[HALLINAN, C.J. and ZANNETIDES, J.]
(October 11, 1955)

GEORGHIOS MILLIOTIS, of Lyssi,

Appellant,

v.

THE COMMERCIAL FIRM P. IOANNOU & CO.,
of Famagusta,

Respondents.

(Civil Appeal No. 4145)

Contract — Contract Law, s. 141 — Time for performance extended—Guarantor's subsequent assent to indulgence—Surety not discharged — Amendment of pleadings on appeal.

The appellants sold goods to S. and with the defendant as a guarantor. Later S. gave the defendants a promissory note which had the effect of extending the time for payment from 20 days to 25 days. The defendant when he came to know of the promissory note assented to the arrangement. The statement of defence pleaded that the extension of time for payment had discharged the guarantor. The plaintiffs did not deliver a reply. The trial Court held that the defendant guarantor was not discharged.

Held: (i) The Contract Law, s. 141, reproduces the common law. At common law, the surety remains bound if he assents to the extension of time for performance after he comes to know about it.

Mayhew v. *Crickett*, 36 E.R., 585.

(ii) Leave granted to plaintiffs to deliver an amended reply alleging the defendants' consent to the extension of time.

Leavey v. *Hirst* (1943) 2 A.E.R., 581 followed.

Appeal dismissed.

Appeal by defendant from the judgment of the District Court of Famagusta (Action No. 401/53).

G. Chr. Pelaghias with *X. Syllouris* for the appellant.

Chr. Mitsides with *N. Antoniou* for the respondents.

The facts sufficiently appear in the judgment delivered by:

HALLINAN, C.J.: In this case the respondents sued a certain Nicolas Savva and the appellant as Savva's guarantor. The respondents on the 21st March, 1951, undertook to deliver certain tiles to Savva valued £114 and on condition that he obtained a guarantee from the appellant. This guarantee was executed by the appellant on the same day and provided that the appellant would pay the debt within 20 days.

Reading this document it might be well construed as

an indemnity rather than guarantee but as the whole case in the Court below proceeded on the basis of its being a guarantee we are prepared to treat it in the same way on the hearing of this appeal.

On the same day, 21st March, Savva gave a promissory note to the respondent in which he undertook to pay for the tiles within 25 days. Savva admitted the debt when these proceedings were instituted by the respondents against himself and the appellant, and the trial Court held that the appellant also was also liable to pay the debt under his guarantee.

The trial Court considered the provisions of section 141 of the Contract Law (Cap. 192) which provides that when a creditor promises to give time to the principal debtor then the surety is discharged unless he assents to such alteration in the contract. This section reproduces section 135 of the Indian Contract Law. We have looked at Pollock and Mulla's book on this law and we are unable to find any reason for the submission made by counsel for the appellant that this section is anything more than a statement of the English Common Law on the subject although it may not be exhaustive. The English cases on this branch of law are, in our opinion, applicable. The trial Court relied on a passage in Rowlatt on Principal and surety, 3rd edition, p. 275, in which it is stated that "The surety remains bound where either the intrument of guarantee authorises the indulgence which has been given to the principal or the surety has assented to it at the time, or even upon hearing of it afterwards has ratified it or promised to pay notwithstanding." The authority relied on is the case of *Mayhew* v. *Crickett*, 36 English Reports, p. 585. In our opinion, this statement of the Law must be applied to the interpretation of section 141 of the Contract Law.

Upon the facts set out in the judgment of the trial Court, which have not been seriously challenged on appeal, it is quite clear that the appellant did, after he became aware of the promissory note given by Savva to the respondents, assent to that arrangement, and promise to pay notwithstanding.

The point relied on at the hearing of this appeal has been that, although the appellant pleaded that the prommissory note, by extending the date of payment for five days, discharged the appellant, nevertheless the respondent in his reply did not plead that the appellant had, on becoming aware of the promissory note, promised to pay notwithstanding. The question then arose whether we should allow the respondent's reply to be amended on appeal.

Counsel for the respondent has drawn our attention to the case of *Leavey* v. *Hirst*, (1943) 2 A.E.R., 581, in which the Court of Appeal considered whether, when

issues had been raised in the Court below and evidence led under protest, which issues had not been raised in the pleadings, the Court of Appeal could, upon application by an interested party, amend the pleadings. In stating his reasons for allowing the pleadings to be amended Lord Green, M.R., at p. 583 in that case stated, "on the particular facts in this case, having regard to what took place at the trial we come to the conclusion that, in the circumstances, no real injustice will be done by allowing the amendment."

In the present case the respondent's clerk who made the contract as the respondents' agent gave evidence that the appellant, after he became aware of the promissory note, again reiterated his willingness to pay. No objection was made by the appellant to the admission of this evidence. The appellant himself when he gave evidence showed clearly that he was relying not on any technical question of the extension by the promissory note of time to pay, but that the principal debtor, by executing the promissory note, had undertaken to pay the debt and thereby had discharged the appellant from his liability. In our view, no injustice can be done in this case by allowing the reply of the respondent to be amended. Since we have allowed this amendment to be made, there is in fact and in law no ground upon which the judgment of the trial Court can be disturbed.

The appeal is therefore dismissed. Since it was necessary to amend the pleadings before full justice could be done to the respondents we only allow half of the costs of this appeal to the respondents.

[LORD MORTON OF HENRYTON, LORD KEITH OF AVONHOLM, LORD SOMERVELL OF HARROW AND MR. L. M. D. DE SILVA]

(October 17, 1955)

A. G. PATIKI & CO. AND OTHERS, *Appellants*,

v.

DEMETRA GEORGHIOU PATIKI, *Respondent*.

ON APPEAL FROM THE SUPREME COURT OF CYPRUS.

(Privy Council Appeal No. 26 of 1954)

The facts are summarized in the head-note to the report of the judgments in the District Court and in the Supreme Court at page 36 of Part I of this volume.

Patiki & Co. appealed to the Privy Council upon three issues:

(1) Whether D. G. P., the respondent, could sue without a grant of administration to G. A. Patiki, deceased.

(2) Whether the Supreme Court was correct in holding that the value of the partnership assets should be