

JAMES A. HATHEWAY, *et al.*, } APPELLANTS;  
 (CLAIMANTS)..... }

1892  
 \*Mar. 9.  
 \*May 2.

AND

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

*In re* THE EXCHANGE BANK OF CANADA  
 IN LIQUIDATION.

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

*Letter of guarantee by bank—Claim for loss—Proof of claim—Account sales.*

H. *et al.* upon receipt of an order by telegram from the Exchange Bank to load cattle on a steamer for M. S. with guarantee against loss shipped three days after the suspension of the bank some cattle and consigned them to their own agents at Liverpool. Subsequently they filed a claim with the liquidators of the bank for an alleged loss of \$7,965 on the shipments, and the claim being contested the only witness they adduced at the trial was one of their employees who knew nothing personally about what the cattle realized, but put in account sales received by mail as evidence of loss.

*Held*, affirming the judgment of the court below that assuming that there was a valid guarantee given by the bank, upon which the court did not express any opinion, the evidence as to the alleged loss was insufficient to entitle H. *et al.* to recover.

Per Taschereau J.—That the guarantee was subject to a delivery of the cattle to M. S. and that H. *et al.* having shipped the cattle in their own name could not recover on the guarantee.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) confirming the judgment of the Superior Court, which maintained the respondent's contestation of a claim filed by the appellants for the sum of \$7,968 on the estate of the Exchange Bank of Canada in liquidation. The grounds upon which the appellants

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

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based their claim and which are stated in the report of the case in M. L. R. 7 Q. B. 317, are for alleged losses on two shipments of cattle made, as they alleged in September, 1883, at the request of James McShane, junior, and which shipments they contended were guaranteed from loss by the Exchange Bank of Canada, which, on the 15th September, 1883, suspended payment and went into liquidation. The following letter of credit, cheque and telegram were annexed to the claim, viz. :—

(Copy Letter of Guarantee.)

EXCHANGE BANK OF CANADA.

HEAD OFFICE, MONTREAL, 11th Sept., 1883,

Messrs. HATHAWAY & JACKSON,  
 Boston, Mass.

DEAR SIRS,—This letter will be presented by Jas. McShane, Jr. M. P. P., whose cheque on this bank to the amount of forty thousand dollars will be good.

Yours truly,

(Signed) JAMES U. CRAIG.

(Copy of cheque.)

\$36,375.00— BOSTON, Sept. 17th, 1883.

Cashier of the Exchange Bank of Canada. Pay to the order of Hathaway & Jackson, on demand, thirty-six thousand three hundred and seventy-five dollars.

(Signed) J. McSHANE, JR.

329 Head Cattle

Insurance & feed

SS. Bavarian.

(Copy of Telegram.)

Sept. 18th, 1883.

Dated Montreal.

To Hathaway & Jackson.

Load steamer next week for McShane we guarantee you against loss.

T. CRAIG,  
 Exchange Bank.

This claim was contested by the respondent, a creditor of the bank, and the principal grounds relied on were that the said bank could not legally become surety against loss on a contract of the character alleged by the claimants ;

That at the time the said cattle were delivered to McShane, if at all, said bank had suspended payment to the knowledge of the claimants ;

That the pretended transaction upon which claimants rely was not the act of the bank, but merely the personal act of Thomas Craig.

The cattle were consigned to appellants' agents in Liverpool, and at the trial the only witness examined to prove the alleged loss was one Arthur E. Jackson, a clerk in the employ of the appellants, who stated he knew nothing personally whatever about what the cattle realized, the only knowledge that he had at all was from the accounts or statements which he produced and filed.

*Laflamme* Q.C. and *Brown* for appellants.

*MacMaster* Q.C. and *Greenshields* for respondent.

Sir W. J. RITCHIE C.J.—I was of opinion at the close of the argument in this case that this appeal should be dismissed, and I have seen no reason since to change that opinion.

Assuming plaintiff had a cause of action, which I am by no means, as at present advised, prepared to affirm, he has shown no legal evidence of any loss and therefore the courts below were right in dismissing the claim. The appeal will therefore be dismissed.

STRONG J.—I entirely agree with the judgment of the Court of Queen's Bench.

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TASCHEREAU J.—I am of opinion that this appeal should be dismissed. The appellants base their claim against the liquidators of the bank on their losses on two shipments of cattle, which they allege to have made at the request of James McShane, which shipments were guaranteed from loss, as they contend, by the bank. The bank went into liquidation on the 15th of September, 1883. The appellants rely upon a letter dated the day before the suspension of the bank, addressed to them and signed by Craig, the accountant of the bank in the following words: "This letter will be presented by James McShane, whose cheque on the bank to the amount of \$40,000 will be good." The appellants rely also upon a telegram dated on the 18th day of September, three days after the suspension of the bank, signed by the said Craig; and addressed to the appellants in the following words: "Load steamer next week for McShane; we guarantee you against loss."

It seems to me unquestionable that this guarantee simply meant that the appellants should deliver over to McShane the cattle that they had sold him, but not that they would ship them in their own name. Now, the appellants never delivered the cattle to McShane, but shipped them themselves on their own account, in their own name to their own order, and for their own benefit. Assuming that there ever had been any valid contract with the bank they themselves put an end to it. On the 18th of September Craig could not bind the bank by his telegram he sent to the appellants.

The Court of Queen's Bench, however, without entering into the consideration of any of the other questions raised in the case, dismissed the appellants' claim on the ground that they had failed to prove the alleged loss on the said shipments. And upon that ground alone this appeal must be dismissed. The

only witness examined to prove their loss was their clerk, who knew nothing personally of anything connected with it. His evidence amounts to nothing else but hearsay evidence. The appellants seem to be under the impression that the respondent filed no general denial to their claim; but that is an error. The plea contains an allegation "that all, each and every the allegations, matters and things set forth and contained to the said claim are false, untrue and unfounded in fact and each and every of them is and are specially denied by the said contestant."

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They contend that the respondent's right to contest their claim has not been established; but they joined issue with him without questioning his right, and it is now too late for them to raise that objection.

GWYNNE J.—It is unnecessary to determine whether or not the guarantee under consideration was one which it was competent for the Exchange Bank to have entered into, or whether the contract against loss in respect of which the guarantee upon its face appears to have been given was determined by the mutual agreement of the parties to that contract as was sworn by James McShane one of the parties thereto; for, assuming the contract not to have been determined and the guarantee to be valid and binding, there was no evidence whatever offered of the claimants having sustained any loss in the performance by them of the contract.

PATTERSON J. concurred.

*Appeal dismissed with costs.*

Solicitors for appellants: *Chapleau, Hall, Brown & Sharp.*

Solicitors for respondent: *Greenshields & Greenshields.*