D. McLAURIN BROWN (PLAINTIFF).....APPELLANT; 1900

AND *May 8.

JOHN TORRANCE (DEFENDANT).....RESPONDENT.

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

Suretyship — Conditional warranty — Notice—Possession of goods—Art. 1959 C. C.

T. wrote a letter agreeing to guarantee payment for goods consigned on *del credere* commission to R., on condition that he should be allowed, should occasion arise, to take over the goods consigned. Shortly afterwards the creditor, without giving any notice to T., closed the agency, withdrew some of the goods and permitted others to be seized in execution and removed beyond the reach of T. The creditor did not give T. any authority to take possession of the goods as stipulated in the letter of guarantee. In an action by the creditor to recover the amount of the guarantee :

Held, that the condition of the guarantee had not been complied with by the creditor, and that he could not hold the warrantor responsible.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada, appeal side, reversing the judgment of the Superior Court, district of Montreal, which dismissed the action.

The plaintiff's claim was based on a letter of guarantee signed by the defendant, and sent to the plaintiff's firm, at Bradford, England, which was as follows :—

MONTREAL, December 29th, 1896.

A. S. McLAURIN & Co.,

DEAR SIRS,—I hereby agree to continue the guarantee for £500 which you now hold against the indebtedness of W. E. Ross & Co. for one year more, namely, until the 31st of December, 1897, on the con-

*PRESENT :—Sir Henry Strong C. J. and Taschereau, Sedgewick, King and Girouard JJ.

1900

BROWN v. TORRANCE.

dition that you allow me, should occasion arise, to take over the goods now held on consignment from you by W. E. Ross & Co., as a payment on your account for this guarantee, which also cancels all former guarantees.

JOHN TORRANCE.

The guarantee which had been given previously read as follows :—

MONTREAL, December 31st, 1895.

MESSRS. A. S. MCLAURIN & Co.,

DEAR SIRS,—In consideration of your placing in my possession all the goods held on consignment from you by the firm of W. E. Ross & Co., of this city, I hereby guarantee to you payment of his account with you to the extent of five hundred pounds. This guarantee to be null and void one year from this date.

JOHN TORRANCE.

The plaintiff claimed $2,432.33, and alleged that his firm doing business under the name of "A. S. McLaurin & Co.," in November, 1890, agreed with W. E. Ross, of Montreal, that Ross should sell goods for him as a *del credere* agent, and be responsible for all goods shipped by them to Montreal for customers whose names and orders for goods were given to the firm by Ross, and as security for payment of goods so shipped, *and to be shipped*, Ross gave the firm from time to time a letter of guarantee by defendant, the last one being the letter of guarantee sued upon. Plaintiff closed the Ross agency summarily in January, 1897, without notice to Torrance, withdrew all goods sent out which had been consigned to his own order and allowed those consigned to Ross to be seized in execution and removed from the warehouse, and about a year afterwards he called upon the defendant to pay the amount of the guarantee.

In the trial court, Pagnuelo J., considering that the goods sold by plaintiff after June 1895 to Ross exceeded £500 sterling in value, rendered judgment

in favour of the plaintiff for $2,433.33 with interest and costs.

On appeal to the Court of Queen's Bench, the trial court judgment was set aside and plaintiff's action dismissed, (Blanchet J. dissenting), on the ground that the letter of guarantee was conditional in its terms, stipulating that in case of its being enforced by plaintiff he should give defendant possession of the goods consigned to his agent Ross, at the date when the letter was given, and that the plaintiff did not comply with this condition but withdrew a part of the goods, and allowed the remainder to be dispersed without notification or warning to the defendant, and that it had in consequence become impossible for the defendant to save the recourse stipulated for his own protection under the letter of guarantee.

Hutchison Q.C. for the appellant. No acceptance of the letter of guarantee was necessary, because the letters of guarantee, instead of being offers, were a compliance with a previous demand, and their delivery completed the contract between the creditor, who asked for the security, and the respondent who gave it, and must be presumed to have been given according to the terms of the demand made by the firm or previously agreed upon between the intended parties. The guarantee sued on is not for future liability but for an actually existing one, and covered the balance due at its date by Ross to appellant as well as at any time during the continuation of his agency.

The appellant was only bound to allow respondent to take possession should occasion arise, that is, if he chose to make the request, and as respondent was the only judge of the opportunity of making this demand, and neglected to do so, he cannot complain of want of notice, or pretend that appellant failed to fulfil an obligation which was not imposed upon him.

1900

BROWN v. TORRANCE.

Holt for the respondent. The conditional guarantee was not accepted, nor any act done to give notice of acceptance to the warrantor. Suretyship cannot be presumed; art. 1935 C. C.; Championnière & Rigaud, *t.* 2, n. 1418; 4 Aubry & Rau, p. 630, § 426, 1° and p. 673, 1°; it is at an end when the surety can no longer be subrogated in the rights of the creditor, and here that has become impossible through the conduct of the plaintiff. There was no credit given upon faith of the security and no privity of contract between the parties; *Derouselle* v. *Baudet* (1); nor was there any notice of the extent of the advances, or of the principal debtor's default; Holcombe Leading Cases, p. 176; *Dorion* v. *Doutre* (2); DeColyar's Law of Guarantees, p. 5; *McIver* v. *Richardson* (3).

The judgment of the court was delivered by:

THE CHIEF JUSTICE: (Oral.)—We are all of the opinion that the judgment of the Court of Queen's Bench is perfectly correct for the reasons given by Chief Justice Sir Alexandre Lacoste and Mr. Justice Hall.

I have carefully read the reasons given by Mr. Justice Blanchet for his dissent, and I cannot agree with him. I concur with the learned Chief Justice in the court below in what he says about the condition of the guarantee. The evidence shows that the means the defendant required for his protection by his letter of guarantee were completely taken away by the plaintiff and the defendant was thus deprived of the benefit of the condition upon which he relied for indemnity in the event of his liability on the guarantee.

(1) 1 L. C. R. 41.
(2) 3 L. C. L. J. 119.
(3) 1 M. & S. 557.

1900

BROWN v. TORRANCE.

The Chief Justice.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Hutchison & Oughtred.*

Solicitors for the respondent: *Morris & Holt.*