COMPARATIVE STUDY OF SURETY UNDER THE CIVIL LAW AND AT COMMON LAW

By Gaudencio Garcia, LL. B.

CHAPTER I.

INTRODUCTORY

1. History and development of suretyship.

(a) *Under the Civil Law.* The contract of suretyship dates from the time when the giving of credit came to be known. Its appearance responded to the necessity equally felt in all countries as a result of the greater extension of contractual relations. In the early days, simple and verbal promise was sufficient to remove the fear of a creditor who took the words of a debtor, but when contractual life was extended and juridical relations acquired wider scope, it became necessary to find means to secure the faithful performance of obligations.

In all probability the contract of suretyship was co-eval with the *fides facta*, or pledge of faith. This pledge of faith procured greater respect and security to the obligations incurred. The necessities of the time, however, showed that it was not sufficient to fulfill its object and, therefore, the idea of suretyship as a more effective guaranty appeared.

The contract of suretyship was well known among the Romans. (See Tab. I, Art. IV of XII Tables, cited in Howe's Studies in Civil Law, p. 48; *Lex Apulcia*, about sureties—Hunter, Roman Law, 61, 577-579; Gaius's Institutes, about *sponsio*, *fide promissio*, *fide jussio* as the three stages of suretyship—Hunter, Roman Law, 565.) The obligations of a surety, generally contracted verbally, extended not only to himself, but also to his heirs. The surety could guaranty civil obligations, and even natural, so that at times he could be prosecuted without first suing the principal debtor. The surety could bind himself for less but not for more than the principal obligation. (I, Pothier's Law of Obligations—Evans Ed., 230.) A suretyship which extended the principal obligation was void.

At first a married woman could not become a surety. (Hunter, Roman Law, 572-573.) Later under Justinian this rigid rule was modified so that a married woman could become a surety provided the contract was made in a public instrument signed by three witnesses. (Hunter, Roman Law, 574.)

In the old Spanish laws, as the *Fuero Viejo*, there was no mention of the contract of suretyship as it is at present understood. A treatment of this subject was found in *Fuero Real* from which the *Partidas* copied some provisions. The *Partidas* in turn transmitted these provisions to our present Civil Code with slight modifications.

(b) *Under the Common Law.*—A sketch of the history of the Common Law principles of contract may well begin with the age of Glanvill, in the reign of king Henry II. (I, Pollock and Maitland—History of English Law, 136.) The real contract, the single contract of suretyship, and the sealed obligation of indebtedness were the only contracts recognized and enforced by the Common Law in the twelfth century

The contract of suretyship was originally entered into by means of a formal ceremony involving the delivery of the *festuca*, or staff. Later, in the reign of Edward III, the courts began to require that the undertaking of a surety should be evidenced by a deed or sealed writing. As late as 1314 the action on debt seems to have been brought against a surety who had not bound himself by a sealed instrument. In 1343 it was doubted whether it should not be proved, like the convenant, by a specialty; and later it was assumed, as a matter of course, that the surety could only be bound by a sealed writing.

At first the surety was considered as the principal and only debtor, for one *quid pro quo* could not originate two separate obligations. There could not be a double debt upon a single loan, and if the person who got the *quid pro quo* became bound, the other did not.

The whole law of suretyship was simplified and extended by the appearance of the law of *assumpsit*. The liability of a surety could now be substituted for that of another, and he could be held either with or without his principal.

2. Acceptations of the term "suretyship;" scope of the subject.—Both under the Civil Law and the Common Law, the term "suretyship" has two acceptations—one broader and the other narrower. In its broader sense, suretyship includes all contracts of guaranty as well as pledge and mortgage. (12, Manresa, 146.) In this acceptation it is defined as "the relation occupied by a person liable for the payment of money or for the performance of an act by another, such liability being collateral as to such person, and who is liable to suffer loss in event of the failure of such other person to pay or perform, but whose liability is terminated at once fully and completely if such other person does pay or perform." (Child, Suretyship and Guaranty, 1.) The narrower acceptation of the term is what constitutes suretyship proper. In both senses, the term denotes the assurance of a principal obligation by subsidiary means.

The present study will deal exclusively with suretyship in its narrower sense.

3. Suretyship proper defined.

(a) *Under the Civil Law.*—Manresa defined suretyship proper as "a contract by virtue of which one of the contracting parties gives his personal guaranty to secure the fulfillment of an obligation contracted by another distinct person, binding himself to fulfill it for such if the latter does not do so at the time and in the manner in which he bound himself." (12 Manresa, 148.)

"It is the obligation which one gives as security that the other will pay his debt or perform the conditions of a certain contract. Or, it is the agreement by which

a third person takes to himself the fulfillment of a foreign obligation in case the person who contracted it fails to do so." (Escriche, *Diccionario Razonado*, 691.)

George Bowyer, in his "Commentaries on the Modern Civil Law," defines suretyship thus: "Fidejussio or cautionary is a contract whereby a man binds himself towards a creditor for a debtor, to pay to the former the whole or part of that which the latter owes to him in the event of the debtor not doing so himself." (Bowyer's Commentaries on the Modern Civil Law, 196.)

It is with this acceptation of the contract that the civil codes of most countries deal. Our Civil Code, in Article 1828, has the following definition: "By security a person binds himself to pay or perform for a third person in case the latter should fail to do so."

The Louisiana Revised Civil Code, in Article 3035, defines suretyship as "an accessory promise, by which a person binds himself for another already bound and agrees with the creditor to satisfy the obligation if the debtor does not."

Article 765 of the German Civil Code provides: "By a contract of suretyship, the surety binds himself to the creditor of a third party to be responsible for the fulfillment of the obligation of the third party." (German Civil Code—Chung-hui Wang, Ed.)

Article 825 of the Civil Law of Spain and Mexico defines suretyship as a "contract by which one engages to answer for the obligation of a third person if he should fail to fulfill it." (Schurdt's Civil Law of Spain and Mexico.)

Article 2361 of the Columbian Civil Code has the following provision: "Security is an accessory obligation, by virtue of which one or more persons answer for a foreign obligation, promising to the creditor to fulfill it wholly or in part if the principal debtor does not." (*Codigo Civil Columbiano*—Rodriguez, Art. 2361; see also Art. 2104, Civil Code of Salvador.)

"The engagement of a surety," says Howe, "is one by which a person binds himself in behalf of a debtor to a creditor for the payment of the whole or part of of what is due from such debtor, and by way of accession to the obligation of the latter." (Howe's Studies in Civil Law, 248-249.)

A surety, therefore, is a person who obliges himself for another person and who answers in his name for the security of some engagement; or, he who pledges his faith at the command or request of him who gives him as security, to give to, or to perform something for another person. (2 Domat's Civil Law—Cushing, Art. 1850; 2 Moreau and Carleton's *Partidas* V, Tit. XII, Law I.)

(b) *Under the Common Law.*—Child, in his work on suretyship and guaranty, defines the contract thus: "Suretyship, in its narrower sense, is a legal relation based upon contract between competent parties, in which one person undertakes as the object of such contract, to answer to another for the debt, default or miscarriage of a third person, the third person's liability to the second person being thus similar to that of such first person." (Child's Suretyship and Guaranty, 2.)

"It is a contract whereby one person engages to be answerable for the debt, default or miscarriage of another." (27 American and English Encyclopedia of Law 431.)

The Earl of Halsbury defines the contract thus: "A guarantee (suretyship) is an accessory contract whereby the promissor undertakes to be answerable to the promissee for the debt, default or miscarriage of another person, whose primary liability to the promissee must exist or be contemplated." (15 Laws of England—Earl of Halsbury, Sec. 864, p. 439.)

A surety, therefore, is one who engages to be answerable for the debt, default or miscarriage of another.

(c) *Author's definition and comment.*—The Civil and Common Law definitions of suretyship, differ, if at all, only in phraseology. The fundamental conception of the contract being the same under the two legal systems, a definition may be given which will embrace all its essential elements and thus equally apply to both the Civil and the Common Law. To this end the author gives the following definition:

Suretyship is a contract by virtue of which one of the contracting parties promises to the other to answer for the debt, default or miscarriage of a third person who is under the obligation to the promissee, if such third person does not do so at the time and in the manner in which he bound himself.

A surety is a person who, by contract with another, binds himself to answer for the debt, default or miscarriage of a third person who is bound to such other, if such third person does not do so at the time and in the manner in which he bound himself.

It is to be noted before-hand that, notwithstanding the similarity of the definitions of suretyship under the Civil Law and the Common Law, as well as the fundamental conception of the contract, that is, to secure an existing obligation by subsidiary means on the failure of the principal debtor—still under the Civil Law the contract includes strict guaranty which, under the Common Law, is a different contract. As we shall see later, under the Civil Law, a surety not only undertakes to pay when the debtor does not, but also when the creditor can not; in other words, a surety under the Civil Law, guarantees not only the performance by, but also the solvency of, the principal debtor. Thus under the Civil Law, suretyship is not an original contract which can be enforced against the surety without joining nor consulting the person secured.

CHAPTER II.

NATURE AND EXTENT

4. **General nature.**—From the definition of suretyship, several legal consequences appear, which explain the nature and characteristics of the contract. Such legal consequences are not uncommon to both the Civil Law and the Common Law.

(a) *Accessory.*—The contract of suretyship is necessarily accessory in nature, because it presupposes the existence of a previous obligation the fulfillment of which

is secured. (Art. 3035, Lousiana Revised Civil Code; Art. 2361, Columbian Civil Code; 4 Sanchez Roman 912; 12 Manresa 150; Howe's Studies in Civil Law, 248-249; 2 Domat's Civil Law—Cushing, Art. 1845; Escriche, *Diccionario Razonado*, 691; Gay and Company *vs.* Blanchard, 32 La. Ann. 497; White's Administrator *vs.* Life Association of America, 63 Ala. 419; 15 Laws of England—Earl of Halsbury, 439; 27 American and English Encyclopedia of Law 431.)

(b) *Necessity of a valid obligation.*—The contract being accessory the previous obligation which it presupposes to exist must be valid and binding. If the principal obligation, therefore, be null and void, this will involve the nullity and avoidance of the accessory. But there can be no doubt that the nullity of the accessory will not impair the principal obligation. This rule, however, is subject to qualification—the invalidity of a principal obligation, by virtue of an exception purely personal on the part of the obligor. (2 Moreau and Charleton's *Partidas* V, tit. XII, Law IV; Art. 1824, Spanish Civil Code; Art. 1302, Civil Code of Costa Rica; 765 (note), German Civil Code—Chung-hui Wang; Escriche, *Diccionario Razonado*, 691-692; Howe's Studies in Civil Law, 248-249; Art. 1889, Domat's Civil Law—Cushing, Vol. II; Art. 826, Schurdt's Civil Law of Spain and Mexico; 12 Manresa 199; Bowyer's Commentaries on the Modern Civil Law, 196; 32 Cyc. 23; 15 Laws of England—Earl of Halsbury, 439; 27 American and English Encyclopedia of Law 431.

(c) *Subsidiary and conditional.*—The contract is subsidiary and conditional, because it does not become effective until the fulfillment of the condition or the failure of the principal debtor to satisfy his debt at the time in the manner in which he bound himself. (Art. 1866, Domat's Civil Law—Cushing; 12 Manresa 150; 15 Laws of England—Earl of Halsbury, 439.)

(d) *Consensual.*—The contract has also been termed consensual. (4 Sanchez Roman 912; 27 American and English Encyclopedia of Law 341.) But it seems that the use of this word in describing the contract is misleading inasmuch as the contract may exist by operation of law and without the intervention of the debtor and even of the creditor. (Art. 1823, Spanish Civil Code; 12 Manresa 151; Wayman *vs.* Jones, 58 Mo. App. 313; Smith *vs.* Shelden, 35 Mich. 42.)

(e) *Unilateral.*—Manresa and Sanchez Roman agree in calling this contract "unilateral." Reasoning out, Manresa says: "Moreover, the contract of suretyship is unilateral because the obligation of the surety to the creditor arise from the contract itself, although the fulfillment of the obligation gives rise to an obligation of the debtor to the surety, and also because it can take place without the intervention of the debtor and even of the creditor in whose favor it is constituted." (12 Manresa 151; 4 Sanchez Roman 911.)

This designation of the Civil Law does not seem to be in accord with that of the Common Law for, although the contract is sometimes termed unilateral, still this designation is said to be a misnomer. Thus, it is said: "Although the surety's promise to be answerable for another may not, in the first instance, involve any

corresponding obligation on the part of the promissee, nevertheless, as the surety's promise does not bind him until the promissee has made it irrevocable by bulfilling the prescribed conditions, there is no real want of mutuality. Consequently it is a misnomer to describe a guaranty as a unilateral contract, though it is sometimes so named." (15 Laws of England—Earl of Halsbury, 448.)

With much deference to this able authority, it seems that it is more in accord with reason to call the contract unilateral. The contract may exist without the operation of law; it may exist without the intervention of the debtor and even of the creditor; and from the very existence of the contract the obligation is created.

(f) *Lucrative or onerous.*—The contract may be constituted either for a price or without it, thus it may be either lucrative or onerous. The first seems to be more in accord with the nature of the contract for a person often takes the position of surety from motives of friendship, and generally not as the result of any distinct bargain between him and the creditor, or in consideration of any direct remuneration passing to him from the latter. However, there is no doubt as to the right of the surety to provide for a price as a compensation to the risk to which he may be exposed. (4 Sanchez Roman 912; 12 Manresa 166; Escriche, *Diccionario Razonado*, 691; 15 Laws of England—Earl of Halsbury, 441.)

(g) *Surety a distinct person.*—The surety must necessarily be a distinct person from the creditor and the principal debtor—from the creditor, because no one can be a surety for a debt due to himself, and from the debtor because no one can be a surety for himself. (12 Manresa 151; Child's Suretyship and Guaranty, 2.)

(h) *Excludes the idea of novation and delegation.*—The creation of the surety's obligation does not discharge the principal debtor, but the creditor has in his favor two persons from whom he could obtain payment. The surety is equally bound with his principal. (2 Moreau and Carleton's *Partidas* V, Tit. XII, Law I; 4 Sanchez Roman 912, Escriche, *Diccionario Razonado*, 691; 27 American and English Encyclopedia of Law 431.)

5. **Distinguished from guaranty.**—In common acceptation, a guarantor is a surety for another. Indeed, the ultimate result of the contract in so far as the liability or obligation is concerned is identical. The weight of American authority inclines on drawing a line of distinction between these two contracts. It is said that a surety is primarily liable, while the guarantor is collaterally liable. (27 American and English Encyclopedia of Law 432.) As was said by the Supreme Court of Indiana: "In a strict or collateral guaranty, the obligation of the guarantor is that the principal shall perform his undertaking, or if he fail the guarantor will pay the resulting damage; but when the promise of the guarantor is to do what another is bound to do if he shall not do it himself, this is not a strict collateral guaranty, but is distinguished as an original undertaking in the nature of suretyship." (Woody *vs* Haworth, 24 Ind. App. 634.)

Again, the guarantor does not undertake directly to pay or to perform. As was said in the case of McIntosh-Huntington Company *vs.* Reed, 89 Fed. 464: "The surety undertakes to pay if the principal does not, while the guarantor undertakes to pay if the creditor cannot."

In England the same distinction seems to hold. Indeed, although in her laws, the words guaranty and suretyship and guarantor and surety are used indiscriminately, the idea of suretyship as an original contract is well-recognized. (15 Laws of England—Earl of Halsbury, 439-441.)

Under the Civil Law, there seems to be no such contract of guaranty, which has for its object the guarantying of the solvency of the principal debtor, and which is a distinct contract from suretyship proper. There is such a contract which Manresa calls "fianza simple," but this is no more than a division of suretyship and not a a separate and distinct contract. (12 Manresa 187.) When we speak, therefore, of strict guaranty under the Civil Law, it means no more than suretyship proper.

Here lies the essential difference between suretyship under the Civil Law and the Common Law. Under the Civil Law, the obligation cannot be directly enforced, while under the Common Law it can be. In other words, suretyship under the Civil Law much resembles the strict guaranty known at Common Law.

The distinction between the two contracts is not without merit. Indeed, the weighty reasons given by the majority of American state courts, make the author doubt as to whether he should favor the distinction or not. But a careful study of the two contracts shows that as to matters of right and justice involved they present no substantial difference. The distinction will, therefore, tend to confusion rather than to elucidation. As was said in a Georgia case: "We have little sympathy with artificial distinctions between principles of law which present no substantial difference as to matters of right and justice, which tend to confuse rather than enlighten, and to furnish loopholes for technical escapes from contract obligations." (Small and Company *vs.* Claxton, 1 Ga. App. 83.) Again, in the case of Watriss *vs.* Pierce, 32 N. H. 560, it was said: "In a technical and limited sense a surety is a co-promissor or co-obligor, but in the more general and usual sense a surety is one who undertakes to answer for any debt, or default of his principal without regard to the special character or the special designation given to the contract or undertaking of the principal. A guarantor, also in a strict sense, is one whose liabilities are in general less than those of the surety and they depend upon more technical rules. But in an enlarged sense, a guaranty is a promise to answer for the payment of some debt or the performance of some duty, in case of the failure of another person, who in the first instance is liable."

6. How created.

(a) *By express agreement.*—Both the Civil Law and the Common Law recognize as one of the sources of the contract of suretyship the express agreement of the parties. A surety thus created is called conventional or voluntary, because it is

the result of the exclusive will of the parties. (Art. 1823, Spanish Civil Code; Art. 2362, Columbian Civil Code; 2 Domat's Civil Law—Cushing, Art. 1847; 12 Manresa 176; Pingrey on Suretyship and Guaranty, 10; 27 American and English Encyclopedia of Law 432.)

(b) *By operation of law.*—The contract may exist without the intervention of the debtor and even of the creditor in whose favor it is constituted—that is, it may exist by operation of law. Being founded not on the will of the parties but rather against it, this kind of suretyship may be termed involuntary suretyship. (12 Manresa 151; 4 Sanchez Roman 911; Pingrey on Suretyship and Guaranty, 10; Wayman *vs.* Jones, 58 Mo. App. 313; Smith *vs.* Shelden, 35 Mich. 42; 15 Laws of England —Earl of Halsbury, 443.)

(c) *By express requirement of law.*—One kind of suretyship is that enjoined by law. This is called legal suretyship. (Art. 1824, Spanish Civil Code; Art. 2362, Columbian Civil Code.) Thus a usufructuary is required to give security. (Art. 491, Spanish Civil Code.) Tutors and guardians are generally required to give security. (2 Domat's Civil Law—Cushing, Art. 1865.) Such persons are generally public officers, and the suretyship created is commonly termed statutory bond. (Child on Suretyship and Guaranty, 73; Pingrey on Suretyship and Guaranty, 24.)

(d) *By judicial requirement.*—The judge of a court may require a person to give security for the performance of certain obligations. It is called judicial security under the Civil Law and judicial bond at Common Law. It resembles legal suretyship or statutory bond, but because it is given in the course of a judicial proceeding it is given a distinct name. (Art. 1824, Spanish Civil Code; Art. 2362, Columbian Civil Code; 2 Domat's Civil Law—Cushing, Art. 1849; Child on Suretyship and Guaranty, 376.)

7. Time and manner of execution.

(a) *Concurrent contracts.*—The general rule is that a surety's contract must be concurrent with the principal's. (Pingrey on Suretyship and Guaranty, 45; Swift *vs.* Tyson, 16 Pet. 1; 2 Moreau and Carleton's *Partidas* V, Tit. XII, Law VI.)

(b) *May be executed before the principal obligation.*—Although the contract of suretyship is accessory, it can be executed not only at the same time with and after the principal obligation, but also before. (Art. 1825, Spanish Civil Code; 2 Moreau and Carleton's *Partidas* V, Tit. XII, Law VI; 15 Laws of England—Earl of Halsbury, 439.)

(c) *May be in writing or verbal.*—Not only can the contract be made either in public or private instrument, but it can also be in writing or verbal. (Escriche, *Diccionario Razonado*, 691.) The statute of frauds requires that every promise to answer for the debt, default or miscarriage of another must be in writing, signed by the person charged. But this statutory requirement refers only to voluntary suretyship and to legal and judicial ones. It does not refer to involuntary suretyship. (Child's Suretyship and Guaranty, 89; Pingrey on Suretyship and Guaranty, 391.)

(d) *Must be expressed; cannot be implied.*—Notwithstanding the accessory nature of the contract, nevertheless, it is distinct from that of the debtor, hence the intention must be shown; in other words, the intention must be expressed; it can not be implied. (Art. 1827, Spanish Civil Code; 12 Manresa 226; 32 Cyc. 34; Child's Suretyship and Guaranty, 75.)

8. **Who may become surety.**

(a) *In general.*—Suretyship being a contract, the rules governing the contractual capacity of the parties must generally be observed. Every man may become surety who has the capacity to bind himself. (Art. 1828, Spanish Civil Code; 2 Moreau and Carleton' *Partidas* V, Tit. XII, Law I; 15 Laws of England—Earl of Halsbury, 450.)

(b) *Infants.*—Under the Civil Law we have to draw a line of distinction between an emancipated infant and one who is not, because these two kinds of infants have different rights and capacities. As to emancipated infants, we have to see whether he is 18 years old or over or less. If the emancipated infant is less than 18 years he cannot even with his consent become a surety for another. (Arts. 317, 59, 50, (No. 3), 321, 324, Spanish Civil Code; 12 Manresa 162.) As to the infant who is not emancipated, the rule slightly differs. The general rule is that he has no capacity to contract. But it is a well settled rule that a contract entered into by an infant is binding whenever such contract is beneficial to him. When an infant becomes a surety for another, he thereby enters into a contract which under no circumstance will be beneficial to him. He becomes answerable for another, thus burdening himself with the contract. His contract of suretyship must, therefore, be null. (12 Manresa 159.)

The above considerations refer to a minor becoming a surety. Now, if a person of legal age becomes surety for a minor, the same rule of "beneficial contract" applies. If the obligation incurred by a minor's surety has been profitable to the minor, such surety has his action of relief against said minor, but otherwise the minor is relieved from the obligation to indemnify his surety. (2 Moreau and Carleton's *Partidas* V, Tit. XII, Law IV; 2 Domat's Civil Law—Cushing, Art. 1860; Escriche, *Diccionario Razonado*, 692.) At Common Law, the rules regarding the rights and liabilities of a minor's surety are the same as under the Civil Law. (Goodell *vs.* Bates 14 R. I. 65; Hicks *vs.* Randolph, 3 Baxt. (Tenn.) 352; Kygen *vs.* Sipe, 89 Va. 507.)

At Common Law the technicalities of the Civil Law about emancipated and non-emancipated infants are not found. All persons under a certain age are infants. Thus, the rule is simple and easy of application. Under this system the general rule is that a contract of suretyship by an infant is voidable only, and may be ratified or repudiated by him when he arrives at his legal majority. If ratified, the contract may be enforced. (Pingrey on Suretyship and Guaranty, 23 Child's Suretyship and Guaranty, 60; 1 Parsons on Contract, 295.)

(c) *Married Women.*

1. UNDER THE CIVIL LAW.—The old laws on the subject prohibited a married woman from becoming a surety of other persons, except in the following cases:

(a) Where she becomes a surety for a man on account of his liberty.

(b) Where she becomes a surety in favor of a man for the dowry he is to receive from the woman he may marry.

(c) Where, knowing she cannot and ought not to become surety, she does, nevertheless, become so, renouncing of her free will, all the rights which the law extends to women in that respect.

(d) Where she becomes surety for any one and remains so during two years and then gives a pledge to the person for whom she was surety and executes another writing by which she renews the suretyship.

(e) Where she receives a price for becoming a surety.

(f) Where she fraudulently clothes herself with the apparel of a man.

(g) Where she becomes surety in relation to her own affairs or to her ascendants and descendants.

(h) Where she becomes surety for any one whose estate she happens afterwards to inherit. (2 Moreau and Carleton's *Partidas* V, Tit. XII, Law III; Art. 819, Portuguese Civil Code; 4 Sanchez Roman 913.)

Modern legislations, however, relax this rigid rule. In fact Article 1263 (No. 3) of our Civil Code recognizes the capacity of a married woman to contract whenever she has the authorization of her husband. When, therefore, the husband's consent is given, the obligations contracted by her are valid and binding, including, of course, suretyship. (12 Manresa 159.)

2. UNDER THE COMMON LAW.—By the rules of the Common Law, a married woman has no capacity to bind herself by contract, or to acquire to herself and for her exclusive benefit any right by a contract made with her. And as she can make no valid contract, the husband can not be bound by any contract made by her. (1 Parsons on Contract 346.)

The tendency of modern legislation, especially in the states of the American Union, is to extend more rights and powers to married women in regard to contract and to the use of their property. The growing recognition of the rights of women, the universal tendency to place women on social and industrial and even on political equality with men, is but a response to the demand of an advancing civilization.

(d) *Insane persons.*—Under the Civil Law, insane persons can not give consent to contracts. (Art. 1263 No. 2,) Spanish Civil Code.) From this it results that they can not become sureties for they lack capacity to bind themselves, as required by Article 1828 of our Civil Code. (12 Manresa 162.)

At Common Law, the same rule of incapacity applies. "They who have no mind, 'can not agree in mind,' with another, and as this is the essence of a contract, they can not enter into a contract." (1 Parsons on Contracts; Child's Suretyship and

Guaranty, 60.) A qualification of this rule, however, is made. A contract made by an insane person before he is adjudged insane is not void, but voidable only. (Burnham *vs.* Kidwell, 113 Ill., 425; Somers *vs.* Pumphrey, 24 Ind. 231; Ingraham *vs.* Baldwin, 9 N. Y. 45.

9.—Obligations that may be secured.

(a) *In general.*—All honest and lawful engagements may be secured, provided that the giving of security be not contrary to good manners or morals. (2 Domat's Civil Law—Cushing Arts. 1851 and 1858.)

(b) *Civil obligations.*—These are obligations contracted according to law, and may be enforced by a court of justice. (2 Moreau and Carleton's *Partidas* V, Tit. XII, Law V; 2 Domat's Civil Law—Cushing, Art. 1852; Art. 2364, Columbian Civil Code; 12 Manresa 164.)

(c) *Natural obligations.*—These are obligations which can not be judicially enforced against the obligor, but which a surety validates by undertaking their performance. Thus, an obligation of the wife may remain always null, but if the husband becomes surety he will be obliged. (2 Moreau and Carleton's *Partidas* V, Tit. XII, Law V; 2 Domat's Civil Law—Cushing, Art. 1852; Art. 2364, Columbian Civil Code; 12 Manresa 164.)

Natural obligations have been held to be a sufficient consideration for a new contract. (Mills *vs.* Wyman, 3 Pick. 207.) Hence, such obligations may be secured and may be the subject of the contract of suretyship.

(d) *Future obligations.*—Security may be given not only for a present or past obligation, but also for an obligation yet to be contracted. (2 Domat's Civil Law—Cushing, Art. 1853; Art. 765, German Civil Code—Chung Hui Wang; Art. 1825, Spanish Civil Code; Art. 2365, Columbian Civil Code; 12 Manresa 164, 213; 15 Laws of England—Earl of Halsbury, 439.)

10. Extent.

(a) *Can not be made harder or more onerous.*—We have seen that the obligation of the surety is only accessory to that of the principal. (See Sec. 4-b *supra.*) It results from the accessory nature of the contract that the obligation can not be made more burdensome than the principal one. It will be absurd and repugnant not only to the very nature of the contract, but also to its purpose, to permit the surety's obligation to become harder or more onerous than that of the principal debtor. The contract is intended not to give a gain to the creditor, but only to secure him against a loss. Neither is it intended to hold the surety liable after the principal obligation has ceased. If the law, therefore, will permit the surety to owe more than the principal, or to extend the duration of the contract, the creditor will gain by the default of the surety or be able to hold the latter bound even after the principal obligation has ceased to exist. It follows, therefore, that the contract of suretyship is void as to the surplus, for as Manresa says, "the excess will have no principal obligation upon which it is to depend." (Art. 1826, Spanish Civil Code; Art. 2370,

Columbian Civil Code; Art. 1303, Civil Code of Costa Rica; Art. 767, German Civil Civil Code—Chung Hui Wang; Art. 1854, Domat's Civil Law—Cushing; Art. 827, Schurdt's Civil Law of Spain and Mexico; Art. 2015, French Civil Code; Art. 1353, Austrian Civil Code; 12 Manresa 233; Bowyer's Commentaries on Modern Civil Law, 198; Howe's Studies in Civil Law, 248-249; Escriche, *Diccionario Razonado*, 692; 2 Moreau and Carleton's *Partidas* V, Tit. XII, Law VII; Hunter's Roman Law (4th Ed., 57.)

At Common Law the same rule applies. Thus, it is said: "The surety is regarded as a favorable debtor. He is entitled as such to insist upon a rigid adherence to the terms of his obligation by the creditor, and can not be made liable for more than he has undertaken; for though his contract is not, like that of an insurer, *uberrimae fidei*, it is one of *strictissimi juris*." (15 Laws of England—Earl of Halsbury, 479 and 482. See also Pingrey on Suretyship and Guaranty, 2 and 76; United States *vs.* Allsburg, 4 Wall (U. S.) 186; Child's Suretyship and Guaranty, 133.)

(b) *Can be made less onerous.*—Although it has generally been asserted that the extent of the principal obligation at any time determines the obligation of the surety (Art. 767, German Civil Code—Chung Hui Wang) still it is, nevertheless, true that this obligation need not be co-extensive with that of the principal debtor. We have said above that it is repugnant to the accessory nature of the contract to make the liability harder or more onerous. It can however, be made less onerous, for in this case the accessory nature of the contract is not destroyed. This is true under the Civil Law and at Common Law. (Art. 1826, Spanish Civil Code; Art. 827, Schurdt's Civil Law of Spain and Mexico; Art. 2369, Columbian Civil Code; Art. 1303, Civil Code of Costa Rica; Arts. 2111 and 2112, Civil Code of Salvador; Art. 2015, French Civil Code; Art. 1353, Austrian Civil Code; Escriche, *Diccionario Razonado*, 692; Howe's Studies in Civil Law, 248-249; Pingrey on Suretyship and Guaranty, 93; 15 Laws of England—Earl of Halsbury, 482.)

(c) *Can not be a different thing.*—It also results from the nature of the contract of suretyship that the surety can only bind himself as such for the same thing, or a part of the same thing with his principal. (Escriche, *Diccionario Razonado*, 692; Howe's Studies in Civil Law, 248-249.)

(d) *Obligation passes to heir.*—Under the Civil Law all the property, rights and obligations of a person, except those that are purely personal, pass to the heirs. (Art. 659, Spanish Civil Code.) It results from this that the obligation of a surety passes to his heir, except that which is extinguished by the surety's death. (2 Moreau and Carleton's *Partidas* V, Tit. XII, Law XVI; Art. 1863, Domat's Civil Law—Cushing; Escriche, *Diccionario Razonado*, 693.)

At Common Law, the obligation does not directly pass to the heir. The estate of the deceased surety remains liable. (Child's Suretyship and Guaranty, 20; Pingrey on Suretyship and Guaranty, 99.)

(e) *Insolvency of surety.*—The very nature of the contract gives the creditor the right to require another surety in case the first surety becomes insolvent, because if the surety binds himself to perform in case the principal debtor fails, this security disappears in case the person securing becomes insolvent. This, of course, is true in case the insolvency is subsequent to the creation of the contract, for if the insolvency is at the time the contract is entered into, the person who has accepted the surety can not demand another. The right to demand another surety can not be exercised in the case of the creditor having required and stipulated that a specified person should be the surety. Such has been the rule under the Civil Law. Art. 1829, Spanish Civil Code; 12 Manresa 248; Escriche, *Diccionario Razonado*, 693; 2 Domat's Civil Law—Cushing, Art. 1864.)

At Common Law, the rule is otherwise. It seems that one who has declared his approbation of the surety can not afterwards demand another. Insolvency at the time he entered into the contract is not, in itself, incapacity. (Child's Suretyship and Guaranty, 60; Allen *vs.* Morgan, 5 Humph. Tenn. 624.)

The wisdom of the Civil Law rule on this point is manifest. It is the purpose of the contract of suretyship to secure the fulfillment of a certain obligation. If the means to secure such fulfillment accidentally disappears, what is more reasonable and righteous than to give the creditor the right to demand of the debtor another one who has the means? The existence of such a right will not prejudice the debtor, but its non-existence will defeat the very purpose of the contract on the accidental event of insolvency.

CHAPTER III.

ENGAGEMENT OF SURETY TO CREDITOR

11. In general.

The engagement of the surety is to answer in behalf of a debtor to a creditor for the payment of the debt or the performance of an obligation. (See Sec. 3, *supra.*)

12. Benefit of levy against principal.

Under the Civil Law, a surety can not be compelled to satisfy the creditor so long as the creditor has not attempted compulsory execution against the principal debtor and without result. (Art. 1830, Spanish Civil Code; Art. 771, German Civil Code.) In other words, the surety can not be sued till after the levy against the principal debtor. This is but a logical result of the accessory and conditional nature of the contract. The obligation of the surety is not to become effective until the failure of the debtor. Thus, the surety can not be sued till after the creditor has used all necessary diligence for the levy against the principal debtor and has not been able to recover payment or till after previous execution and sale of the property of the debtor, and the insufficiency of the proceeds to satisfy the creditor. (Art. 1866, Domat's Civil Law—Cushing.) The reason for this benefit is plain. If the creditor has reserved

to himself the right to sue the surety before the debtor, the contract is no longer one of suretyship, but mancomunal. (Art. 833, Schurdt's Civil Law of Spain and Mexico.)

At Common Law the rule is otherwise. The contract is regarded as original, and the obligation can be enforced against the surety without informing the principal debtor. Thus it is said: "Notice of the principal debtor's default need not be given to the surety and he is liable without being requested to pay, in the absence of a stipulation to the contrary, express or implied, or if circumstances rendering a demand upon him a legal obligation. Nor is it necessary for the creditor, before proceeding against the surety, to request the principal debtor to pay or to sue him, though solvent unless this be expressly stipulated for * * *." (15 Laws of England—Earl of Halsbury, Sec. 923; 32 Cyc. 92; Campbell *vs.* Sherman, 151 Pa. 70; Chester *vs.* Broderick, 131 N. Y. 549.)

Here we find that fundamental difference between the contract of suretyship under the Civil Law and under the Common Law. It is this benefit of levy against the principal which makes the contract under the Civil Law resemble strict guaranty as is understood at Common Law.

This difference is certainly essential. In the contract of suretyship, the surety undertakes to pay when the principal debtor does not at the time and in the manner in which he bound himself. The contract gives advantage to the creditor who thereby becomes more certain of the performance of the obligation as both the surety and the principal debtor are bound. The creditor may wait for the time when the principal debtor has to pay and as soon as that time elapses, the liability of the surety attaches. Why, then, shall it be necessary for the creditor to attempt compulsory execution against the principal debtor? Of course, he may do so, if he so desires, but upon no principle can it be contended that he ought to sue the principal debtor before attempting to hold the surety liable; in other words, it is an injustice to the creditor to allow the surety to refuse payment for the simple reason that no attempt has yet been made to recover payment of the principal debtor. To so hold would lead to the result that obligation of the surety would no longer be an original obligation, but a collateral one, depending upon the inability of the debtor, upon his insolvency. The contract will then be one of strict guaranty and not of suretyship.

However, this Civil Law benefit of levy against the principal, which is unknown at Common Law, is not without its justification, for under the Civil Law suretyship and strict guaranty as is understood at Common Law, are not essentially different contracts. (Sec. 5, *supra.*)

The Civil Law, however, wisely makes exceptions to the general rule of benefit of levy against the principal, to wit:

(a) *As to judicial sureties.*—This kind of surety may be prosecuted without a previous levy against the principal debtor, because the institution to which they

bind themselves is the court of justice, and the delay which may be caused by the levy will hinder the administration of Justice. (Art. 1867, Domat's Civil Law—Cushing, Vol. II.)

(b) *As to absent debtor.*—When the principal debtor is out of the jurisdiction of the court and has no visible property in the place, the surety may be sued, unless he obtains a delay from the court. (2 Domat's Civil Law—Cushing, Art. 1868; Art. 1831 (No. 4), Spanish Civil Code; Art. 834, Schurdt's Civil Law of Spain and Mexico.)

(c) If the surety has waived this benefit by expressly renouncing it and assuming the obligation in such manner as to bind himself as principal debtor. (Art. 1831 (Nos. 1 and 2), Spanish Civil Code; Art. 773 (No. 1), German Civil Code—Chung Hui Wang.)

(d) In case of bankruptcy of the principal debtor. (Art. 1831 (No. 3, Spanish Civil Code; Art. 773 (No. 3), German Civil Code—Chung Hui Wang.)

(e) If it may be presumed that compulsory execution on the property of the principal debtor will not lead to the satisfaction of the creditor. (Art. 773 No. 4, German Civil Code—Chung Hui Wang.)

It must, however, be noted that this benefit of levy against the principal which is unknown at Common Law does not extend to property alienated by the debtor. The creditor must first prosecute the debtor for the remaining goods and the surety for his obligation before he can institute his action against the third possessor, if proper. (Art. 1869, Domat's Civil Law—Cushing, Vol. II.)

Neither can the surety oblige the creditor to sue the debtor for it is up to the creditor to take action. (Art. 1870 Domat's Civil Law—Cushing, Vol. II.) In other words, to entitle the surety to avail of this benefit, he must require it of the creditor as soon as the latter may sue for payment. (Art. 1832, Spanish Civil Code.) And when the creditor fails to do so and the debtor becomes insolvent, the loss shall be suffered by the creditor. (Art. 1833, Spanish Civil Code.)

But, notwithstanding the non-existence of this benefit of levy against the principal, at Common Law, under this system the surety may, after the guaranteed debt has become due, and before he has been asked to pay it, require the creditor to call upon the principal debtor to pay off the debt. (15 Laws of England—Earl of Halsbury, Sec. 955, p. 506.)

13. Benefit of division.

The principle underlying this benefit of division, which is another characteristic of the Civil Law is applicable to cases in which there are several sureties. It consists in the right of one of the several sureties to require the creditor to divide among themselves the action he has, thus not obliging him to require of each more than what is due to him by such division. (12 Manresa 278.)

Our Civil Code is very plain on this point. Article 1837 provides among other things: "Should there be several sureties but only one debtor for the same debt, the

liability therefor shall be divided among them all. The creditor can claim from each surety nothing but the proper portion which he may have to pay, unless the joint liability has been expressly stipulated." (See also 2 Moreau and Carleton's *Partidas* V, Tit. XII, Law VIII; Art. 769, German Civil Code—Chung Hui Wang; 2 Domat's Civil Law—Cushing, Art. 1871; Art. 846 No. 1), Schurdt's Civil Law of Spain and Mexico.)

At Common Law, the benefit of division as is understood in Civil Law is unknown. It recognizes the benefit of contribution which resembles the benefit of division This benefit of contribution exists whenever one of the several sureties has paid the whole debt, thus it differs from the Civil Law benefit of division, which can be exercised when the creditor sues for payment. (See Sec. 28, *infra.*)

14. Right of subrogation.

This right belongs to the surety who is obliged to pay the debt. He is subrogated in the place of the creditor.

Under the Civil Law, if one of the sureties pays, in his own name, the whole of the debt, he may require the person to whom he paid it to assign to him the right of claiming it, as well of his co-sureties as of the principal debtor, and it ought to be assigned to him accordingly. (2 Moreau and Carleton's *Partidas* V, Tit. XII Law XI; Art. 1887, Domat's Civil Law—Cushing, Vol. II; Art. 847, Schurdt's Civil Law of Spain and Mexico; Art. 1839, Spanish Civil Code; Somes *vs.* Molina, 9 Phil. 653; Somes *vs.* Molina, 15 Phil. 133.)

At Common Law this right of subrogation is well recognized, the difference being that under the Civil Law this right must be obtained from the creditor, while at Common Law there is no need of such assignment for once the surety pays, he has an immediate right of action against the debtor. (15 Laws of England—Earl of Halsbury, Sec. 982. See Sec. 19, *infra.*)

15. Obligation of one of the sureties annulled.

If one of the several sureties has his obligation annulled, the other sureties will be answerable for the portion appertaining to him. (Art. 1872, Domat's Civil Law —Cushing, Vol. II.) This is because the obligation of each surety extends to his share only if the others can be required to pay theirs.

At Common Law the annullment of the obligation of one of the several sureties, does not affect the amount for which each surety is liable. But in equity a surety who has paid the debt may compel solvent sureties to contribute *pro rata* according to the number of such solvent co-sureties. (27 American and English Encyclopedia of Law 485.) In other words, the shares of those whose obligations are annulled are added to those of the remainning sureties. Thus, there is no difference between the Civil Law rule and that of the Common Law on this point.

16. Defenses of debtor available to surety.

All the defenses which the principal debtor has against the creditor may be used by the sureties, except those that are purely personal. (Art. 1873, Domat's Civil

Law—Cushing, Vol. II; Art. 835, Schurdt's Civil Law of Spain and Mexico; Art. 768, German Civil Code—Chung Hui Wang; Chinese Chamber of Commerce vs. Pua Te Ching, 16 Phil. 406.) This is because when the surety is obliged to pay and he pays without informing the debtor, the latter may utilize against him all the exceptions which he could have set up against the creditor at the time of making the payment. (Art. 1840, Spanish Cicil Code.)

At Common Law the same rule tends to apply. A surety may defend an action against his principal, may set up any legal or equitable defenses which would have availed the principal, and may establish them by proof even if the principal fails to plead. (27 American and English Encyclopedia of Law 465; 15 Laws of England —Earl of Halsbury, Sec. 960.)

17. Engagement of surety follows obligation.

The engagement of the surety is not limited to the person of the creditor to whom he obliges himself. The obligation is annexed to that of the principal debtor and passes with it to the person who shall afterwards have the right to it. (Art. 1874, Domat's Civil Law—Cushing, Vol. II.)

At Common Law the rule is the same. When the creditor dies, his personal representative has a right of action against the surety. As was held in Young vs. Peterson, 165 Pa. 423, if the obligees be deceased, his personal representative can sue upon the bond.

CHAPTER IV

ENGAGEMENT OF DEBTOR TOWARDS HIS SURETY AND OF SURETY TOWARDS DEBTOR

18. The debtor must save the surety harmless.

Under the Civil Law the obligation contracted by the surety implies an engagement to save him harmless. It is, therefore, the duty of the principal debtor to protect his surety either by getting him discharged from his suretyship or by paying the debt. (Art. 1875, Domat's Civil Law—Cushing, Vol. II; Moreau and Carleton's *Partidas* V, Tit. XII, Law XI.)

The above rule of the Civil Law is in perfect accord with that of the Common Law. Under this system it is also the duty of the principal debtor to pay the debt and save the surety harmless. (Child's Suretyship and Guaranty, 298.) The doctrine in such cases rests upon the simple right, as between the principal and surety, that the surety has to be protected by the principal. (32 Cyc. 250.)

The wisdom of this principle is well manifested by its universal acceptance. Indeed, without this, we can hardly imagine how persons will undertake to answer for the debt, default or miscarriage of another.

19. Right to indemnity.

This is another principle in the law of suretyship which is universally approved and accepted.

Under the Civil Law, if the surety pays for the debtor, he will recover from the latter both the principal sum and interest, which the debtor should have paid to the creditor, as also the interest upon said principal and interest, and the damages and other expenses. (Art. 1876, Domat's Civil Law—Cushing, Vol. II.)

Our Civil Code, in Article 1838, wisely enumerates the items of which the indemnity shall consist, to wit:

(a) The total amount of the debt.

(b) Legal interest on the same from the day on which the payment may have been communicated to the debtor, even when it did not produce interest for the creditor.

(c) The expenses incurred by the surety after the latter has informed the debtor that he has been sued for payment.

(d) Losses and damages, when proper.

The wisdom of this principle is manifest. For with regard to the surety, all the money which he may have paid and spent on account of the contract is a capital of which he ought to be indemnified. (Art. 1876, Domat's Civil Law—Cushing, Vol. II; 12 Manresa 293; Art. 841, Schurdt's Civil Law of Spain and Mexico.)

At Common Law the rule is the same. The surety, as soon as he makes payment has an immediate right of action against the principal debtor for indemnity. (15 Laws of England—Earl of Halsbury, Sec. 982.) For it is the duty of the principal to protect the surety and save him harmless. (Sec. 18, *supra.*) And if the surety is obliged to pay, he ought to be indemnified by the person who ought himself to have made payment or performed the obligation. (Reissans *vs.* Whites, 128 Mo. App. 135.) There is always, at least, an implied contract between the principal debtor and the surety, which obliges the former to reimburse the latter on payment of the debt. (32 Cyc. 250; Babcock *vs.* Hubbarb, 2 Conn. 536; Winslow *vs.* Otis, 5 Gray (Mass.) 360; Konitzky *vs.* Meyer, 49 N. Y. 571.) For when the surety makes payment he becomes the creditor and is entitled to recover from the debtor the amount paid. (Bragg *vs.* Patterson, 85 Ala. 233; Coburn *vs.* Parker, 11 Gray 335; 27 American and English Encyclopedia of Law 468; Child's Suretyship and Guaranty, 293. See also Reeves and Company *vs.* Juwell, 140 S. W. 246 (Tex. Civ. App. 1911.)

20. Surety may sue for indemnity before payment in certain cases. The surety may take precaution to save himself. For his own interest and protection, if his indemnity is in hazard, as when the principal debtor squanders away his estate, the surety may sue the debtor even before the term. (Art. 1877, Domat's Civil Law—Cushing, Vol. II.)

Our Civil Code in Article 1843 enumerates the cases in which the surety may sue the principal debtor, even before paying, to wit:

(a) When he is sued for the payment.

(b) In case of bankruptcy or insolvency.

(c) When the debtor has bound himself to relieve him from the security within a specific term, and this term has expired.

(d) When the debt has become demandable because the term in which it should have been paid has expired.

(e) At the end of ten years, when the principal obligation has not a fixed term for its expiration, unless it be of such a nature that it can not be extinguished except in a period greater than ten years.

At Common Law the rule governing this point is similar to that of the Civil Law. After maturity of debt, the surety can go into a court of equity to compel payment of the debt by the principal debtor, or to be secured against loss. (32 Cyc. 248-249; Laws of England—Earl of Halsbury, Sec. 955.)

21. Surety paying before term.

There is no impediment on the part of the surety to pay the debt before it is due.

Under the Civil Law, if the surety pays before the term, he cannot bring his action for relief against the principal debtor till after the expiration of the term. (Art. 1841, Spanish Civil Code; Art. 1878, Domat's Civil Law—Cushing, Vol. II.) The reason is obvious. The surety has no power to make the condition of the principal debtor worse, who is not bound to pay until the term comes.

At Common Law the same rule exists. A surety may pay the debt whether due or not, but he can not bring suit against the principal for indemnity, until maturity of the debt. (Pingrey on Suretyship and Guaranty, 201; Galsen *vs.* Brand, 75 Ill. 148; Barber *vs.* Gilson, 18 Nev. 89; White *vs.* Miller 47 Ind. 385; Ross *vs.* Menefee, 125 Ind. 432.)

22. Surety may pay after term voluntarily.

The obligation of both the surety and the principal debtor is to pay at the end of the term. Under the Civil Law, although the surety is entitled to the benefit of discussion (see Sec. 12, *supra*), he may waive this benefit and pay after the term even without being called upon nor condemned to pay the debt, and have his action of relief against the principal debtor. (Art. 1879, Domat's Civil Law—Cushing, Vol. II.)

At Common Law the principle governing this point is similar to that of the civil law. The obligation of the surety being to pay at the time when the principal debtor does not, it follows that as soon as the debt is due, the surety can pay the same without express request. The surety need not wait until he has been sued. (Child's Suretyship and Guaranty, 292; 27 American and English Encyclopedia of Law 472; Wells *vs.* Mann, 45 N. Y. 327.)

23. Surety paying with knowledge of exceptions.

When the surety voluntarily pays the debt, he must do so without prejudice to the known exceptions which the principal debtor may have. True the surety is not under obligation to search for exceptions and defenses, but if they are known

to him to existst, if they are manifest and their employment will bar the recovery of the creditor, reason as well as prudence dictates that they must be used, otherwise the surety neglecting to employ them will have no cause for recovering what he may have paid under such circumstances.

Such has been the accepted rule not only under the Civil Law but also at Common Law. (Art. 1880, Domat's Civil Law—Cushing, Vol. II; 2 Moreau and Carleton's *Partidas* V, Tit. XII, Law XV; Child's Suretyship and Guaranty 308; May *vs.* Ball 108 Ky. 180.)

24. Surety ignorant of exceptions.

When the debt becomes due, it is the duty of the principal debtor to inform the surety of the defenses which will bar the recovery of the creditor. He must give notice to the surety not to pay the debt, and if the surety, called upon to pay, acquits the debt fairly and honestly and without knowledge of the defenses which the principal debtor may have against the creditor, he will have his relief against the debtor. (Art. 1881, Domat's Civil Law—Cushing, Vol. II.) Such has been the accepted rule of the Civil Law.

At Common Law, the rule is not different. When the surety is sued and he notifies the principal debtor, it is up to the latter to furnish the surety with a defense, otherwise a recovery can be had against him if the surety pays without knowledge of any defense which the principal debtor may have. (27 American and English Encyclopedia of Law 479.)

25. Surety having personal defense.

The obligation of the surety is to pay or perform when the principal debtor does not. It is not his duty to defend the action against him for payment or performance. Although he has some personal exceptions or defenses, he may, nevertheless, pay the debt without taking advantage of said exceptions or defenses, and still have his action for relief against the principal debtor, for in waiving his own right he has done no wrong to the debtor and he has only acquitted him of what he owed. (2 Moreau and Carleton's *Partidas* V, Tit. XII, Law XV; Art. 1882 Domat's Civil Law—Cushing, Vol. II.)

The waiver of surety's personal defenses is not a principle solely of the Civil Law. It is also recognized at Common Law. However, at the Common Law, though admitting that a surety can waive his personal defense, nevertheless the rule is subject to qualification—that such waiver be not to the detriment of his own creditor. (32 Cyc. 259; Child's Suretyship and Guaranty, 256; Hooper *vs.* Pake 70 Minn. 84; Campeon *vs.* Whitney, 30 Minn. 177.)

26. Surety's failure to make defense.

The surety is not under obligation to make a defense when sued by the creditor. His failure to make any defense whatsoever will not bar his right of recovery. The principal debtor can not blame him for his action on the matter of defense. (Art. 1880, Domat's Civil Law—Cushing, Vol II.) From this rule is, of course, excepted the use of defenses which are known. (See Sec. 23, *supra.*)

The Common Law rule on this point is in accord with that of the Civil Law. The principal debtor can not complain of the surety's failure to make a defense without showing that a defense would have been of any avail. (27 American and English Encyclopedia of Law, 470.) However, it seems that the Common Law makes an exception to the rule, for if a surety with full knowledge of facts which would discharge him, pay the debt, he can not recover the money he paid. (Child's on Suretyship and Guaranty, 256.)

27. Creditor giving surety discharge of debt.

That the creditor may release the surety of his obligation is too obvious to require explanation.

Under the Civil Law, if the creditor or another person having his right, gives release to the surety, with the intention to make him a present of the debt as a recompense for some service, or from some other motive, the surety may recover the debt from the debtor, for this favor is designed for the surety alone and not intended for the benefit of the debtor. But if the creditor intends to discharge only the surety without giving him the debt, the right of the creditor will remain entire against the debtor and the surety will only be discharged of his suretyship. (Art. 1886, Domat's Civil Law—Cushing, Vo. II.)

The wisdom of this principle is manifested by its existence not only in the Civil Law but also at Common Law. At Common Law, a release of the surety by the creditor will discharge him, but not the principal debtor. (Child's Suretyship and Guaranty 253; Mortland *vs.* Himes, 8 Pa. 265.)

CHAPTER V
ENGAGEMENT OF SURETIES TO ONE ANOTHER

28. Right of contribution.

When there are several sureties for the same debtor and for the same debt, the one who has paid it may demand contribution from the others. Under the Civil Law the right to demand contribution may be exercised only in the following cases:

(a) When the payment was made by virtue of judicial proceedings.

(b) When the principal debtor should have made an assignment.

(c) When the principal debtor is a bankrupt.

(See 2 Moreau and Carleton's *Partidas* V, Tit. XII, Law XI; Art. 1844, Spanish Civil Code; Art. 1887, Domat's Civil Law—Cushing, Vol. II; Art. 848, Schurdt's Civil Law of Spain and Mexico.)

At Common Law the right to demand contribution is also recognized. Where several persons are co-sureties for a third person one who pays the debt is entitled to demand contribution from the others for whatever sum he may have paid in excess of his aliquot part. This right of contribution is not founded on contract, but results from the application of the general principle of equity which equalizes the burden which two or more persons may be called upon to bear. (27 American and English

Encyclopedia of Law 482; 32 Cyc. 276; Pingrey on Suretyship and Guaranty, 12; Child's Suretyship and Guaranty, 325; Belond *vs.* Guy, 20 Wash. 160; 15 Laws of England—Earl of Halsbury, Sec. 992.)

It must be noted that notwithstanding the existence of this right of contribution under the Civil Law and at Common Law, a difference is noticeable. Under the Civil Law the right can be exercised only in three instances, while at Common Law the right can be exercised as soon as one of the several sureties makes payment.

29. Insolvency of a co-surety.

Under the Civil Law, it is an engagement of the sureties among themselves, that if there be several sureties for one and the same debtor and there be one of them that is insolvent, or whose obligation is null or liable to be rescinded, every one of the others ought to bear his proportion of the share if the surety who is insolvent, or whose obligation does not subsist, for they are all of them sureties for the whole debt. (2 Moreau and Carleton's *Partidas* V, Tit. XII, Law X; Art. 1844, Spanish Civil Code; Art. 1888, Domat's Civil Law—Cushing, Vol. II.)

At Common Law the bankruptcy of a co-surety has no effect upon the liability of the remaining sureties to the creditor. (Pingrey on Suretyship and Guaranty.) The equitable rule and the one now universally accepted in Common Law countries is that if one or more of the several sureties became insolvent, the others would answer. (32 Cyc. 286.)

CHAPTER VI

EXTINGUISHMENT OF SURETYSHIP

30. In General.

The obligation of the surety shall expire at the same time as that of the debtor, and for the same causes as all other obligations. (Art. 1847, Spanish Civil Code.) The causes of such extinguishment are the following:

(a) Payment or fulfillment. (Art. 1156, Spanish Civil Code; Howe's Studies in Civil Law, 251; 15 Laws of England—Earl of Halsbury, Sec. 1009; Pingrey on Suretyship and Guaranty, 111.)

(b) Novation. (Art. 1156, Spanish Civil Code; Howe's Studies in Civil Law, 251; 15 Laws of England—Earl of Halsbury, Sec. 1066.)

(c) Remission of debt. (Art. 1156, Spanish Civil Code; Howe's Studies in Civil Law, 251.)

(d) Compensation. (Art. 1156, Spanish Civil Code; Howe's Studies in Civil Law, 251).

(e) Merger or confusion. (Art. 1156, Spanish Civil Code; Howe's Studies in Civil Law, 251. See also Sec. 36, *supra.*)

(f) Death. (Howe's Studies in Civil Law, 251; 15 Laws of England—Earl of Halsbury, Sec. 1071. See also Secs. 10 (d) and 17, *supra.*)

(g) Loss of the thing. (Art. 1156, Spanish Civil Code; Howe's Studies in Civil Law, 251; 15 Laws of England—Earl of Halsbury, Sec. 1051.)

(h) Resolutory condition. (Howe's Studies in Civil Law, 251; 15 Laws of England—Earl of Halsbury, Sec. 1024; Jones *vs.* Keer, 30 Ga. 93; Cummingham *vs.* Wreen, 23 Ill. 64.)

(i) Expiration of the term. (Howe's Studies in Civil Law, 251; Art. 777, German Civil Code—Chung Hui Wang; Child's Suretyship and Guaranty, 186.)

(j) Rescission. (Howe's Studies in Civil Law, 251.)

(k) Prescription. (Howe's Studies in Civil Law, 251.)

31. Principal obligation unlawful.

We have already seen that as the contract of suretyship is accessory to a previously existing one, the latter must be valid and binding in order to make the contract of suretyship also valid and binding. (See Sec. 4 (h), *supra.*)

Under the Civil Law, if in the principal obligation there be any essential vice which may annul it, the suretyship is likewise annulled, for no one can employ suretyship for validating engagements that are invalid in themselves. (Art. 1889, Domat's Civil Law—Cushing, Vol. II.)

At Common Law the like rule exists. Generally, the principal obligation must be valid and binding in order to bind the surety, and if invalid, the surety will not be bound. (32 Cyc. 23.) Where the act of the parties is illegal, the agreement of a surety is not binding. (Hook *vs.* White, 201 Pa. St. 41; Hartford Board of Education *vs.* Thompson, 33 Ohio St. 321.)

32. Personal exception of debtor does not discharge surety.

The general rule is that the annullment of the principal obligation also annuls that of the surety, and the discharge of the principal debtor discharges the surety. Both Civil Law and the Common Law, however, make exception to this general rule. If the principal obligation was annulled only because of some personal exception which the principal debtor had, such annullment does not discharge the surety. Defenses do not operate in favor of a surety which are personal to the principal. (Art. 1890, Domat's Civil Law—Cushing, Vol II; Art. 1853, Spanish Civil Code; 32 Cyc. 149; Boone County *vs.* Jones, 54 Iowa 699, Child's Suretyship and Guaranty, 235.)

33. Fraud of the creditor with regard to the surety.

Notwithstanding the above rule that a personal exception of the debtor does not discharge the surety, yet, if besides such personal exception there was any fraud on the part of the creditor, whether in the business which was the subject-matter of the obligation, or in the manner of engaging the surety, the obligation of this surety would be annulled. (Art. 1891, Domat's Civil Law—Cushing, Vol. II.) Thus, if one who is willing to lend money to a minor upon security given to the person who is to become surety for the false proof of his being of age, the obligation of the surety will be annulled.

Such has been the accepted principle of the Civil Law. The Common Law rule, however, is not different. If a surety, at Common Law, is induced to enter into his

contract by reason of any false statements, or the concealment of material facts, by the creditor, the surety is not liable. (Pingrey on Suretyship and Guaranty, 167; Child's Suretyship and Guaranty, 64; Melick *vs.* First, Nat. Bank of Tama Dity, 52 Iowa 94; 15 Laws of England—Earl of Halsbury, Sec. 1015.)

34. Discharge of principal obligation.

As a general rule the liability of a surety ends with the extinguishment of the principal obligation. If the debtor, therefore, annuls his obligation, either by payment or by some other way that discharges him, the engagement of the surety is also discharged. This general rule is but a legal consequence of the accessory nature of the contract of suretyship, which presupposes the existence of a previous valid obligation, for if the principal obligation is discharged the accessory is likewise discharged. This general rule is recognized both under the Civil Law and at Common Law. (Art. 1893, Domat's Civil Law—Cushing, Vol II; Bunk *vs.* Bartett, 105 La. 336; 32 Cyc. 151; Brown *vs.* Ayer, 24 Ga. 288; Himrod *vs.* Baugh, 85 Ill. 435; 27 American and English Encyclopedia of Law 492; Pingrey on Suretyship and Guaranty, 110.)

35. Novation or renewal.

Both the Civil Law and the Common Law accept, as a rule, that if the contract is novated between the creditor and the principal debtor without the surety's obliging himself anew, his obligation does not subsist any longer. This rule is another of the many legal consequences of the accessory nature of the contract. When the contract is renewed that shows its previous extinguishment, and thus follows the extinguishment of the accessory obligation. (Art. 1894, Domat's Civil Law—Cushing; 32 Cyc. 87; 15 Laws of England—Earl of Halsbury, Sec. 1066.)

36. Merger of creditor's and debtor's rights.

It is obvious that a person can not be debtor and creditor of one and the same debt. It follows from this that, if the creditor becomes heir or executor to the debtor or the debtor to the creditor, the confusion which is made in the person of the said heir or creditor, of the qualities of creditor and debtor extinguishes the principal obligation and consequently that of the surety. (Art. 1896, Domat's Civil Law—Cushing.)

Such has been the recognized doctrine of the Civil Law. At Common Law the rule is the same. A union of the qualities of debtor and creditor in the same person extinguishes the debt, for in such a case there is no longer either debt or debtor. (Black's Law Dictionary 245.)

37. Merger of creditor's and surety's rights and of debtor's and surety's.

In our discussion of the nature of the contract of suretyship we have said that the surety must necessarily be a distinct person from the creditor and from the principal debtor—from the creditor because no one can be a surety for a debt due to himself, and from the debtor because no one can be a surety for himself. (Sec. 4-(g), *supra.*) It follows from this that the merger of the rights of creditor and

surety and of debtor and surety, extinguishes the contract of suretyship. If it happens, therefore, that the debtor or creditor be heir or executor to the surety, or that the surety succeed to one or the other of them, in all these cases there arise different confusions of the qualities of debtor and creditor and surety, every one of which annuls the engagement of the surety, because if he succeeds to the debtor he himself becomes the principal debtor and consequently ceases to be surety. And if he succeeds to the creditor he is no longer bound, for he can not be bound to himself. But if it is the creditor that succeeds to the surety he will not be bound to himself but will retain only his right against the debtor. And lastly if it is the debtor that succeeds to the surety there remains no longer any suretyship but only a principal obligation in the person of the debtor, although if there be a sub-surety his obligation will not be extinguished. (Art. 1848, Spanish Civil Code; Art. 1897, Domat's Civil Law—Cushing, Vol. II.)

38. Suit against one of the sureties.

That when there are several sureties to one and the same debt, the creditor may sue them all at one and the same time or separately, is too plain to require explanation. The liability of a surety is entire, and although under the Civil Law the benefit of division exists, nevertheless a surety may be required to pay the whole debt or perform the whole obligation. It follows, therefore, that although the creditor sues one of the several sureties, his suit does not hinder him from bringing his action afterwards against the others. (Art. 1898, Domat's Civil Law—Cushing, Vol. II.) This will be especially true if the suit against one of the several sureties does not effect a complete satisfaction of the debt.

39. Loss of the thing.

In our enumeration of the causes of extinction of obligation, we have named the loss of the thing as one of them. (See Sec. 30 (g), *supra.*) Of course, it is obvious that when the thing which is the object of the contract is lost by accident, the obligation is extinguished. This must be understood, however, to be a loss which takes place before the debtor is in default, for if the loss be after, the obligation subsists. (Art. 1899, Domat's Civil Law—Cushing, Vol. II.)

Such has been the accepted rule of the Civil Law. At Common Law a qualified doctrine exists. If the principal be discharged by a destruction of the property in regard to which the surety is liable, the surety is discharged also, unless he has undertaken absolutely that the property shall be returned. (Child's Suretyship and Guaranty, 232.)

40. Payment or performance.

This is one of the causes of extinction of obligation and consequently of suretyship. (See Sec. 30 (a), *supra.*) Such payment or performance in order to terminate the relation must be legal and made by the surety or principal. (Art. 1849, Spanish Civil Code; 32 Cyc. 166; 27 American and English Encyclopedia of Law 490; Pingrey on Suretyship and Guaranty, 111; Child's Suretyship and Guaranty, 122 and 242.)

41. Non-performance of conditions imposed by surety.

When the surety enters into the contract of suretyship voluntarily, he may impose certain conditions which he may deem necessary for his protection and interest. Such conditions must be performed, otherwise the surety can not be bound. (See Sec. 30 (h), *supra*. See also 32 Cyc. 174; Child's Suretyship and Guaranty, 210.)

42. Extension.

When the creditor grants extension to the debtor without the consent of the surety, the latter is discharged, because this is a material alteration of the contract to the prejudice of the surety. (Art. 1851, Spanish Civil Code; Child's Suretyship and Guaranty, 172; Pingrey on Suretyship and Guaranty, 124; 27 American and English Encyclopedia of Law 494; 32 Cyc. 177.)

43. Acts of the creditor depriving surety of the right of subrogation.

We have seen above that the right of subrogation exists in favor of a surety who is required to pay the debt. (See Sec. 14, *supra*.) This right which belongs to the surety can not be bargained by the creditor, nor can the latter perform acts which will deprive the surety of this right without discharging said surety from his obligation. (Art. 1852, Spanish Civil Code; 32 Cyc. 217.)

CHAPTER VII

CONCLUSION

44. Suretyship under the two systems does not differ much from each other.

If from the comparison of the law of suretyship as I have above endeavored to make, it can be said that a single conclusion may be drawn, after a careful and laborious study of the principles of the one and the other system, I should select as that conclusion the fact that suretyship under the Civil Law does not differ much from that of the Common Law. Indeed, in these elementary principles which are essential to the administration of justice, the Civil Law and the Common Law rules on the subject are in perfect accord.

No wonder this is the case, for although it is believed that these two world-wide legal systems—the Civil Law and the Common Law—sprang from different places and were perfected by different peoples under different conditions, still it can not be denied that each of these legal systems has been influenced directly or indirectly by a previous world wide-legal system—the Roman Law. The influence of the Roman Law on the English Common Law is universally denied especially in Common Law countries. But it must be remembered that from the time Julius Caesar landed in Britain in the year 54 B. C. until the legions retired about the year 450 A. D., a period of 504 years, the Roman Republic embraced the whole civilized world and all that there was of art, philosophy, and sciences. Its jurisprudence was like the

sunlight which not only illumines what it directly shines upon, but diffuses itself in all directions and can not be wholly excluded from even those places which skeptical men are trying to darken.

If before the appearance of what is now universally called Common Law, the Roman Law had placed itself and its principles on the soil of England where that Common Law was born, it is logical to suppose that the Roman Law has entered into the body of that new legal system. That entry of the Roman Law principles would result in the existence of similar rules and principles under the Civil Law and at Common Law. Thus the great similarity of the law of suretyship under the two legal systems.

45. Basic difference lies in the method of enforcing the obligation.

Nourished under different conditions and cared for by peoples whose ideas of government and justice are greatly at variance, the law of suretyship under the two legal systems can not have absolute similarity. At least it is unavoidable that they differ in some more or less important points.

The basic and essential difference lies in the method of enforcing the obligation of the surety on the default of the principal debtor. Under the Civil Law recourse must first be had to the principal debtor. At Common Law as soon as default is made an action against the surety can be maintained whether it appears that the principal debtor has sufficient property or not.

This difference is certainly attributable to the difference in the conception of justice. Perhaps it is believed on the one hand that it is more just to have a levy against the principal debtor first and on the other the contrary.

46. Author's position—In favor of the Civil Law.

The author has pointed out the similarity and the difference of the law of suretyship under the two legal systems. He is now confronted by the questions: Which is more sound in principle? Which will better apply in the Philippines? The questions are not easy to answer. Of course, these questions refer only to the laws of suretyship in so far as they differ under the two legal systems.

He believes, however, that in the basic difference the principles of the Civil Law are more in accord with reason and justice. And, of course, born and reared in the country wherein a distinct and different law prevails from that of its present sovereign, he can not but voice a sentiment that will support the continuance of the existing law on the subject, not because, as Howe says: "* * * so far as private law in civil matters is concerned, there is no better system on the face of the earth than that which is represented by the Spanish Codes * * *," but because the Civil Law which for centuries has prevailed in these Islands, has become interwoven with the social and economical mechanism of the Filipino people, and the changes which may be attempted will cause the greatest confusion as well as perpetrate instead of remedy wrongs.

This sentiment of the author can not be fully appreciated by the readers of this short and perhaps imperfect work, without such sentiment having authoritative support. He, therefore, ends with the following passage from President McKinley's Instructions to the Philippine Commission:

"The main body of the laws which regulate the rights and obligations of the people should be maintained with as little interference as possible. Changes made should be mainly in procedure and in the criminal laws to secure speedy and impartial trial and at the same time effective administration and respect for individual rights."