[HIGH COURT OF AUSTRALIA.]

DEANE . . . . . APPELLANT;
DEFENDANT,

AND

THE CITY BANK OF SYDNEY . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 12, 13, 14, 15, 19.

Griffith C.J., Barton and O'Connor JJ.

Principal and surety—Guarantee—Giving time—Extension of limit of overdraft for specified period—Assenting surety not discharged—Contract—Partly oral, partly in writing—Construction—Question of fact for jury—New trial.

Where, at the request of one of several co-sureties on a cash credit bond, but without the knowledge or assent of the rest, the creditor enters into a binding agreement with the principal debtor that an extension of time for payment shall be given him, the surety at whose request the time was given is not thereby discharged.

Quære, whether a covenant, or a binding agreement by a creditor not to sue the principal debtor for a certain time, operates to discharge a surety, even if made without his consent.

Principles underlying the rule as to the discharge of sureties by dealings between the creditor and the principal debtor, considered.

Australian Joint Stock Bank v. *Bailey*, 18 N.S.W. L.R. (L.), 103, distinguished.

A binding agreement by a bank to allow an increase of the limit of a creditor's overdraft during a specified period, may, under some circumstances, amount to a giving of time so as to release the guarantors of the overdraft.

Rouse v. *Bradford Banking Co. Ltd.* (1894) A.C., 586, distinguished.

The construction of a contract partly oral and partly in writing is a question of fact for the jury, who, in construing it, may consider not only the conversations and the documents, but all the surrounding circumstances.

A new trial will not be granted where it is clear that a second trial must have the same result as the first.

Decision of the Supreme Court, (1904) 4 S.R. (N.S.W.), 182, refusing to grant a new trial, affirmed, but on a different ground.

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APPEAL from a decision of the Supreme Court, (1904) 4 S.R. (N.S.W.), 182.

This was an action brought by the respondent bank on a guarantee bond for £20,000, dated 13th December, 1888, which was entered into by the appellant and others for the purpose of guaranteeing an overdraft, which the respondent bank proposed to grant in favour of the Burwood Land, Building and Investment Company, Limited. The guarantors were directors of the company, and their liability under the bond was limited to £10,000 and interest thereon.

The defendants were the appellant and two other guarantors, and they pleaded, amongst other pleas, a plea on equitable grounds to the effect that, after large advances had been made by the respondent bank to the company, it was agreed between the bank and the company "without the consent or knowledge of the defendants and the other sureties," for good and valuable consideration, that the bank should give time to the company and forbear to sue it for a certain time then agreed upon, being a longer time than the period of credit which the bank ought to have given the company for payment of the debt; that the bank in pursuance of the agreement did give time, and forbear to sue during the time agreed upon. Issue was joined upon this plea.

At the trial evidence was given by the appellant that the following conversation took place between him and the general manager of the bank:—"I had an interview before receiving the letter of the 15th January, 1892. I told him we were about to draw a little more largely on the Burwood account, and asked if he would allow a further overdraft to the extent of £20,000. I told him we would give further security, and we should want to operate on the account at once. He said that up to the 30th June we could operate on that account while the securities were being prepared. That ended the conversation and I left." On 15th January the following letter was written by the general manager to the appellant:—

"Dear Sir,

"Referring to our interview of this morning in connection with the Burwood Building Society, I have pleasure in stating that the bank is prepared to further assist the company to the extent asked, viz. £7,500 in addition to the existing limit of £12,500, such excess to be granted until 30th June next, when by your

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own showing ordinary revenue should enable you to easily repay the extra amount required. To support the whole advance generally you are to give security on the bank forms over the lands as set out in the statement you supplied me with."

On 21st January, 1892, the company executed mortgages to secure £20,000, and the appellant and the other directors signed a promissory note, payable on demand, for £20,000, and the company jointly and severally with the directors executed a bond to secure £25,000, also payable on demand. The company afterwards went into liquidation. On 12th February, 1894, the bank wrote to the appellant asking to have the debt reduced in terms of the guarantee. Shortly afterwards the appellant and the two other defendants made arrangements to reduce the liability by instalments. Ultimately the whole £10,000 was paid by them. The action was to recover interest upon so much of the £10,000 as remained unpaid after April, 1894.

At the trial before *Owen* J. the appellant and his co-defendants contended that by the agreement of 15th January, 1892, the bank had given time to the company until the 30th June following, and that, this having been done without the assent and knowledge of all the sureties, the whole of the sureties, including the appellant, were exonerated. His Honor ruled that the construction of the agreement was one of law for himself, not one of fact for the jury, and held that it did not amount to a giving of time. The jury found a verdict for the plaintiff for £3,023 18s. 8d.

The appellant and the other defendants moved to make absolute a rule *nisi* for a new trial on several grounds, of which those material to this appeal were, that His Honor was in error in refusing to leave to the jury as a question of fact what agreement was made between the bank and the Burwood Land and Investment Company on or about the 15th January, 1892, with reference to the company's overdraft, and the granting of time for the payment thereof, and that His Honor was in error in deciding as a question of law that the agreement made between the bank and the company at the date mentioned, with reference to the company's overdraft, was not an agreement binding the bank to give time to the company for the payment of the overdraft.

The Full Court (consisting of *Darley* C.J., *Simpson* J. and *Pring* J.), discharged the rule with costs.

Ralston and *Sheppard* (with *J. L. Campbell*), for the appellant. The contract upon which the appellant relies as a giving of time, whatever it was, was contained partly in the conversation between him and the manager of the bank, and partly in the letter written by the manager next day. Being partly oral and partly in writing the whole evidence on the point should have been left to the jury; its construction was a question of fact for them: *Moore* v. *Garwood* (1); *Bolckow* v. *Seymour* (2); *Stones* v. *Dowler* (3); *Palmer* v. *Bank of Australasia* (4). The letter itself may be either an offer or an acceptance, and requires the conversation to supplement it. The Judge having taken the matter from the jury, there should be a new trial, if the terms of the arrangement are capable of the construction that they amounted to an agreement to give time to the principal debtor.

The only reasonable construction that can be put upon the contract is that time was to be given for the payment of the liability. The letter contemplates that until 30th June the bank would not call up the overdraft. Otherwise the extension of the limit of the overdraft for that period would be idle. Fresh security was to be given for the "excess," or "further assistance." A similar agreement was held sufficient to entitle the debtor to restrain the creditor by injunction from calling up the liability in breach of the agreement: *Re Cracknell* (5). *Rouse* v. *Bradford Banking Co. Ltd.* (6), which was relied upon by the Court below, depended upon the particular facts of the case, and does not decide as a matter of law that in no case can an agreement to extend the limit of an overdraft for a specified period amount to a giving of time. General expressions in a judgment are not to be taken as expressions of the whole law, but as governed and qualified by the particular facts of the case: *per* Lord *Halsbury* in *Quinn* v. *Leathem* (7). It is sufficient for the appellant to establish that the agreement proved by the letter and conversation may have amounted to a giving of time under the circumstances, because in that case a verdict either way would not

(1) 4 Ex., 681.
(2) 17 C.B. N.S., 107.
(3) 29 L.J., Ex., 122.
(4) 16 N.S.W. L.R. (L.), 219; (1897) A.C., 540.
(5) 16 N.S.W. L.R. (B. & P.), 120.
(6) (1894) A.C., 586.
(7) (1901) A.C., 495, at p. 506.

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be disturbed: *Metropolitan Railway Co.* v. *Wright* (1). The jury has not had an opportunity of giving a verdict on the point.

If the agreement was a giving of time, all the sureties are discharged, including the appellant.

[GRIFFITH C.J.—How do you get over the difficulty that the appellant assented to the giving of time?]

It is necessary that all the sureties should consent. It was proved that the consent of one at least was not obtained. He therefore is discharged, and, if one is discharged, all must be, including the appellant. If any one is released, the appellant's position is materially changed for the worse, because his right to contribution is cut down. Assent does not prevent a surety from taking advantage of an alteration in the instrument of suretyship: *Australian Joint Stock Bank* v. *Bailey* (2).

The rule is that when one surety is released, all are released: *Ellesmere Brewery Co.* v. *Cooper* (3). The appellant knew that his co-sureties would be released unless their consent was obtained, and therefore the Court must infer that he only assented on the understanding that their consent would be obtained. The failure to do so was the fault of the bank, whose duty it was to do nothing to prejudice any surety.

[GRIFFITH C.J.—The principle that a man cannot take advantage of his own wrong seems to apply here. A surety who asks for a favour from a creditor, which is granted, surely cannot afterwards say that the result of the favour was to release him.]

The favour was for the debtor, not for the surety, and the appellant was only acting as a director for the company at the time. The bank must be presumed to have been content to take the consequences of its action, if it did not take proper measures to preserve its rights. The bank brought its action on the old bond, against all the sureties, but its contention now is that the appellant consented, not to a continuance of the old liability, but to a totally different one. The onus is on the bank to establish that; it should not be presumed in the absence of positive evidence. Each of several co-sureties is to be presumed to undertake only a

(1) 11 App. Cas., 152.
(2) 18 N.S.W. L.R.(L.), 103.
(3) (1896) 1 Q.B., 75.

joint and several liability. [He referred to *Rowlatt on Law of Principal and Surety*, 1st ed., p. 268.]

[GRIFFITH C.J. referred to *Mayhew* v. *Crickett* (1) in which case a surety was held, by virtue of a subsequent promise to pay, to have assented to the giving of time so as to bind himself, although the other sureties had not consented and were discharged.]

The bank did not stipulate for the reservation of its rights against the sureties, and the appellant was therefore justified in assuming either that the consent of all was to be obtained, or that, failing that, all were to be released. In *Mayhew* v. *Crickett*, (1) it must be taken that the surety ratified the giving of time with the full knowledge of the fact that neither he nor any of the other sureties were any longer bound, and therefore that he was making himself solely liable. Here the appellant must be treated as being in the same position as he would have been if the bank had actually promised to obtain the consent of the other sureties before giving time, and had failed to do so. In any case it was for the jury to say what it was to which he did consent, and the case should go back to have that question determined.

[GRIFFITH C.J.—On this plea the defendant had to prove his case. If he gave no evidence to support it the plaintiff must have a verdict. If on the other hand your plea is a bad plea, the plaintiff is entitled to take advantage of that now, although there was no demurrer. He may retain his verdict on any grounds, and this Court may make the order which the Supreme Court ought to have made.]

It is not shown on the facts that the plaintiff *must* have judgment. The evidence is the other way, that, if the old bond was to continue, it was to continue on the same terms as before, with the same number of sureties.

[GRIFFITH C.J.—There was some evidence of a subsequent assent to the giving of time.]

That assent would be on the assumption, which the appellant was entitled to make, that all the sureties were still bound. It is

(1) 2 Swans., 185.

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the duty of the creditor to see that all necessary steps for the execution of a bond are taken, and that the failure to get the signature of one surety, who had agreed to sign, released the others: *Fitzgerald* v. *M'Cowan* (1).

[O'CONNOR J. referred to *Polak* v. *Everett* (2).]

Dr. Cullen (*Gordon* K.C. with him), for the respondent. There was no question for the jury to try. All parties acted upon the letter, as containing the substance of the agreement. The appellant in his evidence said: "In pursuance of that letter we gave mortgages &c." The evidence of the conversations was only tendered in order to allow the jury to pronounce upon the legal effect of the document.

[O'CONNOR J.—Your argument is on the assumption that the letter is the contract.]

The words of the letter and the other evidence show that the whole agreement was contained in the letter. There was no dispute as to the words used at the conversation, and the letter merely states the substance of it. If the letter is capable of only one construction, the jury will not be allowed to construe it, simply because the same arrangement was also the subject of a conversation. The only question is the legal effect of admitted words. The Supreme Court has put the only possible construction upon the words of the letter, and, as no reasonable jury could find that the coversation in any way varied the effect of it, this Court will not interfere. The cases cited for the appellant are not applicable, because they are cases where there were disputes as to what was actually said, or where the written documents were in conflict with the conversations that were sworn to.

[GRIFFITH C.J.—But it is a question of fact whether the agreement is contained in the letter only, or in both the letter and the conversation. The letter here purports to be a record of an actual conversation, and refers to it in terms. If there is a verbal offer and a written acceptance, the whole contract must go to the jury.]

The letter was the result of the negotiations reduced to writing, and was only capable of the construction that it was not a giving

(1) (1898) 2 I.R., 1.

(2) 1 Q.B.D., 669.

of time. *Rouse* v. *Bradford Banking Co. Ltd.* (1), shows that the legal effect of such an arrangement is, not a giving of time, but merely the extension of the limit of the overdraft, without the suspension of the creditor's right to call up the liability at any moment. If the letter was the only evidence, the Court could construe it in no other way, and that construction is strengthened by a consideration of the surrounding circumstances. *Palmer* v. *Bank of Australasia* (2) is not in point, because there the writing was only a part of the transaction, and the Court held that oral evidence was admissible, not to vary the writing, but to supplement it. Even if the letter was a part of the contract, it is for the Judge to construe it: *Neilson* v. *Harford* (3); and, where the undisputed conversations cannot alter its effect, the jury would be acting unreasonably if they construed the letter in any other way.

[GRIFFITH C.J.—How can you say that any particular form of spoken words, except perhaps "yes" and "no," can have only one meaning in law?]

The words proved are capable of only one meaning in the minds of reasonable men, and therefore the meaning is practically a matter of law, and any other verdict than that which has been returned would be set aside as unreasonable. This Court will not send the case back for trial, because it must have the same result.

Assuming that there was evidence upon which the jury might find that there had been an agreement to give time, the appellant assented to it, and is not released. The case of one of several sureties is the same as that of a sole surety: *Story Equity Jurisprudence*, sec. 164 (*a*) p. 98. Nothing can be done to prejudice him without his consent, but it does not follow from that that, because one surety, who has been so prejudiced, is released, all are released. It must be assumed that when a surety gives his consent to an extension, he does so with knowledge of the consequences. He cannot say that he did not know or had forgotten that the other sureties would be released by the giving of time. *Ellesmere Brewery Co.* v. *Cooper* (4), is distinguishable.

(1) (1894) A.C., 586.
(2) 16 N.S.W., L.R. (L.), 219; (1897) A.C., 540.
(3) 8 M. & W., 806.
(4) (1896) 1 Q.B., 75.

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In that case several persons agreed to execute a joint and several bond, which was afterwards executed by all except one, who refused to sign it, and the Court held that those sureties who had signed were discharged, because the liability under the bond as actually executed was different from what they had intended to undertake when they signed it, and that, as it was for the creditor to see that the security was properly executed, he must suffer. That is no authority for the proposition that, because one surety is released owing to an extension of time granted to the principal debtor, all his co-sureties are also discharged, even if they assented to the extension. In *Woodcock* v. *Oxford and Worcester Railway Co.* (1), it was held that solicitors who were sureties, and who knew of the transaction upon which reliance was placed as discharging the sureties, and prepared the documents in connection with it, were not discharged.

[GRIFFITH C.J.—It is assumed apparently that the effect of the agreement in this case was to give time, and that if the plaintiff had sued on the bond before June they would have been restrained. *Ford* v. *Beech* (2) is a distinct authority that a plea that the bank had agreed not to sue for a limited time would be a bad plea. *Bolton* v. *Buckenham* (3), cited by *White and Tudor*, and by *Leake on Contracts* as an authority for the proposition that a covenant not to sue discharges the sureties, was not a case of a covenant not to sue, but one in which a fresh mortgage was given in place of an old one.]

The plea does not show a ground for an unconditional injunction in Equity, and is therefore bad.

[O'CONNOR J.—Supposing that the agreement was not legally binding, but had been acted upon, would it not be inequitable to sue in violation of it? The securities were given in pursuance of it. Was that not acting on the faith of it?]

The taking of the fresh securities by the bank was not acting upon it in the sense of abandoning the right to sue, because the mortgages gave the bank an immediate right to sue, and were therefore inconsistent with an agreement not to sue. The agree-

(1) 1 Dr., 521. (2) 11 Q.B., 852. (3) (1891) 1 Q.B., 278.

ment not to sue was assented to by the appellant, and therefore did not discharge him: *Moss* v. *Hall* (1).

[GRIFFITH C.J.—That is the only authority, if it is an authority, for the proposition that a covenant not to sue the principal debtor discharges the surety if given without his consent. It seems to be quite inconsistent with the principle upon which the doctrine of release is based, that nothing is to be done to the prejudice of the surety without his consent.]

In *Rouse* v. *Bradford Banking Co. Ltd.* (2) *Lindley* L.J. deals with the effect of giving time upon the liability of sureties.

Ralston in reply. A Court of final appeal will not decide on a point which was never raised in the Court below: *Mackay* v. *Commercial Bank of New Brunswick* (3); *Borough of Randwick* v. *Australasian Cities Investment Corporation* (4). It was never contested that, if there was a giving of time without the consent of all the sureties, all were discharged. That was decided in *Australian Joint Stock Bank* v. *Bailey* (5), which was never questioned by the Privy Council. If the appeal is dismissed on this point, the appellant is shut out from giving evidence on a point which was never raised till now. Issue was joined on the plea, on the assumption that it raised a good equitable defence. Affidavits should be allowed to show what further evidence could be given.

[GRIFFITH C.J.—We cannot do that. We have already expressed an opinion to that effect in another case. You may suggest what evidence could be given.]

It might be proved that there was a minute showing that the old bond with all the old sureties was understood to be in force. It was only thought necessary to call one surety to prove that he had not consented, in order to establish the defence, and that was the right view, if *Australian Joint Stock Bank* v. *Bailey* (5) was good law. It might be proved that the assent to the giving of time was subject to the condition that the assent of the other sureties should be obtained. If there is any question for the jury

(1) 15 Ex. 46; 9 L.J. Ex., 205.
(2) (1894) 2 Ch., 32, at p. 56.
(3) L.R. 5 P.C., 394.
(4) (1893) A.C., 322.
(5) 18 N.S.W. L.R. (L.), 103.

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to try, the appellant is entitled to a new trial. The Court should not assume that the appellant could not give further evidence, because evidence that was unnecessary on the law as it stood at the time of trial, was not given.

An agreement not to sue for a certain time operates as a discharge of the sureties: *De Colyar, Principal and Surety*, 3rd ed., p. 422; *Re Cracknell* (1).

Cur. adv. vult.

December 19.

The judgment of the Court was delivered by

GRIFFITH C.J. This is an appeal from a judgment of the Supreme Court of New South Wales refusing to make absolute a rule *nisi* for a new trial in an action brought by the City Bank of Sydney against Deane and others, sureties under a cash credit bond given to secure an advance to the Burwood Land, Building, and Investment Co., the principal debtors. The question before us arises on an equitable plea in the following words. [His Honor read the plea as set out above.] The evidence offered to prove the agreement consisted of a conversation between the manager of the plaintiff bank and the appellant Deane (who was one of the directors of the company, and its solicitor), followed by a letter written to him the next day by the manager of the bank, together with other circumstances. At the trial before Mr. Justice *Owen*, His Honor ruled that the alleged agreement was contained in the letter, and refused to leave any question to the jury as to the agreement, holding that it was a matter of law for him to determine. It was contended before the Supreme Court for the defendants that, under the circumstances, the agreement being contained partly in the conversation and partly in the letter, its construction was a question of fact for the jury, and a new trial was asked for on that ground. The learned Judges seem to have differed in opinion somewhat on this point, *Darley* C.J., and *Simpson* J., being of opinion that the agreement was contained in the letter only, while *Pring* J. is reported to have said that the whole evidence of the agreement was to be found in the conversation, and that the letter was immaterial, but that, the terms of the conversation being exactly stated, and uncontradicted, the learned

(1) 16 N.S.W. L.R. (B. & P.), 120.

Judge who presided at the trial was right in construing them. He says (1): "The agreement here having been proved solely by parol evidence, which was not contradicted, I am of opinion that His Honor was right in deciding its meaning as a question of law, and in refusing to leave it to the jury."

Now it is well settled law that, when an agreement is made out by parol evidence, its construction is a matter for the jury, but that if, on the other hand, the agreement is in writing, then it is for the Court, not the jury, to construe it. I cannot help thinking that, although His Honor is reported to have said this, what he really meant was that, if upon the evidence as to a verbal agreement there was nothing to warrant the jury in placing any but one construction upon it, there would be no real question for the jury, and the Judge would be practically bound to treat the construction as a matter of law, and in that sense what he said was quite right. The evidence of the conversation is set out in the judgment of *Darley* C.J. [His Honor then read from the judgment the conversation as set out above and proceeded]: It is another well known rule of construction, that, when a contract is partly in writing and partly verbal, all the circumstances may be looked at and considered for the purpose of construing the contract, and even to vary the written documents, and the whole matter is one for the jury. In the present case the first question is, what is the agreement? Is it the writing, or the verbal conversation, or is it to be gathered from the conversation and the letter with all the other circumstances? Possibly it was open to the jury to find that the agreement was contained in the writing, but whether it was or not was a preliminary question of fact for the jury to determine on the evidence. If the question were one for this Court, I should be disposed to say that the agreement was contained in both. We think that, upon the evidence, there was material on which the jury could have found either that the plaintiff bank made an agreement for valuable consideration to give further time to the principal debtor, or that it did not. We assume that such an agreement for extension of time in the case of a cash credit bond would be a binding agreement under the

(1) (1904) 4 S.R. (N.S.W.), at p. 196.

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rule commonly known as the rule in *Rees* v. *Berrington* (1). The best that can be said in favour of the plaintiff's view is that it was a question of fact. In either view there was a question of fact which should have been left to the jury. So that upon that point it would appear that the defendants are *primâ facie* entitled to a new trial, to have the question of fact determined by a jury. But that does not conclude the case. Supposing that the question had been left to the jury, and they had found in the defendants' favour (for the defendants are entitled to be placed in the position in which they would have been if that had happened), let us deal with the case on that footing. It is necessary first to look at the plea itself more closely to see whether it affords any defence to the action, or whether, even if the jury had found in his favour on the issue raised, the plaintiff would not have been entitled to judgment, *non obstante veredicto*. Because, if so, we cannot send the case to a new trial upon an immaterial issue.

The plea is that a binding agreement had been made and executed, giving time to the principal debtor without the knowledge or assent of the sureties, with the consequence of discharging those sureties. The material words of the plea are "without the consent of the defendants and the other sureties." We are told that the defence intended to be set up by that plea was founded on this supposition, that if the creditor gives time to the principal debtor, without the consent of all the sureties, all the sureties are discharged; and from that point of view, evidence was given that one of the sureties did not know of or assent to the giving of time by the bank. The assumption on which this plea was pleaded was that the extension of time granted to the principal debtor without the consent of all the sureties, operates as a discharge even of those sureties who had knowledge of it and assented to it. But there is no such rule. No trace of any such rule is to be found in the books, and, when one considers the principle which is the foundation of the doctrine, it is clear that there cannot be any such rule. The doctrine is nowhere better stated than by *Blackburn* J. in the case of *Polak* v. *Everett* (2). He says: "It has been established

(1) 2 Ves., 540; 2 Wh. & T.L.C., 4th ed., 974.
(2) 1 Q.B.D., 669, at p. 673.

for a very long time, beginning with *Rees* v. *Berrington* to the present day, without a single case going to the contrary, that on the principles of equity a surety is discharged when the creditor, without his assent, gives time to the principal debtor, because by so doing he deprives the surety of part of the right he would have had from the mere fact of entering into the suretyship, namely, to use the name of the creditor to sue the principal debtor, and if this right be suspended for a day or an hour, not injuring the surety to the value of one farthing, and even positively benefiting him, nevertheless, by the principles of equity, it is established that this discharges the surety altogether." He then makes some further observations, in which he expresses some disapproval of the rule, but says that it is now too late to alter it. But when the assent of the surety is given, the foundation of the rule is gone. When the giving of time is at the surety's request, how can it be said that he has suffered any injury? That this is the foundation of the rule appears from the words of Lord *Loughborough* L.C., in the case of *Rees* v. *Berrington* (1): "It is the clearest and most evident equity, not to carry on any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound, and transact *his* affairs (for they are as much his as your own) without consulting him. You must let him judge, whether he will give that indulgence contrary to the nature of his engagement."

But, when he is consulted as to the proposal to give time and assents to it, he cannot complain; *à fortiori* when the time is given at his own request. *Volenti non fit injuria.* Again, it is a settled rule that, even if the extension of time is given without the consent of the surety, but he afterwards assents to it, and promises to pay, his liability revives. The authority for that is the case of *Mayhew* v. *Crickett* (2), which was a case of one of two joint sureties. There is therefore neither principle nor authority for the proposition that, when a creditor gives time to the principal debtor at the request of a surety, that surety can complain, or say that he is discharged thereby. So that, taking the plea, and reading it as it was intended, it is clearly bad.

(1) 2 Ves., 540, at p. 543. (2) 2 Swans., 185.

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If on the other hand, the plea is read distributively that the extension was given to the company without the consent of the sureties severally, there was no evidence of it, because the appellant has proved that the extension was granted at his own request. Therefore, whichever way the plea is construed, the appellant fails, because upon one construction it is a bad plea, and the respondent would be entitled to judgment *non obstante veredicto*, even if the appellant obtained a verdict; and, upon the other, it is not supported by the evidence, because the appellant's own evidence negatives it.

We are told, however, that this is rather hard on the appellant, because the plea was pleaded in reliance upon the case of the *Australian Joint Stock Bank* v. *Bailey* (1). That was a case in which an instrument of suretyship was altered after execution with the consent of some but not all of the sureties, and the Supreme Court held that the bond was thereby rendered void against them all. That is an entirely different proposition from the one now set up, viz., that one surety, who requests that time be given to the principal debtor, may take advantage of it as discharging himself. That case, therefore, has no bearing upon the present case. Then it was suggested that, if the matter had been left to the jury, or if there were a new trial, it might be possible for the appellant to convince the jury that there was a term to be implied from the conversation (which was given in detail) that it was intended that the original bond should remain in full force as against all the sureties. If it was part of the arrangement that the original bond was so to remain in force, then the rights would be reserved against the sureties, and there would be nothing in the defence, because the sureties were not discharged. If, on the other hand, that was not a term of the agreement, then, whatever the arrangement was, it was made at the request of the defendant, and he cannot take advantage of it as discharging him. So that, from whatever point of view it is regarded, the position of the defendant is hopeless. It was suggested that it might be shown that one term of the agreement was that the bank should obtain the consent of the other sureties to the extension of time. It would be very strange indeed if

(1) 18 N.S.W. L.R. (L.), 103.

that should be so, that the bank should agree to ask for the consent of all the sureties to do something which they could have done without their consent, by merely stating that they reserved their rights against the sureties. On all points therefore the defence fails, and we are not justified, after trial, when the plaintiff is clearly entitled, whatever the verdict, to judgment, either for want of evidence for the defendant, or *non obstante veredicto*, in allowing the whole matter to be re-opened. If the appellant has any equitable defence, it is a different one altogether from that which he has set up. Whether he would be allowed to set it up in a Court of Equity is a matter with which we have no concern here. If he can set it up, he may still do so; if not, it would be for reasons which make it equally unjust for us to allow him to set it up now.

I will add a few words as to the case of *Rouse* v. *Bradford Banking Co. Ltd.* (1), on which the Supreme Court relied for the proposition that an agreement to extend the limit of an overdraft for a specified time does not suspend the rights of the creditor and so discharge the sureties. That was a case of an overdraft, but it depended entirely upon its own facts. In that case the overdraft was not secured by a bond. It was a simple contract debt due both by the principal and surety, and the House of Lords found as a fact, upon the terms of the agreement, that it was not an agreement to give time to the debtor. But it does not follow that no such agreement can be made in the case of an overdraft. We have already said that in our opinion the jury might have found on the evidence that there was such an agreement in the present case.

For these reasons we are of opinion that the defendant's appeal fails, and must be dismissed, but, under the circumstances, without costs.

Appeal dismissed.

Solicitor for the appellant, *W. S. Deane.*

Solicitors for the respondent, *Lumsdaine and Leibius.*

C. A. W.

(1) (1894), A.C., 586.