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Present : Bertram C.J. and De Sampayo J.

WIJEWARDENE *v.* JAYAWARDENE.

289—D. C. Colombo, 45,217.

Surety—Beneficium excussionis—*Creditor holds securities given by debtor in trust for surety—Surety discharged if securities become valueless owing to dilatoriness or act of creditor—Creditor can call upon surety to guarantee costs of excussion—Extent to which surety is discharged by misfeasance of creditor.*

Where a surety has not renounced the *beneficium excussionis*, the creditor holds all securities given by the debtor in trust for the surety. The surety is discharged if the securities become valueless, not only by the dilatoriness of the creditor, but also by any act on his part; the act must not be a merely negligent act, but must be a positive act on the part of the creditor.

If a creditor can show that there is no reasonable hope of excussion being successful, he is to ask the surety to guarantee his costs of excussion.

The extent to which surety is discharged by the misfeasance of the creditor considered.

THE facts are set out in the judgment.

Drieberg, K.C. (with him *Hayley, Koch,* and *Canakeratne*), for the defendant, appellant.

Elliot, K.C. (with him *Samarawickreme* and *B. F. de Silva*), for the plaintiff, respondent.

Cur adv. vult.

March 20, 1923. BERTRAM C.J.—

The question for consideration in this case is the responsibility of a creditor who is called upon by his surety to excuss the property of the debtor before requring the surety to pay any sum found ultimately due. More particularly the question is: What are the obligations of such a creditor with regard to the proper conduct of the excussion, and what is the position of the surety if that excussion is not properly carried out ?

The effect of the surety bond in this case has already been considered by this Court in the case of *Wijewardene v. Jayawardene.* [1] It was there decided that the surety had not effectively renounced the *beneficium ordinis seu excussionis*, and that the creditor must first excuss the effects of the principal debtor before calling upon the surety to pay.

[1] *(1917) 19 N. L. R. 449.*

The general facts of the case are stated to some extent in the reported case above referred to, but it may be briefly stated that the transaction related to a now extinct newspaper called the "Ceylonese," that the creditor held a mortgage bond over the assets of that newspaper to secure the payment of the sum of Rs. 10,200 and interest, as well as such further advances as might be made to the Ceylonese Union Company, the proprietors of the paper. The surety was himself interested in the paper, and, at his request, the creditor stayed action on the mortgage bond for a year. The surety meanwhile was to act as managing director of the company, and apparently it was hoped that he would during that period liquidate the mortgage debt. Whether such hopes were entertained or not, they were altogether falsified, because at the end of that year the creditor's debt had swollen to Rs. 46,375·59. The surety was sued upon his bond on May 26, 1916. He pleaded the *beneficium excussionis* on November 15, 1916. Decree directing the excussion was entered on July 6, 1917, and on August 15, 1917, the creditor proceeded to excuss the assets of the debtor by instituting an action on his mortgage bond.

The assets of this paper had been the subject of previous mortgages. One of these in favour of Mrs. Helena Wijewardene had already been paid up. At the date of the institution of this new action the creditor's security was as follows: He had a secondary mortgage in the form of hypothecation over the stock-in-trade, plant, and accessories of the company, which included some valuable machinery. He had a secondary mortgage over the book debts of the company. This was not a hypothec, but was by the way of assignment of the debts by way of mortgage. Further, he had a primary mortgage of the same nature on the unpaid calls due to the company, which, normally at any rate, comprised a very considerable amount. In pursuance of the judgment of the Supreme Court it now became his business to realize this security.

The secretary of the company was a certain Mr. Mendis, a proctor of this Court. No sooner had the creditor instituted the action, when Mr. Mendis proceeded to get in, as rapidly as possible, the assets already mortgaged to the creditor. In particular, between October 20, 1917, and October 30, 1919, he collected no less than Rs. 12,439·09 of the book debts included in the creditor's security. But what is more, the company of which he was secretary, on October 19, 1917, went into voluntary liquidation. Mr. Mendis was appointed liquidator, and proceeded to advertise for sale by auction the creditor's principal security, namely, the stock-in-trade, machinery, and other accessories, together with the goodwill of the business as a going concern. The sale was fixed for December 11 and 12. The creditor had not yet obtained judgment, and his action had been delayed by a plea which was clearly a

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dilatory plea only. He thereupon on December 4 applied to the Court for an order to restrain the sale of his principal security. It is at this point that the creditor's troubles begin. Instead of pressing this claim, he settled it; and on December 11, 1917, it was agreed that the property, which formed the subject of the agreement, should be sold, and that the proceeds of the sale should be brought into Court, to abide the result of the action, the company agreeing to pay the costs of the creditor by way of stamps incurred in respect of the application. Three days later the creditor got formal judgment.

The next step was an extraordinary one. The secretary of the company and its liquidator, Mr. Mendis, was in Court, and was acquainted with the order made. This gentleman, nevertheless, had the effrontery to pretend that the order was not binding on himself as liquidator, as he had not been made a party to the application. He proceeded to sell the property advertised, which realized Rs. 26,401, and paid away the amount he realized, partly in wages, partly in the discharge of certain considerable debts recently incurred for the purpose of running the paper. This coming to the ears of the creditor, he moved the Court, on February 1, to direct the liquidator to deposit in Court the whole of the proceeds of the sale, together with the cost of the stamps incurred in the application for the injunction. Singular as it may seem, this application was allowed to stand over for some weeks, and it was not till April 10, 1918, that the liquidator was brought before the Court.

It is unnecessary to say that the contentions of the liquidator were preemptorily rejected as obviously not put forward in good faith. It is also hardly necessary to say that the liquidator then proceeded to gain time by lodging an appeal in this Court against the Judge's order, so that it was not until September 21, 1918, that the matter again came before the Court. On October 30, 1918, the creditor's proctor brought the matter formally before the Court. Again there was a series of postponements. The defendant could not be served. The case stood over for want of time, &c. At last an attachment was ordered to be issued for January 7, 1919; and on January 10, Mr. Mendis, still unabashed, filed an affidavit, magnifying the assets of the company, and asserting that there were outstanding calls to the amount of Rs. 55,000 still to realize, as well as Rs. 28,000 of book debts. He professed that it would take him six months more to bring the liquidation to a conclusion, and he promised, after that interval, to bring into Court the sum he had misappropriated in the manner above described (loosely and erroneously throughout the record stated as Rs. 22,057).

Singular as it may seem, instead of insisting on this gentleman being treated as his contempt of the Court deserved, the proctor

for the creditor consented to this application being allowed, on the liquidator entering into a personal bond to close the liquidation proceedings within the period, a bond which, in fact, was never taken. It was apparent that there was no more good faith in this affidavit of the liquidator than there had been in his original contentions. It is not surprising to learn that during the six months allowed him he did nothing to realize the unpaid calls and book debts, but sold them on June 19 for Rs. 210. On August 5 he deposited Rs. 1,000 in Court on account; and on proceedings being taken to enforce the Court's order, raised certain dilatory and sophistical objections, and on December 12, 1919, the proctor for the creditor moved for his attachment. Realizing that nothing could come of this attachment, he withdrew this application. Nothing was done to Mr. Mendis. The Rs. 1,000 paid into Court was taken out by the primary mortgagee. Some months later, on May 10, 1920, the creditor's proctor took the only step ever taken to excuss the property of the debtor, and that step was an empty formality. He moved to execute the mortgage decree by sale of defendant company's property. On December 13, 1920, the book debts of the company, already sold by the liquidator, were sold over again in execution. They realized Rs. 70, and the excussion of the assets of the creditor thus having produced practically nothing, the creditor then proceeded to continue the action against his surety on this basis.

The question which we have to determine is: What is the legal effect of this singular story? What happened would be more easily realized if we supposed the proprietor of the "Ceylonese" to be a single individual. Suppose, then, on the creditor bringing his action to enforce his mortgage, the debtor had proceeded to get in and appropriate as much as possible of the book debts mortgaged to the creditor, and had offered for public sale the creditor's principal security. Suppose, thereupon, that the creditor had applied to Court to restrain this proceeding, and had then agreed with the debtor that the sale should nevertheless proceed under an undertaking by the debtor to pay the proceeds into the Court. Suppose the debtor, in violation of this undertaking, had applied the proceeds to the payment of wages and other pressing creditors. Suppose, when he was finally brought before the Court, he undertook to realize assets sufficient to replace the money, taking no account of the fact that the assets he was to realize were already pledged to the creditor. Suppose that the creditor had confidingly accepted this offer, and that the debtor had thereupon sold his outstanding debts for a song, and suppose that the creditor then came to the surety and said: "As things have turned out I have not been able to realize anything from my debtor. Pay me the whole amount of my surety bond." In such a state of affairs we should not require to ask what would have

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been the feelings of the surety, for with these we are not concerned, but we should have to ask ourselves: What was the legal effect of these farcical proceedings?

It is necessary to add, at this point, that so far as the creditor personally was concerned he acted in perfect good faith throughout. He placed himself in the hands of one of the leading lawyers of the city, and acted in accordance with his advice. His difficulties arise from the fact that both he and his lawyer, instead of strictly enforcing their rights, preferred to accept the assurances of Mr. Mendis. The question really involved in this action is: On whom are the results of the irresponsible and unscrupulous proceedings of Mr. Mendis to be visited? I cannot help expressing my regret that a proctor of this Court should have been suffered so to behave with impunity, and that the learned Judge should have felt justified in taking the extraordinary charitable view that Mr. Mendis' proceedings are to be accounted for and, apparently, also to be excused, on the ground of zeal and enthusiasm in the interest of the paper.

I will proceed to consider the law. The authorities on the subject of the excussion of a debtor's assets, and as to the responsibility of a creditor to the surety in respect of such excussion, are unfortunately extremely meagre. One thing, however, is certain, and that is, that by excussion is intended a searching or sifting out of the assets of the debtor by process of law. *Wharton's Law Lexicon* defines "excuss" as "to seize and detain by law" and "excussion" as "seizure by law." Voet defines "excussion" as follows: "*Excussus autem intelligitur, de quo apparitor seu executor retulit, se excussisse, nec ulla alia bona invenisse.*"[1] Or, as the passage is translated in *Swift and Payne's Translation*: "A person is deemed to be excussed when the messenger or sheriff makes a return that he has excussed him, and has found no other property." See also *per* Buchanan J. in *Liquidator of the Owl Syndicate v. Bright.*[2]

On the basis of this definition it is clear that there has been no excussion at all. What happened was that the creditor was satisfied with an undertaking from the debtor that he would excuss himself, and practically handed over his securities to the debtor for that purpose. It being, therefore, a condition precedent of the creditor's right to sue the surety that the creditor should first excuss the debtor, what is the legal position when it turns out that no effective excussion has taken place, with the result that the creditor's securities have become valueless? In discussing this question we must, in the first place, bear in mind the fundamental distinction between a surety who has renounced the *beneficium excussionis* and a surety who has retained it. The effect of this

[1] *Voet 46, 1, 15.*

[2] *(1909) Juta, 26 S. C. C. 12.*

distinction will be found explained by Wessels J. in *Colonial Treasurer v. Swart.*[1] Unless this distinction is realized, many references to text books are liable to be misunderstood.

There is a passage in *Voet*[2] which appears to have a direct, though imperfect, bearing on the question above propounded. In that paragraph Voet clearly expresses the opinion that a surety who had not renounced the *beneficium excussionis* conferred upon him by Justinian is in the same position as "*fidejussores indemnitatis*," or "sureties for an indemnity," under the old law. Of these sureties he says: "*A fideiussione liberati censentur, nec conveniri a creditore possunt, si, cum is agere, ac tum debitorem, tum pignora excutere potuisset, atque ita solidum consequi inter moras eius ac excussionis dilationem debitur principalis facultatibus lapsus fit, aut pignora desierint idonea esse.*"

In *Swift and Payne's Translation* this passage is translated as follows:—

> "Sureties for an indemnity . . . . are held to be free from the suretyship, and cannot be sued by the creditor if, though he could have brought his action and excussed both the debtor and the pledges and so recovered the whole amount due, while he delayed and showed want of energy in excussing, the principal debtor has lost his money or the pledges have ceased to be valuable."

This is unfortunately a loose translation. Voet does not say that "want of energy in excussing" excuses the debtor. What he refers to is "*moras eius ac excussionis dilationem,*" that is to say, delays of the creditor and protraction of the excussion. What he lays down is that if while the creditor is delaying and the excussion is protracted, the debtor becomes denuded of his resources and the securities become inadequate, the surety is excused. In other words, the creditor when excussing the debtor is responsible for the results of dilatoriness in his proceedings and the consequent protraction of the excussion.

It cannot be said here that the surety has been damnified by the delays of the creditor in pursuing his remedies. But is this formula to be considered exhaustive? If a surety may be released, where owing to the dilatoriness of his creditor the debtor's assets have vanished, what is his position when they have vanished by reason of the positive acts of the creditor, which, however, *bona fide* in intention, have had the effect of discharging the debtor and dissipating assets which might have been realized?

Further light is thrown upon this question by the consideration of a principle which, though not precisely identical, is certainly analogous, namely, the right of the surety under the *exceptio cedendarum actionum.* Here the case supposed is that of a surety

[1] *(1910) Transvaal Prov. and Local Div. 552.* [2] *Voet 46, I, 38.*

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who has renounced the *beneficium excussionis*, or has not pleaded it. On being sued by the creditor he is entitled to set up the above exception, and under that exception to have assigned to him all the creditor's securities against the principal debtor. But what if the creditor by his own default is not in a position to assign those securities ? I have not been able to find any decision of this question in the Dutch commentators and in the Roman law. The question is, however, fully discussed by *Pothier on Obligations*,[1] and he there comes to the conclusion that this exception ought to be opposed to the creditor " where by a positive act on his part he has rendered himself incapable of ceding his actions against one of the debtors, by discharging his person or property," or, " where by allowing a demand that he has instituted to be dismissed, he had laid himself open to a suspicion of collusion." He insists, however, that " mere negligence on his part . . . . ought not to subject him to any imputation." This principle has been adopted by a case in the Privy Council, *Macdonald v. Bell*,[2] and it is a recognized principle of equity both in England and America, where it has been held that a mortgage taken by a creditor is held in trust for the surety. See *per* Mr. Chancellor Kent, cited in *Story's Equity Jurisprudence* [3] :—

> " According to the doctrine of the civil law, the surety may, *per exceptionem cedendarum actionum*, bar the creditor of so much of his demand as the surety might have received by an assignment of his lien and right of action against the principal debtor ; provided the creditor had by his own unnecessary or improper act deprived the surety of that resource. The surety, by his very character and relation of surety, has an interest, that the mortgage taken from the principal debtor should be dealt with in good faith, and held in trust, not only for the creditor's security, but for the surety's indemnity. A mortgage, so taken by the creditor, is taken and held in trust, as well for the secondary interest of the surety, as for the more direct and immediate benefit of the creditor, and the latter must do no wilful act, either to poison it, in the first instance, or to destroy it afterwards. These are general principles founded in equity, and are contained in the doctrines laid down in *Pothier's Treatise on Obligations*."

I note that the same opinion is expressed in a local case, *Mohammedo Thamby v. Aremecutty* [4] : " A creditor is in fact the trustee of a surety for the security which he holds for his debts, and it cannot

[1] *Evan's Translation, vol. 1., pp. 360–364.*

[2] *(1840) Privy Council, 3 Moore 315.*

[3] *Story's Equity Jurisprudence in note on p. 501.*

[4] *3 Lorensz 254.*

be allowed him to impair the value of his securities and still preserve his right to proceed against the surety."

We are clearly justified, therefore, in adopting this principle into our own law and in applying it by analogy to the present circumstances. It would obviously be reasonable to hold that a creditor against whom the *beneficium excussionis* is pleaded holds all securities given by the debtor in trust for the surety, and that the surety is discharged if the securities become valueless, not only by the dilatoriness of the creditor, but also by any act on his part. It may be conceded, on the analogy of the principle above explained, and on the authority of the Privy Council case above cited, that that act must not be a merely negligent act, but must be a positive act on the part of the creditor.

That the securities in this case ultimately proved valueless is conceded. Was this result, then, due to mere negligence, or was it due to a positive act on the part of the creditor ? I can have little doubt that the proceedings of the creditor, which resulted in the dissipation of the debtor's assets, come well within this formula. As I have said, instead of excussing the assets, he handed over the excussion to the debtor himself.

Mr. Drieberg, for the surety, contends that, even apart from these circumstances, the surety is entitled to be discharged through the delays of the creditor. He points out that the *beneficium excussionis* was pleaded on September 15, 1916. He urges that from that moment it became the duty of the creditor to proceed against the principal debtor. In fact, no plaint was filed until August 24, 1917. During this interval it seems certain that a great number of book debts were prescribed. I do not think, however, that this year's delay can be taken into account. The creditor required this year for the determination of the points of law which he raised, and I do not think it would be equitable to hold him responsible on the ground of any loss which might be shown to have accrued during this interval.

I will now proceed to consider the argument put forward by Mr. Elliot, that the creditor is under no responsibility for the unfortunate development of the excussion, because, so far as the creditor is concerned, the assets were bound, in any case, to prove valueless. He points out that the mortgage held by Mr. F. R. Senanayake had priority over that held by the creditor. The amount due on this mortgage has not been definitely ascertained. Mr. Elliot suggests that it probably amounted to, at least, Rs. 20,000, and that even if the whole amount realized by the sale had been paid into Court, Mr. Senanayake would have had the first call on the proceeds. As to the unpaid calls and book debts, Mr. Elliot urges that, owing to the general looseness with which he suggests that all the business connected with the paper was conducted, these unpaid calls were, in effect, valueless, that the only way in

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which these calls and book debts could be realized, for the purpose of the mortgage, was by sale, that they could not be sold individually, and that when sold in the mass they were bound to realize very little. I cannot accept this argument.

With regard to the sale of the machinery, &c., Mr. Drieberg, on his side, contends that if the sale had been a Fiscal's sale in execution of the mortgage decree, a higher sum would have been realized. I confess I am not satisfied with this. But even assuming that the amount due on Mr. Senanayake's mortgage would have amounted to Rs. 20,000, the total amount realized was Rs. 26,401, and there would have been, at least, a surplus of over Rs. 6,000 available for the secondary mortgagee. With regard to the unpaid calls and book debts, it is not correct to say that the only way of realizing these securities was a public sale. Mr. Drieberg is, I think, right in contending that they might have been realized by the appointment of a receiver, appointed under chapter L. of the Civil Procedure Code. It must be borne in mind that these calls and debts were not hypothecated, but were assigned by way of a mortgage.

There was indeed nothing to prevent the creditor from the moment when he realized that he had to undertake an excussion, obtaining a list of these debts and himself calling upon the debtors, by legal process, to pay the debts to him by virtue of the cession. If it be considered that under Roman-Dutch law it was necessary for him first to get a legal declaration of his rights, he could at least have obtained an interim order for the appointment of a receiver, immediately on instituting his action. If he had done this, the twelve thousand odd rupees collected by Mr. Mendis, between October 20, 1917, and October 30, 1919, might have been collected for the benefit of the surety. In any case, a receiver could undoubtedly have got in a considerable quantity, both of unpaid calls and book debts. These could have been recovered, if necessary, in Court of Requests' actions, with a minimum of expense. The unpaid debts of a newspaper company, no doubt, consist, for the most part, of a number of small amounts due from subscribers and advertisers. I cannot but believe that, if these persons had been sued, very considerable amounts might have been got in. It is quite true that several of these accounts might have been prescribed, but it by no means follows that, when an account was duly rendered, every debtor, in such cases, would have set up the plea of prescription.

In any case, it was not for the creditor, without informing the surety, to treat this set of assets as not worth excussing. The surety had definitely given him notice of his obligation to excuss, and, if he had any doubt about any particular set of assets, he should have consulted the surety. The principle is thus laid out in *Liquidator of the Owl Syndicate v. Bright* (*supra*) : " If the person

who sues can show that there is no reasonable hope of excussion being successful, he is entitled to say to the defendant, who sets up want of excussion, 'I will proceed to excuss the persons who are liable if you will guarantee me my costs, but if you will not guarantee my costs, as it is useless, I will not do so.'" In the present case, the creditor had precluded himself from taking this prudent course by leaving the excussion to the debtor company itself.

Mr. Drieberg is, I think, also right in arguing that if necessary the assets of the company might have been excussed by a compulsory liquidation under the control of the Court. Mr. Elliot argues that, even if this had been done, Mr. Mendis *might* have been appointed liquidator, and *might* have treated the Court with the same contempt as he treated it in the voluntary liquidation. I confess I do not see how these suggested possibilities can be taken into account. If this method of excussion had been adopted, the provisions of section 90 of the Joint Stock Companies Ordinance, No. 4 of 1891, would have proved very useful for the purpose of getting in unpaid calls. The point is that through the deliberate acts of the creditor, no doubt done with the best intentions and in the highest good faith, the security which he held in trust for the surety was handed over to a person who for whatever motives neglected to realize its full proceeds, and misappropriated them in so far as they were realized.

I now come to the more difficult question as to the extent to which the surety is discharged by the misfeasances of the creditor. The passage cited by Voet in 46, 1, 38 seems to consider that in the case there contemplated the surety is discharged absolutely, and that the remission of his liability is not limited to the amount lost through the creditor's default. In the case, however, of the *exceptio cedendarum actionum*, it appears to be clear that the law, as laid down both by Pothier and by the American jurists, limits the discharge of the surety to the loss that can be shown to have accrued to him from the creditor's misfeasance. If it were possible in the present instance to apply such a limitation, it seems to me most just and equitable that it should be applied. Unfortunately its application appears to be impossible. It is not practicable to calculate what the surety has lost. No one can tell what the creditor could have realized if the excussion had been properly conducted.

I have noted one point which slightly complicates the matter. The goodwill was not included in the mortgage security, but it was included in the sale. It is difficult to say what deduction ought to be made from the funds realized by the sale in respect of this goodwill. As, however, the leasehold interest of the office was included in the mortgage, and was sold with the machinery, I imagine that the actual amount to be attributed to the goodwill would be inconsiderable. In any case, we are left in this position, that

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through the misfeasance of the creditor the surety has lost the benefit of the security to which he was entitled, though the amount which might have been realized in respect of that security, if proper proceedings had been taken, cannot be calculated. Under the circumstances it seems to me that we have no alternative but to hold that the surety is discharged altogether. The amount for which he was sued is a considerable one, over Rs. 45,000, and it is by no means sure that this sum, or anything like it, could have been realized by the proper excussion of the debtor's assets. But, unfortunately, in the circumstances of the case, no other order is practicable.

There are one or two incidental observations on the judgment of the learned District Judge on which I think it right to comment. He expresses the opinion that it is very doubtful whether the creditor's application for an injunction to restrain the sale in the voluntary liquidation would have been successful. I cannot help thinking that if the facts had been fully put forward, any Court would have issued an injunction to restrain such proceedings. Such a sale was obviously intended improperly to defeat the creditor's right. Incidentally I may note that the conditions of sale said nothing about the mortgages to which the property sold was subjected. In the second place, the learned Judge seems to attach some importance to the fact that when the surety took over the management of the paper, he took from the company certain collateral securities to protect himself against the amount which he might have to pay on the surety bond, or in respect of any further advances he might make to the company. I cannot see myself how these circumstances affect the creditor's liability.

For the reasons I have given, I would allow the appeal, with costs, and declare the surety altogether discharged.

DE SAMPAYO J.—

This case was instituted by the plaintiff on May 26, 1916, on the footing that by the agreement dated August 3, 1914, the defendant undertook a principal obligation and was liable to the plaintiff independently of the Ceylonese Union Company, Limited. But this Court, on an appeal preferred by the defendant, decided on July 6, 1917 (see *19 N. L. R. 449*), that the defendant was only a surety, and that as his agreement was made expressly subject to the privilege of excussion, the company's property must first be sold in a properly constituted action before the defendant could be called upon to pay the plaintiff's claim. The plaintiff then, on August 24, 1917, brought the action No. 48,408 against the company on the original mortgage bond granted by the company to the plaintiff. Having failed to recover anything from the company, the plaintiff has resuscitated the present action against

the defendant. It is the effect of the proceedings in the said action No. 48,408, and the plaintiff's acts in connection therewith on the defendant's position as surety, that have to be considered in this case. Though the case was instituted on August 24, 1917, summons was not taken out till October 3, 1917. The defendant company appeared on October 8, 1917, by a firm of proctors, who obtained time till October 29, 1917, to file the company's proxy and answer. At this stage, and subsequently, the company pursued a policy of obstruction and delay, but the important fact to be noted is that on October 19, 1917, the company went into voluntary liquidation, and one Wilfred Mendis, secretary of the company, was appointed liquidator. The liquidator at once began to sell the assets of the company, and there is reason to believe that the liquidation was adopted, and the scheme was hurried through, with a view of saving the company's property as far as possible. The plaintiff, who was a large shareholder, and had been a director of the company, must have been quite aware of the danger. His complacency resulted in the dissipation of the mortgaged property and the misapplication of the money realized by the liquidator. The course open to him and required of him by law for protecting himself and the surety was obvious. It was to get a decree as soon as possible and proceed to execution, or to take steps for the compulsory liquidation of the company, in which case the assets could have been realized by process of the Court, or under his control. Instead of doing either of these things, he was very slow, and allowed time to the company to file answer and consented to postponement of the trial. The answer when filed was found to be most frivolous, and judgment was only entered on December 14, 1917. He should have been extra vigilant and active, in view of the fact that the defendant had successfully set up the plea of the privilege of excussion. He made an attempt, which might have been effective if pursued, to stop the liquidator, but soon withdrew from it and consented to just what the liquidator desired. The liquidator advertised the sale of the most valuable part of the mortgaged property, namely, the machinery, plant, stock-in-trade, and goodwill of the company, and then the plaintiff applied for an injunction to stay the sale. But on December 11, 1917, the plaintiff and the company made a joint motion that the property be sold by the liquidator and the proceeds be brought into Court to abide the result of the action, and the Court made order accordingly. It is surprising that the plaintiff should have joined in such an application, because the Court, under the circumstances, would undoubtedly have issued the injunction asked for. The result, which might surely have been anticipated, was that the liquidator, though he sold the property for Rs. 26,401, did not bring that money into Court. On various pretexts and in various ways he evaded his clear duty, and finally took an appeal which was

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promptly dismissed by the Supreme Court. Further notices issued on the liquidator to bring the money into Court, in pursuance of the previous order, only resulted in Rs. 1,000 being paid in, which, however, the liquidator purported to pay "pending final account of liquidation," and even an attachment issued by the Court was successfully avoided. The liquidator's excuse was that the expenses of liquidation and of carrying on the newspaper business of the company absorbed all the money. The acquiescence of the plaintiff, while all this was happening, and his failure to issue execution, are strange. It is possible that he could not seize the property sold by the liquidator in execution of his own mortgage decree, as he had consented to the sale by the liquidator, but there were other valuable assets mortgaged to him, such as the book debts and unpaid calls, still undisposed of. By this time much over a year had elapsed since the date of the plaintiff's decree. What now took place is most extraordinary. On January 10, 1919, the liquidator moved that he be allowed time till the end of June, 1919, to bring in the proceeds of sale into Court. On January 28, 1919, the plaintiff, jointly with the liquidator, moved that the above application for time be allowed, on the liquidator entering into a personal bond undertaking to close the liquidation proceedings within that period and "to account for the said proceeds in the liquidation proceedings." The Court had no option but to allow this joint motion. It is of a piece with the whole proceeding, that, as a matter of fact, the liquidator did not execute any bond as agreed. Two remarks must here be made. To account for the money "in the liquidation proceedings" means that the liquidator was allowed to credit himself with the payments he alleged he had made in preference to the plaintiff's claim on the mortgage. The plaintiff was no doubt at liberty to sacrifice his rights in this way, if he chose, but there was the surety, the defendant, whose rights should have been conserved. The other point to be noticed is that the giving of time for six months from January to June, 1919, like the withdrawal of the application for an injunction and express consent to the liquidator selling the property advertised for sale, was not a mere matter of slackness or negligence, but a positive act by which the mortgage security was lost, and the defendant as surety was seriously prejudiced. All this was allowed and done in the case of a liquidator who had from the beginning been guilty of misconduct. It cannot be said that the fact of the property being sold by the liquidator instead of by process of Court made no difference. The public would have had more confidence in a judicial sale, and the would-be purchasers would probably have been influenced by the pendency of the mortgage action. Something was also said that there was no real prejudice to the plaintiff as mortgagee, because the same property was subject to a primary mortgage in favour of

Mrs. Helena Wijewardene. But we do not know what was actually due to the primary mortgagee at that time, and, in any case, this is no defence against the plea of the surety who was entitled to require the plaintiff to realize as much as possible, and, ultimately, to cede to him any further securities held by the plaintiff. As a matter of fact, the liquidator in his evidence says that the price for which he sold was cheap, " about half of what it was worth," and that there was a private offer of Rs. 50,000, which was withdrawn before acceptance. With regard to the book debts and unpaid calls, the situation was still worse. Under the arrangements to which the plaintiff was a party, the liquidator sold those assets also in June, 1919, for the ridiculous sum of Rs. 210. The plaintiff later woke to a sense of the improper course of action he had pursued, and on December 13, 1920, had the book debts and unpaid calls sold over again under writ of execution, and realized Rs. 70. According to the liquidator there were Rs. 28,000 worth of book debts and Rs. 55,000 worth of unpaid calls. It is very difficult to understand the plaintiff's sacrifice of his own rights as mortgagee, except on the supposition that he was deeply interested in the company and the newspaper which it published, and did not wish to press for payment of the debt due to him. I quite believe what the liquidator says on this subject: " As soon as I got the Rs. 26,000 (*i.e.*, the proceeds sale of the machinery, &c.), I proceeded to pay it out. I cannot say by what date I had exhausted it. Mr. Wijewardene (plaintiff) was not a stranger to me. Mr. Wijewardene knew that the salaries of the servants, editors, and reporters were being paid out of the proceeds of sale of the machinery, and that I was paying back Messrs. Senanayake and Wijesekere (*i.e.*, persons from whom the liquidator had borrowed money). At that time all that Mr. Wijewardene was concerned with was that I should account to Court for the money and close the liquidation proceedings. He was content to take his chance with the other creditors and get something if there was anything left. At one stage of the case No. 48,408 attachment issued against me. On January 28, 1919, there was a joint motion by me and the plaintiff, whereby it was agreed that I should carry on the liquidation proceedings and account for the money. This was merely a repetition of what took place when I was spending the money." I think that this is an accurate description of the attitude of the plaintiff. The nett result of all this was that the plaintiff's mortgage security was wholly wasted. He now comes upon the surety, the defendant, for the full amount of Rs. 58,654·26 due to him from the company with further interest. I do not think that, under the circumstances, the plaintiff is entitled to do so.

The law applicable to the subject is fully discussed in the judgment of the Chief Justice, and all I need say here is that in any view of the law the various positive and deliberate acts of the

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plaintiff, whereby his mortgage security was lost, must be taken to have discharged the defendant from his obligation as surety. In my opinion this appeal should be allowed, and the plaintiff's action dismissed, with costs, in both Courts.

Set aside.