THE QUEEN ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA ..... PLAINTIFF;

1897
Nov. 16.

AND

THE HONOURABLE A. W. OGILVIE.. DEFENDANT.

Contract—Conflict of law—Appropriation of payments—Receipt—Error—Rectification.

The doctrine that where a contract is made in one Province in Canada and is to be performed either wholly or in part in another, then the proper law of the contract, especially as to the mode of its performance, is the law of the province where the performance is to take place, may be invoked against the Crown as a party to a contract.

2. While both the English law and the law of the Province of Quebec give to a debtor owing several debts the option of appropriating any payment he may make to any particular one of such debts, provided he exercise his option at the time of such payment, yet under the Quebec law where the debtor does not exercise such option and thus give a right to the creditor to appropriate the payment, the creditor must exercise his option immediately upon payment being made, and cannot delay exercising it up to the time of trial as he may do under the doctrine of the modern English cases.

3. Where a person owing several debts has accepted a receipt from his creditor by which a specific imputation is made, he may afterwards have the payment applied upon a different debt by showing that he had allowed the former imputation to be made through error, unless the creditor has been thereby induced to give up some special security.

CLAIM for a balance due under a contract of guaranty The facts of the case are fully stated in the reasons for judgment of Mr. Justice Davidson, Judge *pro hâc vice.*

J. N. Greenshields, Q.C. for the plaintiff: There was no specific imputation by the bank of the payment in favour of the second call of $50,000, a debt in respect of which the defendant here was surety; but it

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is claimed that it was an oversight of the president of the bank that no imputation was made. The court cannot now hold that the imputation may be rectified to carry out any intention of the bank.

Argument of Counsel.

E. L. Newcombe, Q.C., followed for the plaintiff: The debtor's right to appropriate a payment when he owes several debts must be exercised at the time of payment, otherwise a right accrues to the creditor to appropriate. Further, where one of two debts is not more onerous than the other, the presumption of law is that the payment is made on account of the earlier debt. *Clayton's Case, De Vaynes* v. *Noble* (1); *Tudor's Leading Cas. in Merc. Law* (2); *Thompson* v. *Hudson* (3); *Re Accidental Death Insurance Company* (4).

The Solicitor General of Canada: The bank was insolvent, and it is submitted under the authorities in the civil law that an insolvent debtor cannot make an imputation of payments. There is a distinction between *décomposition* and insolvency, and the authorities I have collected refer to cases of insolvency. 17 Laurent, No. 630; Dalloz, *Juris. Genl.*, 1868, 1st pt., 501; Massé, *Droit Commercial*, 4th vol., p. 130; Dalloz, *Juris. Genl. Supplément*, vo. "*Obligation*," 855.

Against the contention that the imputation made by the creditor should now be rectified on the ground of error, I cite arts. 1161 and 1048 C. C. *Petry* v. *La Caisse d'Economie* (5); *Kershaw* v. *Kirkpatrick* (6).

J. S. Hall, Q.C., for the defendant: The guaranteed debt was the most onerous, and by law the payment would be applied to that. *Walton* v. *Dodds* (7); arts.

(1) 1 Meriv. 530, 611.
(2) 3rd ed. p. 1, and notes p. 19.
(3) L. R. 6 Ch. App. at pp. 320, 331.
(4) 7 Ch. D. 568.
(5) 16 Q. L. R. 197; and 19 Can. S. C. R. 713.
(6) 3 App. Cas. 345 and Beauchamp Juris. P.C. 605.
(7) 1 L. C. L. J. 66.

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1160 and 1161 C. C.; *The Ætna Life Ins. Co.* v. *Brodie* (1) *Doyle* v. *Gaudette* (2); *Green* v. *Clark* (3).

W. D. Hogg, Q.C., followed for the defence, citing: *In re Sherry* (4); *Pearl* v. *Deacon* (5); Smith's *Equity* (6); *Young* v. *English* (7); *City Discount Co.* v. *McLean* (8). 3 *English Ruling Cases* (9).

DAVIDSON, J. now (November 16th, 1897,) delivered judgment.

This case was heard before me some time ago, but it was not found possible to complete the record until the beginning of the present month.

The Crown by information, dated September, 1895, prayed judgment for $77,337.03, as balance due under a letter of guarantee signed by defendant on the 11th of May, 1883. At the trial the claim was reduced to $65,820.88.

Defendant pleads that he stands wholly discharged by payments made by the principal debtor subsequent to, and imputable in extinction of, his suretyship.

Financial difficulties, which ultimately resulted in liquidation, compelled the Exchange Bank of Canada to apply to the Finance Department of Canada for assistance. This was granted on three several occasions, in the hope of saving the institution from insolvency. On the 12th of April, the 21st of April, and the 12th of May the Government made deposits of $100,000 each, and in acknowledgement thereof were delivered receipts bearing the numbers 323, 329 and 346. The first of these was returned to the bank under circumstances which are of vital interest to the

(1) 5 Can. S. C. R. 1.
(2) 20 L. C. J. 134.
(3) Cass. Dig. p. 614.
(4) 25 Ch. D. 692.
(5) 1 DeG. & J. 461.
(6) 14 ed. Ch. VII. p. 465.
(7) 7 Beav. 10.
(8) L. R. 9 C. P. 692.
(9) P. 329.

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present controversy; the second and third are of record. No. 329 reads as follows:—

"$100,000. MONTREAL, 17th April, 1883. No. 329.

"The Exchange Bank of Canada acknowledges "having received from the Hon. the Receiver-General "the sum of one hundred thousand dollars, which "sum will be repaid to the Hon. the Received-General "or order, only on surrender of this certificate, and "will bear interest at the rate of five per cent. per "annum, provided thirty days' notice be given of its "withdrawal.

"The bank reserves the privilege of calling in this "certificate at any time on written notice to depositor, "after which notice all interest on the deposit will "cease.

"If, when notice be given by the depositor of with-"drawal, the bank elects to pay immediately, it shall "have the right to do so.

"T. CRAIG,
"*President.*

"Entered. ERNEST P. WINTLE,
"*For Accountant.*"

Receipt No. 346 is in like form, with the exception that the following words are struck out:

"The bank reserves the privilege of calling in this "certificate at any time on written notice to the "depositor, after which notice all interest on the "deposit will cease."

The third deposit, to which I have made brief reference, was not obtained without difficulty. In the course of a letter to the Receiver-General, dated 21st April, 1883, the president of the bank wrote:

"I find that I shall require another sum of $100,000 "to place me in an independent position. Therefore, "I shall have to trespass on your kindness once more.

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"I take the liberty of sending you in advance the "third deposit receipt."

To this application the following answer came:

"I am in receipt of your letter of the 21st, and I at "once telegraphed you that the Government had fixed "the limit at $200,000 and I could not exceed my "instruction. I am under the necessity of returning "herewith the receipt for $100,000, which you enclosed, "and at all events for the present, I can do no more."

This refusal was subsequently withdrawn, and the deposit made, upon the Department being placed in possession of the following letter from defendant, who was at the time one of the directors of the bank:

"OTTAWA, 11th May, 1883.

"MY DEAR SIR,—I beg that the Government will "place a further sum of $100,000 at deposit with the "Exchange Bank on the same terms as the former "deposits of $200,000, and on the Government agree-"ing to comply with the request I hereby undertake "to hold myself personally responsible for the further "deposit of $100,000.

"Yours very truly,

"A. W. OGILVIE,

"J. M. COURTNEY,

"*Deputy Minister Finance.*"

The cheque covering this deposit, for which a receipt bearing the number 346 issued, was delivered to defendant and by him brought to Montreal. Verbal evidence was made at the trial to the effect that it was an express condition and agreement precedent to the cheque being delivered over to the bank authorities, that all future payments to the Government should be first applied in extinction of the amount for which the defendant had thus become surety. This proof was under objections, which I reserved and have presently to determine.

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On the 31st of May, Mr. Courtney notified the managing director that on the 1st of July then next, the Dominion Government would "require the sum of $50,000 to be transferred from the special deposit account with your bank to the general account."

In reply to a request made by the bank's president on the 29th of June, that this transfer might be postponed until the 20th of August, Mr. Courtney answered as follows:

"FINANCE DEPARTMENT,
"OTTAWA, 30th June, 1883.

"MY DEAR SIR,—I am sorry to say I must have "the $50,000 turned into ordinary cash on Tuesday. "I had intended to have drawn it out immediately in "order to meet the payments on account of subsidies, "but this I will do, I will only draw $5,000 a day for "ten days. I may as well inform you that we shall "want another $50,000 to be turned into cash on the "1st August.

"Your truly,
"J. M. COURTNEY,
"*Deputy Minister of Finance,*

"THOS. CRAIG, ESQ.,
"*President Exchange Bank, Canada.*"

The 4th of July brought another letter from the deputy minister, wherein he requested that the president might "be good enough to place to the credit of the Receiver-General the amount of interest due to the 30th June, the end of the fiscal year, on the special deposit in your hands bearing interest, and forward a receipt for the same to this department." And then follows this post scriptum, "I have not turned into cash yet the $50,000, of which notice was given."

Three days later the deputy minister wrote as follows:—

"FINANCE DEPARTMENT,
"OTTAWA, 7th July, 1883.

"SIR,—Referring to previous correspondence, I "have now the honour to request that you will be "good enough to forward to me (at your very earliest "convenience), a receipt for the $50,000 which was to "be turned into cash on the 1st instant, and also a "fresh receipt for $50,000 at interest and I will return "you one of the receipts for $100,000 which we now "hold. Pray attend to this without delay.

"I have, etc.,
"J. M. COURTNEY,
"*Deputy Minister of Finance.*

"THOS. CRAIG, Esq.,
"*Managing Director Exchange Bank, Montreal.*"

Much, if not the whole of the controversy existing between the parties, results from the terms in which answer was made on behalf of the bank. These are its words:—

"EXCHANGE BANK OF CANADA,
"MONTREAL, 9th July, 1883.

"*The Deputy Minister of Finance, Ottawa.*

"DEAR SIR,—As requested in your letter of the 7th "instant, I now forward the deposit receipt of this "bank, No. 358, in favour of the Hon. the Receiver-"General for $50,000, and enclose our receipt for "$50,000, placed to the credit of the Finance Depart-"ment account. Please return deposit receipt No. "323, $100,000, now in your possession, and oblige.

"Yours, etc.,
"JAMES M. CRAIG,
"*Pro Manager.*"

James M. Craig was the accountant of the bank. It will be remembered that No. 323 was the earliest in date of the three receipts held by the Government. It was returned to the bank, as requested.

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In accordance with the notice of the 30th June, the bank on the 10th of July transferred a second amount of $50,000. from deposit to current account. Its letter of advice, also signed by James M. Craig for the manager, requested and obtained the return of the receipt No. 358. Neither this nor the receipt No. 346 issued in connection with defendant's letter of record can be found. It is supposed that they shared in the destruction of a large quantity of the books and papers of the bank which was authorized when its liquidation came to an end.

Aware of the payment of $100,000. and in the apparent belief that his liability had been discharged, defendant pressed the bank for the return of his letter of guarantee. So on the 10th of November, the president wrote to Mr. Courtney in these terms:—

"Concerning the loans we obtained from you last "spring for the last $100,000. which you gave us, "you obtained from Mr. Ogilvie his guarantee for the "pavment of the $100,000. As we paid you this last "amount, and the deposit receipts have been returned "to us, I will be obliged to you if will kindly return "to me Mr. Ogilvie's guarantee letter."

A second request of like nature was forwarded on the 19th of November:—

"I beg to call your attention to my letter of a few "days ago, concerning the guarantee which Mr. "Ogilvie gave you for the last $100,000. you gave "and which has since been paid."

Mr. Courtney took the opinion of the Department of Justice and refused to return the letter of guarantee. The present action was only entered twelve years later.

The bank suspended payment on the 17th of September, 1883. It took advantage of the ninety days grace provided by the Banking Act. A winding-up order

was granted and liquidators appointed on the 5th of December.

The Crown filed a claim for $237,840.24 with interest upon $200,000. at the rate of five per centum, from the 30th of June previous. In support of the claim, pro tanto, the deposit receipts numbers 329 and 346 were filed. The balance of $37,840.24 represented an account unconnected with the transactions under consideration. The claim made no reference to the existence of a suretyship, although by section 62 of *The Winding Up Act* a creditor holding security is to specify the nature and amount thereof and put a specified value thereon.

Under reserve of an asserted right of payment by privilege over all other creditors and in priority to them, the Government received in dividends a sum of $160,503.21.

It is the plaintiff's pretension that the two payments made by the bank of $50,000 each must be wholly imputed to the first deposit of $100,000. which was represented by the returned deposit receipt No. 323, and that as to the dividends defendant is only entitled to credit in the proportion which the amount of his guarantee, with interest added, bears to the total claim of the bank. This view of the case is reduced to actual figures by an account of record which may be summarized thus:—

" To amount of loan.....$100,000.00
" To interest as detailed (*i.e.*, on
" the balances as they existed
" after the payment of each divi-
" dend) from the 11th of May,
" 1883, (*i.e.*, the date of the letter
" of guarantee), to the 14th of

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" February, 1893, (*i.e.*, date of
" the last dividend)..... 33,513.46

$133,513.46

" By proportion of dividends on
" $101,986.30.....$ 67,693.38

$ 65,820.08"

for which balance judgment is sought.

The defendant, on the other hand, contends that any amount in which he was ever responsible towards Her Majesty has been paid; that the sums received on her behalf ought to have been imputed on the sum of $100,000, in connection with which he gave his guarantee; that James M. Craig in asking for the return of the first receipt, No. 323, in connection with the repayment of $100.000. acted in contravention of the agreement between the bank and the defendant, in error, and without the knowledge of and contrary to the instructions of his employers; that the claim is prescribed.

The plea of prescription was not seriously argued at the trial. Prescription has not inured.

English and French authorities were cited at the Bar, on either side, in sustainment of the legal principles relating to imputations or appropriation of payments and to other features of the case which it was desired to uphold.

In case of conflict, which is to prevail as to the issues before me—the law of Ontario or of this province? The common or the civil law? The question needs a definite reply, because defendant signed and delivered his letter to Mr. Courtney, at Ottawa, and there received in return the cheque for $100,000.

But the place of the bank's applications, of the payment of the Government cheques, of the deposits, of the giving of the receipts and of the repayments, was

Montreal. When a contract is made in one country and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance, is the law of the country where the performance is to take place (1).

I must therefore give dominant weight to the law of suretyship as it exists in this province. As both systems, however, boast a common parentage and retain many points of similarity, it will be useful to point out the leading differences which have come to exist between them. The English rules as to imputation of payments are in part these:

1. When one person is indebted to another on various accounts, the debtor is at liberty to pay in full whichever debt he likes first; this right can only be exercised at the time of payment, not afterwards.

2. The debtor has no right to insist on paying a debt partly at one time or partly at another; if, however, the creditor accepts the payment, the debt is, to its extent, extinguished.

3. Where the debtor, having the opportunity so to do, makes no appropriation, express or tacit, at the time of payment, the creditor is entitled to appropriate the payment to whichever debt he pleases, and he may exercise this right at any time he likes.

4. If neither debtor nor creditor apply the payment, the law usually makes the appropriation on the earliest items of an entire unbroken account.

Clayton's Case (2); *Tudor's L. C. Merc. and Maritime Law* (3); *De Colyar on Guarantees* (4); *Shirley's L. C.* (5); *Lindley on Partnership*, (6)

The civil law rules as regards imputation of payments are clearly defined.

(1) Dicey, Conflict of Laws, 570.
(2) 1 Meriv. 530, 611.
(3) P. 25.
(4) 3rd ed. p. 453.
(5) 3rd ed. p. 180.
(6) 6th ed. p. 234.

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1. A debtor of several debts has a right of declaring, when he pays, what debt he meant to discharge; C. C., 1158. He cannot, however, discharge capital in preference to arrears of interest; C. C., 1159. He cannot compel the acceptance of a payment on account of a particular debt; C. C. 1149.

2. If the debtor makes no imputation the creditor may do so, but it must be made at the instant of payment; C. C., 1161. Rolland De Villargues, Vo. *Imputation*, v. 8, p. 169.

3. If the receipt makes no special imputation, then—

(*a*) The payment must be imputed in discharge of the debt actually payable which the debtor has at the time the greater interest in paying:

(*b*) If of several debts one alone be actually payable, the payment must be imputed in discharge of such debt, although it be less burdensome than those which are not actually payable:

(*c*) If the debts be of like nature and equally burdensome, the imputation is made upon the oldest:

(*d*) All things being equal, it is made proportionately on each. C. C., 1161. Ponsot, *Traité du Cautionnement* no. 343; 4 *A. & R.* 167; Rolland de Villargues, *Vo. Imputation*, v. 5 p. 16.

Thus, both English and civil law give the option in the first place to the debtor; but he must optate at time of payment. The like restriction as to immediate option in the event of the creditor coming to exercise his secondary right is preserved by us, but overthrown by comparatively recent decisions in England. The courts there, perhaps giving expression to long continued usage, have reversed the original principle of decision, enabled the creditor to make his election even up to time of trial, and in the absence of express appropriation determine that it is his, and not, as with us, the debtor's presumed intention which is to govern.

I cannot adopt, in the case before me, the common law authorities cited at the bar as determining the law upon these conflicting doctrines.

The special deposit account, or accounts, into which went the Government's three loans of $100,000. each, was not an ordinary current account which might be added to or drawn upon in the usual course of daily business. A single account has been spoken of as "one single open current account," "one entire debit and credit account," an "entire unbroken account." (Lindley *on Partn.* 2nd Am. Ed. sec. 229, p. 300; *Pandectes Françaises, Vo.* "*Compte Courant,*" p. 579.)

To preserve interest, thirty days' notice was required to be given of all proposed demands upon it. The bank became bound to pay only from the date and to the extent of the special call. When, on the 10th of July, payment was made of $50,000, this did not constitute a partial payment. It discharged in full all that was on that day exigible in relation to the deposits, and gave the bank the right to make imputation on the amount covered by the guarantee. This right became more emphatic at the second payment of $50,000, because it completed the sum of $100,000, and thus, in amount at least, ran equal with defendant's letter. Instead of asserting or utilizing its power of electing to get back No. 346, the accountant asked for the receipt first issued, and when the second payment was made asked for No. 358, which bore the last date of all.

The defendant asserts that in all this there was flagrant error. If so, can it be invoked by him? Is it susceptible of proof by oral testimony, and if thus proven is relief now possible?

The court is of the affirmative opinion upon all these points, and for these reasons: When a debtor of several debts has accepted a receipt by which a specific imputation is made, he can afterwards require the payment

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to be made upon a different debt upon any ground for which a contract might be avoided. (C. C. 1160.) Error is one of these grounds. (C. C. 991.) So is surprise. (Rolland de Villargues, Vo. *Imputation*, V. 8, p. 169, No. 19, bis.) It would not be proper to correct the error if the creditor had been thereby induced to deliver up some special security. The surety is the *ayant-cause* of the debtor; he can exercise the rights and plead the exceptions, not purely personal, which belong to the latter; he can urge the error with which the consent of his debtor was infected. (C. C. 1031, 1958; Fuzier-Herman *Rep. Vo. Cautionnement*" T. 9, Nos. 433, 459.) Of the error oral testimony may be made. *Ætna Insurance Co.* v. *Brodie* (1).

I do not know of any reason which bars the present giving of relief, if sufficient proof of error is before us. The Finance Department was not induced, by reason of the alleged mistake, to part with or discharge any special security. All that it gave up was a written acknowledgement of an undisputed debt.

Full consideration of the objection taken leads me to the conviction that what took place between the surety and the debtor is, to the extent sought in this case, provable. It does not make in contradiction of the letter of guarantee. It is relevant by way of confirming the intention of the bank in the exercise of a lawful and then existing right—to apply first payments to the discharge of defendant, and to strengthening the existence of error. Had the bank agreed with the Government to discharge, or of deliberate purpose discharged, one of the unsecured deposits, I imagine that the defendant would have been concluded of any after remedy (2). The evidence as to the agreement with defendant, and as to the error made by the

(1) 5 Can. S. C. R. 1.

(2) *In re* Sherry and London and County Bank. Co., 25 Ch. Div. 692.

accountant, is precise. I read some brief extracts from the testimony taken under commission of Thomas Craig, president of the bank:—

"Q. Mr. Ogilvie held this cheque or document "and refused to hand it over until he was personally "guaranteed by the directors to protect him against the "guarantee which he had given to the Government; "what took place? A. The directors agreed to give "him that guarantee, and it was not reduced to writ- "ing, but simply, as far as I can recollect, on the "minute book of the bank. I cannot recollect whether "it was placed on the minutes or not, but there is no "question but they agreed to do it.

"Q. Anything else?—A. The understanding being "that the first money that the bank repaid to the "Government should release that guarantee, when it "reached the amount of $100,000.

"Q. Do I understand that he refused to do it until "this guarantee was given, and the assurance made "that the first money paid back should go against this "last $100,000?—A. Yes.

"Q. I understand you to say that the cor- "respondence, in connection with these matters, was "entrusted to you as the officer of the bank?—A. Yes. "I should have carried on the whole correspondence.

"Q. Then these two letters, written by Mr. James. "N. Craig, in connection with the return of the "receipts, were not authorized by the bank?—A. No. "Not specially authorized by the bank? He did it as "a matter of routine, against my instructions."

In cross-examination he says:

"(Q. You do not pretend to say that you gave "positive instructions to your accountant, not to "apply that first $50,000 in payment of the first loan? "—A. His instructions were to apply those $50,000 "on account of the last loan.

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"Q. Did you give him those instructions yourself?
"—A. Yes. I remember perfectly well.
"Q. You never notified the Government at any
"time, in any correspondence, that the first $50,000.
"paid back had been wrongly applied?—A. No.
"Q. Nor notified the Government, when the second
"$50,000. were paid, what the application should
"be?—A. But the accountant was instructed to apply
"it that way."

The letters of witness dated the 10th and 19th of November, which I have read, did, however, in effect and fact, notify the Government that the bank considered the letter of guarantee discharged, and ask for its return. Craig's evidence is corroborated by that of the defendant. I understand that the minute book is not in existence.

With error held to be established, in respect of the acts of James Craig, what comes to be the position of the parties?

In neither of the two calls of $50,000. each did the Government seek to elect on which deposit-receipt they were to be applied. When suggesting the issuance of a current account receipt for $50,000. and a deposit account receipt for a like amount, it was not proposed to have these stand in lieu of the earliest receipt, No. 223. What the departmental letter of the 7th of July offered was the return of "one of the receipts which we now hold."

Whether it is held that the specific imputation in favour of the surety, which was intended by the bank, ought to replace the unauthorized and mistaken acts of James Craig, or that the plaintiff and defendant are to be left to the application of legal imputation, makes no difference as to results. For if neither party made election as to the specific debt on which the payments

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were to be applied, they would go in discharge of the one which was the most onerous. The civil law deems that debt to be most onerous to which a suretyship is attached, for the reason that the debtor by one payment discharges two creditors representing principal and accessory obligations. (Ponsot, *Cautionnement*, no. 343; 17 Laurent, no. 619; Roll. de Vill. vo. *Imputation*, v. 5, p. 170, no. 33. Pothier: *Obligations* No. 530.)

These two points are conceded by the Crown.

There is one other feature of the case which deserves a brief reference. Even if I were not for the total dismissal of the action, I could not adopt the figures for which judgment is sought on behalf of the Crown.

The defendant, if liable at all, is entitled to a credit from the dividends, in the proportion which the amount due under his suretyship bears to the total claim of the bank. This principle can only be stated with absolute certainty if the three deposits are not treated as representing one entire current account in which the several items are absolutely blended together. (Ponsot, *Du cautionnement* no. 346; *Martin* v. *Brecknell* (1); Lindley *On Companies* (2); 17 Laurent, no. 630; *Clayton's case* (3); *Thompson* v. *Hudson* (4).

In this respect the Crown concedes that defendant is entitled to a credit of $67,693.38 Against this amount, however, it makes a charge of $33,513.46 for interest from the date of the bank's insolvency, which I do not think is sustainable.

Defendant's letter promised, in consideration of the Government making a third deposit on the same terms as previous ones, "to hold himself personally responsible for the further deposit of $100,000." It did not add "with interest thereon," or "and interest."

(1) 2 M. & S. 38.
(2) P. 200.
(3) (1) Mer. 530.
(4) L. R. 6 Ch. App. 321.

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Suretyship cannot extend beyond the limits within which it is contracted. Unless indefinite, it does cover the accessories of the principal obligation; it is essentially a contract *de droit strict*, and like other contracts is to be interpreted in favour of him who has contracted the obligation. C. C., 1935, 1936, 1019. *Pandectes Françaises*, Rep. vo. *Caution*, p. 203, No. 421. "For the law", says De Colyar, p 350, "favours a surety "and protects him with considerable vigilance and "jealousy."

If the surety has expressly determined the sum for which he is to be obliged he is not liable for interest thereon unless he can be held to have tacitly engaged to pay it. *Pan. Fr.* Rep. Vo. *Caution.* Nos. 427, 440.

As so regarded, the bank interest on the deposits ceased with insolvency. Massé, *Droit Commercial*, v. 4, No. 2172.

There was, as a result, no accumulating fund of interest which could claim priority of interest. I do not need to express the resulting effect to defendant in exact figures. The action is dismissed in its entirety with costs.

With reference to an amendment to the pleadings obtained by the defendant, I fix the costs at $15 in favour of plaintiff.

Judgment for defendant, with costs.

Solicitor for plantiff: *E. L. Newcombe.*

Solicitor for defendant: *J. S. Hall.*