Whetham(1) at page 50 of the report, with reference to rules 3 and 4 of order XVII in so far as they would affect a question such as this, militate against such a construction of section 372 of the Civil Procedure Code being adopted.

In conclusion it must be added that even if it were possible to take a different view from that taken above as to the position of a Receiver empowered to sue and suing he cannot, with reference to the subject of the litigation, be reasonably supposed to stand in a worse position than that of an officer of a corporation competent to carry on legal proceedings on its behalf. This being so, the practice established with reference to the latter class of cases, which requires the substitution of the officer newly empowered where there has been a change of officers pending proceedings (see Seton on 'Judgments and Orders,' 6th edition, Vol. I, page 115, form 5) points to the propriety of similar procedure being followed in regard to Receivers also.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

SUBROYA CHETTY (PLAINTIFF), APPELLANT,

v.

RAGAMMALL (FIRST DEFENDANT), RESPONDENT.*

1904. September 6, 14.

Probate and Administration Act—V of 1881, *s.* 78—*Administration bond entered into by surety—Allegations by surety against administratrix of waste and mismanagement—Suit by surety against administratrix seeking to be discharged from liability regarding future acts of administratrix—Maintainability—Contract Act IX of* 1872, *s.* 130—*Revocation of continuing guarantee—Application to a contract of suretyship under administration bond.*

First defendant was administratrix of her husband's estate. Plaintiff became one of her sureties under section 78 of the Probate and Administration Act. Plaintiff brought this suit alleging that first defendant as administratrix was wasting and mismanaging the estate. He asked that he might be discharged from his recognisance as a surety as regards future transactions on the part of

(1) L.R., 28 Ch.D., 38.

* Original Side Appeal No. 1 of 1904 presented against the decree and judgment of Mr. Justice Moore in Original Suit No. 19 of 1903.

SUBROYA CHETTY v. RAGAMMAL.

the administratrix, that in the alternative the administratrix might be directed to complete her administration of the estate, and that his surety bond might then be vacated:

Held, that the plaintiff was not entitled to the relief asked for.

Held also, that section 130 of the Indian Contract Act does not apply to the special contract of suretyship which is entered into by a surety to an administration bond.

Raj Narain Mookerjee v. *Ful Kumari Debi*, (I.L.R., 29 Calc., 68), not followed.

Bai Somi v. *Chokshi Ishvardas Mangaldas*, (I.L.R., 19 Bom., 245), followed and approved.

SUIT by a surety under an administration bond claiming to be discharged from his recognisance as a surety to the first defendant in regard to *all* future transactions. The first defendant was administratrix to the estate of her deceased husband. Plaintiff, together with defendants Nos. 2, 3 and 4, had executed the surety bond required by section 78 of the Probate and Administration Act. Plaintiff now sought to be relieved from liability in regard to all future transactions of the administratrix on the ground that she had been guilty of maladministration. He prayed in the alternative that first defendant might be directed to complete the administration of the estate and that thereupon his bond might be vacated.

Further facts are set out in the judgment of Mr. Justice Moore as follows :—

The first defendant, as the administratrix with Letters of Administration of the estate of her late husband Arni Sanyasi Candaswamy Chetty, executed on the 12th October 1899 the bond required by section 78 of the Probate and Administration Act, the sureties being the plaintiff and second, third and fourth defendants. The present plaintiff on the 4th November 1901 by means of a Judge's summons applied to be allowed to withdraw from this surety bond on the ground that the first defendant in dealing with the estate had been guilty of maladministration. Mr. Justice Boddam rejected this application on the ground that maladministration had not been proved and that he had no power to discharge the surety. An appeal was preferred from this decision to a Bench of the High Court by which it was held that it was not necessary to decide whether under the Probate and Administration Act the Court had power to order the discharge of surety for an administrator so far as the future was concerned on the ground of maladministration of the estate by the adminis-

trator, inasmuch as the evidence before the Court did not show anything in the nature of maladministration (Original Side Appeal No. 2 of 1902, judgment, dated 8th September 1902).

The plaintiff has now filed the present suit against the administratrix (first defendant) and his three co-sureties (second, third and fourth defendants) praying, *inter alia*, the Court to discharge the plaintiff from his recognizance as a surety for the first defendant in regard to all future transactions. The third issue is as to whether the plaintiff has any cause of action against the defendants or any of them, the fourth is as to whether the present suit is barred as *res judicata* by reason of the decision passed on the application to Mr. Justice Boddam already mentioned, while the fifth issue is as to whether the present suit is maintainable regard being had to No. 470 of the rules of the High Court on the Original Side. These issues have been argued together as preliminary issues. I cannot find anything in the Probate and Administration Act to warrant the inference that a suit such as the present one can be brought, nor have I been referred to any provision of law to be found elsewhere recognising the right of a surety in a bond such as that now under consideration to bring a suit against his co-sureties and the administrator of the estate and in such suit to call on the Court, for the benefit of which, a bond under section 70 has been executed to discharge the surety from his recognizance. A number of English cases have been cited at the hearing, but my attention has not been directed to any case in which a Court has granted relief such as that now prayed for. The Indian case that counsel for the plaintiff has mainly relied on is *Raj Narain Mookerjee* v. *Ful Kumari Debi*(1). There is no doubt a close analogy between that case and the one now under consideration, but it will be found that the surety in that case who prayed the Court to call on the administratrix to furnish a new surety and release him from his liability under the security, did so, not by a suit against the administratrix, but by an application to the District Judge for whose benefit the bond had been executed. I am decidedly of opinion that it must be held on the third issue that the plaintiff has no cause of action against the defendants or any of them. As I have alluded to the decision in *Raj Narain Mookerjee* v. *Ful Kumari Debi*(1) I think

(1) I.L.R., 29 Calc., 68.

SI. IROYA CHETTY v. PALAMMALL.

it advisable to state that I am unable to accept the conclusion arrived at by the learned Judge in that case as the powers of a Court which has once taken a bond with sureties to take a second bond with fresh sureties if necessity arises. Sections 50 and 51 of the Probate and Administration Act no doubt give the Court which has granted letters of administration power to annul the same for just cause, but I am prepared to follow the decision in *Annoda Prosad Chatterjee* v. *Kalikrishna Chatterjee*(1) to the effect that the explanation of the words "just cause" as given in section 50 is not illustrative merely but exhaustive and there can be no question that a disinclination felt by one of the sureties to continue to be responsible under the administration bond is not one of the just causes there set out for annulling the letters of administration. I am further of opinion that the provision of section 130 of the Contract Act cannot be applied to a case such as this. Chief Justice Sir Charles Sargent, in dealing with a case where a person who had given security under section 12 of the Act XX of 1864 (Minors Act) applied to be released from his liability as surety, has pointed out that section 130 of the Contract Act was not applicable to such a case adding as follows :—

"The original applicant asks to be released from his obligation as surety on account of the guardian's maladministration of the minor's estate; but the very object of requiring such surety was to guarantee the minor against such misconduct or mismanagement on the part of the guardian (*Bai Somi* v. *Chokshi Ishvardas Mangaldas*(2))" I do not see how the case here dealt with by the learned Chief Justice can be distinguished from the present one. If, therefore, the plaintiff had brought this matter before the Court, not by a suit against the administratrix and his co-sureties but by an application as was done in the case dealt with at *Raj Narain Mookerjee* v. *Ful Kumari Debi*(3), I should, all the same, have been obliged to hold that I had no power to grant him the relief prayed for. The third issue is decided in the negative. Fourth issue. It does not appear to me that it can possibly be contended that the plaintiff's suit is barred *in toto* as *res judicata*. The very most that can

(1) I.L.R., 24 Calc., 95. (2) I.L.R., 19 Bom., 245.
(3) I.L.R., 29 Calc., 68.

be urged is that the plaintiff is barred by the finding of Mr. Justice Boddam on the application of the 2nd November 1901 put in by the plaintiff from contending that the first defendant had been guilty of any maladministration up to that date. I must however hold that there is no bar as it is clear that no issue raised in the present suit has been heard and finally decided by any Court in any former suit (section 13, Civil Procedure Code), fifth issue. Rule No. 470 does not lay down a hard and fast rule that an application by a surety to vacate a bond or surety's recognizance must be by Judge's summons, but merely that it may be brought before the Court in that manner.

This issue must be decided in the negative.

In consequence of the finding that I have arrived at on the third issue, this suit is dismissed with costs.

Plaintiff preferred this appeal.

Mr. *Chamier* for appellant.

P. R. Sundara Ayyar and *M. Tangavelu Chettiar* for respondent.

JUDGMENT.—In this case the first defendant, who is the administratrix of her husband's estate, gave the bond required by section 78 of the Probate and Administration Act and the plaintiff became one of her sureties. The plaintiff brought a suit in which he alleged that the first defendant was wasting and mismanaging the estate, and he asked that he might be discharged from his recognisances as a surety as regards future transactions on the part of the first defendant, or, alternatively, that the first defendant might be directed to discharge certain specified claims against the estate and complete the administration. The learned Judge dismissed the suit and the plaintiff appeals.

As regards the plaintiff's first claim for relief that he may be discharged from future liability under his surety bond, we think the learned Judge was right in refusing to make the order asked for. In Williams on 'Executors,' Edition 1893, Volume I, p. 462, it is laid down that the Court will not discharge the original sureties to an administration bond and allow other sureties to be substituted for them and a similar statement of the law and practice is to be found in Dixon on 'Probate,' p. 271, and Tristrum and Cootes 'Probate Practice,' 2nd Edition, p. 105. The authority cited is *Re Stark*(1). The later case of *Re Ross*(2) where an

(1) L.R., 1 P. & D., 76.

(2) L.R., 2 P. & D., 274.

SUBROYA CHETTY v. RAGAMMALL.

administrator having gone abroad and under an order in Chancery assets had accrued to the estate during his absence, a substitute was allowed to execute the fresh bond which was necessarily limited to the administrator's execution of a similar bond on his return—is in no way inconsistent with the rule of practice which was recognised in *Re Stark*(1).

Mr. Chamier, on behalf of the plaintiff, sought to distinguish the case of *Re Stark*(1) upon the ground that the basis of the decision in that case was that the substituted sureties could not be made responsible for past transactions and that the plaintiff in the present case only asked to be released from liability as regards future transactions. But the case of *Re Stark*(1) appears to have been accepted by practitioners as recognising the rule that the original sureties cannot be discharged either as regards past or future liability.

No precedent is to be found for the order which we are asked to make and on principle we do not think that any such order ought to be made. The making of such an order might defeat the object for which an administrator is required to find sureties to his administration bond. We are unable to agree with the decision in the case of *Ray Narain Mookerjee* v. *Ful Kumari Debi*(2). The attention of the learned Judge of the Calcutta High Court does not appear to have been drawn to the case of *Re Stark*(1). If, as we should be prepared to hold, the surety to an administration bond is not entitled to an order discharging him from future liability on an application in the probate proceedings to the Judge or officer who is the obligee under the bond of suretyship, it seems to follow *à fortiori* that he is not entitled to this relief where he claims it as here in a separate suit.

We are of opinion that section 130 of the Contract Act, which provides that a continuing guarantee may at any time be revoked by the surety as to future transactions by notice to the creditor, does not apply to the special contract of suretyship which is entered into by a surety to an administration bond. If the section applies the "creditor" would presumably be the obligee under the bond, *i.e.*, the Judge or Registrar, and the surety could, without action or any other legal proceeding, put an end to his liability by giving notice to the Judge or Registrar. This is contrary to

(1) L.R., 1 P. & D., 76.

(2) I.L.R., 29 Calc., 68.

the well-established practice and might lead to great inconvenience. Section 130 embodies the English rule of law and the proceedings in the case of *Re Stark*(1) show that, so far as the English practice is concerned, it has never been suggested that the general rule of law as to continuing guarantees applies in the case of a suretyship to an administration bond. In the Calcutta case the Chief Justice guards himself by saying that he was not dealing with the case of a person who becomes surety and then from mere caprice or for no sound reason desires to be discharged; but under section 130 the surety has an absolute right at any time to revoke his guarantee as to future transactions, and if that section is applicable it seems to us that it would not be open to the Court to inquire into the grounds upon which the surety had given notice of revocation. In *Calvert* v. *Gordon*(2), it was held that upon a bond conditioned for a clerk accounting for and paying over moneys received by him the obligor could not discharge himself from further liability by notice. In *Lloyds* v. *Harper*(3), it was held that a guarantee given to the committee of Lloyds could not have been withdrawn during the lifetime of the guarantor and was not determined by his death. In the case of *Bai Somi* v. *Chokshi Ishvardas Mangaldas*(4) where a surety for the guardian of a minor's estate applied to be released from his obligation on the ground of the guardians' maladministration, the Court held that the surety could not be discharged and that section 130 of the Contract Act was not applicable.

We entirely agree with this decision and with the reasoning upon which it was based.

As regards the plaintiff's alternative claim to relief as he is neither a creditor nor a legatee and is therefore not entitled to bring an administration suit it is clear that it is not open to him to obtain an order against the administratrix requiring her to administer the estate.

We think the decision of Moore, J., was right and we dismiss this appeal with costs.

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(1) L.R., 1 P. & D., 76.
(2) 7 B. & C., 809.
(3) L.R., 16 Ch.D., 290.
(4) I.L.R., 19 Bom., 245.