Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Charles Dudley Robert Ward v. *The National Bank of New Zealand, Limited, from the Supreme Court of the Colony of New Zealand, delivered 11th July* 1883.

Present:

LORD WATSON.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

This is an appeal from a judgment of the Supreme Court of New Zealand, in an action brought by the National Bank of New Zealand, against Charles Dudley Robert Ward. The declaration set out the following agreement, in writing, between the Plaintiff and Defendant:—

"To the National Bank of New Zealand, Limited, incorporated under 'The Companies Acts, 1862 and 1867, and the New Zealand Act I., 1873.'"

"Guaranty :—

"In consideration of your making any advances to John King, auctioneer, &c., Timaru, either by discounting bills or notes, or otherwise, I hereby guarantee you the due payment of all such advances not exceeding in the whole the sum of one thousand pounds, and further agree that you may advance any amount beyond such sum of 1,000*l.* to the said John King, and that no payment received by you from the said John King shall be taken in reduction of my liability on this guarantee, and that this guarantee shall always be a continuing and standing guarantee for the amount due to you from the said John King, and that you may give any time to and take any security from the said John King, and accept any composition from, or release, or discharge the said John King, or any of the parties, to any bills or notes so discounted by you as afore-

said, without prejudice to your claim upon me under this guarantee.

"Timaru, 29th March 1879."

It averred,—

" That the Plaintiff, after the making and giving of the said guarantee and promise of the said Defendant, and in reliance thereon, did from time to time make divers advances of money, and discount bills and notes to, for, and at the request of the said John King, in the ordinary course of business, by permitting the said John King to overdraw a banking account which he kept with the Plaintiff at Timaru aforesaid, and by honouring his drafts and orders when the said account was overdrawn.

" The advances made by the Plaintiff to the said John King on the security of the said guarantee up to the ninth day of May 1879, when the Plaintiff, by notice in writing, demanding payment of the sum of one thousand pounds under the said guarantee, determined the further continuance thereof, and which the said John King was unable and neglected and refused to pay, amounted to a sum far exceeding the sum of one thousand pounds, of all which the said Defendant had notice.

" The Plaintiff has demanded of the Defendant payment of the said sum of one thousand pounds, and has done all things necessary to entitle the Plaintiff to maintain this action, yet the Defendant has not paid to the Plaintiff the said sum, or any part of it, nor to King."

To this declaration the Defendant pleaded the following plea :—

" That at the time of the making and giving of the guarantee set out in the declaration, one John Macintosh was a co-surety with the Defendant for the payment of the advances which the first guarantee was given to secure by virtue of a certain other guarantee for the payment of such advances made and given by the said John Macintosh to the Plaintiff on the 17th May 1878."

A guarantee of that date by Macintosh was then set out identical in its terms with that before set out, except that the sum guaranteed was 600*l.* The plea proceeded :—

" And that afterwards, and prior to the twenty-ninth day of March 1879, the date on which the guarantee, set out in the declaration, was made and given by the Defendant, the Plaintiff received from the said John King bills of exchange drawn by the said John King, and payable to his order, and accepted by the said John Macintosh, for the sum of one thousand four hundred pounds, and to the value of one thousand four hundred pounds, and that the before-mentioned guarantee of the said John Macintosh, and the said bills of exchange accepted by the

said John Macintosh as aforesaid, were on the said twenty-ninth day of March 1879, and up to and on the third day of April 1879, held by the Plaintiff as security for the payment of such advances as aforesaid.

"That on the said third day of April 1879, it was arranged and agreed by and between the Plaintiff and the said John King and John Mackintosh, that the said John Macintosh should be released from liability on his before-mentioned guarantee, and the bills of exchange for one thousand four hundred pounds accepted by him as aforesaid, in consideration of a new guarantee being given by the said John Macintosh to the Plaintiff, in the words and figures following :—

"To the National Bank of New Zealand, Limited, incorporated under 'The Companies Acts, 1862 and 1867, and the New 'Zealand Act I., 1873.'

"Guaranty :—

"In consideration of your making any advances to Mr. John King, auctioneer, &c., Timaru, either by discounting bills or notes, or otherwise, I hereby guarantee you the due payment of all such advances, not exceeding in the whole the sum of two thousand pounds, and further agree that you may advance any amount beyond such sum of two thousand pounds to the said John King, and that no payment received by you from the said John King shall be taken in reduction of my liability on this guarantee, and that this guarantee shall always be a continuing and standing guarantee for the amount due to you from the said John King, and that you may give any time to and take any security from the said John King, and accept any composition from or release or discharge the said John King or any of the parties to any bills or notes so discounted by you as aforesaid, without prejudice to your claim upon me under this guarantee.

"John Macintosh.

"And the said new guarantee was then made and given by the said John Macintosh to the Plaintiff, the latter previously agreeing with the said John Macintosh that if he, the said John Macintosh, would give such new guarantee the Plaintiff would not press him, the said John Macintosh, for payment of the moneys secured by the new guarantee, in the same way as if the bills of exchange were still held by the Plaintiff, in respect of such advances as aforesaid, and the new guarantee not made and given; and in consideration of the making and giving of the said new guarantee by the said John Macintash, as aforesaid, the Plaintiff then released and discharged the said John Macintosh from all liability on the said old guarantee, and the before-mentioned bills of exchange, on and in respect of which he was previously liable to the Plaintiff.

"That the transactions narrated in the two last preceding paragraphs of this plea as having taken place on the third day of April 1879 took place without the knowledge or consent of the Defendant."

All the material allegations in the plea were denied by the Plaintiff in his replication.

A number of issues were settled, and the cause went to trial before a jury, whose findings on such of the issues as were deemed material appear to have been taken by consent, and may be shortly described as amounting to findings in favour of the Defendant of all the allegations in the plea.

A verdict having been entered by consent for the Defendant, a rule was obtained by the Plaintiff to show cause why the verdict should not be entered for him notwithstanding the verdict for the Defendant; it was argued in the Court of Appeal of New Zealand on the following grounds stated by consent:—

"1. That the matters alleged in the third plea are no answer to the declaraction in this action.

"2. That the Defendant was not released from liability under the guarantee set out in the declaration, by the release from liability of the said John Macintosh on the guarantee, and the bills of exchange, in the first paragraph of the plea referred to.

"3. That the Defendant was not, by the giving by the said John Macintosh of the guarantee in the second paragraph of the third plea referred to, and set out in substitution for the guarantee of the seventeenth day of May 1878, and for the said bills of exchange, released from liability on his said guarantee.

"4. That under the guarantee given by the Defendant to the Plaintiff, the Plaintiff was entitled to release the said John Macintosh from liability, under the said guarantee of the seventeenth day of May 1878, and on the said bills of exchange, and was entitled to take the said new guarantee from the said John Macintosh without releasing the Defendant from liability on his said guarantee.

"5. That it appears from the facts alleged in the said plea that the arrangement made between the Plaintiff, the said John King, and the said John Macintosh, for the release from liability of the said John Macintosh on the said guarantee, and the said bills of exchange, and for the giving by the said John Macintosh of the said new guarantee, was unsubstantial, and one which could not be prejudicial to the Defendant.

"6. That it appears from the declaration that the amount advanced to the said John King, and owing by him to the Plaintiff, was a sum far exceeding the sum of one thousand

pounds, and that the Defendant has notice of the said amount so advanced and owing."

After argument, the rule Nisi was made absolute, and from the judgment making it absolute the present appeal is preferred.

The question is, whether the plea if proved is an answer to the action.

Their Lordships' attention has been called to this provision in the guarantee, "you may give "any time to and take any security from the "said John King," and it has been argued that inasmuch as those words would be unnecessary to enable the Plaintiff to take additional security from King, they must, if they have any meaning, refer to some security or change of security which might be to the prejudice of the guarantor, and would comprise the substitution of the second security of Macintosh for the first. This argument is not without force, but their Lordships prefer deciding the appeal on broader grounds.

A long series of cases has decided that a surety is discharged by the creditor dealing with the principal or with a co-surety in a manner at variance with the contract, the performance of which the surety had guaranteed.

In pursuance of this principle, it has been held that a surety is discharged by giving time to the principal, even though the surety may not be injured, and may even be benefited thereby. The reason of this rule is thus given by Lord Eldon in the case of Samuell *v.* Howarth (3 Mer., 272):—"The surety is discharged for "this reason, because the creditor in so giving time "to the surety has put it out of the power of the "surety to consider whether he will have recourse "to his remedy against the principal or not. . . . "It has been truly stated that the renewal of "bills might have been for the benefit of the "surety, but the law has said that the surety "shall be the judge of that. . . . The creditor

" has no right, it is *against the faith of his con-*
" *tract*, to give time to the principal, even though
" manifestly for the benefit of the surety, with-
" out the consent of the surety."

A recent decision of the Court of Appeal, in Holme *v.* Brunskill (3 L. R., Q. B. D., p. 495), is based on the same principle. The Defendant gave the Plaintiff a bond that the tenant of his farm should on the expiration of his tenancy re-deliver a flock of sheep on the farm in good order and condition. By an agreement between the Plaintiff and the tenant, the tenant gave up a field on the farm, and held the remainder at a reduced rental. The jury, at the trial, having found that the surety was not prejudiced by this agreement, it was held by Lords Justices Cotton and Thesiger (Lord Justice Brett dissenting) that, notwithstanding the finding of the jury, the surety was released.

Lord Justice Cotton observes:—"The true
" rule, in my opinion, is that, if there is any
" agreement between the principals with re-
" ference to the contract guaranteed, the surety
" ought to be consulted, and that, if he has not
" consented to the alteration, although in cases
" where it is without inquiry evident that the
" alteration is unsubstantial, and one which can-
" not be prejudicial to the surety, the surety may
" not be discharged; yet that, if it is not self-
" evident that the alteration is unsubstantial, or
" one that cannot be prejudicial to the surety,
" the Court will not, in an action against the
" surety, go into an inquiry into the effect of the
" alteration." The *ratio decidendi* is thus stated:—
" The Plaintiff attempts to substitute for the
" contract that the flock shall be given up in good
" condition with the farm as then demised, a
" contract that it should be delivered up in like
" condition with a farm of different extent. . . .
" The surety ought to have been asked to decide

" whether he would assent to the variation. He " never did assent, and in my opinion was dis- " charged from liability." To the same effect is Polack *v.* Everett (2 L. R., Q. B. D., 669), where, there being a stipulation that half the book debts of the debtor should, under certain circumstances, be made over to the creditor, he released the book debts, and accepted in lieu thereof a supposed equivalent. The ground of the decision is thus stated by Quain, J.:—" The contract of the " surety should not be altered without his con- " sent, and the creditor should not undertake to " alter the contract and then say, 'Although " 'the contract has been altered, and I have put " 'it out of my power to carry it out by a " 'voluntary act, I now offer you an equi- " 'valent.' "

On the same principle it has been held that, when the creditor releases one of two or more sureties who have contracted jointly and severally, the others are discharged, the joint suretyship of the others being part of the consideration of the contract of each. In Bonser *v.* Cox (4 Beav., 379), where the Defendant agreed to become a surety for Richard Cox in a joint and several bond to be executed by Richard Cox and himself, and the execution of the bond by Richard Cox was not obtained, Lord Langdale observes, " The surety has a right to say, The " arrangement was that Richard Cox, as well as " myself, should be held bound by bond to the " creditor, that arrangement never was carried " into effect," and the decision would obviously have been the same if Richard Cox had executed the bond and had been afterwards released.

But where it is no part of the contract of the surety that other persons shall join in it, in other words, where he contracts only severally, the creditor does not break that contract by releasing another several surety, the surety cannot

therefore claim to be released on the ground of breach of contract.

It is true that he is entitled to contribution against other several sureties to the same extent as if they had been joint, but the right of contribution among such sureties depends not upon contract but on principles established by Courts of Equity.

This right of contribution was established in the case of Dering *v.* Lord Winchelsea (1 Cox, 318), affirmed by Lord Eldon in Craythorne *v.* Swinburne (14 Vesey, 169), and is thus explained by Lord Redesdale in Stirling *v.* Forrester (3 Bligh, 59):—
" The principle established in the case of Dering
" *v.* Lord Winchelsea is universal, that the right
" and duty of contribution is founded on doc-
" trines of equity, it does not depend upon con-
" tract. If several persons are indebted, and
" one makes the payment, the creditor is bound
" in conscience, if not by contract, to give the
" party paying the debt all his remedies against
" the other debtors. . . . It would be against
" equity for the creditor to exact or receive pay-
" ment from one, and to permit, or by his con-
" duct to cause, the other debtors to be exempt
" from payment."

In pursuance of this doctrine it has been held that a surety is entitled to the benefit of all securities in the hands of the creditor whether, when he became a surety, he knew of them or not. Thus, in Pearl *v.* Deacon (24 Beav., 186), where the Plaintiff was surety in a promissory note for a sum lent by the Defendants to their tenant, and a mortgage was subsequently taken by the Defendants on the tenant's furniture for the same debt, they afterwards, under a distress, took the same furniture for arrears of rent. It was held by Sir John Romilly that, inasmuch as the produce of the furniture was first applicable to the payment of the promissory note, the land-

lords could not, as against the surety, apply it to the payment of their rent, and that the surety was discharged, not, it is to be observed, absolutely, but *pro tanto;* and the decision was confirmed on appeal. It has been held in other cases that, where the creditor wastes or improperly deals with a security, the surety is released *pro tanto.* The claim of a several surety to be released, upon the creditor releasing another surety, arises not from the creditor having broken his contract, but from his having deprived the surety of his remedy for contribution in equity. The surety, therefore, in order to support his claim, must show that he had a right to contribution, and that that right has been taken away, or injuriously affected.

Applying these principles to the construction of the plea, it is to be observed that, although the Defendant avers that "Macintosh "was a co-surety with him for the payment of "the advances which the guarantee was given "to secure," he does not aver that the liability of Macintosh and himself was joint, and it may be inferred from the instruments set out that it was not, or that he became surety on the faith of Macintosh's co-suretyship, or that he even knew of it. He does not aver that any right of contribution against Macintosh was injuriously affected, or even that any right to contribution ever arose, nor does he set out any facts from which it can be necessarily or reasonably inferred that he had suffered any damage or injury by the substitution described in the plea. The guarantee was for a floating balance; if that balance at the time when he was called upon to pay under his guarantee exceeded the amount guaranteed by himself and Macintosh, there would be no contribution between them; he does not negative that it exceeded that amount. The substituted guarantee of Macintosh of the 3rd of April was

as available for him as the original guarantee for all subsequent advances to King. Under the first document Macintosh guaranteed the debt of King up to 600*l*., and was liable to the bank on bills which were given by him as security for the debt of King up to 1,400*l*. The Defendant, on paying the whole debt of King, and on that condition only, might have had recourse to the bills, but only for the purpose of obtaining the same contribution from Macintosh which he was entitled to under his second guarantee. It follows that he could only be damnified if a portion of the claim of the bank against him had consisted of advances to King made between the 29th of March and the 3rd April, and he does not aver that there were any such advances.

Their Lordships are therefore of opinion that all the allegations in the plea, which must be taken to have been proved, constitute no defence to the action, and that the Plaintiff is entitled to judgment notwithstanding the verdict. Their Lordships will therefore humbly advise Her Majesty that the judgment appealed against be affirmed, and the appeal dismissed. The Appellant must pay the cost of the appeal.