1941 *Present :* **Howard C.J.**

SIVARAMAN CHETTY *v.* EBRAMJEE *et al.*

160—C. R. Colombo, 65,319.

Waiver—Action on promissory note against maker and endorsers—Waiver of claim against maker—Endorsers discharged from liability.

Where, after an action was instituted by the payee against the maker and endorsers of a promissory note, the plaintiff waived his claim against the maker,—

Held, that the endorsers were discharged from liability unless the waiver was made with their knowledge or consent.

APPEAL from a judgment of the Commissioner of Requests, Colombo.

N. Nadarajah (with him *V. Thillainathan*), for the defendants, appellants.

J. E. M. Obeyesekere, for the plaintiffs, respondents.

February 12, 1941. HOWARD C.J.—

This is an appeal from a judgment of the Commissioner of Requests Colombo, in favour of the plaintiffs against the appellants, the second and third defendants, for a sum of Rs. 230.99 together with further interest as specified in the judgment till date of payment. The plaintiffs claimed on a promissory note made by the first defendant in favour of the plaintiffs and endorsed by the appellants. On the evidence before him the Commissioner held that the note was given for a loan of Rs. 300 advanced to the first defendant. This finding by the Commissioner has not been challenged in this appeal. The action against the first defendant and the appellants was instituted on May 11, 1940. On June 21, 1940, the plaintiffs in Court waived their claim against the first defendant and/ trial proceeded against the appellants. Counsel for the appellants both in this Court and in the Court below maintained that the waiver of the claim against the first defendant discharged them from their liability. The learned Commissioner in his judgment stated that the liability of the parties is on a promissory note and as the maker and endorsers are jointly and severally liable, if the plaintiffs chose to waive their claim against the maker, it does not necessarily mean that the endorsers are discharged from liability. I am of opinion that this is not a correct statement of the law which is clearly stated in *Chalmers on Bills of Exchange 9th ed., p. 257,* in he following passage :—

> "Where a relationship in the nature of principal and surety exists between the parties to a bill, or the parties to a bill transaction, and the holder having notice thereof enters into a binding agreement with the principal to give time to him, or, of his own act, discharges the principal, the surety or sureties are discharged, unless the holder, in so doing, expressly reserves his rights against the surety or sureties, thereby preserving the remedy over. The acceptor of a bill is prima facie the principal debtor, and the drawer and endorsers are, as regards him, sureties, and the drawer of a bill is the principal as regard the endorsers."

The law as laid down in this passage is recognized in the judgment of Lord Selborne in *Duncan Fox & Co. v. North and South Wales Bank*[1], where the Lord Chancellor stated as follows :—

> "The statement in *Smith's Mercantile Law (3rd ed., p. 253)* is also correct and is established by many authorities that 'in the contract by bill or note, the maker or acceptor is considered the principal, and the endorsers as his sureties; and consequently, if the holder discharge or suspend his remedy against the former, the latter, unless they have previously consented to it, or afterwards promised to pay with knowledge of it, are all immediately discharged."

[1] *6 A. C. at p. 14.*

The same principle is also formulated in *Liquidators of Overend v. Liquidators of the Oriental Financial Corporation*[1], where it was held that if, after a right of action accrues to a creditor or against two or more persons, he is informed that one of them is a surety only, and after that, he gives time to the principal debtor, without the consent and knowledge of the surety, the rule as to the discharge of the surety applies. In *Suppiaya Reddiar v. Mohamed et al.*[2], a local case, the principal laid down by English law was applied and it was held that, where in an action brought against two joint makers of a promissory note, judgment by default is entered against one, the action cannot thereafter be maintained against the other.

In this case the appellants being endorsers are in the position of sureties for the first defendant, the principal debtor. The waiver of the claim against the latter was made without the knowledge or consent of the appellants. Nor did they afterwards in the altered circumstances consent to pay. Their debt is, therefore, discharged and this action cannot be maintained against them.

For the reasons I have given the judgment of the learned Commissioner is set aside and judgment entered for the appellants with costs both in this Court and the Court of Requests.

Appeal Allowed.