THE UNION BANK OF CANADA (PLAINTIFFS) ..... APPELLANTS;

1910

*March 3, 4.
*March 11.

AND

JANE E. CLARK AND ALEXANDER GRAY FARRELL, EXECUTORS OF THE LAST WILL OF JAMES MAITLAND CLARK (DEFENDANTS) .... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Suretyship—Simple contract—Discharge of one surety under seal—Confirmation of original guarantee—Death of surety—Powers of executors—Continuance of guarantee.

C. and others, by writing not under seal, agreed to guarantee payment of advances by a bank to a company. Later, by writing under seal, all the sureties but one consented to discharge the latter from liability under the guarantee, the document providing that the parties did in every respect "ratify and confirm the said guarantee and consent to be bound thereby as if the said Ogle Carss had never been a party thereto."

Held, that the last mentioned instrument did not convert the original guarantee into a specialty and C. having died an action thereon by the bank against his executors instituted more than six years after his death was barred by the Statute of Limitations.

Held, per Davies, Idington and Duff JJ., that the executors had no power to continue the guarantee terminated by C.'s death by consenting to an extension of time for payment of the amount then due notwithstanding the provision in the guarantee that it was to be continuing and that the doctrines of law and equity in favour of a surety should not apply thereto.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment at the trial by which the action of the plaintiff bank was dismissed.

The material facts are stated in the above headnote.

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*PRESENT:—Girouard, Davies, Idington, Duff and Anglin JJ.

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Raney K.C. and *J. A. Hutcheson K.C.* for the appellants.

Watson K.C. and *Lavell* for the respondents.

GIROUARD J.—I concur in the opinion of Mr. Justice Anglin.

DAVIES J.—The question in this appeal is as to the liability of the estate of the late James Clark for the sum of $28,450 due to the bank by the Perrin Plow Co., Ltd., at the time of Clark's death and for which he was liable as guarantor.

The guarantee was given by Clark and four other shareholders of a company called the Perrin Plow Co., Ltd., to the bank, in the year 1898. It is very loosely and carelessly drawn and it is exceedingly difficult to determine just what it means. But it was a continuing guarantee for advances made to the Plow Co. by the bank either by discounting negotiable securities or by overdrafts. It contained this sentence:

> This is a continuing guarantee intended to cover any number of transactions, and agree (sic) that the said bank may deal or compound with any of the parties to the said negotiable securities, and take from and give up to them again security of any kind in their discretion, and that the doctrines of law or equity in favour of a surety shall not apply hereto.

There was nothing to indicate that the guarantors were to be or become primary debtors, and the only meaning I can put upon the above sentence read in conjunction with the other parts of the guarantee is that in dealing with or compounding with the parties to the negotiable securities they discounted for the Plow Co. they could "deal or compound" and take from and give up to them again security of any kind in their discretion, and that in so doing or acting the law or equity in favour of a surety should not apply

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to discharge the surety. But I cannot construe the sentence to have any such wide meaning as the appellant contends for, namely, that it absolutely disclaimed the application of all rules of law or equity to the dealings between the bank and its guarantors and gave the bank plenary powers of extending the times for payment without prejudice to its rights as against the guarantors. Subsequently to the giving of this guarantee one of the guarantors desired to be released, and a document was drawn up and signed by the other guarantors "ratifying and consenting" to his discharge and

confirming the said original guarantee and consenting to be bound thereto as if the said Ogle Carss had never been a party thereto.

The obvious and only intent and purpose of this document which had seals attached was to discharge one of the original guarantors from and retain the liability of the other guarantors upon the original guarantee. It was not to create any new or extended or varied guarantee and whatever object there may have been in attaching seals to it I cannot assent to the proposition that its effect was to transform the original guarantee into a specialty or otherwise to vary or alter it further than discharging Carss might have such effect.

In January, 1900, Clark died having made a will appointing the respondents executors and trustees. On the 28th February, 1900, an agreement was entered into under seal between the executors of the first part, Brodie, Lavell and Patterson, the surviving guarantors of the second part, and the Union Bank of the third part, by which the executors agreed *inter alia* to:

consent to renewal from time to time as may be desired of all notes of the Perrin Plow Company, Limited, in existence at the time of the death of the said James Maitland Clark, deceased, given under the

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aforesaid guarantee and to an extension of time for the payment of same and the interest thereon, and *to the carrying on of the same according to the requirements of the business of the said company* until six months after notice in writing withdrawing consent to further extension is given to said bank by said executors.

The bank evidently assuming and, from the correspondence put in evidence, construing this agreement as a continuing guarantee, not only for advances made to the Perrin Plow Company, Limited, in Clark's lifetime, but for further advances to be made after his death, until his executors called a halt by "giving six months' notice withdrawing consent to further extension," went on advancing to the Plow Company from $28,500, which amount that company owed the bank at Clark's death, up to $298,334 in March, 1907, when it was wound up.

The question on this agreement for our purposes is whether or not the executors had any power whatever to bind the estate in the way they attempted to do by agreeing to the continuance of the business of the Perrin Plow Company and the continuance of Clark's guarantee and liability for the notes in existence at his death guaranteed by him, and to an indefinite extension of time for payment of such notes until they should by six months' notice put an end to such extension.

They had no power as executors to bind the estate by agreeing to "the carrying on of the same," that is of the negotiable securities guaranteed by the testator, *"according to the requirements of the business of the company."* Such a delegation of powers to third parties to extend the liabilities of the estate was of course illegal. It practically placed the estate at the mercy of the Perrin Plow Company. It attempted not only to continue and extend the liability of the estate practically for an indefinite time, but made that

continuance and extension dependent "upon the *requirements of the business of the company.*" It was not an attempted exercise of the reasonable but limited powers executors may possess of extending time for payment of debts due the estate. It was a delegation of their judgment as executors as to the propriety of giving an extension of time for payment of a debt guaranteed by the testator to the primary debtor to be exercised by such primary debtor as the requirements of its business called for. The liability of the estate as guarantor for the payment of the $28,500 was attempted to be pledged as a credit asset of the Plow Company to the bank in the interest and for the benefit of that Plow Company, and to be used "according to the requirements of that company." It was not the interests of the estate but of the primary debtor and its creditor the bank that were considered.

There was no power of any kind in the will to enable the executors to carry on Clark's business or to enter into any arrangement for the continuance of his guarantee and the extreme stretch of the reasonable common law powers of executors entitling them where the business of the deceased is a valuable asset to carry it on for such reasonable time as may be necessary for them to sell it as a "going concern," per Lord Herschell *Dowse* v. *Gorton*(1), could not be invoked to support any such extraordinary and unreasonable agreement as that made in this case. Williams on Executors (10 ed.), pp. 1430-1433, 1554; *Farhall* v. *Farhall*(2); *Re Evans*(3).

The executors' duty was to wind up the testator's business and estate, not to enter into an agreement to

(1) [1891] A.C. 190, at p. 199. (2) 7 Ch. App. 123.
(3) 34 Ch. D. 597.

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continue a business in which the testator only had a collateral interest or to continue indefinitely their testator's guarantee of a debt owed by a limited business company to a bank. Such an agreement was quite beyond their powers and, as against the estate, void. Its disastrous consequences are of course apparent now, but they might well have been anticipated. The bank, strangely enough, without appearing to have taken proper advice went on enlarging enormously their advances to the Plow Company, and treated as an asset of that company under the executors' agreement the testator's guarantee for at any rate the amount of the company's indebtedness at his death, however many extensions were given in the interests of the primary debtor for its payment.

To hold valid and binding on the estate such an agreement as that by which the executors of the estate of a deceased party could put the estate into the melting pot of a precarious and speculative business would be indeed to add a new terror to death.

My conclusions are that the judgment of the Court of Appeal is right; that the original guarantee was not altered in form or character by the document entered into subsequently, releasing one of the guarantors; that the agreement signed by the executors while good to the extent of the admission of the amount of the debt existing at Clark's death, was bad in so far as it attempted to bind the estate in the carrying on of the business of the company with the aid of the continued and continuing liability and guarantee of the estate; that these varied and prolonged extensions discharged the estate from any further liability on the testator's guarantee, and that in any event and whether they did or not so discharge the estate the

Statute of Limitations is a bar to the recovery of the only claim the bank seeks to enforce, namely, the payment of the $28,500 due on Clark's guarantee at the time of his death as admitted by the executors.

The appeal should be dismissed with costs.

IDINGTON J.—This appeal should be dismissed with costs.

The guarantee given by the late Mr. Clark ended upon his death and notice thereof to the appellant.

Its language never was intended to meet any later liability.

It never was intended by the instrument under seal executed by him and others assenting to the withdrawal of one of the sureties to do more than signify such assent and to continue the original liability on the part of the remaining sureties notwithstanding such withdrawal.

The only apparently conceivable purpose of putting that instrument under seal was possibly to avert any question of want of consideration for assenting to the change. It cannot and does not pretend, otherwise than by the withdrawal of one surety, to enlarge the original liability.

The later instrument between the respondent and the appellant as well as other parties represents a breach of trust and a further contemplated breach of trust on the part of the respondents, who were by the will to become trustees of the remainder of the estate, when realized, and liquidated by them as executors, to invest it in the manner specified for the benefit of the testator's family.

The sum of $28,480, which was the total liability of the testator's co-sureties at his death under the

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original guarantee, was taken, regardless of the then solvency of the principal debtor, and of its assets answerable for such liability, and of the then solvency of his co-sureties, and without the slightest regard to the dangers of these assets being lost and these co-sureties becoming insolvent, and without the slightest measure of protection in either regard, as a proper basis to fix as the measure of an indemnity to be met by this testator's estate in future years after incurring all these risks and also those incidental to the business of the principal debtor; and the respondents entered into an agreement on such basis to bind the testator's estate to appellant for the continuation of the primary debtor's liability, the renewal of its notes therefor from time to time, an extension of time for their payment, and the carrying on of the same according to the requirements of its business and confirming and ratifying the liability of the estate for the payment of said sum.

Nor is that all for the same agreement, so far from providing for a charge upon the primary debtor's estate of the said earlier liability of $28,450, expressly provides for the primary debtor assuming a further liability of $15,000 and giving the creditors advancing that sum a priority over any rights respondent might have to indemnity out of the primary debtor's assets.

The $15,000 referred to does not appear to have been anything for which the testator had incurred any legal liability but, as the recital indicates, what might have become a joint liability with others if certain "contracts and arrangements had been completed."

He died suddenly. The project had not ripened and did not concern his estate. But the hopes of some of the parties to this agreement and concerned in that

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project no doubt were disappointed, and to prevent their disappointment would seem to have been one of the moving causes of this peculiar agreement.

And not satisfied with a liability such as the testator had incurred by virtue of a simple contract and from which he could have withdrawn at any time, the actors, as often happens in such cases, tried to consecrate a vicious purpose by means of a solemn form, and put it under seal as if to make it endure thereby, and attempted to restrict the original right of revocation.

In short the scheme was not one for the protection or interests of the estate which, so far as the evidence shews, required nothing therefor beyond the plain ordinary method of its realization and investment, as expressly directed by the will, but to enable other men interested in the operations of the primary debtor to carry on its business with a credit based on the entire capital of the testator's estate thus attempted to be given over for the security of appellant to the extent of the sum of $28,450 and interest compounded in the renewal notes.

The comparatively small business, only about two years and a quarter old at testator's death, had not likely involved much if any loss, if the estate and no other interest had been looked at, as was respondent's duty.

True it was terminable on six months' notice in writing which might, if given, be extended months beyond the expiration of that period, by reason of the currency of the renewal notes at such length of time as appellant saw fit to make them.

The respondents evidently had been misled, or for want of due care acted improvidently, and forgot all

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about this precious document, preserved however by appellant as a thing of value upon which periodically its officers looked and always rested upon to save the master from loss.

One wonders what they were thinking about, but each shifted the weighty burden of thinking on to the other.

Such an indefensible method of administering an estate has not in any court below received the slightest countenance.

To aid in the diversion of trust funds by such means as this agreement provides for is no part of the function of a court of justice.

If the funds had been, under colour of such an instrument, appropriated to meet the future losses incurred by appellant, knowing the contents of the will as the learned trial judge has found, it might have become the function of a court to see the same restored by the appellant to the children.

If on the death of the testator there was by virtue of the original guarantee a liability, which the estate was answerable for, it was the duty of the executors to have it ascertained as soon as the assets of the primary debtor could have been realized, and that estate liquidated, if need be, at the earliest possible date, if the primary debtor was unable to adjust affairs otherwise.

No excuse appears for any departure from this simple method of procedure.

No power was given by the will to cover such an extraordinary agreement. It cannot be upheld.

It was necessary to examine it fully in order to pass upon the further question of the claim having been barred by the Statute of Limitations.

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Once the agreement out of the way there is absolutely no answer to the plea of the statute most righteously invoked as against a plaintiff so forgetful of the rights of children who could not speak for themselves.

Coming to this conclusion as to the nature of the agreement relied on and its invalidity I have not felt it necessary to examine fully the numerous other grounds of defence, but may say that the argument for appellant seemed to me to misapprehend the learned trial judge's position which was not, as I take it, that a surety may be released by reason of the unexpected growth and magnitude of what the principal debt or business has become, although within the language of the guarantee, but that the comparatively small liability of testator and risk to his estate thereunder was sought to be changed by the parties to this suit to something beyond the scope of the guarantee or any reasonable implication therein.

DUFF J.—I concur in the opinion of Mr. Justice Davies.

ANGLIN J.—I am of the opinion that neither the late J. M. Clark nor his personal representatives ever became bound otherwise than as sureties by simple contract with such of the ordinary rights of suretyship as were not explicitly renounced in the original instrument of guarantee. This instrument was not under seal.

The sole purpose of the document executed by Mr. Clark and others in September, 1899, was to prevent the release of Mr. Carss, one of the co-sureties, operating as a discharge of the others. The original guar-

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antee was merely confirmed "as if the said Carss had never been a party thereto." This document does not import a covenant to pay and did not convert the existing simple contract obligation into a specialty.

There is no evidence whatever of any payment or acknowledgment by the defendants subsequent to the 28th February, 1900. Payments or acknowledgments by the principal debtor did not affect them. *Re Wolmerhausen* (1). Except perhaps as an acknowledgment, the agreement of 1900 was not, in my opinion, in the circumstances of this case, within the power of the executors, and the bank is chargeable with notice of that fact. This action was not brought until 24th August, 1907. I therefore agree that as against the defendants the claim of the plaintiffs is barred by the Statute of Limitations. Without expressing any opinion upon other grounds taken in the courts below, I would for this reason dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Hutcheson & Fisher.*
Solicitor for the respondents: *H. A. Lavell.*

(1) 62 L.T. 541.