GEORGE L. MILNE (PLAINTIFF).....APPELLANT; 1906

*Mar. 12, 13.
*April 6.

AND

THE YORKSHIRE GUARANTEE AND SECURITIES CORPORATION (DEFENDANTS)..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

*Suretyship—Collateral deposit—Ear-marked fund—Appropriation of proceeds—Set-off—Release of principal debtor—Constructive fraud—Discharge of surety—Right of action—Common counts—Equitable recourse.*

K. owed the corporation $33,527.94 on two judgments recovered on notes for $10,000 given by him to R., and a subsequent loan to him and R. for $20,000. M., at the request of and for the accommodation of R., had indorsed the notes for $10,000 and deposited certain shares and debentures as collateral security on his indorsement. K. and R. deposited further collateral securities on negotiating the second loan, but K. remained in ignorance of M.'s indorsements and collateral deposit until long after the release hereinafter mentioned. These judgments remained unsatisfied for over six years, but, in the meantime, the corporation had sold all the shares deposited as collateral security, and placed the money received for them to the credit of a suspense account, without making any distinction between funds realized from M.'s shares and the proceeds of the other securities and without making any appropriation of any of the funds towards either of the debts. On 28th February, 1900, after negotiations with K. to compromise the claims against him, the agent of the corporation wrote him a letter offering to compromise the whole indebtedness for $15,000, provided payment was made some time in March or April following. This offer was not acted upon until November, 1901, when the corporation carried out the offer and received the $15,000, having a few days previously appropriated the funds in the suspense account, applying the proceeds of M.'s shares to the credit of the notes he had indorsed. The negotiations and the final settlement with K. were not made known to M., and K. was not informed of his continuing liability towards M. as a surety.

*Held, per* Sedgewick, Girouard, Davies and Idington JJ. (reversing the judgment appealed from (11 B.C. Rep. 402)) that the secret

*PRESENT:—Sedgewick, Girouard, Davies, Idington and Maclennan JJ.

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dealings by the corporation with K. and with respect to the debts and securities were, constructively, a fraud against both K. and M.; that the release of the principal debtor discharged M. as surety, and that he was entitled to recover the surplus of what the corporation received applicable to the notes indorsed by him as money had and received by the corporation to and for his use.

*Held*, by Maclennan J. that, on proper application of all the money received, the corporation had got more than sufficient to satisfy the amount for which M. was surety and that the surplus received in excess of what was due upon the notes was, in equity, received for the use of M. and could be recovered by him on equitable principles or as money had and received in an action at law.

APPEAL from the judgment of the Supreme Court of British Columbia(1), reversing the judgment of Morrison J. and dismissing the plaintiff's action.

The action was brought, in May, 1903, for a declaration that the plaintiff was discharged from any liability to the corporation as indorser and surety for the amount of four promissory notes for $2,500 each, made by one James Cooper Keith in favour of Rand Brothers, indorsed by them and on which the plaintiff had become a second indorser, at the request of Rand Brothers and for their accommodation, at the time they were discounted, in 1892, by the said corporation.

The circumstances material to the issues raised on the present appeal are stated in the judgments now reported.

*Aylesworth K.C.* and *Deacon*, for the appellant.
*Davis K.C.* for the respondents.

SEDGEWICK J.—This appeal is allowed with costs. I concur in the reasons stated by my brother Idington.

GIROUARD J.—I concur in the judgment allowing

(1) 11 B.C. Rep. 402.

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the appeal with costs for the reasons stated by my brother Idington.

DAVIES J.—I agree generally in the reasoning and conclusion of Duff J. in the court below and concur in the judgment prepared by my brother Idington. I desire only to add a few words.

The relation in which the parties stood towards each other and towards the principal debtor Keith at the time the offer of compromise was made by the defendant corporation to him in February, 1900, was this. Keith owed the corporation about $33,527.94. The corporation held in their hands the proceeds of certain collateral securities which Milne, the appellant, and a surety for the payment of $10,000 forming part of the $33,527.94, had deposited with them. These proceeds had been carried by the corporation to the credit of a suspense account opened in Milne's name, or earmarked with his name, but had not been appropriated by them to the credit of the notes which Milne had indorsed as surety. Milne was a second indorser of the notes and his indorsement was unknown to Keith as was also the fact of the former having deposited the collateral securities with the respondent and that their proceeds were then standing to the credit of the suspense account.

In August, 1900, some months after the offer of compromise had been made to Keith, he obtained and deposited in a bank in Victoria the $15,000 which the corporation had offered to accept in full discharge of his indebtedness and notified it of the facts of his readiness to carry out their offer. The manager, however, did not at once absolutely accept, but intimated that he would probably do so. It was not, however, until the beginning of November or the last of Octo-

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ber, 1901, that the corporation actually executed the papers carrying out the offer of compromise and received the $15,000 bargained for, although the papers are dated as of August, 1900, when Keith deposited his money and notified the corporation of the fact.

The reasons for the delay appeared to be the corporation manager's hope of obtaining from the sureties of Keith—Milne and one Rand, who had each deposited collateral with the corporation—the full amount of the debt due to them.

Milne, however, was kept in ignorance of the negotiations and agreement respecting the compromise with Keith and never had any knowledge of them until long after they were finally completed.

Keith, on the other hand, up to the time of his discharge had no knowledge that Milne had indorsed his notes for $10,000 and was surety for their payment.

In March, 1901, the corporation gave a memorandum to Milne shewing a large amount as due from him on his suretyship contract and, in the following May, they brought suit against him to recover the amount. It was not, however, until March, 1902, long after the receipt of the $15,000 from Keith and the assignment over to his nominees of the judgments and mortgages they held from Keith, that the corporation proceeded with their suit against Milne. They then delivered their statement of claim in the action to which Milne pleaded the Statute of Limitations, and the release of the principal debtor. Upon this the corporation discontinued that action and in giving his evidence on the trial of this suit the manager swore that he was only "running a bluff" upon Milne in filing the statement of claim.

A day or two before receiving the $15,000 from Keith and handing over to his nominees the assign-

ment of the mortgages and judgments they held, the corporation respondent made the entries in their books transferring the amount standing to the credit of Milne in the suspense account in respect of the shares and debentures they had received from him as collateral, to the credit of the notes he had indorsed for Keith.

But even then, in November, 1901, when getting as he thought his full discharge, Keith knew nothing of Milne having indorsed his notes or deposited any collaterals with the corporation as security for them. He thought he was being absolutely discharged, while if the respondent corporation's contention was to prevail, he would, as a matter of law, be still liable to Milne his surety for the monies the latter paid into the suspense account and which the corporation on the day before executing the papers appropriated to Keith's indebtedness. A legal fraud was, therefore, being perpetrated on Keith if that appropriation was held to be good and he became liable to his surety Milne for the amount.

Looking, therefore, at the substance of the agreement made between the corporation respondent and Keith their principal debtor for his absolute discharge, in the light of the correspondence and exhibits produced in evidence as well as the oral evidence of the manager of the corporation and of Keith and Milne, and remembering the relative positions the parties occupied towards each other and the ignorance of the principal debtor Keith of Milne's suretyship or deposit of collaterals to secure payment of the amount, or of the appropriation of the proceeds of those collaterals by the corporation towards the specified debt which he thought he was discharging for $15,000, it seems to me, that the offer of the corporation made to

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Keith and subsequently carried out must be construed as having reference to the time when the parties intended the discharge to take effect.

No appropriation of the amount now in dispute had then been made by the respondent, and any subsequent attempt to do so secretly and without Keith's knowledge and so to impose a liability upon him from which all parties thought he had been discharged would be a fraud.

In discharging Keith no reservation of the corporation's rights as against sureties was made and his discharge, of course, operated as a discharge of his sureties.

If the secret appropriation after the offer and its practical acceptance was illegal as against Keith it must also be so as against Milne, who had no notice or knowledge of Keith's discharge and who from the time when that discharge must be held to relate to the date of the assignments to Keith's nominees, was entitled to have his collateral securities returned to him or their proceeds paid over to him.

IDINGTON J.—The appellant indorsed four promissory notes made by one Keith to Rand Bros. for $2,500 each. This indorsement was for the accommodation of Rand Bros. and renewed in November, 1892. Rand Bros. and Keith each transferred to the respondents by way of security for payment of these renewals, collaterals consisting of stock in the Vancouver Gas Company.

The respondents sold by arrangement with appellant this stock to the wife of the appellant and the money received from such sale was placed by respondents to the credit of a suspense account to be held in lieu of the stock to await the results of time, either

in the way of payment by Keith of these notes, or the realization of hopes Keith had of an improved financial condition.

This was done in 1894 and the accounts meantime stood in the same position till after the 28th February, 1900, save that certain accretions of this stock came to the hands of respondents as the holders of the stock, or having been such were by virtue of the arrangements respecting the same entitled to receive and hold such accretions.

It is not now necessary to repeat the story of the dealings of all these parties and amplify all that was done with these collateral funds. It is sufficient to say, that on the said 28th of February the part of such funds now in question had never been appropriated by the respondents to the payment of these promissory notes or the judgment which had been recovered against Keith thereon, on 1st October, 1893.

There was another claim of respondent's against Keith in respect of which they recovered judgment about the same time for $21,180.23.

Upon this judgment there was received by respondents from various collateral sources money applicable to its payment. Apart from these payments there was nothing done in respect of said judgment, until in February, 1900, when Keith found himself in a position to negotiate for a compromise of all these claims against him.

The respondents' agent then wrote as the result of these negotiations the following letter:

VANCOUVER, B.C., 28th Feb., 1900.

J. C. Keith, Esq., City.

Dear Sir,—With reference to our negotiations and conversations in connection with your indebtedness to this corporation, amounting to $33,527.94, as per annexed statement, if you can make arrangements to pay me some time in March or April the sum of not less

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than $15,000, I will transfer to you or your nominee the following securities and free you from all liability to this corporation, viz.:

Judgment 2nd October, 1893.....$21,180.23
Judgment 1st October, 1893..... 10,634.23

Mortgages and interest amounting to $30,339.32, covering lots 612, 615, 616, south half of lot 620,614, all in North Vancouver.

Blocks 1, 2, 3, 4, 5, 6, 7 of District lot 367.

Lots 14, 15, 16 and 17, Block 67, subdivision 185, City of Vancouver; also Anglo B.C. Packing Co. 50 preference shares, and Anglo B.C. Packing Co. 50 ordinary shares.

Yours faithfully,

I have said that up to this time at least there was nothing done to appropriate the funds now in question and lying at the credit of the suspense account.

It is, however, urged that inasmuch as this letter states the total sum due for both claims at $33,527.94, we ought to infer that this amount is the result of some such prior appropriation of these funds as I have said was not made.

The able counsel for respondents was not able to shew any such calculation resulting from this supposed appropriation he contended for as could shew to my mind any semblance of results therefrom that could be made in any way the approximate equivalent of this sum of $33,527.94.

The "annexed statement" referred to in this letter was not produced. No attempt was made at the trial or on the reference to shew how it was made up or how this result of total was arrived at.

If such a statement ever existed and was shewn to Keith when negotiating for this compromise, as would have proved an appropriation then or theretofore upon the said notes or judgment to Keith's knowledge of the fund now in question, then the respondents could by using that in evidence have removed any ground of complaint on the part of Keith and de-

stroyed the slightest hope of appellant succeeding in his present suit. Yet not only is there no proof of such a statement or such knowledge thereof on Keith's part, but also an entire absence of any attempt on trial or reference or in any way to shew such facts.

The commercial honour of respondents was at stake as well as the money. The plain palpable consequences of such proof being produced would have spurred up the respondents' intelligent agent to have fully demonstrated this alleged appropriation if possible.

Not only is he silent on the point, but the application of the other credits on the larger judgment and the computation of the interest thereon when these credits are properly reckoned with, results in a sum which when added to the sum of $10,634.23 (stated in this letter as amount of the judgment on the notes in question here) produces almost the identical total of $33,527.94.

What is the proper inference to be drawn from such a finding? Clearly to my mind that in respect of the larger judgment there was from time to time an appropriation of the moneys received from collateral sums applicable thereto.

And there was this further that the products of the collaterals applicable to the smaller judgment had been kept as placed originally in suspense and unappropriated.

In consequence of this condition of things, the respondents' agent in writing this letter and using the material before him counted the smaller judgment at its face value and the larger one at its proper value. He either hesitated as to what was to be done with the suspense account, failed to observe it or did observe it and stated incorrectly the amount due on the smaller

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judgment. Whatever he did or whatever caused him to do what he did, he certainly did not apply this suspense account to liquidate the judgment to which in certain events it was intended to have become applicable.

I assume, therefore, that there was not any appropriation of these funds until after the negotiations had so advanced that common honesty required the implementing of the agreement arrived at between Keith and the respondents whether the law bound them or not.

The obvious purpose of the placing of these funds in a suspense account was to await the final condition of the relations between the creditors and their principal debtor.

Penetrating, as far as one can, through the war of words and discarding the improbable contentions put forward by either side on this point, that condition or that period had arrived when the funds in this suspense account had to be dealt with.

Candour and that good faith a surety is entitled to, and an over-burthened debtor is also entitled to, required that both should have been told exactly what the facts then were, and what the creditor proposed doing.

Clearly, failure to do this by the surety was a breach of the spirit of the arrangement between the creditors and surety whereby this suspense account was created to secure the debt.

It is idle to refer to the assignment, to Cooper & Smith, of these judgments and all the securities therefor, as if a sale thereof had been made to strangers.

They were but the nominees and trustees of Keith for whose benefit the whole negotiations were conducted by him and not by them.

The sole purpose of the dealings in question was to obtain the entire and final release of Keith from his obligations to the respondents.

The agent of the respondents, who carried on for them these negotiations, plainly admits this.

The desired result failed, if respondents can retain the appellant's money and drive him to a suit against Keith, and Keith in turn be driven to follow the respondents to complete his release.

I, with great respect, think that the majority of the court below failed to keep in view the purpose of Keith and the relation of Cooper & Smith to Keith instead of treating them as strangers, and thereby failed to reach the correct result.

I do not think that the question of whether the bargain made was binding until carried out has much to do with the matter.

I doubt if it can be said in law that all that transpired up to the delivery of the assignment could have prevented the respondents from receding from the negotiations.

I think, however, that there is a great deal of force in the view that the assignment duly executed in September, 1900, ready to be delivered upon the payment of the consideration therefor, immediately upon its delivery related back to the time of its execution when all the negotiations had been completed and everything done except delivery and payment.

The result of that view would be to leave the appellant's money in respondents' hands unappropriated and owing him as he was in such case freed from obligation by the release of his principal.

I would leave the matter there, but for a doubt I have, whether or not the law of relation back, in the

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case of escrows, can properly be applied to this assignment, when all the facts are borne in mind.

I prefer to rest upon this; that the surety can at all times appeal to the equitable jurisdiction of the court to have his principal as soon as the debt becomes due, and without any payment of the debt, ordered to pay the debt and relieve the surety; and that such right, if exercised now by bringing an action of that sort against Keith and joining the respondents and their assignees, could only have one result, and that would be that the respondents here would, upon Keith shewing that they had discharged him, be ordered to pay over to appellant the money now in question.

See *Wolmershausen* v. *Gullick*(1), where there is a most exhaustive and instructive judgment of Mr. Justice Wright dealing with the first proposition I put forward as to the rights of a surety.

The case of *Law* v. *East India Co.*(2) shews the power the court can exercise to protect a surety and adjust the rights of him and his creditors.

The money now in question could no doubt be ordered, as there, into court to abide the result and be paid out as and where the court found the same ought to go.

The rights of sureties in this regard are so much the outcome of the growth of equitable principles that one finds often the test of what would or might be done in case of resort to a court of equity as the best way to find the rights of sureties.

I merely put forward the possible proceeding I indicate to furnish this illustrative test.

I think it is clear that the money in question is, under the facts I have dealt with, money in the hands

(1) (1893) 2 Ch. 514. (2) 4 Ves. 824.

of the respondents which in justice and equity belongs to another, and is recoverable as money had and received; or at all events the court can direct it to be paid to the plaintiff under the plain, palpable facts of the case, once it finds, as I do, no appropriation of it was made until, on the eve of handing over the release of the principal debtor, what looks not unlike a fraudulent appropriation was made.

The case of *Litt* v. *Martindale*(1) may be referred to for illustration of the principle upon which, in a case of fraud, an action for money had and received may rest. A contract is implied rather than to let improper conduct, fraudulent conduct if such you will, prevail.

If there could be said to exist any technical difficulty I would allow the principal Keith to be added as a defendant, for conformity sake, and then grant relief against a dealing of the company that cannot be permitted to stand.

I think the appeal should be allowed with costs and the judgment of Mr. Justice Morrison be restored.

MACLENNAN J.—This is an appeal by the plaintiff from a judgment of the Supreme Court of British Columbia, reversing a judgment of Morrison J. which awarded to the plaintiff two sums of $1,600 and $1,329.95 and interest, and dismissing the action.

The plaintiff, as surety, sues the defendants as creditor, to recover the two sums in question, as having been deposited with the defendants by the plaintiff, or received by them from him, to answer the suretyship, and as now recoverable on the ground that the debt has been paid or satisfied by or released to the debtor, without resort to and irrespective of the

(1) (1856) 18 C.B. 314.

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sums paid by the plaintiff; or on the ground that the debt was satisfied and discharged in full, partly by the debtor and partly by another surety, who was liable to the plaintiff.

In the year 1892 the defendants discounted for Messrs. Rand Brothers' four promissory notes of even date and tenor, amounting in all to $10,000, made by one J. C. Keith and indorsed by Rand Brothers, and the plaintiff. The plaintiff's indorsements were made at the request and for the accommodation of Rand Brothers, as was well known to the defendants. About the same time the defendants made another loan to Rand Brothers, to the amount of $20,000, on securities held by them from the same debtor Keith; but this other transaction was unknown to the plaintiff.

The notes having been dishonoured at maturity, and the loan of $20,000 not having been paid, actions were brought by the defendants and two judgments were recovered against Keith on the 2nd of October, 1893, one on the four notes indorsed by the plaintiff, for $10,634.23 for debt and costs, and the other upon the other loan made to Rand Brothers for the sum of $21,180.23.

The action on the four notes was brought against Rand Brothers and the plaintiff, as well as against Keith, and judgment was recovered against both Keith and Rand Brothers, but the defendants did not then or at any time proceed to judgment against the plaintiff. This forbearance towards the plaintiff, in the first instance, was in consideration of his depositing with the defendants, as security for his liability as indorser, two hundred and fifty shares of Vancouver Gas stock, which was done some time early in the year 1894. Rand Brothers had made a deposit with the defendants of five hundred shares of the same

stock as further security when applying for the discount of the notes indorsed by the plaintiff; and they also, when subsequently entering into the $20,000 transaction with the defendants, made a similar deposit of other five hundred shares of the same stock as security for that transaction, in addition to the securities held by them from Keith. Keith, therefore, was the principal debtor, and the person ultimately liable to pay both judgments. Rand Brothers were also liable to the defendants for both, while the plaintiff was only liable for the $10,000 judgment, and was entitled to look to both Keith and Rand Brothers for his indemnity.

In the year 1894, after the deposit of those gas shares with the defendants, the Vancouver Gas Company issued to its shareholders certain debentures, by way of dividend or bonus, and the defendants, having received their proportion in respect of the twelve hundred and fifty shares held by them, sold the debentures and received the following sums therefor: On the 9th May, $3,241; on the 18th of June, $3,225; and on the 17th July, 1894, $178.54, amounting in all to $6,646.54. These sums they had a right to appropriate, at the respective times they were received, in due proportion, in satisfaction of the respective judgments recovered by them, that is, two-fifths to the larger judgment and three-fifths to the judgment for which the plaintiff was liable. There is no evidence that they did not so appropriate those sums, and it must be presumed that they did so.

Afterwards, on the 31st December, 1894, the plaintiff procured the defendants to sell to the plaintiff's wife all the shares held by them as above stated, namely, twelve hundred and fifty shares, for the sum of $8,000, and that sum was received by the defendants

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and, by arrangement with the plaintiff, was placed to his credit in a suspense account. The plaintiff's evidence of what passed between him and the defendants on that occasion is not very clear, but it is apparent that the money was agreed and intended to be held by way of security in the same manner as the shares had been. Inasmuch as the defendants might have sold and converted the shares at any time and have applied the proceeds upon the debt, they could also, at any time, have done the same with the money deposited in the suspense account. See *Commercial Bank of Australia* v. *Official Assignee of the Estate of John Wilson & Company* (1).

It is to be observed that although the second deposit of gas shares made by Rand Brothers was made as security for their second loan, the defendants chose to place the proceeds of the whole to the plaintiff's credit in the suspense account. It may be that the defendants might lawfully do that, if they chose so to do, and that neither Keith nor Rand Brothers could object or complain, for they were both debtors in both judgments to the defendants, and the defendants could hold all the securities received by them for one of the debts from either Keith or Rand Brothers until both were paid; and, moreover, not only Keith, but Rand Brothers also were bound to indemnify the plaintiff against his whole liability.

Matters remained in this position from the 31st December, 1894, until the 28th of February, 1900, except that the defendants had received some payments and dividends from the Keith securities amounting to about 6,000, which they had applied on the larger judgment. In the meantime Rand Brothers had failed and nothing had been received from them.

(1) (1893) A.C. 181.

Under these circumstances the defendants, on the 28th day of February, 1900, wrote a letter to Keith, the principal debtor, in both judgments, upon which the plaintiff places great reliance. He says that this letter and what was afterwards done by the defendants and Keith in pursuance of it discharged him, the plaintiff, from all liability as surety and that, as a result, he is entitled to recover from the defendants the proceeds of the sale of the two hundred and fifty shares deposited by him as security, and also a proportionate part of the proceeds of the sale of the gas debentures, and these are the two sums for which he obtained judgment in the first instance, namely, $1,600, the purchase money of his two hundred and fifty shares, and $1,328.90, one-fifth of the proceeds of the debentures.

The letter of the 28th of February, 1900, so far as material, is as follows:

> With reference to our negotiations and conversations in connection with your indebtedness to this corporation, amounting to $33,527.94, as per annexed statement, if you can make arrangements to pay me some time in March or April the sum of not less than $15,000, I will transfer to you or your nominee the following securities and free you from all liability to this corporation:—
>
> Judgment 2nd October, 1893.....$21,180.23
> Judgment 2nd October, 1893..... 10,634.23
>
> Mortgages and interest amounting to $30,339.32, covering certain lots, etc., etc.
>
> Yours faithfully,

The statement here referred to is not produced nor was any evidence of its purport given.

Now this proposal, on the face of it, is to accept a less sum in satisfaction of a greater, and, I think, it is not pretended by any one that, at that date, the whole debt owing by Keith to the defendants did not very largely exceed $15,000, the sum offered to be

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accepted in discharge of his whole debt. The promise would, therefore, on that ground alone, be *nudum pactum*, and void. Not only so, but the time for payment was limited to the following months of March or April, and nothing was done in the way of providing the money until long after these months had elapsed. That proposal, except as to the time of performance, is what was ultimately carried out, and that was not done until the 6th November, 1901, when, by separate instruments executed on that day, but dated the 20th August, 1900, the two judgments of 2nd October, 1893, and the other securities in their hands belonging to Keith were assigned by the defendants to nominees of Keith and they received a sum exceeding $19,000, the excess over $15,000 being for advances made by the defendants to Keith to pay arrears of taxes.

While it is proved orally that both judgments against Keith, as well as the other securities held by the defendants from him, for those judgments were in fact assigned to Keith's nominees on the 6th of November, 1901, the only instrument relating to that transaction which has been produced is an assignment by deed of the $10,634.23 judgment, as already mentioned.

It bears date the 20th of August, 1900, and it recites the judgment and the sum for which it was recovered and proceeds thus:

> And whereas the party of the first part has agreed to assign the said judgment and all benefit to arise therefrom, either at law or in equity, unto the said parties of the second part in manner hereinafter expressed; Now this indenture witnesseth, that, in pursuance of the said agreement and in consideration of the sum of $10,634.23 of lawful money of Canada to the said party of the first part in hand well and truly paid by the said parties of the second part at or before the execution hereof, the receipt whereof is hereby

acknowledged, the said party of the first part hath granted, bargained, sold, etc. * * * to the parties of the second part all the said judgment and the money due or to grow due by virtue thereof for principal, interest and costs.

It was contended very strongly that, although the transaction was not carried into effect until the 6th November, 1901, it must be construed to relate back to the date of the letter of the 28th February, 1900, and although the deeds were dated the same day as the letter, and although the transaction finally carried out was substantially what was proposed by the letter written nearly two years before, I think that during the interval there was no agreement between the parties, and that there was no moment, during all that time, during which the defendants were legally bound to do what they ultimately did. It was argued that this transaction of the 6th November was merely an assignment of securities to third persons and had no effect in discharging Keith's indebtedness. I think, however, upon the whole of the evidence, that it was in fact and in law a settlement between the defendants and their debtor, Keith, although, in form, it was an assignment of the debt to third persons.

But the proceeds of the debentures, as I have pointed out, had been applied upon the debt when received in 1894 and the proceeds of the plaintiff's shares had been so applied, at latest, on the 31st October, 1901.

If, therefore, this appeal depended on whether the proceeds of the plaintiff's shares and relative debentures had or had not in fact been appropriated to the debt, before the settlement with Keith, I should have thought the plaintiff could not succeed.

But, I think, he is entitled to succeed on another ground. I have already described the form of the

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transaction between the defendants and Keith in relation to the judgment in question. It is proved that at that time they actually received from him, or on his behalf, the sum of $15,000, and they acknowledged by deed that what they received for this particular judgment was the sum of $10,634.23. The defendants had a right to appropriate that sum to that extent to that judgment and there could be no more solemn or effectual appropriation of so much of the money received to that particular judgment debt. I think the defendants cannot be heard to say, as between themselves and Keith, that they did not, either on the 20th of August, 1900, or on the 6th of November, 1901, actually receive from him, as and for a payment of that judgment against him, the sum of $10,634.23. Keith was the principal debtor. He owed the whole amount of the judgment to somebody. So far as he knew, the only persons to whom he owed it all were the defendants. There is no evidence that he knew that the defendants had either sureties or security, except what he had himself given, for the debt or any part of it, or knew that they had received any payment on account from any one. Under these circumstances, Keith paid that sum of $10,634.23 to the defendants, and they received it as and for a payment on that judgment debt.

Now, it follows, in my opinion, that, if at that time, by reason of the payments which they had received from Rand or the plaintiff, or from the securities received from them for that judgment debt, there was not so much due as $10,634.23, whatever was received more than was due was in equity received for the plaintiff and Rand Brothers, according to their respective rights as between themselves, and was money clearly recoverable from them on equitable

principles, or as money had and received in an action at law.

The plaintiff has a right to recover his money from somebody. If he were to sue Keith, his answer would be that he had paid the debt himself to the extent of $10,634.23, without knowledge that the plaintiff had anything to do with it.

The question then is: What sum was due to the defendants on the judgment in question when they received the payment? It may be that the plaintiff has a right to regard the payment as made on the 28th February, 1900, but, in any view, as made on the 6th of November, 1901.

I have made a computation, allowing interest at four per cent. on the judgment from date of recovery to the 23rd of July, 1894, when the rate was changed by statute to six per cent., and, applying the payments received from seven hundred and fifty shares of gas stock and the relative debentures at the dates when the same were received, and I find that the sum due on the judgment was only $3,314.61, or the defendants received $7,321.38, out of which to repay the plaintiff what they had received from him. Or, if we compute what remained due on the judgment by applying thereon the sums received from Rand Brothers five hundred shares and debentures alone, and as if they had never applied the plaintiff's shares or debentures at all, but held them for him, they would still have received $3,081.39 more than was due. The defendants have received from the debtor, in my opinion, more than enough to repay the sums received from the plaintiff and for which he, in the first place, recovered a judgment, and, in my opinion, the appeal should be allowed and the judgment should be restored.

1906

MILNE v. YORKSHIRE GUARANTEE CORPORATION.

Maclennan J.

For the satisfaction of the parties I append my computations.

Computation applying the sums received from plaintiff's two hundred and fifty shares and Rand Brothers five hundred shares and relative debentures:

| | | |
|---|---|---|
| Judgment, Oct. 2, 1893 | | $10,634.23 |
| Int. to 9 May, 1894, 219d, at 4% | | 255.22 |
| | | $10,889.45 |
| Paid 9 May, 1894 | | 1,944.60 |
| | | 8,944.85 |
| Interest from 9 May, 1894, to 18 June, 40 d. at 4% | | 39.20 |
| | | 8,984.05 |
| Paid 18 June, 1894 | | 1,935.00 |
| | | 7,049.05 |
| Int. 18 June to 11 July, 23 d at 4% | | 17.76 |
| | | 7,066.81 |
| Paid 11 July, 1894 | | 107.12 |
| | | 6,959.69 |
| Int. 11 July to 23 July, 12 d at 4% | | 9.15 |
| Int. at 6% 23 July to 31 Dec. 157 d | | 179.59 |
| | | 7,148.43 |
| Cash on sale of 750 shares | | 4,800.00 |
| | | 2,348.43 |
| Int. 31 Dec., 1894, to 6 Nov., 1901, 6y. 10m. 6d | | 965.18 |
| | | $3,314.61 |

Computation applying only to Rand Brothers' 500 shares and relative debentures:

| | | |
|---|---|---|
| Judgment, Oct. 2, 1893 | $10,634.23 | |
| Int. to 9 May, 1894 | 255.22 | |
| | | 10,889.45 |
| Paid 9 May | 1,296.40 | |
| | | 9,593.05 |
| Int. 9 May to 18 June, 40d. at 4% | 42.05 | |
| | | 9,635.10 |
| Paid 18 June | 1,290.00 | |
| | | 8,345.10 |
| Int. 18 June to 11 July, 23d. at 4% | 21.28 | |
| | | 8,366.38 |
| Paid 11 July | 70.40 | |
| | | 8,295.98 |
| Int. to 23 July, 12d. at 4% | 11.04 | |
| Int. 23 July, '94, to 31 Dec., '94, 157d. at 6% | 216.68 | |
| | | 8,523.70 |
| Cash on sale of 500 shares | 3,200.00 | |
| | | 5,323.70 |
| Int. to 6 Nov., 1901, 6y. 10m. 6d. | 2,229.14 | |
| | | $7,552.84 |

*Appeal allowed with costs.*

Solicitor for the appellant: *W. J. Bowser.*
Solicitor for the respondents: *D. G. Marshall.*