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GAUDER *v.* GAUDER.

D. C., Colombo, 18,949.

Co-debtors—Payment by one co-debtor of more than his proportionate share—Right to recover from other co-debtors a contribution pro rata.

One of several co-debtors who are jointly and severally liable in respect of a debt may, upon paying more than his proportionate share of the debt, recover from his co-debtors their proportionate shares of the excess, whether the entire debt has been extinguished or not by such payment.

THIS was an action brought by certain co-debtors against two other co-debtors for the recovery of a sum of money said to be due by them to the plaintiffs in respect of a payment which the plaintiffs had made to the common creditor in reduction of the debt due by all the co-debtors. It appeared that the plaintiffs, the defendants, and three others were indebted on the 7th March, 1903, to one Noorbhai upon four mortgage bonds for principal and interest in the sum of Rs. 22,543.83; that they had hypothecated for the payment of their said debt their several shares in certain immovable property; that on the 7th March, 1903, the plaintiffs paid the creditor a sum of Rs. 13,750 in part payment of the principal and interest due on the said bonds and obtained from the creditor a full discharge of all their liability to him on the said bonds, as also a release of their shares of the immovable property mortgaged; and that the debt due to the said creditor at the date of the institution of the suit was more than the proportionate share of the debt for which the defendants were liable as between the debtors themselves.

On the footing of these facts the question submitted for the decision of the District Court of Colombo was whether the plaintiffs were entitled to claim the sum of Rs. 1,472.45 as contribution from the defendants. The learned District Judge (Mr. J. Grenier) held as follows:—

"I understand the action to be one for contribution, and I see nothing in the Roman-Dutch Law which limits the right to ask for contribution only where a co-debtor has paid the whole debt. In this case the money that was borrowed by the co-obligors was divided amongst them in the proportions mentioned in the plaint and admitted by the defendants, and on the 7th March, 1903, plaintiffs paid to the obligee Rs. 17,350 in part payment of principal and interest due on the bonds. The proportionate share payable by the defendants jointly amounts to Rs. 1,472.45.

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The difference between plaintiffs and defendants seems to be that the defendants say that, unless there is a complete release of the joint obligation, there can be no action for contribution. In the present instance the plaintiffs have been released by the payments they have made to the obligee from all liability upon the four bonds referred to in the plaint, and the shares of the immovable property mortgaged by them have also been released. It is admitted, however, that the plaintiffs have paid a larger sum than their share of the joint debt, and unless there is express authority to the contrary, it seems to me only just and equitable that the defendants should contribute what the plaintiffs have paid on their own account, whether there has been a complete release of the joint obligation or not. Judgment will be entered for plaintiffs as claimed with costs."

The defendants appealed.

The case was argued before Layard, C.J., and Moncreiff, J., on 25th November, 1904.

Dornhorst, K.C., for appellant.—According to English Law, it is necessary that the plaintiff should have paid the whole of the debt to entitle him to recover from the defendants their proportionate shares of the excess. Voet (*20, 4, 5*) speaks of payment in full (*in toto*) of the debt by one debtor to entitle him to obtain cession of action from the creditor. Van der Linden (*1, 14, 9*) and other Dutch authorities also lay down that it is only a debtor who has paid the whole debt who can recover their proportionate shares from his co-debtors. Further, the recovery of the excess before the satisfaction of the debt *in toto* would lead to a multiplicity of actions.

Walter Pereira, K.C., for plaintiff, respondent.—The question involved is not one as to the right of one co-debtor, who has paid the whole debt, to demand and obtain cession of action from the creditor. Cession of action was not absolutely necessary under the Roman-Dutch Law to enable one debtor, who has paid the whole debt, to recover from his co-debtors what he has paid in excess of his own proportionate share. He might recover in his own right from each of his co-debtors his share of the debt. No doubt, the Roman-Dutch authorities speak of payment of the whole debt by one co-debtor to entitle him to recover from the rest, but there is no reason to suppose that it was intended that the rights that accrued to a debtor who had paid the whole debt should not accrue to one who had paid a part of the debt, which, however, was in excess of his own proportionate share of the debt. As explained in *Pothier 2, 3, 8, 1*, in the case of debt *in solido*, although

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the debtors are debtors of the whole in respect of the creditor as between themselves, each is only liable *pro se* as to that part of the debt of which he was the cause.

If, therefore, one debtor pays more than such part, it is but just that he should have the right to recover the excess from his co-debtors. The English Law would appear to allow it.

The multiplicity of actions that such a practice would seem to lead to appears to be a necessary evil, for it is absurd to expect a co-debtor who has wiped off a portion of the principal, and thus prevented the interest accruing thereon, to wait till he is able to discharge the balance of the debt.

Cur. adv. vult.

30th November, 1904. LAYARD, C.J.—

It has been contended for the appellants in this case that the right of contribution is only given to a debtor who pays the whole of the debt due by him and his co-debtor, and that he has no right of action against his co-debtor until the creditor's right of action has been extinguished by payment of the whole debt.

The appellant's counsel contended that both under the English Law and our law where several persons are liable as co-debtors for the same debt, which as between themselves is payable in equal shares, it is only where one of the co-debtors is compelled to pay the whole he is entitled to recover from each of the others a contribution in proportion of the excess beyond his own share. With regard to the English Law, he stated that in England it has been decided that only where several persons are liable as co-sureties for the same debt and one of them has paid the whole can he recover from his co-sureties so much as he may have paid in excess of his share. In all the English text-books on the law of contracts I have had the opportunity of examining I find that it is laid down that, where one co-debtor has been compelled to pay not only the whole debt, but a greater part than his share, he is entitled to recover from each of his other co-debtors a contribution in proportion of the excess beyond his own share, and also if there be several sureties and one of them pays more than his proportion of the demand, he is entitled to contribution against his co-surety or co-sureties for the excess.

It has been suggested that the text writers are not supported by the authorities cited by them, and that they have erred in extending the right of contribution to cases in which the whole debt has not been extinguished. On a reference, however, to a large number of English cases I think that the text writers have not overstated the law. I understand Lord Eldon to have decided in

the case of *Ex parte Gifford* (*2 B...& P. 269*), cited with approval and followed by Baron Parke in *Davies v. Humpreys* (*6 M. & W. 168*), that sureties stand with regard to each other in a relation which gives rise to the right that, if one pays more than his proportion, there shall be a contribution for a proportion of the excess beyond the proportion which, in all events, he is to pay. Baron Parke states it might be more convenient to require that the whole amount should be settled before the sureties are permitted to call upon each other in order to prevent multiplicity of suits, but it seems clear that when a surety has paid more than his share every such payment ought to be reimbursed by those who have not paid their shares in order to place him on the same footing, and a right of action accrues to him to enforce such payment.

The English Law is against the appellant's contention. The case however, must be decided by our won law quite irrespective of the English Law. It is argued that the Roman-Dutch Law authorities in express terms nowhere declare that, where a co-debtor has paid a greater part than his own share of a debt, he can bring an action for contribution before the debt of the creditor has been entirely extinguished. It is suggested that he must pay the whole debt before he is at liberty to recover the excess of his share paid by him.

No Roman-Dutch Law authority has been cited to us by either appellant's or respondent's counsel which expressly states that he can or cannot recover contribution before the whole debt is extinguished. Though it is admitted by respondent's counsel that constant reference is made in Voet and other Roman-Dutch Law authorities to the right to recover contribution where the whole debt has been satisfied, there having been no actual authority cited to us to establish that the right to recover contribution was limited to the case in which the whole debt had been extinguished, it remains for us to decide whether on general principles the right should be so limited.

Let us then examine the facts of the case and the liability of the parties to the joint contract. Here they had mortgaged property to which they were entitled in common. Under such a contract in our law the mortgagee-creditor is at liberty to proceed for the whole debt against the plaintiffs' share and the plaintiffs could not, by tendering him a proportion of the debt, prevent the mortgagee-creditor from resorting to them for the whole of the share owned by them (*Voet, 20, 4, 4*).

The mortgagee-creditor could have sued them for the whole debt and have caused their undivided interests in the mortgaged premises to be sold, and at such sale have acquired the plaintiffs'

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share, or some third party might have purchased it and the mortgagee-creditor have drawn the proceeds arising from such sale. The price realized at the sale might, whilst exceeding the proportion of the debt due by the plaintiffs, be less than the full amount of the mortgage debt. The plaintiffs could not stop the sale by tendering their proportion of the debt; consequently they would be deprived of their property, and the mortgagee-creditor, having satisfied a portion of his debt, might not proceed any further. The sale of the plaintiffs' property would have discharged part of the debt of his co-contractors. Plaintiffs could not compel the creditor to take further proceedings against his co-contractors, and, possibly not having means or property to satisfy the whole of the mortgage debt, he would, if appellant's counsel's contention is correct, be left without any remedy to enforce his indemnity by the contribution to which he is entitled from his co-debtors. I cannot believe that the Roman-Dutch Law would have under such circumstances left the plaintiffs without any remedy. Equity appears to me to require that the plaintiffs should be entitled to have recourse against their co-contractors, and I know of no law so equitable as the Roman-Dutch Law, and, unless express authority can be shown to the contrary, I shall hold that the plaintiffs are entitled to their remedy against appellants.

As I said before, no express authority has been cited to us on the point. Appellant's counsel laid great stress on the frequent reference in *Voet* (*20 4, 5*) to the payment in full of the creditor's debt. Here Voet appears to me to be dealing with the right of a co-debtor to obtain cession of action from the mortgagee-creditor, and not to a case like the present, where there could not possibly be a cession of action, as the whole debt was not extinguished. I understand the law to be that a cession of action can only follow the extinguishment of the entire debt.

It has been further argued for the appellants that they have been prejudiced by the plaintiffs' payment and release of the plaintiffs' share of the mortgaged property. I cannot see that they have in any way suffered. Their original liability was *in solidum* for the full amount, and they now remain liable *in solidum* for a less sum than they were before the plaintiffs made the payment alleged in the plaint. The mortgagee-creditor could have enforced payment against the plaintiffs' share of the land mortgaged, and the plaintiffs could not prevent him from having recourse against them alone; the nature of the contract entered into by plaintiffs and appellants enabled the mortgagee-creditor to have recourse against any party to the mortgage, and he was not bound to sue all. Their position does not appear to me to be prejudicially affected by

the action of the plaintiffs. Should at any time, from circumstances which may arise hereafter, the appellants or any one of them have to pay more than his proportionate share of the debt, they or he can have recourse for contribution against their or his co-debtors, and I cannot see that the fact that the plaintiffs have recovered in this case judgment for the amount of their claim will prevent the appellants from hereafter recovering from them any sum that respondents could rightly be charged with as their share of the contribution to the debt created by the mortgage.

I think the appeal should be dismissed with costs.

MONCREIFF, J.—

I agree with the view of the Chief Justice. I agree that the plaintiffs, having paid more than their proportion of the debt secured by the mortgage bond, are entitled to recover rateably from their co-obligees. The debtors under the bond were in the position of sureties, each for the other; the rule which applies to sureties is equally applicable to debtors *in solidum* (*Pothier, 363*). I learn from *Voet* (*46, 1, 31*) that a surety has recourse to the principal debtor for everything he has been compelled to pay in his capacity of surety—*Regressus ei contra debitorem principalem datur in id omne, quod fidejussore nomine solvere coactus fuit.* For that purpose he has the *actio mandati* when he became surety on mandate from the principal debtor, and the *actio negotiorum gestorum* when he appears to have intervened without mandate and settled the business of the debtor advantageously—*Si sine mandato interveniens utiliter negotium debitoris gessisse probetur.* Voet goes on to say that these actions are distinct from those which are ceded by the creditor as against the other sureties to a surety who has paid the whole debt—*Distant hæ actiones ab iis quæ per creditorem fidejussori solidum solventi adversus confidejussores cessæ sunt.* They are actions *in id omne, quod fidejussoris nomine solvere coactus fuit;* whereas, if the surety paying the whole debt has a cession of action from the creditor, he can recover no more than the creditor could recover.

It seems to me that Van der Linden (*Juta, 3rd Edn. 1897, p. 122*) puts the matter in the same way. In any case I can dicover no reason why a surety or debtor *in solidum* should not have the actions Voet speaks of against his co-sureties or co-debtors on payment of less than the whole. Part payment extinguishes a debt *pro tanto*. As Pothier puts it (*p. 367*),—"regularly payment of a part of what is due extinguishes the debt as to that part; therefore, if you owe me £10 and pay me £5, the debt is extinguished for a moiety (*L. 9, sec. 1, ff, de Solut*)."