1884
*May. 16.
1885
*Jan. 12.

GEORGE MOFFATT (DEFENDANT).....APPELLANT;

AND

THE MERCHANTS' BANK OF CANADA (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE CHANCERY DIVISION OF THE HIGH COURT OF JUSTICE FOR ONTARIO.

Deed— Construction of—Estoppel—Misrepresentation.

G. M., a man of education, well acquainted with commercial business, executed a bond to pay certain sums of money, in certain events, to the Merchants' Bank of Canada. By an

* PRESENT.—Sir W. J. Ritchie, C. J., and Strong, Fournier, Henry and Gwynne, JJ.

agreement, bearing even date with the bond, it was recited *inter alia* that in consideration of a mortgage granted to the bank by M. Bros. & Co., the bank had agreed to make further advances to M. Bros. & Co., joint obligors with G. M., and parties to the agreement, and that the agreement was executed to secure the bank in case there should be any deficiency in the assets of the firm, or in the value of the property comprised in said mortgage, and to secure the bank from ultimate loss. The agreement contained also a proviso that if the firm should well and truly pay their indebtedness, then the bond and agreement should become wholly void. In a suit brought upon the said agreement against G. M., alleging a deficiency in the assets of the firm and indebtedness to the bank, G. M. pleaded that the agreement had been executed by him on representation made to him by one of his co-obligors that it was to secure the bank against any loss which might arise by reason of the refraining from the registration of the mortgage, or by reason of any over valuation of the property embraced in the mortgage, and not otherwise. The bank, the plaintiffs, made no representations whatever to the defendants.

Held (affirming the judgment of the Court below, Gwynne, J., dissenting), that G. M. was bound by the execution of the documents, and was liable upon them according to their tenor and effect.

APPEAL from the judgment of Ferguson, J., sitting as a judge of the Chancery Division of the High Court of Justice for Ontario (1).

Leave to appeal direct to the Supreme Court of Canada, without any intermediate appeal being first had to the Court of Appeal for Ontario, was given by Gwynne, J., under sec. 6 of the Supreme Court Amendment Act of 1879, on the ground that the Court of Appeal for Ontario would be bound by the case of *Cameron* v. *Kerr* (2), whereas the appellant sought to avoid the effect of that decision in this action.

The facts of the case, as set out in the judgment of Mr. Justice Ferguson in the court below, are as follows:

"On and prior to the 26th day of January, 1874, the

(1) 5 Ont. R. 122. (2) 3 Ont. App. R. 30.

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commercial firm, Moffatt Bros. & Co., being composed of Lewis Moffatt, Kenneth Mackenzie Moffatt and Lewis Henry Moffatt, were largely indebted to the plaintiffs for advances made, and the plaintiffs held the commercial paper of the customers of the firm for such advances, this being the kind of paper upon which the advances had been made; and the firm then applied to the plaintiffs for additional advances for a limited period, and it was agreed that such additional advances should be made upon the plaintiffs receiving security for the indebtedness of the firm, which was $153,011. In pursuance of this agreement, a mortgage upon certain lands and premises was executed by the members of the firm. The proviso in the mortgage so far as material here was as follows: Provided this mortgage to be void on payment of $153,011 in nine months from the date hereof (the 26th January, 1874), and all bills of exchange, promissory notes, drafts and other paper on which the firm were liable to the plaintiffs on the 31st day of December, 1873, together with all renewals, substitutions and alterations thereof, and all indebtedness of the firm to the plaintiffs in respect of the same, and it was in the proviso stated that the mortgage was intended to be a continuing security to the plaintiffs for the amount, notwithstanding any change in the membership of the firm either by death, retirement therefrom, or addition thereto, and that the mortgage was also to secure and cover any sum due, or to become due, in respect of interest, commission upon the notes or renewals, or other commercial paper. This mortgage was in favor of Archibald Cameron, who was a trustee for the plaintiffs.

"On the same day (the 26th January, 1874,) an agreement was executed between Lewis Moffatt of the first part, Kenneth Mackenzie Moffatt of the second part, the defendant of the third part, and the plaintiffs of the fourth part.

This agreement recited the facts of the indebtedness, that the plaintiffs had refused to make further advances to the firm, and had threatened to close the account and compel immediate payment thereof, unless they received additional security for the advances, and that the mortgage bearing even date with the agreement had been executed.

"The agreement further recited that in consideration of the security, the plaintiffs had agreed to make further advances to the firm, and that the agreement was executed to secure the plaintiffs in case there should be any deficiency in the assets of the firm, or in the value of the property comprised in the mortgage, and to secure the plaintiffs from ultimate loss, and contained a covenant by the parties thereto of the first and second parts, that the capital of the party of the second part, then invested in and forming part of the assets of the firm, should not be withdrawn therefrom until the mortgage should be fully paid and satisfied, unless with the consent of the plaintiffs. Also a covenant by the parties to the agreement of the first, second and third parts in consideration of the premises, and of the acceptance by the plaintiffs of the mortgage and agreement to pay to the plaintiffs, and the covenantors thereby declare themselves jointly and severally indebted to the plaintiffs, their successors and assigns in the sum of ten thousand dollars, to be well and truly paid in nine months from the date of the agreement, as secured by a money bond bearing even date therewith. The agreement also contained a proviso, that if the party of the second part thereto should not withdraw his capital from the firm until the indebtedness of the firm to the plaintiffs should be paid and satisfied, and that if the firm should well and truly pay their indebtedness to the plaintiffs, then the bond and agreement should become wholly void. The agreement also pro-

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vided that the plaintiff should be at liberty to deal with the firm or their successors, and to make such business arrangements as they might deem just and proper, and that nothing thereby done should alter, impair, diminish or render void the liability of the parties to the mortgage bond and agreement, and that the doctrines of law and equity in favour of a surety should not apply to the prejudice of the plaintiffs in consequence of any act done, committed or suffered by them, unless the parties or some one of them shou'd have previously notified the plaintiffs of their objection thereto.

"One the same day a money bond in the penal sum of $20,000 in favour of the plaintiffs was executed by Lewis Moffatt, Kenneth Mackenzie Moffatt and the defendant. The condition of the bond was that if the obligors and each of their heirs should jointly and severally well and truly pay or cause to be paid to the plaintiffs, their successors and assigns, the just and full sum of $10,000 in nine months from the date thereof without any deduction, &c., then the bond to be void, otherwise to remain in full force and virtue.

"The plaintiffs bring this suit upon the said agreement and bond against George Moffatt as a sole defendant, alleging that the indebtedness of the firm Moffatt Bros. & Co., to them the plaintiffs, continued from the date of the time of the giving of the securities as aforesaid to the time of an assignment in insolvency of the said firm on the 12th day of August, 1875; and that it has continued to a large extent thence hitherto, and the plaintiffs allege and charge that the said firm did not well and truly pay their indebtedness to the plaintiffs, and that there is a deficiency in the assets of the firm and in the value of the property mortgaged to the extent of $50,000; and that they, the plaintiffs, are entitled to be paid the sum of $10,000 and interest by the Defendant George Moffatt, and ask that it may be declare

that the sum of $10,000 is due and payable by the defendant under and by virtue of the said agreement and bond, and that the defendant may be ordered to pay the same and interest and the costs of this suit.

"The defendant, in his defence, says that shortly before the execution of the documents that have been before mentioned, he was informed by Lewis Moffatt that at the request of the plaintiffs he had agreed to execute a mortgage upon certain real estate to secure the then indebtedness of the firm to the plaintiffs, and that the property to be comprised in the mortgage had been by him represented to the plaintiffs as being of the value of $50,000; and that he was desirous that the execution of this mortgage should not become known through the registration thereof, and so impair the credit of the firm, and that he and the plaintiffs had agreed that they should refrain from registering the mortgage, and also from having a valuation made of the property; and that he Lewis Moffatt on the same occasion stated that the plaintiffs were willing to agree to the foregoing—provided he could give them security against any loss which might arise by reason of the refraining from the registration of the mortgage or by reason of any over-valuation of the property embraced in the mortgage, and that upon these representations, he, the defendant, consented to become surety for such purposes and not otherwise; and that Lewis Moffatt thereupon presented certain documents to him the defendant for execution—at the same time informing him that they had been prepared in accordance with the understanding before mentioned as to the nature and extent of the intended suretyship by his solicitors, who were also the solicitors for the plaintiffs, and that relying on the assurance of the said Lewis Moffatt, and the said solicitors through him, that the documents correctly expressed, and were strictly in accordance with the nature and ex-

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tent of the suretyship which he had agreed to enter into, he executed the documents without reading them or examining their contents, and without consulting a legal adviser or obtaining advice respecting them; and that if he, the defendant, had known that the tenor and effect of the documents were in any respect different from, or could be construed to increase the liability that he had as aforesaid consented to assume, he would not have executed them. The defendant also says that he never agreed to become in any way liable as surety for any deficiency in the assets of the said firm, and that the documents sued on cannot, nor can either of them be held to so operate. He also says that the mortgage was agreed to be given and was intended to secure the plaintiffs against any loss, and none other—that they might sustain upon the commercial paper of the customers of the said firm held by the plaintiffs on the 31st day of December, 1873; and the then existing indebtedness of the said firm to the plaintiffs as represented by the said commercial paper, and all renewals, alterations or substitutions thereof; and that the said indebtedness so secured had long before this suit been extinguished and ceased to exist, and this the defendant says is an effectual bar to the plaintiffs' claim. The defendant contends that the mortgage was not a continuing security for any amount of indebtedness up to the of $153,011; but only a continuing security for the due payment of the bills and promissory notes in existence and under discount on the 31st day of December, 1873; and any renewals, alterations and substitutions of the same, and that he cannot be made liable as surety otherwise, and he alleges that all such bills and notes had been paid; and satisfied before this suit.

"The defence also alleges that large portions of the said $153,011 were not at the time, the 31st December,

1873, debts contracted to the plaintiffs, nor for which the plaintiffs could legally take and hold the mortgage as additional security, and that as to debts not contracted at the time of the giving of the mortgage, and all renewals and substitutions therefor, the mortgage was and is null and void; and the defendant sets up and relies upon the plaintiffs' charter and the General Banking Acts.

"The defendant pleaded by way of supplemental answer, stating the transactions somewhat, but not I think materially differently, and in this supplemental answer he alleges that the agreement and bond sued upon were given for the purpose of guaranteeing and securing the plaintiffs that the property contained in and covered by the mortgage was not over-valued on the estimate of value placed upon it by the firm, and that the same was of the value of $50,000; and for no other purpose, and that the bond and agreement so far as they purport to contain any further or other guarantee do not express the true intention, object and agreement of the parties; and that they were executed by mutual mistake, and that the property was of the value of $50,000; and that no breach of the agreement and bond occurred, and the defendant asks that these documents should be rectified so as to express the true agreement between the parties to them. At the close of the evidence, however, defendant's counsel by leave amended the supplemental answer by striking out the 7th and 8th paragraphs of it so as to abandon any claim to have the document reformed."

The judgment appealed from was rendered on the 26th April, 1883, and was in favor of the respondents for the full amount payable under the bond, $10,000, and interest from the date of the commencement of the action, with costs.

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Dalton McCarthy, Q. C., and *J. H Ferguson* for appellants:

Under the agreement, the appellant's liability was limited to the indebtedness of the firm at the time of the execution of the agreement, and that indebtedness has long been extinguished. It was never suggested or intended that the mortgage was to be a continuing security for anything more than the due payment of bills and promissory notes in existence, and under discount at the date of the agreement, and any renewals, alterations and substitutions of the same, and he cannot be made liable as surety otherwise. If the agreement and bond are drawn to express a wholly different contract from what was intended, such as to make the appellant liable to the respondents for any deficiencies in the assets of the firm of Moffatt & Co., or that he was to save the bank from ultimate loss on its transactions with that firm, *primâ facie* the agreement and bond on the evidence adduced in the case are not the deeds of the appellant, and are not binding upon him. See *Thoroughgoods'* Case (1), *Comyn's Digest* (2), *Edwards* v. *Brown* (3), *Simmons* v. *G. W. R. Coy.* (4), *Kennedy* v. *Greene* (5), *Vorley* v. *Cooke* (6).

The present is not a case where the interest of the third party can intervene. It is a question between the original parties alone, and there has been no negligence here which the plaintiffs can avail themselves of against the defendant. No estoppel can arise in such a case. See *Swan* v. *North British A. Co.* (7).

But even if the appellant is bound by the documents in their present form, we submit that the bond as controlled by the explanatory agreement must be held

(1) 2 Co., Rep. 9 B.
(2) Fait, B. 2.
(3) 1 C. & J., 311.
(4) 2 C, B. N. S. 620.
(5) 3 M. & R. 699.
(6) 1 Giff. 230.
(7) 2 H. & H. 176.

to be only collateral, and his liability thereon can extend only to such of the indebtedness of the firm as existed at the date of the agreement and as was secured by the mortgage; and the evidence shows that all the paper held by the bank at the time of the agreement had been paid and retired, and that the respondents held no renewals or substitutions thereof secured by the mortgage when this suit was brought. *Corley* v. *Lord Stafford* (1), *Royal Canadian Bank* v. *Cummer and Mason* (2).

C. Robinson, Q. C., and *J. F. Smith* with him for respondents:

The appellant and all the parties to these documents were intelligent men of business, and merchants of long standing The appellant was in addition a director of various corporations, and knew thoroughly what he was about, and no one ever attempted to mislead him. He says he did not read the documents, but he evidently had read the guarantee in its original shape, when the documents sued on were presented to him for execution, and had declined to execute it. He afterwards executed it in its altered form on or about 5th February, 1874, subsequent to the execution of the other documents.

On the other hand, the respondents never had any doubt as to what security they required for the continuance of the account; and although at this distance of time it is not possible to recall what took place verbally during the negotiations, the various letters in the case in connection with the documents leave no doubt as to what the respondents intended to have as security, what they believed they got, and what they have since acted and relied on, viz., security from ultimate loss in case there should be any deficiency in the assets of the firm.

(1) 1 DeG, & J. 238. (2) 15 Gr.

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The counsel relied on the cases cited in the judgment of Ferguson, J., in the court below (1), and particularly on *Campbell* v. *Edwards* (2); *Foster* v. *McKinnon* (3); *Dominion Bank* v. *Blair* (4); *Hunter* v. *Walters* (5).

It is said that the indebtedness under the mortgage in the pleadings mentioned has been extinguished and paid off. This question was raised in an action on the mortgage, in the suit of *Cameron* v. *Kerr*, and was decided by Blake, V. C., in favor of the Bank; and on being carried to the Court of Appeal for Ontario it was again decided in favor of the respondents by an unanimous judgment of that court (6). The respondents rely on that case and the authorities there cited, as well as on the expressed intention of the parties in the instruments, and on the evidence; and also on the letters of Mr. Lewis Moffatt. The evidence on this point in this action does not materially differ from that in the case last cited. The object of the taking of the securities was to protect the respondents from ultimate loss on the account, which had grown too large, and had become weak. This account consisted of commercial paper, discounted for the firm, and endorsed by them. On the 31st December, 1873, the date fixed by the parties, it amounted to $153,011, and that amount was made payable in nine months. From that date to the insolvency of the firm (11th August, 1875) the amount of their indebtedness to the bank, although it sometimes increased, never fell below $140,000. This account is kept in banks in a book called the "Liability or Discount Ledger," and is altogether distinct from the ordinary "Deposit Ledger," which is entirely a record of cash transactions. By the contention of the appellant, the debt was all paid off by the time the

(1) 5 Ont. R. 124.
(2) 24 Gr. 171 *et seq.*
(3) L. R. 4, C. P. 711.
(4) 30 U. C. C. P. at p. 608.
(5) L. R. 7 Ch. 81.
(6) 3 Ont. App. R. 30.

mortgage was executed. At the time of the insolvency, the indebtedness of the firm amounted to a much larger sum than the amount secured. The entries in the Liability Ledger of the respondents show this. As to the method of keeping the accounts: see *The City Discount Co. (Limited)* v. *McLean* (1); *Fenton* v. *Blackwood* (2), and *Cameron* v. *Kerr* (3).

Dalton McCarthy, Q. C., in reply, cited *The Commercial Bank* v. *The Bank of Upper Canada* (4).

RITCHIE, C.J.:—

In no sense, in my opinion, can Lewis Moffatt be said to have been the agent or representative of the bank in obtaining the defendant's signature to the bond and agreement, nor should the defendant have dealt with or treated him as such; and if Lewis Moffatt made false representations as to the contents of the bond and agreement, and, if the defendant, a man of business, or, as Mr. Justice Ferguson expresses it, a gentleman of education and well accustomed to commercial business, having been for many years a member of a large and prominent commercial firm, who carried on their business in Montreal, and having been a director in several business corporations for several years, chose, well knowing, as he must have done, the relative positions of Lewis Moffatt and the bank to one another, to act on such representations, and, without reading the bond and agreement, or satisfying himself as to what the contents really were, when he could easily have done so, to execute the same and permit Lewis Moffatt to deal with such bond and agreement so executed by delivering the same to the bank to be acted upon, and they, there being no fraud or misrepresentation on their part, innocently acted upon the faith of the bond and

(1) L. R., 9 C. P. 692.
(2) L. R., 5 C. P. 176.
(3) 3 Ont. App. R. 30.
(4) 7 Gr. 250.

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agreement being valid, the defendant is estopped as between himself and the bank so acting. If the defendant chose to rely on the understanding and belief which he says he derived from Lewis Moffatt, no representations having been made to him on the part of the plaintiffs, as he says, that he is aware of, and did not choose to read the document, or make other enquiries as to its contents, he has only himself to blame.

Mr. Justice Ferguson says (1) :—

> Jackson Rae, who was the plaintiffs' manager at Montreal, and whose evidence was also taken under a commission, says: "The special conditions referred to in my last answer consisted of the requirement of collateral security of a satisfactory character, and the bank preferred to exact personal security." This, however, the firm could not find, but offered instead mortgages covering real estate in the city of Toronto and elsewhere. After much negotiation, the bank at length consented, provided it could be offered in such a shape and of such value as would be satisfactory. The proposed security when defined, was valued by the firm at $75,000 or over, and the firm urged the bank to waive a formal valuation by some independent party, and as an inducement offered to give the bank personal security to the extent of $10,000, to protect it from loss consequent upon over estimate. Subsequently it was further urged upon the bank to waive registration of the mortgage deeds, and that personal security to the amount of $50,000 would be furnished to secure the bank against any injury that might be suffered in consequence of the non-registration. After much negotiation, it was ultimately agreed that if satisfactory personal security were given for the said $50,000, to cover non-registration, and to the extent of $10,000 to cover any possible ultimate loss there might be on the account, the bank would comply with their request to waive registration and special valuation. The evidence of Mr. Rae, the solicitor, who acted for the plaintiffs, is very positive as to the arrangement being in fact as it is stated in the agreement. He appears to have no doubt on the subject, his letter of the 30th of December, 1873, to the plaintiff, then manager at Montreal, speaks of the $10,000 as being in addition to the other security. The recollection of Mr. Lewis Moffatt appeared to be very imperfect regarding many of the particulars of the transactian. Both he and the defendant appear to be under a mistake as to the amount of the valuation of

(1) 5 Ont. R. 135.

the property embraced in the mortgage, about which so much was said, and he had entirely forgotten that he had taken the documents to Montreal at the time of the execution. I think it a fair conclusion upon the evidence, and that I must find that the transaction or arrangement made between him and the plaintiffs, was stated in the documents. The bank - the plaintiffs—did not make any representation whatever to the defendant. Mr. Lewis Moffatt was not the agent for the plaintiffs, I think, as was contended: his representations were not, I think, in any sense, representations of the plaintiffs; it is not shown that any representation was made to the defendant after the 21st of December, 1873, which was nearly a month before the execution of the papers; none was made to him at the time of their execution, and I am of opinion that the weight of authority binding upon me shows that the defendant by executing the documents sued on, under the circumstances disclosed in the case, became liable upon them according to their tenor and effect.

In this conclusion I concur; and, under these circumstances, I think, that the judgment of the Court of Appeal should be affirmed with costs.

STRONG, J.:—

I am of opinion that the appeal should be dismissed for the reasons assigned by Mr. Justice Ferguson in his judgment.

FOURNIER, J., concurred.

HENRY, J.:—

I entertain exactly the same view. A gentleman of intelligence and education, accustomed to mercantile transactions has a document placed before him, and he signs it. The plaintiffs having acted upon it, the defendant is, in my opinion, answerable for the continued indebtedness of the firm with which the agreement was made, and there is evidence that the firm was really indebted (upon going into insolvency) to an amount larger than the agreement, for which this was the security. Under the circumstances in connection with this bond, if the party could get clear of the effect of an

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obligation of that character, a solemn document involving thousand of dollars, if he signs it under a misapprehension, I do not know where the end would be, from the facilities which would be afforded to parties to avoid the payment of liabilities, or to avoid their liability for the enforcement of documents which they executed. I think the appeal should be dismissed with costs, and the judgment of the court below affirmed with costs.

GWYNNE, J.:—

The evidence appears to me to establish beyond all doubt that the utmost extent of the intention of the bank authorities in procuring the preparation and execution of the bond sued upon, was that it should operate, when executed, only as a guarantee to the extent of $10,000 for payment of the balance, if any, which, upon taking a final account of the commercial paper, which at the time of the execution of the bond represented the debt for which the mortgage was given, and of all notes, drafts, &c., in renewal of or which might be given in substitution for any of such commercial paper, as the lands conveyed by the mortgage executed by Messrs. Moffatt Brothers & Co. at the same time should be insufficient to pay; and that this is the extent of the appellants liability upon the bond is, in my opinion, the proper construction to be put upon it, in view of all the surrounding circumstances. The bank were advised that the mortgage could not be taken to secure future advances, and they were willing, upon being secured the then existing debt of Moffatt Brothers & Co., to make them advances to the amount of thirty or thirty-five thousand dollars upon commercial paper of theirs for a limited period of nine months. The mortgage was, therefore, designedly limited to securing the then existing debt, and the design of the bond was to guarantee to the extent of ten thousand

dollars, any balance which might remain unpaid after realizing upon the commercial paper representing the debt, and upon the mortgaged lands. The security of the then existing debt is the object of all the instruments executed simultaneously with the mortgage. True, it is that the promise upon the part of the bank (upon the then existing debt being secured as it was by those instruments,) to make further advances to Messrs. Moffatt Brothers & Co. upon further commercial paper to be furnished by them is recited, but all liability under the instruments, of the parties executing them, is limited to the amount of the then existing debt as set out in the mortgage, and represented by the commercial paper of Moffatt Brothers & Co. then held by the bank. By the mortgage which is executed by Messrs. Moffatt Brothers & Co., that is to say, by Lewis Moffatt, Kenneth Mackenzie Moffatt and Lewis Henry Moffatt, as mortgagors, after reciting that the mortgagors are indebted to the Merchants Bank for debts contracted by the said mortgagors to the said bank in the course of banking, and for which the said bank now hold the commercial paper of the customers of the said mortgagors upon which the said advances have been made, and the said mortgagors have applied to the said bank for additional advances for a limited period to which the said bank has agreed upon receiving security for the present indebtedness; and it is intended by these presents to carry out such agreement, it is witnessed, that in consideration of one hundred and fifty-three thousand and eleven dollars, being the amount of the indebtedness of the mortgagors to the said bank on the 31st day of December now last past, and still unpaid, and of 5 per cent. the lands therein mentioned, are conveyed to Mr. Cameron, manager of the Merchants Bank at Toronto, in fee, subject to a proviso therein contained, that the mortgage should be

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void on payment of one hundred and fifty-three thousand and eleven dollars in nine months from the date thereof, and all bills of exchange, promissory notes, drafts and other paper upon which the said Moffatt Brothers & Co. were liable to the said bank on the 31st of December last preceding the date of the mortgage, together with all renewals, substitutions and alterations thereof, and all the indebtedness of the said mortgagors to the said bank in respect of the said sum, this indenture being intended to be a continuing security to the said bank for the above amount, notwithstanding any change in the membership of the said firm, either by death, retirement therefrom, or addition thereto, and also to secure and cover any sum due, or to become due, in respect of interest commission upon the said notes or renewals, or other commercial paper, and taxes and performance of statute labor. The mortgage then contains a covenant by the mortgagors to pay the said mortgage debt and interest. The bond is then executed on the same day by Lewis Moffatt and Kenneth Mackenzie Moffatt, two of the above mortgagors, and by George Moffatt, the appellant, as their surety in the penal sum of $20,000, conditioned for the payment to the bank of $10,000 in nine months from the date thereof, and on the same day is executed an instrument explanatory of the whole transaction. This indenture recites that the firm of Moffatt Brothers & Co. are indebted to the bank, and that the bank had refused any longer to make advances to them, and had threatened to close their account and to compel immediate payment of their debt, unless the bank should receive additional security for said advances, and that the parties of the first, second and third parts to the said indenture, that is to say, the said Lewis Moffatt, and Kenneth Mackenzie Moffatt, and the now appellant George Moffatt had agreed to give such security, and for that purpose that

the said Lewis Moffatt, Kenneth Mackenzie Moffatt, and one Lewis Henry Moffatt had executed a mortgage of even date to the bank to secure the same, and that in consideration of such security the said bank had agreed to make further advances to said Moffatt Brothers & Co., and that the indenture now in recital was executed to secure the bank in case there should be any deficiency in the assets of the said firm, or in the value of the property comprised in the mortgage and to secure the bank from ultimate loss. The indenture then witnessed that in consideration of the premises Lewis and Kenneth Moffatt covenanted with the bank, that the capital of Kenneth Mackenzie Moffatt then invested in and forming part of the assets of the firm of Moffatt Brothers & Co., should not be withdrawn therefrom until the said mortgage should be fully paid and satisfied, unless with the consent in writing of the bank and the said Lewis Moffatt and Kenneth Mackenzie Moffatt and the appellant George Moffatt, jointly and severally covenanted with the bank that in consideration of the premises and of the bank's acceptance of the said mortgage, and the indenture now in recital, to pay to the bank the sum of ten thousand dollars in nine months from the date of the said indenture as secured by money bond bearing even date with the said indenture. The indenture then contained a clause by which it was declared that if the said Kenneth Mackenzie Moffatt should not withdraw his capital from the said firm of Moffatt Brothers & Co., until the indebtedness of the said firm to the bank should be fully paid, and if the said firm of Moffatt Brothers & Co. should well and truly pay their indebtedness to the said bank, then the said bond and this indenture now in recital should become wholly void. Now, it appears to me, to be very obvious that what is meant by the word "indebtedness" here used is the then existing debt se-

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cured by the then existing commercial paper upon which the moneys constituting the debt were advanced by the bank, and in further security for which the mortgage was given, and it is also, in my opinion, obvious that the words "ultimate loss," as used in this indenture, apply to any loss, if any there should be, upon a final account being taken of the moneys which the bank might receive in respect of the commercial paper then in existence, which constituted the debt secured by the mortgage as additional security, and in respect of all renewals thereof and of all commercial paper which might be accepted by the bank in substitution of such notes, &c., and renewals, and of the moneys arising from the sale of the mortgaged lands. It was only with that debt and with any loss arising in respect of it, that the appellant had anything to do. He never was asked to guarantee and never contemplated guaranteeing the bank against any loss, if any should arise in respect of the future advances which, upon the then existing debt being secured, they promised Moffatt Brothers & Co. to make to them. For such advances the bank were to look alone to the personal credit of Moffatt Brothers & Co., and to the commercial paper upon which such future advances should be made. That this was the clear intention of the bank is apparent from some of the letters which were produced in evidence.

On the 29th December, 1873, Mr. Jackson, the general manager of the bank at Montreal, writes to Mr. Cameron, the manager of the bank at Toronto, as follows:

DEAR SIR,—Referring to the correspondence between us on the subject of Messrs. Moffatt Brothers & Co's. account, I have now to inform you the firm desire to make over security on real estate to extent of $75,000 in value to protect the bank from ultimate loss on the same, and in consideration thereof to procure from the bank an increase temporarily in their present line of discount to the extent of $35,000. I hand you herewith the firm's statement of affairs

also that of Mr. Moffatt's private estate, and I wish you to ascertain from him in what way he proposes to make up the required amount of security, and then submit the whole matter to Messrs. Smith, Rae & Fuller in order to ascertain:

1st. That the bank can legally possess the proposed security and hold it as a protection against ultimate loss on the bills now current or renewals thereof.

2nd. Can any portions of the private estate property be legally pledged to the bank for the same purpose.

3rd. A proper valuation of the property proposed to be mortgaged will be required.

4th. Can this agreement which is now proposed to be made to continue for the period of, say nine months, at the end of which time the bank shall have the right to discontinue discounting for the firm and to recover as best it can upon the bills and securities then in its possession.

I am now awaiting statement of the present position of the firms account with you, on receipt of which, and of Messrs. Smith, Rae and Fuller's report, the board will decide what course shall be taken in regard to the application.

Now, from this letter, which shows the origin of the transaction, it is apparent that what the bank contemplated getting additional security for was the then existing debt—and protection against ultimate loss on the bills then current or renewals thereof. They were not asking for any security for the future advances contemplated to be made to Moffatt Brothers & Co. upon the then existing debt being secured. At this time the guarantee bond sued upon was not contemplated. By a letter of the 30th December, 1873, addressed to Mr. Jackson Rae by Messrs. Smith, Rae & Fuller, they send him their report upon the question submitted to them as contained in the above letter of the 29th December In this letter the solicitors of the bank wrote to the general manager as follows:—

Re Moffatt Brothers.

DEAR SIR,—Mr. Cameron has handed us your letter of yesterday in this matter, and, also the enclosed statement of Mr. Moffatt, and we have seen Mr. Moffatt as to it. On the points stated in your letter, we are of opinion that the bank can take a mortgage or mortgages from

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the different members of the firm as additional security for the present indebtedness of the firm to the bank on the bills now current or renewals thereof.

2nd. That the private property of any member of the firm can be pledged for that purpose.

3rd. Mr. Moffatt is very much averse to greater publicity being given to this matter than is absolutely necessary, and he has gone over the valuation of the properties with us. The first property is a farm, regarding which we know nothing. The second, a part of Collingwood harbor, which had for a long time a merely speculative value. For the last few years it has risen much, and two years ago seven acres were rented for seven years, and one condition of the lease is that the tenant was to erect, keep, and have, at the expiration of the term a saw mill costing at least $6,000. This mill has been built and other improvements made, which, in Mr. Moffatt's opinion, are worth the sum at which the whole property is valued. The warehouse has been valued at $35,000 by the officer appointed by the company in which it is mortgaged for $20,000. As to the mills we know nothing. As to the house Mr. Moffatt states that he holds a policy on the building and contents for $30,000, which he will assign, and the land is certainly valued low at $30 a foot.

Mr. Moffatt offers, in case the bank has any doubt, to give in addition a bond for $10,000 from himself and his brothers George and Kenneth, but does not wish the valuation made for the reason we have before given.

4th. The agreement can be drawn as you propose and for the period; upon this point we had no conversation with Mr. Moffatt."

Now, the bond as here offered, is plainly contemplated as being collateral to the mortgage and as additional security for the same debt as that intended to be secured by the mortgage and as a protection to the bank against ultimate loss on the bills then current, which represented that debt or renewals thereof, in case the property proposed to be mortgaged should prove insufficient for that purpose. The idea that it should operate as a security for any part of the future advances, promised to be made by the bank upon the then existing debt being secured, does not seem to have been entertained by anyone.

On the 14th January, 1874, the Messrs. Smith Rae and

Fuller again wrote to the general manager of the bank as follows:—

Re Moffatt Brothers.

DEAR SIR,—We have consulted (confidentially) with Mr. Bethune in this matter and have come to the conclusion that the best course to take is to take a mortgage in the usual form. This can be taken to Mr. Cameron so that some publicity will be avoided. Your first letter to us proposed to take security upon the real estate for the then indebtedness of the firm being $152,000, and we understand that the bank has arranged to make a further advance to the firm in all of $30,000 in their line of discounts. If this be so, then we do not think these additional advances will be secured by a mortgage under a possible interpretation of the Act, and that it is not your intention to do so; simply the present indebtedness and any renewals of paper securing it.

Again on the 16th January, 1874, they write to him as follows:—

Re Moffatt Bros. & Co.

DEAR SIR,—We have received your telegram and also your letter of the 15th instant. We had previously settled and partly engrossed mortgage and copies covering the properties submitted by Mr. Lewis Moffatt, in which mortgage all the members of the firm, viz., himself, his son and Col. Moffatt join. A bond from Mr. Lewis, Moffatt, Col. Moffatt and George Moffatt, of Montreal, for $10,000, and, also an agreement showing that this $10,000 should be payable in the event of any loss or deficiency in payment of the mortgages, and enabling the bank to make any arrangement with Moffatt Brothers & Co., they deemed proper. We had drawn the mortgage for $153,011, the balance due on the 31st of December, and all renewals or substitution on this account up to this amount. Mr. Bethune agrees with us, and, in fact holds a much stronger opinion than we do regarding the impropriety of taking a mortgage to cover future advances, he holds that this mortgage and bond being given partly upon the promise of further advances is on that account made stronger against any other creditors, and that if taken to cover future advances, the whole security might be set aside. In that view we had advised Mr. Cameron to open a separate account for the future advances beyond $153,011, and to take care that the paper taken on that account should be unexceptionally good. In this view the bank is not likely to sustain much loss as all the private estate of Messrs. Lewis and Col. Moffatt would be liable for $153,011 and George Moffatt for $10,000, should there be any deficiency on this account.

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On the 24th January, 1874, Mr. Jackson Rae, the general manager of the bank, wrote to Mr. Cameron, the manager at Toronto, a letter in which occur the following passages:

DEAR SIR,—I have had several interviews with Mr. Moffatt recently, and he has produced the various mortgages executed in your name in trust for the bank in accordance with the views of your solicitors. The bank has (executed) the $10,000 guarantee bond from Lewis George and Col. Moffatt, and all the documents have been placed in Mr. Moffatt's possession for transmission to your solicitors at Toronto. Mrs. Moffatt's signature to the deeds has yet to be obtained. When this is done, the mortgage may be considered effected. The bank has agreed to delay registration for the period of ten days from this date to enable Mr. Moffatt to procure a bond of indemnity signed by Messrs. Henry Covert and George Moffatt protecting the bank to the extent of $50,000 from any evil consequences which might result to it by refraining from registering the mortgage. If Mr. Moffatt fails to satisfy the bank in regard to this matter within the time named, registration must then proceed.

You will be careful to preserve the old account at about the sum named in the mortgage ($153,011), the additional advances or increased accommodation must be carried on in a new account, which you will understand is not secured, and therefore the paper composing it must be carefully selected. This new account is in accordance with your solicitor's advice.

The indemnity referred to in this letter as to be executed by Messrs. Henry Covert and George Moffatt protecting the bank to the extent of $50,000 from any evil consequences which might result to the bank by reason of its refraining to register the mortgage was given; but it is unnecessary to set out here, for it is not alleged, that any evil consequences did result from the non-registration of the mortgage, nor is any claim now made by the bank as accruing under this guarantee; all that is in question in this suit is as to the liability of the appellant, George Moffatt, under his guarantee bond for $10,000.

A question having arisen as to whether the bank had agreed to give up the guarantee bond for $10,000 upon

receiving the above guarantee to the extent of $50,000 executed by Messrs. Covert and George Moffatt, and a letter having been written upon the subject, of the date of the 7th February, 1874, by Messrs. Smith, Rae and Fuller to the general manager of the bank, the latter replies thereto by a letter dated the 9th February, 1874, addressed to Messrs. Smith, Rae and Fuller as follows :

I have received your letter of the 7th instant enclosing the document as stated, which I now return herewith to be placed in charge of the *Toronto* branch. Mr. Moffatt is in error as to the willingness of the bank to surrender the bond for $10,000 or the deed of agreement in consequence of the execution of the bond of indemnity by H. Covert and G. Moffatt. The latter was taken merely between the bank from loss in consequence of consenting to withhold the mortgage from registration. The bond for $10,000 was accepted in lieu of the requirement as to valuation, and the agreement provides for the continuance of Col. Moffatt's money in the concern as long as the firm continues indebted to the bank.

Col. Moffatt's capital never was removed from the firm, so that no question arises upon that point. The sole question is as to the liability of the appellant under that bond as a collateral security to the mortgage of even date therewith, and in view of the above documents and letters relating to the preparation and execution of the documents, it is, in my opinion, impossible to hold that the bond was prepared or executed with any intent, that it should operate directly or indirectly as security for any part of the future advances which might be made by the bank to Messrs. Moffatt Brothers, or as any protection to the bank against any ultimate loss, if any should arise, upon the taking of an account of such subsequent advances, or for any other purpose than to secure the bank against ultimate loss on an account being taken of the bills, &c., then current, or any renewals thereof, or any paper expressly taken by the bank in substitution for any such paper after realization of the properties comprised in the mortgage. It was as a security against loss in

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respect of the then existing debt alone that the bond was given, and its operation cannot, in my opinion, be extended beyond that purpose.

By the contemporaneous agreement executed for the purpose of defining the extent of the operation of the bond, it is declared to be void if Kenneth McKenzie Moffatt shall not withdraw his capital from the firm, and if Moffatt Brothers & Co., shall well and truly pay their indebtedness to the bank, which indebtedness clearly, as it appears to me, is the only debt which then existed, and to secure which the mortgage was given, and which in that mortgage is described as being $153,011, consisting, as is recited in the mortgage, of bills of exchange, promissory notes, drafts, and other paper upon which the said firm of Moffatt Brothers & Co., were liable to the said Merchants' Bank at Toronto, on the 31st December, 1873, together with all renewals, substitutions and alterations thereof, and all indebtedness of the mortgagors to the bank in respect of said sum, and also any sum then due or to become due in respect of interest or commission upon the said notes or renewals or substitutional paper.

Now, to entitle the bank to recover against the appellant upon this bond, it appears to me to be clear that the onus lies upon them to show that of the moneys constituting the debt of Moffatt Brothers & Co. to the bank, when the bond was given, secured by commercial paper held by the bank, there still remained after realizing upon the properties comprised in the mortgage a sum due to the bank. For any amount so established to be due within the sum of $10,000, the appellant would be liable; but until there should be established to be such ultimate loss upon taking an account, apart altogether of all future advances, of the paper held by the bank at the time the mortgage was given, and of all renewals thereof, and of all commercial paper, if any,

accepted by the bank in actual substitution for any of such paper, and after realization of the mortgaged lands no action could be sustained against the appellant upon his bond. To the taking of such an account, it was absolutely necessary that an account of the secured debt and of the paper held by the bank representing such debt, and of all renewals thereof and of all paper accepted in substitution therefor, should be kept quite separate and distinct from an account of the future advances. And this was well understood by the bank as appears from Mr. Jackson Rae's letter of the 24th January, 1874, to Mr. Cameron, giving him very peremptory instruction to that effect and giving the reason therefor, namely, that any debt to arise in respect of the subsequent advances was unsecured otherwise than by the notes, bills, &c., upon which such subsequent advances should be made, which paper was, therefore, to be most carefully selected by Mr. Cameron. That a loss should arise in respect of the paper which was to be so carefully selected was never contemplated or anticipated. The bank kept no account of the transactions in relation to the old secured debt separate and distinct from the account kept of the subsequent advances. What they did, and the manner in which the paper representing the old secured debt was dealt with, was this: They countinued the account in which the old debt appeared and of the subsequent advances as one account. The customers of Messrs. Moffatt Brothers, who were primarily liable upon some of the commercial paper held by the bank representing the old debt, paid the amounts due on such paper to the bank direct and retired the paper. What amount was so paid to the bank direct, and what notes, bills, &c., were so retired does not appear. Other makers of notes and acceptors of bills held by the bank representing the old debt, were in the habit of paying the amounts

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secured by such paper to Messrs. Moffatt & Co., who were in the habit of paying the sums so paid to them into their credit in the bank. The proceeds of the new discounts constituting the further advance were deposited by the bank to the credit of Messrs. Moffatt Brothers in the same account. The amount to their credit on this account during the first six months after the execution of the mortgage and bond was $1,094,973, of which from 20 to 25 per cent. consisted of cash deposits and the residue of the proceeds of the discounts upon new paper.

By cheques given by Messrs. Moffatt Brothers upon this account, and by direct payments to the bank made by parties, the customers of Messrs. Moffatt, who were primarily liable on the notes and bills, the whole of the notes and bills which the bank had held representing the original debt, which was collaterally secured by the mortgage and the guarantee bond now sued upon were paid, and the notes and bills taken up. No renewals or substitutional paper having ever been given for any of such paper.

Payments so made operated, in my opinion, as direct payment, discharge and extinguishment of so much of the original debt as was represented by the notes and bills taken up, of which the appellant is entitled to the benefit.

Besides the subsequent advances made by the bank to Messrs. Moffatt Brothers upon customers paper the bank advanced to them from $50,000 to $60,000 upon what they knew to be accommodation paper, which moneys were also entered to the credit of the firm in the same account. The result of the taking an account of all these transactions blended into one, is that, after realizing upon the property mortgaged there still remains due to the bank by Messrs. Moffatt Brothers a sum about the same precisely as the amount of the

advances made by the bank upon the accommodation paper. An amount so arrived at cannot, in my opinion, be said to be within the appellant's guarantee. The loss which the bank are seeking indemnity from the appellant for, more properly may be said to have arisen by reason of the bank's own improvidence in making the advances which they made upon the accommodation paper.

It is contended, however, that the bank is entitled to recover this loss from the appellant upon his bond, notwithstanding that the loss should be attributable wholly to the subsequent advances, and even though traceable specially to the advances made upon the accommodation paper, by reason of a clause in the instrument, which provides for defeasance of the bond, which is as follows:

And it is further agreed, that the said parties of the fourth part, (the bank) shall be at liberty to deal with the said Messrs. Moffatt Bros. & Co. or their successors, and to make such business arrangements as they may deem just and proper, and that nothing thereby done shall alter, impair, diminish, or render void the liability of the parties to the said mortgage bond or this agreement; and that the doctrines of law and equity in favor of a surety shall not apply to the prejudice of the parties of the fourth part (that is the bank) in consequence of any act done, committed, or suffered by them, unless the parties hereto, or some, or one of them, shall previously, in writing, notify the parties of the fourth part of their objection thereto.

It is impossible to construe this clause which specially provides that no business arrangements which the bank should make with Messrs. Moffatt Brothers & Co., should have the effect of altering or diminishing the liability incurred by the appellant as appearing in the previous part of the instrument, should nevertheless have the effect of altering by increasing that liability by making the appellants' bond, which, as I have shown, was given and accepted as, and intended to be, a guarantee in respect of the old debt only, and the commercial paper representing it, to be a guarantee also

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against loss in respect of the subsequent advances, including not only those made upon business paper but those also made upon accommodation paper. So to construe this clause would be to defeat the plain intention of all parties at the time of the execution of the bond. In so far as the clause can affect the appellant, it can only relate to such business arrangements as the bank and Messrs. Moffatt may deem just and proper in relation to the subject-matter with which the appellant is concerned, namely, the old debt and the business paper representing it, and the doctrine of law and equity in favor of a surety which are not to be asserted to the prejudice of the bank, must be limited to the same subject-matter in respect of which the appellant is a surety; and sufficient effect can be given to the clause by construing it as providing that the surety should not avail himself of the doctrine of discharge from his liability by reason of any extension of time which might be given to the parties primarily liable upon the banking paper representing the original debt, by renewals, or by reason of the discharge of any of such parties by reason of the bank accepting substitutional paper in lieu of the current paper or renewals thereof. In the view which I take of the documents and of the intention of the parties to them, *The City Discount Co.* v. *McLean* (1) and *Fenton* v. *Blackwood* (2), and such like cases have no application whatever to the present case, which, in my judgment, does not present any question arising upon the rule in Clayton's case as to the right, in the absence of specific appropriation, of applying the oldest item on the credit side of an account in payment of the oldest item of debt. What the evidence shows, in my opinion, is the retirement of the notes and bills which constituted and represented the

(1) L. R. 9 C. P. 692. (2) L. R. 5 P. C. 167.

old debt by specific payment directly to the bank of some of those notes and bills by the parties primarily liable thereon, and by equally direct and specific payment of the residue of such bills and notes by cheques given to the bank by Messrs. Moffatt Brothers upon a fund over which they had, as is admitted, absolute control, and which fund was composed in part of moneys expressly placed in their hands for the purpose of retiring such notes, &c.

Upon such notes having been retired in the manner above stated, and not by renewal or substitutional paper, so much of the old debt, as those notes respectively represented, was paid and extinguished, and nothing has occurred to deprive the appellant of his right to compel the bank to show that the loss in respect of which they now claim indemnity from him, arose wholly out of the transactions connected with the old debt apart from all the subsequent advances; and as the bank has not only failed in establishing this to be the fact, but in my judgment have, on the contrary, shown that it have risen wholly in respect of the subsequent advances, and specially by reason of the advances made upon the accommodation paper, this appeal should be allowed with costs, and the action in the court below against the appellant be ordered to be dismissed with costs (1).

Appeal dismissed with costs.

Solicitors for appellant: *Ferguson & Ferguson.*

Solicitors for respondents: *Smith, Smith & Rae.*

(1) Application was made to the Judicial Committee of the Privy Council for leave to appeal from this judgment and was refused.