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the master's license is committed by the servant, the master is punishable, and he alone, unless the servant also holds a license under the Act; for it cannot be inferred, from the description in s. 53 of the servant in such a case as the "actual offender," that he also is liable to a penalty under any of the sections specified in s. 53, unless his act strictly falls under those sections. It is clear that to a servant not being the holder of a license, s. 45 of the Act has no application, and, therefore, s. 53 has no application to the accused in the present case.

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[48] ORIGINAL CIVIL.

Before Mr. Justice Farran.

GOVERDHANDAS GOCULDAS TEJPAL (*Plaintiff*) *v.* THE BANK OF BENGAL (*Defendants*).* [14th and 15th July, 1890.]

Surety—Creditor and surety—Right of surety to benefit of securities held by creditor—Surety for a part of debt due by principal debtor to creditor—Payment by surety of that part—Right of surety to benefit of securities does not arise until whole of debt paid off—Contract Act (IX of 1872), s. 141.

In August, 1889, one Khimji Jairam was indebted to the Bank of Bengal (the defendants) in the sum of Rs. 3,15,000. The Bank pressed for security or payment, and on the 5th September, 1889, Khimji Jairam executed, in favour of the Bank, two mortgages of certain immoveable properties, the value of which was estimated to be Rs. 1,35,000. The mortgages, though stamped to secure this amount only, were drawn to recover the whole liability of Khimji Jairam to the Bank, and recited that he had become largely indebted to the Bank on certain bills, &c., and had agreed to give security in respect of such indebtedness as was thereafter expressed, and they contained covenants by Khimji Jairam to pay to the Bank all sums of money then due, or thereafter to become due, by him in respect of such bills, &c. Besides the said two mortgages, the Bank obtained other securities for a further sum of Rs. 55,000, making the total sum secured Rs. 1,90,000, and leaving a balance of Rs. 1,25,000 unsecured. Under these circumstances the Bank refused to renew certain bills of Khimji Jairam's which fell due on the 9th September, 1889, unless further security were given, and accordingly the plaintiff became surety for Khimji Jairam for the sum of Rs. 1,25,000. This sum he was subsequently obliged to pay, and he then brought this suit claiming to share in the proceeds of the mortgages held as security by the bank. He contended that these mortgages were given as security for the whole debt (*viz.*, Rs. 3,15,000); that of this debt he, as surety, had paid a part, *viz.*, Rs. 1,25,000 to the Bank; and that he was, therefore, to that extent entitled to stand in the place of the Bank and to receive a share of the proceeds of the said securities proportioned to the sum which he had paid.

Held, that the plaintiff was not entitled to the benefit of the securities held by the Bank until the whole of the debt due to the Bank by Khimji Jairam was paid.

A surety who has paid the debt which he has guaranteed, has a right to the securities held by the creditor, because as between the principal debtor and surety the principal is under an obligation to indemnify the surety. The equity between the creditor and the surety is that the creditor shall not do anything to deprive the surety of that right. But the creditor's right to hold his securities until his whole debt is paid is paramount to the surety's claim upon such securities, which only arises when the creditor's claim against such securities has been satisfied.

[R., 35 M. 728 = 11 Ind. Cas. 570 = 21 M.L.J. 600 = 10 M.L.T. 57 = (1911) 2 M.W.N. 285.]

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* Suit No. 708 of 1889.

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IN the month of August, 1889, one Khimji Jairam Sewji, who traded under the name of Jairam Sewji, was indebted to the [49] Bank of Bengal (the defendants) in the sum of Rs. 3,15,000. The Bank pressed him for security or payment, and on the 29th August he entered into an agreement with the Bank by which, in effect, he undertook to clear his account with the Bank by the 5th September following, or, in default, to execute legal mortgages to the Bank of certain immoveable properties in Bombay the title-deeds of which he deposited with the Bank at the time of entering into agreement. These properties included a property at Vithalvadi, in Bombay, to which he could not make a title. Khimji Jairam did not clear his account by the 5th September, and on that day he executed, in favour of the Bank, the two mortgages agreed upon, the total estimated value of the properties comprised therein being Rs. 1,35,000. The Bank also retained the title-deeds of the said property at Vithalvadi, which was valued at Rs. 30,000, so that the Bank on that day received from Khimji Jairam securities to the extent of Rs. 1,50,000, his total debt being, as above stated, Rs. 3,15,000.

The two mortgages were in similar terms. They recited that Khimji Jairam as the drawer, acceptor or endorser of certain bills of exchange or *hundis* held by the Bank and also in current account had become largely indebted to the Bank in respect of the same, and had agreed to give such security in respect of his indebtedness as was thereafter expressed, and they contained a covenant by Khimji Jairam to pay to the Bank *all sums of money then due, or thereafter to become due, by him* to the Bank in respect of the said bills and *hundis* and current account, &c., &c. The mortgages then, after conveying to the Bank all the properties mentioned in the agreement of the 29th August, except the Vithalvadi property, to be held subject to the proviso for redemption, provided that if the amount owing in respect of the said bills, *hundis* and current account, with interest thereon, should be duly paid within fourteen days after demand, then the premises should be reconveyed to Khimji Jairam; it also contained a proviso of sale exerciseable immediately after demand and non-payment.

The mortgages though drawn, as above set forth, to cover the total liability of Khimji Jairam to the Bank, were stamped to [50] secure the amount of Rs. 1,35,000 only, as that was estimated to be the value of the properties comprised in them. These mortgages were obtained by the Bank from Khimji Jairam, because his credit had ceased to be good, and because the Bank had reason to suspect that a large proportion of the bills which they held from him had the name of one Ebji Sewji forged upon them, or were collaterally secured by writings of guarantee which bore Ebji Sewji's forged signature.

On the 9th September, 1889, two of the bills on which Khimji Jairam was liable to the Bank for Rs. 50,000 fell due. Inquiries were then made, and it was ascertained that the signatures of Ebji Sewji had been forged on bills of Khimji Jairam held by the Bank or letters of guarantee securing their payment to the extent of Rs. 2,75,000, but his signature securing payment of a bill or bills to the extent of Rs. 25,000 was admitted to be genuine.

On the said 9th September, 1889, therefore, the Bank was secured in respect of the sum of Rs. 3,15,000 (for which Khimji Jairam was liable to it) to the extent of Rs. 1,90,000 in all, *viz.*, Rs. 1,35,000 by the two legal mortgages, Rs. 30,000 by the equitable mortgage on the Vithalvadi property and Rs. 25,000 by the signature of Ebji Sewji. For the balance of

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Rs. 1,25,000 it held no security. Under these circumstances the Bank refused to renew the two bills of Khimji Jairam for Rs. 50,000 which, as above mentioned, fell due on the 9th September, 1889, and laid a criminal information against his *munim* for forgery of the name of Ebji Sewji. In this emergency Khimji Jairam applied to the plaintiff to help him. He told the plaintiff that bills for Rs. 50,000 had fallen due and that he was in distress. The plaintiff asked Khimji Jairam how much was wanted from him, and he was told that Rs. 1,25,000 was required, and that if the plaintiff stood security for that amount the Bank would renew the bills. The plaintiff agreed to stand security for that amount. He was not told by Khimji Jairam of the mortgages which the latter had given to the Bank.

On the following day the plaintiff and Khimji Jairam went to the Bank and had an interview with the agent. Conflicting evidence was given at the trial as to what passed at this interview. **[51]** With reference to it, the Judge said in his judgment:—"I cannot bring myself to hold that, at this interview, it was brought home to the mind of the plaintiff that the bills which he guaranteed were also covered by the mortgage, and that he, knowing that fact, agreed to waive or relinquish the benefit, if any, which that conferred on him. I rather infer that he was led to believe that he had nothing to do with the debt covered by the mortgages or mortgage, and that, therefore, he has forgotten that the mortgage was mentioned to him at all, as it did not interest him in any way."

The result of the nterview was that the plaintiff became security to the Bank for Khimji Jairam to the extent of Rs. 1,25,000. This amount he subsequently paid to the Bank, and for the sum so paid Khimji Jairam gave him (the plaintiff) a mortgage on certain properties in Bombay and Zanzibar.

The plaintiff brought this suit, praying that he might be declared entitled to share in the benefit of the mortgages of the 5th September, 1889, given as security to the Bank; that the said mortgage might be realized, and that out of the amount realized he should be paid an amount proportioned to the amount of Khimji Jairam's debt which he had paid to the Bank. He contended that the mortgages were given as security for the whole debt of Rs. 3,15,000 due to the Bank; that of this he had paid off to the Bank a part, *viz.*, Rs. 1,25,000; that, as the Bank held the mortgages from the debtor as security for that part as well as for the rest of the debt, he (the plaintiff), as a surety who had paid that part, was entitled to that extent to stand in the place of the Bank (the principal creditor) and to obtain the benefit of the securities held by it. He submitted that, so far as the Bank was concerned, the mortgages were now only securities for the portion of the debt which remained unsatisfied, and that he, as surety, was entitled to a share of the proceeds of the securities proportioned to the sum which he had paid. He claimed 5/11ths of the proceeds.

The prayer of the plaint was as follows:—

"(*a*) That the plaintiff may be declared entitled, in place of the defendants, to the benefit of the securities comprised in and given by the said indentures dated 5th September, 1889, for payment of the sum of Rs. 1,25,000, and interest.

[52] "(*b*) That the defendants may be ordered to realize the said securities, or that the same may be realized by the Court, or that the defendants may be decreed to transfer the same to the plaintiff.

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"(c) That, in the event of their realization, the plaintiff may be declared entitled to be paid 5/11ths of the proceeds thereof, or that his share therein may be ascertained and declared, and ordered to be paid to him."

The defendants (Bank) contended that the plaintiff was not entitled to share in the securities; that the mortgages were given to secure a part only (*viz.*, Rs. 1,35,000) of the debt (Rs. 3,15,000) due by Khimji Jairam, and not the whole, and that while that part remained unpaid, the plaintiff, who was surety only for the remainder, could not claim.

The following paragraphs set forth the defendants' case :—

"(3) Three bills for sums aggregating Rs. 1,25,000 drawn by the said Khimji Jairam Sewji were falling due on the 9th September, 12th September and 23rd September, 1889. The security given by the said Khimji Jairam Sewji was considered sufficient to cover his other liabilities, but not his liability on the said three bills, and the defendants were accordingly unwilling to renew or take bills in substitution for the same, unless such renewed or substituted bills were well secured independently of any other security held by the defendants.

"(4) The plaintiff, before he agreed to be security for the due payment of said sum of Rs. 1,25,000, was informed that the security in the possession of the defendants was insufficient to secure the said bills for Rs. 1,25,000. The plaintiff then agreed to be security for the amount of the said unsecured bills, and accordingly, on the 10th September, 1889, endorsed a bill for Rs. 50,000 and, signed a letter guaranteeing the due payment, if renewed, of the bills for Rs. 75,000 then shortly falling due. Subsequently the plaintiff, as in the plaint stated, endorsed the said renewed bills.

"(5) The defendants deny that the plaintiff is entitled to the benefit of the securities held by them as contended by him, and submit that this suit should be dismissed with costs."

The following issues were raised at the hearing :—

1. Whether the plaintiff was entitled to a 5/11th share in the mortgages of the 5th September, 1889 ?

2. Whether the plaintiff was entitled to share in the said mortgage before the whole of the debt due to the defendants secured thereof had been paid ?

3. Whether the defendants were not entitled to retain the said mortgages as security for the moneys due thereunder to them ?

[53] 4. Whether the defendants can be forced to realise the said securities, or either of them, except at their own pleasure ?

5. Whether the plaintiff did not become surety for the Rs. 1,25,000 mentioned in the plaint under the circumstances mentioned in paras 3 and 4 of written statement ?

6. Whether the plaintiff did not obtain from Khimji Jairam security for becoming surety in the said sum of Rs. 1,25,000 ?

7. Whether, in any event, the plaintiff was entitled to a share in the said mortgages until he had exhausted his remedies against the properties comprised in the indentures of mortgage dated the 2nd December, 1889, made between the said Khimji Jairm Sewji and the plaintiff ?

8. Whether, if the last issue were found in favour of the plaintiff, the defendants were not entitled to the benefit of the mortgages of 2nd December, 1889 ?

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As to the last two issues, counsel for the defendants stated that they were based on facts which did not become known to the defendants until after the written statement had been filed.

Macpherson (Acting Advocate-General) and *Lang*, for the plaintiff, cited the Contract Act IX of 1872, s. 41; *Hobson* v. *Bass* (1).

Inverarity (with him *Russell*), for defendants.—The plaintiff bases his claim on s. 141 of the Contract Act. But that section has no application to a case like the present. That section operates as soon as a man becomes a surety. Whatever rights he gets under that section he gets at once. The section does not confer any rights subsequently. It does not apply to a case where (*e.g.*) a mortgage is paid off. A surety is entitled to the securities of the creditor, because the principal debtor is bound to indemnify him. That is the reason of the rule, and, therefore, it is clear that he can acquire no right to the prejudice of the creditor—*Yonge* v. *Reynell* (2). There are no equities between him and the creditor; but if a surety pays a debt secured by mortgage, the principal debtor ought to put him in the position of the [54] secured creditor who is paid off—*Dering* v. *Earl of Winchelsea* (3); *Duncan, Fox & Co.* v. *North and South Wales Bank* (4); *Pearl* v. *Deacon* (5); White and Tudor's Leading Cases, Vol. I, p. 126; *Wade* v. *Coope* (6); *Williams* v. *Owen* (7); *The Bank of Bengal* v. *Radakissen Mitter* (8); *Waugh* v. *Wren* (9); *Forbes* v. *Jackson* (10); *Hobson* v. *Bass* (1) does not affect this case, as that decision turns on the special terms of the suretyship (see page 792) in question. It does not apply to a case in which the security existed at the time of the suretyship, and in which no alteration in the amount of debt was made afterwards. No case can be cited to show that where a creditor holds a security for three *lakhs* he is bound to share that security with a person who has paid off part—*Ex Parte Turquand*; *In re Fothergill* (11).

Further, we say that the plaintiff has lost any right he may have had to this security by taking another security. He took a mortgage from Khimji Jairam for the amount paid to the Bank. When he did that, he knew of Khimji Jairam's mortgages to the Bank; Coote on Mortgage, 1220; *Cooper* v. *Jenkins* (12).

Next we say that the doctrine of marshalling applies in this case. The plaintiff has other securities. The defendants can only proceed against one. The plaintiff must go against the others—2 White and Tudor 96; *Dolphin* v. *Aylward* (13).

We contend that the plaintiff is not entitled to share in our security, unless he pays us off in full.

Macpherson (Acting Advocate-General) in reply:—We base our case on s. 141 of the Contract Act. The authorities cited on the other side do not apply. With the exception of *Farebrother* v. *Wodehouse* (14) they are all cases where the surety was surety for the whole debt, or where the principal creditor had claims against the principal debtor other than and distinct from the debt in question. Here what was secured

(1) L.R. 6 Ch. Ap. 792.
(2) 9 Hare 809 (818).
(3) 1 Wh. & T.L.C. 114.
(4) L.R. 6 Ap. Cas. (15).
(5) 24 Bea. 186.
(6) 2 Sim. 155.
(7) 13 Sim. 597.
(8) 4 Moo. P.C. Cas. 140 (159).
(9) 9 Jur. (N.S.) 365.
(10) L.R. 19 Ch. D. 615.
(11) L.R. 3 Ch. D. 445.
(12) 32 Bea. 337.
(13) 4 Eng. &. Ir. Ap. 486 (505).
(14) 23 Bea. 18=23 L.J. Ch. 81 (240).

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[55] was Rs. 1,25,000, a part of the total debt which was secured by the two mortgages of the 5th September. On those facts we say that by English law or by the Indian Contract Act the plaintiff, by paying the part of the debt which he had guaranteed, became entitled to have the securities realized. It does not matter whether a part or the whole is paid —*Pledge* v. *Buss* (1) ; *Gedye* v. *Matson* (2). In *Gedye* v. *Matson* (2) the surety, who was held to have a right as against the mortgagor, was surety for the whole debt. *Farebrother* v. *Wodehouse* (3) is like the present case, and it is a decision against us ; but it is not law. It was decided on the authority of *Williams* v. *Owen* (4) which has been overruled by *Hopkinson* v. *Rolt* (5) : see White and Tudor's Leading Cases (ed. 1886), p, 130 ; *In re Kirkwood* (6). *Forbes* v. *Jackson* (7) follows *Newton* v. *Chorlton* (8), not *Williams* v. *Owen* (4). Counsel cited and commented on *Thorntone* v. *M'Kewan* (9) ; *Ex parte Rushforth* (10) ; *Ellis* v. *Emmanuel* (11). These cases show the English law on the point. The other side contend that the rights of a surety are to be postponed to the rights of the creditor in regard to the part of the debt not secured by the suretyship. No English authority for that position has been cited, except *Farebrother* v. *Wodehouse* (3), and s. 141 of the Indian Contract Act (IX of 1872) does not support that view. That section seems to be taken from p. 27 of the report of that case. The judgment in that case was, no doubt, before the Indian Legislature, and yet the proviso suggested at page 27 was not added to s. 141 of the Contract Act ; but that section was enacted in its present form. As to the effect of taking a fresh security, that question, as shown by the cases cited—*Waugh* v. *Wren* (12) and *Cooper* v. *Jenkins* (13)—turns on the question of intention ; see [56] also *Brandon* v. *Brandon* (14). On the question of marshalling, counsel cited *Webb* v. *Smith* (15).

JUDGMENT.

26*th July*, 1890. FARRAN, J.—The material facts in this case are these. In the month of August 1889, the Bank of Bengal held a large number of bills upon which Khimji Jairam, carrying on business in the name of Jairam Sewji, was primarily liable. Mr. Slater, the Agent of the Bank in Bombay, pressed Khimji Jairam for security or payment. On the 29th of August, Khimji Jairam entered into an agreement with the Bank, under which he, in effect, undertook to clear his account with the Bank by the 5th September following, or, in default, to execute legal mortgages to the Bank of certain immoveable properties in Bombay, the title-deeds of which he deposited with the Bank at the time of entering into the agreement. The liability of Khimji Jairam to the Bank at this time amounted to Rs. 3,15,000. Mr. Slater had these immoveable properties valued by Messrs. Gostling and Morris, and these gentlemen estimated their aggregate value at Rs. 1,64,000, and sent in their valuation on the 4th September, 1889, and subsequently made a detailed report (Ex. 5) which the Bank received on the 17th September. These

(1) Johnson Rep. 663, 666.
(2) 25 Bea. 310.
(3) 23 Bea. 18=25 L.J. Ch. 81 (240).
(4) 13 Sim. 597.
(5) 9 H.L.C. 514.
(6) I.L.R. Ir. 108.
(7) L.R. 19 Ch. D. 615.
(8) 10 Hare 646.
(9) 1 H. & M. 525.
(10) 10 Ves. Jun. 409.
(11) L.R. 1 Ex. D. 157.
(12) 9 Jur. (N.S.) 365.
(13) 32 Bea. 337.
(14) 3 DeG. & J. 524=5 Jur. (N.S.) 256.
(15) L.R. 30 Ch. D. 192.

properties included a property at Vithalvadi, to which Khimji Jairam could not make title, and the value of which was Rs. 30,000.

Khimji Jairam did not clear his account with the Bank by the 5th September, and on that day executed, in favour of the Bank, two mortgages (Exs. D and E). These mortgages are in similar terms, and after reciting that Khimji Jairam, as the drawer, acceptor, or endorser of certain bills of exchange and *hundis* held by the Bank, and also in current account, had become largely indebted to the Bank in respect of the same, *and had agreed to give such security in respect of his indebtedness as is thereinafter expressed*, contained a covenant on the part of Khimji Jairam to pay to the Bank all sums of money *then due, or thereafter to become due, by him to the Bank in respect of the said bills and hundis* and current account (including interest, commission, and other customary charges), with interest, in the meantime, at the rate of 12 per cent. *per annum*. The mortgages then, after conveying to **[57]** the Bank all the properties mentioned in the previous agreement, except the Vithalvadi property, to be held subject to the provision for redemption thereinafter *contained, provided that if the amount owing in respect of the said bills, hundis, and current account, with interest thereon, should be duly paid within fourteen days* after demand, then the premises should be reconveyed to Khimji Jairam; and also contained a power of sale, exerciseable immediately after demand and non-payment.

It will, therefore, be seen that the mortgages were a security held by the Bank for the *whole debt then actually due by Khimji Jairam, or to become due from him, in respect of the bills and hundis upon which he was then liable to the Bank*. They were, in fact, a security for past advances, though some of *such past advances had not actually become due*. These mortgages were obtained by the Bank from Khimji Jairam, because his credit had ceased to be good, and because the Bank had reason to suspect that a large proportion of the bills, which they held from him, had the name of Ebji Sewji forged upon them, or were collaterally secured by writings of guarantee which bore Ebji Sewji's forged signature. The mortgages though drawn to cover the total liability of Khimji Jairam to the Bank, were stamped to secure the amount of Rs. 1,35,000 only, as that was estimated to be the value of the mortgaged premises. The Bank retained the title-deeds of the Vithalvadi property also, and that, they considered, secured them to the extent of Rs. 15,000 further. The mortgages they held, both legal and equitable, thus were estimated to secure the Bank to the extent of Rs. 1,50,000.

On the 9th September, two of these bills, under which Khimji Jairam was liable to the Bank for Rs. 50,000, fell due. Mr. Slater then sent for the *munim* of Ebji Sewji, and from him ascertained that the signature of Ebji Sewji had been forged on bills of Khimji Jairam held by the Bank, or letters of guarantee securing their payment, to the extent of Rs. 2,75,000. The signature of Ebji Sewji, securing payment of a bill or bills to the amount of Rs. 25,000, was admitted to be genuine, and three bills bore genuine names of solvent shroffs.

[58] On the 9th September, the Bank was, or considered itself, secured, in respect of the above sum of Rs. 3,15,000, for which Khimji Jairam was liable to it, to the extent of Rs. 1,50,000, plus Rs. 25,000, plus Rs. 15,000, or in all Rs. 1,90,000; while it was, or considered itself, unsecured to the extent of Rs. 1,25,000. Under these circumstances the

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Bank refused to renew the bills of Khimji Jairam for Rs. 50,000 falling due on the 9th September, and laid a criminal information against his *munim* for forgery of the name of Ebji Sewji. In this emergency, Khimji Jairam applied to the plaintiff, a wealthy young man, to help him. He told the plaintiff that bills for Rs. 50,000 had fallen due, and that he was in great distress. The plaintiff asked Khimji how much he wanted from him, and was informed that the Bank alleged that Rs. 1,25,000 of Khimji's bills bore the forged endorsement of Ebji Sewji; that that sum was required, and that if the plaintiff stood guarantee for that amount, the Bank would renew the bills. The plaintiff agreed to stand guarantee to the Bank for that amount. He was not told by Khimji of the mortgages which the latter had given to the Bank. I take this account from the plaintiff's evidence. I see no ground upon which I ought to discredit it.

On the next day, the plaintiff and Khimji Jairam attended at the Bank with Surbhai, the plaintiff's manager, and Ruttonji, a clerk of Khimji Jairam. There are five witnesses who give an account of this interview who all differ more or less in their recollection of it. I adopt, with one modification, Mr. Slater's account as being the most reliable. There is, however, no reason to suppose that all the witnesses are not speaking truly to the best of their recollection. Even of a recent interview, the most truthful witnesses often give widely different accounts. The one I am considering took place on the 9th September last, and some of the incidents of it may well have faded from the memories of those who were present. (His Lordship then discussed the evidence given with reference to this interview and continued).

I cannot bring myself to hold that, at this interview, it was brought home to the mind of the plaintiff that the bills which [59] he guaranteed were also covered by the mortgage, and that he, knowing that fact, agreed to waive or relinquish the benefit, if any, which that conferred on him. I rather infer that he was led to believe that he had nothing to do with the debt covered by the mortgages or the mortgage, and that, therefore, he has forgotten that the mortgage was mentioned to him at all, as it did not interest him in any way. After this interview, the plaintiff paid the bill for Rs. 50,000, which he had endorsed, and endorsed the renewals of the bills for Rs. 75,000 mentioned in the guarantee paper which he signed, and subsequently paid them all at maturity. To secure repayment of these sums and of a further sum of Rs. 10,000 to the plaintiff, Khimji Jairam, on the 2nd December, 1889, executed a mortgage of certain properties in Bombay and at Zanzibar in favour of the plaintiff (Ex. O). Some of these properties had been previously mortgaged by Khimji Jairam.

Under these circumstances, the question arises, whether the plaintiff is entitled to share in the proceeds of the properties mortgaged to the Bank before the Bank has been paid the amount due to the Bank by Khimji Jairam and still unpaid. This is the claim made by the plaint. Its prayer is: (His Lordship read the prayer as above given, and continued).

Stated in the abstract the question is, whether a surety, who has guaranteed an *aliquot* and defined portion of a past due debt secured by a mortgage, is, *on payment by him of the portion of the debt* which he has guaranteed, entitled to share in such mortgage in proportion to the amount of the debt which he has guaranteed and paid, before the mortgagee has

been paid the full amount of his mortgage-debt? The surety's claim to be placed in this position is based upon s. 141 of the Contract Act, which is as follows :—" A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not." It has been argued by the Advocate-General, for the plaintiff, that this section enlarges, or is different from, or removes some doubt which existed in the English law upon the same subject. This, **[60]** I think, is not so. I find the rule laid down in the same terms in nearly all English text-books (see Chitty on Contracts, ch. III, s. 2, p. 5; Coote on Mortgages, ch. LXXXVII (1), and in American text-books (Story's Equity Jurisprudence, s. 499, Parsons, Vol. II, p. 5). In White and Tudor it is stated more broadly than in the Contract Act. "A surety is entitled to the benefit of all the securities which the creditor has against the principal ; " but the more broad rule is said to be subject to some few qualifications. This rule derived from equity was also so stated by the great judges of that system. Lord Eldon in *Copis* v. *Middleton* (1) laid it down as established law. " It is a general rule that in equity a surety is entitled to the benefit of all the securities which the creditor has against the principal." It is amplified in the judgment in *Hodgson* v. *Shaw* (2), but is there laid down to the same effect. It is true that in *Farebrother* v. *Wodehouse* (3) the Master of the Rolls speaks of the proposition as too broad; but it is doubtful whether that case can be treated as correctly expounding the law. See the rule of law stated by Master of the Rolls in *Gedye* v. *Matson* (4) in the exact terms of the Contract Act IX of 1872. The Contract Act, however, does not lay down when the surety is entitled to have the security made over to him, wholly or in part, whether it is when the debt of the creditor is paid off or when the surety pays the amount of his guarantee. This is left undetermined, and I think that we must have recourse to the English authorities to solve the question.

With one exception, which I shall hereafter refer to, there is no case which directly establishes the affirmative to the above proposition. The Advocate-General, however, relies upon a class of cases which, he says, establish the principle that, when a surety pays the portion of a debt for which he is liable under his guarantee, he is entitled to any sums which the principal creditor may receive as dividends from the estate in bankruptcy of the debtor, paid in respect of the portion of the debt which **[61]** the surety has paid. These cases begin with *Ex parte Rushforth* (5) and end with *Gray* v. *Seckham* (6). They are all analysed in the judgment of the Court in *Ellis* v. *Emmanuel* (7). They do, in my opinion, establish the principle for which they are cited by the Advocate-General. Mr. Inverarity contends that they only establish this principle in cases in which the guarantee is given to cover a floating balance (and it is true that all these cases are cases in which the guarantee was given to cover such a balance to a limited amount) ; and that the Court so decided in *Ellis* v. *Emmanuel* (7). That is not, I consider, the effect of the decision in that case. The decision is this, as expressed by Blackburn, J. : " I think that the class of cases referred to do not lay down any general doctrine

(1) 1 T. & R. 229.
(2) 3 M. & K. 183 (191).
(3) 23 Beav. 27=26 L. J. Ch. 81 (240).
(4) 25 Beav. 310.
(5) 10 Ves. Jun. 409.
(6) L.R. 7 Ch. 680.
(7) L.R., 1 Ex. D. 157 (163, 164).

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that where there is a surety, with a limit on the amount of his liability, for the whole of a debt exceeding that limit, he is entitled to the benefit of a rateable proportion of the dividends paid on the whole debt; but only that where the surety has given a continuing guarantee, limited in amount, to secure the floating balance which may from time to time be due from the principal to the creditor, the guarantee is as between the surety and the creditor to be construed, both at law and in equity, as applicable to a part only of the debt, co-extensive with the amount of his guarantee; and this upon the ground, at first confined to equity, but afterwards extended to law, that it is inequitable in the creditor, who is at liberty to increase the balance or not, to increase it at the expense of the surety." That is a rule of construction adopted upon equitable principles, and determines that though the guarantee in such cases may, reading it literally, extend to the whole debt, being limited only as to the amount recoverable from the guarantor, yet it must in all cases be interpreted or construed to mean a guarantee for a limited amount only of the whole debt, with the legal consequences flowing from such a guarantee—one of such consequences being that the surety is entitled, on payment of its amount, to the dividends in bankruptcy of the debtor declared in respect of the portion of the debt so guaranteed. The Court in that case, I think, also recognized the general principle that a guarantor of a limited **[62]** amount of a debt, who pays such limited amount, is entitled on the bankruptcy of the debtor to the dividends declared in respect of his portion of the debt which he has paid, or, on payment of it, to recover such dividends from the creditor who has already received them; and that whether the guarantee has been given to secure part of a past debt or of a floating balance. This, I think, is clear from the passage at p. 163: "It was contended that they were wrong. It was said that the dividends are by law applied to each pound of the debt rateably, which is unquestionably true; and it was argued that the defendant was entitled to take credit for 9*s.* 2*d.* in the pound on the £1,300, just as he would have been if his contract had been not to be surety for the whole £7,000, with a proviso limiting his liability to £1,300, but to be surety for £1,300, parcel of the £7,000. If this was so, the amount for which execution has been allowed to issue is considerably too large. I have, however, come to the conclusion that the Court below was right." In the result the guarantee in that particular case was construed to be a guarantee for the whole debt, but limited as to the amount recoverable from the guarantor to £1,300. The law deducible from that case is the law now laid down in s. 140 of the Contract Act: "When a guaranteed debt has become due, the surety, upon payment of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor;" *inter alia*, to recover or receive the dividends in insolvency payable or paid in respect of the part of the debt which he has made good to the creditor.

It becomes necessary now to consider the reason of this rule of law. I think it may be gathered from the agreement in *Ex parte Rushforth* (1), and from the argument and judgment in *Paley* v. *Field* (2), namely, that where a surety limited to a certain amount pays that amount, he is entitled to prove against the debtor's estate for the amount so paid. If the creditor proves in respect of that portion of the debt which he has been paid, he prevents the surety from proving, for double proof in respect

(1) 10 Ves. Jun. 409. (2) 12 Ves. Jun. 435.

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of the same debt is not allowed in bankruptcy, and when he receives dividends in respect of such portion, he receives them as trustee [63] for the surety, as was the case in *Hobson* v. *Bass* (1). Were it otherwise the surety would pay more than he has contracted to pay, first by paying the full amount of his guarantee and secondly by the guaranteed creditor receiving the dividend which properly belongs to the surety. It makes no difference, in principle, whether the creditor receives payment first from the surety and then receives the surety's dividends, or whether he receives the dividends first and then exacts payment from the surety. In the one case he receives money at common law for the surety's use; in the other, on account of the equity attaching, he is not allowed to retain both the dividends and the payments. The same principle does not apply in the case of the creditor applying the securities he holds in payment of the residue of his debt after he has been paid one portion of it by the surety. This works no apparent injustice to the surety, for he can still sue the debtor and prove against his estate. If the creditor is bound to make over a proportionate part of his securities to the surety, upon the latter paying the proportion of the debt which he has guaranteed, it must be on some other principle. I, therefore, think that the class of cases I am now considering do not assist me in determining the question which I have to solve.

The right of a surety, who has paid a debt, to the securities held by the creditor depends also upon a principle of equity. The reason of the rule is stated in *Yonge* v. *Reynell* (2). Turner, V. C., says: "I take it (the reason of the rule) to be, because, as between the principal and surety the principal is under an obligation to indemnify the surety; and it is, as I conceive from this obligation the right of the surety to the benefit of securities held by the creditor is derived." The equity between the creditor and the surety is for the creditor not to do anything to deprive the surety of that right. This exposition of the law is adopted by Lord Selborne in the House of Lords when delivering the judgment in *Duncan, Fox* v. *North and South Wales Bank* (3). The judgment is too long for citation; but it is impossible to read it through without feeling that the creditor's right to hold his security until his whole debt is paid is paramount to the surety's [64] claim upon such securities, which only arises when the creditor's claim against such securities has been satisfied. In *Gedye* v. *Matson* (4) the creditor's right is laid down as being superior to that of the surety. The surety is, however, there assumed to be surety for the whole debt. *Forbes* v. *Jackson* (5) is not an actual decision against the plaintiff, but it strongly tends to show that the opinion of the profession in England is opposed to his claim. It was at one time decided that if a further charge was afterwards made by a mortgagor in favour of the same mortgagee, the surety for the mortgagor could not, on paying off the first charge, call for an assignment of the mortgage security without redeeming the further charge—*Williams* v. *Owen* (6): *Farebrother* v. *Wodehouse* (7). These cases are, however, not law—*Forbes* v. *Jackson* (5). If they were, a creditor could do indirectly what he cannot do directly, namely, deprive the surety of the benefit of the mortgage security, and in effect hand it over to the mortgagee—*Pearl* v. *Deacon* (8); but if the law, as now contended for

(1) L. R., 6 Ch. App. 792.
(2) 9 Hare 809 (818, 819).
(3) L. R. 6 App. Cas. 1 (13).
(4) 25 Beav. 310.
(5) L. R. 19 Ch. D. 615.
(6) 13 Sim. 597.
(7) 23 Beav. 18=26 L. J. Ch. 81 (240).
(8) 24 Beav. 186.

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by the plaintiff, were in existence, it is impossible to see how the right to tack could even have been thought of. After the tacking the surety would still have been entitled to a proportionate share of the mortgage securities. This contention was never even put forward in these cases. I have not been referred to, nor have I been able to find, any case in the authorized reports in which the proposition put forward on behalf of the plaintiff has even been suggested. It seems to me to be a strange doctrine that a creditor, not fully secured by a mortgage, who obtains the benefit of a surety for part of his mortgage-debt in order to further secure himself, by that very act is deprived of portion of the security, the inadequacy of which was a reason for demanding the surety; or that a person advancing, say, Rs. 10,000 on a mortgage, which is valued only at Rs. 5,000, and has Rs. 5,000 of his advance guaranteed by a surety, is only in reality secured to the extent of Rs. 7,500, by reason of the surety's right to claim the benefit of the mortgage security on paying his half of the debt. To hold so would, I think, defeat the intention of [65] the parties to such a transaction. A principle of equity is seldom adopted, which has that effect. If such were the result of s. 141 of the Contract Act, I should expect to find the wording of s. 140 repeated in s. 141. The striking difference in the language of the two sections is a strong argument against the plaintiff's contention. That contention must, therefore, for the reasons I have given, fail.

The case of *Goodwin* v. *Gray* (1) is relied on by the plaintiff. That case was decided on the lines of *Ex parte Rushforth* (2) and that class of cases I have already referred to and distinguished. It, however, seems to place dividends received upon shares held as security by the creditor on the same footing as dividends received in bankruptcy. Curiously enough, the shares themselves which were held as security were not sought to be made available by the surety. Either the explanation of the case is that the Bank had no lien on the dividends, and they were treated as dividends payable out of an insolvent estate, or else the case has been misreported. It has not found its way into the authorized reports which undoubtedly it would have done, as the first of its kind which applied the principle of *Ex parte Rushforth* (2) and that class of cases to securities held by the creditor for his debt. If the Master of the Rolls had intended to do this, he would certainly have referred to some of the cases decided upon the other branch of the law. The case as reported, except upon the supposition I have made, is quite irreconcileable with what Lord Selborne in the House of Lords assumes to be law in *Duncan, Fox* v. *The North and South Wales Bank* (3). I may remark as to the statement of the law by Lord Hatherly, L. C., in *Hobson* v. *Bass* (4)—"If a person guarantees a limited portion of a debt, all the authorities show that if he pays that portion of the debt he has in respect of it all the rights of a creditor"—that it clearly means of a creditor against the principal debtor or his estate in bankruptcy and not all the rights of the creditor whose debt he guarantees. This is also what Sir R. Baggaley and Webster are reported to have argued or admitted in *Godwyn* v. *Gray* (1),

[66] The only declaration to which the plaintiff is entitled is to a declaration that he, in common with Ebji Sewji and the shroffs who paid the bills for Rs. 15,000, can share proportionately in any surplus which

(1) 22 W.R. 312.
(2) 10 Ves. Jun. 409.
(3) L.R. 6 App. Cas. 8.
(4) L. R. 6 Ch. App. 792.

may remain out of the proceeds of the mortgaged premises after the defendants' claim under the mortgages have been satisfied. 1890 JULY 15.

Suit dismissed with costs. ORIGINAL CIVIL.

Attorneys for the plaintiff :—Messrs. *Little Smith, Frere, and Nicholson.* 15 B. 48.

Attorneys for the defendant :—Messrs. *Crawford, Burder, Buckland, and Bayley.*

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15 B. 66.

REVISIONAL CRIMINAL.

Before Mr. Justice Birdwood and Mr. Justice Candy.

QUEEN-EMPRESS *v.* KHANDIA BIN PANDU.* [3rd July, 1890.]

Evidence Act (I of 1872), s. 30—*Confessions of fellow-prisoners tried jointly for the same offence—Evidence.*

When the accused was convicted solely on the confession of his fellow-prisoners, who were tried jointly with him for the same offence.

Held, that the conviction was bad. Under s. 30 of the Indian Evidence Act (I of 1872) such confessions could be "taken into consideration" against the accused, but they were not evidence within the definition given in s. 3 of the Act; and they could not, therefore, alone form the basis of a conviction.

[R., 22 A. 445 (447)=20 A.W.N. 169; 24 M. 523 (541)=1 Weir 351; L.B.R. (1893—1900), 368 (369); 11 O.C. 328 (331); 38 B. 156 (175).]

THIS was an application under s. 435 of the Code of Criminal Procedure (Act X of 1882).

The applicant and two other accused were tried jointly on a charge of theft by the First Class Magistrate of Thana, convicted, and sentenced to three months' rigorous imprisonment.

The only evidence against the applicant was that contained in the confessions of the co-accused.

The applicant moved the High Court, under its revisional jurisdiction, to set aside the conviction and sentence.

Nagindas Tulsidas, for the applicant:—The confessions of the fellow-prisoners are no evidence against the accused. They [67] may be taken into consideration under s. 30 of the Evidence Act along with the evidence recorded in the case. But there is no independent evidence in the present case. The conviction is, therefore, unsustainable.

The Court (BIRDWOOD and CANDY, JJ.) delivered the following

JUDGMENT.

The applicant was convicted of theft solely on the confessions of the accused persons Nos. 2 and 3 who were tried jointly with him for the same offence. Under s. 30 of the Evidence Act (I of 1872), these confessions could be "taken into consideration" as against him; but they are not technically evidence within the definition given in s. 3 of the Act, as was pointed out in *Imperatrix* v. *Bayaji* (1), and they could not,

* Criminal Revision No. 106 of 1890.

(1) Bom. H. C. Criminal Ruling, dated 18th November 1886.