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*June 14.
*June 24.

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

AND

A. McKILLOP AND SONS, LIMITED (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Company law—Trading company—Powers—Contract of suretyship—R.S.O. [1897] *c.* 191.

An industrial company incorporated under, and governed by the "Ontario Companies Act," R.S.O. [1897] ch. 191, has no power to guarantee payment of advances by a bank to another company whose sole connection with the guarantor is that of a customer, for the general purposes of the latter's business, and such a contract of suretyship is *ultra vires* and void.

Judgment appealed against (30 Ont. L.R. 87) affirmed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), affirming the judgment at the trial in favour of the defendants.

The facts which brought about the action in this case are not in dispute. The action is brought upon a guaranty executed under the defendants' seal and by its officers. The defences are two-fold, first that there was no money owing for the debt, second that the guaranty was *ultra vires* of the defendant company.

The defendants were incorporated pursuant to the "Ontario Companies Act" then in force (R.S.O., 1897,

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

(1) 30 Ont. L.R. 87.

ch. 191), by letters patent of the Province of Ontario dated the 28th September, 1904, and the said guaranty is in form a general guaranty to the United Empire Bank of Canada guaranteeing the account of the West Lorne Wagon Company, Limited, to the sum of fifteen thousand dollars.

The Union Bank is the successor of the United Empire Bank and entitled to any rights it might have under such guaranty.

The defendant company was incorporated by Archibald McKillop, his three brothers and a sister; and on the 17th February, 1905, these individuals, as individuals, had executed a guaranty to the Merchants Bank for the indebtedness to the West Lorne Wagon Company, Limited, to the sum of twenty thousand dollars.

On the 13th day of March, 1907, when the guaranty sued on was executed the defendant company owned one share in the West Lorne Wagon Company, Limited, the West Lorne Wagon Co. then owed the Merchants Bank about forty thousand dollars, and at this time the wagon company arranged with the United Empire Bank that this latter bank should take over the account.

The West Lorne Wagon Co. assigned for the benefit of creditors to Mr. G. T. Clarkson, of Toronto, on the 25th April, 1911. The West Lorne Co. paid no divident to creditors, but the Union Bank as successors of the United Empire Bank received $105,250.71 from the assignee on bonds secured by mortgage held by the bank and the bank also received $20,081 in respect of book accounts also assigned to the bank. The plaintiffs claim that at the time the action was commenced, namely, the 5th June, 1912, there was owing

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to them in respect of the indebtedness of the West Lorne Co. the sum of seventy-eight thousand dollars odd. The respondents claim that after making proper allowance there was no indebtedness from the wagon company to the bank.

Hamilton Cassels K.C. for the appellants, cited *Attorney-General* v. *Great Eastern Railway Co.*(1); *Ashbury Railway Carriage and Iron Co.* v. *Riche*(2); *Hughes* v. *Northern Electric and Mfg. Co.*(3).

C. A. Moss and *J. B. McKillop* for the respondents.

THE CHIEF JUSTICE.—I would dismiss this appeal.

DAVIES J.—For the reasons given by Mr. Justice Hodgins speaking for the Appellate Division of the Supreme Court of Ontario I am of opinion that this appeal should be dismissed with costs.

IDINGTON J.—The appellant seeks to recover from respondent, which is a company incorporated on the 28th September, 1904, under the "Ontario Companies Act" then in force, upon an alleged guarantee of respondent for the indebtedness of the Lorne Wagon Company, Limited, to the appellant, for the sum of $15,000.

The "Ontario Companies Act" enabled the partnership firm of McKillop & Sons to become so incorporated, but did not in express terms enable respondent to give such a guarantee.

It happens to be the fact that the said firm was,

(1) 5 App. Cas. 473. (2) L.R. 7 H.L. 653.
(3) 50 Can. S.C.R. 626.

and the respondent company continued to be, a family-owned concern, having no other shareholders than those composing the firm which became so incorporated.

It is proven that the guarantee of said firm before its incorporation had been given for an amount and under such circumstances as would, if there had been no incorporation of the firm, have resulted, by virtue of the events which have transpired, in possibly rendering the members of the firm liable for the sum claimed.

They escaped that possible liability because the guarantee which the firm had given was surrendered and in substitution therefor the guarantee of the corporate company was taken.

The neat question whereon this appeal must turn is whether or not this corporate company had within the powers given it by the "Companies Act" that of guaranteeing as sureties the debt of the West Lorne Wagon Company, which all the shareholders of the respondent had a very material interest in seeing paid, or at least in their being relieved from liability therefor, but it as a corporation had none.

It is alleged that respondent had no other creditors.

It does not appear to me that this interest of the shareholders can have anything to do with the question or any bearing thereon whatever.

The powers of the incorporated company must be measured by the express powers given by the Act of incorporation and such necessarily implied powers as the general purview of the statute demonstrates were intended to be covered by the expressions used in the statute.

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For example, the corporation may have been enabled to undertake some obligation, or by law may have had imposed upon it some obligation, which in either case must be discharged. The clear legal duty thus created may have rendered necessary the doing of that which the express language of the statute creating it or enabling its creation may not by that language have been very accurately defined.

In such a case the corporation may, by way of implication, be found to possess the powers which the language defining its powers might not have made quite apparent.

In the case presented there is no pretence of such express power and there is nothing from which the express language used can, by interpretation, be so modified by way of implication therein as to support the alleged guarantee.

I think the corporation not only has no powers beyond that so given it, but must assert such power as it may have been given by the method through and by which it is enabled to act, and when going beyond such limits its acts are *ultra vires* and void. Such, I think, was the nature of this alleged guarantee.

The recent decision of this court in the case of *Hughes* v. *The Northern Electric and Mfg. Co.*(1), was relied upon by appellant's counsel. The decisions in that case and the unreported case of *Lambert* v. *Richards,* and some other cases, mark a trend of judicial opinion which, followed out logically, may soon justify the argument presented. The notion seems somewhat prevalent that so long as none but shareholders are concerned that they can use the

(1) 50 Can. S.C.R. 626.

name and so abuse or transgress the powers of the company as they please and by such acts as the statute has not enabled bind the corporation to contracts never contemplated by the statute creating it or upon which its creation rests, so long as it has not prohibited the doing thereof.

I respectfully submit that the proper measure of a company's powers are what it has been enabled to do, and not what it has been prohibited from doing.

But I do not think even these decisions or that mode of reasoning can maintain this appeal.

Again, the "Companies Act" was so modified in 1907 as to carry into it the word "guarantee" amongst the new powers of the corporations entitled to act upon such amended Act, and appellant relies thereon.

I do not think as at present advised that the amendment applies to such a case as presented here.

The facts, however, do not warrant such application. In the case of a company, which this is not, having for its object, or one of its objects, the business of a guarantor, or incidentally to the transaction of its business occasions to give a guarantee, we can conceive of such a thing as a company using this new power.

I shall not attempt to define what is intended by the amendment. I must be permitted to doubt if it ever can be applied to the case of a pure act of suretyship without any relation to the transactions in which the corporation is rightfully engaged.

The appeal should be dismissed with costs.

DUFF J.—The appellants now put their case in two ways. First, they say that the guarantee of the

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13th March, 1907, was within the powers of the defendant company.

The contract upon which the action is brought is not within the objects defined by the letters patent either expressly or by necessary implication. *Hughes* v. *Northern Electric and Manufacturing Co.*(1) was referred to, but that decision had no relevancy, resting as it did upon necessary implication.

Counsel for the appellant bank also relies upon the contention that he is entitled to call in aid of the provisions of the "Ontario Companies Act" of 1907, ch. 24, sec. 17, sub-sec. (*d*), and sections 210 and 211. The effect of the last two sections undoubtedly is to make this Act applicable to the defendant company, but it could not be read as giving validity to the pretended contract which was entered into before the passing of the Act. That contract is inoperative for want of capacity on the part of the company.

The ground which the appellant bank ultimately took up was that the defendant company by reason of its conduct since the Act of 1907 came in force has made itself responsible for the payment of the moneys the bank seeks to recover.

There is an objection based upon the Statute of Frauds which it will be unnecessary to discuss. The insuperable obstacle in the way of this contention is that it has no substratum of fact. The evidence is explicit and it is not contradicted that the advance made under this guarantee was made in the month of April, 1907, some months before the Act came in force. The note which was given for the advance was renewed a number of times after the passing of

(1) 50 Can. S.C.R. 626.

the Act of 1907, but it is not suggested that the renewals were granted by the bank upon the faith of anything done by the appellants and there is no evidence to justify a suggestion even that during this time the bank was not acting upon the faith of the guarantee given in March. I have no doubt it was assumed by everybody until advice was taken upon it that this guarantee was perfectly valid.

ANGLIN J.—The giving of the guarantee, which the plaintiffs seek to enforce, was not authorized in terms by R.S.O. 1897, ch. 191, by which the defendant company was governed when it was executed and delivered, and the authorities, many of which are cited in the judgment of the Appellate Division, make it clear that such a contract cannot be regarded as something incidental either to the undertaking or to the expressed powers of such a company. The evidence seems to shew that the account of the West Lorne Wagon Company was taken over by the United Empire Bank — the plaintiff's predecessors — before the date at which the "Ontario Companies Act" of 1907 came into force. But, if the bank actually made its advances subsequently to that date, they were made upon the faith of the guarantee given on the 13th March, 1907. There is no evidence of any new contract, or of any subsequent ratification by the defendant company of the guarantee sued upon, if, indeed, there could be ratification of such an *ultra vires* instrument. Indeed, it is quite clear that in taking over the account and making its advances the bank acted upon the assumption that the guarantee had been *ab initio* valid and effectual, and that neither ratification

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nor a new contract under the powers conferred by the Act of 1907 was requisite.

The appeal, in my opinion, fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Du Vernet, Raymond, Ross & Ardagh.*

Solicitors for the respondents: *McKillop, Murphy & Gunn.*