

HER MAJESTY THE QUEEN (PLAIN- } APPELLANT ; 1898
TIFF) } *Oct. 10, 11.

AND

THE HONOURABLE A. W. OGILVIE } RESPONDENT. 1899
(DEFENDANT) } *Feb. 22.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Debtor and creditor—Appropriation of payments—Error in appropriation
—Arts. 1160, 1161 C. C.*

A bank borrowed from the Dominion Government two sums of \$100,000 each, giving deposit receipts therefor respectively numbered 323 and 329. Having asked for a further loan of a like amount it was refused, but afterwards the loan was made on O., one of the directors of the bank, becoming personally responsible for repayment, and the receipt for such last loan was numbered 346. The Government having demanded payment of \$50,000 on account that sum was transferred in the bank books to the general account of the Government, and a letter from the president to the Finance Department stated that this had been done, enclosed another receipt numbered 358 for \$50,000 on special deposit, and concluded, "Please return deposit receipt no. 323—\$100,000 now in your possession." Subsequently \$50,000 more was paid and a return of receipt no. 358 requested. The bank having failed the Government took proceedings against O. on his guarantee for the last loan made to recover the balance after crediting said payments and dividends received. The defence to these proceedings was that it had been agreed between the bank and O. that any payments made on account of the borrowed money should be first applied to the guarantee loan and that the president had instructed the accountant so to apply the two sums of \$50,000 paid, but he had omitted to do so. The trial judge gave effect to this objection and dismissed the information of the Crown.

Held, reversing the judgment of the Exchequer Court (6 Ex. C. R. 21), Taschereau and Girouard JJ. dissenting, that as the evidence showed that the president knew what the accountant had done

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.
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and did not repudiate it, and as the act was for the benefit of the bank, the latter was bound by it; that the act of the Government in immediately returning the specific deposit receipts when the payments were made was a sufficient act of appropriation by the creditor within Art. 1160 C. C. no appropriation at all having been made by the debtor on the hypothesis of error; and if this were not so the bank could not now annul the imputation made by the accountant unless the Government could be restored to the position it would have been in if no imputation at all had been made which was impossible as the Government would then have had an option which could not now be exercised.

APPEAL from a judgment of The Exchequer Court of Canada (1), dismissing an information by the Attorney General for Canada on behalf of the Crown against the defendant.

The material facts are sufficiently stated in the above head-note, and more fully in the judgment of the majority of the court delivered by Mr. Justice King.

Fitzpatrick Q. C., Solicitor General for Canada, and *Newcombe Q. C.*, Deputy of the Minister of Justice, for the Crown. No defence is suggested except alleged payment. Nothing has been paid by the respondent and the only sums paid by the bank since receipt of the deposit represented by number 323 are the two payments of \$50,000 each and interest, and the dividend of 66 $\frac{2}{3}$ per cent upon the entire claim of the Government which was paid by the liquidators. The two sums were paid by the bank on 9th July, 1883, and 16th August, 1883, and those payments were appropriated by letters of the accountant, that with the first remittance requesting the return of deposit receipt no. 323, and the second expressly making the appropriation on deposit receipt no. 358. It was never suggested previous to this action that there was any error in making the appropri-

ations, nor that the accountant of the bank in making the payments and appropriations was not acting within the scope of his authority. The evidence as to conversations between the respondent and his co-directors with regard to the payment of the deposit guaranteed by the respondent out of the first moneys available by the bank was properly objected to. It is *res inter alios acta* and cannot affect the rights of the Crown in these proceedings. As to the scope of the accountant's authority the effect of the evidence is that it was part of his ordinary duties to make and apply payments such as that in question, and that he wrote the letters in the ordinary course of business and, in view of the fact that he had conducted a considerable part of the correspondence with the Government, was acting within the apparent scope of his authority. Evidence that he had in fact in this case acted contrary to specific instructions would not be material for the purpose of limiting his authority as between the bank and the Crown to whom no notice of his special instructions had ever been given. *Kershaw v. Kirkpatrick* (1).

The mistake, if any, was made within the scope of his authority, for the benefit of the bank, which thereby received further credit and acted upon and took the benefit of the appropriation. The bank cannot therefore now alter the appropriation. Pollock on Contracts (4 ed) p. 531 *et seq* : *Mackay v. Commercial Bank of New Brunswick* (2). The appropriation could only be changed by a rescission of the appropriation made by consent of all parties; *Kershaw vs. Kirkpatrick* (1); and any agreement between respondent and his co-directors as to the manner in which the appropriation was to be made or the intention of the bank, undisclosed to the Government, can have no effect in con-

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(1) 3 App. Cas. 345.

(2) L. R. 5 P. C. 394.

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trolling the appropriation clearly made by the correspondence. *Smith v. Hughes* (1); *Tamplin v. James* (2).

The dividend of 66 $\frac{2}{3}$ per cent was paid under orders of the court in respect of the aggregate claim of \$237,840.20, filed by the Government and cannot be applied on the guaranteed deposit receipt except *pro ratâ*. *Thompson v. Hudson* (3); *In re Accidental Death Ins. Co.* (4); *De Colyar on Guarantees*, (3 ed.) 458; *Dixon v. Clark* (5); *Martin v. Brecknell* (6); art 1160 C. C.

The bank had no right to appropriate its payment except at the time when the payment was made. The Crown is content with the appropriation which the bank then made. If that appropriation be set aside the appropriation made by the Crown as creditor to receipt number 323 will stand. *Devaynes v. Noble*; *Clayton's Case* (7); *Tudor's Mercantile and Mercantile Law* (3 ed.) p. 1 and notes at pp. 19, 21 *et seq.* In the absence of any appropriation by debtor or creditor the law would also appropriate to deposit receipt number 323 which was the earliest debt. Even if the guaranteed deposit might be considered the more onerous debt and imputation invoked according to the Civil Code of Quebec, art. 1161, that rule cannot apply in this case because the Crown's position has been changed and its rights prejudiced by the appropriation upon receipt no. 323 by the bank and, until the defence was filed in this action, upwards of twelve years afterwards, the Crown had no notice that the bank did not intend to stand by its appropriation. Meantime the bank had failed and its affairs had been wound up. If the imputation had been originally made upon the guaranteed account the Government would doubtless have pressed imme-

(1) L. R. 6 Q. B. 597.

(2) 15 Ch. D. 215.

(3) 6 Ch. App. 320.

(4) 7 Ch. D. 568.

(5) 5 C. B. 365.

(6) 2 M. & S., 39.

(7) 1 Mer. 585.

diately for payment of the unsecured account. It is therefore now too late to set aside the appropriation for error and allow the law to appropriate to the disadvantage of the Crown. The law presumes prejudice in such cases. *London and River Plate Bank v. Bank of Liverpool* (1). Finally the appropriation cannot be set aside or varied in this action to which the bank is not a party, nor after the bank, having been wound up, has ceased to exist.

Reference was also made to *Williams v. Rawlinson* (2), per Best C. J. at page 371; *Harding v. Tift* (3), at page 464 to 466 as to undisclosed intention; *Stone v. Seymour* (4); *Robson v. McKoin* (5); *Plomer v. Long* (6); *Gordon v. Hobart* (7); *Ex parte Whitworth* (8); Monger on Appropriation, p. 75 and cases there cited; *Stamford Bank v. Benedict* (9); *Shaw v. The Bank of Decatur* (10), at page 713 where a summing up of the cases appears; and also to the remarks of Mr. Justice Story in *United States v. Wardwell* (11).

J. S. Hall Q.C. and *Hogg Q.C.* for the respondent. The law of Quebec governs this case; the application of the bank was from Montreal, the deposit was made at Montreal and the repayment was to be made there. The performance, or payment, or fulfilment of the contract, either under the deposit receipt or defendant's letter, was to be at Montreal, and in matters of deposit it is the law of the place of fulfilment that governs. Dicey Conflict of Laws, 570; *The Queen v. Doutre* (12); *Brooks v. Clegg* (13). The \$100,000 paid back by the bank must be imputed on the loan covered

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(1) [1896] 1 Q. B. 7.

(2) 10 Moo. C. P. 362.

(3) 75 N. Y. 461.

(4) 15 Wend. 20.

(5) 18 La. An. 544.

(6) 1 Stark. 153.

(7) 2 Story 243.

(8) 2 M. D. & DeG. 164.

(9) 15 Conn. 437.

(10) 16 Ala. 708.

(11) 5 Mason 82.

(12) 6 Can. S. C. R. 342.

(13) 12 L. C. R. 461.

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by the defendant's letter, art. 1161 C. C., in the absence of imputation, or if left to the operation of law, so as to discharge the debt actually payable which the debtor had at that time the greater interest in paying. The authorities are unanimous that a secured debt is such a debt. Therefore, the money paid back by the bank must go to the discharge of the \$100,000 in connection with which defendant gave his letter. It must be presumed to have been within the knowledge of the Minister of Finance, the bank and the respondent, at the time the letter was given, that defendant was entitled to have the first money paid back credited to the \$100,000 for which he gave the letter, and nothing could have been done to change or alter his legal position without defendant's knowledge or consent.

The three deposits virtually became one debt merged together without one part having any priority over the other. When the demand for payment of \$50,000 was made all the deposits were due. The numbers of deposit receipts had no significance. They were numbered simply as a convenience to the bank and the deputy-minister evidently viewed it in this way for in his letter of the 7th July, 1883, asking for \$50,000, and a new receipt, he adds, "I will return you *one* of the receipts for \$100,000 which we now hold." It, made no difference to the Government, and the surety was entitled to have the imputation made so as to discharge him. *Doyle v. Gaudette* (1); *Attorney General of Jamaica v. Manderson* (2).

The agreement by the bank, that the first monies paid back should be on account of the last \$100,000, followed the law. There was error and mistake in the accountant's letter, and he wrote not only without authority, but contrary to the instructions of the president of the bank. We invoke the error and ask the payment to be

(1) 20 L. C. Jur. 134.

(2) 6 Moo. P.C. 239.

made as was intended. Arts, 991 and 1160 C. C.; Rol-
land de Villargues *vo.*, "Imputation," no. 19 *bis*; *Ætna*
Ins. Co. v. Brodie (1). The surety can urge the right of
the debtor; he is the *avant cause* of the debtor and can
also urge the error of the debtor. Art. 1958 C. C.;
Fusier-Herman, Rep. *vo.* "Cautionnement," nos. 433,
459.

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As to the Crown's claim for interest it cannot be
sustained. The defendant's letter in no way covers any
interest. The construction of a contract of suretyship
must be strictly in favour of him who contracts the
obligation. Under any circumstances the deposit
receipts only bore interest if thirty days' notice was
given of their withdrawal, and, in any event, the bank's
liability to pay interest ceased on its insolvency and the
appointment of the liquidators, and in such cases the
Crown is not a privileged creditor. *Exchange Bank of*
Canada v. The Queen (2).

The claim of the Crown in this action has been dis-
charged by the payments made by the liquidator of
the Exchange Bank amounting in the course of the
liquidation to \$160,503.21, or 66 $\frac{2}{3}$ per cent. of the claim
filed with the liquidator. As between the surety and
the Crown this sum should be applied in the first place
in payment of the amount guaranteed because it was,
in fact, a payment by the debtor not specifically
imputed by the Crown to any distinct portion of
the debt, and if the guarantee remained outstand-
ing and undischarged, it should now be imputed
to discharge the debt so guaranteed under article 1161
of the code as being the debt in which the debtor had
and has the greater interest in paying. *Walton v. Dodds*
(3); *Doyle v. Gaudette* (4); *Devaynes v. Noble*; *Clayton's*
Case (5). Where no expressed declaration has been

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

(3) 1 L. C. L. J. 66.

(2) 11 App. Cas. 157.

(4) 20 L. C. Jur. 134.

(5) 3 Camp Eng. Ruling Cases 329; 1 Mer. 530.

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made, the intention is presumed most favourably to the debtor. In *Young v. English* (1) an intention to discharge the secured debt was presumed, and in the *City Discount Company v. McLean* (2) it was said that though the English rule falls short of that of the Roman law already mentioned, there is a tendency in the same direction arising from the disposition to impute an intention to a debtor to appropriate his payments upon the most onerous debt. Even under the English authorities, where one of the debts is guaranteed the creditor must allow the composition or dividend in reduction, and charge the surety only for the balance. *Bardwell v. Lydall* (3); *Gee v. Pack* (4). But here, under art. 1161 C. C. the dividend must be applied, in the absence of specific appropriation, upon the debt or portion of debt which the debtor has the greater interest in seeing paid.

We also rely upon the decisions in *Paget v. Marshall* (5); *Chinnock v. Ely* (6); *Harris v. Pepperell* (7).

THE CHIEF JUSTICE.—I concur in the judgement of Mr. Justice King.

TASCHEREAU J.—I agree with my brother Girouard that this appeal should be dismissed.

SEDGEWICK J.—I concur in the opinion of my brother King that the appeal should be allowed.

KING J.—This is an appeal from the judgment of the Exchequer Court (per Davidson J. *pro hac vice*) dismissing the claim of the Crown.

(1) 7 Beav. 10.

(2) L. R. 9 C. P., 692.

(3) 7 Bing. 489.

(4) 33 L. J. (Q. B.) 49.

(5) 23 Ch. D. 255.

(6) 4 DeG. J. & S. 638.

(7) L. R. 5 Eq. 1.

The claim was based on a letter of respondent dated 11th May, 1883, guaranteeing a loan or deposit of \$100,000 then being made to the Exchange Bank of Canada at the request of the respondent.

The Exchange Bank had its head office in Montreal. Its president was one Thomas Craig, and Mr. Ogilvie was one of the directors.

In April, 1883, the bank was in financial difficulty and applied to the Finance Department for a loan of \$100,000. The loan was made on the 12th of the month by way of special deposit, at 5 per cent interest withdrawable on thirty days' notice. The deposit receipt given by the bank was numbered 323.

Four days afterwards the bank made application for another \$100,000, and on the 18th of April received this loan also, giving their deposit receipt for the amount. This deposit receipt was numbered 329, and is as follows :

No. 329.

\$100,000.00.

MONTREAL, 17th April, 1883.

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 Receiver 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 the depositor, after which notice all interest on the deposit will cease.

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

(Sd.) T. CRAIG,

President.

Entered.

(Sd.) ERNEST D. WINTLE,

p. Accountant.

Three days later the bank wrote the department that another \$100,000 would be required to place them

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in an independent position, but the department declined to make such further loan.

Then Mr. Ogilvie came to Ottawa and upon his undertaking to guarantee such further deposit, it was made on the 12th of May, 1883.

The letter of guarantee is as follows :

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 agreeing to comply with this request I hereby undertake to hold myself personally responsible for the further deposit of \$100,000.

Yours very truly,

(Sd.) A. W. OGILVIE,

J. M. COURTNEY, Esq.,

Deputy Minister of Finance, Ottawa.

The deposit receipt given in respect of this loan was numbered 346 and is as follows :

No 346.

\$100,000.

MONTREAL, 12th May, 1883.

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 Receiver General or order, only on surrender of this certificate, and will bear interest at the rate of 5 per cent per annum, provided thirty days' notice be given of its withdrawal.

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

(Signed,) T. CRIAG.

President.

Entered,

(Signed,) ERNEST D. WINTLE,

p. Accountant.

On the 31st of May, 1883, Mr. Courtney for the Finance Department wrote to the bank that "on the 1st day of July next the Dominion Government will require the sum of \$50,000 to be transferred from the special deposit account with your bank to the general account."

In consequence of a letter from the bank of 29th June requesting that the repayment be postponed until after the 20th July, Mr. Courtney wrote on the 30th of June to the bank as follows :

I am sorry to say that I must have the \$50,000 turned into ordinary cash on Tuesday. I had intended to have drawn out immediately (*i.e.* after it had been transferred to general account) in order to meet 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.

The following further correspondence in reference to this payment then took place :

Mr. Courtney to the President (Managing Director.)

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 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 will return you one of the receipts for \$100,000 which we now hold. Pray attend to this without delay.

James M. Craig, pro. Manager to Mr. Courtney.

MONTREAL, 9th July, 1883.

As requested in your letter of 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 Department account. Please return deposit receipt no. 323—\$100,000 now in your possession and oblige.

Mr. Courtney to the President of the bank :

OTTAWA, 10th July, 1883.

I have the honour to acknowledge the receipt of your letter of the 9th instant enclosing special deposit receipt for \$50,000, and I have now the honour to enclose herewith your deposit receipt no. 323 of the 13th April, 1883, for \$100,000.

James M. Craig pro. Manager, to Mr. Courtney of 11th July, acknowledging receipt of deposit receipt no. 323.

Then with respect to the withdrawal or repayment of the second \$50,000, of which Mr. Courtney had

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given notice on 30th June for the 1st of August, there is the following correspondence:

Mr. Toller, acting Deputy Minister of Finance to the President of the Bank:

July 31st, 1883.

In reply to your letter of yesterday's date asking that the \$50,000 which is to be taken from interest to ordinary cash to-morrow should be allowed to remain until the 1st of September, I regret to say that I am unable to comply with your request, as my instructions from Mr. Courtney were that the money was to be paid on the day named by him.....

President of Bank to Mr. Toller asking that Government will draw on the general account only at the rate of \$10,000 every third day.

Toller to President of Bank, 15th August.

As I wrote to you the end of last month my instructions were to call upon you to place \$50,000 (of which due notice has been given) at the credit of the Receiver General's ordinary cash from the amount now at interest. I do not see how I can consent to its remaining until the 1st of September. I shall, however, be most happy to comply with your request about drawing out the money. Please send us a receipt showing that the amount has been transferred from "interest" to current account with the accrued interest thereon.

James M. Craig, Pro. Manager, to Deputy Minister of Finance, 16th August, 1883.

I beg to acknowledge the receipt of your letter of the 15th instant, and herewith enclose receipt showing the current account with the department credited \$50,315.07. Please return deposit receipt No. 358—\$50,000, in favour of the Receiver General and oblige.

The bank suspended payment on the 17th of September, 1883, and on the 5th of December a winding-up order was issued under which the affairs of the bank have been fully wound up.

The Crown filed a claim for the amount of the two deposits as per receipts nos. 329 and 346, with interest thereon, and for the further sum of \$37,840.24 in respect of other transactions and received in dividends

a sum \$160,503 21, or sixty-six and three-eighths per cent.

The principal question relates to the application of the two payments of \$50,000 each.

For the Crown it is contended that they were made upon the first indebtedness evidenced by the special deposit receipt no. 323, and by the receipt no. 358 given in substitution for the one-half of such loan remaining unpaid after the payment of the first sum of \$50,000.

The respondent contends that such alleged application is null and void for error and want of authority in the person making it, and that in such event by the law of Quebec (which is claimed to be applicable) the payments are to be applied to the discharge of the guaranteed debt, thereby relieving the debtor of his obligations at once to the creditor and to his surety.

Arts. 1160 and 1161 (in part) of the Civil Code are as follows :

(1160.) When a debtor of several debts has accepted a receipt by which the creditor has imputed what he has received in discharge specially of one of the debts, the debtor cannot afterwards require the imputation to be made upon a different debt except upon grounds for which contracts may be avoided.

(1161.) When the receipt makes no special imputation, the payment must be imputed in discharge of the debt actually payable which the debtor has at the time the greater interest in paying.

It may be noticed in passing that Art. 1160 seems to relate to cases where the creditor has made the imputation, and not to cases where the imputation has been made by the debtor.

The error assigned as sufficient under Art. 1160 to avoid the imputation of payment of the first loan or debt is briefly this :

It is said that in consequence of the bank having agreed with Mr. Ogilvie that the first moneys paid would be paid on account of the guaranteed debt,

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Thomas Craig, the Bank President, gave instructions to the accountant, James M. Craig, so to apply the two sums of \$50,000, but that without the knowledge or consent of the bank he omitted to do so, but on the contrary purported to make the payments on account of the first of the loans. It is not suggested that the Government knew anything of these transactions or understandings between the bank and Mr. Ogilvie, or of the instructions to James M. Craig.

The learned Judge has upheld these contentions of the respondent, and has directed that the payments be applied to the discharge of the guaranteed indebtedness, and dismissed the information of the Crown.

It may for present purposes be assumed that the view taken in the court below as to the case being governed by the law of Quebec is correct.

It has not been contended that the guarantor's responsibility under the terms of his letter of guarantee would cease whenever the bank's special deposit indebtedness to the Crown should become reduced to \$200,000, the amount at which it then stood. If it had been so contended, it might have been replied that the guarantee was that of a particular debt then being about to be contracted, and referred to as "the further deposit of \$100,000." The several loans were distinguished by the respective deposit receipts or contracts entered into in respect of each, and which were not entirely similar in terms. The contract numbered 346 was that for the performance of which by the bank Mr. Ogilvie made himself responsible.

Then as to error and want of authority on the part of James Craig in purporting to make the imputation of payment.

The act of an agent binding the principal needs to be not only within the scope of the authority, but for the employer's benefit. As to the last point first.

The natural effect of Craig's imputation was to maintain the failing credit of the bank with its creditor, by preserving to the latter the personal security of Mr. Ogilvie, while at the same time the total liability was reduced. It was therefore clearly an act done by James Craig for the benefit of the bank under the circumstances in which it was placed.

Then as to the scope of Craig's authority. It seems manifest from the testimony of the bank president that, in the condition in which the bank was, things were left to be done by the accountant acting for the manager which perhaps at other times might not have been left to him. Thomas Craig, the president, says:

At that time things were in a pretty bad shape and we did not know where we were standing, and instead of doing this myself as I ought to have done according to the agreement of the board (referring to the agreement with Mr. Ogilvie) by some means or other it was done by the accountant.

That is to say, owing to the confusion the president by some means or other left it to the accountant acting for him to transact this part of the bank's business. It further appears from the instructions said to have been given by the president to the accountant that the latter was recognized and treated as the officer charged with the signification of the imputation of payments.

Throughout the correspondence, beginning with the forwarding of the first deposit receipt, James Craig acts at every stage of the transactions as on behalf of the president, and with his knowledge.

In the letter to the bank president of 10th July, 1888, Mr. Courtney referred to James Craig's letter of the day before and enclosed "deposit receipt no. 323 of the 13th April."

There can be no reasonable question then that the president knew of what had been done, for the deposit

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receipt was referred to not only by its number but its date, and not only did he not repudiate it, but concluded the arrangement by making out fresh deposit receipt no. 358.

Supposing however, that there was error, the annulment of the imputation by James Craig would still leave the act of the Crown in immediately sending back the deposit receipts as a sufficient act of appropriation on their part, no appropriation at all having been made by the bank on the hypothesis of error.

And even if this were not so, the bank could not get a benefit from their own error, and annul the imputation made by Craig, unless the creditor could be put in the same position as he would have been if there had been no imputation at all by the bank, and for obvious reasons no option can now be exercised by the Crown. There was clear prejudice to the Crown in being deprived of an option that would have belonged to it if Craig's act had, on the instant of making it, been nullified.

There seems therefore, upon these several considerations, to be no satisfactory ground for treating the case as though there had been no appropriation of payment either by the bank or the Crown.

It is further suggested that the imputation was invalid because not made at the time of payment.

With regard to the first payment of \$50,000, Craig's letter of 9th July advises that the amount has been placed to the credit of the Finance Department, i. e., to the credit of the general or current account, and simultaneously asks for return of deposit receipt no. 323. This was at once assented to by the Crown (whose assent may be considered necessary upon a part payment of the debt), and acted upon by the return of the receipt asked for. Craig's letter con-

stitutes an immediate appropriation. If not, there was the appropriation instantly made by the Crown upon being notified of the fact of payment, or it was made by the joint assent to receiving part payment on account of such debt. In either way, therefore, there was valid application to the first debt.

If the actual payment of the money upon cheques drawn against general account be regarded, it must on principle be considered that the previous declarations and consents as to the application of the payments continued to operate so as to govern and explain the act of payment when it should take place, and to determine its character and quality.

So as to the second sum of \$50,000, Craig's letter of 16th August advises of the transfer of the amount from the interest account to current account, and at the same time requests the return of deposit receipt no. 358. This also was acted upon and the deposit receipt returned. Until such return of the deposit receipt the transaction was incomplete.

Again, regarding the payments as not made until payment of the cheques drawn against general account, such subsequent payments would in the way already mentioned be considered as being made in pursuance of the subsisting declaration of intention and consent.

As to the dividends received by the Crown in the winding-up, the debts being distinct, the surety is entitled to have a ratable amount applied towards the reduction of the guaranteed debt.

As to interest, the respondent in his letter of 11th of May requested that the further deposit of \$100,000 be made on the same terms as the former deposits of \$200,000, and these terms included payment of interest by the bank at 5 per cent; the obligation to be respon-

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sible for the deposit therefore reasonably includes interest at the named rate.

The result, therefore, is that the appeal is to be allowed with costs here and below, and judgment to be entered for the Crown for the amount of the deposit with interest at 5 per cent, deducting a ratable amount of the dividends received by the Crown upon the winding-up of the bank.

GIROUARD J. (dissenting.)—This is an appeal from a judgment of the Exchequer Court of Canada (Davidson J. *ad hoc*), which dismissed the information of the Attorney General of Canada, praying for judgment against the respondent for \$77,337.03, as balance due under a letter signed by him on the 11th of May, 1883, and purporting to guarantee the last of three loans for \$100,000 each, made by the Government of Canada to the late Exchange Bank of Canada. The bank failed on the 17th of September, 1883, and went into liquidation on the 5th of December of the same year. In 1892, its affairs were wound up in insolvency, the liquidators discharged and all the books and papers (except a few which were deposited in court) ordered to be destroyed. The information of the Attorney General was fyled on the 17th of September, 1895, and the trial took place in Montreal on the 21st of July, 1897. So the Government had been silent at least twelve years after the debt had been created and exigible, and three years after the affairs of the bank had been finally liquidated in insolvency, and their books, papers and vouchers burnt by order of court. The respondent had no reason to object to this destruction, as nothing had been said or done by the Government about their claim against him, either in the insolvency proceedings or elsewhere. The respondent not only lost what would have proved to be valuable written

evidence, but the living witnesses also disappeared. Nearly the whole board of directors died. The Government knew that any attempt to collect from the respondent would be resisted as they were informed by Mr. Thomas Craig, President of the bank, as early as November, 1883, that his letter of guarantee was considered as paid, without, however, alleging any error in the imputation; apparently he was not aware of it at the time, nor for years after, till the institution of the present suit, when the papers were produced by the Crown. The Department of Justice, to whom the matter was referred in 1883, advised the Department of Finance that the respondent was still liable. This opinion was only communicated to the bank then in insolvency, and not to the respondent who was never asked to pay, even verbally, although no doubt in frequent contact with the Crown representatives, as a member of the Senate. As the respondent says, referring to the period of time posterior to the delivery of the letter of guarantee: "I never had anything to do with the Government good, bad or indifferent; never heard of the debt; they never asked me for it for 14 years." Under the circumstances he naturally supposed that the Department of Finance had concluded that their claim was discharged by payment, if not by prescription. He says in his evidence :

Witness : I said, I asked if he (T. Craig) had paid back that \$100,000 and he said he hadn't.

Q. When was this?—A. I suppose six or seven weeks afterwards or four or five weeks (after the letter of guarantee was given.) I asked him repeatedly, and he told me at last that he had paid back the \$100,000 and I asked him where my letter was.

Q. Then what was his answer?—A. He told me that he would have my letter in a very few days, that he had written asking for it.

The letter was never remitted and remained in the possession of the Finance Department for at least

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twelve years before they thought of collecting it; and after that long silence, which would be fatal to an ordinary creditor, he is called up to answer the demand of the Crown for a very large balance alleged to have remained unpaid, after deduction of the dividends received in insolvency and amounting to sixty-six and three-eighths per cent. The case, therefore, affords a most remarkable illustration of the great hardship of the law, prevailing at least in the Province of Quebec, which allows the Crown to plead prescription against a subject, just as any individual can, but refuses the subject every plea of prescription against the Crown, even in commercial matters, except prescription of thirty years. Arts. 2211, 2215 C. C. We do not, however, sit here to reform the law, but to interpret and apply the same. The defendant has invoked prescription. The trial judge observes that the plea of prescription was not seriously argued at the trial, and finally holds, and correctly so, that prescription had not inured. The law is clearly against the respondent, but equity evidently is with him.

The respondent has also pleaded payment by the bank and, in connection with this, has raised delicate questions of imputation of payment, which were decided in his favour by the court below. In order to have an intelligent understanding of this decision, it is necessary, first, to recapitulate the facts.

On the 13th of April, 1883, the Government of Canada, which was already in current account with the Exchange Bank of Canada, then in financial difficulties, and with a view of coming to its assistance, advanced them \$100,000, for which the bank issued a special deposit receipt, no. 323. That paper is not produced and was likely destroyed.

Four days later, on the 17th April, the Government deposited a further sum of \$100,000 and received a second special deposit receipt, no. 329, which is produced.

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On the 12th May following, the Government made a third advance of \$100,000, and got a third deposit receipt, no. 346, which is also fyled; but this time the guarantee of the respondent was demanded and granted in these terms:

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 agreeing to comply with this 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 of Finance.

All the deposit receipts are signed by the accountant and the president of the bank, T. Craig. They are of the same form and tenor, and read as follows:

No. 329,

MONTREAL, 17th April, 1883,

\$100,000.00.

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 Receiver 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 the depositor, after which notice all interest on the deposit will cease.

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

T. CRAIG,

President.

Entered.

ERNEST D. WINTLE,

p. Accountant.

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Receipt 346 does not contain the second paragraph,
"The bank reserves, etc."

It is admitted that the respondent gave his letter of guarantee without having any understanding with the Government as to its future payment and discharge; but it is proved that he had gone to interview the Government at the bank's request; that he negotiated this third advance on consenting to become surety; that the Government cheque was remitted to him; and that finally upon his return to the head office of the bank in Montreal, he reported to the president and the directors what had taken place and informed them that he would not part with the cheque, unless they promised that the first money paid back would be applied to the loan he had so guaranteed, which request was immediately agreed to; and that upon this understanding the cheque was delivered to the bank, and deposit receipt no. 346 was issued. So says the respondent, and also Mr. Craig, the president, who adds that he personally undertook to see that the agreement would be carried out. Their testimony is not contradicted, although the appellant had ample opportunity to do so, if possible, by examining Mr. James M. Craig, the accountant, or Mr. E. K. Greene, the only surviving director (with the respondent and Mr. Thomas Craig), at the time of the trial. Mr. Craig believes that an entry of the agreement was made in the minute book of the board of directors, but speaking after that length of time, he could not say positively. It is not even possible to verify the correctness of his impression, as the minute book is not produced and was probably destroyed with the other papers. In the whole of this transaction the respondent did not make one farthing of profit, and acted generously to assist the bank, of which he was a director and shareholder, and it is unfortunate for him

that before giving the cheque he did not exact a written agreement and transmit the same to the Government.

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Two payments of \$50,000 each, it is alleged, were made in July and August, 1883. The three loans were payable on demand, the notice of thirty days being only required to save the interest. The payments were, however, only partial, and the creditor was not obliged to receive them; but not only did he accept the same, but he invited, in fact forced, the debtor to make them without even suggesting any imputation. On the 31st May, 1883, some three weeks after the respondent gave his letter of guarantee, the bank was informed by letter that "on the first day of July next, the Dominion Government will require the sum of \$50,000 to be transferred from the special deposit account with your bank to the general account." On the 30th of June, Mr. Courtney notified the bank "that we shall want another \$50,000 to be turned into cash on the 1st August." No reference is made to any particular loan.

Finally, on the 7th July, when Mr. Courtney, who had not yet drawn upon any money transferred to the current account in payment of the first \$50,000 call, proposed to the bank a modification of the arrangement, which was finally accepted and carried out, he does not state that the money paid, or to be paid, will be imputed upon the first loan, but that he "will return one of the receipts for \$100,000 which we now hold." It is therefore clear that the Government did not intend to make any special imputation of payment as a condition of the partial payment. The information of the Attorney General alleges that the imputation was made by the bank and agreed to by the Government and that is exactly what took place. It is proved that this imputation was done

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by the bank, acting not by its president, Mr. Thomas Craig, but by Mr. James M. Craig, its accountant, without authority, by error and contrary to his instructions. The evidence is clear upon this point. Mr. Thomas Craig, in his examination under a commission, as he was then carrying on business in the city of Brooklyn, N. Y., says :

Q. Mr. Ogilvie held this check 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 writing, but simply, as far as I can recollect, on the minute book of the bank. I cannot recollect whether it was placed in the minutes or not, but there is no question but they agreed to do it.

Q. Anything else ? 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. In connection with these two payments of fifty thousand dollars each, do you remember what instructions you gave to James N. Craig ? (Objected to as illegal. Objection reserved by consent of parties). A. To the best of my recollection, he was instructed to apply this on the last loan—these two payments.

Q. By the last loan you mean the last sum of one hundred thousand dollars deposited by the Government, for which Mr. Ogilvie gave his letter of guarantee ? A. Yes.

Q. I understand you to say that the correspondence, in connection with these matters, was intrusted 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 M. Craig, in connection with the return of the deposit receipts, were not authorized by the bank ? A. No. Not especially authorized by the bank. He did it as a matter of routine, against my instructions.

In cross-examination he says :

Q. Will you please look at the correspondence contained in Exhibit "A" and tell me the number of the receipt issued for the first loan of one hundred thousand dollars ? A. The number in 323.

Q. When the first fifty thousand dollars was paid back, the accountant of the bank asked for the return of that deposit receipt? A. Yes, but he asked that through error.

Q. But it was returned? A. It was.....

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.

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 in that way.

Re-examination by Mr. Hall, on behalf of defendant.

Q. You say in your cross-examination that the Government were not notified in any way about there being an error in the application of these two sums of fifty thousand dollars each. I suppose you mean no notice was sent prior to the letter of the 10th and 19th of November 1883? A. Yes, when I asked to get the return of the letter of May 11th, 1883, that was given by the defendant, Mr. Ogilvie, to the Government.

This statement, so far as it relates to the agreement with the bank, is corroborated by the respondent, who was examined on his own behalf. The reply of Mr. Thomas Craig to the request of the respondent to get back the letter of guarantee and also the two letters of Mr. Craig written in November and October, 1883, demanding the surrender of the letter as being paid, confirm his statement under oath made fourteen years afterwards that he instructed his accountant, James M. Craig, to apply the two payments to the last loan.

The trial judge maintained the plea of error and I agree with him that it is well founded, not only in fact, not also in law.

The appropriation of payment was suggested by the bank, but it was agreed to and carried out by the Gov-

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ernment and may fairly be considered as one made by the creditor within the meaning of article 1160 of the civil code. The enactment of this article, moreover, is not limited to the case where the debtor has omitted to make an imputation, but provides generally for the case where the debtor has accepted a receipt in which the creditor has imputed, as was done in this instance by returning receipt no. 323, as requested.

It must be noticed that in this respect, the Quebec civil code is much broader than the Code Napoleon. Our own code, art. 1160, says :

When a debtor of several debts has accepted a receipt by which the creditor has imputed what he has received in discharge specially of one of the debts, the debtor cannot afterwards require the imputation to be made upon a different debt, except upon grounds for which contracts may be avoided.

The Code Napoleon, art. 1255, limits the remedy of the debtor to "*dol ou surprise de la part du créancier.*" The Louisiana code, art. 2161, has reproduced the latter. Error is not mentioned. Error, however, is a cause of nullity of contract, whether common to all the contracting parties or personal to one of them only, and can be proved by verbal testimony ; arts. 991, 992, 1000 C. C. It can be invoked at any time before thirty years' prescription is acquired under art. 2242 C. C., different from art. 1204 of the C. N. which allows only ten years from the date of its discovery.

The appropriation of payment, made in this case, can therefore be attacked at the present time by the debtor for any of the causes for which he may impeach any contract he has made or assented to. The surety is in the rights of the debtor and it is an elementary principle that he can oppose all the exceptions which are not purely personal to him. Arts. 1031, 1958 C. C.

What are the legal consequences of this error ? The principles which govern matters of error have been

recently laid down by this court in *Delorme v. Cusson*, (1), and it is sufficient to refer to what we said in that case. The imputation made by James M. Craig, in the name of the bank, although accepted and carried out by the Government in good faith, must be set aside, not only because it was unauthorized, but also because, even if authorized, it was made by error. The parties must be placed in the same position they were before the mistake or error was made. True, if any damage has thereby been suffered by the Government, the debtor, or in this case the surety, must indemnify them. But the Government has not pleaded any; none has been shown; the very opposite is proved. The first deposit receipt no. 323 has been returned, it is true, but it was a mere acknowledgement of debt which was never denied by any one, and if disputed could be otherwise proved. The Government continued to hold its equivalent in value, deposit receipt no. 346, for all the special deposit receipts were of like commercial value. They were collected on the estate of the bank without any question as to the amount. By timely notification on the part of the bank, they would have irrevocably lost their recourse against the surety. They had no control over that. The bank alone first could tell whether Mr. Ogilvie would be discharged or not. It was the privilege of the bank, free from any interference or action of the Government who could do nothing, except if the bank had been inactive. Without the error committed by the accountant of the bank, how could the Government reasonably expect to save the guarantee of the respondent? The Finance Department had so little hope of this result that when, on the 7th of July, they proposed to receive \$100,000 in two payments, they did not say: We will keep deposit receipt no. 346, but, "we will return

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you one of the receipts for \$100,000 which we now hold," meaning any receipt you indicate. Under these circumstances the imputation should be set aside as having been made by error.

What is the position of the surety in such a case? No conventional imputation was made, and therefore he is discharged by operation of law, the debtor having more interest to pay the last loan than the first or second, because he frees himself of two creditors and relieves his friend at the same time. It may also be said that the third loan is the most onerous, as it is due by two debtors. Such is the meaning of Art. 1161 of the Civil Code, similar to Art. 1256 of the French Code, as laid down by a well settled jurisprudence both in Quebec and in France. *Brooks v. Clegg* (1); *Doyle v. Gaudette* (2); arrêt of the 3rd August, 1705, reported in Augéard; *Dénisart Vo. Imputation de paiement*, no. 6; Cass. 24th August, 1829; Grenoble, 29th July, 1832; Paris, 26th Nov. 1833, all reported in Delvincourt, 32, 2, 572, 594; Cass. 19th Mars 1834, Dal. Jur. Gén. vo. Cautionnement, n. 43; Orleans, 3rd April, 1851, S. 51, 2, 555; Dijon, 20th Dec. 1878; Cass. 19th Nov. 1879, S. 81, 1, 211; Agen, 24th May, 1886; Lyon, 27th Oct. 1888, and Bordeaux, 9th Jan. 1889, quoted in *Pandectes Francaises Rép. Alph.* 1893, vo. Oblig. n. 3541; Pothier, Oblig. n. 567; 7 Toullier, n. 179; 2 Delvincourt, p. 770; 12 Duranton, n. 199; 4 Mar. 726; 2 Poujol, p. 223; 4 Boileux, p. 552; Carrier, Obl. 245; 4 Aubry et Rau, n. 320, note 12; 5 Colmet de Santerre, 201, bis. 2; 5 Demolombe, 62; 17 Laurent, 619; 3 Larombière, art. 1256, n. 5; 8 Huc. p. 117; 2 Baudry-Lacantinerie, 5th ed., p. 761; Dal. Jur. Gen. 1893, 2, 425, notes 5 to 7; 2 Molitor, 986.

Let us suppose that no error has been committed by the bank in making the imputation; is the respondent

(1) 12 L. C. R. 461.

(2) 20 L. C. Jur. 134.

yet liable? The issue presents another feature which has been merely alluded to by the learned trial judge, without drawing any conclusion applicable to the case, namely: Was the imputation made at the very moment of the payment or payments? The learned judge, taking the view he did of the plea of error, no doubt considered that it was not necessary to examine this point of fact, although he lays down the rule of law that any appropriation of payment, whether by the debtor or the creditor, must be made at the instant of payment, and he quotes arts. 1158 and 1160 of the Civil Code and also Rolland de Villargues, vo. Imputation, p. 169; he finally draws the attention to the difference that exists between the English and the Civil law; for our Code as well as the French Code have merely reproduced the Civil law.

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Thus, (he concludes), 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, determined that it is his, and not, as with us, the debtor's, presumed intention which is to govern.

See also notes to Clayton's case in Tudor's leading cases.

The civil law, which must govern this case, is undoubtedly as stated by the learned judge. Art. 1158 C. C. says:

A debtor of several debts has the right of declaring when he pays what debt he means to discharge.

Art. 1160 :

When a debtor of several debts has accepted a receipt by which a creditor has imputed what he has received in discharge specially of one of the debts, the debtor cannot afterwards require the imputation.

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to be made upon a different debt except upon grounds for which contracts may be avoided.

The jurisprudence seems to be well settled that the imputation by the creditor, as well as that by the debtor, must be made at the very instant of payment, and that likewise the receipt mentioned in art. 1160 must be given, or supposed to be given, at that very time, and in accordance with the facts then existing. No doubt the creditor and debtor could agree, before or after, as to the imputation, but it cannot be so made to the detriment of third parties.

Toullier, vol 7, n. 176 :

Si le débiteur ne fait pas l'imputation, le créancier a le droit de la faire, pour vu que ce soit à l'instant même du paiement, et dans la quittance.

Larombière, art. 1255, n. 2 :

D'autre part, le créancier doit le faire à l'instant même du paiement.

Aubry et Rau, vol. 4, no. 320 :

Lorsque le débiteur ne déclare pas qu'elle est l'obligation qu'il entend acquitter, l'imputation faite par le créancier, au moment où il reçoit le paiement, doit obtenir son effect.

Laurent, vol. 17, n. 611 :

Pothier dit que si le débiteur, en payant, ne faite pas d'imputation, le créancier à qui il est dû pour différentes causes peut la faire par la quittance qu'il lui donne. L'article 1255 (1160 of the Quebec code) consacre implicitement ce droit.

Pothier y met deux conditions. Il faut d'abord que l'imputation ait été faite dans l'instant. L'article 1255 ne reproduit pas cette condition, mais elle résulte de la nature même du paiement. Imputer, c'est payer ; donc l'imputation doit se faire lors du paiement soit par le débiteur, soit par le créancier.

Baudry-Lacantinerie, vol. 3, p. 761, 5th ed :

Le créancier doit faire cette imputation au moment même du paiement ; après il serait trop tard, car il se trouverait en présence d'une imputation faite par la loi, et il n'aurait pas le droit de la modifier.

At no. 1058, he mentions the case of an imputation agreed to by both the creditor and the debtor ; he holds

this imputation valid, but it must be made at the time of payment :

Cette imputation, effectuée au moment du paiement, devrait être respectée alors même qu'elle causerait préjudice à des tiers.

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He quotes in this sense an arrêt of Grenoble, 25th of June, 1892, D. 93, 2. 425. See also Pandectes Françaises, Rép. Alph. vo. Obl. n. n. 3484, 3489; *Bloodworth v. Jacobs* (1); *Adams v. Bank of Louisiana* (2). In *Bloodworth v. Jacobs* (1), Eustis C. J., of the Court of Appeals of Louisiana, said :

The rules concerning the imputation of payments were laid down with such admirable clearness and precision in the Roman law that they have undergone very little change since, and the learned counsel who argued this case concur in their exposition of them.

The debtor has first the right to make the imputation ; if he does not exercise this right, it then appertains to the creditor ; if neither makes the imputation, the law makes it for them ; and in all cases the imputation takes place in one of these modes at the time payment is made, it being understood that where the imputation is made by the creditor, the debtor is always protected against surprise as well as against fraud.

After the debtor shall have accepted a receipt in which the imputation is made by the creditor to any particular debt, it becomes irrevocable, unless there has been surprise or fraud on the part of the creditor.

But can the debtor and creditor agree in advance, but after the creation of all the debts, that any future payment shall be applied to any particular debt, to the detriment of the surety who has not been consulted, although he has an eventual right of being discharged ? I have not been able to find, in France or Quebec, any decision or opinion of the commentators in point, although the general principle is laid down that the creditor or debtor or both cannot interfere with the rights of third parties. Pand. Fr. Rép. Alph. vo. Obl. n. 3512. Of course, the authorities admit the legality of an imputation agreed to in advance by

(1) 2 La. An. 24.

(2) 3 La. An. 351.

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all the interested parties, including the surety; Caen, 17th April, 1869; D. 71, 2, 184; 17 Laurent, 613; 28 Demolombe, 62; Pandectes Françaises, vo. Ob., n. 3591; and a decision is quoted to the effect that an imputation made on a subsequent transaction, at the very time it was closed, would also bind the surety, although not consulted. But, if the imputation be settled only by the creditor and debtor on past transactions, no one has ventured to define the position of the surety, not assenting or even consulted. I cannot see how an agreement of that kind can have any effect in so far as he is concerned. Contracts have effect only between the contracting parties and cannot affect third parties, except in the cases specially provided by law. C. C. 1023, 1028. Articles 1158 and 1160 authorize imputations of payment by the debtor or creditor or both, provided they are made at the moment of payment. Therefore they cannot be made at any other time, and if not so made would not be binding upon third parties. Of course, an imputation made at the time of payment, as previously agreed to, would bind the surety, not in consequence of the agreement, but of the imputation being made at the time fixed by law. But this is not what took place in the present case.

The information of the Attorney General alleges, par. 5, that :

On the 9th day of July, 1883, the said Exchange Bank paid to Her Majesty the sum of \$50,000 on account of the first advance or loan above mentioned, and at the same time delivered to Her Majesty a deposit receipt No. 358 to cover the \$50,000 remaining on deposit of such first loan, and Her Majesty, at the request of the said bank, returned the deposit receipt numbered 323, which had been issued by the said bank to the Government for the said first advance or loan of \$100,000.

6. That on the 16th day of August, 1883, the said bank repaid to Her Majesty the remaining \$50,000 of the first advance or loan, and

Her Majesty, at the request of the said bank, returned to the said bank the deposit receipt No. 358, which had been received in respect of the said balance, as mentioned in the last preceding paragraph hereof.

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The respondent, in his pleas, does not allege any particular day of payment; he simply says that the \$100,000 were paid by the bank "prior to its going into liquidation, and should be, and defendant claims, must be imputed and paid in payment of said last deposit."

In the course of the argument which was presented to this court, the parties seem to have overlooked the time the appropriation of payment was made. In my humble opinion this point cannot be ignored or dismissed, simply because it was not taken up at the hearing. It is clearly raised by the issue, and fully covered by the evidence, and I consider that the respondent is entitled to the benefit of the same. As I understand the case, it was the duty of the appellant to prove the allegation contained in his information that the imputation had been made by the Government at the request of the bank, and on the 9th of July and 16th of August, respectively. Has the appellant made that proof? What are the real facts? Mr. Dickieson, the bookkeeper of the Department of Finance, says that the money was

paid back by a transfer from the deposit to the ordinary cash account and we checked against that.

Q. And then you got the whole of the amount?—A. Yes.

Q. And that explains the terms of those two receipts exhibits 5 and 4?—A. Yes.

Mr. NEWCOMBE: And the other \$50,000 paid in the same way?—A. Exactly in the same way. I was going to say that the bank did not give us a cheque for the \$50,000, but they transferred to our credit in the current account \$50,000 twice, and sent us a receipt.

We have here the proof that the whole \$100,000 were actually paid by the bank; but Mr. Dickieson does not say precisely when they were so paid; neither

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does he state whether the money was checked out in two payments of \$50,000 or in parts of \$5,000 or \$10,000 extending over several days, as Mr. Courtney had agreed to do. The cheques of the Government are not produced; they were likely never retired from the bank, and shared the fate of the other papers.

The books of the Government show conclusively that the two payments were made on the 10th of July and 17th of August. and not on the first loan but on the three loans generally, without any special imputation. The receipt no. 358 is not even charged. The Government account is as follows:

Exhibit C.

Exchange Bank, Montreal.

(Special Account.)

		\$	cts.	\$	cts.
1883.					
April 12.	To cash.....	100,000	00		
17.	"	100,000	00		
May 11.	"	100,000	00		
July 10.	By cash.....			50,000	00
Aug. 17.	"			50,000	00
1885.					
Feb. 15.	By Exchange Bank liquidation account.....	200,000	00		
		300,000	00	300,000	00

This statement *prima facie* at least makes proof against the Crown; C. C. 1222; *Darling v. Brown* (1). It shows that no special appropriation was made and that, in consequence, the respondent was discharged by mere operation of law. No error is alleged and none is proved. No explanation is even offered. The burden of proof lies upon the appellant to show that the facts relating to the payments establish a different case.

Speaking from memory, Mr. Craig swears that the payments were made "at the date or about the date he (Mr. Courtney) requested." He adds:

(1) 1 Can. S. C. R. 360; 2 Can. S. C. R. 26.

By the correspondence, it seems that by letter of the 9th of July that fifty thousand dollars was sent to him and a new deposit receipt for fifty thousand dollars sent, with request to return the old one.

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The fact is that, outside the Government books, the only available evidence is to be found in the correspondence between the bank and the Department of Finance, whether carried on by mail or otherwise, does not appear, but, from its perusal, we may infer that it was by mail, which would require one intervening day at least for transmission and reply. It is far from being satisfactory; it is not supplemented, nor explained by any verbal testimony. As it is, it must be accepted in its entirety and not in pieces; and, in my humble opinion, it does not support the contention of the Crown.

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On the 31st of May the bank was informed by letter that on the first day of July next, the Dominion Government will require the sum of \$50,000 to be transferred from the special deposit account with your bank to the general account.

On the 29th of June Mr. T. Craig wrote: "I shall be greatly obliged if you will postpone it until after the 20th," meaning, of July.

On the 30th June, Mr. Courtney replies;

I must have the \$50,000 turned into cash on Tuesday (which the calendar for 1883 indicates to have been the 5th July), but 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.

On the 4th of July, Mr. Courtney writes about the payment of interest, and adds in a P. S.:

I have not turned into cash yet the \$50,000 of which notice was given,

meaning, if I understand him rightly, that he had not yet commenced to draw against the general account, and in face of his letter of the 30th of June, he could not have done so. The natural inference of this P. S. was, however, that the money was in the

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bank to the credit and at the disposal of the Government, to be withdrawn as agreed to.

On the 7th July, Mr. Courtney proposed a modification to the arrangement, but without altering his promise to draw only at the rate of \$5,000 per day.

Referring, he said, 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 will return you one of the receipts for \$100,000 which we now hold. Pray attend to this without delay.

On the 9th of July, James M. Craig answers :

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. Receiver General for \$50,000, and enclose our receipt for \$50,000 placed to the credit of the Finance Department account. Please return deposit receipt No. 323, \$100,000, now in your possession and oblige.

On the 10th July Mr. Courtney replies :

I have the honour to acknowledge the receipt of your letter of the 9th instant, enclosing special deposit receipt for \$50,000, and I have now the honour to enclose herewith your deposit receipt No. 323 of the 13th April, 1883, for \$100,000.

The ordinary receipt for \$50,000 "placed to the credit of the Finance Department account" has been produced by the Crown as exhibit No. 4. It is antedated 1st July, 1883, and shows upon its face that the money had been so "placed" on that day, and in this particular it agrees with the facts and circumstances as they appear from the record. It reads as follows :

Exhibit No. 4.

MONTREAL, July 1st, 1883.

Memorandum Form to
 Exchange Bank of Canada,
 Montreal.

Received from the Hon. the Receiver General for credit of current account with the Finance Department, fifty thousand dollars, being one-half of deposit receipt No. 323, dated 13th April, 1883, for \$100,000 standing in the name of the Hon. the Receiver General.

Please reply on this slip.

JAMES M. CRAIG.

4,000-4-8-'77.

For President.

This document and the evidence establish that the imputation was suggested long after the first so called payment was made, and that no money actually reached the Government on the 9th of July or previously or even on the 10th, although at its disposal since the first. It was not a payment in specie or its equivalent, or even the delivery of an accepted cheque of the bank or of another bank, but a mere exchange of receipts or credits of the same nature and effect,—a mere substitution of the form of the debt—a different acknowledgment of the same, in words only, but not in substance, almost a mere matter of bookkeeping, the actual debit and credit remaining the same. Before this exchange of receipts or credits, the Government could collect at any time, on demand, but then without interest; and after the exchange, the position was the same. In both cases they were simple creditors, first as a special depositor and last as an ordinary one. The liability of the bank was not paid or discharged, but on the contrary continued the same. The operation was so far from being a payment—that is a mode of extinguishing the debt, as contemplated by article 1138 of the Civil Code—that if the bank had failed on the 9th, 10th or 11th of July, or any other subsequent day, but before the full withdrawing of the whole \$50,000, the Government would have been a simple creditor as before, for any amount not withdrawn.

To sum up, these documents establish that at the time of the first payment, two receipts were substituted for receipt no. 323, namely a special one for \$50,000, no. 358 (not produced), which was a renewal in part of no. 323, and an ordinary one, dated the 1st of July (exhibit no. 4) for \$50,000 standing to the credit of the Government in the current account, to be drawn at the rate of \$5,000 a day. Therefore no money was actually paid on the 9th or even the 10th of July, or before, but

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subsequently at the rate of \$5,000 per day, and without any imputation being made at the time of payment or payments, so far as we can judge by the correspondence and the evidence.

The same operation was about repeated with regard to the second payment. On the 14th of August, Mr. T. Craig writes to the Department of Finance :

Referring to our loan from you, and the \$50,000 called, I should like to know if you have decided to wait until the 1st September for payment. Doing so would be a great convenience to us, but if that is impossible, I shall be greatly obliged if you will draw on us only at the rate of \$10,000 every third day.

On the 15th the department answers :

As I wrote you the end of last month, my instructions were to call upon you to place \$50,000 (of which due notice had been given) at the credit of the Receiver General's ordinary cash from the amount now at interest. I do not see how I can consent to its remaining until the 1st September. I shall however, be most happy to comply with your request about drawing out the money and will make it as easy as I can. Please send us a receipt showing that the amount has been transferred from "interest" to current account with the accrued interest thereon.

On the 16th, the bank, through James M. Craig, replied :

I beg to acknowledge the receipt of your letter of the 15th instant, and herewith enclose receipt showing the current account with the department credited \$50,315.07 (the \$315.07 being for interest). Please return deposit receipt no. 358—\$50,000, in favour of the Receiver General and oblige.

Whether special deposit receipt no. 358 was returned or not, does it not appear from the evidence.

The ordinary receipt referred to in the letter of the 16th, is plaintiff's exhibit no. 5, and reads as follows :

Exhibit No. 5.

|                          |      |                            |
|--------------------------|------|----------------------------|
| Memorandum               | Form | To                         |
| Exchange Bank of Canada. |      | MONTREAL, 15th Aug., 1883. |
| Montreal.                |      |                            |

Received from the Receiver General, for credit of current account with Finance Department the sum of fifty thousand three hundred

and fifteen  $\frac{1}{100}$  being for deposit receipt no. 358, within terest at the rate of five per cent. to date.

JAMES M. CRAIG,  
D. M. G.

Please reply on this slip.  
4,000-4-8-77.

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It appears from this document that when the second payment was made—that is, when the transfer was made from the special deposit account to the general account on the 15th of August—no imputation was made; this was only done on the 16th by the letter of James M. Craig.

It may be said that the transfer was not completed till it was accepted by, or at least notified to, the Government, that is on the 16th or 17th of August. But the acceptance had been made in advance, the transfer being in fact requested by the Government. But suppose the transfer was not perfect till so notified or accepted; it is admitted that no cash was paid either on the 15th, 16th or 17th of August and that an ordinary receipt, dated 15th August, 1883 (Exhibit no. 5) was merely substituted for deposit receipt no. 358, to be drawn against “at the rate of \$10,000 every third day.”

To conclude, the above documents show only a provision or arrangement for payments, and no actual payments. With regard to the first payment, cheques could not be drawn before the 11th of July, and it must be remembered only at the rate of \$5,000 per day, and with regard to the second one, before the 18th of August, at the rate of \$10,000 every third day—that is in each case, after the imputation had been made by the bank. At all events, it is clear to me that the imputations were not made at the time of the payments.

It is not essential to the validity of a payment that it should be made in cash; its equivalent may be accepted; any form or mode of payment may

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satisfy the debtor and creditor, either by bills, notes, transfer of credits, novations, compensation, *dation en paiement*, or otherwise. But no matter how made, it must have the effect of extinguishing the debt. So say all the commentators, both modern and ancient; 17 Laurent 597; 18 Id. 323; 27 Demolombe 26; 4 Larombière, art. 1235, n. 1; 4 Marcadé 661; Domat. liv. 4, tit. 1; Pothier, Obl. 493; Rousseaude Lacombe, vo. Payement n. 12; Denisart, vo. Payement, nos. 1 and 14; C. N. Art. 1234. Likewise under the Quebec Code, a payment to be perfect must be one which *ipso facto* operates the extinguishment of the debt. Art. 1133. A payment will bind the surety only when so made; and consequently it is only when so made, and at the very time the debt becomes extinct, that any imputation of payment, whether conventional or legal, can affect him. Any other payment is a mere agreement. In this case, the substitution of receipts made in July and August, 1883, did not extinguish the debt and therefore did not constitute legal payments. At the time the payments were truly and really made, that is when the monies credited to the general account were checked out by the Government and were actually delivered by the debtor and received by the creditor, as contemplated by article 1139 C. C., no imputation was made by either of them, and consequently, according to the authorities, the surety was discharged under article 1161 of the Civil Code.

It may be said that the Government, by withdrawing the money as agreed to, has made the imputation at the time they actually received it. It cannot be contended that such imputation was stipulated at that moment; the Government simply received the money placed in its credit without saying anything. And how can an imputation be presumed from what had



been done or agreed to previously? I have endeavoured to show, and I believe satisfactorily, at least to my mind, that any such action or agreement was null and void in so far as the surety was concerned, and cannot affect him.

Upon the correspondence and the evidence I have no hesitation in arriving at this conclusion; but even if any doubt was possible, I would give the benefit of it to the respondent, not only by reason of the equity of the case, but especially in face of the books of the Department of Finance, Exhibit C. To my mind, the absence of any conventional imputation at the time the moneys were checked out is a reasonable explanation of this exhibit, for I must presume that the Finance Department knew the laws governing the case.

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

*Appeal allowed with costs.*

Solicitor for the appellant: *E. L. Newcombe.*

Solicitor for the respondent: *J. S. Hall.*

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