[HIGH COURT OF AUSTRALIA.]

McDONALD AND ANOTHER . . . . APPELLANTS;
DEFENDANTS,

AND

DENNYS LASCELLES LIMITED . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 1.

SYDNEY, *May* 15.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Contract—Vendor and purchaser—Instalments of purchase money—Purchaser in default—Rescission—Rights of parties.

Principal and surety—Sale of land—Contract of sale—Purchase money—Instalment—Default by purchaser—Payment guaranteed—Default by vendor under earlier contract—Rescission of vendor's contract—Subsequent rescission by purchaser—Discharge of surety.

Instalments of purchase money, other than the deposit payable, upon a sale of land cannot be retained or recovered by the vendor after the contract has been determined by his election to treat the purchaser's default as a discharge. In such a case the contract is determined only in so far as it is executory, and the party in default remains liable for damages for his breach: nevertheless, the contract being at an end, instalments which are prepayments on account of the price of the land become repayable at law, in the absence of a stipulation to the contrary, and equity relieves against such a stipulation. The liability of a surety for an instalment is also discharged when the contract of sale is so determined, because the principal debt to which his obligation is accessory is extinguished.

So *held* by *Rich*, *Starke*, *Dixon* and *McTiernan* JJ.

The R. Co. entered into a contract to purchase land from A, who was himself a purchaser of the land under a contract of sale. A assigned to the plaintiff his interest in the contract with the R. Co. The R. Co. made default in payment of an instalment of the purchase money, and, in consideration of the

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plaintiff's agreeing to postpone the payment of the instalment for a year, the defendants, who were directors of the R. Co., guaranteed the due payment of the instalment. At the end of the year the R. Co. was still in default. A also had defaulted under his contract, and the vendor to him rescinded the contract. The R. Co. thereupon intimated that it treated its contract as at an end, and this intimation was accepted by A and the plaintiff as putting an end to the contract. The plaintiff brought an action against the defendants for the recovery of the amount of the instalment guaranteed by them.

Held, by *Rich*, *Starke*, *Dixon* and *McTiernan* JJ. (*Evatt* J. dissenting), that, the liability of the R. Co. to pay the instalment having been discharged upon the failure of the contract of sale to it, the obligation under the guarantee was likewise discharged.

Effect of the bankruptcy law and the law relating to the winding up of companies upon the liability of a surety considered.

Decision of the Supreme Court of Victoria (*Cussen* A.C.J.) reversed.

APPEAL from the Supreme Court of Victoria.

In an action in the Supreme Court of Victoria by Dennys Lascelles Ltd. against John McDonald and Arthur Henry Holdsworth, the statement of claim was substantially as follows :—

1. On 19th February 1930 the Rye Grazing Co. Pty. Ltd., which was incorporated under the *Companies Act* of the State of Victoria, was indebted to the plaintiff in the sum of £1,000 and it had been so indebted since 24th January 1930. 2. On 19th February 1930 the defendants and each of them executed a document under seal, of which the following is a copy :—" Guarantee.—In consideration of Dennys Lascelles Limited Geelong agreeing to postpone payment of the sum of one thousand pounds the instalment now due under the contract of sale made between C. H. Besley and others with E. W. Dunkley and the Rye Grazing Company Proprietary Limited and the benefit of which has now been assigned to Dennys Lascelles Limited until the twenty-fourth day of January 1931 We John McDonald and Arthur Henry Holdsworth both of Lansell Road Toorak graziers being two of the directors of the said Rye Grazing Company Proprietary Limited do hereby jointly and each of them separately guarantee to Dennys Lascelles Limited the due payment by the said E. W. Dunkley and the Rye Grazing Company Proprietary Limited of the said sum of one thousand pounds on the said twenty-fourth day of January 1931." 3. The plaintiff postponed payment

of the sum of £1,000 due by the Rye Grazing Co. Pty. Ltd. as in the guarantee mentioned until the date therein fixed, namely, 24th January 1931. 4. The Rye Grazing Co. Pty. Ltd. failed to pay the said sum or any part thereof on 24th January 1931, and the same is still wholly unpaid. And the plaintiff claims against the defendants jointly and each of them severally, £1,000.

The following is substantially the statement of facts which was agreed upon by the parties :—

1. Louis Johnson, George Johnson, Thomas Joseph Johnson and Harry Johnson (hereinafter referred to as "Johnson Brothers") are, and at all times material were, registered as the proprietors of an estate in fee simple in certain land at Rye containing 1,876 acres 3 roods and 35 perches.

2. By a contract of sale dated 9th March 1925, Johnson Brothers agreed to sell and Charles Henry Besley, Annie Besley, Estelle Besley and Herbert Wills agreed to purchase the land, together with certain chattels, for the total sum of £19,238 18s. 7d., payable as follows : £3,000 by way of deposit, £1,000 on 1st April in each of the years 1926, 1927, 1928, 1929 and 1930, and the balance of £11,238 18s. 7d. on 1st April 1931.

3. The deposit and all the instalments, up to and including the instalment payable on 1st April 1929, were duly paid by the purchasers. The amounts due on 1st April 1930 and 1st April 1931 have not been paid.

4. By a contract of sale dated 23rd June 1927, Charles Henry Besley, Annie Besley, Estelle Besley and Herbert Wills agreed to sell and Edgar Wilfred Dunkley and the Rye Grazing Co. Pty. Ltd. agreed to purchase the land for the total sum of £23,462 2s. 3d., payable as follows : £6,000 by way of deposit, £1,000 on 24th January 1928, 24th January 1929 and 24th January 1930, and the balance of £14,462 2s. 3d. on 24th January 1931.

5. The defendants were at all times material the directors of the Rye Grazing Co. Pty. Ltd.

6. The deposit and instalments, up to and including the instalment payable on 24th January 1929, were duly paid by the purchasers under the last-mentioned contract. The amounts due on 24th January 1930 and 24th January 1931 have not been paid.

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7. By deed of assignment, dated 14th August 1929, and made between Charles Henry Besley, Annie Besley, Estelle Besley and Herbert Wills of the one part and the plaintiff of the other part, Charles Henry Besley, Annie Besley, Estelle Besley and Herbert Wills, in consideration of the sum of £2,000 paid to them by the plaintiff, assigned to the plaintiff the contract of 23rd June 1927 and all the right, title, benefit, advantage, property, claim and demand whatsoever of the assignors in the contract and in the land, and in the moneys then and thereafter payable under the contract by Dunkley and the Rye Grazing Co. Pty. Ltd. Notice in writing of the assignment was duly given to Dunkley and the Rye Grazing Co. Pty. Ltd. The assignment contained a direction to Johnson Brothers to transfer the land to the plaintiff or at its direction, but it did not contain any express requirement that the plaintiff should apply the purchase money receivable under the second contract to the discharge of the first, or should indemnify the assignors in respect of the obligations incurred by them under the first contract.

8. The instalment of £1,000 payable, under the contract of 23rd June 1927, on 24th January 1930 not having been paid, the defendants, in consideration of the plaintiff agreeing to postpone payment thereof until 24th January 1931, jointly and severally guaranteed to the plaintiff the due payment by Dunkley and the Rye Grazing Co. Pty. Ltd. of that sum on 24th January 1931. [A copy of the guarantee appears in the statement of claim which is set out above.] Johnson Brothers at the same time agreed to the postponement until 1st April 1931 of the payment of the sum of £1,000 payable to them on 1st April 1930 under and by virtue of the contract of 9th March 1925.

9. Dunkley and the Rye Grazing Co. Pty. Ltd. made default in payment of the sum of £1,000 payable on 24th Janaury 1931, and in payment of the balance of purchase money also payable on that date.

10. Charles Henry Besley, Annie Besley, Estelle Besley and Herbert Wills made default in payment of the sum of £1,000 payable to Johnson Brothers on 1st April 1931, and also in payment of the balance of purchase money payable on that date under and by virtue

of the contract of 9th March 1925. Those sums were not paid by the plaintiff or any other person to Johnson Brothers.

11. On 16th April 1931 Johnson Brothers gave notice to Charles Henry Besley, Annie Besley, Estelle Besley and Herbert Wills, and also to the plaintiff, that they rescinded the contract of 9th March 1925.

12. Negotiations then took place between the plaintiff and the defendants and Johnson Brothers, and on 12th June 1931 the defendants obtained from Johnson Brothers an option to purchase the land from Johnson Brothers for £11,000, such option to remain in force until 30th June 1931.

13. On 19th June 1931 the Rye Grazing Co. Pty. Ltd. informed Charles Henry Besley, Annie Besley, Estelle Besley and Herbert Wills, and also the plaintiff, that it proposed to treat the contract of 23rd June 1927 as repudiated and at an end.

14. On 20th June 1931 Johnson Brothers entered into possession of the land and have since that date remained in possession thereof.

15. On 26th June 1931 Dunkley informed Charles Henry Besley, Annie Besley, Estelle Besley and Herbert Wills and the plaintiff that he also proposed to treat the contract of 23rd June 1927 as repudiated and at an end.

16. The writ in this action was issued on 5th June 1931, claiming the sum of £1,000 from the defendants under the guarantee dated 19th February 1930. The said sum of £1,000 was at the date of the issue of the writ, and still is, wholly unpaid.

The action coming on for hearing on the above-stated facts, *Cussen* A.C.J. gave judgment for the plaintiff for the amount claimed.

Cussen A.C.J., in delivering judgment, said that the difficulties he felt were whether general principles were applicable in relation to the very special facts of this case. Referring to Johnson Brothers, the original vendors of the land, who throughout remained registered proprietors, as "A," to Besley and others, who contracted to purchase from A, as "B," to the Rye Grazing Co. Pty. Ltd. and Dunkley, who contracted to purchase from B, as "C," to the contract of 9th March 1925 as "contract no. 1," and to that of 23rd June 1927 as "contract no. 2," his Honor said that there were some matters which were material in considering the rights of the parties in the

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action. "The first is that, though B and the plaintiff may eventually have been unable to complete, C was not ready or willing to complete from 24th January 1931. C was therefore a defaulter, and I have no doubt that if C had fulfilled his obligations as to payment there would have been no breakdown. A, throughout, seems to have behaved very generously, and for some time after 1st April 1931 payment by C as provided by contract no. 2, or even of a smaller sum than was provided by that contract, would have solved all difficulties. Secondly, as I understand the facts and figures, C was not only the original cause of the breakdown but was the one party who (whatever might be the result of a claim on the guarantee) would substantially gain by the breakdown. This results from the great fall in the value of the land as compared with what C agreed to give for it. A, who out of £18,000 has received £7,000 and some interest, and on the other hand was out of occupation for some time, has so far apparently been content to get the land back. B, who has paid £6,500 and some interest and was in occupation for some time, received £8,000 and some interest from C and also £2,000 (or £2,500) from the plaintiff. B is therefore, as things stand, at present a gainer, but this is due, not to any breach or breakdown, but mainly to the fact that the deposit on contract no. 2 was so much larger than that in contract no. 1. Plaintiff has, as I understand, paid £2,000 in August 1930, and possibly an additional £500 and interest on 24th January 1931, and so far has received nothing. On the other hand, C has paid £8,000 and some interest and, though in occupation for some time, is no doubt a loser on the whole, but the loss is not due to the breakdown but to the fact that C made what turned out to be a very disadvantageous contract. If C had completed his bargain he would have lost in addition some thousands of pounds. At law, therefore, C has suffered no damages by the breach. The third matter is that I should judge that all parties (and C, in particular, by repeated requests for delay and by giving over possession to A) have acquiesced in the result that the earlier transactions by which the land was intended to pass to C and his assigns should not be given effect to. . . . The first and main thing to consider here is the form of the guarantee construed in the light of the circumstances existing at the

time. There is something to be said for the view that by it the defendants guaranteed *simpliciter* the payment by C to plaintiff of £1,000 on 24th January 1931. But suppose one adds after 'one thousand pounds' the words 'the instalment now due under contract no. 2' or even the further words 'if then existing as a liability,' the result would still be in favour of the plaintiff. In other words, the liability of the defendants under this particular guarantee should . . . I think be unaffected by the events taking place subsequently to 24th January 1931. I would add that, even if the view just expressed is not right, I think defendants are compelled, in order to get rid of plaintiff's common law right, to rely on general equitable doctrines, and that these will not be applied where the result will be, not equity, but something quite otherwise. Here, as I have shown, defendants and C, with whom they were associated, have taken an active part in bringing about the events which have happened. I have shown too that, so far as appears, C has never, on or since 24th January 1931, been ready and willing to carry out his part of contract no. 2, that C's failure to carry out such part has resulted in the general breakdown and that C is the real gainer by it, and that C and the defendants joined in giving up possession of the land. I think that the Court should not in the circumstances of this particular case apply equitable principles which, stated in a general way, have been applied in other cases."

From this decision the defendants now appealed to the High Court.

Further material facts appear in the judgments hereunder.

O'Bryan, for the appellants. In 1931 the second purchasers, Rye Grazing Co., defaulted. The respondent could thereupon have rescinded, but it did not do so. It kept the contract alive. In April 1931 the original contract money fell due, but nothing was paid and Johnson Brothers rescinded. The purchasers under the second contract then rescinded on the ground that their vendors were no longer able to complete. The transaction in question was a guarantee of a debt, and not an independent promise, and a guarantee of a subsisting obligation (*Mayson* v. *Clouet* (1)). The second contract was affirmed on breach (*Wulff* v. *Jay* (2)). If the

(1) (1924) A.C. 980.

(2) (1872) L.R. 7 Q.B. 756.

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respondent wished to succeed against the guarantors it should have kept alive the obligation to the principal debtor. The effect of the extinguishment of the principal obligation has been considered in *Stacey* v. *Hill* (1). The principle of that case was applied in *Hastings Corporation* v. *Letton* (2). A similar position arose in *Hewison* v. *Ricketts* (3), which was a case of hire-purchase agreement. (See also *In re Darwen and Pearce* (4).)

[McTIERNAN J. referred to *In re FitzGeorge*; *Ex parte Robson* (5).]

That case was distinguished in *In re Moss*; *Ex parte Hallet* (6). If the obligations of the surety are altered by operation of law the surety may be discharged (*Pybus* v. *Gibb* (7); *Forrer* v. *Nash* (8); *Wylson* v. *Dunn* (9); *Brewer* v. *Broadwood* (10)).

[DIXON J. referred to *Reynolds* v. *Fury* (11).]

As soon as the first contract was rescinded the purchaser under the second contract was entitled to declare his contract at an end. The Besleys had no right to sue for instalments under the second contract (*Mayson* v. *Clouet* (12)). If the true position is that the purchaser is entitled to recover the payment of an instalment, a fortiori the vendor cannot recover an instalment that has not been paid. The principle on which the Courts have acted is that, as the principal debt was extinguished, so the surety's obligation disappeared (*Commercial Bank of Tasmania* v. *Jones* (13)). It is immaterial whether the release is under seal, by novation, or by the omission of a creditor to keep on foot another contract (*Perry* v. *National Provincial Bank of England* (14)).

[STARKE J. referred to *Dane* v. *Mortgage Insurance Corporation* (15).]

That case and the case of bankruptcy are the only cases in which a release of the debt does not release the surety. Otherwise the rule is that the surety is released upon the extinguishment of the

(1) (1901) 1 Q.B. 660, at p. 666.
(2) (1908) 1 K.B. 378.
(3) (1894) 63 L.J. Q.B. 711.
(4) (1927) 1 Ch. 176, at p. 182.
(5) (1905) 1 K.B. 462.
(6) (1905) 2 K.B. 307.
(7) (1856) 6 E. & B. 902; 119 E.R. 1100.
(8) (1865) 35 Beav. 167, at p. 171; 55 E.R. 858, at p. 860.
(9) (1887) 34 Ch. D. 569, at p. 577.
(10) (1882) 22 Ch. D. 105.
(11) (1921) V.L.R. 14, at p. 17; 42 A.L.T. 122, at p. 123.
(12) (1924) A.C. 980.
(13) (1893) A.C. 313.
(14) (1910) 1 Ch. 464, at pp. 468, 472, 477.
(15) (1894) 1 Q.B. 54, at p. 63.

debt. In this case, the discharge was not by operation of law but by the omission of the guaranteed party to keep alive the obligation due by him.

[STARKE J. referred to *Mortgage Insurance Corporation* v. *Pound* (1).]

Giving time to the principal will exonerate the surety from past, as well as from future, liability. The whole scheme of the second contract was that the Rye Grazing Co. should be selling the land and giving transfers to buyers, but that could only be carried out if the respondent had a title (*Eyre* v. *Bartrop* (2)). The basis of the discharge of the surety is that his position has been altered (*Polak* v. *Everett* (3)). The respondent gets no greater rights than its assignor. The assignment does not enable the assignee to enforce an obligation which the assignor could not enforce. If the first contract is not kept alive, the surety is asked to carry out an entirely new obligation. The contract in this case was a composite contract and the respondent was bound to keep the first contract on foot. If the debtor by his own act alters the position of the surety, the surety is discharged. The vendor of land is, to some extent at least, after the contract is made, a trustee of the land in favour of the purchaser. If an instalment falls due and is not paid and if the vendor gets rid of his title to the land and still seeks to recover the instalment, he will not be entitled to do so. The purchaser could come to a Court of equity and say the vendor has no longer any title to the land, and the vendor would have no answer in a Court of equity to an application to restrain him from proceeding with his action. A vendor who no longer has any title to his land cannot get judgment for payment of an instalment, and, if a judgment had been obtained, a Court of equity would restrain such a vendor from giving effect to it (*Spence's Equitable Jurisdiction* (1846), vol. I., pp. 423, 424, 673, 674). The Besleys owed a duty to the Rye Co. to keep their contract on foot, and the respondent, as assignee, owed that duty to the Besleys (*Smith* v. *Wood* (4)).

Russell Martin, for the respondent. The promise in the guarantee is an unconditional promise to pay, and the performance of the

(1) (1894) 64 L.J. Q.B. 394, at p. 396.
(2) (1818) 3 Madd. 221 ; 56 E.R. 491.
(3) (1876) 1 Q.B.D. 669, at p. 675.
(4) (1929) 1 Ch. 14.

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second contract is not made a condition precedent to payment. If this action had been brought in January 1931, there would have been no answer to it, and nothing happened subsequently to alter this position. The debtors had got the very thing they bargained for, namely, a forbearance to sue for twelve months. The fact that Johnson Brothers rescinded this contract on 16th April did not discharge the guarantors. There is no suggestion in the assignment of the contract to the respondent that the latter will undertake the obligations of the first contract. The Courts will not imply a covenant merely because they think it would have been reasonable that such a clause should have been incorporated in the contract (*Reigate* v. *Union Manufacturing Co.* (*Ramsbottom*) (1)). In no form of action could the Rye Grazing Co. recover moneys which it paid to the respondent, assuming that it could recover such moneys from the Besleys. The suggestion that the respondent acquired a defeasible right is unwarranted. The right could only be lost by some legal method of defeasance. The mere fact that the surety lost a security which he had could not extinguish his liability. There must be some positive act on the part of the creditor before the surety will be discharged (*Hardwick* v. *Wright* (2); *Black* v. *Ottoman Bank* (3)). If the creditor by his own act or omission voluntarily or actively interferes with the payment of the debt, then the surety is released (*Polak* v. *Everett* (4); *R.* v. *Fay* (5)), but it is only when the creditor so conducts himself towards the debtor that the rights of the surety are impaired that the surety is discharged (*Browne* v. *Carr* (6); *In re FitzGeorge*; *Ex parte Robson* (7); *Rowlatt* on *Principal and Surety*, 2nd ed. (1926), p. 272; *Ex parte Agra Bank*; *In re Barber & Co.* (8); *Rees* v. *Berrington* (9); *Stacey* v. *Hill* (10)). *Mayson* v. *Clouet* (11) would enable the principals to recover. The Besleys are the only persons who could recover. As far as the respondent is concerned, if any

(1) (1918) 1 K.B. 592, at p. 605.
(2) (1865) 35 Beav. 133; 55 E.R. 845.
(3) (1862) 15 Moo. P.C.C. 472; 15 E.R. 573; 6 L.T. N.S. 763.
(4) (1876) 1 Q.B.D. 669.
(5) (1878) L.R. 4 Ir. 606, at p. 615.
(6) (1831) 7 Bing. 508, at p. 515; 131 E.R. 197, at pp. 199, 200.
(7) (1905) 1 K.B. 462.
(8) (1870) L.R. 9 Eq. 725, at p. 732.
(9) (1795) 2 Ves. Jun. 540; 30 E.R. 765; *White & Tudor, Leading Cases in Equity*, 9th ed. (1928), p. 521.
(10) (1901) 1 Q.B. 660.
(11) (1924) A.C. 980.

instalment had been paid to it, it could not have been recovered. [He referred to *Deane* v. *City Bank of Sydney* (1) and *Ellis* v. *Wilmot* (2).]

O'Bryan, in reply, referred to *Finch* v. *Jukes* (3); *Mortgage Insurance Corporation* v. *Pound* (4); *Bechervaise* v. *Lewis* (5); *In re Moss*; *Ex parte Hallet* (6).

Cur. adv. vult.

May 15.

The following written judgments were delivered :—

RICH J. In this case I have had the advantage of reading the judgment prepared by my brother *Dixon* and I agree with his conclusion and reasons. I desire to add that, although, upon examination, the decisions as to relief of sureties by reason of the discharge of the original debtor appear to draw no clear lines between the discharge, on the one hand, of the surety because the creditor has altered the relations between himself and the principal debtor, upon the subsistence of which the surety is entitled to rely, and, upon the other hand, cases in which the surety is relieved regardless of any fault in the creditor simply because, through the failure of the principal liability, the groundwork of the accessory obligation has disappeared, yet I cannot doubt that English law, like the civil law, does not insist upon the fulfilment of the surety's liability where the creditor has become disentitled to the benefit intended to be secured by the principal obligation. In cases in which the bankruptcy law, or the law relating to the winding up of companies, or the law authorizing compromises and schemes of arrangement among shareholders and creditors of companies, absolves the principal debtor from liability, the object is not to disentitle the creditor from the benefit which the principal obligation was intended to secure, but merely to change the nature of his right, in the interests as well of himself as of all others who have claims of like degree against the debtor. Once it is decided, as upon the authority of

(1) (1904) 2 C.L.R. 198, at pp. 202, 211.
(2) (1874) L.R. 10 Ex. 10.
(3) (1877) W.N. 211.
(4) (1894) 64 L.J. Q.B., at p. 396.
(5) (1872) L.R. 7 C.P. 372, at p. 377.
(6) (1905) 2 K.B. 307, at pp. 309, 310.

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Rich J.

Mayson v. *Clouet* (1) I think it must be decided, that as between purchaser and vendor the vendor cannot retain, let alone recover, an overdue instalment of purchase money after the contract has come to a premature end even by his own fault, I think it follows that no guarantee of such an instalment could be enforced by the vendor. I do not see upon what principle a vendor's assignees can stand in any different position. The obligation in this case incurred by the appellants was that of guarantors. I have not been able to see any reason for treating it as an independent, as opposed to a collateral, obligation. It secures the same sum of money: it is described as a guarantee and, to the knowledge of the creditor, as between the appellants and the purchasers, the purchasers' liability was primary and the appellants' secondary. Of course there was nothing to prevent a contract being made between the appellants and the respondent imposing upon the latter an absolute liability to pay the sum of £1,000 whatever happened as between the respondent and the purchasers, but it would be contrary to principle, I think, to treat a document described as a guarantee, by which due payment of a sum described as an instalment is guaranteed, as having such an independent and absolute operation.

I think the appeal should be allowed and judgment entered for the defendants.

STARKE J. This was an action upon a guarantee under seal, dated 19th February 1930, in the following terms: "In consideration of Dennys Lascelles Limited Geelong agreeing to postpone payment of the sum of one thousand pounds the instalment now due under the contract of sale made between C. H. Besley and others with E. W. Dunkley and the Rye Grazing Company Proprietary Limited and the benefit of which has now been assigned to Dennys Lascelles Limited until the twenty-fourth day of January 1931 We John McDonald and Arthur Henry Holdsworth . . . being two of the directors of the said Rye Grazing Company Proprietary Limited do hereby jointly and each of them separately guarantee to Dennys Lascelles Limited the due payment by the said E. W. Dunkley and the Rye Grazing Company Proprietary Limited of the said sum

(1) (1924) A.C. 980.

of one thousand pounds on the said twenty-fourth day of January 1931." Besley and others, by a contract of sale dated 23rd June 1927, had sold certain lands to Dunkley and the company for £23,462. The deposit on the sale was £6,000, and the balance was to be met by payments of £1,000 on 24th January in each of the years 1928, 1929 and 1930, and of £14,462 on 24th January 1931. The conditions of sale provided for forfeiture of the deposit and rescission of the contract in case the purchasers made default in payment of the purchase money or any part of it, and that time should be considered of the essence of the contract. By an assignment dated 14th August 1929, Besley and others, in consideration of the sum of £2,000, assigned to Dennys Lascelles Ltd. all that the said contract of sale of 23rd June 1927 and all their right, title, benefit, advantage, property, claim and demand whatsoever in or to the same and in the property therein and the moneys then or thereafter payable thereunder. Notice of this assignment was given to Dunkley and the Rye Grazing Co. Pty. Ltd., the purchasers named in the contract of sale. These purchasers did not pay the instalment of £1,000 falling due under the contract on 24th January 1930, and an arrangement was made, extending the time to 24th January 1931, upon the execution of the guarantee above mentioned. But the purchasers did not pay this instalment on 24th January 1931, or the balance of the purchase money, £14,462, due under the contract on that date. And on 5th June 1931 Dennys Lascelles Ltd. brought this action on the guarantee above set forth. At this time, their right to recover was perfectly clear. But on 19th June 1931 the purchasers, though in default, having discovered that a contract of sale under which their vendors had acquired the land sold to them (the purchasers) had been rescinded for non-payment of purchase money, intimated that they treated their contract as at an end, because their vendors, and the assignee, Dennys Lascelles Ltd., were no longer able, ready or willing to complete the contract.

I do not stay to consider whether the purchasers had any right so to rescind the contract, for their vendors and Dennys Lascelles Ltd. accepted the renunciation and acted as if the contract were ended. The rescission of the contract, however, did not operate to extinguish it *ab initio*, but *in futuro*, so as to discharge obligations

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under it unperformed (*Salmond and Winfield, Law of Contracts*, (1927), p. 320). It is of no little importance in the present case to ascertain the consequences of the rescission. The precise terms of the contract often determine those consequences. But, apart from any special stipulations of the contract, I apprehend that a purchaser who is not himself in default is discharged from further performance of the contract and is entitled to recover any money paid or property transferred by him thereunder; he is entitled to take proceedings in equity to assert his right and secure restitution, or to sue at law (*Palmer* v. *Temple* (1); *Mayson* v. *Clouet* (2); *Williams* on *Vendor and Purchaser*, 3rd ed. (1923), vol. 2, pp. 1012, 1013). On the other hand, a vendor who is not himself in default is discharged from further performance of the contract, and is entitled to the return of his land the subject matter of the contract, or his interest therein, but is bound to restore any moneys paid or property transferred to him thereunder: the vendor cannot have the land and its value too (*Laird* v. *Pim* (3); *Williams* on *Vendor and Purchaser*, 3rd ed., vol. 2, p. 1013). A deposit paid as security for the completion of the contract stands perhaps in an exceptional position, because the intent of the parties is that, if the contract goes off by default of the purchaser, the vendor shall retain it (*Howe* v. *Smith* (4)). On the other hand, stipulations providing for forfeiture of instalments of purchase money in case of default have been treated as in the nature of a penalty and relief given against them (*In re Dagenham (Thames) Dock Co.*; *Ex parte Hulse* (5); *Kilmer* v. *British Columbia Orchard Lands Ltd.* (6); and cf. *Palmer* v. *Moore* (7)). Relief against forfeiture is no doubt an equitable remedy. But, in the case of a rescission of a contract of sale of land by a vendor, moneys paid under the contract by a purchaser in default that are not forfeited can be recovered at law. That is recognized, I think, in *Palmer* v. *Temple* (1) and in *Ockenden* v. *Henly* (8); and, if it be not a legal remedy, still the equitable remedy is clear and well established. Consequently, after the rescission of the contract, about June 1931,

(1) (1839) 9 Ad. & E. 508; 112 E.R. 1304.
(2) (1924) A.C. 980.
(3) (1841) 7 M. & W. 474, at p. 478, per *Parke* B.; 151 E.R. 852, at p. 854.
(4) (1884) 27 Ch. D. 89.
(5) (1873) L.R. 8 Ch. 1022.
(6) (1913) A.C. 319.
(7) (1900) A.C. 293.
(8) (1858) E.B. & E. 485; 120 E.R. 590.

an action or proceeding for the recovery of the instalment of £1,000, the payment of which had been extended to 24th January 1931, and of the balance of purchase money, could not have succeeded, for the vendors were not entitled to both the land (or their interest therein) and the purchase money. The assignee of the vendors stands in no better position, for it accepted or acted upon the renunciation of the contract as well as the vendors; it cannot be affirmed that it was, after the date of the purchaser's rescission, ever ready or willing to carry out the contract or make title to the property sold.

I now turn to the guarantee. Ex facie, the appellants, McDonald and Holdsworth, contract with the respondent, Dennys Lascelles Ltd., to be responsible to it by way of security for the payment of £1,000 by Dunkley and the Rye Grazing Co. Pty. Ltd. on 24th January 1931. The obligation is that of a surety, and therefore "a collateral obligation postulating the principal liability" of Dunkley and the Rye Grazing Co. Pty. Ltd. And, apart from the express terms of the contract, Dennys Lascelles Ltd. knew that the relationship between the appellants and Dunkley and the Rye Grazing Co. Pty. Ltd was that of surety and principal debtor (*Rouse* v. *Bradford Banking Co.* (1).) A surety, however, is not liable on his guarantee where the principal debt cannot be enforced, because the essence of the obligation is that there is an enforceable obligation of a principal debtor (*De Colyar* on *Guarantees*, 3rd ed. (1897), p. 210). A surety is discharged where the principal debtor is released without his (the surety's) consent. Again, where the principal is entitled to a set-off against the creditor's demand, arising out of the same transaction as the debt guaranteed and in fact reducing that debt, the surety is entitled to plead it in an action by the creditor against the surety alone (*Bechervaise* v. *Lewis* (2)). But the generality of the rule is subject to some modifications. A release in bankruptcy does not discharge a surety, for that is the act of the law (*Ex parte Jacobs*; *In re Jacobs* (3); *In re London Chartered Bank of Australia* (4)). Again, a person who becomes surety for another under a known disability may be treated as the

(1) (1894) A.C. 586.
(2) (1872) L.R. 7 C.P. 372.
(3) (1875) L.R. 10 Ch. 211.
(4) (1893) 3 Ch. 540.

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principal debtor (*Wauthier* v. *Wilson* (1)—the case of an infant), and a person who becomes surety for the repayment of money borrowed by a company beyond its powers has been held liable (*Yorkshire Railway Wagon Co.* v. *Maclure* (2); *Garrard* v. *James* (3)), either because "the obligation of a mere guarantee for a debt can be satisfied by payments by the surety, who may be considered as prepared to lose his right over against the corporation, if the law forbids it to pay" (*Rowlatt, Principal and Surety*, 2nd ed. (1926), p. 166, note (*d*)), or because the surety's liability arises from the failure or omission of the company, from whatever cause, to meet its obligations (*Garrard* v. *James*). The present case, however, stands clear of these modifications of the rule, for there has been no discharge of the obligations of the contract, in bankruptcy or analogous proceedings, and no question of disability or incapacity arises. The principal debt cannot here be enforced owing to the acts of the parties in rescinding the contract of sale. It is true, I think, that the cause of the breakdown in carrying out the contract of sale was the default of the purchasers, Dunkley and the Rye Grazing Co. Pty. Ltd., in payment of the instalment of £1,000 and of the balance of the purchase money on 24th January 1931. The defendants—the sureties—who were directors of the Rye Grazing Co. Pty. Ltd., were no doubt aware of this default, and probably appreciated its consequences, both to the vendors and to their assignee, the plaintiff. But do those facts make it inequitable for the sureties to rely upon the fact that the principal debt is no longer recoverable owing to the rescission of the contract? It does not appear to me that they affect the vital position, which is that the principal debt is no longer enforceable or recoverable, by reason of the rescission of the contract; and the legal consequence of that position is that the sureties are not liable.

The appeal should be allowed.

DIXON J. On 9th March 1925 the registered proprietors of about 1,877 acres of land at Rye sold it, together with some chattels, for a price of about £19,239. Of the price, £3,000 was payable as a

(1) (1911) 27 T.L.R. 582; (1912) 28 T.L.R. 239.

(2) (1881) 19 Ch. D. 478.

(3) (1925) Ch. 616.

deposit, £5,000 by five annual instalments of £1,000 each on 1st April 1926 to 1930, and the balance of £11,239 on 1st April 1931. On 23rd June 1927 the purchasers resold the land for a price of £23,462, of which £6,000 was payable as a deposit, £3,000 by three annual instalments of £1,000 on 24th January 1928 to 1930, and the balance of £14,462 on 24th January 1931. On 14th August 1929 the plaintiff took from the purchasers, who had so resold, an assignment of the second contract and of their right, title, etc., in the property therein. The assignment, which was by deed, recited that upon the first contract the balance of purchase money payable was £12,738 and upon the second, £15,462, a difference of £2,724. The consideration was expressed to be a payment of £2,000 to the assignors. The instrument contained a direction to the vendors under the first contract to transfer the land to the plaintiff or at its direction, but it contained no express requirement that the plaintiff should apply the purchase money receivable under the second contract to the discharge of the first, or should indemnify the assignors in respect of the obligations incurred by them under the first contract.

An instalment of £1,000 fell due under the contract of resale on 24th January 1930, but the purchasers sought a year's postponement from the plaintiff for its payment. The plaintiff agreed to allow payment to stand over until 24th January 1931 when the balance of purchase money fell due, but upon two conditions. The first was that the vendors under the original contract should grant a corresponding extension of time for payment of the instalment of £1,000 payable to them on 1st April 1930 and allow it to stand over for payment until 1st April 1931, when the balance of purchase money under that contract fell due. The second condition was that a guarantee should be given by the defendants, who were directors of the company which was one of the joint purchasers upon the resale. These conditions were complied with and the defendants gave the guarantee now sued upon. It is dated 19th February 1930, is headed "Guarantee," and is under seal. It is expressed to the effect that, in consideration of the plaintiff's agreeing to postpone until 24th January 1931 payment of the sum of £1,000, the instalment then due under the second contract of sale, of which

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the benefit had been assigned to the plaintiff, the defendants, being two of the company's directors, did thereby jointly and severally guarantee to the plaintiff the due payment by the sub-purchasers of the said sum of £1,000 on 24th January 1931.

When the year elapsed the sub-purchasers were unable to pay either the instalment of £1,000 or the balance of purchase money. On 25th February 1931 the plaintiff demanded payment by the defendants under the guarantee, but it also informed the vendors under the original contract that the plaintiff itself had so small an interest in the transaction that it was unlikely that it would decide to pay any further moneys to protect that interest. The defendants admitted their liability under the guarantee but craved time. The balance of purchase money under the second contract was not forthcoming and none was provided for the completion of the first contract on the due date, 1st April 1931. On 16th April 1931 the vendors gave notice of rescission under the first contract as in pursuance of clause 6 of Table A of the Victorian *Transfer of Land Act* 1915, which applied to the contract. The plaintiff or its assignors, in my opinion, had not in the meantime elected either to affirm or to disaffirm or rescind the second contract upon which the sub-purchasers were in default. But on 19th June 1931 the defaulting sub-purchasers purported to rescind it on the ground that, the first contract having been rescinded, no title could be made under the second contract. From this date, at any rate, all parties treated the second contract as at an end. On 9th June 1931 the plaintiff had issued the writ in this action against the defendants to recover the amount of £1,000 under the guarantee.

The defence relied upon by the guarantors is that the liability of the purchasers under the second contract to pay the instalment of purchase money was discharged or determined upon the failure of the contract and that, as their guarantee was secondary or accessory to this principal liability, the obligation incurred under it was likewise discharged or determined. It is apparent from its statement that two questions arise upon this defence, which are separate. The first question raised by it is whether the collapse or failure of the second contract did entirely relieve the purchasers from paying the instalment of £1,000. If the purchasers' obligation to pay the

instalment was discharged, the second question arises, namely, whether thereupon the defendants ceased to be liable under their guarantee.

Even if it arose apart from the second question, the first could not be answered satisfactorily without some examination of the nature of the liability incurred by a purchaser under an agreement to prepay before conveyance part of the purchase money and of the responsibility of the vendor to repay instalments so prepaid when the contract comes to an end and no conveyance is to be made. But, in addition, it will be found material to the second question to ascertain the principle upon which the purchasers' liability is discharged; because it is evident that a surety might remain responsible for a debt which simply ceases to be recoverable by legal process from the principal debtor, while his responsibility would terminate if the principal obligation were annihilated upon grounds going to the just right to the enjoyment of the sum in question as between the parties to the primary contract. It thus appears necessary to consider with some degree of exactness what are the material rights and obligations of vendor and purchaser with respect to instalments. It must be borne in mind that the instalment in dispute was overdue when the contract came to an end. According to the terms of the contract, it was originally due and payable on 24th January 1930. Was it then recoverable as a sum certain in money? Convincing reasons for an affirmative answer have been given in Victoria and in New Zealand. Sir *John Salmond* has stated the principles determining this conclusion:— "As a general rule, on the failure or refusal of a purchaser to complete an executory contract for the purchase of land the vendor is not entitled to sue for the purchase money as a debt. He is entitled merely to sue for specific performance or for damages for the loss of his bargain. It is only when the contract has been completed by the execution and acceptance of a conveyance that unpaid purchase money may become a debt and can be recovered accordingly. This general rule is sufficiently illustrated and established by the case of *Laird* v. *Pim* (1). The sale of land is in this respect similar to the sale of goods. In the case of goods sold and delivered, and

(1) (1841) 7 M. & W. 474; 151 E.R. 852.

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of goods bargained and sold, the property in each case having passed to the buyer, the seller's remedy is to sue for the price. But if under any executory contract the buyer wrongfully refuses to accept the goods the seller's only remedy is an action for damages. The general rule, however, that in an executory contract for the sale of land the vendor cannot sue for the price is excluded whenever a contrary intention is shown by the express terms of the contract. And it seems established by authority that a contrary intention is sufficiently shown in all cases in which by the express terms of the contract the purchase money or any part thereof is made payable on a fixed day, not being the agreed day for the completion of the contract by conveyance. In all such cases the purchase money or such part thereof becomes, on the day so fixed for its payment, a debt immediately recoverable by the vendor irrespective of the question whether a conveyance has been executed and notwithstanding the fact that the purchaser may have repudiated his contract. Notwithstanding such repudiation the vendor is not bound to sue for damages or specific performance, but may recover the agreed purchase money" (*Ruddenklau* v. *Charlesworth* (1)). In *Reynolds* v. *Fury* (2), the Full Court of Victoria, after a very full examination of the authorities, decided that instalments of purchase money, which, by the conditions of a contract of sale of land are payable at fixed times before conveyance, become immediately recoverable as debts or liquidated demands, notwithstanding that the sale has not yet been completed by conveyance.

From this it follows that after 24th January 1930, subject to the vendors' agreement to forbear between a date about 18th March 1930, when the conditions stipulated for their forbearance were complied with, and 24th January 1931, the instalment might have been recovered from the sub-purchasers as a liquidated demand. Did the subsequent discharge of the second contract relieve the sub-purchasers of this liability? When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties

(1) (1925) N.Z.L.R. 161, at pp. 164, 165.

(2) (1921) V.L.R., at p. 17; 42 A.L.T., at p. 123.

are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected. When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be, to the position they occupied before the contract was made. But when a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach. (See *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1); *Hirji Mulji* v. *Cheong Yue Steamship Co.* (2); *Cornwall* v. *Henson* (3); *Salmond and Winfield, Law of Contracts*, (1927), pp. 284-289; *Morison, Principles of Rescission of Contracts* (1916), pp. 179, 180.) It does not, however, necessarily follow from these principles that when, under an executory contract for the sale of property, the price or part of it is paid or payable in advance, the seller may both retain what he has received, or recover overdue instalments, and at the same time treat himself as relieved from the obligation of transferring the property to the buyer. When a contract stipulates for payment of part of the purchase money in advance, the purchaser relying only on the vendor's promise to give him a conveyance, the vendor is entitled to enforce payment before the time has arrived for conveying the land; yet his title to retain the money has been considered not to be absolute but conditional upon the subsequent completion of the contract. "The very idea of payment falls to the ground when both have treated the bargain as at an end; and from that moment the vendor holds the money advanced to the use of the purchaser" (*Palmer* v. *Temple* (4)). In *Laird* v. *Pim* (5), *Parke* B. says: "It is clear he cannot

(1) (1888) 39 Ch. D. 339, per *Bowen* L.J., at p. 365.
(2) (1926) A.C. 497, per Lord *Sumner*, at p. 503.
(3) (1899) 2 Ch. 710, at p. 715 (reversed, C.A., (1900) 2 Ch. 298).
(4) (1839) 9 Ad. & E. at pp. 520, 521; 112 E.R., at p. 1309.
(5) (1841) 7 M. & W., at p. 478; 151 E.R., at p. 854.

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have the land and its value too" ; the case, however, was one in which conveyance and payment were contemporaneous conditions (see *Laird* v. *Pim* (1)). It is now beyond question that instalments already paid may be recovered by a defaulting purchaser when the vendor elects to discharge the contract (*Mayson* v. *Clouet* (2)). Although the parties might by express agreement give the vendor an absolute right at law to retain the instalments in the event of the contract going off, yet in equity such a contract is considered to involve a forfeiture from which the purchaser is entitled to be relieved (see the judgment of *Long Innes* J. in *Pitt* v. *Curotta* (3)). The view adopted in *In re Dagenham (Thames) Dock Co.* ; *Ex parte Hulse* (4) seems to have been that relief should be granted, not against the forfeiture of the instalments, but against the forfeiture of the estate under a contract which involved the retention of the purchase money : and this may have been the ground upon which Lord *Moulton* proceeded in *Kilmer* v. *British Columbia Orchard Lands Ltd.* (5), notwithstanding the explanation of that case given in *Steedman* v. *Drinkle* (6) and *Brickles* v. *Snell* (7). However, these cases establish the purchaser's right to recover the instalments, other than the deposit, although the contract is not carried into execution. If a vendor under a contract containing an express power to forfeit instalments at first determined the contract and retained the instalments but afterwards resiled from his former election to treat the contract as discharged and insisted that, if the purchaser was unwilling to forfeit his instalments according to the tenor of the agreement, he should at least carry out the sale, perhaps the purchaser as a term of equitable relief against forfeiture would be required to carry out his contract. But, where there is no express agreement excluding the implication made at law, by which the instalments become repayable upon the discharge of the obligation to convey and the purchaser has a legal right to the return of the purchase money already paid which makes it needless to resort to equity and submit to equity as a condition of obtaining relief, the

(1) (1841) 7 M. & W., at p. 480 ; 151 E.R., at p. 855.
(2) (1924) A.C. 980.
(3) (1931) 31 S.R. (N.S.W.) 477, at pp. 480-482.
(4) (1873) L.R. 8 Ch. 1022.
(5) (1913) A.C. 319.
(6) (1916) 1 A.C. 275.
(7) (1916) 2 A.C. 599.

vendor appears to be unable to deduct from the amount of the instalments the amount of his loss occasioned by the purchaser's abandonment of the contract. A vendor may, of course, counter-claim for damages in the action in which the purchaser seeks to recover the instalments.

In the present case, the contract of resale contains no provision for the retention or forfeiture of the instalments. If, therefore, the instalment originally due on 24th January 1930 had been paid by the purchasers to the vendors, they would, in my opinion, have been entitled to recover it from the vendors. The right so to recover it is legal and not equitable. It arises out of the nature of the contract itself. This would be so even if the second contract was rescinded by the vendors upon the purchasers' default. If in the present case the purchasers' claim to rescind this contract were justified, an instalment already paid would have been recoverable as on an ordinary failure of consideration. But, if the difference be material, I am disposed to think that the purchasers' claim to rescind was not, in the circumstances, well founded and that the second contract should be treated as discharged by the vendors' acceptance of the repudiation by the purchasers involved in their attempt to rescind. It appears to me inevitably to follow from the principles upon which instalments paid are recoverable that an unpaid overdue instalment ceases to be payable by the purchasers when the contract is discharged. The fact that the contract was assigned does not increase or vary the purchasers' liabilities under it, and, accordingly, I think that the purchasers upon the sub-sale ceased to be liable for the instalment guaranteed.

The second question remains, namely, whether the cesser of the sub-purchasers' liability for the instalment of £1,000 operates to discharge the sureties. Their liability had, like that of the sub-purchasers, become immediately enforceable, and it is said that it could not be discharged by a subsequent failure of the obligation guaranteed. The consequences of the dissolution of the principal obligation are described in *Pothier* on *Obligations*, *Evans*' translation (1806), vol. I., p. 235, as follows:—"It results from the definition of a surety's engagement, as being accessory to a principal obligation, that the extinction of the principal obligation necessarily induces

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that of the surety; it being of the nature of an accessory obligation, that it cannot exist without its principal; therefore, wherever the principal is discharged, in whatever manner it may be, not only by actual payment or a compensation, but also by a release, the surety is discharged likewise; for the essence of the obligation being, that the surety is only obliged on behalf of a principal debtor, he therefore is no longer obliged, when there is no longer any principal debtor for whom he is obliged." In the civil law this general proposition is subject to qualifications and exceptions, but it formulates a leading principle. As a general principle, subject to similar qualifications and exceptions, it appears to be well recognized in English law, although it is evidenced by decisions giving it particular applications and by dicta rather than by formal pronouncements (*Lakeman* v. *Mountstephen* (1), *Bechervaise* v. *Lewis* (2), *Finch* v. *Jukes* (3), *Mortgage Insurance Corporation* v. *Pound* (4), *Stacey* v. *Hill* (5), and *Morris & Sons Ltd.* v. *Jeffreys* (6)). It does not extend to a discharge of the principal debtor's personal liability by operation of law when the discharge is for the purpose of liquidating his affairs or transforming the rights of the creditor against him into rights against or in respect of his assets. The doctrine should be understood to look rather to the continuance of a just claim in the creditor to receive payment in respect of the principal debtor's obligation than to the latter's relief from actual personal liability.

In the present case, not only is the principal debtor relieved from personal liability to pay the instalments but the vendors' just title both to obtain and to retain the instalment altogether ceases. If there had been no assignment and if the instalment had been duly paid, it would have become the vendors' duty to repay it. It is, perhaps, uncertain whether, if the payment of the instalment had been duly made to the plaintiff, as assignee, the liability to repay it would have fallen upon it or upon its assignors, the vendors, because it is not clear that the obligation to repay it does not arise out of contractual implications by which the assignee would not be bound,

(1) (1874) L.R. 7 H.L. 17, per Lord *Selborne*, at p. 24.
(2) (1872) L.R. 7 C.P. 372, per *Willes* J., at pp. 377, 378.
(3) (1877) W.N. 211, per *Hall* V.C.
(4) (1894) 64 L.J. Q.B., per *Wright* J., at p. 396.
(5) (1901) 1 Q.B. 660, per *Collins* L.J., at p. 666.
(6) (1932) 148 L.T. 56, per *Swift* J., at p. 58.

as distinguished from an independent duty springing simply from the receipt of the money and the subsequent discharge of the contract. But, when the money has not been reduced into possession, the assignee's right to recover it is precisely that of the vendors and is affected by exactly the same considerations. The plaintiff, therefore, became disentitled to recover and enjoy the instalment. If the guarantors were liable to pay the instalment, they would in equity be entitled to resort for indemnity to the principal debtors, who, upon payment, would apparently be entitled to recover the instalment from either the vendors or the plaintiff, the assignee of the contract. If they could recover from the vendors, the latter might or might not be able to resort to the assignee according to the actual nature of the transaction between them. But, in any case, if the contract of guarantee is a secondary or accessory obligation for the performance of the principal obligation to pay the instalment, and contains no exceptional promise or condition, it follows that it was discharged.

The judgment appealed from, however, treats the case as depending upon very special facts and as much affected by the construction to be given to the guarantee in the light of the circumstances existing at the time. I have been unable to find, either in the terms of the instrument or in the surrounding circumstances, any sufficient reason for considering the promise of the defendants anything other than a collateral or secondary undertaking securing the fulfilment of the principal or primary liability under the contract. The fact that the promisee, the plaintiff, was assignee of the principal obligation does not appear to me a reason for treating the guarantee as a detached or independent liability. The consideration that the discharge of the principal obligation did not proceed from any act or default of the creditor is not, in my opinion, an answer to the consequential discharge of the accessory liability of the surety, because the case is one in which at law and in equity the creditor became disentitled to the benefit or advantage the principal obligation was designed to give him. The contention, apparently adopted by *Cussen* A.C.J., that the result would be the same as it would be if the defendants had paid the money and were seeking to get it back, I also have assumed to be correct, except that I have, for the reasons given,

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considered it unnecessary to decide whether the defendants should have recourse in such an event to the assignors or to the assignee. But, proceeding upon this assumption, I think the defendants could have recovered the instalment thus supposed to be paid from one or the other. The conduct of the purchasers in bringing about the destruction of both transactions through their failure to pay the balance of purchase money under the second contract does not, upon the cases, disentitle them from recovering the instalments other than the deposit, and I, therefore, do not see how it can give rise to equitable considerations which preclude the guarantors, whose participation in the default of the purchaser company was only in the character of directors, from relying upon the ordinary doctrines affecting their liability as sureties.

For these reasons I am of opinion that the appeal should be allowed.

EVATT J. The present appellants, J. McDonald and A. H. Holdsworth, were the sole directors of a company called Rye Grazing Co. Pty. Ltd. The respondent is the assignee of the persons named as vendors in a contract of sale dated June 23rd, 1927, by which Besley and others agreed to sell certain lands to Rye Grazing Co. Pty. Ltd. and one E. W. Dunkley. Under the terms of this contract the purchasers were obliged to pay Besley and others on January 24th, 1930, the sum of £1,000, and on January 24th, 1931, the balance of purchase money, £14,462.

Under the assignment mentioned, which was dated August 14th, 1929, the respondent paid £2,000 to Besley and others, and acquired the benefit of the moneys thereafter payable by Rye Grazing Co. Pty. Ltd. and E. W. Dunkley under the contract of sale. But the amount of £1,000 which became due to Besley and others on January 24th, 1930, was not paid. After much entreaty on behalf of those in default, the respondent accepted a document dated February 19th, 1930, instead of taking steps to enforce its rights by action. Besley and others took no part in the transaction.

The document signed by the two appellants was in the following terms :—

> " In consideration of Dennys Lascelles Limited Geelong agreeing to postpone payment of the sum of one thousand pounds the instalment now due under

the contract of sale made between C. H. Besley and others with E. W. Dunkley and the Rye Grazing Company Proprietary Limited and the benefit of which has now been assigned to Dennys Lascelles Limited until the twenty-fourth day of January 1931 We John McDonald and Arthur Henry Holdsworth both of Lansell Road Toorak graziers being two of the directors of the said Rye Grazing Company Proprietary Limited do hereby jointly and each of them separately guarantee to Dennys Lascelles Limited the due payment by the said E. W. Dunkley and the Rye Grazing Company Proprietary Limited of the said sum of one thousand pounds on the said twenty-fourth day of January 1931. Dated the nineteenth day of February 1930."

On January 24th, 1931, the Rye Grazing Co. Pty. Ltd. and Dunkley made further default in payment of the £1,000, and, suing the appellants upon their written undertaking, the respondent obtained judgment in the Supreme Court of Victoria. From that judgment the present appeal is brought.

The appellants' case necessarily depends upon matters which occurred subsequently to January 24th, 1931. These, they say, discharged their prima facie liability to pay £1,000 to the respondent under the agreement.

It appears that the Rye Grazing Co. Pty. Ltd. and Dunkley defaulted, not only in respect of the £1,000, but also in respect of the balance of £14,462 which on January 24th, 1931, became payable to Besley and others under the contract of sale. It is obvious that it was this default which prevented Besley and others from being able, on April 1st, 1931, to meet their obligation to pay the balance of £12,238 to the original vendors, Johnson and others. After this further default, the latter gave Besley and others a notice dated April 16th, 1931, purporting to rescind the original contract of sale. The conclusion of *Cussen* A.C.J., that the default of Rye Grazing Co. Pty. Ltd. and Dunkley caused the subsequent default, is quite unimpeachable. Long before that time, however, the respondent, on February 25th, 1931, wrote to the solicitors for the appellants and for Rye Grazing Co. Pty. Ltd. in the following terms :—

"We are acting for Dennys Lascelles Ltd. in this matter. The company has instructed us to compel Messrs. John McDonald and Arthur H. Holdsworth to carry out the terms of their guarantee of 19th February 1930. Under this document Messrs. McDonald and Holdsworth guaranteed the due payment by Mr. Dunkley and the Rye Grazing Company of the sum, of £1000 on 24th January, 1931. The balance of the purchase money payable by Mr. Dunkley and the Rye Grazing Company fell due on 24th January last. We are instructed that it has not been paid and that no arrangements have been made with the

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company for an extension of the time for payment. Will you kindly let us hear from you on the subject. The balance of the purchase money payable by Messrs. Besley and others to the original vendors falls due on 1st April next."

In the letter of reply dated February 27th, 1931, it was stated, *inter alia* :—

"*Messrs. McDonald and Holdsworth have no intention of disputing an obligation for which they are personally liable*, but so that the whole question of the payment of the moneys due, both to the original vendors Messrs. Johnson Bros. and to your client could be dealt with at the same time, we suggested that your client should defer its request until the 1st April next."

(I italicize certain words). The answer of the respondent dated March 3rd, 1931, was :—

"We have referred your letter of the 27th ult. to Dennys Lascelles Ltd. Our client desires Messrs. McDonald and Holdsworth to pay the sum of £1,000 in terms of the guarantee. The company also wishes to know what arrangements are being made with the original vendors ; only a few weeks will elapse before 1st April when the final balance falls due. Kindly let us hear from you at once, as our instructions are definite to press this matter."

On May 1st, 1931, the respondent again demanded payment of the £1,000, and once again there was a humble request, dated May 2nd, "not to take any precipitate action." On May 5th, 1931, the respondent ceased to yield further to the importunity of the appellants, and issued a writ, commencing the Supreme Court action for payment of £1,000.

Although the appellants had denied any intention of disputing their liability to pay £1,000 to the respondent, their conduct after action brought belied them. On June 12th, they procured an option, expiring on June 30th, to purchase the property for £11,000. On June 19th and June 26th respectively, the Rye Grazing Co. Pty. Ltd. and Dunkley wrote letters to the respondent and to Besley and others, purporting to rescind the contract of purchase. The reason given was the rescission on April 16th, by Johnson and others, of the original contract with Besley and others. On June 20th Johnson Brothers were placed in possession of the land by the present appellants and their company.

It is argued for the appellants that all the obligation of Rye Grazing Co. Pty. Ltd. and Dunkley under their agreement with Besley and others "came to an end" by June 26th, that, by that time also, the liability of the Rye Grazing Co. Pty. Ltd. and Dunkley

to pay £1,000 to the respondent company "came to an end," and that the appellants' existing indebtedness under the guarantee also "disappeared." *Cussen* A.C.J. rejected this reasoning, and in my opinion he was right.

I assume in favour of the appellants that the guarantee should not be construed as promising the absolute payment by the appellant of £1,000 on January 24th, 1931, or even as promising such payment if on January 24th, 1931, Dunkley and the company (of which the appellants were directors) were still liable to pay the instalment then becoming due. As a consequence, I assume that the events taking place after January 24th, 1931, can be looked at in order to see whether the appellants have been relieved of the fully accrued obligation to pay the £1,000 to the respondent.

In my opinion there is nothing in those events sufficient to achieve such a purpose. First of all we find that the appellants, upon being called upon to pay the £1,000 to the respondent, affirmed their intention of paying and emphatically stated that they had no intention of disputing their liability. This representation was made at a time when the respondent was in a position to collect the £1,000 by recovering immediate judgment in proceedings to which the appellants would have no possible answer. It is clear that the respondent refrained from action largely because of this new undertaking to pay. As *Rowlatt* J. has pointed out,

> "if on being applied to the surety gives a new undertaking to pay, as a note of his own or a covenant by himself, or makes an arrangement by which the creditor is to work out satisfaction from securities provided by the surety, he may be held to have come under a principal liability to pay, and will not be discharged by dealings between the creditor and the original principal" (*Rowlatt* on *Principal and Surety*, 2nd ed. (1926), p. 259).

What *Cussen* A.C.J. calls the "breakdown" was directly caused by the default in the enormous sum of £14,462 by the company of which the appellants were directors. Further, after this action was instituted on June 5th, 1931, the appellants continued their manœuvre to evade the payment of the present £1,000 by procuring a factitious "rescission" of their company's contract, although its previous default alone prevented Besley and others from meeting their obligations to the original vendors. In the absence of any argument as to the quantum of damages, I refrain from any attempt

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to measure the liability to the respondent of the appellants' company by reason of the defaults of January 24th, 1931, which defaults not only prevented the respondent from paying Besley and others in the following April and completing the transaction but also led directly to the claim, an impudent one in the circumstances, that the respondent (and Besley and others) had itself repudiated its obligations to the appellants' proprietary company. I am by no means satisfied that the evidence is sufficient to show that the contract between Besley and others on the one hand and Rye Grazing Co. Pty. Ltd. and E. W. Dunkley on the other was duly rescinded. It is quite certain that those who first repudiated it were the latter and they are liable in damages to the former. In such circumstances it may not be possible to treat the instalment of £1,000 in complete abstraction from the liability, necessarily heavy, to pay damages for breach.

I am of opinion that the appellants have not shown any sufficient grounds for the alleged " disappearance " of their accrued liability under the guarantee and that their subsequent course of conduct precludes them from relying upon the supposed rescission of the contract of sale between the original principal debtor and the respondent company's assignor.

The judgment of *Cussen* A.C.J. was right and the appeal should be dismissed with costs.

McTIERNAN J. The appeal should, in my opinion, be allowed. I agree with the judgment of my brother *Dixon*.

Appeal allowed with costs. Judgment of Cussen A.C.J. discharged and judgment entered for defendants with costs.

Solicitors for the appellants, *Shaw & Turner*.

Solicitors for the respondent, *Aitken, Walker & Strachan*.

H. D. W.