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*Feb. 22, 23.
*May 1.

THE CORPORATION OF THE CITY OF THREE RIVERS (DEFENDANT)... } APPELLANT;

AND

THE SUN TRUST COMPANY, LIMITED (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

*Suretyship—Bond issue—Acceleration clause—Default by principal debtor —Liability of guarantor—Art. 1092, 1935 CC.*

The city appellant, authorized by by-law to guarantee and indorse a bond issue of $100,000 to be put out by the Three Rivers Shipyards, Limited, entered into a trust deed in favour of the respondent as trustee for the bondholders. The bonds were made redeemable and payable in annual instalments on the 1st September from 1919 to 1927, the first to be $12,000 and the others $11,000 each, bearing interest payable semi-annually. They were so described in the by-law. By clause 8 of the trust deed, it was stipulated that the total amount of the bond issue then remaining unpaid and interest thereon would become immediately exigible, at the option of the trustee, upon default by the Three Rivers Shipyards Company to pay the bonds or the interest coupons at their respective dates of maturity ("à leurs échéances respectives"). Such default also gave the right to the trustee, under clause 9, to enter into possession of the properties, rights, revenues and franchises of the company and it was further stipulated that the city might prevent the operation of that clause by itself paying the bonds or interest coupons due. By clause 18, which contained the terms of the guarantee given by the city, upon failure by the company to perform the conditions, charges and obligations imposed on it by the trust deed, the city obliged itself to pay the bonds and the interest coupons at their respective dates of maturity ("à leurs échéances respectives"). Clause 19 also created in favour of the city a hypothec upon the lands and a charge upon the movables of the company for the total amount of the debenture issue, which were made exigible upon default of payment of interest. The first instalment of $12,000 and the interest due on the 1st of March, 1920, was paid by the Three Rivers Shipyards, Limited, but the company made default in the instalment of $11,000 due on the 1st of September, 1920, and also in the interest then due on the unredeemed bonds. The respondent then sued the city for the whole amount of the unredeemed bonds and the interest due.

*Held,* Anglin and Mignault JJ. dissenting, that the respondent, in view of the default of the Three Rivers Shipyards, Limited, had the right to claim from the city immediate payment of the whole capital amount outstanding of the bond issue, with the interest then due, as the acceleration clause 8, stipulated against the company as principal debtor, was binding also on the city, its surety.

*Per* Anglin and Mignault JJ. dissenting.—The obligation of the city was merely to pay the bonds and interest coupons at their respective dates of maturity ("à leurs échéances respectives").

Judgment of the Court of King's Bench (Q.R. 34 K.B. 351) affirmed, Anglin and Mignault JJ. dissenting.

*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1) affirming the judgment of the Superior Court, district of Three Rivers, Duplessis J. and maintaining the respondent's action.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgments now reported.

*Lafleur K.C.* for the appellant.—Under article 1935 C.C., suretyship is not presumed; it must be expressed and cannot be extended beyond the limits within which it is contracted. The extent of the guarantee given by the city is clearly set forth in the terms of clause 18 of the trust deed taken in conjunction with the terms of the by-law.

The words " respective due dates " can only be applied to each date in so far as the city is concerned. This interpretation is made still clearer by the terms of clause 9 of the trust deed.

*Fortin K.C.* and *Perron K.C.* for the respondent.—The city appellant is bound toward the respondent in exactly the same manner as the Three Rivers Shipyards, Limited.

The appellant is more than a surety or guarantor, it is an indorser.

The meaning of the words "à leurs échéances respectives" is when the bonds become due and exigible for any cause whatsoever.

IDINGTON J.—For the several reasons assigned by the learned trial judge and respectively assigned by the majority of the learned judges in the Court of King's Bench in support of the judgment herein appealed from I am of the opinion that this appeal should be dismissed with costs.

DUFF J.—I have reached the same conclusion as the Court of King's Bench. The obligation under article 18 is

à défaut par la compagnie d'accomplir les conditions, charges et obligations auxquelles elle est tenue vis-à-vis d'eux (détenteurs des obligations) et tel que convenu dans le présent acte de fiducie, à effectuer le paiement des obligations et des coupons d'intérêt à leurs échéances respectives.

Articles 8 and 19 set forth some of the most important of these conditions, article 8 being the ordinary accelera-

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tion clause making the principal exigible on non-payment of interest; and article 19 among other things creates in favour of the municipality a hypotheque upon the lands and a charge upon the movables of the debtor for the total amount of the debenture issue ($100,000), which is also made exigible upon such default.

The natural reading of the words "à leurs échéances respectives" construed in the light of these cognate provisions seems to me to be that which the court below has given them. It is upon failure of the debtor to fulfil the conditions of the agreement, that the municipality guarantees payment of principal and interest at "leurs échéances respectives"; and on the default which happened, which brought the guarantee into operation, the principal by the terms of article 8 was not only to become due, and did become due to the creditor, but under article 19 the payment of it was to become and did become enforceable at the instance of the guarantor. The instrument provides for acceleration not only in favour of the creditor, but in favour of the guarantor also.

Consider the effect of the construction advanced by the appellants. The guarantor may, on default in respect of interest, enforce his hypothec for the principal in the usual way by obtaining judgment and proceeding to execution while under that construction he all the while is under no personal obligation to pay until the date of maturity named in the debentures. It seems a more convincing reading of the instrument to regard the right of the surety under the conditions making the municipality's hypothec enforceable upon default in respect of interest as the natural correlative of its responsibility for payment of the principal in accordance with the terms of article 8.

The appeal should be dismissed with costs.

ANGLIN J. (dissenting).—Although the weight of modern French opinion may be to the contrary (vide 13 Baudry-Lacantinerie, 1040; 2 Planiol, 2339), on the authority of Pothier (Obligations, nos. 371 and 404) I shall assume that, unless relieved by the terms of the contractual provision evidencing its character and extent (clause 18), the obligation of the appellant would be, upon default of the

principal debtor, to meet whatever liability it had undertaken, including that of payment in full before maturity, consequent upon such default. I therefore proceed at once to consider the meaning and effect of clause 18 of the contract, having in mind that, while the obligation of a surety cannot exceed, it may fall short of, and be subject to conditions less onerous than, that of the principal debtor. Article 1933 C.C.

Under clause 18 the liability of the surety arises only upon the principal debtor making default in carrying out the terms of its contract. Clause 8 of the contract upon such default occurring renders the whole debt then remaining unpaid and interest thereon immediately exigible from the principal debtor, if the trustee should deem it advisable to demand it. Yet, although the debt should thus become payable by the principal debtor in one sum and immediately, the consequent liability undertaken by the surety is expressed in clause 18 as follows:

*à effectuer le paiement des obligations et des coupons d'intérêt à leurs échéances respectives.*

In other words, although the principal debtor (*inter alia*) on his making default in payment, is penalized by losing the privilege of deferring payment of the bonds and interest coupons until their respective dates of maturity (the term), the surety contracts that on such default occurring it will make payment of the bonds and interest coupons, not at once and *en bloc,* but only at the respective dates on which they fall due (à leurs échéances respectives). I cannot reconcile this explicit provision of the contract with an obligation of the surety to pay in one sum and immediately on demand of the trustee, the whole debt, both principal and interest; nor does it seem proper to give to the phrase, "*à leurs échéances respectives,*" one meaning in clauses 8 and 9 and another and a different meaning in clause 18, especially if to do so might extend the burden of the surety "beyond the limits within which it was contracted." (Article 1935 C.C.)

The contractual acceleration clause, applying as it does to breach of any condition or obligation to which the principal debtor is subject under the terms of the trust deed, is much more onerous than the stipulation for forfeiture

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of term (acceleration) which article 1092 C.C. would import. Indeed it would seem that the obligation of the surety was explicitly restricted as it is by clause 18 to payment of the bonds and interest coupons at their respective due dates, notwithstanding the consequence of acceleration which the contract provided that default should entail upon the principal debtor, in order to make it clear that the surety should not be subject either to the forfeiture of term imposed by article 1092 C.C. or to the more onerous provision for the like forfeiture accepted by the principal debtor in clause 8 of the contract and to which, as surety *in omnem causam,* a general or indefinite guarantee might have exposed it. Pothier, Obligations, no. 404.

Nothing in the indorsement of the bonds imposes any greater obligation than that evidenced by clause 18 of the trust deed, since by the indorsement itself the trust deed is declared to be the governing instrument.

On the other hand measuring the obligation of the city by the terms of the by-law no. 335—the sole authority for its assumption—its liability is restricted to guaranteeing payment of debentures,

*dont le terme de remboursement sera par séries de deux à dix ans de la date où la cité donnera cette garantie,*

with interest payable semi-annually. There is nothing whatever in the by-law to authorize subjecting the city to the penalty of the acceleration clause which the plaintiffs seek to impose upon it as surety because the debtor accepted it for itself. The contract evidenced by clause 18 of the trust deed should be construed in the light of the by-law under the authority of which it was executed by the civic officials. Whatever might be said of their right to commit the city as surety to an obligation or guarantee of an indebtedness left subject to the application of article 1092 C.C., there could be no justification for their committing it to an undertaking involving the wider acceleration provision embodied in clause 8 of the trust deed. It is a reasonable inference from the terms of clause 18 that it was inserted to preclude any contention that the city was so bound. The terms of the by-law therefore afford a strong argument for giving to clause 18 the construction above indicated.

I would for these reasons allow this appeal with costs here and in the Court of King's Bench and would reduce the judgment against the defendant to a sum equal to the amount of the bonds and interest coupons which had, according to their respective dates of maturity, fallen due before this action was begun, with interest thereon up to that time. The plaintiff should have its costs down to and inclusive of judgment in the Superior Court.

BRODEUR J.—La principale question qui nous a été soumise est de savoir si la déchéance du terme qui a frappé le débiteur principal s'étend à la caution.

La compagnie " The Three Rivers Shipyards, Limited," a, en vertu d'un acte de fiducie en date du 22 septembre 1917, émis des obligations au montant de $100,000 qui étaient payables comme suit: $12,000 en 1919 et ensuite $11,000 par année jusqu'en 1927 avec intérêts.

Il était en outre stipulé à l'articlé 8 de cet acte que, si la fiduciaire, la compagnie Sun Trust, le jugeait convenable, le montant total de l'émission ou telle partie d'icelle restant alors due deviendrait exigible dans aucun des cas suivants:

(*a*) Si la compagnie ne paie pas les obligations ou les coupons d'intérêts à leurs échéances respectives.

(*b*) Si la garantie présentement donnée est diminuée pour aucune cause ou raison quelconque.

(*c*) Si aucune des conditions et obligations auxquelles la compagnie peut être tenue par les présentes ne sont pas rigoureusement remplies.

La cité de Trois-Rivières a dans le même acte, par la clause 18, cautionné dans les termes suivants:

18. Et pour assurer plus amplement le paiement des dites obligations et de leurs coupons d'intérêts, la ville déclare par les présentes garantir le paiement des obligations émises par la compagnie comme susdit jusqu'à concurrence de la somme globale de cent mille piastres ($100,000) en principal avec en plus les intérêts, la ville s'obligeant vis-à-vis du fiduciaire pour le compte et le bénéfice des détenteurs de ces obligations et de ces coupons, à défaut par la compagnie d'accomplir les conditions, charges et obligations auxquelles elle est tenue vis-à-vis d'eux et tel que convenu dans le présent acte de fiducie, à effectuer le paiement des obligations et des coupons d'intérêt à leurs échéances respectives.

La compagnie " The Three Rivers Shipyards, Limited," n'a pu en 1920 payer les intérêts et le capital alors dus et elle a été mise en liquidation.

La fiduciaire, la compagnie intimée The Sun Trust, poursuit la cité de Trois-Rivières pour réclamer le paiement de la somme totale qui est due en vertu des obligations. La

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cité plaide que la fiduciaire est incompétente pour exercer cette action et que la déchéance du terme que le débiteur principal a encourue ne saurait l'affecter comme caution.

Nous allons d'abord examiner ce dernier point.

Qu'est-ce qu'un cautionnement? C'est un contrat par lequel quelqu'un s'oblige pour un débiteur envers le créancier à lui payer ce que ce débiteur lui doit en accédant à son obligation.

Dans le cas actuel, la compagnie Three Rivers Shipyards s'est obligée de payer $100,000 par versements annuels de 1919 à 1927; mais il est stipulé dans l'acte que si elle fait défaut d'effectuer ces versements ou si elle diminue ses garanties, alors le créancier a droit de se faire payer en entier et le débiteur principal perd le bénéfice du terme qui a été stipulé.

La cité de Trois-Rivières cautionne les obligations du débiteur principal. Quelle est l'étendue de ce cautionnement? Pothier, qui est toujours un guide bien sûr dans l'étude de questions comme celle-ci, nous dit au n° 371 de son admirable Traité des Obligations que

si le cautionnement n'exprime rien, on y doit sous-entendre le terme ou la condition exprimées dans l'obligation principale.

Il exprime la même opinion avec encore plus de force au no. 404 du même traité quand il dit:

Lorsque les termes du cautionnement sont généraux et indéfinis, le fidéjusseur *est censé s'être obligé à toutes les obligations* du principal débiteur résultantes du contrat auquel il a accédé; il est censé l'avoir cautionné *in omnem causam.*

Voilà qui est clair et bien précis; la caution doit remplir toutes les obligations du débiteur principal *in omnem causam,* suivant les termes et les conditions du contrat originaire.

Tout le monde admet que la Three Rivers Shipyards, Limited, doit maintenant la balance de ses obligations sous les dispositions de la clause 8ème du contrat. En est-il de même de sa caution, la cité de Trois-Rivières? En principe général, il n'y a pas de doute, car la caution assume toutes les obligations du débiteur principal. Mais on dit: "La cité ne s'est pas obligée au même dégré que le débiteur principal et la déchéance du terme originairement stipulé que le débiteur principal avait acceptée ne frappe pas la caution." La caution aurait certainement pu for-

mellement déclarer que cette déchéance ne la lierait pas. Mais elle ne l'a pas fait. Les mots " échéances respectives " sur lesquels elle se base à l'appui de sa prétention couvrent non-seulement les échéances originairement stipulées, mais aussi l'échéance globale et conditionnelle qui est mentionnée dans le contrat, si le débiteur principal fait défaut dans l'exécution de ses obligation.

Pour soustraire la caution à l'accomplissement de toutes les stipulations de la convention principale, il aurait fallu une disposition plus formelle et plus explicite que celle qui est invoquée.

On a cité à ce sujet l'opinion d'auteurs modernes, comme Demolombe, Guillouard, Planiol, Duranton et Pardessus, et un jugement de la cour de Cassation, 1891-1-5, à l'appui de la thèse soutenue par l'appelante que si le débiteur principal est en faillite et qu'il soit à cause de cela déchu du bénéfice du terme, cette déchéance ne rejaillit pas sur la caution.

Mais il ne faut pas oublier que ces auteurs ont écrit sous un système de droit contenant une disposition spéciale dans le Code de Commerce qui a nécessairement influé sur leur décision. Cette opinion est d'ailleurs combattue et victorieusement suivant moi, par d'autres auteurs modernes dont les écrits font grande autorité, savoir: Aubry & Rau, tôme 4, art. 303, note 18; Laurent, vol. 17, n° 213; Huc, vol. 7, n° 289; Larombière, art. 1188.

Ne vaut-il pas mieux suivre l'opinion exprimée par Pothier et que j'ai citée plus haut? Il écrivait sous le droit coutumier. Il n'y avait pas alors dans le droit français cette disposition du Code de Commerce. Pothier était sous ce rapport dans la même position que nous sommes dans Québec.

Il est bon de remarquer aussi que ce point ne paraît n'avoir été soulevé qu'en Cour du Banc du Roi.

Pour toutes ces raisons, le jugement qui a déclaré que la cité de Trois-Rivières était obligée de payer maintenant le montant global des obligations est bien fondé.

On a aussi prétendu que la fiduciaire n'avait pas droit de poursuite. Les cours inférieures ont été unanimes sur ce point, et il n'a pas été discuté devant cette cour. Je

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vois d'ailleurs que la cause de *Porteous* v. *Reynar* (1), a formellement décidé que l'article du code qu'on a invoqué ne s'applique pas aux fiduciaires

in whom the subject of the trust has been vested in property and possession for the benefit of third parties and who have duties to perform in the protection or realization of the trust estate.

L'appel devrait être renvoyé avec dépens.

MIGNAULT J. (dissenting).—The whole question here is whether under the contract whereby the appellant guaranteed in favour of the respondent the ten-year bond issue of The Three Rivers Shipyards Limited, the respondent can, in view of the default of the latter company, claim from the appellant the immediate payment of the whole capital amount outstanding of the said bond issue? In other words, is the acceleration clause stipulated by the respondent against The Three Rivers Shipyards, Limited, in case of the default of the latter, binding on the appellant, its surety?

This acceleration clause (clause 8 of the contract) is as follows:

Nonobstant le terme accordé pour le paiement de chacune des obligations, le montant total de la dite émission de cent mille piastres ($100,000) ou telle partie d'icelle restant alors due, deviendra exigible, si le fiduciaire le juge convenable, dans aucun des cas suivants, savoir:

(*a*) Si la compagnie ne paie pas les obligations ou les coupons d'intérêts à leurs échéances respectives.

(*b*) Si la garantie présentement donnée est diminuée par aucune cause ou raison quelconque.

(*c*) Si aucune des conditions et obligations auxquelles la compagnie peut être tenue par les présentes ne sont pas rigoureusement remplies.

The default of the company to pay the bonds and interest coupons " à leurs échéances respectives " also gives the right to the trustee (respondent), under clause 9 of the contract, to enter into possession of the properties, rights, revenues and franchises of the company, after 30 days' notice to the company and to the city, and it is stipulated that the city

pourra alors éviter l'effet de cette clause en effectuant le paiement des obligations ou coupons échus.

I desire to note, before going further, that the words " à leurs échéances respectives " which are found in clauses 8 and 9, undoubtedly refer to the date of maturity mentioned

(1) [1887] 13 App. Cas. 120.

in each bond and in each interest coupon, and not to any acceleration of such date of maturity. And it is significant that the city can prevent the entry into possession of the trustee on the default of the company by paying only the overdue bonds or interest coupons.

The obligation of the city appellant to guarantee the bond issue is expressed as follows in clause 18 of the contract:

Et pour assurer plus amplement le paiement des dites obligations et de leurs coupons d'intérêts, la ville déclare par les présentes garantir le paiement des obligations émises par la compagnie comme susdit jusqu'à concurrence de la somme globale de cent mille piastres ($100,000) en principal avec en plus les intérêts, la ville s'obligeant vis-à-vis du fiduciaire pour le compte et le bénéfice des détenteurs de ces obligations et de ces coupons, à défaut par la compagnie d'accomplir les conditions, charges et obligations auxquelles elle est tenue vis-à-vis d'eux et tel que convenu dans le présent acte de fiducie, à effectuer le paiement des obligations et des coupons d'intérêt à leurs échéances respectives.

This obligation of the appellant is subsidiary to that of the company, arising only on the default of the latter to fulfil the conditions, charges and obligations to which it is held towards the bondholders, and is to pay the bonds and interest coupons "à leurs échéances respectives."

Here again, as in clauses 8 and 9, the words "à leurs échéances respectives" refer in my opinion to the date of maturity mentioned in each bond and in each interest coupon, and not to any accelerated maturity of the same. It is very important to note that the parties in clause 18 contemplate the default of the company referred to in clause 8, and that in that event the obligation of the city, on the contract of suretyship, is only to pay the bonds and coupons at their respective dates of maturity.

I merely mention clause 21 relied on by the respondent to show that I have not overlooked it. It declares the obligation of the city absolute towards the bondholders, notwithstanding certain conditions stipulated by it with regard to the company, but this obligation of the city is that created by clause 18 which I have cited.

On the construction of the contract, my opinion is therefore that the default of the company to pay the bonds and interest coupons at their maturity, while it renders the whole capital amount due as regards the company, only makes the city liable to pay the bonds and interest coupons as they respectively mature.

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Mignault J.

Mr. Fortin on behalf of the respondent cited Pothier, Obligations, no. 371, paragraph 2, where he says:—

Observez que si le cautionnement n'exprime rien, on y doit sous-entendre le terme ou la condition exprimée dans l'obligation principale, de même qu'il est décidé en la loi, 61 ff. eod. tit. que le lieu du paiement exprimé dans l'obligation principale, est sous-entendu dans le cautionnement.

And the contention was that if the suretyship deed be silent or even equivocal as to the term within which the surety must pay, this term must be held to be the same as that applicable to the principal debtor.

The argument would be well worthy of consideration were the contract in question silent or even equivocal as to the term of payment applicable to the surety, or in Pothier's words, *si le cautionnement n'exprimait rien.* But, on the contrary, clause 18 is very clear, and I do not see how the intention of the city to be liable for the bonds and coupons only when they respectively mature, could be better expressed.

I have referred only to the contract, for I regard the question at issue as involving merely the proper construction of the instrument signed by the parties. It is therefore useless to mention any article of the civil code, such as Art. 1092, which, according to weighty modern French authorities, and some decisions of our courts (see Beauchamp, *Code Civil Annoté,* article 1092, no. 12), does not apply to the surety. The parties here have made their own contract and determined the effect of the debtor's default on the obligation of the surety. There remains nothing to do but to give effect to their expressed intention.

I would allow the appeal with costs against the respondent here and in the appellate court. There should be judgment for the respondent against the appellant only for the bonds and coupons which had reached their respective dates of maturity when this action was taken. The appellant should pay the respondents' costs in the Superior Court, for it wrongly asked for the entire dismissal of the respondent's action.

*Appeal dismissed with costs.*

Solicitor for the appellant: *George Méthot.*

Solicitors for the respondent: *Perron, Taschereau, Rinfret, Vallée & Genest.*