1896
*Oct. 10.
1897
*Jan. 25.

DUNCAN MACDONALD (DEFENDANT)..APPELLANT;

AND

GEORGE WHITFIELD (PLAINTIFF)....RESPONDENT.

GEORGE WHITFIELD (PLAINTIFF IN WARRANTY)..... } APPELLANT;

AND

THE MERCHANTS BANK OF CANADA (DEFENDANTS IN WARRANTY) } RESPONDENTS.

ON APPEALS FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Suretyship—Recourse of sureties inter se—Ratable contribution—Action of warranty—Banking—Discharge of co-surety—Reserve of recourse—Trust funds in possession of a surety—Arts. 1156, 1959 *C. C.*

Where one of two sureties has moneys in his hands to be applied towards payment of the creditor, he may be compelled by his co-surety to pay such moneys to the creditor or to the co-surety himself if the creditor has already been paid by him.

Where a creditor has released one of several sureties with a reservation of his recourse against the others and a stipulation against warranty as to claims they might have against the surety so released by reason of the exercise of such recourse reserved, the creditor has not thereby rendered himself liable in an action of warranty by the other sureties.

APPEALS from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) affirming the judgment of the Superior Court, District of Montreal, upon the trial of the united cases, by which the action by the respondent Whitfield against the appellant Macdonald was maintained with costs, and the action

*PRESENT:—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

en garantie by the appellant Whitfield against the Merchants Bank of Canada was dismissed with costs.

In the case instituted in February, 1886, by George Whitfield against Edward C. Macdonald, (represented in the action, since his death in 1889, by the appellant, *par reprise d'instance*,) the plaintiff recovered $19,716 partly for a moiety of the balance of a judgment debt paid by him to the Merchants Bank of Canada for which he and Macdonald were declared to be equally liable, as between themselves as joint sureties by their indorsements on notes of the Saint Johns Stone Chinaware Company, by a judgment of the Privy Council in 1883, (1), and a further sum of $5,234.10, amount of a dividend of 15 per cent on the full amount of the bank's claim against the insolvent estate of the company for which Macdonald had become liable on purchasing the assets by undertaking to pay, as part of the price, a dividend, at that rate, on the claims of all unsecured creditors.

The circumstances which led to the litigation between the parties may be briefly stated as follows:

The St. Johns Stone Chinaware Company carried on business in the Town of St. Johns, P.Q., and among the directors were the late Edward C. Macdonald, the said George Whitfield, Isaac Coote and James Macpherson. In July, 1875, the company made a promissory note for $10,000, payable on demand to the order of Macdonald, which was indorsed by him and by Whitfield, Coote and Macpherson, and discounted for the company by the Merchants Bank at St. Johns. On 21st March, 1877, the company made another note for $8,500, payable three months after date, to the order of Macdonald, which was indorsed by Whitfield and Coote, and also discounted for the company by the Merchants Bank. On 26th March, 1877, the company

(1) *Macdonald* v. *Whifield* 8 App. Cas. 733; 52 L. J. P. C. 70.

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made a third note for $4,500 payable three months after date to the order of Macdonald, which was also indorsed by him and by Whitfield and Coote, and discounted by the same bank for the company.

The notes were not paid at maturity and were duly protested, and in December, 1877, the bank instituted an action in the Superior Court, for the district of Iberville, against Macdonald, Coote and Whitfield for the amount of the three notes, with costs of protest and interest. Whitfield alone pleaded, and the action was maintained as against him for the amount of the two last notes, the court holding that the bank had lost its recourse against him on the first note by delay in presentation for payment. The action was maintained as against the other defendants for the full amount. Whitfield had, in the meantime, instituted an action in warranty, against Edward C. Macdonald as prior indorser. This action was dismissed by the Superior Court. In the Court of Queen's Bench, however, on appeal, both judgments were reversed, the bank thus obtaining judgment against the three indorsers, Macdonald, Whitfield and Coote, jointly and severally, for the full amount of the three promissory notes, Whitfield's action in warranty being maintained, and Macdonald condemned to protect Whitfield against the claim of the bank. Macdonald appealed to the Privy Council, and his appeal was allowed (1), the judicial committee deciding that the three indorsers were equally liable, as between themselves, as the joint sureties of the company for whose benefit and accommodation they had indorsed. This judgment of the Privy Council finally established the position and rights of the indorsers as between themselves.

During this litigation the company had become insolvent, as had also Macpherson and Coote, leaving

(1) 8 App. Cas. 733.

Whitfield and Macdonald to satisfy the judgment in favour of the Merchants Bank. In the course of the winding up of the affairs of the company Macdonald purchased from the assignee all the assets agreeing to pay as part of the price a dividend of fifteen per cent on all the unsecured claims against the company.

The claim of the bank under its judgment as claimed by plaintiff amounted at the date of the action, in principal, interest and costs, to $34,894, and deducting $400 received by the bank from the insolvent estate of Macpherson, with accrued interest, left a balance of $34,350, as the claim of the bank. Whitfield paid the bank $29,740.50 which was more than sufficient to pay the claim of the bank less the fifteen per cent dividend payable by Macdonald, and instituted the present action, claiming $19,792.10, being fifteen cents on the dollar on the $34,894, which by the terms of purchase of said assets Macdonald was bound to pay and which had not been paid, and $14,557.95 being one-half of the balance of the claim of the bank after deducting the fifteen per cent and the $400 received from the estate of Macpherson.

The defendant admitted liability to a certain extent for the principal debt, but denied the claim for the interest and costs and for the payment of the 15 per cent dividend, claiming that he had finally settled with the bank for all claims they held against him by an agreement made on the 12th October, 1878. The agreement contained a clause to the effect that the bank reserved its rights against all other parties, except Macdonald, liable on the notes made by the company as indorsers, and specially declared that it gave no warranty against claims Whitfield or others might seek to enforce against Macdonald by reason of the exercise of the recourse reserved. After the filing of defendant's pleas the plaintiff took action against the

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bank *en garantie* asking to have the bank made a party to the cause to warrant him against the consequences which might result from the dealings with the defendant disclosed by the pleas. The cases were united and tried together, the judgment in the trial court being as above stated. The Court of Queen's Bench affirmed the judgment of the Superior Court, and from this latter judgment Macdonald appeals to have the judgment against him set aside, so far as it decreed payment of the dividend, Whitfield also appealing on the ground that his action in warranty against the bank was justified and consequently he should not have been mulcted with costs.

Macdonald v. Whitfield. *Geoffrion* Q.C., and *Fleet* for the appellant. The settlement made with the bank by Macdonald not only released him but all other co-sureties as well and had the effect of satisfying the bank's judgment against the indorsers of the notes. The judgment consequently was discharged by the payment of the consideration mentioned in the deed of release and if the respondent for any cause saw fit afterwards to make a payment thereon to the bank he did so at his own risk and can have no recourse in any event for the 15 per cent dividend. Possibly the Privy Council judgment is conclusive as to the balance.

His suretyship was at an end, for the creditor had by the deed extinguished the power of subrogation Art. 1959 C. C.

Under any circumstances there could be no reservation of recourse against co-sureties as to the amount of the 15 per cent dividend, for which there had been novation by the bank's concurrence in the sale of the insolvent company's estate on those terms, thereby accepting a new obligation to the extent of the promised dividend.

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Abbott Q.C., and *Taylor* for the respondent. The reservation in the deed still left the appellant Macdonald responsible for his share of all payments exigible from his co-sureties by the exercise of the recourse which the bank specially retained. It was impossible for the co-surety to claim any benefit for the amount of the 15 per cent dividend which the bank has in fact never received, consequently leaving that amount still exigible although funds were in Macdonald's hands specially applicable towards payment of the creditor to that extent on account of their mutual debt.

Whitfield v. The Merchants Bank. *Taylor* for the appellant. If we succeed in having the appeal by Macdonald dismissed the present appeal is merely as to the question of costs. We contend that instead of contesting our action *en garantie* the bank ought to have made common cause with us against Macdonald by becoming a party to our action against him. We were entitled to have them in the suit as warrantors. *Archbald* v. *deLisle* (1). We consequently ought not to pay costs.

Abbott Q. C. for the respondent. The relations between the co-sureties amongst themselves in this case result from the provisions of article 1156 C. C. and can have no possible effect upon the bank which is fully protected in the deed as to recourse and by the absence of any warranty. As to costs the court below has followed *Archbald* v. *deLisle* (1). It would have been improper for the bank to come into the original action and admit a warranty which did not exist in fact.

THE CHIEF JUSTICE.—These two cases are separate appeals from a judgment applying to both the actions.

(1) 25 Can. S. C. R. 1.

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The Chief Justice.

I am of opinion that this judgment was in all respects free from error and must consequently be affirmed.

Whitfield was never a party to any arrangement or convention which in any way prejudiced his right to contribution from his co-surety Macdonald, and there was therefore no defence to his action to compel Macdonald to indemnify him to the extent of a moiety of the amount paid by him to the bank.

As regards the sum of $5,234.10 it is clear that that amount ought to have been paid over by Macdonald to the bank and applied in part payment of the amount due upon the three promissory notes. Under the arrangement by which Macdonald became the purchaser of the assets of the principal debtor—the Chinaware Company—as embodied in the notarial deed of 4th March, 1878, this amount of $5,234.10 being 15 cents in the dollar on the amount of the debt to the bank, was part of the purchase money realized by the sale of the assets of the company, the principal debtor, and as such must be considered as funds in the hands of Macdonald, lodged with him by the principal debtor for payment to the creditor.

It cannot be successfully contended that in point of law one of two co-sureties who has in his hands moneys of the principal debtor, deposited with him for the express purpose of paying the creditor, cannot be compelled by the other co-surety to pay such money to the creditor, or if the latter has already been paid by the surety seeking relief, then to pay over the amount to the latter. Then this is all the judgment decrees.

The action in guarantee brought by Whitfield against the bank had no legal foundation whatever, inasmuch as the bank had manifestly entered into no agreement which created an obligation in guarantee towards Whitfield. The action was therefore properly dismissed.

Both appeals are dismissed with costs.

GWYNNE, SEDGEWICK and KING JJ. concurred.

GIROUARD J.—From the admissions of the parties of the 7th of May, 1894, I find that the respondent, Whitfield, paid to the bank, at various times, from the 6th of August, 1885 to the 8th of May, 1889, a total sum of $36,534.19, for one-half of which the appellant was liable to him as co-surety, altogether $18,267.09½. But this sum included some costs incurred by Whitfield and more than two years' interest accrued from the day of the institution of the action to the day of the last payment in 1889, and consequently the trial judge fixed the amount paid by Whitfield to the bank at $34,288, or $17,144.35 for Macdonald's one-half, with interest from the day of the institution of the action. Adding to that amount $2,571.65, being one half of the dividend of $5,143.30, which the insolvent estate of the principal debtor, the St. Johns Stone Chinaware Company, realized, as admitted by both parties, and which Edward C. Macdonald undertook to pay as purchaser of the estate, but did not in fact pay, I find, although by a different process of calculation, that the total amount due by the heirs of the said Edward C. Macdonald to Whitfield, in consequence of his co-suretyship and purchase of said insolvent estate, is exactly the amount which they were condemned to pay, namely $19,716.00, with interest as mentioned in the judgment. The bank not having received more than its due the action *en garantie* was also rightly dismissed. I am therefore of opinion that both appeals should be dismissed with costs.

Appeals dismissed with costs.

Solicitors for Macdonald: *Robertson, Fleet & Falconer.*

Solicitors for Whitfield: *Taylor & Buchan.*

Solicitors for The Merchants Bank of Canada:

Abbotts, Campbell & Meredith.

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