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*Nov. 5, 6.
*Nov. 13.

FRANCIS H. CLERGUE (DEFENDANT)...APPELLANT;

AND

SAMUEL F. HUMPHREY AND WILLIAM S. ADAMS, EXECUTORS OF DAVID BUGBEE, DECEASED (PLAINTIFFS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Action on foreign judgment—Original consideration—Ontario Judicature Act—Promoter of company—Loan to—Personal liability.

Under the Ontario Judicature Act, as before it, the declaration in an action on a foreign judgment may include counts claiming to recover on the original consideration.

A promoter of a joint stock company borrowed money for the purposes of the company giving his own note as security. The lender was informed at the time of the manner in which the loan was to be, and was, applied.

Held, that as the company did not exist at the time of the loan it could not be the principal debtor nor the borrower a mere guarantor. The latter was, therefore, primarily liable for repayment of the loan.

Judgment of the Court of Appeal (*Bugbee* v. *Clergue*, 27 Ont. App. R. 96) affirmed.

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

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APPEAL from a decision of the Court of Appeal for Ontario (1) reversing in part the judgment at the trial in favour of the plaintiff.

Francis H. Clergue, now of the Town of Sault Ste. Marie, in the Province of Ontario, and manager of large industrial and manufacturing establishments there, was in the year 1891 resident in Bangor, in the State of Maine. He was a member of the law firm of Laughton & Clergue, who were also actively engaged in promoting financial schemes. Amongst other companies, there were the Bangor Street Railway Company, the Water Works Company, the Bangor Electric Light and Power Company, and the Penobscot Water Works Company, the latter being in the adjoining Town of Veasey. Of all of these companies Laughton was president and Clergue a director.

An amalgamation or consolidation scheme had been brought about by the formation of a new company, the Public Works Company, to which the property of these several companies, amounting to about two million dollars, had been transferred. Of this company Laughton was also president and Clergue a director, one Wardell being treasurer.

The Public Works Company were in June, 1891, engaged in constructing large works at the hydraulic plant midway between the town of Bangor and the town of Oldtown; and on June 1st, 1891, a pay day was approaching when the funds of that company in hand were not sufficient to meet the whole pay-roll. Clergue went to Bugbee, the original plaintiff, and applied for a loan of $1,500 to the Public Works Company expressly for the pay-roll—to meet the pay-roll on the coming Saturday at the works then going on. Bugbee gave his cheque for $1,500 on the Eastern Trust and Banking Company payable to Laughton &

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Clergue; handed this cheque to Clergue, who took it down to Wardell, the treasurer of the Public Works Company, indorsed it over and delivered it to Wardell with instructions to credit Bugbee with the $1,500 in the books of the Public Works Company, which was done. This money was used by the Public Works Company to meet the pay-roll.

A few days afterwards, Bugbee came to the office of Laughton & Clergue and asked for a guarantee from Laughton & Clergue for the repayment of the loan, and it was then arranged that the note of Laughton & Clergue should be given for this purpose; it was also arranged that $5,000 stock in the Bangor Street Railway Company belonging either to the Public Works Company or one of the consolidating companies, should be given as collateral security to Bugbee. The stock was accordingly delivered to Bugbee and the note given. The note became due and Bugbee refused to renew it; and Clergue heard no more about it till two or three years after, in 1894.

Clergue came to Sault Ste. Marie, Ontario, in the fall of 1894, and has resided there ever since.

Waiting till Clergue had been out of the country for a year, Bugbee on the 15th August, 1895, issued a writ out of the Supreme Judicial Court of the State of Maine, against both Laughton and Clergue. Laughton admits service of this and of notice of trial, apparently assisting Bugbee. He subsequently "defaulted," not appearing or answering, and judgment was noted against him in January, 1896.

This writ was not served upon Clergue and no notice of it was ever given or came to him.

In 1897 Bugbee issued a writ against Clergue in the High Court of Justice for Ontario indorsed with a claim on the judgment recovered in Maine. The statement of claim in said action contained a count

claiming also on the original debt, namely, the promissory note given by Laughton & Clergue when the loan was effected.

At the trial the plaintiff, Bugbee, recovered on both the note and the judgment. The Court of Appeal affirmed this judgment as to recovery on the note but reversed it as to the judgment.

Riddell Q.C. for the appellant. By the writ the action is on the judgment only and the statement of claim cannot give plaintiff another and separate action. *Ker* v. *Williams* (1); *United Telephone Co.* v. *Tasker* (2); *Lancaster* v. *Moss* (3). Moreover, the note is merged in the judgment.

If the note can be sued upon, it can only be as of the date of issue of the statement of claim and it is barred by pre-emption. *Dumble* v. *Larush* (4); *Chard* v. *Rae* (5).

Wyld and *Osler* for the respondent, referred to *Large* v. *Large* (6); *Smythe* v. *Martin* (7); *Bullock* v. *Caird* (8).

The judgment of the Court was delivered by:

GWYNNE. J.—This appeal, we think, must be dismissed with costs.

Before the Judicature Act, a declaration in an action on a foreign judgment might contain counts upon the original consideration upon which the judgment was obtained, and the plaintiff failing to prove the judgment, might recover on the original consideration. We do not think the Judicature Act which requires the cause of action to be briefly stated on the writ of summons, and the fact, that on the writ of summons, in this case, was indorsed a statement that the plaintiff's claim

(1) 30 Sol. Jour. 238.
(2) 59 L. T. 852.
(3) 15 Times L. R. 476.
(4) 25 Gr. 552.
(5) 18 O. R. 371.
(6) [1877] W. N. 198.
(7) 18 Ont. P. R. 227.
(8) L. R. 10 Q. B. 276.

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was on a judgment recovered in the Supreme Court of the State of Maine, for a sum stated, have the effect of preventing the plaintiff inserting in his statement of claim a count as formerly upon the original consideration.

To the statement of claim, which declared upon the judgment and also a note which was the original consideration, the defendant pleaded to both claims. As to the note he pleaded the statute of limitations and as to that plea must fail, unless he should succeed in establishing, as he contends, that the date of the commencement of the action, as regards the claim upon the note, must be the day of filing the statement of claim and not the day of issue of the writ of summons.

We do not think that this contention can prevail, the sole effect of which could be to bar a claim which appears to be quite just. But, apart from consideration of the effect of such contention prevailing, we do not think it well founded.

Then, as to the merits of the claim on the note, we are not troubled with considering the point so much urged at the trial and before us as to what the law is in the State of Maine as to the liability of guarantors of the debt of another, or as to what is the difference between the liability of guarantors and of sureties, for we have no difficulty in holding, upon the evidence, that the makers of the note sued upon, namely the defendant and his law partner, were the sole principals in the transaction.

The contention of the defendant was that the advance was made to a company whose guarantor only the defendant was, and that by the law of Maine a guarantor cannot be sued until his principal is put in default, but he himself admitted that it was he who applied for the loan for which the note was given—that his partner was president and he himself a

director of several companies, the consolidation of all which into one he was then engaged in promoting. It was, as the lender (of whose will the present plaintiffs are executors) in his lifetime testified, to assist the defendant in promoting the consolidatien in which he was engaged that the advance was made to him, and it was to secure payment of this loan that the note sued upon was made. Now, whether the consolidation so in promotion did take place and if so when, matters not, for when the loan was made at the defendant's request, the consolidated company was not in existence, and so could not have become the principal debtor, but whether it was to the consolidated company or to one of the several companies the consolidation of which the defendant was engaged in promoting that the defendant now contends the advance was made the evidence fails to show that the testator (whose executors the plaintiffs are) who advanced the money into the hands of the defendant and received the note as his sole security ever dealt with any company or with any other persons than the makers of the note, as principals in the transaction. The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *H. C. Hamilton.*

Solicitors for the respondents: *Beatty, Blackstock, Nesbit, Chadwick & Riddell.*