1894

*Mar. 30, 31.

*Oct. 9.

D. W. ALEXANDER (PLAINTIFF).....APPELLANT;

AND

JAMES WATSON (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Construction of agreement—Guarantee.

A., a wholesale merchant, had been supplying goods to C. & Co. when, becoming doubtful as to their credit, he insisted on their account being reduced to $5,000 and security for further credit. W. who had endorsed to secure a part of the existing debt thereupon gave A. a guarantee in the form of a letter as follows :—

"I understand that you are prepared to furnish C. & Co. with stock to the extent of $5,000 as a current account but want a guarantee for any amount beyond that sum. In order not to impede their operations I have consented to become responsible to you for any loss you may sustain in any amount upon your current account in excess of the said sum of five thousand but the total amount not to exceed eight thousand dollars, including your own credit of five thousand, unless sanctioned by a further guarantee." * * * A. then continued to supply C. & Co. with goods and in an action by him on this guarantee :

Held, affirming the decision of the Court of Appeal, Gwynne J. dissenting, that there could be no liability on this guarantee unless the indebtedness of C. & Co. to A. should exceed the sum of $5,000, and at the time of action brought such indebtedness having been reduced by payments from C. & Co. and dividends from their insolvent estate to less than such sum A. had no cause of action.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment of Mr. Justice Rose in favour of the plaintiff.

The decision in the case turns on the construction of the guarantee set out in the above head-note. The facts are fully set out in the judgment of Mr. Justice Sedgewick.

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*PRESENT:—Fournier, Taschereau, Gwynne, Sedgewick and King JJ.

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Christopher Robinson Q.C., and *Clark Q.C.*, for the appellant referred to *In re Sherry* (1); *Martin* v. *McMullen* (2).

Delamere Q.C. and *English* for the respondent cited *Pike* v. *Dickinson* (3).

FOURNIER J.—I am in favour of dismissing this appeal for the reasons given by the majority in the Court of Appeal.

TASCHEREAU J.—I am of opinion that the appeal should be dismissed with costs.

GWYNNE J.—It is very important to bear in mind the character and particulars of the debt of Charlesworth & Co. to the plaintiff at the time that they procured the defendant, who was the uncle of one of the partners of the firm of Charlesworth & Co., and who was security for the company to a bank to the amount of $65,000 and deeply interested in the success of the company, to give to the plaintiff the guarantee sued upon, and also what had passed between the plaintiff and Charlesworth & Co., which caused the latter to procure the defendant to give the guarantee.

Immediately prior to the 11th August, 1886, when the guarantee was given, the debt of Charlesworth & Co. to the plaintiff as found by the referee amounted to the sum of $10,486.95, of which sum $1,262.14 was in respect of customers' paper discounted by the plaintiff for Charlesworth & Co. The referee has also found that the plaintiff was also the holder of notes made or endorsed by the defendant as surety for the firm in respect of $3,431.30, portion of their debt to the plain-

(1) 25 Ch. D. 692.
(2) 20 O.R. 257.
(3) 7 Ch. App. 61.

stand as an open account, but insisted that for any further goods Charlesworth & Co. should require they must furnish security and that they must reduce their debt by cash or collaterals to the said sum of $5,000. To these terms Charlesworth & Co. acceded. Now, as the plaintiff already held, as shown above, security for $4,262.14 of the amount of Charlesworth & Co.'s debt, no part of which was then due, it plainly never was nor could have been contemplated by the plaintiff or Charlesworth & Co. that the latter were either to pay cash or give collaterals by way of reduction of or security for notes so already secured and not yet due; or that the notes of Charlesworth & Co. for the unsecured portion, which the plaintiff had most probably discounted at and transferred to his bank, should be paid or secured by collaterals before they should mature. The reasonable construction of the agreement is that it was the unsecured amount of their debt to the plaintiff that Charlesworth & Co. had agreed to reduce by cash or collaterals to $5,000 and that the intent and understanding of the parties was that the notes given by Charlesworth & Co. for such unsecured portion, as they should mature, should be either paid in cash or secured by collaterals so as to leave the open account of $5,000 so agreed upon to stand upon their own security alone. This agreement having been arrived at with Charlesworth & Co. and the plaintiff, and the former having pressing need for further goods to be furnished to them by the plaintiff which he refused to give without security, they procured the defendant to give the guarantee sued upon. Horatio George Charlesworth, a witness called by the defendant, and who procured the guarantee to be given and in whose handwriting it is, says:—

He (the plaintiff) refused to give us any more credit for goods unless we would secure him in some way, and a guarantee from Mr.

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Watson was suggested, and that was obtained and handed to Mr. Alexander.

The guarantee so procured is as follows:—

TORONTO, 11th August, 1886.

D. W. ALEXANDER, ESQ.,

DEAR SIR,—I understand you are prepared to furnish Charlesworth & Co., with stock to the extent of five thousand dollars, as a current account, but want a guarantee for any amount beyond that sum. In order not to impede their operations I have consented to become responsible to you for any loss you may sustain in any amount upon your current account in excess of the said sum of five thousand, but the total amount not to exceed eight thousand dollars, including your own credit of five thousand dollars, unless sanctioned by a further guarantee, and the note for one thousand dollars now held by you to be given up.

Yours truly, JAS. WATSON.

Upon the guarantee being handed by Charlesworth & Co. to the plaintiff a note of the defendant which the plaintiff held as security for $1,000, part of Charlesworth & Co.'s debt to the plaintiff, was, as the referee has found, delivered up to the defendant, and the defendant took from one Dunspaugh his promissory note for $3,000 as an indemnity against the defendant's liability on the said guarantee, and (Dunspaugh having become insolvent) proved against his estate in respect of the said note for $3,000 and has received a dividend thereon. By this arrangement the secured portion of Charlesworth & Co.'s debt to the plaintiff was reduced to $3,262.14, and the unsecured portion increased to $7,224.81.

Upon the faith of this guarantee the plaintiff supplied Charlesworth & Co. with goods to the amount of $3,000. The goods so supplied slightly exceeded that sum, but the plaintiff's claim is limited by the guarantee to $3,000.

Upon the 20th November, 1886, Charlesworth & Co., having failed, made an assignment for the benefit of their creditors, and their estate being insufficient to

pay their liabilities in full this action is brought against the defendant upon his guarantee, and the referee to whom the action was referred has found that the defendant was indebted to the plaintiff in the sum of $2,188.01 with interest from 1886, that is as I understand him to mean from the date of the assignment on the 20th November, 1886.

The defendant's contention now is threefold.

1st. That the guarantee was given upon the faith, expressed, as is contended, upon its face, that the plaintiff should thereafter furnish goods to Charlesworth & Co. to the amount of $5,000 as the plaintiff's proportion of the contemplated open current account, which he never did, and that therefore the guarantee never had any force or effect at all.

2nd. That upon the true construction of the guarantee it is necessary that the plaintiff must have the full amount of his share of the current account, namely, $5,000, before the guarantee becomes available to him; that the guarantee merely secures the plaintiff against the loss of any greater amount than $5,000 upon the contemplated account current; and

3rd. That assuming the defendant to be at all liable under the guarantee he is not liable to the amount found by the referee for that on or about the 1st of November, 1886, Charlesworth & Co. placed in the hands of the plaintiff collaterals to the amount of $2,984.04 out of which after the assignment but before any dividend was paid on the Charlesworth insolvent estate the plaintiff realized $2,588.17, a considerable portion of which, as contended by the defendant, was applicable to the liquidation of that portion of Charlesworth & Co.'s debt to the plaintiff, to which the defendant's guarantee applied.

There is no foundation, in my opinion, for either of the first two of these contentions. I cannot upon the

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evidence entertain a doubt that the defendant well knew that Charlesworth & Co. had then an account with the plaintiff upon which they were indebted to him in an amount exceeding $5,000, and that he refused to supply them with any more goods without security. The defendant well knew also, for he admits that Charlesworth & Co. so informed him, that it was important with them that their account with the plaintiff should not be stopped—that they should continue to get credit from him which they could not get without furnishing security.

Interested also as the defendant was, and admits himself to have been, in the maintenance of the credit of Charlesworth & Co., and in their business being carried on, the plain intention of the defendant in giving the guarantee and handing it to Charlesworth & Co. to be used by them was that they should use it for the purpose of perfecting their arrangement with the plaintiff, by giving it to him as security for such goods as the defendant should require to its extent; the plain purpose and intent was that the current account mentioned in the guarantee, for $3,000 of which the defendant agreed to become responsible, was an account limited to $8,000 consisting of $5,000 then due and unsecured from Charlesworth & Co. to the plaintiff and the $3,000 for which the defendant became responsible.

It appears further by the referee's report that Charlesworth & Co. not only paid upon the unsecured portion of their debt to the plaintiff as the notes representing such debt matured but also paid part of the two notes for $1,000 each secured by the defendant; and at the time of Charlesworth & Co. making their assignment on the 20th Nov., 1886, they had paid upon the unsecured portion of their debt the sum of $2,235.-36 (as appearing in Exhibit G), which sum being de-

ducted from the sum of $7,224.78 the total amount of the unsecured account left the sum of $4,989.42 the amount due upon the unsecured account at the date of the assignment, to which being added the $3,000, amount of defendant's guarantee, made the open account to which that guarantee applied, when it was then finally closed, to be $7,989.42. The defendant's liability was then three-eighth parts of the account so closed. To this amount interest would have to be added until the account should be liquidated in whole or in part; and in three-eighths of so much of that amount as still remains due the defendant is indebted to the plaintiff.

Not knowing the dates or date at which the plaintiff received dividends upon Charlesworth & Co.'s estate we cannot tell the amount of interest to be added to the above sum in order to determine accurately the amount remaining due after deducting the amount of dividends paid but we can, apart from such interest, determine the amount to which the above sum, treating it as principal, is reducible by the amount of dividend paid.

The referee's report shows that the estate of Charlesworth & Co. paid and the plaintiff has received 29 cents in the dollar, which upon the above sum of $7,989.42, amounts to the sum of $2,316.92, leaving the balance of $5,662.50. The defendant's liability, save in so far as the above interest and any other payments if any there be to the benefit of which the defendant is entitled may affect the account is three-eighths of this sum of $5,672.50, being $2,127.18. But the defendant contends and apparently with great reason that the $2,588.17 received by the plaintiff from the collaterals placed in his hands on or about the 1st Nov., 1886, was as applicable to the liquidation of that portion of the debt to which the defendant's guarantee applied as to any other portion.

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Now no part of that sum would be applicable to the payment of any part of the discounted paper amounting to $1,262.14 other than so much of such paper as should not be paid by the parties primarily liable thereon; and exhibit "L" attached to the referee's report seems to show that the sum of $179.90 was the total amount not so paid. Then exhibit "G" shows that at the time of the assignment there was due upon one of the sums of $1,000 secured by the defendant only $539.87, and upon the other only $510.44, making together the sum of $1,050.31, to which being added the above $179.90 makes the sum of $1,230.21 as the whole amount besides the account to which the defendant's guarantee applied, to which the said sum of $2,588.17 was apparently applicable.

It does therefore, seem, unless capable of some explanation which I do not see on the referee's report, that the defendant is entitled to some considerable benefit from the collaterals upon which the plaintiff received the said sum of $2,588.17.

I think therefore that though the appeal must be allowed with costs in all the courts the case must be referred back to the court in which the action was instituted and is pending with direction that it should be ascertained by reference to the same or to some other referees what appropriation was made by the plaintiff of the said sum of $2,588.17, and of any other sums if any received from the said collaterals, for the purpose of determining what amount if any of the amount of the said collaterals of $2,984.04 received by the plaintiff, if any, should have been applied in reduction of the amount to which the defendant's guarantee applies; with the amount paid to the plaintiff by error in excess of what he was entitled to receive from Charlesworth & Co.'s estate and for which he is liable to the estate the defendant has nothing to do beyond

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the amount of 1 cent per dollar which the referee has found to be his dividend share in that sum.

SEDGEWICK J.—The appellant is a wholesale leather merchant carrying on business in Toronto. Prior to the 11th August, 1886, he had been supplying leather and other goods to the firm of Charlesworth & Co., of the same city, and on that date the indebtedness of Charlesworth & Co. to him amounted to the sum of $10,486.95. It would appear that he, the appellant, became doubtful as to the credit of his customers and not only insisted that the amount of their indebtedness should be reduced to $5,000 but that if they required any further credit they could only get it upon furnishing security. Thereupon they applied to the defendant Thomas Watson who was interested to some extent in Charlesworth's affairs and he thereupon wrote out and delivered to the appellant a guarantee in the following form :—

TORONTO, 11th August, 1886.

D. W. ALEXANDER, ESQ.,

DEAR SIR, — I understand that you are prepared to furnish Charlesworth & Company with stock to the extent of $5,000 as a current account, but want a guarantee for any amount beyond that sum. In order not to impede their operations I have consented to become responsible to you for any loss you may sustain in any amount upon your current account in excess of the said sum of five thousand, but the total amount not to exceed eight thousand dollars, including your own credit of five thousand, unless sanctioned by a further guarantee, and the note for one thousand now held by you to be given up.

Yours truly,

(Signed) JAMES WATSON.

Upon receiving this document he gave up the one thousand dollar note therein mentioned, and subsequently sold them goods or advanced them money to the extent of $3,081.69.

On the 30th October, following, Charlesworth & Company failed. Their estate was realized and the appellant received his due proportion of the assets from the assignee of the estate. This action was com-

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menced against the guarantor on the 23rd December, 1889, to recover the sum of $3,000 alleged to be still due upon the defendant's guarantee, and was referred pursuant to section 102 of the Judicature Act to Mr. Clarkson, an accountant, as special referee. His findings so far as they are necessary, in my view, for the purpose of determining this appeal were that, on the day when the guarantee was given, Charlesworth & Company were indebted to the plaintiff in the sum of $10,486.95. Between the date of that document and their failure the plaintiff had advanced to them on current account $3,081.69; that during the same period he had received from them on account $6,855.95, and that he had also received as dividends from the Charlesworth estate the sum of $3,186.16, leaving the net indebtedness to the plaintiff at the commencement of this action irrespective of interest $3,631 (the exhibits annexed to his report, however, showing the true amount to be $3,526.53); and he further found that the amount of the defendant's indebtedness upon his guarantee to the plaintiff was the sum of $2,188.01, for which amount with interest he ordered judgment to be entered for the plaintiff.

Upon appeal from this report to Mr. Justice Rose it was confirmed.

Upon the case being brought before the Court of Appeal judgment was ordered to be entered for the defendant, the appeal being unanimously allowed with costs.

I am of opinion that, for the reason hereinafter pointed out, the conclusion arrived at by the Court of Appeal as to the defendant's liability upon the guarantee in question is the correct one. Assuming the guarantee to have been what all parties seem to have understood it to be, namely, a proposal to *continue to* furnish Charlesworth & Co. with stock to the extent of $5,000 as a current account, I think the

intention of the parties clearly was that the plaintiff was to continue to allow Charlesworth & Co. to be indebted to him in the sum of $5,000. They would not give him a credit beyond that sum unless such credit was guaranteed, and the agreement on the part of the guarantor was that if the plaintiff should sell to Charlesworth & Co. goods to the extent of $8,000, he, the guarantor, would pay any loss which the plaintiff might sustain in the event of Charlesworth & Co.s failure beyond the sum of $5,000, provided such excess did not exceed $3,000. There was nothing in the guarantee to prevent the plaintiff from giving an unlimited credit to the Charlesworths; they had, however, the defendant's guarantee to pay on account of such indebtedness $3,000 should it turn out that upon the final settlement of affairs the plaintiff's loss exceeded by $3,000 the $5,000 which they were to allow without security. Inasmuch, however, as according to the report of the referee the loss of the plaintiff in connection with the whole account was not $5,000 but only $3,526.53, there was no liability on the part of the defendant to which his guarantee could attach, although had an action been brought upon it at the time of the failure there would have been a liability, a liability wiped out in the interim by the dividends received from the estate.

On this ground I think the appeal should be dismissed with costs.

KING J.—I concur in the judgment delivered by Mr. Justice Sedgewick.

Appeal dismissed with costs.

Solicitors for appellant: *Meredith, Clark, Bowes & Hilton.*

Solicitors for respondent: *Delamere, Reesor, English & Ross.*