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THE TRUST AND LOAN COMPANY OF CANADA (DEFENDANTS AND INCIDENTAL PLAINTIFFS) } APPELLANTS;

*March 7,9.
*March 20.

AND

THE HONOURABLE JONATHAN SAXTON CAMPBELL WÜRTELE AND ERNEST FREDERICK WÜRTELE (PLAINTIFFS AND INCIDENTAL DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Mandate—Principal and surety—Negligence—Laches—Release of surety—Mortgage—Pledge—Construction of contract—Principal and agent—Arts. 1570, 1959, 1966, 1973 *C. C.*

Upon the execution of a deed of obligation and hypothec, the plaintiffs became sureties for the debtor and, for further security, the debtor assigned and delivered to the mortgagee, by way of pledge, a policy of assurance upon his life for the amount of the loan. One of the clauses of the deed provided "for further securing the repayment of the said loan, interest and accessories and premiums of insurance on the said life policy" that the debtor and sureties "by way of pledge *à titre d'antichrèse*, transferred and made over unto the said lender" certain constituted rents and seigniorial dues. The deed further provided that the actual agent of the seigniory should remain agent until the loan should be repaid with interest and insurance premiums disbursed by the creditor, and that the creditor should have the right to dismiss said agent should he fail to make out the revenues of the seigniory and remit to the creditor the amount necessary for the payment of such interest and insurance premiums. It further provided that the lender should not be responsible to the debtor and sureties for the agent's acts, the debtor and sureties assuming responsibility therefor. The judgment appealed from found, as facts, that the sureties had made a provision in the hands of the creditor for the purpose of payment of the premiums out of the revenues assigned, that, for such purposes, the creditor had become the mandatary of the sureties and responsible for the due fulfilment of such mandate, and that there were sufficient funds derived from

*PRESENT:—Sedgewick Girouard, Davies, Nesbitt and Idington JJ.

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such revenues to pay a renewal premium which fell due shortly before the death of the debtor, and of which payment had been omitted to be made through some neglect or fault of the creditor in obtaining the funds therefor from the agent. In consequence of this failure to pay the premium the benefit of the policy was lost.

Held, affirming the judgment appealed from (Q. R. 13 K. B. 329), Idington J. dissenting, that the deed contemplated the payment of the premiums by the creditor out of the funds assigned; that the creditor had failed to use proper diligence in respect to the payment of the premium and that the sureties were, therefore, entitled to be discharged *pro tanto* and the property pledged released accordingly.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), reversing the judgment of the Superior Court, Pagnuelo J. in the District of Montreal, and maintaining the action of the plaintiffs and dismissing the incidental demand of the defendants with costs.

In March, 1894, the late Jonathan Wilfred L. Würtele, deceased, borrowed $7,500 from the company, appellants, and subsequently, in February, 1899, he borrowed from the company a further sum of $2,500, in each case giving a deed of obligation and hypothec. The terms and conditions of the deeds were identical and both affected the Seigniory of Bourg-Marie de l'Est, and the constituted rents thereof, for the purpose of securing the repayment of the loans, the Honourable J. S. C. Würtele, as institute in the substitution charged upon the said seigniory and Ernest F. Würtele, as the substitute (in case of the death of the borrower, the first substitute), becoming parties to both deeds for the purpose of charging the seigniory with said hypothecs, and also thereby obliging themselves as sureties for the repayment of the loans jointly and severally with the borrower. As further security, in each case, policies of assurance on the life of the borrower for the amounts of the loans, respectively, were assigned, transferred and delivered to the company, at the times of the

(1) Q. R. 13 K. B. 329.

execution of the deeds. In each of the deeds of obligation there were clauses as follows:

"And for further securing the repayment of the said loan, interest and accessories and premiums of insurance on the said life policy, the said Honourable Jonathan S. C. Würtele, the said borrower, and the said Ernest Frederick Würtele have, by way of pledge, *à titre d'antichrèse*, transferred and made over unto the said lender, accepting hereof by the said Richard John Evans, the said constituted rents of the said seigniory of Bourg-Marie de l'Est, established by the said schedule No. 10 of the seigniorial cadastre of the old district of Three Rivers, and entered in the said schedule under the cadastral numbers from one to four hundred and sixty-six, both inclusive.

"It is covenanted and agreed by and between the said parties that the present agent of the said seigniory, Charles John Campbell Würtele, of the City of Sorel, Esquire, advocate, shall retain the agency of said seigniory until such time that the said lender shall have been repaid the amount of the present loan, in capital, interest and accessories and insurance premiums, but with the option, on the part of the said lender, to dismiss him should he fail to make out of the revenues of said seigniory any of the instalments of interest as they become due, or, at the expiry of the term of payment, if the capital is not repaid, or any of the insurance premiums as may be paid by the said lender.

"It is also understood that the said lender shall not in any way be responsible to the said borrower and to the said Honourable Jonathan S. C. Würtele and Ernest Frederick Würtele for the acts and deeds of the said agent, the said borrower and sureties hereby exonerating the said lender from all such responsibility

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as regards the acts and deeds of said agent, and assuming themselves personally the said responsibility.

"It is understood that the collection of the said constituted rents shall never be, at any time, at the expense of the lender, but that, on the contrary, all expenses attending that collection should be exclusively borne by the said borrower and sureties and kept out of said constituted rents and retained as first charge thereon.

"And for security of the payment of said insurance premiums, liquidated damages, expenses above mentioned, interest on overdue interest, and of that which may happen to be due to the lender over and above the two years' interest and the current year, and of the repayment of any such taxes as may be imposed on the present loan by virtue of any law in force in this province and of the repayment of all expenses incurred by the lender for the said publication of the above transfer by way of pledge, as required by law, the borrower and said Honourable Jonathan S. C. Würtele and Ernest Frederick Würtele have hypothecated the above described immoveable property in favour of the lender (in the first deed) to the further extent of one thousand and fifty dollars" (and, in the second deed) "to the further extent of three hundred dollars."

The company paid all the half yearly premiums on the first policy, with moneys supplied by the borrower during the first three years and, afterwards, with funds for which they reimbursed themselves out of the rents pledged to them, but they neglected to pay the premium on the policy transferred to them at the time of the second loan, in February, 1899, which became due in the month of January following, (1900), and the borrower, Jonathan Wilfred L. Würtele, died on the 24th of February, 1900, at which time the

second policy had been allowed to lapse, it was alleged, through the neglect of the company.

The action was brought by the sureties for a decree against the company ordering them to execute a discharge of the second mortgage, (tender being made of the difference between the amount due thereon and the $2,500, amount of the lapsed policy) and to retransfer to the plaintiffs the constituted rents of the seigniory transferred to the company to secure the second loan. The company contested the action, refused to discharge the sureties and hypothec and made an incidental demand against the plaintiffs for the amount of the second mortgage which they claimed to be still due and unsatisfied. The judgment of the Superior Court dismissed the action of the plaintiffs with costs, allowed the incidental demand by the defendants, and condemned the plaintiffs to pay the amount thereof with costs to the company. On appeal to the Court of King's Bench, this judgment was set aside and the plaintiffs action maintained with costs while the defendants' incidental demand was dismissed with costs. The company now appeals.

The questions raised upon the argument of this appeal are referred to and discussed in the judgments now reported.

Kavanagh K.C. for the appellants.

Angers K.C. and *DeLorimier K.C.* for the respondents.

SEDGEWICK J.—I concur in the judgment dismissing the appeal with costs for the reasons stated by my brother Nesbitt.

GIROUARD J.—I might be satisfied by a reference to the complete and well considered opinion by Chief Justice Lacoste to indicate the reasons which induce

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me to dismiss the appeal, but on account of the importance of the questions which it presents, I feel myself bound to state them shortly in the few following observations, although they may not add to the force of his reasoning.

I have arrived at the conclusion that the obligation of the appellant to pay the insurance premium results both from the contract and from the law.

In the first place, as to the contract, it must not be lost sight of that the hypothecated seigniory, Bourg-Marie de l'Est, having a permanent revenue, not subject to fluctuation, was amply sufficient to guarantee the loan, in capital, interest, assurance premiums and other accessories, even leaving a surplus reverting to Judge Würtele, a fact admitted by the appellant; that there was no reason why it should have the additional guarantee of a life assurance policy from the borrower or any one else; that the borrower, the eldest son of Judge Würtele, Jonathan W., known by the name of "Jack", was not the owner of it and that he had a simple expectancy of ownership, namely, in case he survived his father. This event failing, his younger brother, Ernest, was to become owner on the decease of the father under the substitution created by the will of their ancestor Josias Würtele. Ernest, and the father, the latter having alone the right to the revenues during his life as institute or *grevé*, had therefore, an interest to protect himself against the possibility of Jack, the borrower, pre-deceasing him. The father was willing to deprive himself of a portion of his revenues to oblige his eldest son, but like his son Ernest, he did not wish to expose himself to repay the capital sum loaned. It was, accordingly, agreed between all the parties to the deed of obligation, evidently for the advantage of the sureties, that Jack should secure a policy of assurance on his life for the

amount of the capital of the loan. A policy was taken by Jack Würtele for $2,500, and delivery of it with a transfer indorsed on the back was made to the appellant which caused the assignment to be accepted by the assurance company. The deed of obligation which was executed on the 7th of February 1899, does not state by whom the premium should be paid in January each year. In any event it could not in the first place be due by any one but the principal debtor, and it would only be in default of such payment by him that the sureties could be called upon to do so. Naturally, the first premium was paid by Jack, but the second (which was the last) was not, and the appellant did nothing to keep the policy in force, although it had the best guarantees in the world that the needful advance, $110.25, would be repaid; it had the hypothec for the insurance premiums and even an additional hypothec for $300. But what is remarkable, about the same date, on the 8th January, 1900, it paid, long before the last day of grace, fixed at the 31st of January, the semi-annual assurance premium upon another policy for $7,500 in connection with another obligation executed in 1894 between the same parties and with the same terms and conditions. Several times previously this premium was likewise advanced by the appellant for which it was reimbursed without delay. But with regard to the policy for $2,500, the appellant, by an unpardonable negligence, did nothing to keep it in force; it did not even notify Judge Würtele, who resided in the same city, of what they had done on the 8th January and of its intention with regard to the other policy for $2,500; if it had done so he had all the month of January to pay the premium. The consequence was that the policy lapsed and Jack Würtéle died a few days afterwards, on 20th February 1900, and several years before his father. By their

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action the sureties ask to be discharged. The appellan contends that the loss should fall upon them.

The conduct of the appellant in this matter is simply inexplicable. It contends for the first time, in its factum, —its plea, and the judges of the courts below being silent thereon—that the larger policy had a commercial value and that that was the reason that the premium was paid, as if it was needed for the reimbursement of the loan. It is an afterthought conceived evidently for the purpose of covering, if possible, the carelessness and responsibility of an employee of the appellant, not examined, who was charged with renewal of policies of assurance. If this pretended excuse was well founded, the appellant would not only be in fault but also in bad faith, because it had deliberately allowed the insurance policy to lapse.

It is well to note that the appellent had no more funds in hand to provide for one of these policies than for the other. It had done nothing to obtain from the agent, Charles Würtele, the judge's brother, who was, at any time, he tells us in his testimony, in a position to remit the necessary amount. This is what he says, speaking of the two loans :

Q. Did you pay the premium of insurance every time you were called upon ?

A. I did. Every time I was notified I paid it.

Q. By whom were you ever notified ?

A. Never except by the Trust and Loan Company.

Q. Never except by the Trust and Loan Company ?

A. No.

Q. Were you ever notified by the Trust and Loan Company to pay the premium on the second policy for two thousand five hundred dollars ?

A. No, I never was.

Q. Did you know where that policy was ?

A. I never knew anything about it till I came up to Montreal this time.

Q. Now, will you look at this policy, Plaintiff's Exhibit p-7. (The policy for $2,500). The insured there is....

A. Jonathan W. Würtele.

Q. The borrower ?

A. Which I understand to be the borrower.

Q. You knew him ?

A. I knew him, yes.

Q. Were you in a position to pay the premium on that policy had you been requested to do so by the Trust and Loan Company ?

A. Yes, that is at any time after the eleventh of November.

Mr. Kavanagh K.C. :

Q. In what year ?

A. Any year.

Mr. Angers K. C., continuing :

Q. That was payable in January ?

A. Yes, I was in a position then to pay it had I been requested.

I infer from the clauses of the deed of obligation, from the construction that the appellant's conduct has given to it, and the circumstances, the obligation on its part to pay the premiums upon their falling due, solely for the protection of the sureties, so much so that the appellant has not considered it necessary to protect the policy.

The appellant contends that Judge Würtele received a part of the revenues so as to render them insufficient to meet the premiums. The precise testimony of the agent is quite to the contrary. The evidence moreover shews that Judge Würtele had, besides the Seigniory of Bourg-Marie de l'Est, the Seigniory of St. David and some mills in the immediate vicinity, yielding him altogether more than $3,000 net per year, all administered by the same agent, his brother Charles, who, by the deed of obligation, was also the agent of the appellant. The receipts of all these properties formed only one fund of which the agent rendered account in one and the same statement ; and, in receiving the money which the agent remitted to him, Judge Würtele could reasonably have supposed that he was receiving only that which belonged to him. Examined as a witness for the appellant, he says :

My brother was appointed agent to receive the rents of the Seigniory of Bourg Marie, to be applied in default of my son's paying, to be applied on demand and on request by the Trust and Loan Company, to the pay-

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ment of interest and premiums of insurance, and when that was paid, when all the demands of the company were satisfied-he paid over the balance to me. It was included in my general balance.

If Judge Würtele received more than his share, which is not shewn, it was the fault of the appellant which did nothing to make its rights known to the agent; it did not send him a copy or a memo. of the deed of obligation; it did not even inform him of the existence of the second loan.

But, assuming that the agreement and the appellant's conduct do not establish the duty on the part of the appellant to pay the premium, the law imposes it by two precise articles, arts. 1959 and 1973 C. C.

Article 1959, different from the Roman Law (Pothier, obl. n. 557; Baudry-Lacantinerie, caut. n. 1175), more precise then the old French jurisprudence, similar to article 2037 of the Code Napoléon, and it seems in accord also with the English law, decrees as follows:

> The suretyship is at an end when by the act of the creditor the surety can no longer be subrogated in the rights, hypothecs and privileges of such creditor.

The respondents knew of the practical effect of this article of the Civil Code; they knew they could rely upon the assurance policy for reimbursement of the capital of the loan in case of the death of the borrower before his father. The appellant, by its act, has made it impossible for it to transfer all its rights, namely, those accruing from the assurance policy and, in consequence of its negligence, the sureties find themselves released by the terms of art. 1959.

It cannot be contended that the forfeiture decreed by this article takes place only when "the act" of the creditor is positive, *in commitendo*; it may result likewise if it consists simply *in omittendo* and is in good faith. The doctrine and jurisprudence as well in

France as in Quebec and Louisiana, which also reproduced the article of the Code Napoléon, are in accord and leave not the least doubt on this point, which, moreover, has been conceded by Mr. Kavanagh, the appellant's counsel. Nevertheless he added, and he maintains in his factum, that the article does not apply to sureties jointly and severally liable; but in this respect his contention is overruled by the commentators and the *arrêts*, the article of the code making no distinction between simple suretyship and several suretyship; they are collected in Beauchamp's Code Civil Annoté, art. 1959; Merrick's Rev. Civil Code of La., art. 3061; Gilbert sur Sirey, art. 2037 C. N.; 4 Aubry & Rau, p. 694; 9 Marcadé p. 368; Fuzier-Herman, *vo.* Cautionnement, nos. 750-761; 12 Huc, nos. 250-253; 21 Baudry-Lacantinerie Cautionnement, nos. 1174-1180

Judge Würtele was not content with the protection afforded him by art. 1959 C. C. Familiar with this class of financial operations and undoubtedly, on the admission even of Mr. Kavanagh, the highest legal authority in such matters, he stipulated in the deed that the policy of assurance should be delivered and held "by way of pledge." This pledge actually existed, for the stipulations and the facts fulfil all the necessary conditions to make the pledge perfect. The policy of assurance, which is movable property, *un bien meuble*, was placed in the hands of the creditor with the consent of assurer and assured and sureties, as a security for the debt, and that is what constitutes pledge. Arts. 374, 1966 C. C. Then comes article 1973:

> The creditor is liable for the loss or deterioration of the thing pledged according to the rules established in the title of obligations.
>
> On the other hand, the debtor is obliged to repay to the creditor the necessary expenses incurred by him in the preservation of the thing.

It appears to me clearly that, in the terms of this article, the appellant was obliged to pay the premiums,

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whether provided for, guaranteed or not, saving recourse for reimbursement. This article has the principal debtor in view, but it enures to the benefit of the surety invoking it. Art. 1958 C. C.

For these reasons I am of the opinion that the appeal should be dismissed with costs.

DAVIES J.—I concur for the reasons stated by my brother Nesbitt.

NESBITT J.—The mortgage in question contained a provision as follows:

> And for further securing the repayment of the said loan, interest and accessories, the said borrower hath transferred and assigned, and doth transfer and assign by way of pledge unto the said lender the policy of insurance * * * * And for further securing the repayment of the said loan, interest and accessories *and premiums of insurance* on the said life policy, the said Honourable J. S. C. Würtele, the said borrower, and the said Ernest Frederick Würtele, have by way of pledge, *à titre d'antichrèse*, transferred and made over unto the said lender * * * the said constituted rents, etc.

The mortgage further provided that the agent of the seigniory, C. J. C. Würtele, should remain agent until the lender should be paid the loan, interest and insurance premiums, with the right of dismissal of the said agent by the lender if he failed to make out of the revenues of the said seigniory the interest or insurance premiums. It further provided that the lender was not to be responsible to the borrower and sureties for the acts and deeds of the agent, the borrower and sureties assuming responsibility therefor.

The Court of King's Bench, for the Province of Quebec, held that the sureties had made a provision in the hands of the creditor for the purpose of payment of the premium and undertaken to employ the assigned revenues in payment of the interest and premiums, and that for such purpose it became the mandatary of

the sureties and was responsible as any other mandatary for the due fulfilment of its mandate. It was also held that the evidence disclosed that there were funds derived from the rents of the seigniory which were sufficient to pay the premiums due in January. It was further held that it was through forgetfulness or some fault on the part of the loan company that it did not obtain from the agent the amount required to pay the premium.

Assuming these findings of fact to be correct, I think the judgment appealed from ought to be affirmed. I also think, in the clauses in the mortgage I have extracted, the premiums were contemplated to be paid by the loan company and repayment made to them out of the funds assigned. I think that Ernest Würtele had a right to expect that the creditor would use due diligence to see that no one did obtain any moneys until after the rents so assigned had been properly applied to the payment of the insurance premiums to keep alive the policy assigned to the company by the borrower. This policy was the only security which Ernest Würtele, on payment of the debt, could receive. The rents which were mortgaged belonged not to the borrower but to Mr. Justice Würtele. I think that by art. 1570 of the Code the assignment as between the parties to the deed was complete. That article provides as follows:

> The sale of debts and rights of action against third persons, is perfected between the seller and buyer by the completion of the title if authentic, or the delivery of it if under private signature.

Signification is only required as against the *censitaires*. *Bank of Toronto* v. *St. Lawrence Fire Insurance Co.* (1).

Art. 1966 C. C. provides as follows:

(1) [1903] A. C. 59.

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Pledge is a contract by which a thing is placed in the hands of a creditor, or, being already in his possession, is retained by him with the owner's consent, in security for his debt.

The thing may be given either by the debtor or by a third person in his behalf.

Art. 1973 C. C. provides:

The creditor is liable for the loss or deterioration of the thing pledged according to the rules established in the title of obligations.

On the other hand, the debtor is pledged to repay to the creditor the necessary expenses incurred by him in the preservation of the thing.

Art. 1959 C. C provides:

The suretyship is at an end when by the act of the creditor the surety can no longer be subrogated in the rights, hypothecs and privileges of such creditor.

This latter is a copy of article 2037 of the Code Napoleon.

Laurent, vol. 28, No. 310, says:

Que faut-il entendre, dans l'article 2037, par fait du créancier? Est-ce seulement un fait positif, tel que la renonciation à l'hypothèque, ou est-ce aussi la simple négligence par suite de laquelle le créancier perd ses droits? Si l'on s'attache au principe tel que l'ont expliqué les orateurs du gouvernement et du Tribunat, il faut dire que toute faute du créancier qui a pour conséquence de faire périr, en tout ou en partie, les garanties qui assurent le payement de la dette entraîne la décharge de la caution. On suppose que celle-ci s'engage sous la condition d'être subrogée aux droits du créancier, et que celui-ci s'oblige à conserver ces garanties. Dès que le créancier ne remplit pas cette obligation, il est responsable; or, il ne la remplit pas par cela seul que les garanties périssent par une faute qui lui est imputable; et les fautes se commettent par négligence, aussi bien que par un fait positif.

This corresponds with the English law upon the subject. In *Watts* v. *Shutleworth* (1) Pollock C.B. says:

The rule upon the subject seems to be that if the person guaranteed does an act injurious to the surety, or inconsistent with his rights, or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged. Story's Equity Jurisprudence, sec. 325. The same principle is enunciated and exemplified by the Master of the Rolls in *Pearl* v. *Deacon* (2) where he cited with approbation the opinion of Lord Eldon in *Craythorne* v. *Swinburne* (3), that the rights of a surety depend rather on principles of equity

(1) 5 H. & N. 235-247.
(2) 24 Beav. 186-191.
(3) 14 Ves. 164-169.

than upon the actual contract; that there may be a *quasi* contract; but that the right of the surety arises out of the equitable relation of the parties.

This rule was adopted by this court in *Merchants Bank of Canada* v. *McKay* (1).

In deColyar on Guarantees (3 ed) page 446, the rule is stated as follows:

> We have already seen that a surety is entitled to the benefit of all the securities which the creditor has against the principal. It follows, therefore, that, if the surety be deprived of this benefit by the act of the creditor, he will be discharged to the full extent of the security to which he was entitled; and, consequently, a creditor is bound to use diligence and care with regard to securities held by him. Thus, for instance, a creditor holding a mortgage for a guaranteed debt is bound to hold it for the benefit of the surety so as to enable him, on paying the debt, to take the security in its original condition, unimpaired. The right of the surety is to have the same security in exactly the same plight and condition in which it stood in the creditor's hands. This doctrine does not, however, apply to such securities as life insurances. It is not the duty of the creditor on the bankruptcy of the debtor to keep up a policy on the life of the latter. On the contrary, it is his duty to sell and realize such a security.

In Rowlatt's Law of Principal and Surety (1899 ed.) the rule is stated more narrowly and the cases referred to by deColyar as justifying his statement of the law are analyzed and additional cases cited, particularly the case of *Queen* v. *Fay* (2). I shall refer to this case later. Brandt on Suretyship (2 ed.), secs. 444 and 448, inclusively, collects the English and American authorities, and with special reference to *Wulff* v. *Jay* (3), lays down the doctrine that omission is equivalent to commission. I do not think that the cases go this length. So far as I can see the French authorities agree with what I conceive to be the result of the English authorities, namely, that unless there is some duty to do that which is omitted, such duty arising from express or implied obligation, then mere passiveness by the creditor will not release the surety. See,

(1) 15 Can. S. C. R. 672.
(2) 4 L. R. Ir. 606.
(3) L. R. 7 Q. B. 756.

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in addition to the cases referred to in deColyar, already quoted, Story's Equity (2 ed. London, 1892); *Carter* v. *White* (1) at page 670; and the review of all the English authorities to date by Chief Baron Palles in *The Queen* v. *Fay* (2), before noted.

I think that in every case where the surety has been held to have been discharged, the decision was founded upon some act or omission of the creditor which was held to be a breach of obligation due by him to the surety. Chief Baron Palles seemed (in the *Fay Case* (2)) to think that if the act which was omitted could have been performed either by the surety or by the creditor the creditor could not be held liable, and if that was so I think it would be difficult to hold the loan company liable in this case. But in appeal Lord Chancellor Ball rests his judgment upon the ground that neither the nature of the security nor the knowledge possessed by the officers of the Crown that there were any lands against which registration of the bond could be effective, would render a duty to register incumbent upon the officers of the Crown.

As I have said the searching analysis which has been made of all the authorities in *The Queen v. Fay* (2) renders it unnecessary to go through the various cases again, and I am content to rest my judgment upon the short ground that the sureties made a provision for the express purpose of paying these premiums and had the right to rely upon the loan company making that provision effective by notification to C. J. C. Würtele of the amounts required for interest and premiums, and he was to collect the moneys from the rents sufficient to pay this premium and remit same to the loan company; and that the sureties had a right to assume that if the loan company desired the surety to pay the

(1) 25 Ch. D., 666.

(2) 4 L. R. Ir. 606.

premiums it would notify its desire to the surety and its non-reliance upon the provision for payment created by the mortgage and assignment of the rents.

I cannot distinguish this case in principle from this illustration. Suppose the sureties had handed over to the loan company bonds or certificates of stock the coupons or dividends of which were ample to pay interest and premiums and the loan company had failed to pay the premiums and allowed the policy to lapse, would it be argued the sureties could not claim a discharge *pro tanto?*

I think the appeal should be dismissed with costs.

Since writing the above, I have had the advantage of reading the opinion of my brother Girouard and, so far as that opinion is based upon the construction of the documents hypothecating the seigniory and pledging the rents thereof, I fully agree with it.

With regard to the construction to be placed upon art. 1973 of the Quebec Code, I do not find it necessary, for the purposes of this case, to express any views, as I have reached my conclusion upon the proper construction of the written documents between the parties.

IDINGTON J. (dissenting).—On the 17th March, 1894, the late Jonathan W. L. Würtele son of the respondent, the late Honourable Jonathan Saxton Campbell Würtéle, borrowed $7,500 from the appellants and secured same by deed of transfer in which the respondents joined as sureties, and by transfer of a policy of a life insurance on the life of the borrower.

This transaction is, as far as the matter now in question is concerned, of no moment save as furnishing some light upon the relations of the parties thereto and that it remained a prior charge upon the properties now in question when the later mortgage or hypothecation we have to consider was created.

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The instruments are, save as to the amounts secured by each, in all material terms almost identical.

Inferences might, as was pressed upon us in the argument, be drawn from the acts of the parties in relation to the first document and transactions it related to showing how they understood such a document.

I am inclined to think that the course of dealing in respect of the first policy of insurance on which for the three first years the company did not pay premiums tended to forbid the respondents from relying upon any obligation or supposed obligation of the appellants to look after, for the sake of respondents, the maintenance of the second policy of insurance.

In saying that much I desire to make clear that I discard such inference in arriving at the conclusion I do in regard to the claims set up and treat the matter as if such inference had not been possible, for I doubt if its consideration is a legitimate factor in dealing with what is now in dispute.

The first mortgage and its priority over the one we have to consider and the means by which it was secured, including the agency of Charles Würtele, must all be kept in mind however.

The same borrower, on the 7th of February, 1899, borrowed from the appellants $2,500, and by a deed of obligation and transfer of that date in which the plaintiffs as sureties joined secured the repayment of said sum on the 1st day of May, 1904, with interest at six per centum per annum yearly at the office of the lender on the 1st day of November in each and every year.

The borrower also had transferred by assignment of same date a policy of insurance for $2,500 on his life dated 24th of January, 1899, which was handed over to the appellants when assigned, and this assignment

was intimated to the Sun Life Assurance Company of Canada who were the insurers.

The premium was $110.25 which for the *first year had not been paid* when the assignment of policy was made and deed of obligation and transfer had been *executed on 7th February*, 1899.

The receipt for this first premium shows that it was on the 14*th February*, 1899, that it was paid. It was not paid by the appellants.

On the 2nd December, 1899, the sum of $600 was paid by the hand of Charles J. C. Würtele, agent of the Seigniory of Bourg Marie de l'Est, out of the rents of which he was the collector, to the appellants to cover a year's interest on both loans.

Nothing more was ever paid appellants since the second loan but the sum of $111.95 to pay a half yearly premium on the first assigned policy, and there does not seem to have been any further communications had between the appellants and the respondents and the borrower in relation to the second loan or any of the securities therefor, or, in short, in any way whatsoever relating to such matters, till after the death of the borrower, the late J. W. Würtele, on the 24th of February, 1900.

It is said that if the second premium of insurance for and in respect of the policy for $2500 had been paid on the 1st of January, 1900, or any day up to the 31st January, 1900, that such would by reason of his death have become payable to the appellants and would have been paid, and the respondents, who were only sureties, would have been relieved from the burthen.

It is further alleged that the non-payment of this premium is attributable to the neglect of the defendants and that as a result the respondents are released and are entitled to have their property discharged of and from what is now apparently a charge thereon.

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In order that the true position may be clearly apprehended I may state that the deed of obligation and transfer I adverted to above bound the late Honourable J. S. C. Würtele as well as the borrower *personally* to repay the loan but only in the event of his becoming entitled under the will of his grandfather to the hypothecated property. Did it bind Ernest Frederick Würtele in any way?

They all however, the late Honourable J. S. C. Würtele as institute and said two sons as substitutes under said act, will and testament, hypothecated the real estate and immovable property therein described as part of seigniory commonly known as Bourg Marie de l'Est, now represented by the capital of the constituted rents, to secure the repayment of the loan of $2500 and interest.

And by these instruments the borrower for further securing such repayment transferred by way of pledge unto the lender the policy of insurance dated 24th January, 1900, for $2500.

And then the provisions therein are as follows:

And for further securing the repayment of the said loan, interest and accessories and premiums of insurance on the said life policy, the said Honourable Jonathan S. C. Würtele, the said borrower, and the said Ernest Frederick Würtele have by way of pledge, *à titre d'antichrèse*, transferred and made over unto the said lender, accepting hereof by the said Laurence Edye, the said constituted rents of the said seigniory of Bourg Marie de l'Est, established by the said schedule No. 10 of the seignorial cadastre of the old district of Three Rivers and entered in the said schedule under the cadastral numbers from one to four hundred and sixty-six both inclusive.

It is covenanted and agreed by and between the said parties, that the present agent of the said seigniory, Charles John Campbell Würtele, of the City of Sorel, Esquire, Advocate, shall retain the agency of the said seigniory until such a time that the said lender shall have been repaid the amount of the present loan, in capital, interest and accessories, and insurance premiums; but with the option on the part of the said lender to dismiss him, should he fail to make out of the revenues of said seigniory any of the instalments of interest as they become due, or at the expiry of the

term of payment if the capital is not repaid or any of the insurance premiums as may be paid by the said lender.

It is also understood that the said lender shall not in any way be responsible to the said borrower and to the said Honourable Jonathan S. C. Würtele and Ernest Frederick Würtele for the acts and deeds of the said agent, the said borrower and sureties hereby exonerating the said lender from all such responsibility as regards the acts and deeds of said agent, and assuming themselves personally the said responsibility.

It is understood that the collection of the said constituted rents shall never be, at any time, at the expense of the lender, but that on the contrary all expenses attending that collection shall be exclusively borne by the said borrower and sureties and kept out of said constituted rents and retained as a first charge thereon.

It is also understood and stipulated that all expense incurred by the lender for the publication of the above transfer by pledge, as required by law, shall be paid by said borrower and sureties to the said lender.

(Stipulations are here made for certain expenses and damages.)

The borrower shall pay interest at the rate of six per cent on overdue interest.

And for the security of the payment of said insurance premiums, liquidated damages, expenses above mentioned, interest on overdue interest, and of the repayment of any such taxes as may be imposed on the present loan by virtue of any law in force in this province, and of the repayment of all expenses incurred by the lender for the said publication of the above transfer by way of pledge as required by law, the borrower and said Honourable Jonathan S. C. Würtele and Ernest Frederick Würtele hypothecated the above described immovable property in favour of the lender to the further extent of three hundred dollars.

Upon these provisions and the relations between appellants as creditors, and respondents as sureties, for the debt in question the respondents rely in claiming that an obligation rested upon the appellants to do all that was necessary to keep alive the security furnished by the $2,500 policy of insurance.

It is to be observed that there is not here or elsewhere in the document now to be interpreted an express covenant by the appellants to discharge any such duty as the alleged obligation implies, or to give notice to Charles Würtele, the agent

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It is to be further observed that one would naturally expect so serious an obligation as the payment of $110.25 a year, if intended by the parties, to have been expressly provided for.

If intended at all it must operate for five years at least.

Where was the money to come from?

Two sources are pointed out—One the annual revenue from the Seigniory which the agent in his evidence speaks of as follows:

> Question.—Will you please state if the amount you collect annually could cover, and did cover the interest on the first loan, and the premium on the first insurance, the interest on the second loan, and the premium on the second policy?
>
> Answer.—Yes, I collect sufficient yearly to cover the amount.
>
> Question.—Was there a surplus?
>
> Answer.—Well, *when everything was collected there would* be a surplus of thirty some odd dollars.

It is clear that this makes no provision for the expenses of collection or the supervision of the collection.

Then the other source is that provided for by the hypothecation above set forth of the imovable property in favour of the lender to the further extent of three hundred dollars to cover this and *all the other matters therein specified.*

This rather scant sort of security does not encourage one to believe that the appellants thought they were undertaking to look after the premiums upon this policy which the evidence shews was, and would be for two years longer, even if premiums paid, worth less as a realizable commercial asset, if insured should live so long.

It is to be observed that in none of these provisions is there any allowance made *for interest upon the sums that might thus be advanced by the appellants* for the payments of premiums of insurance.

The rents which formed the revenue of the Seigniory fell due on the 11th day of November in each year, and generally were all collected by the agent Charles J. C. Würtele on or before the 2nd of December and accounted for and paid over to the respondent, the late Honourable J. S. C. Würtele, by the 2nd of December.

Those for 1899 proved no exception and the agent had no answer to the demand for the balance due to the institute if he asked for it.

How then can it be said that the appellants had funds placed in their hands to meet the premium of insurance falling due in respect of this $2,500 in the month of January ?

The instrument giving any right to the use of such rents only gave it in relation to such premium as the appellants *had paid* to repay them.

The appellants could only, if any obligation rested upon them to see the premiums paid, advance it in January, and wait till following November to be repaid, and thus lose the interest on the money in the meantime.

This is not an idle suggestion. It represents the actual condition appellants were left in by the respondent's surety, the Honourable J. S. C. Würtele, in January, 1900, for *he admits he was paid the balance in the agent's hands after the interest on both loans and the premium on the first life insurance had been provided for.*

He, in other words, by this suit sought to hold the appellants liable for not having used the money they never received (but, so far as existing any place, he got) to pay the premiums due in January, 1900.

This divested of all its wrappings that obscure the issue is the gist of the complaint here made.

Want of notice to his agent is raised as entitling the late the Honourable J. S. C. Würtele to make this complaint.

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Before consideration can be given to such want of notice it ought to be shewn by proof beyond doubt, which is not the case here, that such want of notice was the cause of the money not being in the hands of the agent Würtele to pay the premium in question. The right to claim either notice or relief by reason of omission to give such notice can only rest upon a legal equity. The agent here to be notified being the agent of him who complains, seems to suggest that it does not lie in his mouth to raise such question or questions.

The logical result of holding the appellants bound to notify Charles J. C. Würtele under penalty of forfeiting the security of sureties would be that if the late the Honourable J. S. C. Würtele had for want of this notice and by reason of its absence collected the rents and used them for the whole term of the mortgage he would be discharged in law as the rents were lost and not available to discharge the debt.

It is urged that the agent Charles J. C. Würtele became by the words of this document the agent of the appellants.

He speaks of himself throughout his evidence as his brother's agent, beginning thus:

Question.—Previous to the first loan for seven thousand five hundred dollars, and previous to the second loan for two thousand five hundred dollars made to Mr. Jonathan W. L. Würtele, the borrower, you were the agent of the Seigniory of Bourg Marie de l'Est?

Answer.—I was the agent since eighteen hundred and seventy-two.

Question.—After these loans, were you retained as agent to collect the rents?

Answer.—I have collected them all the time, ever since eighteen hundred and seventy-two.

Question.—Did the Trust and Loan Company make known to you the loan made to Mr. Würtele, and the transfer of the rents to the Trust and Loan Company?

Answer.—Well I cannot say that the Trust and Loan Company made it known to me, *but my brother, the plaintiff in this case, informed me of it.*

* * * * *

And again :

Question.—You are still the agent of Judge Würtele, are you not ?
Answer.—Yes, I am.
Question.—And you have been his agent for how long did you say ?
Answer.—Since eighteen hundred and seventy-two.
Question.—And during all the interval ?
Answer.—During all the interval, yes.

And again at page 92 of case :

My brother told me not to make any distinction between those and the lots that were transferred, so the whole thing coming together always came to more than the amount of the schedule rents.

And at page 93 :

Question.—What were the expenses of collection in each year ?
Answer.—Well, I cannot say for each seigniory, because I collect—
Question.—(Interrupting)—I am talking about one seigniory.
Answer.—I cannot say. I am paid a block sum for collecting on all the seigniories that my brother owns—my brother owns another seigniory there, far larger than this one transferred. I am still his agent for that, and I am paid for both together, a block sum, so I cannot specify which is for which.

And at page 98 :

Question.—Now, you stated that you continued to remain the agent of the plaintiff in this case ?
Answer.—Yes, for this and other seigniories I was telling you of, River David.
Question.—Those several seigniories ?
Answer.—He has those two.
Question.—Besides the one mortgaged to the Trust and Loan Company ?
Answer.—Yes, one besides that. I continued as his agent the same as before.
Question.—You are agent for the mills, farms, and the collection of rents ?
Answer.—Yes.
Question.—Seigniorial rents ?
Answer.—Yes.

He was paid a block sum of two hundred dollars annually by his brother for collecting all, including rents here in question.

Such being the nature of the agency how can it be said that there was or was intended to be created any privity between the appellants and this agent of the

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institute respondent? He was not a party to this contract.

The appellants are forbidden by the express terms of the contract to meddle with the existing relations of the agent to the seigniory unless *default be made in the required payments or repayments.*

The parties all agree Charles Würtele is to continue in such agency subject to an option of dismissal by appellants if he failed to collect and pay.

But surely this did not deprive either the institute or the borrower of the right to pay by either of their own hands and from such other sources as they or either of them had the money that would fall due.

It would seem to me unwarranted officiousness for the appellants to have assumed that such default would have to be anticipated by serving a formal notice upon the agent before any moneys fell due, and especially so as the first premium had been paid by the borrower after this security had been given, and the borrower and his sureties expressly undertook that the appellants were not to be responsible to either of them but that the borrower and sureties were to be liable for the acts and deeds of the said "agent" and to answer personally such responsibility.

The hypothecation of this insurance policy was peculiarly for the protection of the sureties. The lenders were secured otherwise and as to them its maintenance was a burthen. Was it not the duty of the institute to instruct his own agent if he desired to keep such a security on foot? By what right should he for whose benefit it might be needed transfer his burthen on to the appellants?

All these considerations I submit tend to repel the implication of any legal obligation binding appellants to pay the premiums or to give notice to the agent Charles J. C. Würtele to pay it and see that he did so.

If the proper interpretation of this contract supplies no express contract to pay, and the implications arising from it and the relation of the parties as seen in light thereof and the surrounding facts seem to repel any implication of such a character, is there anything in the law governing the relations of creditor and surety that raises such a duty as is claimed here? Or, does the weight of authority not go the other way?

Strange v. *Fooks* (1): Where security was lost by reason of the creditor's failure to *perfect* the assignment of same by service of notice upon the trustees of the settlement;

Wa'son v. *Allcock* (2): Where a creditor omitted to file a warrant of attorney that the agreement and circumstances called upon him to do, and the security was lost as a result;

Capel v. *Butler* (3): Where creditor had failed to register an assignment of a ship;

Wulff v. *Jay* (4): Where creditor failed to register bill of sale and having so failed did not cover that initial default by taking possession of the goods as he might have done;

And *Beliveau* v. *Morelle* (5), of same nature and others like unto these all rest upon the failure to perfect the *security that all parties were agreed upon should be* made so and were acts necessary to the perfecting of the security and *peculiarly within the power of the creditor to have done.*

The duty there springs up manifestly in accord with reason and justice.

If the appellants had failed to intimate to the insurance company the assignment here and loss had happened by reason of the borrower transferring to others the parallel would be complete.

(1) 4 Giff. 408.
(2) 4 DeG. M. & G. 242.
(3) 2 Sim. & Stu. 457.
(4) L. R. 7 Q. B. 756.
(5) 16 L. C. R. 460.

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Or if the appellants were not relieved from publication, and by reason thereof the rents had been collected from the *censitaires* by a subsequent assignee and the substitute surety applied to be relieved, the parallel would be complete.

But in the case I put, though the substitute surety might claim relief how could the institute surety, who in such supposed case would be the party getting the money and producing the loss, complain?

How much less can he here where the step to be taken was not to perfect the instrument or security but to collect and pay or to repay the premium.

The notice of the agent of the institute to provide funds could have been given by the institute or other party concerned.

Once the security is perfected, as it was here, or as we may fairly for the present purpose assume it was as no injurious result came from want of publication, there rested no further duty, for which authority can be found, upon the appellants to pay the premiums needed for preservation of the policy or to remind the institute surety or his agent of the need to do so.

What was said by Lord Eldon in *Eyre* v. *Everett* (1), where forbearance to sue was claimed as relieving the surety, that

> the surety has no right to say that he is discharged from the debt which he has engaged to pay, together with the principal, if all that he rests upon is *the passive conduct* of *the creditor in not suing*,

may well be applied here.

It has since been applied in or to many modifications of circumstances in regard to *passive conduct* of a creditor in relation to preservation of securities and in all these instances I have found if nothing more existed the result has been in favour of the creditor and against the surety.

See, amongst others, the following:—*Macdonald* v. *Bell* (2), at pages 332 and 333, where the money was much

(1) 2 Russ. 381.

(2) 3 Moo. P.C. 315.

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more certainly available upon mere notice of the demand than here and for want of which the security was lost, yet the highest court of appeal held that not having been lost by a positive act but by an omission the sureties were not relieved; *Carter* v. *White* (1), at page 670, where the surety was not discharged merely by the negligence of the creditor to fill in the drawer's name and give notice of the bill as the surety might do it; *Coates* v. *Coates* (2), where the Master of the Rolls expressly held that a creditor was not bound to pay insurance premiums in absence of express contract to do so, and that sureties were not, for want of it, discharged; *Mayor of Kingston-upon-Hull* v. *Harding* (3), where plaintiff who had a right to superintend and a right to retain part of the money drawn upon a building contract did neither and yet sureties were not discharged. See also *Queen* v. *Fay* (4) at pages 615 and 627: *Black* v. *Ottoman Bank* (5) where similar law is laid down. See Colebrooke on Collateral Securities, pages 424,425 and 428, and cases cited there; de Colyar, pages 334, 335 and 336, and case scited there; *Killoran* v. *Sweet* (6), *Rees* v. *Berrington* (7) page 599 *et seq.*

I think the appeal should be allowed with costs against the estate of the late Honourable J. S. C. Würtele.

As to the other plaintiff it was alleged by counsel for appellants and seemed not to be denied that there was some mistake in the entry of judgment, and that apart from the liability of the late Honourable J. S. C. Würtele's estate as surety the claim of the other surety to be relieved and the claim of the appellants against both sureties is not ripe for consideration. The conclusions in the pleadings and the reservation in the cross action

(1) 25 Ch. D. 666.
(2) 33 Beav. 249.
(3) [1892] 2 Q. B. 494.
(4) L. R. Ir. 4 C. L., 606.
(5) 15 Moo. P. C. 472.
(6) 72 Hun. (N.Y.) 194.
(7) 2 White & Tudor, L. C. (7 ed.) 568

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or counterclaim of appellants would seem to bear this out to the extent at all events of making it inexpedient to deal here with the liability of the respondent Ernest F. Würtele. One surety being relieved sometimes has the effect of relieving another, but that can not operate in this case where the surety was himself a party to the fault that may have relieved the other. I do not desire to be held as expressing opinion in regard to the other.

Appeal dismissed with costs.

Solicitors for the appellants; *Branchaud & Kavanagh.*

Solicitors for the respondents; *Angers, DeLorimier & Godin.*