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THE ONTARIO BANK (CLAIMANTS).....APPELLANTS;

AND

EDWARD CHAPLIN (CONTESTANT).....RESPONDENT;

AND

THE EXCHANGE BANK OF CANADA .. .. } IN LIQUIDATION.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).*

Joint and several debtors—Insolvency—Distribution of assets—Privilege—R.S.C. ch. 129 sec. 62—Winding-up Act—Deposit with bank after suspension—Practice—Leave to appeal—Order nunc pro tunc.

Held Per Ritchie C.J., and Taschereau J., affirming the judgment of the court below, Strong and Fournier JJ. *contra*, that a creditor is not entitled to rank for the full amount of his claim upon the separate estates of insolvent debtors jointly and severally liable for the amount of the debt, but is obliged to deduct from his claim the amount previously received from the estates of the other parties jointly and severally liable therefor.

Per Gwynne and Patterson JJ. That a person who has realized a portion of his debt upon the insolvent estate of one of his co-debtors cannot be allowed to rank upon the estate (in liquidation under the Winding-up Act) of his other co-debtors jointly and severally liable without first deducting the amount he has previously received from the estate of his other co-debtor. R. S. C. ch. 129 sec. 62. The Winding-up Act.

Held, also (affirming the judgment of the court below) that a person who makes a deposit with a bank after its suspension, the deposit consisting of cheques of third parties drawn on and accepted by the bank in question, is not entitled to be paid by privilege the amount of such deposit.

After the case was argued the appellant with the consent of the respondent obtained from a judge of the court below an order to extend the time for bringing the appeal, and subsequently before the time expired he got an order from the Registrar of

* PRESENT:—Sir W. J. Ritchie C.J. and Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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the Supreme Court, sitting as a Judge in Chambers, giving him leave to appeal in accordance with section 76 of the Winding-up Act, and the order declared that all proceedings had upon the appeal should be considered as taken subsequent to the order granting leave to appeal.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) confirming a judgment of the Superior Court for Lower Canada, Montreal district (2), maintaining the contestation of the appellants' claim upon the Exchange Bank in liquidation.

The Ontario Bank creditors of the Exchange Bank, on the 5th June, 1886, filed an amended claim with the liquidators of the Exchange Bank of Canada, which had stopped payment on the 17th September, 1883, and had gone into liquidation under the Winding-up Act (1). The claim consisted of two items of $11,216.56, including a sum of $15,766.56, concerning which there was no contestation, and $6,450.00 in respect of certain promissory notes of Hyde, Turcot & Co., insolvents, which had been discounted for the Exchange Bank in 1883, and the payment of which at maturity had been guaranteed, and a further sum of $939.85, representing a deposit made by the Ontario Bank of several cheques drawn by customers of the Exchange Bank upon their accounts there, which cheques were handed in to the bank, after suspension of payment but before the Ontario Bank was aware of the suspension, and were passed to the credit of the Ontario Bank and charged against the several drawers of them, and which amount the Ontario Bank asked to be paid by preference.

In 1884, when the Ontario Bank first proved its claim under the Winding-up Act, it credited the Ex-

(1) M.L.R. 5 Q.B. 407. (2) 15 Rev. Lég. 435.

(1) R. S. C. Ch. 129.

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change Bank with the dividends it had received from the insolvent estate of Hyde, Turcot & Co., viz.: $2,454.29, but in the amended claim these dividends were not deducted.

The respondent Edward Chaplin, a creditor of the Exchange Bank in liquidation, contested the amended claim of the Ontario Bank on the ground that the Exchange Bank being liable as endorsers, were entitled to the credit of the dividends received by the Ontario Bank on Hyde, Turcot & Co.'s promissory notes, and that the cheques not having been presented until after the suspension of the bank, could not be paid by preference.

The written guarantee of the Exchange Bank when Hyde, Turcot & Co.'s notes were discounted reads as follows :—

"DR. IN ACCCOUNT WITH EXCHANGE BANK OF CANADA.

00843—D. Morrice & Co	Oct. 15	Beet Sugar Co	$	3,632 46
1—Gault Bros. & Co	Dec. 24	" " "		4,000 00
50—C. H. Nash	Dec. 24	A. W. Ogilvie		8,642 80
9—St. Lawrence S. Co.	Nov. 17	F. E. Gilman		5,000 00
60—W. Angus	Dec. 17	" "		5,000 00
798—Hyde, Turcot & Co.	Nov. 20	A. H. Plimsoll		2,150 00
9— " " "	Dec. 20	" "		2,150 00
800— " " "	Jan. 21	" "		2,150 00
71—Wm. Tarley	Dec. 4	M. H. Gault		1,279 20
55—C. Lamoureux & Cie.	Dec. 18	Brossard, Chaput & Co		2,000 00
				$36,004 46

"In consequence of the Ontario Bank having discounted the above list of notes for the Exchange Bank of Canada, the said Exchange Bank hereby guarantee the prompt payment of the same at maturity.

"T. CRAIG,

"*President, Exchange Bank of Canada.*

"Montreal, 21st August, 1883."

The contestation of the amended claim of the Ontario Bank was maintained by the Superior Court and the Court of Queen's Bench.

Upon the appeal to the Supreme Court of Canada, the only questions argued were :—

1. As to the right of a creditor to rank, for the full amount of his claim, upon the separate estates of two insolvent debtors jointly and severally liable for the amount of the debt ; or, in the present case, the right of the appellants to rank for the full amount of their claim, founded upon notes discounted for the Exchange Bank, without deducting from their claim the amount received from other parties jointly and severally liable with the bank upon the notes ; and

2. As to the right of the appellants to be paid by privilege the amount of a deposit made with the Exchange Bank of Canada after its suspension, represented by cheques of third parties accepted by the Exchange Bank, and placed to the credit of the appellants.

After the case was set down for hearing the appellant, having failed to obtain leave to appeal to the Supreme Court in accordance with section 76 of the Winding-up Act, obtained from the judge of the court below an order extending the time for leave to appeal, and before the time expired the Registrar of the Supreme Court to whom a motion *nunc pro tunc* was referred granted leave to appeal, and his order declared that all proceedings had upon the appeal should be considered as taken subsequent to the order grating leave to appeal.

The case which had been argued at the May sessions, 1890, was ordered to be reargued at the February sessions, 1891, in order that the case should be decided by the full court, Mr. Justice Taschereau being absent at the May sessions, 1890.

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Ritchie C.J.

Abbott Q.C. for appellants; and *Geoffrion* Q.C. and *J. H. Greenshields* Q. C. for respondent. The points of argument and cases cited are fully reviewed in the reports of the case (1), and in the judgments hereinafter given.

Sir W. J. RITCHIE C. J.—For the reasons given by the Court of Queen's Bench for Lower Canada (appeal side), I am of opinion that this appeal should be dismissed.

STRONG J.—I entirely agree with the Court of Queen's Bench that there is no foundation for the appellants' claim to preferential payment of the amount of the cheques deposited by the appellants in the Exchange Bank after its suspension.

I am, however, of opinion that the appellants are entitled in other respects to succeed in their appeal. The promissory notes for the full amount of which the appellants claim to be ranked as creditors without deducting payments received from other parties, were discounted by the appellants in the ordinary course of business, the Exchange Bank having first endorsed them. The latter bank thus became liable upon the paper jointly and severally with the prior parties to it.

The appellants had therefore, *primâ facie*, a legal right to get the benefit of this liability *in solido* by actions brought against all or any of the parties so liable. This being so it seems reasonable that the same right—to obtain payment in full—should be conserved to the creditor in the case of the bankruptcy or insolvency of the debtors—against the bankrupt or insolvent estates unless there is some positive law or enactment to the contrary. There being no such enactment, the solution of the question must depend entirely on the old law of France as it existed at the time of the

cession of the country, which law formed the common law of Lower Canada. Without entering upon a critical examination of the various authorities which have been cited, it is sufficient for me to say upon this point that I have come to the conclusion that the ancient law of France was that which was finally established by the jurisprudence. The state of this jurisprudence is shown by the arrêt of the Parliament of Paris of the 18th of June, 1776, and the arrêt of the Council of the 24th February, 1778, reversing the decision of the Parliament of Aix of the 18th June, 1776, which last arrêt is reported by Emerigon (1). The law as thus declared was embodied in Art. 542 of the Code of Commerce. I cannot, after a full consideration of all the authorities agree with the Court of Queen's Bench in holding that this was new law, introduced for the first time by the Code of Commerce, and applicable only to commercial matters ; on the contrary, the best opinion I can form is that it was the reproduction of a principle which was established law, not only in commercial but also in civil matters. I am led to form this opinion, not only by what is said by authors of high authority, particularly Massé (2) ; Alauzet (3) ; Delvincourt (4) ; Rivière (5) ; Bravard-Veyrières, (6) ; and Larombière (7) ; but also by the consideration that in no other way can the creditor who has the joint and several obligation of several debtors obtain his right to a full payment save by treating each person obliged to him as the sole debtor. One of the authors before mentioned, Bravard-Veyrières, in the 7th edition of his work edited by Demangeat, has so clearly demonstrated this upon principle, as to con-

(1) Edition by Boulay-Paty, vol. 2, p. 565.
(2) Ed. 3, vol. 3, No. 2019.
(3) Ed. 3, vol. 8, pp. 2 et seq.
(4) Droit Commercial Ed. 2, vol. 2, p. 456, and note to p. 279.
(5) P. 754 et seq.
(6) Droit Commercial Ed. 7, par Demangeat, p. 600 et seq.
(7) 2 vol. p. 617.

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vince me that the creditor has a right to prove for the full amount of his debt against each estate without deducting payments received from the other, and that no other conclusion can be consistent with the contractual rights of a creditor to whom several debtors are bound *in solido*.

I am of opinion that the appeal should be allowed to the extent above indicated.

FOURNIER, J.—La question à décider en cette cause est absolument la même que celle soulevée dans la cause de *Benning et al.* v. *Simpson et al.* et *l'hon. R. Thibaudeau* (1), au sujet du droit d'un créancier de se présenter dans chaque masse en faillite de ses co-débiteurs solidaires pour la totalité de la somme qui lui est due. Il y a aussi la question de savoir si l'appelante a un privilège pour se faire payer de la somme de $939.80 qu'elle avait déposée à la banque d'Echange après la fermeture de ses portes, pour insolvabilité.

Dans la première cause il est indubitable qu'il y avait solidarité, parce que la créance des appelants était pour la plus grande partie fondée sur des billets promissoires, signés par diverses personnes et endossés par Marcotte en faveur des appelants Benning *et al.* Il y a également solidarité entre la banque d'Echange et les souscripteurs et endosseurs des billets promissoires mentionnés dans l'exhibit D. et en date du 21 août 1883, transportés à la banque d'Ontario pour escompte, par la dite banque d'Echange. La solidarité ne résulte pas dans ce cas comme dans l'autre, de billets promissoires signés par divers prometteurs en faveur de Marcotte et par lui régulièrement endossés en faveur de Benning *et al.* Elle résulte de la lettre de garantie donnée par la banque d'Echange à l'appelante et qui est conçue dans les termes suivants :—

(1) 20 Can. S. C. R. 110.

CLAIMANTS' EXHIBIT "D" AT ENQUETE.

(Please examine and report immediately.)

Dr. Cr.

IN ACCOUNT WITH EXCHANGE BANK OF CANADA.

00843—D. Morrice & Co	Oct.	15	Beet Sugar Co	$3,632	46
1—Gault Bros. & Co	Dec.	24	" "	4,000	00
50—C. H. Nash	Dec.	24	A. W. Ogilvie	8,642	80
9—St. Lawrence Steam'p Co.	Nov.	17	F. E. Gilman	5,000	00
60—W. Angus	Dec.	17	" "	5,000	00
798—Hyde, Turcot & Co	Nov.	20	A. H. Plimsoll	2,150	00
9— " "	Dec.	20	" "	2,150	00
800— " "	Jan.	21	" "	2,150	00
71—Wm. Tarley	Dec.	4	M. H. Gault	1,279	20
55—C. Lamoureux & Cie	Dec.	18	Brossard, Chaput Co.	2,000	00
				$36,004	46

In consequence of the Ontario Bank having discounted the above list of notes for the Exchange Bank of Canada, the said Exchange Bank hereby guarantee the prompt payment of the same at maturity.

T. CRAIG, *Pres.*,
Exchange Bank of Canada.

Montreal, 21st Aug., 1883.

Cette lettre constitue d'après notre loi l'espèce de cautionnement que l'on appelle un aval. Il ne faut pas le confondre avec le cautionnement ordinaire parce qu'il produit des effets plus étendus.

L'aval, de quelque manière qu'il ait été donné, produit de plein droit la solidarité, etc., etc.

Sur la nature et les effets de l'aval il n'y a aucune différence d'opinion dans le droit français. Celui qui a garanti un effet de commerce est toujours solidaire de celui qu'il garantit. Ce principe n'a nullement été mis en question dans cette cause. Les deux cours Supérieure et du Banc de la Reine l'ont également reconnu. Le jugement de la cour Supérieure s'exprime ainsi à ce sujet :

Attendu que la réclamante, dans sa réponse à la contestation du contestant, allègue : que, dans le mois d'août mil huit cent quatre-vingt-trois, la réclamante a prêté à la banque d'Echange du Canada, la somme

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de trente-cinq mille deux cent quatre-vingt-dix-huit piastres et cinq centins, et lui a escompté, en faisant ce prêt, divers billets promissoires qu'elle avait alors, et pour le paiement desquels la dite banque d'Echange se rendit conjointement et solidairement responsable, avec les personnes obligées au paiement de ces billets, qu'au nombre de ces billets s'en trouvaient trois de la société Hyde, Turcot et Cie, au montant de deux mille cent cinquante piastres chacun.

La cour du Banc de la Reine a aussi admis la solidarité en confirmant purement et simplement le jugement de la cour Supérieure. Cela suffit pour régler la question de solidarité entre la banque d'Echange et les souscripteurs et endosseurs des billets garantis par la lettre ci-dessus citée.

Comme on le voit, la question dans cette cause se résume, comme dans celle de Benning *et al.*, à savoir si l'appelante a droit à un dividende sur le montant de sa demande, ou bien seulement sur la balance de sa réclamation, après déduction faite du dividende reçu dans la faillite de Hyde, Turcot et Cie.

Je ne crois pas devoir répéter ici l'argument que j'ai déjà fait sur cette question dans la cause de *Benning et al* (1), où j'en suis venu à la conclusion que le créancier solidaire peut se présenter pour le plein montant de sa créance dans les différentes masses en faillite de ses débiteurs solidaires jusqu'à entier paiement de sa créance.

Voir aussi Ruben de Cauder. Dict. de droit commercial (2).

1. L'aval est une espèce de cautionnement, mais il ne faut pas le confondre avec le cautionnement ordinaire parce qu'il produit des effets plus étendus.

7. Aucune forme particulière n'est prescrite pour l'aval.

24. L'aval de quelque manière qu'il ait été donné, produit de plein droit la solidarité et assujétit celui qui l'a souscrit à toutes les obligations de la personne pour laquelle il a été donné.

Les parties conservent la faculté d'en restreindre l'étendue par des stipulations particulières.

(1) 20 Can. S. C. R. 110. (2) 2 vol. vo. Aval.

25. Mais ces restrictions ne se supposent pas. A moins d'une convention expresse le donneur d'aval est soumis aux mêmes obligations que le débiteur principal.

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Quant à la somme de $939.80 réclamée à titre de privilège, je concours dans les motifs donnés par l'honorable juge Mathieu pour justifier son refus de reconnaître l'existence d'un privilège pour le remboursement de cette somme.

D'après mon opinion le jugement de la cour du Banc de la Reine devrait être modifié de manière à reconnaître le droit à l'appelante d'être colloquée sur le plein montant de sa réclamation sans déduction du dividende de Hyde, Turcot et Cie.

TASCHEREAU J.—I am also of opinion that the appeal should be dismissed for the reasons given by the Court of Queen's Bench for Lower Canada (appeal side).

GWYNNE J.—There are two sums only as to which questions are raised upon this appeal, viz., $2,454.29 and $944.81; as to this latter sum the Ontario Bank claim a right to rank as privileged creditors on the Exchange Bank in liquidation. As to the $2,454.29, the question is whether the Ontario Bank should be allowed to amend a claim brought in and proved by them on oath against the Exchange Bank in liquidation, by erasing from the credit side of the said claim so proved the above sum, for which in their claim they had given credit as received out of certain promissory notes discounted by the Ontario Bank for and at the request of and guaranted by the Exchange Bank. If the Exchange Bank had continued solvent they could not have been held liable in an action brought against them upon their contract of guarantee for any greater amount than remained due and unpaid upon the notes guaranteed at the time of the commencement of the

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action. So in like manner, upon the Ontario Bank bringing in and proving their claim against the Exchange Bank in liquidation under the Winding-up Act, they could not be received as claimants against the bank in liquidation for a larger amount than that bank would have been liable for in an action, if solvent, the Ontario Bank could not be recognized as creditors for a greater amount than was actually due by their debtor. When therefore the Ontario Bank in their claim made in December, 1884, which was proved upon the oath of their agent, gave credit for the above sum of $2,594.29 theretofore received by them upon the notes which were guaranteed by the Exchange Bank, they acted quite correctly in so doing and to the claim as then made, and which in truth was the only one existing, they must be held.

As to the $944.81 the claim is founded upon the fact that the Exchange Bank after they had stopped payment, but before the Ontario Bank were aware thereof, received from the Ontario Bank for deposit to their credit certain cheques made in their favour by certain customers of the Exchange Bank upon them, and which had been marked as good by the latter bank (and received or marked by the Ontario Bank before the Exchange Bank stopped payment) and entered the amounts of the cheques to the credit of the Ontario Bank's account in the books of the Exchange Bank. This entry was in fact but a completion of the undertaking involved in the marking the cheques as good a couple of days previously before the bank had stopped payment. But assuming this conduct of the Exchange Bank in entering those cheques to the credit of the Ontario Bank as above stated without informing the Ontario Bank of the stoppage of payment by the former, to have constituted an actionable wrong to the Ontario Bank, the nature of their bank's remedy

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was to compel a return of the cheques so as to enable the Ontario Bank to look to the persons who had given them the cheques and the latter to have proved against the Exchange Bank in liquidation. Not having pursued that remedy, but on the contrary made claim against the Exchange Bank as their debtors in respect of their deposit, and having proved the item in their claim presented in December, 1884, in the liquidation, they can only claim in respect of that deposit as ordinary creditors. To allow them to rank as privileged creditors in respect of that item, would operate to the prejudice of the general creditors of the bank in liquidation, and there is in my opinion no foundation whatever in law for the appellants' contention. The appeal must therefore be dismissed with costs.

PATTERSON J.—The Ontario Bank discounted for the Exchange Bank, on the 21st of August, 1883, a number of promissory notes, three of which were made by Hyde, Turcot & Co., the whole amounting to $36,004.46, and the Exchange Bank gave a written guarantee of the prompt payment of all the notes at maturity. The notes were all paid by the parties to them, except those of Hyde, Turcot & Co. who became insolvent.

The Exchange Bank stopped payment on the 17th of September, 1883, and went into liquidation under the Winding-up Act. If I correctly understand the documents before us, none of the notes fell due until after September, 1883, but they had all fallen due before the filing of the claim of the Ontario Bank on which the present contest arises.

That claim was proved on the 5th of June, 1886. It consists of two items. One is a special claim for $939.85 the consideration of which we may defer. It has no reference to the notes. The other item of

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$11,216.56, includes $5,472.97 concerning which there is no question before us, and $5,743.59 in respect of the notes. This amount is produced by debiting, as of the 21st of August, 1883, $35,298.05 for cash advanced, being the proceeds of the $36,004.46 of notes discounted on that day, and crediting $29,554.46, the amount of all the notes except those of Hyde, Turcot & Co. Those three notes amounted to $6,450, and the Ontario Bank had received in March and June, 1884, before they proved any claim under the winding-up of the Exchange Bank, two dividends from the insolvent estate of Hyde, Turcot & Co., amounting together to $2,454.29.

The proof made on the 5th of June, 1886, was an amended claim. A claim had been proved on the 30th of December, 1884, in which credit had been given for these dividends, but that was withdrawn, and the contest, on this branch of the case, is whether the appellants are bound to deduct the dividends from their claim of $5,743.59, or have the right to rank for the whole amount.

It seems perfectly plain that the contention of the appellants cannot be maintained if the transaction is treated as they have treated it in their proof of claim. It is there represented as a loan to the Exchange Bank of $35,298 05 for which that corporation was primarily liable as borrower and the notes security for the loan. I am inclined to think that in putting the claim in this shape the appellants truly represented its real character, but if so they ought to have proved as for a secured claim under section 62 of the Winding-up Act (1), and cannot be allowed to rank without first accounting for the value of their security.

(1) R. S. C. ch. 129.

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The argument for the appellants, however, ignores the form in which their claim was presented to the liquidator, and falling back upon the ostensible transaction of a discount of notes with a letter of guaranty, asserts a joint and several obligation, the co-debtors being, in the case of each note, the makers or endorsers of the notes and the bank as guarantor. This question of joint and several obligation is one which I do not find free from difficulty, and the authorities, which are fully cited and examined by Mr. Justice Jetté in *Benning* v. *Thibaudeau* (1), are by no means agreed upon it. My own opinion inclines to the recognition in this case of the joint and several obligation. I think that opinion is supported by articles 1103, 1104, 1105 and 2310 of the Civil Code, in connection with which I may refer to an English authority. In the case of *Liquidators of Overend, Gurney & Co.* v. *Liquidators of Oriental Financial Corporation* (2) there was a guaranty in these terms:

> I agree to indemnify you for all the loss that you may incur by discounting the bills, and in the event of the same not being paid at maturity, I engage to pay the amount of the bills on demand.

Lord Cairns speaking of that guaranty said:

> To all intents and purposes as regarded Overend and Gurney (who had discounted the bills) Mr. Henry (the guarantor) was exactly in the same position as to these bills as if his name had been found on the bills as a party to them. He had promised to pay them on demand when they reached maturity. Although he had given that promise not upon the face of the bills but upon a collateral writing, to all intents and purposes he was bound by the fate of the bills.

There appears to be an embarrassing conflict of opinion respecting the consequence of this joint and several liability. Does it entitle the creditor to rank on the estate of each of the co-debtors for the full amount of the debt, not crediting either estate with the amount realized from the other, until his debt is fully

(1) M. L. R. 2 S. C. 338. (2) L. R. 7 H. L. 348, 358.

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paid? In *Benning* v. *Thibaudeau* (1), Mr. Justice Jetté answers the question in the affirmative, differing therein from the opinion of Chief Justice Meredith in *Rochette* v. *Louis* (2), and supporting his opinion by an able and learned argument, which however failed to convince Mr. Justice Andrews, who in *Chinic* v. *Rattray* (3) adhered to the view that the law of France at the time of the cession of Canada to Great Britain, which is conceded on all hands to afford the rule in the absence of legislation, was as it was declared to be by Chief Justice Meredith in Rochette's case. I do not feel that we are at present called upon to decide between these divergent opinions, because I think the question is concluded by section 62 of the Winding-up Act. The debt of the Exchange Bank to the appellants was a secured debt to the extent of the value of the notes they held. The appellants advance in their factum some arguments against this view. They urge that this being a commercial transaction, and therefore a joint and several obligation under article 1105, the bank is liable jointly and severally with the other parties on the paper. Granted; but so it is in any case of maker and endorser, and yet it cannot be doubted that, in view of section 62, the maker of a promissory note is security to the endorsee. It is further submitted that the section deals only with negotiable paper upon which the company is indirectly or secondarily liable, and that in any event it merely requires a valuation of the security when the paper is not due or exigible. It is urged by the appellants in another part of their factum, on the authority of Demolombe (4) and Sirey (5), that the account must be regarded as of the date of the insolvency and not as of the date of the proof. That proposition, if it were true in proceedings under the Winding-up Act, would dis-

(1) M. L. R. 2 S. C. 338.
(2) 3 Q. L. R. 97.
(3) 14 Q. L. R. 265.
(4) Vol. 26 p. 269.
(5) 62, 2, 121, 297.

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place the point taken touching debts not due or exigible, because the notes in question were not due when the winding-up proceedings commenced. But, apart from that, the appellants do not read section 62 correctly. The section makes provision for the case of a creditor holding a claim based upon negotiable instruments on which the company is only indirectly or secondarily liable and which is not mature or exigible, enacting that such creditor shall be considered to hold security within the meaning of the section, and shall put a value on the liability of the person primarily liable thereon as being his security for the payment thereof, but that after the maturity of such liability and its non-payment he shall be entitled to amend and revalue his claim. This is, in my judgment, a distinct affirmance, as applied to the present case, of the claim against the Exchange Bank being, in view of section 62, a secured claim, whether we regard the claim as of the commencement of the winding-up when the liability was not mature or exigible, or as of the date of the filing of the proof when the value of the security had been ascertained and realized. Whatever may be the true doctrine respecting the rights of a creditor who proves the same debt against the estates of two joint and several debtors, and however the general rule may be ultimately settled, it is clear to my apprehension that there are cases, of which the present is one, where an obligation which under articles 1103, 1104, 1105 and 2310 C.C. is joint and several, must be dealt with under the Winding-up Act as provable against the estate of one of two co-debtors as a debt secured by the liability of the other.

I am of opinion that the appellants have been correctly held to be bound to deduct the dividends and to be entitled to rank only for the balance of their claim.

I believe this opinion agrees with the jurisprudence which has obtained in the province of Quebec under

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our Insolvent Acts of 1869 and 1875, which contained provisions similar to those of section 62 of the Winding-up Act. I refer to *In re Bessette* (1); to *Rochette* v. *Louis* (2), and to remarks by Mr. Justice Jetté in *Benning* v. *Thibaudeau* (3).

The appellants in executing the deed of composition and discharge of Hyde, Turcot & Co. noted that they did not waive their recourse against the bank. Nothing now turns on that reservation. The right of recourse against the bank has been accorded to the appellants without question notwithstanding their release of Hyde, Turcot & Co. The recourse stipulated for was, as I understand it, for the amount released not for the amount received.

The contest respecting the claim of the appellants to be paid by preference an item of $939.85 relates only to a part of that amount which represents a deposit, made by the appellants, of several cheques drawn by customers of the bank upon their accounts there, which cheques were handed in to the bank after the suspension of payment but before the appellants were aware of the suspension, and were passed to the credit of the appellants and charged against the several drawers of them.

I do not think it necessary to say more as to the claim to rank as preferred creditors for this amount than that, while the appellants apparently make out of the circumstances a case of some hardship, I have not been able to perceive any valid grounds for admitting their claim to be collocated as preferred creditors.

On both branches of the case I am of opinion that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellants: *Abbotts, Campbell & Meredith.*

Solicitors for respondents: *Greenshields, Guerin & Greenshields.*

(1) 14 L. C. Jur. 21; 15 L.C. Jur. 126.

(2) 3 Q.L.R. 97.

(3) M.L.R. 2 S.C. 338.