[HIGH COURT OF AUSTRALIA.]

McLEAN . . . . . APPELLANT;
PLAINTIFF,

AND

DISCOUNT AND FINANCE LIMITED AND OTHERS . . . . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1939.

SYDNEY, *Aug.* 4, 8-11; *Dec.* 13.

Latham C.J., Rich, Starke, Evatt and McTiernan JJ.

Guarantee—Default of principal debtors—Independent sureties—Bonds deposited with creditor by one surety—Sale—Proceeds credited to suspense account—Balance of indebtedness paid by co-surety—"Payment"—Contribution—Moratorium legislation—Moratorium Act 1930-1931 (*N.S.W.*) (*No.* 48 *of* 1930—*No.* 66 *of* 1931), *secs.* 2, 16—*Moratorium Act* 1932-1937 (*N.S.W.*) (*No.* 57 *of* 1932—*No.* 3 *of* 1937), *secs.* 2, 6, 14A, 20, 41.

The plaintiff guaranteed the liability of a firm to a bank by the execution of a letter of lien over Commonwealth bonds which were deposited with the bank. Authority was given to the bank to sell the bonds and to apply the proceeds in discharge of the firm's indebtedness. The principal debtor having made default, the bank, with the consent of the plaintiff, sold the bonds, and, on 19th August 1932, without the knowledge of the plaintiff, credited the proceeds to a suspense account. Thereafter interest on the amount of such proceeds was not credited to the suspense account nor debited to the principal debtors' account. On 23rd February 1937 a co-surety paid to the bank a sum of money which together with the sum in the suspense account amounted to the full amount of the firm's indebtedness to the bank, and certain documents given by the co-surety to the bank in respect of the guarantee were cancelled. After the commencement of a suit brought by the plaintiff against the co-surety for contribution the bank credited the principal debtor's account with the amount at the credit of the suspense account and thus closed the latter account. The defence was raised in the suit that the amount at the credit of the suspense account could not be treated as paid before the commencement of the suit.

Held, by *Rich*, *Starke*, *Evatt* and *McTiernan* JJ., (*Latham* C.J. not deciding), that payment had been made and the proceeds of the bonds applied in discharge of the principal debt before the commencement of the suit. *Per Rich* and *McTiernan* JJ.: Payment was made when the proceeds of the bonds were carried to a suspense account on 9th August 1932. *Per Starke* and *Evatt* JJ.: There was a final and definite appropriation of the proceeds of the sale of the bonds towards the payment of the guaranteed debt on 23rd February 1937.

Held, also, by *Starke*, *Evatt* and *McTiernan* JJ., (*Latham* C.J. dissenting, and *Rich* J. not deciding), that a surety whose liability is secured and therefore postponed by the New-South-Wales moratorium legislation is not precluded from recovering from a co-surety contribution in respect of a payment made to the principal creditor by reason of the fact that such payment was made before the date to which the liability was postponed.

Decision of the Supreme Court of New South Wales (*Nicholas* J.) reversed.

APPEAL from the Supreme Court of New South Wales.

A suit by way of statement of claim was brought in the equitable jurisdiction of the Supreme Court of New South Wales by William King McLean to enforce contribution from one of the defendants, Discount and Finance Ltd., as his co-surety, in respect of a debt owed to the National Bank of Australasia Ltd. by the other three defendants, Walter George Melbourne Wall, Eric Vernon Wall and Raymond William Rothwell, who traded as a firm under the name of George Wall, which firm, however, was insolvent.

There was not any appearance to the statement of claim entered by or on behalf of any of these last-mentioned three defendants.

McLean in his statement of claim in its original form claimed actual payment of contribution from Discount and Finance Ltd. upon the basis that he, McLean, was liable as surety to the amount of £3,000 and Discount and Finance Ltd. to the amount of £5,000. The debt of the firm for which the sureties were actually made liable was £7,772 17s. 3d., which included interest and bank charges.

Before 3rd December 1930 Discount and Finance Ltd. became surety to the bank for the indebtedness of the firm of George Wall to a fixed amount.

On 3rd December 1930 McLean guaranteed the liability of the members of the firm of George Wall to the bank by the execution of a letter of lien under seal over Commonwealth bonds, which were deposited by McLean with the bank. By this document McLean charged the bonds with the amount of the firm's liability and gave the bank authority to sell the bonds and to apply the proceeds in discharge of the firm's indebtedness.

On 15th December 1930 the principal debtors made default.

H. C. OF A. 1939.

McLEAN v. DISCOUNT AND FINANCE LTD.

The bank, on 9th August 1932, sold the bonds deposited by McLean for the sum of £2,936 16s. 3d. and paid the sum into a suspense account in the name of "George Wall, W. K. McLean Treasury Bonds, Manager's Suspense Account." The bank treated the overdraft liability of the firm as reduced by the amount placed in the suspense account and charged interest only on the balance of the overdraft.

On 23rd February 1937 Discount and Finance Ltd. paid to the bank a sum of money which together with the sum placed in the suspense account amounted to the full overdraft liability of the firm to the bank. On or about this date Discount and Finance Ltd.'s guarantee was cancelled by the bank.

After the institution of this suit McLean forwarded to the bank a letter, witnessed by a solicitor, wherein he stated that he ratified and confirmed the action of the bank in appropriating the proceeds of sale of his bonds towards payment of the indebtedness of the firm.

The *Moratorium Act* 1930 (N.S.W.) came into operation on 19th December 1930, and was repealed by the *Moratorium Act* 1932, which came into operation on 21st December 1932.

When the matter came on for hearing McLean discovered that Discount and Finance Ltd. had on 28th November 1929 guaranteed the firm to the extent of £10,000 and the claim was amended accordingly, contribution being claimed on the basis that Discount and Finance Ltd. should bear ten thirteenth parts of the liability and not only five eighth parts thereof as originally claimed.

Nicholas J., by whom the suit was heard, found as a fact that the amount for which Discount and Finance Ltd. was liable had not been reduced from £10,000 to £5,000 as claimed by that company, and he held that McLean had not, before action brought, actually paid any moneys to the bank. An amendment was allowed to introduce a *quia timet* claim for a declaration of liability of Discount and Finance Ltd. and an order for payment within a time to be fixed by the court.

The judge held that, having regard to the provisions of the *Moratorium Act* 1932-1936, payment was not made before the institution of the suit and that McLean did not become entitled to contribution on the sale of the bonds. The suit was dismissed, but, having regard to the provisions of sec. 14A (*d*) of the *Moratorium Act* 1932-1936, without prejudice to McLean's right to bring further proceedings for the same relief.

From that decision McLean appealed to the High Court, and Discount and Finance Ltd., on the ground that the suit should have

been dismissed outright, cross-appealed with respect to the liberty given to institute further proceedings.

Further facts appear in the judgments hereunder.

Williams K.C. (with him *Beale*), for the appellant. The basis of the equitable doctrine of contribution as between co-sureties is not that payment must have been made necessary but that one surety must have contributed more than his proper proportion of the debt (*Dering* v. *Earl of Winchelsea* (1)). The appropriation of the proceeds of the sale of the appellant's bonds, namely, £2,936 16s. 3d., which had been paid into a suspense account, to the overdraft account on 9th August 1932, in that the latter account was reduced on that date by that sum in calculating interest on the overdraft account, was sufficient to give the appellant a vested right to payment of the contribution against the respondent company in the same way as if that sum had in fact been paid into the overdraft account, because on the date mentioned (i) the bank got the benefit of the sum; (ii) the overdraft account benefited *qua* interest as if the sum had been paid into it; and (iii) the appellant could not recover any part of the sum from the bank because the whole of it was charged with the appellant's liability under his guarantee. As to payment, see *Reade* v. *Lowndes* (2) and *Hall* v. *Hutchons* (3). At all times the bank treated the amount in the suspense account as being set off against the overdraft account. As to set-off under sec. 40 of the *Moratorium Act* 1932-1937, see *Parkes Property and Stock Co. Ltd.* v. *Perpetual Trustee Co. Ltd.* (4). If that appropriation was not sufficient to give the appellant a vested right to the payment of contribution on 9th August 1932, the events of 23rd February 1937 would be sufficient for that purpose, because on the latter date the bank accepted payment of £4,638 16s. 10d. from the respondent company on the basis that that sum was the balance still owing on the overdraft account after deducting the above-mentioned sum of £2,936 16s. 3d. from that account as from 9th August 1932. If what the bank did on that date was a release of the respondent company, then the appellant is entitled to rely on the authority of *Ex parte Snowden*; *In re Snowden* (5). The rule that a surety cannot recover contribution from another surety until the former has paid more than his proportion of the debt is based upon the principle that the second surety is not to be twice vexed (*Davies* v. *Humphreys* (6); *Dering*

(1) (1787) 1 Cox 318 [29 E.R. 1184].
(2) (1857) 23 Beav. 361, at pp. 367, 368 [53 E.R. 142, at pp. 144, 145].
(3) (1833) 3 My. & K. 426 [40 E.R. 162].
(4) (1936) 36 S.R. (N.S.W.) 457; 53 W.N. (N.S.W.) 185.
(5) (1881) 17 Ch. D. 44, at pp. 48, 49.
(6) (1840) 6 M. & W. 153, at pp. 168-170 [151 E.R. 361, at pp. 367 368].

H. C. OF A. 1939. McLEAN v. DISCOUNT AND FINANCE LTD.

v. *Earl of Winchelsea* (1); *White and Tudor's Leading Cases in Equity*, 9th ed. (1928), vol. 2, pp. 488, 490, 492, 493). If the events referred to above did not give the appellant such a vested right to payment of contribution, the appropriate inferences to be drawn from the events of 23rd February 1937 are: (*a*) that the bank accepted the sum of £4,638 16s. 10d. from the respondent company on the basis that it held the appellant responsible for the payment of the balance, namely, £2,936 16s. 3d., and (*b*) that the bank discharged the securities given by the respondent company and by the respondent partnership but did not give a formal release. The liability of the respondent company under its guarantee to the extent of £10,000 was not reduced or varied. The only inference that can be drawn from these events is that the bank discharged the respondent company but intended to retain its rights against the appellant for the balance. The bank must therefore be deemed to have discharged the respondent company on the basis that it reserved its rights to recover that sum from the appellant (*Ex parte Gifford* (2); *Watters* v. *Smith* (3); *Ex parte Good*; *In re Armitage* (4); *In re E.W.A.* (5); *White and Tudor's Leading Cases in Equity*, 9th ed. (1928), vol. 2, p. 547). The position, therefore, is that after 23rd February 1937 the bank was still entitled to recover from the appellant the whole of the sum of £2,936 16s. 3d., and the appellant was still entitled to contribution against the respondent company. He could have enforced this contribution by paying the sum mentioned and suing the respondent company for its share thereof; or by suing *quia timet*, and asking for an order *quia timet* that the respective liabilities of the appellant and the respondent company to pay the balance of the debt be ascertained, and that the respondent company should be ordered to pay the bank its share thereof, or that, upon the appellant paying the bank the whole of the balance, the respondent company should be ordered to recoup to the appellant its share thereof (*Ex parte Snowdon* (6); *Wolmershausen* v. *Gullick* (7); *In re Anderson-Berry*; *Harris* v. *Griffith* (8); *McIntosh* v. *Dalwood* [*No.* 3] (9); *Tate* v. *Crewdson* (10); *Rowlatt* on *Principal and Surety*, 2nd ed. (1926), pp. 239, 240). A surety is entitled to sue *quia timet* in equity as soon as the contingent debt has become an actual debt. The right of a person to bring a *quia-timet* action is discussed in *Ascherson* v. *Tredegar Dry Dock and Wharf Co. Ltd.* (11). A surety's

(1) (1787) 1 Cox, at pp. 321, 322 [29 E.R., at pp. 1185, 1186].
(2) (1802) 6 Ves. 805 [31 E.R. 1318].
(3) (1831) 2 B. & Ad. 889 [109 E.R. 1373].
(4) (1877) 5 Ch. D. 46.
(5) (1901) 2 K.B. 642, at p. 650.
(6) (1881) 17 Ch. D., at p. 48.
(7) (1893) 2 Ch. 514.
(8) (1928) Ch. 290.
(9) (1930) 30 S.R. (N.S.W.) 332, 415; 47 W.N. (N.S.W.) 85, 128.
(10) (1938) Ch. 869.
(11) (1909) 2 Ch. 401, at p. 408.

debt may become an actual debt in several ways (*Craythorne* v. *Swinburne* (1)). In an action between co-sureties, if the principal debtor is before the court it is not necessary to prove his insolvency: here, however, there is ample evidence of insolvency (*Hay* v. *Carter* (2)). If a debt is released as to part and as against one surety is enforced as to part, that surety is entitled, in respect of the part so enforced, to contribution from a co-surety to the extent of the latter's proper proportion of that part (*Walker* v. *Bowry* (3)). There is nothing inconsistent between *Commercial Bank of Australia Ltd.* v. *Official Assignee of the Estate of Wilson & Co.* (4) and *Fahey* v. *Frawley* (5), because when the mortgage was handed over in the latter case it was for the purpose of paying and for the purpose of satisfying the obligations of the surety under his guarantee. If the bank on 23rd February 1937 did absolutely release the respondent company then the rights had crystallized between the parties and the appellant became immediately entitled to contribution. *Ward* v. *National Bank of New Zealand Ltd.* (6) only applies where the liability of the several sureties is still contingent, and has no application after a surety has been called upon to pay more than his fair share of the debt. The ratification or consent given by the appellant to the bank in November 1938 had, under sec. 14A (*d*) of the *Moratorium Act* 1932-1937, a retrospective operation. The only case in which it is stated that a cause of action has to be complete at the date of the institution of the suit is *Attorney-General* v. *Avon Corporation* (7). In a proper case the court should allow supplementary facts to be pleaded (*Eshelby* v. *Federated European Bank Ltd.* (8)).

Teece K.C. and *McKillop*, for the respondent Discount and Finance Ltd.

Teece K.C. A co-surety is not entitled to sue for payment of contribution until he has been under a legally enforceable liability to pay and has in fact paid more than his share of the guaranteed debt (*Rowlatt* on *Principal and Surety*, 2nd ed. (1926), pp. 237 et seq., note *z*; 3rd ed. (1936), pp. 242 et seq., note *o*; *Walker* v. *Bowry* (3)). In cases in which he has not in fact paid more than his share he is entitled to bring a *quia-timet* action for a declaration of his right to contribution and consequential orders only when there has been a judicial adjudication declaring and ascertaining his liability

(1) (1807) 14 Ves. 160, at p. 164 [33 E.R. 482, at pp. 483, 484].
(2) (1935) Ch. 397.
(3) (1924) 35 C.L.R. 48.
(4) (1893) A.C. 181.
(5) (1890) 26 L.R. Ir. 78.
(6) (1883) 8 App. Cas. 755.
(7) (1863) 3 DeG.J. & Sm. 637, at p. 650 [46 E.R. 783, at p. 789].
(8) (1932) 1 K.B. 254, 423.

H. C. OF A. 1939. McLEAN v. DISCOUNT AND FINANCE LTD.

to the principal creditor in an amount in excess of his share of the guaranteed debt (*Story* on *Equity*, 3rd ed. (1920), par. 494a ; *Hanbury's Modern Equity*, 2nd ed. (1937), p. 81 ; *Shepheard* v. *Bray* (1)). A co-surety has no such right when he is only under a liability to pay such excess, whether or not the principal creditor has made demand on him. Even then, to have such a right he must be under a presently enforceable liability to pay ; his debt must not only be *debitum in praesenti* but also *solvendum in praesenti* (*Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.* (2) ; *Leake* on *Contracts*, 7th ed. (1921), p. 50). Whether the appellant did or did not in law pay the bank prior to the institution of the suit, he was not prior to the institution of the suit, nor afterwards, on the date of actual payment, namely, 9th November 1938, presently liable to pay the bank out of his bonds the amount secured by the deposit thereof (*Moratorium Act* 1930 (N.S.W.), secs. 4, 16 (3) ; *Moratorium Act* 1932-1937 (N.S.W.), secs. 2, 7, 9, 18). The word " chattel " as used in the *Moratorium Act* 1930 includes a bond (*Bullock* v. *Dodds* (3)). Even if the putting of the money into a suspense account is ambiguous and capable of two interpretations, the court should accept an innocent interpretation of such action. A co-surety who pays a debt which is not presently enforceable has no right of contribution : he cannot by his own voluntary act accelerate the liability of another co-surety to contribution. A bank has security over moneys in a suspense account (*Commercial Bank of Australia Ltd.* v. *Official Assignee of the Estate of Wilson & Co.* (4)). The bank never exercised its power of sale in respect of the bonds, therefore the appellant could not ratify what had not in fact taken place. If the bank in fact purported to exercise its power of sale what it did was a nullity (*Coroneo* v. *Australian Provincial Assurance Association Ltd.* (5)) : Cf. *Cox* v. *National Bank of Australasia Ltd.* (6) and *Creelman* v. *Hudson Bay Insurance Co.* (7).

[STARKE J. referred to *Gibbs* v. *Messer* (8).]

A surety is not entitled to bring an action for indemnity, a *quia timet* action, against a principal debtor, or a co-surety, if the day of payment has not elapsed (*Ascherson* v. *Tredegar Dry Dock and Wharf Co. Ltd* (9) ; *Nisbet* v. *Smith* (10) ; *Dale and Perry* v. *Lolley* (11)).

(1) (1906) 2 Ch. 235, at p. 253.
(2) (1882) 22 Ch. D. 561.
(3) (1819) 2 B. & Ald. 258 [106 E.R. 361].
(4) (1893) A.C. 181.
(5) (1935) 35 S.R. (N.S.W.) 391, at p. 395 ; 52 W.N. (N.S.W.) 131, at p. 132.
(6) (1931) 31 S.R. (N.S.W.) 410 ; 48 W.N. (N.S.W.) 123.
(7) (1920) A.C. 194.
(8) (1891) A.C. 248.
(9) (1909) 2 Ch., at p. 409.
(10) (1789) 2 Bro. C.C. 579 [29 E.R. 317.
(11) (1808) 2 Bro. C.C. 582, note 2 [29 E.R. 319].

The provisions of the *Moratorium Acts* postpone the obligation to pay. What was done with the appellant's bonds did not until 9th November 1938 amount to payment; therefore he had not paid more than his share and consequently had no claim for contribution. That being so, he did not have an equity to bring a *quia-timet* action, because his liability to pay was not imminent. Allegations in a suit cannot be supported or proved by facts which occurred since the commencement of the suit (*Attorney-General* v. *Avon Corporation* (1); *Evans* v. *Bagshaw* (2); *Eshelby* v. *Federated European Bank Ltd.* (3); *Daniell's Chancery Practice*, 8th ed. (1914), p. 378). If there were no suretyship of a plaintiff at the time the writ was issued he ought not to be allowed, on subsequently becoming a surety, to amend; if he had not overpaid when the writ was issued he cannot be allowed to amend so as to prove an overpayment. The question is irrelevant on a *quia-timet* action, because that depends upon imminence: such an action is solely on the supposition that what had happened before the writ did not in fact amount to payment. Before the appellant paid more than his share, or even before he was under a presently enforceable liability to pay the bank, the bank discharged and released the respondent company from its liability and thereupon deprived the appellant of his right to contribution from the respondent company. After such release the appellant's only redress was against the bank. He was by the release of his co-surety, the respondent company, discharged from his liability to the bank *pro tanto*, that is, to the extent that his right to contribution had been injuriously affected (*Rowlatt* on *Principal and Surety*, 3rd ed. (1936), pp. 282, 283, 293; *Mayhew* v. *Crickett* (4); *Ward* v. *National Bank of New Zealand Ltd.* (5)). The cases cited on this point on behalf of the appellant are irrelevant, because they are all cases which involved joint and joint and several liabilities where, if there had been a release and discharge, the other parties would have been absolutely discharged. *Ex parte Snowdon* (6) does not deal with release by a creditor: See also *Stirling* v. *Burdett* (7). If, however, the foregoing arguments are not accepted, the decision of the court below should be sustained on the ground that prior to the appellant becoming surety the respondent company's liability under the guarantee of 28th November 1929 had been discharged or varied by the agreement of indemnity dated 9th September 1930. Under

(1) (1863) 3 DeG.J. & S., at p. 650 [46 E.R., at p. 789].
(2) (1870) 5 Ch. App. 340.
(3) (1932) 1 K.B., at pp. 258-263.
(4) (1818) 2 Swans. 185, at p. 192 [36 E.R. 585, at pp. 587, 588].
(5) (1883) 8 App. Cas., at p. 766.
(6) (1881) 17 Ch. D. 44; 50 L.J. Ch. 540.
(7) (1911) 2 Ch. 418, at p. 425.

H. C. OF A. 1939.

McLEAN v. DISCOUNT AND FINANCE LTD.

such varied or substituted agreement the respondent company was not a co-surety with the appellant and, therefore, could never be under any liability for contribution; or, alternatively, its liability to contribution, if any, was to pay five eighth parts only of the guaranteed amount (*Reuss* v. *Picksley* (1); *Agar* v. *Biden* (2); *American Surety Co. of New York* v. *Wrightson* (3)). The respondent company having been discharged by the bank from its liability, the appellant's right of contribution has been finally and absolutely determined, and therefore the decree of the court below should not have been without prejudice to the appellant's right to bring further proceedings claiming the same relief.

McKillop. The agreement between the respondent company and the bank based upon the document dated 28th November 1929, was terminated by agreement between the parties based on the offer comprised in the document dated 10th September 1930 and the bank's acceptance of the offer by performance. The proper inference to be drawn from the relevant letters, all dated September 1930, and other circumstances is that the bank as to future advances did agree to the substitution of the second agreement for the first agreement. The arrangement was implemented in several definite and conclusive ways and the document of 9th September was retained by the bank. The acceptance of this position by both parties was acted upon by them and continued throughout (*Chapman* v. *Bluck* (4); *Watcham* v. *East Africa Protectorate* (5); *Howard Smith & Co. Ltd.* v. *Varawa* (6); *Foley* v. *Classique Coaches Ltd.* (7); *May & Butcher Ltd.* v. *The King* (8); *Clayton* v. *Le Roy* (9); *Law Quarterly Review*, vol. 48, pp. 4, 310; vol. 49, p. 316; vol. 51, p. 277). By reason of the nature of the first agreement, the facts amount to a termination of that agreement within its terms. That agreement was a continuing guarantee comprising an offer under seal by the respondent company and an acceptance by performance on the part of the bank. On its true construction it was terminable as to future advances, (*a*) by the company by proper notice, and (*b*) by the bank in declining to make further advances (*Lloyd's* v. *Harper* (10); *In re Crace*; *Balfour* v. *Crace* (11)). There must be a proper differentiation between the rule governing an agreement of this nature, as to further advances, and the ordinary rule as to release of a contract under seal or an

(1) (1866) L.R. 1 Ex. 342.
(2) (1832) 2 L.J. Ch. 3.
(3) (1910) 103 L.T. 663.
(4) (1838) 4 Bing. N.C. 187 [132 E.R. 760.
(5) (1919) A.C. 533, at p. 538.
(6) (1907) 5 C.L.R. 68, at pp. 77, 78.
(7) (1934) 2 K.B. 1.
(8) (1934) 2 K.B. 17.
(9) (1911) 2 K.B. 1031, at p. 1053.
(10) (1880) 16 Ch. D. 290, at p. 319.
(11) (1902) 1 Ch. 733, at p. 737.

offer under seal. The new agreement comprised (*a*) an offer under seal, and (*b*) acceptance by performance on the part of the bank, and any requirement as to writing by sec. 9 of the *Usury, Bills of Lading, and Written Memoranda Act* 1902 (N.S.W.) is satisfied. In any event writing is immaterial to the respondent company's case because (*a*) the new agreement (i) amounted to a determination of the prior agreement which latter was completely executed upon payment off of the overdraft, (ii) was completely executed and resulted in a debt due from the respondent company to the bank (*Koellner* v. *Breese* (1)), (iii) was a perfect agreement even if not enforceable against the bank, and (iv) is used purely as a weapon of defence (*Perpetual Executors and Trustees Association of Australia Ltd.* v. *Russell* (2) ; *Law Quarterly Review*, vol. 50, p. 532). The correspondence from 1st September to 10th September 1930 shows that the respondent company intended to intimate to the bank that the company was terminating the first agreement and that the bank understood the company's position. Later correspondence and acts of the parties confirm this view. The company was not bound under the first agreement as from the receipt by the bank of the letter dated 10th September 1930, and the bank had no option but to accept that position. The second agreement was an agreement of indemnity, not of guarantee. The general rule is that the form is to be disregarded and the essence of the contract is to be looked at (*Permanent Trustee Co. of N.S.W. Ltd.* v. *Hinks* (3)). Where, as here, a third party promises to save a guarantor harmless in respect of liability incurred under guarantee, then, by legal implication, the agreement between the guarantor and the third party must be an indemnity and not a guarantee (*Thomas* v. *Cook* (4) ; *Wildes* v. *Dudlow* (5) ; *Re Bolton* (6) ; *Guild & Co.* v. *Conrad* (7) ; *Re Law Courts Chambers Co. Ltd.* (8) ; *Rowlatt* on *Principal and Surety*, 3rd ed. (1936), pp. 44 et seq). There is, therefore, no right of contribution (*Dering* v. *Earl of Winchelsea* (9)). If both the appellant and the respondent company are sureties the principle laid down in *Dering* v. *Earl of Winchelsea* (10) still applies, because the risk covered is not the same : See *American Surety Co. of New York* v. *Wrightson* (11). Another test is : Were the two guarantees one and the same

(1) (1909) 9 S.R. (N.S.W.) 457 ; 26 W.N. (N.S.W.) 92.
(2) (1931) 45 C.L.R. 146.
(3) (1934) 34 S.R. (N.S.W.) 130 ; 51 W.N. (N.S.W.) 37.
(4) (1828) 8 B. & C. 728 [108 E.R. 1213].
(5) (1874) L.R. 19 Eq. 198.
(6) (1892) 8 T.L.R. 668.
(7) (1894) 2 Q.B. 885.
(8) (1889) 61 L.T. 669.
(9) (1787) 1 Cox, at p. 322 [29 E.R., at p. 1185].
(10) (1787) 1 Cox 318 [29 E.R. 1184].
(11) (1910) 103 L.T. 663.

H. C. OF A. 1939.

McLEAN v. DISCOUNT AND FINANCE LTD.

transaction, or were they separate transactions (*Stirling* v. *Forrester* (1); *Coope* v. *Twynam* (2))? There was not a common engagement or a common liability (*In re Denton's Estate*; *Licences Insurance Corporation and Guarantee Fund Ltd.* v. *Denton* (3); *Craythorne* v. *Swinburne* (4).

Beale, in reply. The sale of the bonds in August 1932, the placing of them in a suspense account, and the notional crediting of the proceeds to the guaranteed account was either an actual payment or was at any rate a sufficient payment within the meaning of the cases. If any ratification were needed of the bank's actions in August 1932, then the letter by the appellant to the bank after the suit had been commenced was effective under secs. 14 and 14A (*d*) of the *Moratorium Act* 1932-1937 and was acted on by the bank. If there were not any payment in August 1932, then the events of February 1937, when the bank settled with the respondent company on the footing of having received £2,936 from the appellant and treated the account as concluded, was certainly a payment. The total debt on this date was £7,574 and the amount of £4,638 paid by the respondent company could not have been arrived at except by treating the appellant's £2,936 as having been received by the bank. If there was a sufficient payment on either August 1932 or February 1937, then the cases cited in chief show that the appellant acquired a vested right to contribution for the excess paid by him calculated as to the date of payment. The *Moratorium Act* 1930 does not apply. Bonds are not " chattels " within the meaning of sec. 2 of that Act: Cf. *Australian Trust Ltd.* v. *Ho Chin* (5). This being so, the *Moratorium Act* 1932 does not apply either, because the bonds had been sold before that Act came into force (*Callachor* v. *Moses* (6)). But in any case, neither Act is relevant to the matter, because (*a*) the Acts were merely for the benefit of mortgagors giving them " days of grace "; (*b*) even though the time for payment of the principal is postponed there is nothing to prevent a mortgagor paying: Cf. *Moratorium Act* 1932-1937, sec. 20, and *Re E. A. Davies (Deceased)* (7). The test is not whether there is a " presently enforceable liability ", but whether there was a debt and whether it was paid actually or notionally. Here there was a debt and it was paid by the sale of the appellant's bonds and appropriation of the proceeds as shown above. Apart from the question of payment, a surety is

(1) (1821) 3 Bli. 575, at p. 592 [4 E.R. 712, at p. 718].
(2) (1823) Turn. & R. 426 [37 E.R. 1164].
(3) (1904) 2 Ch. 178.
(4) (1807) 14 Ves. 160 [33 E.R. 482].
(5) (1932) 32 S.R. (N.S.W.) 55; 50 W.N. (N.S.W.) 28.
(6) (1931) 31 S.R. (N.S.W.) 424; 48 W.N. (N.S.W.) 149.
(7) (1933) 50 W.N. (N.S.W.) 231.

entitled to come to the court for a declaration *quia timet* to avoid having to pay more than his share of the common debt. He is entitled to bring such a suit before he pays immediately the position is such that the defendant surety cannot be twice vexed. The appellant relies on the following facts and circumstances as giving rise to his right to bring his suit *quia timet*: (*a*) the principal debt was called up on 15th December 1930 and the account stopped; (*b*) the debtors were insolvent and unable to pay and never have paid; (*c*) demand was made upon the appellant on 7th July 1931; (*d*) the appellant's bonds were sold in August 1932 and realized the sum of £2,936; and (*e*) the bank might have appropriated this money, assuming it had not already done so in fact, or it might have brought proceedings against the appellant under the *Moratorium Act*. The above-mentioned facts *a* to *d* show that as from August 1932 the liabilities of the parties had so crystallized that the respondent company could not be twice vexed. The same arguments apply even more strongly to the position on 23rd February 1937, when it was obvious that the bank was looking to the proceeds of the sale of the appellant's bonds to satisfy the balance of the debt. The events of 23rd February 1937 did not and could not amount to an absolute release. The irresistible inference from the surrounding circumstances is that, at most, there was merely a covenant by the bank not to sue the respondent company. The surrounding circumstances are: (*a*) there was no formal release, the guarantee of 28th November 1929 merely being endorsed as cancelled, and (*b*) the amount paid by the respondent company, namely, £4,638, was arrived at by treating the proceeds of the appellant's bonds, namely, £2,936, as still being available to the bank or having been paid to it by the appellant, the guaranteed account then being treated as settled. The judge of first instance should have exercised his discretion under sec. 68 of the *Equity Act* 1901 (N.S.W.). He was not bound by the decision in *Eshelby* v. *Federated European Bank Ltd.* (1). Sec. 68 is intended for such a case as the present one and the proper course was to have allowed the amendment to prevent multiplicity of suit. If there was a variation it must have been the subject of discussion and agreed upon. The onus was on the respondent company, yet it did not call any evidence of any such discussions. There was not any evidence given of an oral agreement, and the only written evidence shows disagreement. Therefore the trial judge was right in holding that no agreement had in fact been reached. The document of indemnity dated 9th September 1930 is relied upon by the respondent company as being an offer acted upon by the bank, but this (*a*) was refuted by the bank's letter in

(1) (1932) 1 K.B. 254.

H. C. OF A. 1939. McLEAN v. DISCOUNT AND FINANCE LTD.

reply; (*b*) was never stopped or acted upon; (*c*) was not referred to in later letters from the bank, reference therein being made only to the guarantee of 28th November 1929; (*d*) was not cancelled or handed back on 23rd February 1937; (*e*) was tentative only; (*f*) was not sent by the bank to its solicitors when giving instructions to sue; and (*g*) was not referred to in the respondent company's letters of February 1931. The release of the film which belonged to the debtors, and the payment by them of £7,000 to the bank, was made independently of the indemnity dated 9th September 1930 and was a separate matter. The payment was made on 10th September 1930 and the indemnity was not received till the next day. The pencilled notation on the guarantee of 28th November 1929 was put on in error. This is borne out by the bank's letters. The form of the writ was due to the same error and the bank's letters show this also. The instructions to counsel to settle the declaration and the form of the declaration would have amply proved that this was so and the judge should have admitted them into evidence. Apart from the indemnity of 9th September 1930 there is not any evidence to show that any alleged variation to the guarantee of 28th November 1929 had been agreed upon prior to 3rd December 1930 and the onus is upon the respondent company to show this. The settlement of 23rd February 1937 negatives any suggestion that the liability had been varied as claimed, because (*a*) it was made in respect of the whole of the debtors' account; (*b*) the document which was cancelled was that of 28th November 1929 and not 9th September 1930, and (*c*) the fact that the respondent company paid only £4,638 is entirely neutral because the total liability was only £7,574, and the bank had money of the appellant amounting to £2,936. As to the alternative submissions that there was a variation from £10,000 to £5,000 though still in respect of the common debt, the correspondence shows that although the bank was willing to do this as an act of grace only the parties contemplated the execution of a formal document and this was never forthcoming. Therefore there was not any binding agreement: See *Sinclair, Scott & Co. Ltd.* v. *Naughton* (1) and *Chillingworth* v. *Esche* (2).

Teece K.C., by leave. The point upon which it was cited in this case was not fully argued in *Australian Trust Ltd.* v. *Ho Chin* (3), and the relevant point was not raised in *Re E. A. Davies (Deceased)* (4).

Cur. adv. vult.

(1) (1929) 43 C.L.R. 310.
(2) (1924) 1 Ch. 97.
(3) (1932) 33 S.R. (N.S.W.) 55; 50 W.N. (N.S.W.) 28.
(4) (1933) 50 W.N. (N.S.W.) 231.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a decree of the Supreme Court of New South Wales dismissing a suit by the appellant, W. R. McLean, which was brought to enforce contribution from the defendant company, as his co-surety, in respect of a debt owed by the other three defendants (who trade under the firm name of George Wall) to the National Bank of Australasia Ltd. The bank was not a party to the proceedings. The members of the firm were joined as parties in order to dispense with the necessity of proof of insolvency of the firm (*Lawson* v. *Wright* (1) ; *Hay* v. *Carter* (2)). The insolvency of the firm, however, is not disputed.

The plaintiff in his statement of claim in its original form claimed actual payment of contribution from the defendant company upon the basis that the appellant was liable as surety to the amount of £3,000 and the defendant to the amount of £5,000. The debt of the firm for which the sureties ultimately were actually made liable was £7,772 17s. 3d., which included interest and bank charges as well as principal. When the case went to trial it was discovered by the plaintiff that the defendant had, on 28th November 1929, guaranteed the firm to the extent of £10,000, and the claim was amended accordingly, contribution being claimed on the basis that the defendant company should bear ten-thirteenths of the liability, and not only five-eighths, as originally claimed. The learned judge, however, held that the plaintiff had not, before action brought, actually paid any moneys to the creditor. An amendment was allowed to introduce a *quia-timet* claim for a declaration of liability of the defendant company and an order for payment within a time to be fixed by the court. The learned judge held that payment had been made by the plaintiff, but only after the proceedings were instituted, and that therefore there was no cause of action at the time of action brought. The suit was dismissed without prejudice to fresh proceedings. The plaintiff appeals, and the defendant, contending that the suit should have been dismissed outright, cross-appeals with respect to the liberty given to the plaintiff to institute further proceedings.

The evidence is almost entirely documentary in character. I propose first to state the facts in outline, and then to examine them more particularly, so far as necessary, in relation to the relevant principles of law.

On 28th November 1929 the company became surety to the bank for the firm for past debts and future advances to the amount of

(1) (1786) 1 Cox 275 [29 E.R. 1164].
(2) (1935) Ch. 397

H. C. OF A. 1939.

McLEAN v. DISCOUNT AND FINANCE LTD.

Latham C.J.

£10,000. A clause in the guarantee entitled the company to determine the guarantee at any time as to future advances.

In September 1930 the company made proposals for a determination of the existing guarantee and the substitution of a new guarantee limited to £5,000, and also limited to the liability of the bank under a guarantee which the bank had given to the Collector of Customs in respect of customs duties payable by the firm. The company maintained that this variation was actually made. The plaintiff contended that no new agreement was in fact made, although such an agreement had been suggested and discussed, and that the original guarantee of £10,000 remained in full force and effect. The learned judge found in favour of the contention of the plaintiff.

On 3rd December 1930 the plaintiff executed a guarantee in favour of the bank in respect of all indebtedness of the firm to the bank. The guarantee was in the form of a letter of lien under seal over Commonwealth bonds of a face value of £3,000, which were deposited by the plaintiff with the bank. By this document the plaintiff charged the bonds with the amount of the firm's liability to the bank and gave authority to the bank to sell the bonds and to apply the proceeds in discharge of the firm's indebtedness. The guarantee contained a provision that the bank might release any person liable to the bank in respect of the debt of the firm without discharging or affecting in any way the plaintiff's liability as surety. The letter of lien did not contain any personal covenant for payment by the plaintiff: Cf. *Perry* v. *National Provincial Bank of England* (1).

On 15th December 1930 the principal debtors made default.

On 15th January 1931 the bank claimed from the firm payment in full of the indebtedness of the firm to the bank stated at an amount of £9,981 1s. 3d. This liability was subsequently reduced by payment of £2,000, which sum, however, was found by the learned trial judge not to have been paid by the defendant company. This finding is not challenged by either party. On the same date the bank made a written demand on the company. The letter from the bank informed the company that the bank had paid the sum of £6,000 to the Collector of Customs under the guarantee given to the collector by the bank, and claimed payment in full of the indebtedness of the company to the bank by virtue of the guarantee dated 28th November 1929 in favour of the bank "in the sum of £10,000 and interest which was reduced in amount by subsequent correspondence to £5,000 and interest."

(1) (1910) 1 Ch. 464.

On 7th July 1931 the bank made a demand upon the plaintiff, giving notice of default by the customer, and stating that it proposed to exercise the powers conferred upon it by the letter of lien given to the bank by the plaintiff.

The bank did not sell the bonds immediately. On 19th December 1930 a *Moratorium Act* came into operation, and it may have been on account of the provisions of this Act that the bank did not act at once. On 1st August 1932, however, the plaintiff sent a letter to the bank in which he said that " he would like to confirm his expressed wish that the bonds being held by the bank be converted into cash by sale, such action to, of course, in no way prejudice my case."

On 9th August 1932 the bank sold the bonds for £2,936 16s. 3d. The bank had received a sum of £197 5s. 2d. as interest on the bonds and had appropriated it in part payment of the overdraft liability of the firm. Thus the amount of money which the plaintiff has provided in respect of his obligation as surety is £3,134 1s. 5d. There is no evidence to show that the plaintiff heard anything more from the bank about the matter at any time. The evidence does not show that the plaintiff was at the time aware of certain facts, to which I propose now to refer, which took place between 9th August 1932 and 23rd February 1937.

Without any intimation to the plaintiff the bank placed the sum of £2,936 16s. 3d. in a suspense account which was headed in its books—" George Wall, W. R. McLean Treasury Bonds, Manager's Suspense Account." This amount remained as a credit in the account from 1932, and this was still the position when the action was tried. Also without any communication to the plaintiff, the bank treated the overdraft liability of the firm as if it had been reduced by the said amount and charged interest only on the balance of the overdraft.

On 23rd February 1937 the defendant company paid to the bank an amount of £4,638 16s. 10d. This amount, together with the amount of £2,936 16s. 3d., paid off the liability of the firm to the bank in full. That liability included liability to the Customs Department, which the bank had guaranteed and had paid. On or about this date the company's guarantee of 28th November 1929 was cancelled by the bank. Lines were drawn across the guarantee, and the word " cancelled " was written between them, and the signatures and the seal were struck out. There is no evidence to show when the plaintiff became aware that the company had been a surety to the bank in respect of any liability of the firm.

On 13th April 1938 the statement of claim in the suit was issued. On the day on which the case was called on for trial (9th November

H. C. OF A. 1939. McLEAN v. DISCOUNT AND FINANCE LTD. Latham C.J.

1938) the plaintiff signed a letter witnessed by a solicitor (who was not the solicitor for the bank), which was in the following terms:— "I understand that on receipt of the proceeds of the sale of my bonds in August 1932 you appropriated the said proceeds of sale towards payment of the debt of the above firm to the bank in that when you paid the said proceeds to a separate account you allowed a set-off of interest as though the said amount had been paid to the credit of the said account. This is to ratify and confirm your action in that respect." It is contended by the plaintiff that by virtue of the *Moratorium Act* 1932-1936, sec. 14A, this letter brings about the result that the plaintiff actually paid to the bank on 9th August 1932 the amount realized by the bonds.

A creditor to whom guarantees have been given may compel any surety to pay according to his contract. He is not bound to take any steps to distribute the burden among the sureties. Thus a surety who has guaranteed the whole of the debt may be compelled to pay the whole debt even though there are other sureties. But as between co-sureties the rule is "equality of burthen and benefit." A surety who has paid more than his share of the debt as between himself and his co-sureties is entitled to compel them to contribute in proportion to their respective liabilities. This rule applies not only where sureties are bound jointly and severally, but also where they are bound severally and whether by the same or different instruments. The rule is also applicable even though the surety claiming contribution did not know when he became a surety that there were co-sureties (*Dering* v. *Earl of Winchelsea* (1); *White and Tudor's Leading Cases*, 9th ed. (1928), vol. 2, p. 488; *Craythorne* v. *Swinburne* (2)).

The right of a surety to actual payment of money by way of contribution arises when the surety has actually paid more than his share. Until it is clear that he has paid more than his proportion he has no equity to receive a contribution (*Davies* v. *Humphreys* (3); *Ellesmere Brewery Co.* v. *Cooper* (4); *Stirling* v. *Burdett* (5)).

If the plaintiff and the company were co-sureties and the plaintiff has made any payment to the bank, then, as between himself and the company, he has paid the bank more than his share of the guaranteed debt, whether his share be three-eighths or three-thirteenths. He puts his case in two ways: Either he paid before action brought, and so is entitled in this action to claim the overpayment from his co-surety by way of contribution; or he paid after action

(1) (1787) 1 Cox 318 [29 E.R. 1184].
(2) (1807) 14 Ves., at p. 165 [33 E.R., at p. 484].
(3) (1840) 6 M. & W., at pp. 168, 169 [151 E.R., at pp. 367, 368].
(4) (1896) 1 Q.B. 75.
(5) (1911) 2 Ch. 418.

brought, and in that event is entitled to a declaration on a *quia-timet* basis that the company is bound to make a payment by way of contribution because at the time of action brought, to put it shortly, his money was in peril (*Wolmershausen* v. *Gullick* (1)).

In order to succeed upon either claim the plaintiff must first show that the defendant was at the relevant time a co-surety with him. He must therefore show that the defendant was a surety for the same debt—namely, the debt owed by the firm of George Wall to the bank.

If the defendant's guarantee of 28th November 1929 was not determined or varied, there can be no doubt that the plaintiff and the defendant were liable respectively up to a maximum of the value of the bonds and the amount of £10,000. But the defendant company argues that the facts show that a new agreement was made between it and the bank which displaced the earlier guarantee and that this agreement was made before the plaintiff became a surety on 3rd December 1930. The learned trial judge took the view, upon the correspondence which was in evidence, that no new agreement was actually concluded. This conclusion is challenged by the defendant company. As I have the misfortune to differ from the learned judge and from my colleagues upon this part of the case, I think it proper to state my reasons fully for coming to the conclusion which commends itself to me.

Both the plaintiff and the defendant company were content to rely upon documentary evidence with respect to this part of the case. Neither party called as witnesses any officers of the bank to give evidence upon this matter. The first relevant document is a letter, dated 1st September 1930, written to the bank by Messrs. Campbell, Campbell & Campbell, who acted as solicitors for the firm of George Wall and also for the defendant company. This letter shows that negotiations had been in progress for some readjustment of the liabilities of the firm to the bank and of the company as surety for the firm. It is written upon the basis that an agreement has been reached and that all that is necessary is that, as the first paragraph states, settlement should take place at an early date. The letter summarizes the arrangements, which were stated to be practically complete. These arrangements were stated to be as follows :—(*a*) The overdraft of the firm of approximately £7,000 to be extinguished ; (*b*) the security held by the bank over the "Journey's End" contracts to be released ; (*c*) the guarantee by Discount and Finance Ltd. to be released ; (*d*) the bank to continue its guarantee of £6,000 to the Collector of Customs ; (*e*) the bank

(1) (1893) 2 Ch. 514.

H. C. OF A. 1939.

McLEAN v. DISCOUNT AND FINANCE LTD.

Latham C.J.

to be secured by either (i) a guarantee limited to £5,000 from Discount and Finance Ltd., or (ii) arrangements being made with the Sun Insurance Co. to protect the bank in relation to any payments which it might make for the firm to the Collector of Customs; (*f*) "The liability of Discount and Finance Ltd. under the new guarantee, if it is required, will be only in respect of the customs." It is evident that these various arrangements were interdependent; it was not contemplated that one or some only of the terms could be accepted and the others rejected.

It is convenient at this stage to state what actually took place in relation to each of the matters mentioned :—As to *a*—The overdraft of £7,000 was paid off; as to *b*—The security held by the bank over contracts relating to a film known as "Journey's End" was released; as to *c*—The defendant asserts and the plaintiff denies that the guarantee, that is, the £10,000 guarantee by Discount and Finance Ltd., was terminated; as to *d*—The bank did continue a guarantee of £6,000 to the Collector of Customs; as to *e*—A deed of indemnity was executed by the company protecting the bank to a limit of £5,000 and also a covenant was given by the members of the firm to obtain an indemnity from an insurance company in respect of the liability of the bank to the Collector of Customs under its guarantee of the firm; as to *f*—The liability of the company under the new instrument was limited to customs transactions.

Thus all the proposals were accepted and put in legal form except, according to the plaintiff's argument, that which was the most important matter from the point of view of the company, namely, the reduction and limitation of its liability to the bank in relation to the firm. This (the view now submitted by the plaintiff), however, was not the view of the parties to the transaction—the bank and the defendant company. After the correspondence was concluded and the legal documents had been executed and forwarded to the bank, both the company and the bank acted upon the basis that the liability of the defendant company to the bank was limited to £5,000 and to customs transactions. The security officer of the bank made a memorandum to that effect upon the £10,000 guarantee.

On 3rd September 1930, the bank replied to the letter of 1st September. The letter begins with the following words: "Referring to your letter of 1st instant we are prepared to make settlement in the following manner." Thus this letter also assumes that arrangements have been made for a readjustment and that all that is further required is to make a settlement in the ordinary way by executing and handing over the necessary formal documents. The letter then recites that £7,000 is to be paid off Wall's account and that the

security over the film is to be released, but requires that a second charge over the film should be given to the bank. Such a second charge was in fact given. The bank required that this security should be given in addition to "the guarantee for £5,000 by Discount and Finance Limited." This phrase shows that the bank accepted the position that there was to be a new guarantee in place of the old guarantee and that it was to be a guarantee of the description mentioned in the letter of 1st September 1930, namely, £5,000 limited to customs transactions. The letter added that the bank was agreeing to the proposals on the understanding that W. G. M. Wall would arrange with the Sun Insurance Co. for an indemnity policy to reimburse the bank with respect to its liability under the guarantee of the firm given by the bank to the Collector of Customs. In the actual result the bank accepted an indemnity from the defendant company together with a covenant by the members of the firm to arrange an indemnity insurance policy with an insurance company.

In the next letter, dated 8th September, the solicitors forwarded an assignment by way of discharge of mortgage for execution by the bank's attorney. This discharge or release was executed by the bank (item *b* of the letter of 1st September). The letter further states that Mr. Wall had informed the writer that he expected to be able to arrange a full indemnity policy in favour of the bank and added: "Of course some assurance of this kind must be given before completion of the matter." Such an assurance was given, as already stated, in the form of a covenant to the bank (item *e* (ii) of the letter of 1st September). The letter concludes with a request for a form of guarantee for execution by the company. A form was provided, but it was altered so as to become an indemnity, and not a guarantee. It was headed "indemnity."

On 10th September the solicitors wrote another letter, forwarding the second mortgage, which had been asked for by the bank in the letter of 3rd September. The letter also enclosed an indemnity by the company (in the form provided) in respect of the bank's guarantee of the firm to the Customs Department, "the total limit of Discount and Finance Ltd.'s liability under the indemnity being £5,000" (item *e* (i)). The letter continued: "We understand that Discount and Finance Ltd.'s undertaking" (item *e* (i)) "is to be operative only until the indemnity policy" (item *e* (ii)) "is arranged and is then to be released."

This letter asked for a letter to be written stating that the existing guarantee for the company for £10,000 had been cancelled. There is no evidence that any such letter was sent, but at some time,

H. C. OF A. 1939.

McLEAN v. DISCOUNT AND FINANCE LTD.

Latham C.J.

certainly before January 1931, the security officer of the bank wrote a memorandum on the company's £10,000 guarantee in the following words: "This guarantee is limited to £5,000 vide arrangement and covers only guarantee to Customs Department."

The document of indemnity (called a guarantee by both parties) which was forwarded with this letter was dated 9th September 1930 and was under the common seal of the defendant company. There is no evidence to show that the bank has ever contended that this indemnity did not become effective in substitution for the older guarantee. The bank retained possession of it and, as will be seen, though there was some confusion about the matter, never claimed from the defendant company any sum as surety except upon the basis of limitation of liability to £5,000 and to customs transactions. The confusion arose from the fact that an officer of the bank apparently treated the memorandum on the old guarantee as the record of the transaction, and did not seek for and find the deed of indemnity which was in fact the formal expression of the intention of the parties.

By the deed of indemnity the company agreed to pay to the bank on demand all such sums as might be demanded or claimed by the Collector of Customs by virtue of the guarantee given by the bank to the Collector of Customs in respect of duties of customs payable by the firm, with a proviso that the amount ultimately payable by the company should not exceed £5,000. It is now contended by the plaintiff that this document is entirely ineffective and that, although every other part of the proposed readjustment was carried out, and although the reduction of the company's liability was evidently one of the substantial objects (if not *the* substantial object) to be attained, yet this single part of the transaction was not effective, though expressed in a deed sealed and delivered and held by the bank.

The argument for the plaintiff upon this point depends entirely upon the terms of a letter of 15th September 1930, written by the bank to the solicitors for the firm and for the company. In this letter the bank recites the history of the matter and includes in that history a statement that the bank agreed to reduce the company's guarantee to £5,000 upon receiving £7,000 in reduction of the indebtedness of the firm to the bank. The letter then continues by representing as a "suggestion" the proposal (which in fact had already been accepted and performed) that the guarantee should be limited to the customs liabilities. The letter proceeds to state that "the bank prefers to continue the general form of guarantee as at present held so that we are covered whether Wall's commitments to the Customs involve us partially in overdraft as well as outstanding

liability under our guarantee to the Customs. We would therefore ask that you be so good as to arrange for fresh guarantee on the lines of that already held but for the agreed reduced amount of £5,000." (In fact no such fresh guarantee was ever arranged. The bank did nothing further in pursuance of its request, but was content to retain the deed of indemnity.)

The learned trial judge held that this letter shows that there was no concluded agreement between the bank and the company for the reduction of the guarantee to £5,000 and the limitation of it to customs liabilities.

In my opinion the prior correspondence, together with the execution of the release of the existing mortgage, the execution of a second mortgage, the execution of the document of indemnity to the bank, and the delivery of that document to the bank, actually constitute a set of completed contractual arrangements which the bank was not at liberty to alter or set aside by making statements as to what it would "prefer" and by making new requests. The whole arrangement proposed in the first of the letters mentioned was carried out. One mortgage was discharged, another mortgage was given, £7,000 was paid off the overdraft, and an indemnity was given to the bank together with a covenant to secure an indemnity from an insurance company in respect of customs liabilities. As a result, in the mortgage of the film "Journey's End" dated 9th September 1930, that is, the new second mortgage, the bank agreed to give or to continue its guarantee to the Customs. It is in this document that the firm agreed to arrange and to keep on foot an indemnity insurance policy with an insurance company in favour of the bank.

The subsequent conduct of the parties strongly supports the view that a new agreement was actually made. As I have already said, it is certain that both the bank and the company were of the opinion that it had been made. When, in January 1931, the bank made a demand upon the firm to settle its indebtedness, the demand related to all the moneys owed by the firm to the bank. But when, on the same day, a demand was made upon the company, the letter of demand stated that the liability of the company was limited to £5,000, and claim was made only in respect of the moneys paid by the bank to the Collector of Customs.

On 21st January 1931, when the company's solicitors replied to the demand, they said that their client's guarantee was for £5,000 and that it related solely to a customs guarantee (that is, by the bank) of £6,000. When the bank, on 27th January 1931, replied to the solicitor's letter, it was not disputed that the liability of the company

H. C. OF A. 1939. McLEAN v. DISCOUNT AND FINANCE LTD. Latham C.J.

was so limited. When the bank decided to take legal proceedings against the company its solicitors were given the guarantee for £10,000 bearing the pencil note that it had been reduced to £5,000 and had been limited to customs transactions. On 21st January 1931 the bank issued a writ against the company, claiming £5,132 18s. 1d. under a guarantee given by the company to the bank " to the extent of £10,000 and interest which said guarantee the said plaintiff bank subsequently agreed to limit to the amounts which the said plaintiff bank might be called upon to pay to the Collector of Customs on behalf of the said firm of George Wall and to the extent of £5,000 only and interest."

Thus the documentary evidence shows that the parties engaged in negotiations which resulted in an agreement to substitute for the £10,000 guarantee a new protection to the bank which was to be limited to £5,000 and to customs transactions. This agreement was actually carried out by the execution of the necessary documents. These documents included the document of 9th September. I am unable to discern any justification for dealing with the case as if this document did not exist.

In my opinion, therefore, the conclusion should be drawn that after 10th September 1930, when the bank received (and thereafter retained) the indemnity mentioned, the company was liable only up to a maximum of £5,000, not of £10,000. This conclusion affects the proportion in which contribution should be made by the defendant if any contribution is payable.

The plaintiff, up to a maximum limit of the value of his bonds, was subject to the liability of having his bonds sold and of the proceeds being applied by the bank in reduction of the general indebtedness of the firm to the bank. The defendant company, subject (in my opinion) to a maximum limit of £5,000, was liable to be called upon, under its indemnity, to pay to the bank such part of the general indebtedness of the firm to the bank as was represented by payments made by the bank under its guarantee to the Customs on account of the firm and not made good by the firm to the bank. Thus there was, I think, a liability for a common debt to which the general principle of contribution was prima facie applicable: See *Duncan Fox & Co.* v. *North and South Wales Bank* (1) :—" Where a creditor has a right to come upon more than one person or fund for payment of a debt, there is an equity between the persons interested in the different funds that each shall bear no more than its due proportion. This is quite independent of any contract between the parties thus liable."

(1) (1880) 6 App. Cas. 1, at p. 19.

The next question which arises is whether the plaintiff paid the sum of £2,936 before or after action brought or at all. I do not examine this question, because I am of opinion that, by reason of the *Moratorium Act* 1930, the plaintiff, even if he has at any time paid any amount under the guarantee constituted by the letter of lien, has paid prematurely. A surety cannot claim contribution against a co-surety if he has paid before he was under any liability to pay. So, also, where the basis of a claim for contribution is to be found in the realization and application of the proceeds of a security given by the surety, the liability of a co-surety cannot be accelerated, for purposes of contribution, by the surety suffering such realization and application at a date before the creditors had any right to call upon the surety.

The *Moratorium Act* 1930 was in force on 9th August 1932, when, according to one view, the plaintiff made a payment of £2,936 to the bank. In sec. 2 " mortgage " was defined as follows : " ' Mortgage ' means any deed, memorandum of mortgage, instrument, or agreement whereby security for payment of moneys or for the performance of any contract is granted over land or chattels or any interest therein respectively, and includes an equitable mortgage by deposit of title deeds, and any document by which the duration of a mortgage is extended." The question which arises is whether the letter of lien was a mortgage of chattels. In *Australian Trust Ltd.* v. *Ho Chin* (1) it was held by the Full Court of the Supreme Court of New South Wales that a " lien " in favour of a company over its own shares, created by the articles of association, was not a mortgage within the definition quoted. Such a lien did not involve the possession of any chattel or give any security over any chattel. The opinion was expressed that the word " chattel " was limited to personal property which is capable of being transferred by actual delivery and which can be the subject of occupation or manual possession.

The plaintiff's guarantee was a mortgage of Commonwealth bonds. Under the letter of lien the bank was entitled to the physical possession of the bonds. Indeed, such physical possession was the necessary element in the security, as the bonds were transferable by delivery. A lien over bonds which, by the terms of the lien, must be and remain in the possession of the lienee, is a very different thing from the " lien " over shares which was under consideration in *Australian Trust Ltd.* v. *Ho Chin* (1). In the present case the essence and the value of the lien consisted in the physical possession of the bonds. Thus the lien given by the plaintiff was, in my opinion,

(1) (1932) 33 S.R. (N.S.W.) 55 ; 50 W.N. (N.S.W.) 28.

H. C. OF A. 1939.

McLEAN v. DISCOUNT AND FINANCE LTD.

Latham C.J.

a mortgage within the definition of the *Moratorium Act* 1930. Sec. 16 of the Act extended the time for payment of the principal sum secured by any mortgage to which the Act applied, and in the case of the plaintiff's letter of lien the due date became 28th February 1933. By subsequent legislation the date upon which the money became payable was fixed at 28th February 1940 : See *Moratorium (Amendment) Act* 1937, sec. 2.

According to another view the plaintiff made a payment on 23rd February 1937 or on 9th November 1938. At each of these times the *Moratorium Act* 1932 (as amended) was in force. It is not disputed that the letter of lien was a mortgage within the definition of mortgage contained in that Act. Under that Act the due date for payment became 28th February 1940.

I am therefore of opinion that the appeal should be dismissed on the ground that the plaintiff had, by reason of the moratorium legislation, not become liable before action brought and has not yet become liable to pay any sum to the bank, or, more strictly, to suffer the application of the proceeds of the bonds by the bank to the debt of the firm, and that therefore he cannot claim contribution from any co-surety. In view of the contrary opinion of my colleagues it is not necessary for me to deal with the cross-appeal.

Two of my colleagues are of opinion that judgment should be given for the plaintiff for £1,552 9s. 4d. Two are of opinion that the amount of the judgment should be £1,340 6s. 6d. There is agreement that judgment should be given for the plaintiff for at least £1,340 6s. 6d. The order of the court should therefore be that judgment should be given for the plaintiff for £1,340 6s. 6d. with interest at the rate of four pounds per centum per annum from 23rd February 1937 to the date of the decree in the Supreme Court, 20th March 1939.

RICH J. The suit which stands dismissed by the decree now appealed from was brought by a surety to recover from an alleged co-surety contribution so that each would bear the just proportion of the principal debt. The doctrine which the plaintiff invokes for this purpose cannot be stated more clearly that it was by *Hamilton* J., as he then was, in *American Surety Co. of New York* v. *Wrightson* (1) :—"I think . . . that where sureties have guaranteed a principal debtor by separate instruments for different sums their position is exactly the same as if they had guaranteed him by the same instrument stipulating that their liability should differ in amount, and that then the sureties should make contribution

(1) (1910) 103 L.T., at p. 667.

inter se in proportion to the amount of their guarantees; that the object, both with regard to contribution of sureties and the rule with regard to double insurances, is to put people who have commonly guaranteed or commonly insured in the same position as if the principal creditor or the assured had pursued his remedies ratably among them instead of doing as he is entitled to do, exhausting them to suit himself against one or other of them."

The principal debtor was a firm of customs agents carrying on a large business. The parties did not regard it as worth while to develop in evidence the course of the business carried on or the surroundings of the transaction. But it would seem that the firm paid customs duties by their own cheques drawn upon their bank and reimbursed themselves by cheques from their clients which they paid into their banking account. Apparently His Majesty's Customs accepted their cheques because they had given a customs bond for £6,000 supported by some obligation which the bank entered into as surety. The course of business required the firm to find a margin of finance, which they did by a floating overdraft of fluctuating amount. To support this overdraft the respondent company gave the bank a continuing guarantee limited in amount to £10,000. The guarantee covered the principal debtors' liabilities to the bank of all kinds, and thus included its liability to His Majesty's Customs under its bond or obligation. At a subsequent date, viz., 3rd December 1930, the plaintiff gave to the bank a security over some Commonwealth bonds to the amount of £3,000 to support the overdraft and the firm's liabilities generally. Ultimately the respondent company paid to the bank under its suretyship the sum of £4,638 16s. 10d., and the plaintiff was called upon to bear £2,936 16s. 3d. —sums which together made up the amount owing by the firm to the bank. This amount included a large sum which the bank paid to His Majesty's Customs—the balance of the overdraft to the debit of which had been carried the bank's liability of £6,000 which it had been called upon to pay to His Majesty's Customs. If the matter stood there, it would be clear that the plaintiff had paid more than his just proportion and that he was entitled to contribution. But the respondent company says that the matter does not stand thus and sets up several answers to the suit.

The first answer set up is that the guarantee of £10,000 was terminated and replaced by an "indemnity" given by the respondent company to secure only the bank's liability to His Majesty's Customs on its bond or obligation. This involves three results: (*a*) that the respondent company was no longer a surety, (*b*) that the debt or liability was not the same as that for which the plaintiff had

H. C. OF A. 1939.

McLEAN v. DISCOUNT AND FINANCE LTD.

Rich J.

become surety; and (*c*) that in any event the limit of its liability was £5,000 and not £10,000, so that the proportions of contribution would be five-eighths and three-eighths and not ten-thirteenths and three-thirteenths. The arrangement or negotiations relied upon to produce this result took place in September 1930 between the bank and a firm of solicitors representing the principal debtor and the respondent company. The evidence as to what arrangement or agreement was arrived at is restricted to letters passing between the solicitors and the bank dated 1st September, 3rd September, 8th September, 10th September, and 15th September, a form of "indemnity" dated 9th September executed by the respondent company and sent to the bank, a mortgage dated 9th September executed by the firm or principal debtor and sent to the bank, to certain notations made by a bank clerk on the original guarantee, and to the fact that on 10th September the bank received £7,000 as part of the transaction. I do not propose to discuss these documents and matters at length, but merely to state my conclusion. I feel sure that the bank never agreed to accept the so-called "indemnity" in substitution for its original guarantee. It is obvious from the course of business I have described that to secure itself against liability in connection with His Majesty's Customs the bank required much more than an indemnity against liability under its bond or obligation. The bond or obligation was furnished in case the bank dishonoured cheques drawn by the firm for customs duties. But one of the risks of the bank was that after it had honoured cheques for customs duties the firm might fail to procure and pay in its customers' cheques by which the firm was reimbursed and the account replenished. This seems to me to be the meaning of the bank's last letter, and the earlier correspondence is not inconsistent with the result. I have felt, however, a good deal of doubt as to whether the bank did not give a binding undertaking to reduce the limitation on the guarantee of the resident company from £10,000 to £5,000. I think the burden of proof on this question of fact lies upon the respondent company. *Nicholas* J. found against it, evidence was available to prove it which was not called, and on the whole I am not satisfied that such an agreement was made, and at any rate I am not prepared to disturb the finding of *Nicholas* J. The reduction in the amount of the limit upon the guarantee is doubtless an important matter, because it affects the proportion of contribution. But I have not been able to grasp the importance of the alleged substitution of the so-called "indemnity." The name "indemnity" can hardly matter, and the relations between the respondent company and the firm obviously remained those of

principal and surety. The £6,000 for which the bank was liable to His Majesty's Customs formed the most substantial item in the overdraft; so that the sureties were not guarantors of different debts, although possibly there would be an overlap in the case of the plaintiff. However, upon my view of the facts these questions do not arise.

The next matter relied upon by the respondent company was that before suit brought no actual payment had been made by the plaintiff as surety and that the proceeds of the bond had not been applied in discharge of the principal debt. This depends on the banking practice of carrying payments by a surety to a suspense account. "Payment is not a technical word; it has been imported into law proceedings from the exchange, and not from law treatises" (per *Maule* J. in *Maillard* v. *Duke of Argyle* (1)). I have on a former occasion discussed the meanings of the word: See *J. C. Williamson's Tivoli Vaudeville Pty. Ltd.* v. *Federal Commissioner of Taxation* (2). We are here dealing with a conception of equity based on or connected with its doctrines of equality and marshalling. I should have thought that what we should look for is the maturing of the liability of the co-surety suing for contribution in such a form that he has clearly discharged the burden imposed on him by his guarantee and to a greater extent than is just. *Starke* J. and *Evatt* J., whose judgments I have had the advantage of reading, are both of opinion that payment was made before the commencement of the suit, and in this view I concur. Indeed, I consider the payment was made when the proceeds of the sale of bonds were carried to a suspense account on 9th August 1932.

The third answer given by the respondent company depends upon the effect of the New-South-Wales *Moratorium Acts*. I think the contention that the plaintiff was protected by these Acts and therefore could not call on the co-surety to contribute is wrong. The *Moratorium Act* 1930-1931 did not cover mortgages of choses in action, but was limited to securities over land and chattels. The plaintiff's bonds were not, I think, "chattels" within the purview of the Act: Cf. *Australian Trust Ltd.* v. *Ho Chin* (3). By the time the *Moratorium Act* 1932 came into force the bonds had been sold and, as I think, the plaintiff's right to contribution had matured. In any event the bank held no property of the plaintiff's after that date. The proceeds of the bonds were not a fund to be held in specie.

(1) (1843) 6 Man. & G. 40, at p. 45 [134 E.R. 801, at p. 803].
(2) (1929) 42 C.L.R. 452, at pp. 476-478.
(3) (1932) 33 S.R. (N.S.W.), at p. 60; 50 W.N. (N.S.W.), at p. 29.

H. C. OF A. 1939.

McLEAN v. DISCOUNT AND FINANCE LTD.

In my opinion the appeal should be allowed and a decree should be made that the appellant is entitled to a contribution from the respondent company on the basis that the former should bear only three-thirteenths and the latter ten-thirteenths of the amount paid to the bank by them in combination.

STARKE J. Appeal from a decision of the Supreme Court of New South Wales which dismissed a suit brought by the appellant against Discount and Finance Ltd. (hereinafter called " the respondent ") and others.

The appellant claimed contribution from the respondent as co-surety with him of a debt or liability of a firm of George Wall to the National Bank of Australasia Ltd. of so much of the debt or liability paid by the appellant as was in excess of his proper share and proportion or a declaration that the respondent was liable as co-surety with the appellant to contribute its proper share and proportion of the debt or liability and ancillary relief. The firm of George Wall, hereinafter called " the principal debtors," was a customer of the National Bank of Australasia Ltd. and was largely overdrawn on current account. In November 1929 the respondent by a guarantee in writing undertook to pay to the bank on demand all moneys then owing or which might from time to time be owing to the bank on any account or in any manner by the principal debtors either alone or jointly with any other person or corporation, but it was agreed that the amount ultimately payable by the respondent under the guarantee should not exceed the sum of £10,000 and interest thereon. It was a continuing guarantee. It also provided that the bank might without affecting the guarantee grant time or other indulgence to the principal debtor or any person or corporation whatsoever or release, abandon, relinquish or renew in whole or in part any security or right held by the bank.

In December 1930 the appellant by a document in writing charged bonds specified in the schedule thereto and called " deposited documents " with the payment to the bank, on demand, of all such advances and of all debts and liabilities which were then or might be thereafter owing to the bank on any account by the principal debtors either alone or jointly with any other person or corporation. It was provided by this lien or charge that the bank might, without the necessity of requesting the appellant to do so, sell or otherwise dispose of for valuable consideration the deposited documents and apply the net proceeds thereof in discharge *pro tanto* of the principal debtors' indebtedness to the bank, together with all interest, costs and expenses which might have accrued or been incurred in respect

thereof, and should account for the surplus, if any, to the appellant. It was also provided by this lien or charge that the bank might without the appellant's assent grant time or other indulgence to the principal debtors or any person or persons and compound with or release them or any of them or release, abandon, vary, or relinquish in whole or in part any security for the time being held by the bank without discharging or affecting the appellant's liability thereunder. Treasury bonds having a face value of £3,000 were deposited with the bank pursuant to the lien or charge. The appellant, it will be observed, incurred no personal obligation under this lien or charge, as did the respondent under its guarantee, but the principles of law applied in the surety cases are applicable to the case (*Smith* v. *Wood* (1)).

The claim of the appellant is founded upon the equitable principle that, whenever a surety has been required to pay the principal debt or liability or more than his just share or proportion of the debt or liability, then he is entitled to contribution from his co-sureties in respect of the excess. The equity arises from the fact that the parties are co-sureties of the same principal debt or liability and is not founded upon contract (*Dering* v. *Earl of Winchelsea* (2)). But it was said that the right to contribution only arises when a surety has paid or provided the principal debt or more than his just share or proportion thereof (*Maxwell* v. *Jameson* (3) ; *Davies* v. *Humphreys* (4) ; *Wolmershausen* v. *Gullick* (5)). At common law, no doubt, a surety could not maintain an action for contribution or money paid until he had actually paid more than his just proportion of the principal debt. But the authorities support the view that in equity the right to contribution can be declared before actual payment is made or loss sustained provided that such payment or loss is imminent (*Wolmershausen* v. *Gullick* (5)). A judgment against a surety for the whole amount of the principal debt justifies such a declaration, as does the allowance of a claim by the principal creditor against the estate of a deceased surety (*Wolmerhausen* v. *Gullick* (5)). The apprehended loss or over-payment thus appears sufficiently imminent, and the court acts *quia timet* (*Wolmershausen* v. *Gullick* (5) ; *In re Anderson-Berry* (6)). And the amount of contribution that can be recovered or in respect of which the right can be declared is in proportion to the limits of the respective liabilities of the sureties (*Ellesmere Brewery Co.* v. *Cooper* (7)).

(1) (1929) 1 Ch. 14.
(2) (1787) 1 Cox 318 [29 E.R. 1184].
(3) (1818) 2 B. & Ald. 51 [106 E.R. 286].
(4) (1840) 6 M. & W. 153 [151 E.R. 361].
(5) (1893) 2 Ch. 514.
(6) (1928) Ch. 290.
(7) (1896) 1 Q.B. 75.

H. C. OF A. 1939.

McLEAN v. DISCOUNT AND FINANCE LTD.

Starke J.

The facts in the present case may now be considered. In July 1931 the account of the principal debtors with the bank stood in debit about £7,800. The bank notified the appellant that the principal debtors had made default in payment of their indebtedness and that it was proposed to exercise such powers as were conferred upon it by the lien or charge already mentioned. The principal debtors, who are parties to this action, were not in a position to meet and did not meet their indebtedness to the bank: in fact, they were not solvent: See *Rowlatt, Principal and Surety*, 3rd ed. (1936), p. 234. Nothing seems to have been done until August 1932, when the bank inquired of the appellant whether he had any objection to the conversion of the bonds into cash and he replied that he had not. And on 1st August 1932 he confirmed by letter the bank's expressed wish that the bonds be converted into cash by sale, such action in no way to prejudice his case. The bonds were sold on 5th and 6th August 1932, and realized net £2,936 16s. 3d. The bank did not carry this sum to the credit of its principal debtors' account, but on 9th August 1932 opened a manager's suspense account to which it credited the sum of £2,936 16s. 3d., where it remained at credit until 9th November 1938. Interest was not credited to the suspense account in respect of the sum mentioned, nor on the other hand was interest debited, after the opening of the suspense account, on a sum of £2,936 16s. 3d., to the principal debtors' account. Apparently these interest charges were regarded as offsetting one another and were omitted from the accounts. Subsequently, in November 1938, the appellant confirmed this action of the bank. In February 1937 the principal debtors' account with the bank stood in debit in the sum of £7,575 13s. 1d. On 23rd February 1937 the respondent paid to the bank the sum of £4,638 16s. 10d., which was credited to the principal debtors' account, leaving it in debit in the sum of £2,936 16s. 3d., which was precisely the amount at the credit of the manager's suspense account. At the same time the word " cancelled " was written across the respondent's guarantee of November 1929, lines were also run through the signatures of the directors, and a second mortgage by way of assignment of rights in a motion picture given by the principal debtors to the bank in September 1930 was endorsed " discharged." And on 9th November 1938 the sum of £2,936 16s. 3d. was carried, so the court was informed, from the manager's suspense account to the principal debtors' account with the bank, thus closing it.

It was contended for the respondent that this sum of £2,936 16s. 3d. at the credit of the suspense account could not be treated as paid by the appellant or at all on account of the principal debt until

November 1938, when it was transferred and appropriated by the bank to the account of the principal debtors (*Commercial Bank of Australia Ltd.* v. *Official Assignee of Estate of Wilson & Co.* (1)). This appropriation was after the commencement of the suit, from which was deduced the conclusion that the appellant could have no enforceable right to contribution from the respondent at that time, namely, on 13th April 1938. In my judgment the argument is untenable. Under the lien or charge the authority of the bank was to sell deposited securities and apply the net proceeds in discharge, *pro tanto*, of the principal debt. And the acts of the bank, which I need not recapitulate, between the beginning of July 1931 and the end of February 1937, expressed in the final entry of November 1938 transferring the amount at credit of the suspense account to the principal debtors' account, evince its intention to appropriate the sum of £2,936 16s. 3d. towards payment of the principal debt and an actual application of the sum in and towards satisfaction of the principal debt on 23rd February 1937, if at no earlier date.

But, even if this view were rejected, still the appellant would be entitled to a declaration establishing his right to contribution from the respondent because the evidence makes it clear that the bank intended to and would apply the proceeds of the appellant's bonds in its hands in and towards satisfaction of the principal debt, whereby the appellant would almost certainly provide more than his just share of the principal debt. The transfer in November 1938 of the proceeds of the bonds from the suspense account to the account of the principal debtors makes it clear that the bank did what must have been apprehended in February 1937 and was then almost certain. The application of the proceeds of the bonds proposed or threatened by the bank in 1937 put the appellant in danger of imminent loss or payment in excess of his just share or proportion of the principal debt. The amount of that debt was ascertained. In February 1937 the amount of the principal debt in the books was £7,575 13s. 1d. The bank accepted £4,638 16s. 10d. of this sum from the respondent and proposed to and did satisfy the balance of the account, £2,936 16s. 3d., with the proceeds of the appellant's bonds at credit of the suspense account. In addition, the bank had also collected a sum of £197 5s. 2d. for interest from the appellant's bonds and credited it to the principal debtors' account. The limits of the appellant's and respondent's liabilities were £3,000 (the face value of the bonds deposited) and £10,000, the limit of the respondent's guarantee. The appellant and the respondent should

(1) (1893) A.C., at pp. 185, 186.

H. C. OF A. 1939. McLEAN v. DISCOUNT AND FINANCE LTD. Starke J.

therefore respectively contribute in the proportion or shares of three-thirteenths and ten-thirteenths of the total liability paid or discharged by them in respect of the principal debt. That as already indicated was £7,772 18s. 3d., as follows: £197 5s. 2d.—interest on bonds, £2,936 16s. 3d.—proceeds of bonds, £4,638 16s. 10d. —discharged by respondent. But the appellant's contribution was or would be £1,793 14s. 11d. (three-thirteenths of £7,772 18s. 3d.), whereas his bonds and interest provided £3,134 1s. 5d., which exceeds or would exceed his proper share or proportion of the total liability by a sum of £1,340 6s. 6d. On the day of the opening of the suspense account in August 1932 the corresponding amount would have been £1,552 9s. 4d. Consequently it is clear that before suit commenced the appellant had provided more than his just share of the principal debt or was threatened by a bank with action which must result in the appellant providing more than his just share of that debt.

Some further contentions were put forward by the respondent in answer to this suit which require consideration. One was that about September 1930 an arrangement was made between the bank and the respondent which closed or put an end to the common obligation of the appellant and the respondent for the principal debt. It was said that the respondent's guarantee of 1929 was cancelled and a new arrangement substituted whereby the respondent undertook to indemnify the bank against claims on the bank by the Customs under a guarantee which in 1930 it had given to the Customs in respect of customs duties payable by its principal debtor, but stipulated that its liability should not exceed £5,000. Apparently the principal debtors' account was in an unsatisfactory state in 1930. On 1st September 1930 the solicitors who acted for the principal debtors and the respondent wrote to the bank that arrangements were practically complete to enable the principal debtors to pay off the overdraft with the bank and seeking the bank's confirmation of certain proposals. The bank replied that it was prepared to make a settlement on the terms it set out. But it insisted that the arrangement was tentative and subject to "an arrangement with the Sun Insurance Co. to reimburse the bank to the extent of £6,000 should the bank be called upon to make any payments up to £6,000 under the guarantee to the Customs." On 10th September 1930 the solicitors forwarded a number of documents to the bank for the purpose of carrying out the proposals already mentioned. But the covering letter stated :—"You will note that in accordance with your instructions the security specifically provides for a full indemnity policy to be arranged in favour of the bank. Mr. Wall informs us that arrangements are on foot with Lloyds . . . for the issue of a

policy . . . Will you please acknowledge receipt of these documents and also let us have a letter stating that the existing guarantee from Discount and Finance Ltd. in respect of George Wall's overdraft has been cancelled ? " But the bank replied on 15th September reviewing the position. It said that " as an act of grace it was agreed that the Discount and Finance Co.'s guarantee could be reduced to £5,000 upon the picture film loan of £7,000 being received for reduction of bank indebtedness. Your present suggestion is that we accept a qualified guarantee of £5,000 from the D. & F. Ltd., limiting their liability strictly to cover our obligations in respect of the Customs guarantee (but excluding any overdraft) given on account of Wall. . . . the bank prefers to continue the general form of guarantee (as at present held). . . . We would therefore ask that you be so good as to arrange for fresh guarantee on the lines of that already held but for the agreed reduced amount of £5,000. We may say that we would be agreeable to meet the D. & F. Ltd.'s request to release their guarantee provided approved security in substitution thereof is furnished to the bank but the amount is to be £6,000." But the insurance suggested was not obtained, nor was a fresh guarantee prepared nor given on the lines required by the bank, nor was £6,000 approved security in substitution of such guarantee furnished to the bank. The bank was not willing to give up its guarantee of 1929 until it obtained a fresh one approved by it. It is said that some of the suggestions made by the respondent's solicitors were carried through and effected. But it is clear that the bank did not accept the so-called indemnity of 9th September 1930, which was one of the documents forwarded to the bank with the letter of 10th September 1930. And on the face of the documents no concluded agreement is shown abandoning the old guarantee unless a new and approved one was given. A pencil memorandum was, however, placed by one of the bank's officers on the respondent's guarantee of 1929 in these terms : —" This guarantee is limited to £5,000 vide arrangement and covers only guarantee to Customs Department." Despite this indorsement, the bank's solicitors, on 16th December 1930, notified the respondent, the Discount and Finance Co. Ltd., that the Customs had made a claim on the bank and that the bank's liability was protected by the respondent's guarantee of 1929. About the middle of January 1931 instructions went to the bank's solicitors to take action and a notice of demand was served upon the respondent under the guarantee of 1929, which, the demand stated, " was reduced in amount by subsequent correspondence to £5,000 and interest." But nothing was done by the respondent, and writs were issued on 21st January 1931

H. C. OF A. 1939. McLEAN v. DISCOUNT AND FINANCE LTD. Starke J.

against both the principal debtors and the respondent. The bank's claim against the respondent was founded on the guarantee of 1929, "which said guarantee," the particulars of claim alleged, "the said plaintiff bank subsequently agreed to limit to the amounts which the said plaintiff bank might be called upon to pay to the Collector of Customs on behalf of the said firm of George Wall and to the extent of £5,000 only and interest." Proposals were made for the settlement of the actions which the bank accepted with some modifications: See correspondence between the solicitors to the parties 18th February 1931, 24th February 1931, 26th February 1931. Apart from the bank being paid two sums each of £1,000 "as an act of grace and without any condition," the modified proposals were not carried out. But the bank does not seem to have further pursued its actions. The learned trial judge was not satisfied that the respondent paid the two sums each of £1,000. They were paid by solicitors who acted for the principal debtors as well as for the respondent, and there was no evidence that the respondent put the solicitors in funds to make the payments: in fact, the principal debtors did so. This finding has not been challenged. Further, the learned judge found that the respondent's guarantee of 1929 had not been reduced from £10,000 to £5,000, or limited to the Customs-guarantee account. Apart from the endorsement on the guarantee, the particulars in the writ, and the bank's demand, the documentary evidence adduced does not establish any concluded agreement to cancel or vary the guarantee of 1929; and persons who took part in the negotiations for alteration of the guarantee and who might have deposed to the precise terms of any arrangement that was made were not called by either party. The indorsements and the bank's demand do not bind the appellant nor establish against him the cancellation or variation of the respondent's guarantee of 1929. These indorsements and the demand may have been due to want of proper instructions to the bank's solicitors or to counsel. Instructions to counsel who drew the indorsement were tendered, objected to and rejected, and a possible explanation of the indorsement thus excluded. In my opinion it was for the respondent to satisfy the trial judge that its guarantee of 1929 was cancelled or varied, and it did not do so. The finding of the learned judge ought not, in the circumstances mentioned, to be disturbed, unsatisfactory as is the evidence upon the matter.

Another contention of the respondent was that the transaction of February 1937, when the respondent paid the bank £4,638 16s. 10d. and its guarantee of 1929 was indorsed "cancelled," released it and deprived the appellant of any right to contribution against the

respondent. *Ex parte Gifford* (1) and *Ward* v. *National Bank of New Zealand Ltd.* (2) were referred to. But the argument is untenable. The bank did not release the respondent, as I understand the facts, from any part of the principal debt. It required and obtained payment of the whole of the principal debt. It had in hand from the appellant £3,134 1s. 5d. (£2,936 16s. 3d. and £197 5s. 2d. interest on bonds), and the respondent paid the balance of the principal debt then owing, £4,638 16s. 10d. The bank had exercised its rights against each party whereby unequal contributions to the principal debt had arisen: Cf. *Rowlatt* on *Principal and Surety*, 3rd ed. (1936), pp. 173, 174. But it is the unequal contribution so enforced that establishes the right to contribution on the part of the party who has provided more than his just proportion.

Finally, the respondent relied upon the *Moratorium Acts* of New South Wales. The *Moratorium Act* 1930-1931, now repealed, was referred to, but it seems probable that the lien or charge in the present case was not caught by its provisions owing to the interpretation clause. "Mortgage" in that Act means any deed, memorandum of mortgage, instrument, or agreement whereby security for payment of moneys or for the performance of any contract is granted over land or chattels or any interest therein. Under the *Moratorium Act* 1932-1937, however, "mortgage" means any deed, memorandum of mortgage, instrument, or agreement whereby security for payment of moneys or for the performance of any contract is granted over real or personal property in New South Wales or any interest therein: See sec. 2. It was conceded, rightly I think, that the lien or charge of 1930 from the appellant to the bank falls within this definition: See also sec. 41. Then by sec. 6 it is provided that a mortgagee under a mortgage shall not exercise any of the rights, powers, or remedies against the mortgagor or mortgaged property for the recovery of the moneys secured by the mortgage or realization of the security without the leave of the court, unless he first gives notice of his intention so to do to the mortgagor, who may then apply to the court for an order as to the exercise by the mortgagee of his rights, powers, and remedies under the mortgage or as to the suspension thereof. But provision is made for the consent of the mortgagor in certain cases: See sec. 14. Further, it is provided by sec. 18 (3) that the date for repayment of the principal sum secured by a mortgage to which the Act applies shall, if the principal sum is payable on demand, be 28th February 1940. The Act of 1932 received the Royal assent on 21st December 1932. It was contended that the bank had not, by reason of these provisions,

(1) (1802) 6 Ves. 805 [31 E.R. 1318]. (2) (1883) 8 App. Cas. 755.

H. C. OF A. 1939. McLEAN v. DISCOUNT AND FINANCE LTD. Starke J.

any right to enforce the lien or charge of 1930 for payment of the principal debt and that its action in realizing the security and appropriating the proceeds towards satisfaction of the principal debt could not be treated as a payment of that debt or accelerate in any way the right to contribution from the respondent. Indeed, it was claimed that the bank's act was a nullity (*Coroneo* v. *Australian Provincial Assurance Association Ltd.* (1)). In my judgment this contention should be rejected. If the proceeds carried to the credit of the suspense account on 9th August 1932 be treated as a payment on that date on account of the principal debt then it would seem that the charge or lien of December 1930 given by the appellant to the bank had ceased to be a mortgage security before the Act came into operation and its provisions would then appear to have no operation. But that does not appear to me to be a right view of the facts. The intention of the bank, so far as that is material, was to hold the proceeds of the bonds in suspense and not appropriate them to payment of the principal debt. It is possible that the bank's action was dictated as much in the interest of the appellant as in its own interests. Be that as it may, all the bank's acts in connection with the proceeds and the suspense accounts were ultimately approved and ratified by the appellant. The 23rd February is, I think, the date on which the proceeds of the bonds to the credit of the suspense account were appropriated to payment of the principal debt. The *Moratorium Act* 1932 was then in operation. The principal debt was ascertained and the debtors had made default in payment. The *Moratorium Act* 1932-1937 did not discharge nor, in the present case, even suspend payment of the principal debt. It suspended, no doubt, the bank's right to enforce its rights under the lien or charge given by the appellant without the leave of the court or the consent of the appellant. There is nothing, however, in the Act which prohibits a mortgagor from paying debts that he owes nor a surety from discharging debts that he has guaranteed or given security for payment: Cf. *Electrolytic Zinc Co. of Australasia Ltd.* v. *Knight* (2); *Barcelo* v. *Electrolytic Zinc Co. of Australasia Ltd.* (3). Such payments are lawfully made and discharge obligations due though payment be suspended if mortgagors within the Act stand on its provisions. Indeed, sec. 41 (11) of the Act provides that nothing in this Act or in the *Moratorium Act* 1930-1931 as amended by subsequent Acts shall be construed to impair the right of a guarantor to reimbursement by a mortgagor or to

(1) (1935) 35 S.R. (N.S.W.) 391; 52 W.N. (N.S.W.) 131.
(2) (1932) V.L.R. 193, at pp. 219, 220.
(3) (1932) 48 C.L.R. 391, at pp. 415, 416.

contribution from any co-guarantor. One of the provisions aimed at by this section was sec. 4 of the Act No. 66 of 1931, which provides that all covenants for the payment or repayment of any moneys secured by a mortgage of real property shall, except for the purpose of enabling a mortgagee to exercise all or any of the rights against the mortgaged property, be void and of no effect. But it makes plain that the substance of the respondent's contention is that the appellant's bonds were realized and applied towards payment of the principal debt at a time when the appellant was not compelled or required to provide for it. It may be that a prior consent was required by the bank as a justification for its action in selling the bonds despite the subsequent confirmation by the appellant: Cf. *Equitable Life Assurance of the United States* v. *Bogie* (1). But that is a matter between the appellant and the bank and not between the appellant and the respondent. The appellant was under no duty to claim the benefit of the *Moratorium Act* for the benefit of the respondent. No right of the respondent was infringed if the appellant did not so claim.

The plain facts of the case are that the bank realized and applied the proceeds of the appellant's bonds towards satisfaction of the principal debt. The appellant acquiesced. But, even if he had not acquiesced or consented in the manner required by the Act, still the bank had acted and appropriated the proceeds of the appellant's bonds. The appellant is under no obligation to obtain a refund of the proceeds from the bank: he can lawfully treat them as applied not voluntarily but pursuant to his obligation under his lien or charge towards satisfaction of the principal debt. It may be that the bank acted without the authority required by the *Moratorium Act*, but that would not, with respect, make its unauthorized act a nullity for all and every purpose. According to the *Coroneo Case* (2) a mortgagor would have no right of action for damages against a mortgagee for a sale without leave of the court or the consent of the mortgagor. But would a purchaser of property, for instance, treasury bonds, bona fide and without notice of any contravention of the *Moratorium Act* obtain no title? In the case of real property a purchaser might be put upon inquiry as to the right to sell, having regard to the *Moratorium Act*, but an unauthorized sale would not, I should think, be classed as a nullity, though it might confer no title. The title of the present holder of the treasury bonds sold by the bank is, I think, unassailable and unaffected by any contravention on the part of the bank of the *Moratorium Act*.

(1) (1905) 3 C.L.R. 878, at p. 896.
(2) (1935) 35 S.R. (N.S.W.) 391; 52 W.N. (N.S.W.) 131.

H. C. OF A. 1939. McLEAN v. DISCOUNT AND FINANCE LTD. Starke J.

In my opinion this appeal should be allowed and declarations and an order made to the following effect:—1. That the appellant and the respondent are liable to contribute in the proportions of three-thirteenths and ten-thirteenths respectively of the sum of £7,772 18s. 3d. paid or provided by them on or before 23rd February 1937 in respect of the principal debt of the firm of George Wall to the National Bank of Australasia Ltd.; 2. That the appellant has paid or discharged £1,340 6s. 6d. of such liability in excess of his proper share and proportion; 3. Order that the respondent pay to the appellant the said sum of £1,340 6s. 6d.

EVATT J. The question to be decided is whether, according to well-settled principles of equity, the appellant has become entitled to a co-surety's contribution from the respondent company upon the footing that the appellant has paid or been called upon to pay more than his just proportion of the liability of the partnership known as "George Wall" (hereinafter called the principal debtor) to the National Bank of Australasia (hereinafter called the bank).

The appellant became bound to the bank on 3rd December 1930, when he executed a letter of lien whereby, in consideration of advances made, or to be made, by the bank to the principal debtor, he charged certain securities deposited by him with the bank with the payment to the bank on demand of all advances, debts and liabilities owing by the partnership. By this document, the appellant irrevocably appointed the bank's officers as his attorneys to sell the deposited securities and to apply the net proceeds of sale in discharge *pro tanto* of the indebtedness of the principal debtor. On the same day—3rd December 1930—the appellant duly deposited with the bank Commonwealth bonds to the face value of £3,000. This figure, £3,000, has been taken as measuring the appellant's due proportion of the total guarantees covering the liability of the principal debtor to the bank; so that, if the right of contribution has arisen, the proper share for which the appellant is chargeable, as against a co-surety who is guaranteeing the same indebtedness to the extent of £10,000, is according to the ratio of three to ten, i.e., the appellant is chargeable with only three-thirteenths of the total indebtedness. The fact that under the document of lien the appellant was not under a personal liability does not affect his equitable right to contribution if the other conditions of enforcement are satisfied. Nor is the appellant's right dependent upon the fact of notice or knowledge by either co-surety of the responsibility assumed by the other (*Smith* v. *Wood* (1)).

(1) (1929) 1 Ch., at p. 21.

The appellant claims that at all material times after 3rd December 1930 he and the respondent company remained co-guarantors of the general liability of the firm to the bank; but the respondent company contends that its document of guarantee dated 28th November 1929 was duly terminated or rescinded prior to 3rd December 1930. By the said document, the respondent company guaranteed (to the limit of £10,000) the general indebtedness of the principal debtor to the bank.

The preliminary question is of crucial importance. It turns upon whether *Nicholas* J. was right in finding that the 1929 agreement was not replaced by an agreement by which, as to future advances by the bank, the company merely indemnified the Collector of Customs to the extent of £5,000 in accordance with the company's written offer dated 10th September 1930.

In his judgment, dated 3rd March 1939, *Nicholas* J. has fully set out the correspondence and facts relied upon to establish the fact of acceptance of the offer of 10th September 1930. The learned judge found that, despite certain authorized or unauthorized admissions on the part of several bank officials, the guarantee of 1929 would be treated as though the respondent company's liability was by way of indemnity and to the extent of £5,000 only—"there has never been a *consensus ad idem* between the bank and the defendant company by which another agreement was substituted for that expressed in the document of 1929."

This part of the case was fully and lucidly argued by Mr. *McKillop* and Mr. *Beale*. I am of opinion that *Nicholas* J. was right in finding against the respondent company. On 15th September 1930, after the date of the alleged offer, the bank dealt expressly with the respondent company's "present suggestion . . . that we accept a qualified guarantee of £5,000 from the D. & F. Ltd., limiting their liability strictly to cover our obligations in respect of the customs guarantee (but excluding any overdraft) given on account of Wall." In reply to the company's suggestion, so stated, the bank said: "The nature and conduct of Wall's transactions with the customs are such that the bank prefers to continue the general form of guarantee (as at present held) so that we are covered whether Wall's commitments to the customs involve us partially in overdraft as well as outstanding liability under our guarantee to the customs."

In face of this, it seems evident that no concluded agreement had been reached on 15th September 1930. Certainly, I think it is impossible to find that the guarantee of 28th November 1929 was varied by another agreement between the bank and the respondent

H. C. OF A. 1939. McLEAN v. DISCOUNT AND FINANCE LTD. Evatt J.

company before 3rd December 1930, when the plaintiff executed his guarantee to the bank.

Indeed, the respondent company has not been able to answer the question—*when* did the variation of the 1929 agreement take effect? If an agreement for alteration or termination was made, it must have taken place between officers exercising high executive authority in the case both of the bank and of the respondent company. But the respondent company did not call a single witness to prove any such altered arrangement and the date thereof. The court is merely asked to infer from certain letters and the subsequent conduct of the two parties that, on some occasion or other, an arrangement must have been come to. As the plaintiff duly proved the execution of the respondent company's guarantee of 28th November 1929, it was for the company to show that the relation of suretyship established by such document had been altered before the plaintiff executed his letter of lien. The form of the writ issued by the bank against the respondent company has to be considered, but that may have been due to a misapprehension of the position, and, if, as was suggested, the instructions to solicitors and counsel would have disclosed such an error, evidence to this effect could, and should, have been admitted. Further, when the settlement of 23rd February 1937 was made between the respondent company and the bank, for the sum of £4,638, this settlement was made in respect of the whole of the principal debtor's liability, and it is noteworthy that the document then cancelled was that of 28th November 1929, and not any other document.

It follows that at all material times the relationship of co-sureties existed between the appellant and the respondent company.

The other material facts of the case may be summarized in the following chronological order:—(*a*) 15th December 1930: Default on the part of the principal debtor. (*b*) 15th January 1931: Demand on principal debtor by the bank. (*c*) 15th January 1931: Demand upon respondent company by bank. (*d*) 7th July 1931: Letter from bank to appellant informing him of default of the principal debtor, and of the bank's intention to exercise its powers under the letter of lien. This letter stated that the interest collected on the deposited bonds had already been credited against the indebtedness of the principal debtor. (*e*) 1st August 1932: Letter from appellant to bank confirming appellant's wish that bonds held by the bank should be converted into cash by sale—"such action to . . . in no way prejudice my case." (*f*) 9th August 1932: Sale of plaintiff's bonds by the bank for £2,936, and deposit of such sum to a suspense account.

After this last day, 9th August 1932, the interest upon the £2,936 standing to the credit of the suspense account was credited by the bank to the overdrawn account of the principal debtor, and the appellant says that this crediting is a sufficient appropriation to establish the fact of payment by him to the bank as at 9th August 1932. But, in the circumstances, I think that something more tangible was required to establish payment by the appellant. The establishment of a " suspense " account may be fairly regarded as indicating that the bank was acting provisionally rather than definitively. The occasion did not demand final action on the part of the bank, and the deposit is capable of being explained as evidencing a mere change in the form of security. On the whole I am not satisfied that the appellant, who bears the onus of this issue, has established the fact of payment on 9th August 1932.

However, I am satisfied that on 23rd February 1937 the appellant must be taken as having paid the bank, and that the rights of the parties to this appeal should be adjusted upon that footing. It was then, as has already been pointed out, that the bank came to a final settlement with the respondent company. On that day, the total indebtedness of the principal debtor exceeded the amount of the proceeds of sale of the appellant's deposited securities (i.e., £2,936) by exactly £4,638 16s. 10d. It was upon payment of this sum (i.e., £4,638 16s. 10d.) that the respondent company became discharged from its obligations under the guarantee of 28th November 1929. Point is lent to this part of the appellant's case by the respondent company's contention that this discharge by the bank operated to release the appellant's obligation to the bank to the extent of the right of contribution lost by the discharge. In my opinion, the transaction of 23rd February 1937 did not release the appellant in any respect whatever. The proper inference is that on that day the bank, which was under no obligation to notify the appellant of its decision, finally and definitively appropriated the proceeds of the sale of the appellant's securities towards the payment of the debt of the principal debtor. Such appropriation was within the plain authority given by the letter of lien. After and as a consequence of such appropriation of the sum of £2,936 16s. 3d., then standing to the credit of the suspense account, the indebtedness of the respondent company was fixed at £4,638 16s. 10d., which was the balance of the principal debtors' indebtedness to the bank. In my view, the transaction is inexplicable upon any hypothesis other than that of payment by the appellant of £2,936 towards the satisfaction of the indebtedness of the principal debtor. Upon the finding of payment by the appellant on 23rd February 1937, it follows that,

H. C. OF A. 1939. McLEAN v. DISCOUNT AND FINANCE LTD. Evatt J.

subject to one further argument, the appellant is entitled to an order against the respondent company in the sum of £1,340 6s. 6d., which the parties have agreed was the amount paid in excess of the three-thirteenths liability which alone was the plaintiff's equitable share of the common burden. It becomes unnecessary to consider whether in any event the plaintiff is entitled to a declaration *quia timet* upon the finding that actual payment had not taken place at the commencement of the suit.

The final argument of the respondent company is that at no time before the commencement of the suit was the appellant under any presently enforceable liability to pay the bank, because, throughout the whole period in question, he was protected by the terms of the New South Wales *Moratorium Act*.

Under the *Moratorium Act* 1930-1931, it was provided that a mortgagee should not, without leave of the court, exercise any power of sale, and also that the time of repayment of the principal sum secured by a mortgage to which the Act applied should be extended to a date specified in sec. 16 of the Act. By sec. 2 of the Act of 1930-1931, a mortgage was defined as meaning an instrument whereby security for payment of moneys, etc., was granted "over land or chattels or any interest therein respectively, and includes an equitable mortgage by deposit of title deeds." I am of opinion that this Act did not apply to securities where, as in the present instance, the property charged consisted of Commonwealth bonds. As *Harvey* J. said in *Australian Trust Ltd.* v. *Ho Chin* (1), "although shares, debts, and other choses in action, may, in some contexts, be included under the expression 'chattels,' I think there are indications that the word 'chattels' is, in this definition, limited to personal property which is capable of being transferred by actual delivery and can be the subject of occupation or manual possession."

But, as the date of payment by the appellant did not take place until 23rd February 1937, it is also necessary to consider the subsequent *Moratorium Act* 1932-1937. By that Act, "mortgage" was extended to cover securities "over real and personal property in New South Wales or any interest therein" (sec. 2 (1)). This broader definition would no doubt cover a lien over the securities lodged by the plaintiff. Further, the *Moratorium Act* 1932-1937 extended the date of payment of the principal sum of a mortgage until 28th February 1940.

But, in my opinion, these *Moratorium Acts* cannot be construed as depriving a co-surety who has paid the principal debt after the date for payment fixed by the security, but before the prescribed

(1) (1932) 33 S.R. (N.S.W.), at p. 60; 50 W.N. (N.S.W.), at p. 29

date as extended by the statute, from enforcing as against a co-surety a right to contribution which would otherwise exist. Perhaps sec. 41 (11) is of itself sufficient to show that the right of a guarantor to contribution from a co-guarantor is not to be impaired by the Acts. Then, sec. 20, which provides that, where the principal sum secured by a mortgage is paid after the date for payment fixed by the mortgage, but before the prescribed statutory date for repayment, the mortgagee is not entitled to receive any payment by way of interest in lieu of notice, strengthens the conclusion which I have stated. Further, as has been held, a mortgagor is entitled to redeem on any day after the date fixed for payment by a mortgage and before the prescribed date without payment of interest up to the date to which the Act has extended the time for repayment. I entirely agree with the observations of *Long Innes* J.: "Having regard to the general object of the *Moratorium Act* 1930, and to its title, which is 'An Act to make provision for a moratorium; to restrict temporarily certain of the rights possessed by mortgagees, vendors, and others; and for purposes connected therewith,' and to the intention of the legislature as expressed in the Act itself, I should myself have thought that the Act was not intended to deprive a mortgagor of his right to pay off a mortgage on the date fixed by the agreement between the parties, if notwithstanding the depressed condition of the country and the fall in real estate values he was in a position, and willing, so to do" (*Re E. A. Davies (Deceased)* (1)).

In short, the object and policy of the *Moratorium Acts* were to benefit mortgagors by giving them an extension of the time of payment, the equivalent of a statutory period "of grace," but certainly not to *prevent* a mortgagor from paying an existing debt, and from enforcing any collateral remedies against third parties to which such payment might otherwise entitle him.

In my opinion, the appeal should be allowed, and an order should be made that the respondent company should pay to the appellant the sum of £1,340 6s. 6d. which is the sum payable to the appellant upon the basis of a three-thirteenth contribution as at 23rd February 1937, together with interest on the said sum from the said date up to the date of decree.

McTIERNAN J. The first question is whether the defendant company was a surety of the principal debt of which the plaintiff says that he has paid a greater share than as between himself and the company it was equitable for him to bear. The debt was the liability of the other defendants, a firm of customs agents, on their

(1) (1933) 50 W.N. (N.S.W.), at p. 232.

H. C. OF A. 1939.

McLEAN v. DISCOUNT AND FINANCE LTD.

McTiernan J.

account with the bank. The letter of lien which the plaintiff executed on 3rd December 1930 made him a surety of that debt. It contains no personal covenant by the plaintiff to pay: no point is made of the absence of such a covenant. The defendant company's guarantee of 28th November 1929 had made it a surety of the same principal debt as that to which the plaintiff's letter of lien related. No question is raised whether the plaintiff could be entitled to a surety's right of contribution when he did not know at the time he executed the letter of lien that the defendant company had executed the guarantee. It is clear that, if the guarantee was in force when the letter of lien was executed, the defendant company and the plaintiff would have become co-sureties of the same principal debt. The learned trial judge found that the guarantee was then in force. The letter of 1st September 1930 which the defendant company's solicitors sent to the bank shows that it was sought to release the guarantee of 28th November 1929 and to substitute an instrument described as an indemnity which would be limited to the liability of the bank to the Customs Department under a guarantee which the bank had given for the firm's liability to the department. The bank's guarantee was limited to £6,000, and it was proposed that the defendant company's indemnity to the bank should be £5,000. Although there are a number of considerations which can be thrown in the balance against the plaintiff, there are two things which, in my opinion, weigh down the scale in his favour on the question whether the guarantee of 28th November 1929 was released prior to the execution of the letter of lien on 3rd December 1930. First, there is the fact that on 23rd February 1937 or soon after the bank had the defendant company's guarantee of 28th November 1929 marked with the word "cancelled." It did so on receiving from the respondent company its cheque for the sum of £4,638 16s. 10d. This was the balance due by the firm to the bank after it credited the account with the proceeds of the sale of the plaintiff's bonds. This evidence shows that the guarantee of 28th November 1929 was treated as being in force until 23rd February 1937. Secondly, the bank's letter of 15th September 1930 explicitly rejected the proposal that the form of the existing guarantee which covered the general indebtedness of the firm on their trading account should be replaced by a guarantee that was limited to a particular liability. This letter was sent in answer to a letter from the defendant company's solicitors. In the course of that letter they wrote: "We also enclose indemnity by Discount and Finance Ltd. in respect of your guarantee to the Customs, the total limit of Discount and Finance Ltd.'s liability under the indemnity being £5,000. We

understand that Discount and Finance Ltd.'s indemnity is to be operative only until the indemnity policy is arranged and is then to be released and we would be glad if you would confirm this. Will you please acknowledge receipt of these documents and also let us have a letter stating that the existing guarantee from Discount and Finance Ltd. in respect of George Wall's overdraft has been cancelled. Notice of the bank's security has been given to Australian Films Ltd. and the latter's acknowledgment will be forwarded to you as soon as it comes to hand. The indemnity to Discount and Finance is liable to £1 stamp duty and we would be glad if, after perusing the document, you would return it to us so that we may have it stamped." The bank's reply was in the following terms :— "Your present suggestion is that we accept a qualified guarantee of £5,000 from D. & F. Ltd., limiting their liability strictly to cover our obligations in respect of the Customs guarantee (but excluding any overdraft) given on account of Wall. The nature and conduct of Wall's transactions with the Customs are such that the bank prefers to continue the general form of guarantee (as at present held) so that we are covered whether Wall's commitments to the Customs involve us partially in overdraft as well as outstanding liability under our guarantee to the Customs. We would therefore ask that you be so good as to arrange for fresh guarantee on the lines of that already held but for the agreed reduced amount of £5,000. We may say that we would be agreeable to meet the D. & F. Ltd.'s request to release their guarantee provided approved security in substitution thereof is furnished to the bank but the amount is to be £6,000 as already stipulated." It should be observed that this reply was made by the bank after the so-called indemnity had been sent to it; also that the bank did not comply with the solicitors' request in their letter of 10th September 1930 to return the document to them for stamping. The bank's letter shows that it was not content that the guarantee of 28th November 1929 should be supplanted by the indemnity. The letter also shows that the bank would have been content with a guarantee in the same form as the guarantee of 28th November 1929 but limited to £5,000. But there is no evidence that the solicitors carried out the bank's request "to arrange for the fresh guarantee." No such guarantee is proved to have been sent to the bank, and, as the solicitors did not carry out the bank's request, it is impossible to conclude that the existing guarantee had been released or superseded. The evidence, as already observed, shows that the guarantee of 28th November 1929 was not cancelled until 23rd February 1937. There was, however, on the margin of the guarantee a note written by hand

H. C. OF A. 1939.

McLEAN v. DISCOUNT AND FINANCE LTD.

McTiernan J.

in these words : " Guarantee is limited to £5,000 vide arrangement and covers only guarantee to the Customs Department." There is no evidence showing who gave instructions for this note, which was written in pencil, to be put on the guarantee. The writer of the note was not called as a witness. It is clear that the note had no operative effect on the guarantee, and, even if it were to be regarded as evidence of an arrangement entered into between the bank and the defendant company, it would be necessary to assume, before it would have any weight, either that the bank had in its letter of 15th September 1930 repudiated an agreement to release the guarantee and to have the limited form of guarantee substituted for it or that it subsequently retreated from the position taken up in that letter. There is, I think, nothing to justify either assumption. Some of the documentary evidence in the case shows that the solicitors acting for the bank in proceedings against the defendant company did take the view that the original guarantee had been varied. But it is not shown that they had any other material upon which to form this view than the letters in evidence and the note on the guarantee. When it is shown that the correspondence is in conflict with their views and the note is presumably incorrect, any document prepared by the solicitors which expresses the view that the guarantee was released or varied can have little, if any, weight in favour of the defendant company on the issue whether or not the original guarantee was in force when the plaintiff gave the letter of lien to the bank. In my opinion, the inference to be drawn from the evidence, such as it is, is that the defendant company's guarantee was in force on 3rd December 1930 and that the limit of the guarantee, which was £10,000, had not been reduced. It follows, therefore, that on 3rd December 1930 the plaintiff and the defendant company became co-sureties of the debt with the payment of which the plaintiff then agreed by his letter of lien to charge the bonds deposited by him at the bank.

The plaintiff's liability as surety under the letter of lien has been discharged, but the grounds upon which the defendant company opposes his claim to contribution make it necessary to determine at what date the liability was discharged. In my opinion, that date was 9th August 1932, when the bonds were sold and the proceeds taken by the bank. The proceeds were paid to the credit of a suspense account in the bank's books for the purpose—and it may be observed that the plaintiff did not know that the bank had done this—but the evidence shows that as from the date of the sale of the bonds the bank charged interest on the principal debt as if it had been reduced by an amount equal to the sum which the bank

obtained by selling the bonds. The evidence also shows that on 23rd February 1937 the bank accepted from the defendant company in satisfaction of its liability as a surety a sum equal to the difference between the amount of the principal debt and the proceeds of the sale of the bonds. It is amply proved that on 9th August 1932 the proceeds of the sale of the bonds were, with the plaintiff's consent, taken by the bank in satisfaction of the pecuniary obligation which he undertook as a surety by the letter of lien. In my opinion, the bank had then enforced against the plaintiff payment of a part of the principal debt equal to the proceeds of the sale of the bonds. If the amount paid exceeded the proportion of the debt which as between the plaintiff and the defendant company it was equitable for him to bear, it is difficult to see why a right to contribution did not arise on 9th August 1932 against the defendant company because the bank for its own purposes and without the plaintiff's consent put the proceeds of the sale of the bonds into the suspense account.

It is contended that, even if the plaintiff's obligation to pay the principal debt was performed at that date, the payment did not found a right to contribution against the defendant company, because the moratorium legislation of New South Wales applied to the letter of lien and the plaintiff's obligation as a surety was not enforceable by the bank on 9th August 1932 because of the operation of this legislation. But even if the legislation did apply, it would not make the performance of the obligation at the time it fell due for performance according to the terms of the letter of lien a voluntary payment. The legislation extended the time for the performance of the obligation, and, in my opinion, whether it was performed at the stipulated time or within such further time allowed by the legislation, it was still a performance by the plaintiff of his obligation as a surety to provide a part of the principal debt and not the voluntary assumption of a burden which the defendant company was not bound to share with him. The moratorium legislation did not compel the plaintiff, if he were entitled to take advantage of it, to perform his obligation as a surety to pay the principal debt when called upon to do so by the bank, at a later date than that upon which it became ripe for performance according to the tenor of the letter of lien. It follows, in my opinion, that, even if the moratorium legislation applied to the letter of lien, the plaintiff did not lose his right to contribution by declining to take an advantage of the legislation.

The total sum which the plaintiff paid to the bank in reduction of the principal debt was £3,134. This sum consisted of £2,936, the proceeds of the sale of the bonds, and £197, the amount of interest derived by the bank from the bonds and credited by it to the principal debtor's account. If the finding is correct that the plaintiff

H. C. OF A. 1939. McLEAN v. DISCOUNT AND FINANCE LTD. McTiernan J.

and the defendant company became co-sureties and their obligations as sureties were determined by the letter of lien and the guarantee of 28th November 1929 respectively, the proportions of the principal debt which *inter se* they were bound to pay were three-thirteenths and ten-thirteenths. The defendant company has paid £4,638 in reduction of the principal debt. It follows that at 9th August 1932 the plaintiff had contributed more than three-thirteenths of that debt and he then became entitled to a contribution.

The plaintiff and the defendant company have agreed that, if the court decided that payment of the proceeds of the sale of the bonds was made on 9th August 1932 and the plaintiff was entitled to a decree for contribution, the amount of contribution payable by the defendant company should be £1,552 9s. 4d.

It may be observed that, if the finding that the plaintiff and the defendant company were co-sureties is correct, there is no ground for suggesting that the bank released the defendant company before 9th August 1932. The company's guarantee was not cancelled by the bank until it received payment on 23rd February 1937 of the sum of £4,638.

In my opinion, the appeal should be allowed and the cross-appeal dismissed.

Appeal allowed with costs. Cross-appeal dismissed with costs. Decree of Supreme Court set aside. In lieu thereof declared: (1) *that the appellant and the respondent Discount and Finance Ltd. are liable to contribute in the proportion of three-thirteenths and ten-thirteenths respectively of the sum of* £7,772 18*s.* 3*d. paid or provided by them on or before* 23*rd February* 1937 *in respect of the principal debt of the firm of George Wall to the National Bank of Australasia Ltd.*: (2) *that the appellant has paid or discharged* £1,340 6*s.* 6*d. of such liability in excess of his proper share and proportion. Order that the said respondent pay to appellant the said sum of* £1,340 6*s.* 6*d. with interest at the rate of four pounds per centum per annum from* 23*rd February* 1937 *to date of payment of the said sum together with costs of the suit. Liberty to apply to Supreme Court.*

Solicitors for the appellant, *T. W. Garrett, Christie & Buckley.*
Solicitors for the respondents, *Campbell, Campbell & Campbell.*

J. B.