[HIGH COURT OF AUSTRALIA.]

O'DAY . . . . . APPELLANT;
PLAINTIFF,

AND

THE COMMERCIAL BANK OF AUSTRALIA LIMITED . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *June* 6, 7.

SYDNEY, *Aug.* 21.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Guarantee and indemnity—Discharge of surety—Guarantee of bank account of company—Provision disentitling surety to interest in security given by company—Debenture over assets—Whether security improperly disposed of—Impairment of principal debtor's ability to pay—Demand for payment—Appointment of receiver and manager followed by sale—Reasonable time for payment—Necessity for statement of exact sum due.

The appellant, who was a director of a Company, guaranteed the Company's account with its Bank. As security the appellant gave a general lien to the Bank over property deposited with it, a joint and several guarantee given by the appellant with two co-sureties, and a mortgage over the appellant's land. Each of these instruments contained provisions by which the surety renounced any interest or rights in respect of security given by the Company. The Company also gave a debenture by way of floating charge over its assets to the Bank. On 22nd June 1931, when the Company was indebted to the Bank to the extent of about £150,000, the Bank served on the Company a demand in writing requiring payment of all moneys owing by the Company to the Bank. On 23rd June the Bank appointed a receiver and manager of the Company's business under the debenture. The receiver and manager went into possession, and after the lapse of time specified in the debenture, sold a great part of the Company's assets.

In an action by the appellant against the Bank claiming that he had been discharged from all liability under the general lien, the joint and several guarantee and the mortgage and for the delivery up and discharge of all securities lodged

with the Bank under such instruments, on the grounds that the demand for payment by the Bank did not state the exact amount of the sum that was alleged to be due, but merely demanded "payment of all principal, interest and other moneys owing by" the Company; that the debenture deed required that a reasonable time should elapse between the demand and the appointment of a receiver and manager, and that the time given, one day, was not reasonable, and that the seizure of the assets was consequently illegal; that the wrongful act destroyed the security given by the debenture deed, and that the secured debt being gone, the surety was discharged, and that even if the principal debtor were not released the wrongful act of the Bank destroyed the security constituted by the debenture deed, and that upon general equitable principles the surety had been deprived of his rights in the debenture deed, and was in equity accordingly released from liability; and that a verbal statement by the Bank's manager that the demand was "more or less a formal demand," and that "the Board have not decided to do anything" had the effect nullifying the operation of the demand.

Held, that the demand by the Bank for payment and the subsequent appointment of the receiver and manager and the subsequent disposal of the Company's assets were all within the powers of the Bank conferred by the debenture deed, and that, consequently the surety was not discharged.

Held further, by *Rich*, *Dixon*, *Evatt* and *McTiernan* JJ., that the provisions of the instruments of suretyship effectually disentitled the surety to any right or interest which he might otherwise have had in the security given by the principal debtor.

Per Rich, *Starke* and *Dixon* JJ.: The equitable doctrine that "a mortgagee is bound on payment to restore the property to the mortgagor and if by the act of the mortgagee, unauthorized by the mortgagor, it has become impossible to restore the estate on payment of all that is due the mortgagee will be prevented from suing the mortgagor at law" has no application to a floating charge created by debenture where nothing is vested in or handed over to the creditor.

Decision of the Supreme Court of Victoria (*Mann* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

P. O'Day Pty. Ltd. was a customer of the defendant, respondent, the Commercial Bank of Australia Ltd. The Company being indebted to the Bank upon its overdraft, the plaintiff, appellant, Richard Bernard O'Day, a director of the Company guaranteed the Company's indebtedness to the Bank.

To secure the Bank's advances the following documents were executed:—A general lien given by the plaintiff to the defendant dated 19th October 1926; a debenture given by P. O'Day Pty. Ltd. to the defendant dated 14th January 1930 and amended on

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25th February 1930; a joint and several guarantee given by the plaintiff with two co-sureties to the defendant, dated 16th May 1930; a mortgage by the plaintiff to the defendant over certain land dated 11th June 1930.

By the general lien dated 19th October 1926 the plaintiff, in effect, charged all negotiable instruments and documents of title deposited by him with the Bank with the payment of loans, advances, discounts, interest, commission, banking charges, costs, charges and expenses and other moneys for which the customer might be or become liable to the Bank and guaranteed that in the event of the moneys thereby secured not being paid at maturity or on demand, the plaintiff would pay the same, and authorized the Bank, in the event of the moneys thereby secured not being paid at maturity or on demand or at the discretion of the Bank without the necessity for waiting for the maturity of the moneys or for the making of any demand to enter into and obtain possession of such property and to let or sell such property. The Bank also was thereby appointed the plaintiff's agent for the purpose of executing any documents relating to the title to such property and it was also provided that such powers might be exercised by the Bank at any time thereafter without any necessity for calling upon or requiring the plaintiff or waiting for any refusal or neglect by him to make and execute any such document and either before or after the moneys thereby secured might mature and without the necessity for any demand for payment. The lien also provided that the Bank might release any security held by it without discharging the plaintiff. The plaintiff also agreed that he would not, by reason of any payment made by him under this security prove for any dividend out of the estate of the customer in the event of the customer being unable to pay its creditors in full in competition with the Bank and so as to diminish the dividends to which but for such proof the Bank would be entitled. The plaintiff further agreed that a copy or statement of the accounts in the books of the Bank at the office where the account of the customer might be kept for the time being or any account stated or settled by or between the Bank and the customer would be conclusive evidence of the state of the accounts between the Bank and the customer; and further declared that this security should be

considered to be in addition to any other security which the Bank then had or might thereafter take and that he would not in any way claim the benefit or seek the transfer of any such other security and that nothing therein contained should be held to discharge abate or prejudice any lien which the Bank then had or might thereafter have on such property.

The debenture given by the customer over its assets to the Bank dated 14th January 1930, as amended on 25th February 1930, contained a covenant by the customer that it would on demand in writing by the Bank pay the balance which should for the time being be owing by it to the Bank on its current account or on any other account. The debenture also provided that "The Company as beneficial owner hereby charges with such payments to the Bank its undertaking and all its property and assets whatsoever and wheresoever both present and future including therein the uncalled and unpaid capital (if any) of the Company for the time being." The conditions subject to which the debenture was issued provided in substance—1. The charge created by this debenture shall constitute a floating security only. 2. At any time after the principal moneys have become payable the Bank may appoint a receiver or a receiver and manager of the Company's business and such receiver or receiver and manager shall have power to sell the Company's business as a going concern and all or any of the property and assets comprised in this security, provided that no such power of sale shall be exercised unless and until notice in writing requiring payment of the principal moneys and interest (if any) has been served on the Company by the Bank in conformity with the provisions of the debenture and the Company has made default in payment of such principal moneys and interest or part thereof for a period of two weeks after such notice. 3. Pending any such sale the receiver and receiver and manager appointed by the Bank may enter into such agreements and do all such things as may be necessary or proper for the protection or preservation of the property and assets comprised in this security. 4. This security is without prejudice to the Bank's ordinary lien or other right in respect of a customer's overdrawn account or to any security the Bank may hold granted to it by the

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Company including any mortgage of freeholds whether registered or not, and provided further that this debenture shall be deemed a collateral security only to the Bank.

The joint and several guarantee dated 16th May 1930 given by the plaintiff and two other guarantors provided in substance that in consideration of advances made or to be made by the Bank to the Company the guarantors jointly and severally agreed with the Bank :—1. To pay the Bank on demand in writing all advances payable by the Company to the Bank, provided that the amount ultimately payable by the guarantors hereunder shall not exceed the sum of £70,000 and interest on the said sum or so much thereof as shall be owing or unpaid from time to time. 2. That this guarantee shall be a continuing guarantee and shall not be considered as wholly or partially satisfied by the payment at any time or times hereafter of any sum or sums of money for the time being due upon the general balance of the account of the Company with the Bank. . . . 5. That this guarantee shall be considered to be in addition to any other guarantee or security either from the guarantors or any other person or company which the Bank now has or may hereafter take for the debts of the Company and that the guarantors will not in any way claim the benefit or seek the transfer of any other security or any part thereof.

By the mortgage given by the plaintiff to the defendant Bank, dated 11th June 1930, the plaintiff, the mortgagor, covenanted in substance :—1. To pay to the Bank on demand in writing the balance which shall for the time being be owing by the mortgagor to the Bank on the account current of the mortgagor with the Bank and/or by P. O'Day Pty. Ltd. on the account current of the Company with the Bank. . . . 8. That this mortgage shall be a security for every bill of exchange representing any money for the time being hereby secured and that the demand aforesaid may be made notwithstanding the currency of any such bill of exchange, provided always that this covenant shall be deemed a collateral security only. 9. That nothing herein contained shall prejudice or affect any lien or security which the Bank is entitled to by reason of the deposit of the title or titles relating to the said land or any other security the Bank now holds or may hereafter hold or take. . . . 11. That

in respect of all moneys due by or on account of the Company and hereby secured (*a*) As between the mortgagor and the Bank the mortgagor shall be a principal debtor for the whole of the moneys hereby secured. (*b*) That it shall be lawful for the Bank to grant to the Company any time or other indulgence; and that the mortgagor will not by reason of any payment which may be made by him under this mortgage prove for or claim any dividend out of the estate of the Company in the event of the Company being unable to pay its creditors in full in competition with the Bank and so as to diminish the dividends to which but for such proof or claim the Bank would be entitled; and that this mortgage shall be considered to be in addition to any other security which the Bank now has or which it may hereafter take for the debts of the Company and that the mortgagor will not in any way claim the benefit or seek the transfer of this mortgage. (*c*) That a copy or statement of the account of the Company in the books of the Bank or any account stated or settled by or between the Bank and the Company shall be conclusive evidence of the state of the accounts between the Bank and the Company. (*d*) That any demand on the Company shall be deemed to have been duly made and received if given to the Company or sent through the post office as a letter addressed to the Company.

On 22nd June 1931, when the Company was indebted to the Bank to the extent of about £150,000 the Bank served on the Company a demand in writing requiring payment of all principal, interest and other moneys owing by the Company to the Bank the payment of which was secured by the debenture dated 14th January 1930 from the Company to the Bank. On 23rd June 1931 the Bank appointed a receiver and manager of the Company's business under the powers conferred by the debenture. The receiver and manager went into possession of the Company's business and after an interval of fourteen days, he sold a great part of the Company's assets.

The plaintiff brought the present action against the Bank, claiming a declaration that he had been discharged from all liability under the general lien given by the plaintiff to the defendant Bank and dated 19th October 1926, and the joint and several guarantee given by the plaintiff with two co-sureties to the defendant and dated

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16th May 1930, and the mortgage given by the plaintiff to the defendant and dated 11th June 1930.

The action was heard by *Mann* J. who summarized the contentions of the plaintiff as follows :—" The grounds upon which the present plaintiff claims relief against the Bank turn upon the sufficiency of the notice to pay given by the Bank to the Company under the debenture deed. It is submitted by Mr. *Walker*, first, that there was not sufficient notice to pay because the demand in writing which was in fact made did not state what the sum was that was then due, and payment of which was then demanded. The notice in fact demanded ' payment of all principal interest and other moneys owing by P. O'Day Proprietary Limited to the Commercial Bank of Australia Limited aforesaid the payment of which is secured by the debenture ' ; and, secondly, it was contended that, assuming that the demand was sufficient in point of form, yet the appointment of the receiver and the entry of the receiver upon the business and assets of the Company was wrongful, because so little time elapsed between the demand and the appointment of the receiver, that it could not be said, upon the reasonable construction of the deed, that the principal moneys had become payable within the meaning of the deed. In other words, that the debenture deed required that a reasonable time should elapse between the demand and the going into possession, and that the time which in fact elapsed, which seems to have been one day, was not a reasonable time in the circumstances, and that the seizure of the assets thereupon became an unlawful act which might have been treated as a trespass. The conclusion which counsel for the plaintiff seeks to draw from this is that having in fact sold the assets of the Company, the Bank by its receiver has unlawfully destroyed the security given by the debenture deed, that by so doing it has deprived itself of the right to call upon the Company, the principal debtor, to pay the debt secured, and that, the secured debt being in effect gone, the guarantor's liability as a natural consequence has gone too. The second branch of the argument is this, that even if the principal debtor has not been released in the way just stated, at all events the wrongful procedure by the Bank has destroyed the security constituted by the deed of debenture, and that, upon general equitable principles applicable to

the relation of principal and surety, the surety has been deprived of his rights in that debenture deed, and has accordingly in equity to be released from his liability as a surety under his own mortgage."

During the hearing evidence was given of a conversation between one of the directors of P. O'Day Pty. Ltd. and the Bank's manager the substance of which was that after receipt of the demand for payment on 22nd June 1931 the witness saw the Bank's manager and asked him what was the meaning of the demand and said " Do you intend to close the business and ruin everybody and involve the Bank in a heavy loss ? " The Bank's manager replied " Oh, it is more or less a formal demand. The Board have not decided to do anything. I will let you know in the course of a few days what they determine on doing." On the following day the witness received the notice of the appointment of a receiver. It was contended that these oral statements had the effect of nullifying or suspending the operation of the demand for payment.

Mann J. decided against the plaintiff's contentions and dismissed the action.

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

Walker, for the appellant. The principal creditor had released the surety. The appointment of a receiver for the sale of the customer's assets was an unauthorized and therefore unlawful act, because (*a*) the notice to pay did not state the amounts to be paid, (*b*) the debtor was informed simultaneously by the defendant that the demand was merely formal and that the Bank's board of directors had not decided on any course of action and, (*c*) that the debtor Company was not allowed reasonable time to pay before the appointment of a receiver. Those acts being unauthorized and unlawful the Bank precluded itself from suing to recover the principal debt as against the debtor. If the sale of the assets was not authorized the surety also would be released, because that affects its liability to pay. Even if those acts were not unauthorized the surety was entitled to notice of demand before the creditor proceeded to execution and should have been given an opportunity to pay and relieve the Company. The undertaking by the surety does not arise until notice to pay is given and the amount demanded is stated.

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A demand, under clause 2 of the document, should inform the customer of the amount due by the principal debtor. The evidence is that the Company complained of what the Bank was doing. In guarantees of this kind the surety is entitled to notice as a matter of equity because no liability commences until the money is called up. This must imply that the surety is entitled to notice before the Bank puts in a receiver. The practical question is whether the Bank can act like this when it has its account guaranteed. The notice calling up the moneys owing is based upon one that is applicable to mortgage transactions or others in which the amount of principal is fixed. The *Transfer of Land Act* 1928, sec. 146, provides that the mortgagee may serve on the mortgagor notice in writing to pay the money owing. The evidence shows that the receiver went into possession and realized on everything. The Bank knows or ought to know what was being done and it should have communicated the facts to the surety (*Commercial Bank of Australia Ltd.* v. *Colonial Finance, Mortgage, Investment and Guarantee Corporation Ltd.* (1)). This matter turns upon the construction of this particular deed, and the words " pay on demand " must be read in reference to the transaction contemplated by the parties. The words " on demand " do not mean instantaneously (*Vyse* v. *Wakefield* (2)).

[DIXON J. referred to *Stevens* v. *Colonial Sugar Refining Co.* (3).]

It is to be implied from the terms of the contract that the amount of the demand should be disclosed. Unless notice of the amount is given the demand cannot be complied with.

[DIXON J. referred to *Geake* v. *Ross* (4).]

The expression " pay on demand " was considered in *Toms* v. *Wilson* (5); *Brighty* v. *Norton* (6); and *Moore* v. *Shelley* (7). Before the creditor proceeds to execution he must give the promisor an opportunity of complying with the demand.

[DIXON J. referred to *Wharlton* v. *Kirkwood* (8).]

The contract is not that the amount shall be paid immediately upon demand.

(1) (1906) 4 C.L.R. 57, at p. 64.
(2) (1840) 6 M. & W. 442, at p. 453; 151 E.R. 485, at pp. 489, 490.
(3) (1920) 28 C.L.R. 330.
(4) (1875) 44 L.J. C.P. 315.
(5) (1862) 4 B. & S. 442, 455; 122 E.R. 524, 529.
(6) (1862) 3 B. & S. 305; 122 E.R. 116.
(7) (1883) 8 App. Cas. 285, at p. 293.
(8) (1873) 29 L.T. 644.

[DIXON J. referred to *Bradford Old Bank* v. *Sutcliffe* (1).]

If the Bank had meant immediately upon demand it should have so stipulated (*Ex parte Trevor*; *In re Burghardt* (2)). The statement of the bank manager that this was only a formal demand shows that the receiver should not have been appointed until a reasonable time after the giving of the notice. If the notice was insufficient and the time was unreasonable the receiver was wrongly appointed and the assets were wrongly disposed of, and the guarantor cannot avail himself of the security and is consequently discharged.

[DIXON J. referred to *Fisher* on *Mortgages*, 6th ed. (1910), p. 469.]

The rights of the surety are stated in the *Supreme Court Act* 1928, sec. 72. The Bank could no longer sue the debtor because it had wrongfully disposed of the debtor's goods (*Palmer* v. *Hendrie* (3); *Palmer* v. *Hendrie* (*No.* 2) (4); *Coote* on *Mortgages*, 9th ed. (1927), p. 993; *Ashburner* on *Mortgages*, 2nd ed. (1911), pp. 431, 594; *Schoole* v. *Sall* (5); *Ellis & Co.'s Trustee* v. *Dixon-Johnson* (6)). If the Bank could not sue the customer, the surety could not sue either. The Bank owes a duty to the surety not to do anything that will prevent the surety suing the debtor.

[EVATT J. referred to *Fink* v. *Robertson* (7).]

In this case the Bank wrongfully destroyed the credit of the debtor and affected its ability to pay its debt. As a consequence the surety is discharged. If one person guarantees the liability of another the creditor cannot injure the credit of the debtor. If he does so then the surety is released (*Rees* v. *Berrington* (8); *Mayhew* v. *Crickett* (9)). If it is difficult to measure the extent of the damage the surety will be wholly discharged, but if it can be estimated he may be discharged only *pro tanto*. Here the credit of a Company was destroyed at one stroke (*Polak* v. *Everett* (10)). Part of the arrangement was that portion of the book debts was to be used in paying this debt, and the creditor used the debts for some other purpose and thereby the surety was discharged. When the surety

(1) (1918) 2 K.B. 833, at p. 848.
(2) (1875) 1 Ch. D. 297.
(3) (1859) 27 Beav. 349; 54 E.R. 136.
(4) (1860) 28 Beav. 341; 54 E.R. 397.
(5) (1803) 1 Sch. & Lef. 176.
(6) (1924) 1 Ch. 342; (1924) 2 Ch. 451; (1925) A.C. 489, at p. 491.
(7) (1907) 4 C.L.R. 864, at p. 872.
(8) (1795) 2 Ves. Jr. 540; 30 E.R. 765.
(9) (1818) 2 Swan. 185; 1 Wils. Ch. 418; 36 E.R. 585.
(10) (1876) 1 Q.B.D. 669.

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guarantees this debt knowing the Bank has a debenture giving certain powers, he is entitled to object to the Bank doing anything that curtails the debtor's ability to pay. This is a breach of duty to the surety. The surety is as much interested in the recovery of the money as the creditor, and if the creditor does something that acts to the prejudice of the surety the latter is discharged. The Bank wrongfully put an end to this Company by giving an insufficient notice and by not giving sufficient time to the surety to pay. The effect of this wrongful act is to release the surety who relied upon the continuance of the debtor, except in so far as it was terminated by the wrongful acts of the Bank. The question of what is "reasonable notice" is dealt with in *Wharlton* v. *Kirkwood* (1), which refers to *Massey* v. *Sladen* (2). What was contemplated was a demand with reasonable time for complying with it. If the expression "payment on demand" means immediate payment the notice ought to state the amount and if it does not mean immediate payment then a reasonable time should be allowed (*In re J. Brown's Estate*; *Brown* v. *Brown* (3); *Bradford Old Bank* v. *Sutcliffe* (4)). The surety should have been given an opportunity to enable him to act so as to protect the Company (*Polak* v. *Everett* (5); *Holme* v. *Brunskill* (6)). All that the surety has to show is that the risk is varied, not that the contract is varied. This argument is not based on contract. The rights of sureties are not based on contract but on equitable principles. The effect of appointing a receiver is dealt with in *Moss Steamship Co.* v. *Whinney* (7).

Russell Martin (with him *Dean*), for the respondent. Whatever rights the surety may have in an ordinary case in the present case the surety had contracted himself out of them. The documents provided that each security should be in addition to all other securities. Whatever defects there may have been in the notice of demand the surety is not affected thereby because he has contracted that he will not look to any other securities. If there is a contract, express or implied, that the creditor shall acquire or preserve any right

(1) (1873) 29 L.T. 644.
(2) (1868) L.R. 4 Ex. 13.
(3) (1893) 2 Ch. 300.
(4) (1918) 2 K.B. 833.
(5) (1876) 1 Q.B.D., at p. 673.
(6) (1877) 3 Q.B.D. 495, at pp. 498, 508.
(7) (1912) A.C. 254, at p. 263.

against the debtor, and the creditor deprives himself of the right which he has stipulated to acquire, or does anything to release any right which he has, that discharges the surety; but when there is no such contract, and he only has a right to perfect what he has in his hand, which he does not do, that does not release the surety unless he can show that he has received some injury in consequence of the creditor's conduct (*Carter* v. *White* (1)). If the instrument by which the surety accepts liability contains apt words to cover the position the surety may remain liable although the principal debtor has been discharged by the creditor (*Perry* v. *National Provincial Bank of England* (2)). In the present case the surety could never claim the advantage offered of the debenture security. Not every alteration of the position of the parties entitles the surety to be discharged (*Tucker* v. *Laing* (3); *White and Tudor's Leading Cases in Equity*, 9th ed. (1928), vol. II., p. 526). *Holme* v. *Brunskill* (4) went entirely on the ground of the variation of the contract which has always been a recognized ground for releasing the surety (*Halsbury's Laws of England*, 1st ed. (1911), vol. xv., p. 546). By the very terms of the contract between the surety and the creditor it did not matter in this case whether the creditor had all the principal debtor's securities, including its goodwill and credit. It did not matter to the surety whether the business of the debtor was destroyed or not. There was in this case a proper demand and even the debtor would have had no cause of complaint. There was no necessity to specify the amount in the notice to pay. Alternatively, the demand for payment was sufficient if the person to whom the notice was given could get that information (*Geake* v. *Ross* (5); *Reg.* v. *Mayor, &c., of Hotham*; *Ex parte Bent* (6)). At the date when the surety was asked to pay all he was asked to pay was the amount debited in the books of the Bank. Until it was discovered that the Company had drawn upon letters of credit the Bank did not know that there was anything owing under them. The statement of *Cleasby* B. in *Massey* v. *Sladen* (7) was *obiter* (*Knox* v. *Gye* (8)). There is no

(1) (1883) 25 Ch. D. 666, at p. 670.
(2) (1910) 1 Ch. 464, at pp. 471, 475, 477.
(3) (1856) 2 K. & J. 745, at pp. 750, 751; 69 E.R. 982, at p. 985.
(4) (1877) 3 Q.B.D. 495.
(5) (1875) 44 L.J. C.P. 315.
(6) (1878) 4 V.L.R. (L.) 409.
(7) (1868) L.R. 4 Ex. 13.
(8) (1867) 16 L.T. 76, at p. 81.

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authority for the proposition that a debtor is to be given an opportunity to make new financial arrangements. It is part of the Bank's duty to the surety to go first to the assets of the principal debtor. The money was payable on demand and was payable at once. The most that the debtor was entitled to was a reasonable time to procure the money, otherwise the money was payable immediately. The whole purpose of appointing a receiver was to enable the assets to be realized properly. On the facts of this case there is no evidence that the day that was given was not a reasonable time to procure the money.

In this case the director of the Company and his brother joined in selling the assets of the Company and the surety cannot rely upon any dissipation of the assets in these circumstances (*Woodcock* v. *Oxford and Worcester Railway Co.* (1); *Hollier* v. *Eyre* (2); *General Steam Navigation Co.* v. *Rolt* (3)). If the Bank were wrong in what they did, it would not result in a discharge of the surety absolutely but he would be discharged *pro tanto* only (*Taylor* v. *Bank of New South Wales* (4)).

Walker, in reply. There was an alteration of the terms of the contract because the debenture provided that the debtor should be allowed to have full control of his business. At all events, until reasonable notice was given. The moment the principal comes under any liability to the creditor to which the guarantee attaches, the surety acquires an interest in every term of that liability, and the creditor has no authority to modify it even though he would in the first instance have been within his rights if he had taken it in another form (*Rowlatt* on *Principal and Surety*, 2nd ed. (1926), p. 115 (Note (Z)). It must be taken to be part of the arrangements that the Bank will perform its duties under the contract.

Cur. adv. vult.

(1) (1853) 1 Drew. 521, at p. 529; 61 E.R. 551, at p. 555.
(2) (1840) 9 Cl. & F. 1, at p. 52; 8 E.R. 313, at p. 334.
(3) (1858) 6 C.B. (N.S.) 550; 141 E.R. 572.
(4) (1886) 11 App. Cas. 596, at pp. 602-603.

The following written judgments were delivered :—

RICH J. This appeal was an experiment by a guarantor who not unnaturally regretted having involved himself in such a liability. It was supported by an able and ingenious argument by Mr. *Walker* on behalf of the appellant, but the resources of his ingenuity were too heavily taxed by the carefully prepared banking documents which contained provisions designed to guard the Bank against the application of the doctrines of equity which might otherwise apply to the facts of the case. Mr. *Walker's* attempt to find a navigable course through these charted rocks appeared to me to be foredoomed to failure. My brother *Dixon* has prepared a judgment which deals with the arguments on precise technical grounds and the reasons which he has given appear to me completely to answer these arguments. Other answers might, perhaps, also be given but I prefer to content myself with expressing my concurrence with those which he has assigned. The appeal should be dismissed.

STARKE J. A Company styled P. O'Day Pty. Ltd. was a customer of the Commercial Bank of Australia Ltd., and on 22nd June 1931 was indebted to the Bank in a sum approaching £150,000. It had given the Bank a debenture charging all its property and assets with the principal interest moneys and other liabilities mentioned therein, but so that the charge constituted a floating security only. The debenture stipulated that the Company would on demand in writing . . . pay to the Bank all moneys for the time being owing on or secured by the debenture. By a condition of the debenture it was also provided that at any time after the principal moneys became payable the Bank might appoint a receiver or a receiver and manager of the Company's business, and such receiver or receiver and manager should have power to sell the Company's business as a going concern and all or any of the property and assets comprised in the security on such terms and for such consideration as he might think proper . . . provided that no such power of sale should be exercised unless and until notice in writing requiring payment of the principal moneys and interest (if any) had been served on the Company by the Bank in conformity with the provisions of the said debenture and the Company had made

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default in payment of such principal moneys and interest or part thereof for a period of two weeks after such service. The receiver or receiver and manager, it was stipulated, should be deemed the agent of the Company, which should be solely responsible for his acts.

Richard Bernard O'Day became a surety for the Company. In October of 1926, he gave a general lien over his assets in favour of the Bank, securing the indebtedness of the Company, and agreed, in the event of the moneys secured or any part thereof not being paid at maturity or on demand to pay the same. Further he declared that the security constituted by the general lien should be considered in addition to any other security which the Bank had or might thereafter take, and that he would not in any way claim the benefit or seek the transfer of any such other security or any part thereof. O'Day further supported the Company's account with the Bank by a guarantee dated 16th May 1930 and a mortgage dated 11th June 1930. The guarantor promised to pay to the Bank on demand in writing all moneys then payable or thereafter becoming payable by the Company to the Bank. It is declared, however, that the guarantee shall be considered in addition to any other guarantee or security either from the guarantor or any other person or company which the Bank has or may thereafter take for the debts of the Company, and that the guarantor will not in any way claim the benefit or seek the transfer of any such other security or any part thereof. The mortgage contains a similar provision.

The Company's account with the Bank fell into an unsatisfactory condition, and on 22nd June 1931 the Bank made demand in writing upon the Company. It simply stated that the Bank " demands payment of all principal interest and other moneys owing " by the Company to the Bank " the payment of which is secured by the debenture dated 14th January 1930 " created by the Company in favour of the Bank. The moneys were not paid. On 23rd June 1931, the Bank appointed a receiver and manager of the business of the Company and authorized him to enter and take possession of the property and assets charged by the debenture. The receiver and manager accordingly entered, and took possession of the property and assets of the Company, and proceeded to sell and

realize and has in fact sold and realized a considerable proportion of those assets.

Richard Bernard O'Day in 1932 commenced an action in the Supreme Court of Victoria against the Bank, claiming a declaration that he was discharged from all liability under the general lien, the guarantee, and the mortgage, given by him, and ancillary relief. *Mann* J., who tried the action dismissed it. Hence this appeal.

"A mortgagee may pursue all his remedies at the same time." But he is "bound, on payment, to restore the property to the mortgagor, and if it appear from the state of the transaction that by the act of the mortgagee, unauthorized by the mortgagor, it has become impossible to restore the estate on payment of all that is due," equity ". . . will interfere and prevent the mortgagee suing the mortgagor at law" (*Lockhart* v. *Hardy* (1); *Schoole* v. *Sall* (2); *Palmer* v. *Hendrie* (3); *Palmer* v. *Hendrie* [*No.* 2] (4); *Kinnaird* v. *Trollope* (5); *Ellis & Co.'s Trustee* v. *Dixon-Johnson* (6)). Authority may be derived however from the mortgage deed (as from an express power of sale), or from the direct concurrence of the mortgagor, or, possibly, otherwise (*Rudge* v. *Richens* (7); *Kinnaird* v. *Trollope* (8)). The argument addressed to us in the present case is that the Bank disposed of the assets of the Company —the security given by the debenture already mentioned—without lawful authority from the Company, and is unable to restore them on payment of the moneys due to it by the Company and secured by the debenture. Consequently, it is contended, the Bank would not in equity be permitted to enforce the debt against the principal debtor, the Company, nor, therefore, against the surety, the appellant. In order to justify the appointment of a receiver and manager, the bank must no doubt have complied with the conditions precedent contained in the debenture, and it is claimed that it did not do so. The debenture provided that the Company should pay on demand in writing, and that at any time after the principal moneys became payable the Bank might appoint a receiver and

(1) (1846) 9 Beav. 349, at p. 357; 50 E.R. 378, at p. 381.
(2) (1803) 1 Sch. and Lef. 176.
(3) (1859) 27 Beav. 349; 54 E.R. 136.
(4) (1860) 28 Beav. 341; 54 E.R. 397.
(5) (1888) 39 Ch. D. 636.
(6) (1925) A.C., at p. 491.
(7) (1873) L.R. 8 C.P. 358.
(8) (1888) 39 Ch. D., at p. 646.

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manager, who should have a power of sale. The demand, it is said, however, was bad, because the precise amount due and demanded was not specified, and because a reasonable time after demand was not allowed the debtor to enable him to find the money (*Comyns's Digest*, 5th ed. (1822), "Condition" G5; *Massey* v. *Sladen* (1); *Brighty* v. *Norton* (2); *Toms* v. *Wilson* (3); *Moore* v. *Shelley* (4)). Therefore, the argument concludes, the Company was not in default under the debenture, and the appointment of the receiver and manager, and the subsequent sale of the assets were unauthorized. But there is nothing in the debenture, or in the nature of the case, which suggests that the demand in writing should specifically set forth the sum demanded. The demand is for the purpose of bringing home to the Company that the Bank is demanding its money, and that is sufficiently indicated by claiming all principal interest and other moneys owing to it. Again, it must not be overlooked that the security is but a floating charge: it is dormant until the Bank, in whose favour the charge was created, intervenes. One method of intervention is by the appointment of a receiver, and that is often a most urgent act to protect the charge. The appointment of a receiver and manager does not in itself effect a sale or forfeiture of the property charged. But in any event, the question whether a reasonable time was allowed to elapse after the demand and before the appointment of the receiver and manager must depend upon the circumstances of the case (*Wharlton* v. *Kirkwood* (5)). And I should have thought it not unreasonable in the present case, having regard to the nature of the security, the character of the debt, and the conduct of the principal debtor. Further, it appears to me that if the appointment of the receiver and manager were authorized, then the Bank is not required to justify his acts in the sale, for the debenture itself provides that he shall be deemed the agent of the Company and that the Company should be solely responsible for his acts and defaults. The same result would follow if the Company had acquiesced in the appointment of the receiver and manager and waived a demand in writing or the lapse of time between the demand

(1) (1868) L.R. 4 Ex. 13.
(2) (1862) 3 B. & S. 305; 122 E.R. 116.
(3) (1862) 4 B. & S. 442, 455; 122 E.R. 524, 529.
(4) (1883) 8 App. Cas., at p. 293.
(5) (1873) 29 L.T. 644.

and the appointment of a receiver. Assume, however, that the appointment of the receiver and manager was unauthorized, the surety must still, I think, fail in his action. " A floating security is an equitable charge on the assets for the time being of a going concern. . . . It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes " (*Governments Stock and Other Securities Investment Co.* v. *Manila Railway Co.* (1)). The Bank, under the debenture, obtained neither the possession nor the property in the undertaking and assets charged. A charge, and not a mortgage or an agreement to give a mortgage, was created by the debenture, and the party entitled to that charge would be entitled to the assistance of the Court in effecting a sale, but not to foreclosure (*Sampson* v. *Pattison* (2); *Tennant* v. *Trenchard* (3); *Shea* v. *Moore* (4)). The right to foreclose and the right to redeem are correlative rights, and can only arise in cases in which there is " either a legal mortgage or an agreement for a legal mortgage " (*Ashburner* on *Mortgages*, 2nd ed. (1911), p. 411). Consequently, in my opinion, the rule of equity illustrated in the case of *Lockhart* v. *Hardy* (5) and the other cases cited has and can have no application to the floating charge created by the debenture in the present case; there is not and never was any property vested in the Bank which it could restore to the Company.

It is true, no doubt, that the Bank is liable in trespass and in conversion if it entered the Company's premises and seized and sold the latter's assets before its right to the appointment of a receiver and manager attached (*Brierly* v. *Kendall* (6)). But the debt to the Bank subsisted, though subject to the question whether it must not be reduced by the amount of the assets realized or the damages sustained by the Company. (See *Walker* v. *Jones* (7)).

One or two minor arguments were also made for the appellant, but they are untenable and do not require specific mention.

The appeal should be dismissed.

(1) (1897) A.C. 81, at p. 86.
(2) (1842) 1 Hare 533; 66 E.R. 1143.
(3) (1869) L.R. 4 Ch. 537.
(4) (1894) 1 I.R. 158.
(5) (1846) 9 Beav. 349; 50 E.R. 378.
(6) (1852) 17 Q.B. 937; 117 E.R. 1540.
(7) (1866) L.R. 1 P.C. 50, at pp. 62, 63; 16 E.R. 151, at pp. 156, 157.

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DIXON J. The question upon this appeal is whether a surety has been discharged from the obligations of suretyship by the conduct of the creditor. The creditor is a Bank and the principal debtor, a proprietary Company, is its customer. The instruments of guarantee are three in number. The first is a general lien given by the surety charging his property with payment of loans, advances, discounts, interest, commission, banking charges, costs, charges, expenses or other moneys for which the customer might be or become liable to the Bank and guaranteeing to pay such moneys if the customer should fail to do so on demand. The second is a joint and several guarantee given by the surety with two co-sureties to pay on demand all sums of money which were or should become payable to the Bank by the customer. The third is a mortgage of real property given by the surety to the Bank containing a covenant on demand to pay (*inter alia*) the balance owing to the Bank by the customer on current account or otherwise. After the first and before the second instrument was given by the surety, the principal debtor, the customer, gave to the Bank a security creating a floating charge over all its assets. This security contained a covenant by the principal debtor that it would on demand in writing pay the balance which should for the time being be owing by it to the Bank on its account current and on any other account. It conferred upon the Bank a power "at any time after the principal moneys have become payable" to appoint a receiver and manager. It authorized the receiver to sell after the principal debtor had been in default for fourteen days from the service of notice in writing requiring it to pay principal and interest. At a time when the principal debtor was indebted to the Bank in a sum of the order of £150,000, the Bank served upon it a notice demanding payment of all principal, interest and other moneys owing by it to the Bank, and on the following day appointed a receiver and manager who went into possession. Subsequently, but after an interval of at least fourteen days, he sold a great part of the principal debtor's assets. The surety complains that the power to appoint the receiver and manager had not arisen because the principal moneys had not become payable and that his proceedings were therefore unauthorized. It is said that, for three reasons, the demand was ineffectual to make the principal moneys payable.

The first reason relied upon fails upon the evidence. A case was made that when the notice of demand was served upon the principal debtor the representative of the Bank made oral statements which had the effect of nullifying or suspending the operation of the demand. I think that no such construction should be placed upon the expressions ascribed to him.

The two remaining grounds have more substance. The notice of demand did not specify the amount demanded. It is said that a notice of demand is bad unless it names the sum payable. In support of this interpretation of the principal debtor's covenant to pay upon demand reliance is placed upon the observations of *Cleasby* B. in *Massey* v. *Sladen* (1); cf. *Wharlton* v. *Kirkwood* (2). Finally, it is contended that the power to appoint a receiver and manager did not arise until a reasonable time elapsed after service of the notice of demand and that one day was insufficient. According to this contention the power to appoint a receiver is not exercisable unless the principal debtor has made default under its covenant to pay on demand and there is no default until a reasonable time has expired for payment in compliance with the notice of demand. Such an interpretation is often adopted of powers to seize or sell conferred by securities requiring a demand upon the debtor (see *Brighty* v. *Norton* (3); *Toms* v. *Wilson* (4); *Moore* v. *Shelley* (5); *Fitzgerald's Trustee* v. *Mellersh* (6). Compare *Bradford Old Bank* v. *Sutcliffe* (7)).

I find it unnecessary to consider the correctness of either of these grounds for denying validity to the appointment of the receiver and manager and to the exercise of his powers. Assuming that the conditions precedent to the power to appoint him did not occur and the power had, therefore, not arisen, it does not, in my opinion, follow that the surety was discharged by the course taken in appointing a receiver and causing him to enter into possession and to sell assets. The ordinary rights of a surety in respect of securities given by the principal debtor do not exist in the present case. Each of

(1) (1868) L.R. 4 Ex. 13.
(2) (1873) 29 L.T. 644.
(3) (1862) 3 B. & S. 305; 122 E.R. 116.
(4) (1862) 4 B. & S. 442, 455; 122 E.R. 524, 529.
(5) (1883) 8 App. Cas. 285.
(6) (1892) 1 Ch. 385, at p. 390.
(7) (1918) 2 K.B., at pp. 844, 845 and 848, 849.

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the instruments of suretyship contains elaborate provisions which effectually disentitle the surety to any interest in, and to any rights in respect of, the security, whether by way of subrogation or otherwise. It follows that no reliance could be placed upon a contention that the acts of the Bank amounted to a wrongful dealing with securities discharging the surety. But to surmount this difficulty two arguments were advanced on behalf of the surety. These arguments did not deny, but proceeded upon the assumption that he could not complain of the creditor's dealings with securities as such. The first of these arguments was that the creditor, the Bank, had placed it beyond its power to restore the security given for the principal debt, and that, as redemption had become impracticable, no part of the principal debt so secured could be recovered. Accordingly it was argued that, as the principal debt was irrecoverable, the surety must be released (cf. *McDonald* v. *Dennys Lascelles Ltd.* (1)). It may be that some of the instruments of guarantee sufficiently negative the principle by which failure of the liability guaranteed releases the accessory obligation of the surety. But there is at least one other valid answer to the contention. The very assumption upon which the argument proceeds is that the floating charge did not become a specific security; it was never crystallized. A floating charge operates to secure moneys over an undertaking without giving to the creditor any legal or equitable interest in any specific piece of property comprised in the undertaking until the event occurs upon which it becomes a fixed security. The creditor obtains neither the possession nor property in any part of the assets. He has nothing to retransfer or to redeliver to the debtor upon payment of the debt. The debtor retains control of the assets and the power to dispose of them in the course of business. The rule of equity invoked is that "if a creditor holding security sues for his debt, he is under an obligation on payment of the debt to hand over the security; and if, having improperly made away with the security, he is unable to return it to his debtor, he cannot have judgment for the debt" (per Viscount *Cave* L.C., *Ellis & Co.'s Trustee* v. *Dixon-Johnson* (2)). This doctrine is entirely inapplicable to a charge which remains floating where nothing is vested in or handed over to

(1) (1933) 48 C.L.R. 457.

(2) (1925) A.C., at p. 491.

the creditor. If the Bank failed to give the required notice, the seizure and sale may have involved it in trespass and conversion, but certainly did not expose it to a suit for redemption. On the other hand, if the appointment of the receiver was regular, or, although irregular, was not void *ab initio*, or was validated by waiver on the part of the principal debtor, then the sale of assets was open to no further objection. In that case, even if the receiver in selling acted as agent of the Bank and not of the principal debtor, the Company, no doubt could exist as to the continuance of its liability for the balance of the debt (*Gordon Grant & Co.* v. *Boos* (1)). It is, therefore, unnecessary to inquire whether the irregular or premature exercise of a power of sale affecting marketable chattels would preclude a mortgagee from recovering the balance of the mortgage debt. (Cf. *Ellis & Co.'s Trustee* v. *Dixon-Johnson* (2).)

The surety then fell back upon the contention that the appointment and entry of a receiver and manager necessarily destroyed or impaired, or was calculated to destroy or impair, the principal debtor's ability to pay and, if it was unauthorized, the Bank thereby had committed a wrongful act likely to impede or actually impeding performance of the principal obligation and so had discharged the surety. In my opinion this contention cannot be sustained. The Bank acted in the purported exercise of a remedy given to it to secure satisfaction of the principal liability. The surety had no interest in the security or in the remedy, or in the conditions precedent which are said not to have been observed. The fact that, in a *bonâ fide* endeavour to obtain payment of some part of the principal debt, the creditor does something which happens to impair the principal debtor's credit or earning capacity, and also happens to be a legal wrong, cannot, unless the surety has some further or other equitable or legal interest which is also affected, operate as a discharge of his obligations.

For these reasons I think the appeal should be dismissed.

EVATT J. I think that the judgment of the Supreme Court was right, and that the appeal should be dismissed. The documents of guarantee signed by the appellant are themselves sufficient to defeat

(1) (1926) A.C. 781, at p. 786.
(2) (1924) 1 Ch., at p. 353; (1924) 2 Ch., at pp. 467, 470, 471, 473; (1925) A.C., at pp. 491, 494.

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the arguments so vigorously contended for by Mr. *Walker*. Although a surety is a debtor most favoured by the law, he cannot escape his contractual obligations where they provide, as they do here, for their own survival in the very contingency which the surety relies upon in order to work a discharge.

The appeal should be dismissed.

McTIERNAN J. I agree that the appeal should be dismissed. It was contended for the appellant, the surety, that the appointment of the receiver, under the debenture given by the principal debtor to the respondent, was unlawful in its inception, because the moneys due thereunder were not payable at the time of such appointment, as the same had not been lawfully demanded under the debenture, and also because, if the demand was valid, the time allowed by the debenture for payment, a reasonable time, so it was contended, had not elapsed after the demand when the receiver was appointed and took possession of the principal debtor's assets. For these reasons it was contended that the sale of the principal debtor's assets was a tortious act. Mr. *Walker* submitted that if these contentions are correct the appellant is entitled to be discharged from the suretyship on the following grounds :—1. The creditor's unlawful action caused the loss of the security held by it for the payment of the debt for which the security was secondarily liable. 2. The same unlawful action destroyed or was calculated to destroy the principal debtor's credit and ability to pay. 3. As this unlawful action had rendered it impossible for the creditor to restore the security to the principal debtor should the money secured by the debenture become legally payable and the principal debtor pay the same, the principal debt was thereby extinguished.

In my opinion the surety in the present case is not entitled to be discharged from the suretyship on any of these grounds, even if the appellant's submissions as to the illegality of the appointment of the receiver and the sale of the assets were conceded. In this view it is immaterial to inquire whether the acts complained of were lawfully done under the debenture. It will be sufficient to deal with the question of the validity of the above-mentioned grounds upon which

it is submitted the surety should be held to be discharged, assuming the appellant's preliminary contentions to be correct.

As to the first ground. It is true that the surety is entitled to the benefit of all securities held by the creditor and if such securities are by the creditor's act rendered unavailable to the surety he will be entitled to be discharged from the suretyship. This right " is not necessarily dependent upon contract, but is the result of the equity of indemnification attendant on the suretyship " (*De Colyar* on *Guarantees*, 3rd ed. (1897), p. 322 ; *Duncan, Fox, & Co.* v. *North and South Wales Bank* (1)). But the surety may by his contract give up this right (*Perry* v. *National Provincial Bank of England* (2)). In my opinion Mr. *Russell Martin* rightly contended that the right which the appellant might otherwise have had in the security was deliberately excluded by the conditions of the contract whereby he assumed the obligations of a surety. These contracts contain elaborate provisions which were manifestly inserted with that object and they effectually achieve it. The respondent's dealing with the security, assuming that it was unlawful did not therefore violate any right of the appellant as surety in the security for the principal debt.

As to the second ground. It is not alleged that the action taken by the creditor to realize the assets of the principal debtor was taken with the intention of injuring it and amounted to a fraud on the surety. Although such action was injurious in a sense to the principal debtor, it did not partake of any other character than a *bonâ fide* exercise of a power, even if it were also, as alleged, in excess of the creditor's rights under the debenture. In *Black* v. *Ottoman Bank* (3) Lord *Kingsdown* dealing with the converse case of conduct on the part of a creditor which would appear to have been beneficial to a debtor but disadvantageous to a surety said " From these cases it is clear that . . . the mere passive inactivity of the person to whom the guarantee is given, his neglect to call the principal debtor to account . . . does not discharge the surety ; that there must be some positive act done by him to the prejudice of the surety, or such degree of negligence as, in the language of Vice-Chancellor *Wood* in *Dawson* v. *Lawes* (4), 'to imply connivance and

(1) (1880) 6 App. Cas. 1.
(2) (1910) 1 Ch., at pp. 471, 476.
(3) (1862) 15 Moo. P.C.C. 472 ; 15 E.R. 573.
(4) (1854) Kay 280 ; 69 E.R. 119.

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amount to fraud' " (1). *Wood* V.C., after referring to decisions with respect to the right to be discharged of a surety who had guaranteed the conduct of a person in an office, there said "All those remarks point to active connivance, amounting, in fact, as it would do in such a case, almost, if not entirely, to a fraud on the part of the person, and particular officers who were so conducting themselves" (*Dawson* v. *Lawes* (2)). As the mere inactivity of a creditor which has no other colour than failure to enforce his rights against a debtor will not discharge a surety so also I think that action by a creditor against a debtor which has no other colour or character than action *bonâ fide* taken in pursuit of his remedies will not discharge a surety though such action may be taken under a mistake of law as to the creditor's rights. Assuming the creditor's action in the present case to have been tortious it lacked the additional character and colour necessary to render it an equitable cause for the discharge of the surety on the ground that it injured him.

As to the third ground upon which the appellant submits that he is entitled to be discharged. If the assets were tortiously made away with there is no question of redemption at the suit of the debtor and there is no basis for the contention that the principal debt was extinguished because they could not be restored to the principal debtor. On the other hand if the action taken was a due exercise of the creditor's powers under the debenture there is again no basis for the contention that the surety was discharged by the realization of the principal debtor's assets.

Appeal dismissed with costs.

Solicitor for the appellant, *J. R. A. O'Keeffe.*

Solicitors for the respondent, *J. M. Smith & Emmerton.*

H. D. W.

(1) (1862) 15 Moo. P.C.C., at p. 483; 15 E.R., at p. 577.

(2) (1854) Kay, at p. 301; 69 E.R., at p. 128.