held bound where the situation of circumstances in respect to those rights and remedies are different from that contemplated by himself and all other parties.

The case of *Mayhew* v. *Crickett* (*b*) exemplifies the principle that if the creditor relinquishes securities which he could enforce in discharge of his debt, the surety becomes exonerated to the extent at least of the value of such securities: for the reason that securities which the creditor is entitled to apply in discharge of his debt, he is bound either so to apply, or to hold them as a trustee, ready to be applied should the surety desire it. In that case the creditor, having taken out execution against his debtor, withdrew it without the knowledge of the sureties, and in doing so it was held that he had discharged the sureties.

Decree confirmed with costs.

(*b*) 2 Swanst. 185.