MICHAEL STARRS (DEFENDANT).....APPELLANT;

AND

THE COSGRAVE BREWING AND MALTING COMPANY OF TORONTO (PLAINTIFFS)..... RESPONDENTS.

1885
*Nov. 19.
1886
*April 9.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Suretyship—Contract of with firm—Continuing security to firm and member or members constituting firm for the time being—Death of partner—Liability of surety after.

S. by indenture under seal became security to the firm of C. & Sons for goods to be sold to one Q., and agreed to be a continuing

*PRESENT—Sir W. J. Ritchie C.J., and Fournier, Henry, Taschereau and Gwynne JJ.

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security to the said firm, or "to the member or members for the time being constituting the said firm of C. & Sons," for sales to be made by the said firm, or "any member or members of the said firm of C. & Sons," to the said Q., so long as they should mutually deal together.

P. C., the senior member of the said firm, having died, and by his will appointed his sons, the other members of the firm, his executors, the latter entered into a new agreement of co-partnership and continued to carry on the business under the same firm name of C. & Sons, and subsequently transferred all their interest in the said business to a joint stock company.

An action having been brought against S. for goods sold to Q., after the death of the said P. C.:

Held, reversing the judgment of the Court of Appeal, that the death of P. C. dissolved the said firm of C. & Sons, and put an end to the contract of suretyship.

APPEAL from the judgment of the Court of Appeal for Ontario (1), allowing the appeal of the respondents from the judgment of Mr. Justice Rose (2) dismissing the respondents' action.

The action was on a bond dated 16th of April, 1879, given by the appellant to Patrick Cosgrave, John Cosgrave and Lawrence Joseph Cosgrave, then carrying on business as brewers, under the name of Cosgrave & Sons, as security for any beer, ale or porter they might sell to one Michael Quinn.

The respondents alleged that after the execution of the bond the firm of Cosgrave & Sons supplied goods to Quinn; that on the 6th of September, 1881, Patrick Cosgrave died; that afterwards John Cosgrave and Lawrence Joseph Cosgrave entered into a fresh partnership and carried on the business under the old name, and supplied goods to Quinn as before till the 2nd of October, 1882, when they transferred the business to one James Douglas, as trustee; that the business was still carried on under the same name of Cosgrave & Sons till the 13th of December, 1882, when Douglas assigned the business to the respondents, who

(1) 11 Ont. App. R. 156. (2) 5 O. R. 189.

thence afterwards carried it on.

The respondents sought to recover the balance due from Quinn on all the prior transactions up to $5,000, the amount of the bond.

The appellant urged that he was not responsible for any transactions after the death of Patrick Cosgrave, and that all prior transactions were paid, which, on the argument, was admitted to be the case.

The following is the bond or agreement above mentioned :

Memorandum of agreement made this 19th day of April, A.D. 1879.

Between Patrick Cosgrave, John Cosgrave, and Lawrence Joseph Cosgrave, all of the city of Toronto, carrying on business as brewers, under the name, style, and firm of Cosgrave & Sons, of the first part, and Michael Quinn, of the city of Ottawa, hotel keeper, of the second part, and Michael Starrs, of the said city of Ottawa, grocer, surety for the said party of the second part, of the third part.

Witnesseth that at the request of the said party hereto of the third part, it hath been agreed and it is hereby agreed between the said parties hereto, that they, the said parties of the first part, should, from time to time, so long as they, the said parties of the first part, desire, sell to the said party of the second part, and that the said party of the second part should purchase from the parties of the first part beer, ale, lager beer, and the casks, bottles, and vessels containing such liquors, or any part thereof, and at such prices and on such terms of payment as may from time to time be mutually agreed upon, and that the said party of the third part should be a continuing security to the said parties of the first part, or to the member or members for the time being constituting the said firm of Cosgrave & Sons, to the amount of $5,000, to cover and protect any sales or

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advances now or hereafter indefinitely to be made by the said parties of the first part or any member or members of the said firm of Cosgrave & Sons to the said parties of the second part, so long as they may mutually deal together.

And further, it is hereby agreed between the said parties hereto, that until all such sales and advances, and every part thereof, shall have been paid in cash, that these presents shall continue to be a good and valid security at law and in equity to the said firm of Cosgrave & Sons to the amount of $5,000, notwithstanding that they may from time to time receive other securities, notes, bonds, deeds, conveyances, or assignments of lands or goods, or either of them, from the said party of the second part, or any other person or persons as further security for the said sales or advances, or any part thereof, and notwithstanding that they, the said parties of the first part or any of them, may extend the time of payment of the moneys due, or any part thereof, for any such sales or advances, and notwithstanding that they, the said parties of the first part, or any of them, may do any act, matter, or thing thing that would release the said party of the third part at law or in equity from these presents, were it not for the stipulations herein contained.

In consideration whereof the said party of the second part hereby agrees with the said parties of the first part to pay the price of all advances and sales of ales, porter, and lager beer, and of all casks, vessels, or bottles that may from time to time be sold to him by the said parties of the first part, or any of them, and at the times that may from time to time be agreed for the payment thereof, and also to pay all notes, bonds, mortgages, or other securities that may from time to time be given for the same.

And the said party of the third part hereby coven-

ants and agrees with the said parties of the first part, and with each of them, that he, the said party of the second part, will pay for all such sales and advances, and at the times that might be agreed for the payment thereof, and also all notes, bonds, mortgages, and other securities that may be given for the same, or any part thereof, and that he, the said party of the second part, will in all things perform and fulfil this agreement and all other agreements that may hereafter be made by and between the said parties of the first and second parts with reference to any such sales or advances, or in respect of any money unpaid therefor, and that in default thereof that he, the said party of the third part, will, to the extent of $5,000, be liable to, and pay, the said parties of the first part, or to the member or members for the time being constituting the said firm of Cosgrave & Sons, for all ale, porter and lager beer, and for all casks, bottles, and vessels containing same that may from time to time be sold by the parties of the first part, or the said firm of Cosgrave & Sons, or by any member thereof, to the said party of the second part, and also that in default of payment by the said party of second part of all or any notes, bonds, mortgages, or other securities that may from time to time be given by him, the said party of the second part, to the said parties of the first part as security for any such sales or advances, or any part thereof that he, the said party of the third part, will pay the same.

It is hereby expressly stipulated between the parties hereto that nothing herein contained shall compel the parties or any of them hereto to any dealing to any given amount, or for any given period; and further, that these presents shall continue a valid and continuing agreement till all such sales or advances have been fully paid for in cash, and all agreements, notes, bonds mortgages, and securities hereinafter made in respect

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thereof have been fully satisfied.

McLennan Q.C. and *O'Gara* Q.C. for the appellant.

This action is for goods supplied after the death of Patrick Cosgrave and up to the date of the notice that appellant would no longer be a surety for Quinn.

We submit, in the first place, that the death of Patrick Cosgrave dissolved the firm with which the appellant made his contract of suretyship, and an entirely new firm was created by the sons after his death, although under the same name. It is the fact that the name of the original is retained that is relied upon by the respondents to bind us under the clause in the deed, by which he covenants to be a continuing security to the member or members for the time being of the firm of Cosgrave & Sons. But those words must be held to depend upon the continued existence of the firm, and once its existence ceases any covenant made with it must be released. To hold otherwise would be to make the appellant covenant with any firm of the name of Cosgrave & Son, which would be absurd. Words must be construed in a legal, not a commercial, sense. *Bank of Scotland* v. *Christie* (1), *Pemberton* v. *Oakes* (2), *Backhouse* v. *Hall* (3), *Chapman* v. *Beckinton* (3), *Weston* v. *Barton* (4), *Williamson* v. *Steeves* (5), Pollock on Contracts p. 440.

But I submit, secondly, that even if Starrs can be held liable after the death of Patrick Cosgrave, he is discharged by the giving of time to his principal, the company having taken Quinn's notes for the full amount of the debt

Osler Q.C. for the respondents.

It is admitted that effect must be given to the words "continuing security in the deed," and I think a reasonable explanation of our contention may be found in

(1) 8 Cl. & F. 214.
(2) 4 Russ. 154.
(3) 6 B. & S. 507.
(4) 4 Taun. 673.
(5) 4 All. (N.B.) 449.

the difference between the terms "firm" and "partnership."

(The learned counsel here read the definitions of these words from Imperial Dictionary and Wharton.)

The main thing in the arrangement was the goods supplied. As long as Cosgrave's beer was sold to Quinn it made no difference who the parties were who supplied it. All the members might go out of the firm, and as long as the brewery business was carried on the liability of the guarantor continued.

The case of *Pemberton* v. *Oakes* shows the question to be whether or not the parties ever manifested any intention that the liability should continue in case of a change in the firm. The document itself is the best answer to that question.

See *Lloyds* v. *Harper* (1), *Barclay* v. *Lucas* (2), *Metcalf* v. *Bruin* (3), *Pease* v. *Hirst* (4), *Pariente* v. *Lubbock* (5), Lindley on Part. 4 Ed. p. 215, *Ex parte Lloyd* (6), *Ex parte Loyd* (7).

If a change in the firm would relieve the surety I submit that, according to the authority of these cases, we come within the exception.

As to the question of time being given to the principal, I draw your lordships' attention to the express provision in the agreement. *Hargreave* v. *Smee* (8).

McLennan Q.C. in reply cites Baylis on Sureties 140, and *Fire Extinguisher Co.* v. *North-West Ex. Co.* (9).

Sir W. J. RITCHIE C.J.—This action was brought to recover $5,000 upon an agreement of suretyship. The learned judge gave judgment in favor of the respondents.

The firm of Cosgrave & Sons appears to have been a

(1) 16 Ch. D. 290.
(2) Cited in 1 T. R. 291.
(3) 12 East 400.
(4) 10 B. & C. 122.
(5) 8 DeG. M. & G. 5.
(6) 1 Glyn. & J. 389.
(7) 3 Dea. 305.
(8) 6 Bing. 244.
(9) 20 Gr. 625.

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case of ordinary partnership, and there being no agreement to the contrary, there can be no doubt that the death of Patrick Cosgrave immediately dissolved the partnership, not only as regards the deceased, but as regards all the other partners. This, Mr. Lindsey says, is obviously reasonable, for, by the death of one of the members, it is no longer possible to adhere to the original contract, the essence of which is, in such a case, that all the parties to it should be alive. And the mere fact that the partnership was entered into for a definite term, which was unexpired when the death occurred, is not sufficient to prevent a dissolution by such death.

The representatives of the deceased have no right to succeed him in the firm unless there is a clear agreement to that effect.

On dissolution, each one of the partners has a perfect right to require, and through equity to compel, a final settlement and adjustment of all questions and all property. On dissolution the power and authority of the surviving partners is for the purpose of winding up and no further; it is an incident to the contract of partnership that the surviving partners should collect the assets and wind up the business of the firm, and after the dissolution of the firm the authority of each partner to bind the firm continues only so far as is necessary to settle and liquidate existing demands, and to complete transactions begun but unfinished at the time of the dissolution, and not otherwise. So that, as to future dealing, the partnership is terminated by the death of one partner, the dissolution, as between the partners themselves, putting an end to the joint power and authority of all the partners any further to employ the property or funds or credit of the partnership in the business or trade thereof or do any act or make any disposition of the partnership property in any manner inconsistent with the primary duty now

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incumbent upon all of them of winding-up the whole concern of the partnership. And therefore it is the duty of the surviving partners thenceforth to cease altogether from carrying on the trade or business thereof.

All parties must be assumed to have entered into this agreement with the full knowledge of the law governing partnerships. Who then were the parties of the first part with whom Starrs contracted? The firm of Cosgrave Bros. by whomsoever and of what time soever composed? Clearly not. The deed itself states that the parties of the first part were Patrick Cosgrave, John Cosgrave and Lawrence Joseph Cosgrave, doing business under the firm of Cosgrave & Sons; it is with that firm, as so composed at the date of the deed, that Starrs contracted; it was with the association of these three, so carrying on business under the name of Cosgrave & Sons, and no other. So soon as the death of the one partner occurred there was a dissolution, and though the surviving partners might enter into a new co-partnership, they had no power or authority to continue the old co-partnership so at an end, and their duty then was, as surviving partners, to close up the affairs of the defunct co-partnership, and the representatives of the deceased partner had the right, and their sole right was, to compel an account by the surviving partners of the state of the firm on the death of their principal, and to call on the surviving partners to settle and close up the affairs of the co-partnership, and to pay over to the estate of the deceased partner the share coming to him on such settlement; and they had no right to carry into a new partnership affairs of the old, whether the old would be thereby benefited or injured.

In this case, the moment Patrick Cosgrave died, *eo instanti*, the partnership was dissolved. When was the

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new partnership established? And what were the rights of all parties in the interval that must have existed between the death of the partner and the then dissolution of the firm, and the coming into existence of the new firm, which could only exist by virtue of the new contract entered into by the members of such new firm?

In my opinion, the rights of the surviving members of the old firm, and of the representatives of the dead partner, and of every one dealing with that firm, in the absence of an express contract to the contrary, was then and there fixed and determined, and the affairs of the old firm with whom Quinn dealt and for whose indebtedness Starrs became guarantee were then and there settled and determined, and the liability on the guarantee could not be extended, without the consent of Starrs, to dealing between Queen and a new firm with which, as such, Starrs had no connection. The wording of the agreement itself, I think, clearly shows that the security was only to the firm of Cosgrave & Sons as it existed at the time of entering into the contract; the sum guaranteed, $5,000, was "to cover and protect any sales or advances now or hereafter indefinitely to be made by Cosgrave & Sons, or any member or members of the said firm of Cosgrave & Sons to Quinn (that is as I construe it—sales on account of the said firm) so long as they, that is, in my opinion, the firm of Cosgrave & Sons as it existed, and Quinn, may mutually deal together."

The law of England was well established before the passing of the Mercantile Amendment Act; a guarantee was not a continuing guarantee so as to remain in force after the death of a member of a firm to or for which it was given, unless it appeared by the terms of the instrument that it was the intention of all parties that it should so continue, and the Mercantile Amendment Act did not alter the English law as settled by

decided cases, but it was, as said by Blackburn J. in *Backhouse* v. *Hall* (1), to make the law of Great Britain uniform, there being a difference in Scottish law. The question as put in that case is just what arises in this: "Does the intention that the guarantee should continue appear by express stipulation, or by necessary implication, or from the nature of the firm, or otherwise?" And the answer, as given in that case, applies with equal force to this. Now there is certainly no express stipulation and there is nothing in the nature of the firm beyond those incidents common to every partnership that the partners had changed or might again change, with the exception or additional consideration that, in the present case, the partnership had ceased to exist by the death of one of the partners and no provision for its continuance.

I think, therefore, that this contract should not be construed as a continuing guarantee after the dissolution of the firm with which the guarantor contracted, and that the appeal should be allowed.

The following authorities may be cited in support of the views I have expressed. In *Myers* v. *Edge* (2), the report gives the facts as follows:—

At the trial before Rooke J., at Lancaster, the plaintiffs, to take the case out of the statute of frauds, gave in evidence the following letter written by the defendant dated 15th, January, 1794. "To Messrs. Myers. Fielden, Ainsworth & Co.:—If you please you may let the bearer, Thomas Duxbury, have six bunches of twist more than I told you, and I will be answerable for them as before; and after this I will be answerable for one pack and no more; so when he pays you for the first half pack you may let him have another, and so on till I tell you to the contrary; and you may make the invoice to us both, &c." At the time when this engagement was entered into, Ainsworth was a partner in the same house with the plaintiffs, and continued so till May, 1795; during which time many parcels of goods were delivered to Duxbury, which were all paid by him, who wa

(1) 6 B. & S. 507. (2) 7 T. R. 254.

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debited for them in the plaintiffs books. The goods in question were furnished to Duxbury by the plaintiffs alone after Ainsworth had retired from the partnership, and Duxbury having failed to pay for them, they demanded payment of the defendant, who said it should be settled, and requested time; but afterwards refusing to pay, this action was brought. It was objected on the part of the defendant, that the action could not be maintained by the present plaintiffs, because Ainsworth, with whom also the contract was made, was not joined with them, and he not being a partner at the time when the goods were furnished. Rooke J. overruled the objection, considering the security as having been given to the house and not to the individuals; the jury found a verdict for the plaintiffs. A rule was granted in this term calling on the plaintiffs to show cause why the verdict should not be set aside and a non-suit entered, or a new trial granted.

Lord Keynon C.J. (1):

I think that the rule ought to be made absolute. We are to judge on the contract that the parties have made, and ought not to substitute another in lieu of it. Here the defendant contracted with Myers, Fielden, Ainsworth & Co. Perhaps the defendant when he entered into this contract had great confidence in Ainsworth, and thought that he would use due diligence in enforcing payment of the goods from Duxbury regularly as they were furnished; at least it is too much for us to say that, after Ainsworth ceased to be a partner, the defendant would have given the same credit to the remaining partners. * * * But we cannot say that a contract, that on the face of it imports to have been made with five, ought to be construed to be a contract made with four persons only. I very much approve of the case cited from 3 Wilson 532.

Ashhurst J.:

This is not a contract made with a corporation, it is made with a partnership consisting of a certain number of individuals; and when one of the partners left the business, it put an end to this engagement. If the plaintiffs had intended to furnish goods to Duxbury after this alteration in the partnership, they should have required a new undertaking.

Denman C. J. in *Chapman* v. *Beckinton* (2).

All this may well have been without advertising to or intending to alter the legal consequences of such change in the members of the firm; and we ought to be slow in extending by implication the meaning of words beyond that which they ordinarily bear in legal construction, in order to extend the liability of a surety.

(1) At p. 256. (2) 3 Q. B. 720.

We are strengthened in this opinion by the authority of a case cited by the counsel for the defendant, which it is difficult to distinguish in principle from the present, that of *Pemberton* v. *Oakes* (1). There a banking partnership was formed for fifteen years, between Harding, Oakes and Wellington; it was stipulated that, if Oakes or Wellington should die during the term the concern should be continued by the survivor or survivors, the deceased's share to be paid to his executor up to the death; but if Harding should die he might dispose of his share to his wife and children; and there was a provision for his appointing persons who should carry it on, as if he were living, during the minority of his children; and the business was, in that event, to be carried on by the surviving partners and the appointee, in the manner and on the terms and conditions directed by the partnership articles, as if he had not died. Harding made his will in favor of his children as to this share, and appointed persons to carry on the concern with his partners; and, he dying, this was carried into effect. The question was, whether a surety for a customer of the original firm, who had executed a deed to the members of that firm to secure them for sums already due or which should become due to them for advances to be made thenceforward to the end of fifteen years, was liable for any advance made after the death of Harding. And the present lord chancellor held clearly that he was not liable for advances by a new firm, although he had stipulated to secure advances made during the whole fifteen years; and that the death of Harding, with the substitution of the appointees, though contemplated by the original articles, made a new firm. In this case it is true, no new partner has been admitted; but that is immaterial if the death of one of the old ones works a dissolution. And it is true, also, that in this case the defendant (the surety) is averred to have had full notice of the covenants in the partnership deed, a circumstances which did not exist in the case cited; but this also is immaterial, the question turning on the written language of the instruments.

In DeColyar's Law of Guarantees, 2 Ed. 255:

To the same effect, also, is the case of *Weston* v. *Barton* (2). There the condition of the bond was for the repayment to five persons of all sums advanced by them, or any of them, to Catterall & Watson, in their capacity of bankers. It was held that the bond did not extend to sums advanced after the decease of one of the five by the four survivors, the four then acting as bankers. Mansfield C. J. delivered the following judgment: "The question here is, whether "the original partnership being at an end, in consequence of the

(1) 4 Russ. 154. (2) 4 Taunt. 673.

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"death of Golding, the bond is still in force as security to the sur-
"viving four; or whether that political personage, as it may be
"called, consisting of five, being dead, the bond is not at an end.
"The case has stood over in consequence of doubts which the court
"entertained on particular expressions in the bond. Many cases
"were cited at the bar, and the result of them is that, generally,
"when a change takes place in the number of persons to whom such
"a bond is given, the bond no longer exists. These decisions cer-
"tainly fall hard on the obligees; for I believe the general under-
"standing is that these securities are given to the banking house,
"and not to the particular individuals who compose it; and we
"should readily so construe the bond if the words would permit.
"The words of the condition on which the question depends (and
"which His Lordship now read over), again and again refer to the obli-
"gee's capacity as bankers; they were bankers, only as they were
"partners in their banking house, as it is called, and this security is
"conditioned to pay any money advanced 'by them five, or any or
"'either of them.' Taking those last words by themselves, it might
"at first be conceived that, if any one of the five advanced money
"this bond should secure it, but the words are afterwards explained,
"when it is seen that the money is to be paid to the five. Now it
"could never be intended that money advanced by one of them
"singly should be repaid to the five; and this shows that the words
"'advanced by them, or any, or either of them,' must be confined in
"their meaning to money advanced by any or either of them in their
"capacity of bankers, on behalf of all the five. This, then, being the
"construction of the instrument, from almost all the cases, in truth,
"as we may say, from all (for though there is one adverse case, *Bar-
"clay* v. *Lucas*, the propriety of that decision has been very much
"questioned), it results that where one of the obligees dies the
"security is at an end. It is not necessary now to enter into the
"reasons of those decisions, but there may be very good reasons for
"such a construction; it is very probable that sureties may be
"induced to enter into such a security, by a confidence which they
"repose in the integrity, diligence, caution and accuracy of one or
"two of the partners. In the nature of things there cannot be a
"partnership consisting of several persons, in which there are not
"some persons possessing these qualities in a greater degree than the
"rest; and it may be that the partner dying, or going out, may be
"the very person on whom the sureties relied; it would, therefore,
"be very unreasonable to hold the surety to his contract after such
"change. And, though the sum here is limited, that circumstance
"does not alter the case; for, although the amount of the indemnity

"is not indefinite, yet £3,000 is a large sum; and, even if it were "only £1,000, the same ground, in a degree, holds, for there may be "a great deal of difference in the measure of caution or discretion "with which different persons would advance even £1,000; some "would permit one who was almost a beggar to extend his credit to "that sum; others would exercise a due degree of caution for the "safety of the surety; and, therefore, we are of opinion, that as to "such sums only which were advanced before the decease of Gold-"ing can an indemnity be recovered by the plaintiffs; and, as to "the sums claimed for debts incurred since his decease, the judg-"ment must be for the defendant."

A similar decision was also come to in the case of *Pemberton* v. *Oakes*, 4 Russ. 154. There a banking partnership was formed for fifteen years, between Harding, Oakes and Wellington. It was stipulated that if Oakes or Wellington should die during the term, the concern should be continued by the survivor or survivors, the deceased share to be paid to his executors up to the death; but that if Harding should die, he might dispose of his share to his wife and children, and there was a provision for his appointing persons who should carry it on as if he were living during the minority of his children; and the business was, in that event, to be carried on by the surviving partners and the appointee, in the manner and on the terms and conditions directed by the partnership articles, as if he had not died. Harding made his will in favor of his children as to this share, and appointed persons to carry on the concern with his partners, and he, dying, this was carried into effect. The question was, whether a surety for a customer of the original firm, who had executed a deed to the members of that firm to secure them for sums already due, or which should become due to them for advances to be made thenceforward to the end of the fifteen years, was liable for any advance made after the death of Harding. Lord Chancellor Lyndhurst held clearly that he was not liable for advances by a new firm, although he had stipulated to secure advances made during the whole fifteen years; and that the death of Harding, with the substitution of the appointees, though contemplated by the original articles, made a new firm.

And yet another case in which the same view prevailed, is that of *Chapman* v. *Beckington* (1). In that case the plaintiff and one William Chapman entered into partnership, by deed, with one Potts. Potts was to be the acting partner. In consideration of this trust he and the defendant bound themselves by a bond of guarantee to the plaintiff and the said William Chapman, for the observance by Potts of the covenants in the partnership deed, and also that Potts, during

(1) 3 Q. B. 703.

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such time as he should continue the acting partner in the said trade of the said co-partnership, should faithfully make and deliver a true account in writing of all sums of money, notes, bills and other partnership effects, which should come to his hands, or which he should be intrusted with by or on account of the said co-partnership, and also make good, answer for and pay over, the moneys due on the balance to the said plaintiff and W. Chapman. Potts, after the decease of W. Chapman, rendered false accounts. It was held, that the co-partnership referred to in the condition of the bond was determined by W. Chapman's death, and that the defendant was therefore not liable for Potts' default happening after that event. In this case Lord Denman C.J., said: "Many cases were cited to show that, where the surety had covenanted with the house, and not the members of the firm, or had stipulated that his liability should not be affected by a change of the members, he would remain liable to the new firm. These cases we do not in the least question, our judgment proceeding on the language of this condition, making all due allowance for the effect which the language of the deed ought to have on its construction."

And at p. 270:

The effect of the death of one of the principal debtors is to determine the surety's liability. Thus in *Simon* v. *Cooke* (1), a bond by which, after reciting the partnership of J. C. and T. C., one W. P. become surety for such sums as should be advanced to meet bills drawn by J. C. and T. C. or either of them, was held not to extend to bills drawn by J. C. after the death of T. C.

The voluntary retirement of one of the principal debtors likewise has the effect of putting an end to the surety's liability. In the case of *The University of Cambridge* v. *Baldwin* (2), the condition of a bond recited that the chancellors, masters, and scholars of the university of Cambridge had appointed B., C. and J. their agents for the sale of books printed at their press in the university, and that the defendant had offered to enter into a bond with them as a surety; and it was conditioned that if the said B., C. and J., and the survivors and survivor of them, and such other persons as should or might at any time or times thereafter, in partnership with them or any or either of them, act as agent or agents of the said chancellor, &c., and their successors, for all books delivered or sent to them or any or either of them for sale as aforesaid, and should pay all moneys which should become payable to the said chancellor, &c., in respect of such sale, then the obligation to be void, &c. An action having been brought on this bond against the surety, it was held that, by

(1) 1 Bing. 452. (2) 5 M. & W. 580.

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the retirement of J. from the partnership of B., C. and J., the defendant, as their surety, was discharged from all further liability on this bond.

Lord Arlington v. *Merricke* (1) :

In *Bodenham* v. *Purchas*, a bond was given to secure a banking account to several partners; one of them died and a new partner was taken in; the obligor was at that time indebted in a considerable sum; new advances were made, and money paid on account, no new head of account being opened, but the whole being treated as one entire account; the balance was much reduced, and was afterwards transferred to another customer, who, with his assent, was charged by the bankers with the debt of the obligor; that customer becoming insolvent the surviving bankers sued the obligor; it was held, that in the absence of any specific appropriation the money paid on account must be applied to the debt due at the death of the partner, and the money so paid being sufficient to cover that debt, the bond was discharged.

FOURNIER J.—I think the agreement plainly shows that the appellant only became a guarantee to the firm of Patrick Cosgrave & Sons. In no other way can effect be given to the words "member or members for the time being constituting the firm of Patrick Cosgrave & Sons." I believe these words must have been inserted there inadvertently, but being there we must give effect to them. The appeal must be allowed.

HENRY J.—I cannot conceive the existence of the slightest relationship between the company here, the Cosgraves, who entered with partnership after the death of the senior partner, and Starrs.

In the first place there was a new partnership of the surviving members of the old one. They carried on business, not for the late partnership, nor for any one interested in that partnership, but for themselves. There was no time when the heirs-at-law of the deceased partner could not have enforced a settlement of the previous partnership. The law does not make a party answerable to any one unless by his own act.

(1) 2 Wm. Saun. 823 n.

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As soon as Patrick Cosgrave died the contract was put an end to, and I think the plaintiffs here have no cause of action. All the advances made to Quinn were paid for up to a certain time, after notice by the appellant that he would not be answerable under the contract.

The business was conducted for several years in the name of the sons, and then a company was formed. Now how can it be said that there was any privity of contract between Starrs and the company? What right had the company to carry on a contract entered into with totally distinct persons and hold the guarantor to another party answerable?

I consider that the appeal should be dismissed, and judgment given in favor of the appellant with costs.

TASCHEREAU J.—I am of the same opinion. I do not think the appellant is answerable for any sales made after the death of Patrick Cosgrave.

GWYNNE J.—I am of opinion that whatever right of action, if any there was, which the firm of Cosgrave & Sons constituted as it was after the death of Patrick, had against the defendant upon his guarantee, at the time of the execution of the instrument of the 2nd of October, 1882, that right has passed to the plaintiffs by force of that instrument and of that of the 13th December, 1882, and that therefore this action is well brought by the plaintiffs, if Cosgrave & Sons had such a right of action.

The learned counsel for the defendant in his argument before us contended that assuming the guarantee of the defendant to be a continuing guarantee until the 5th of April, 1882, as adjudged by the Court of Appeal for Ontario, and to cover what was then due by Quinn to the firm of Cosgrave & Sons as then constituted, still the evidence showed such amount to have been subsequently and before action fully paid, and that therefore the

Court of Appeal for Ontario should have adjudicated upon this point instead of directing a reference to the registrar of the divisional court to enquire and report thereon to that court. The parties at the trial certainly seem to have been of opinion that the evidence as taken was sufficient to enable a determination to be made not only of this point but upon all the points raised, when it was agreed that, upon the jury passing upon the single point agreed to be submitted to them, namely, whether the notice, admitting it to have been given, had not been retracted, as was alleged, then all the other questions should be submitted to the determination of the court. The defendant was, and now is, entitled to judgment in his favor upon this point or any of the points raised and which have all been argued before us, if the evidence be sufficient to warrant and require such judgment as it is contended that it is. The evidence shows Quinn to have been indebted to Cosgrave & Sons on the 5th April, 1882, in a sum varying from $5,931.56, according to Quinn's evidence, to $6,640 according to the evidence of John Cosgrave It also appears in evidence that between the 5th of April and the 2nd October, 1882, Quinn paid to Cosgrave & Sons $6,620.25, but that this sum was applied, or should have been, or was applicable, to the payment of the amount due on the 5th April, 1882, does not appear, for goods were delivered by Cosgrave & Sons to Quinn between the said 5th of April and 2nd of October to the amount of $6,000, and the manner in which the parties dealt appears to have been that Quinn was in the habit of giving his notes or acceptances to Cosgrave & Sons for the amounts of the several deliveries of the goods sold to him, which notes Cosgrave & Sons discounted and used the proceeds in their business. These notes, under what was deemed to be the authority of the provision in the guarantee relating to extension of time for pay-

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ment to Quinn, were, as they fell due, renewed, and their renewals were again from time to time renewed in whole or in part; Quinn's practice as to payments made by him appears to have been to remit moneys for the purpose of meeting particular notes falling due in the bank where they were. By exhibit No. 9, which appears to have been filed by the defendant, it appears that on the 5th April, 1882, there were in existence and discounted by Cosgrave & Sons ten notes given by Quinn which represented the goods previously sold to him, which notes were made payable at different times between the 6th of April and the 3rd of August, and that all of these notes were renewed at least once, and many of them several times, and that one of such renewals for $406.65, was dated the 2nd November, 1882, after the execution of the indenture of the 2nd October, and after the firm of Cosgrave & Sons had assigned all their estate, good will, debts and securities to Douglas in trust to be assigned to the plaintiff company when formed; now, if this exhibit is to be relied upon, and its correctness does not appear to be questioned, then there appears to have been still due by Quinn, when the plaintiffs became assignees of Cosgrave & Sons' assets, notes and securities, (in respect of sales made to Quinn by Cosgrave & Sons prior to the 5th April, 1882,) the sum of $2,759.11, which still remains due, and for which, if the judgment of the Court of Appeal for Ontario be correct as to the continuance of the guarantee, the defendant is liable to the plaintiffs, unless he has become discharged from such liability by reason of the time given by Cosgrave & Sons to Quinn after the 5th April, 1882, and by the plaintiffs since the assignment to them.

I understand it to have been contended by the learned counsel for the defendant, that by the books of the plaintiffs and all of Quinn's notes remaining still

unpaid, and which were before the court at the trial, it appeared that the plaintiffs held notes or acceptances of Quinn's given payable to themselves, which have been discounted by them, and which were taken and received by them in renewal of the notes which were current in the hands of Cosgrave & Sons on the 2nd of October, 1882, and by which notes the plaintiffs have given an extension of time for payment of the moneys secured by the notes, which Cosgrave & Sons held on the said 2nd October in respect of goods sold prior to 5th April, 1882. This may have appeared at the trial, but I find a difficulty in tracing it upon the exhibits before us. If it be true, the parties must be aware of it, and a reference to ascertain it would involve a needless expense, but if it be true the defendant is, in my opinion, discharged and entitled to judgment in his favor upon this point, for the agreement in the guarantee as to the extension for time for payment which might be given to Quinn cannot, in my opinion, be construed to extend to the plaintiffs, who derive title only as the assignees of the assets, business notes, debts and securities, which belonged to the firm of Cosgrave & Sons; which firm upon the execution of the instruments of the 2nd October, 1882, became extinct; assuming the defendant's right to have judgment rendered in his favor to rest upon this point alone the reference ordered by the Court of Appeal for Ontario, does not appear to be large enough to authorize the taking of evidence upon this point, if the evidence given at the trial be insufficient; nor upon a point as to which the plaintiffs can so readily supply what evidence may be necessary, ought there be any necessity for a reference. Whether the defendant is discharged by the extension of time given by Cosgrave & Sons after the termination of the guarantee upon the 5th of April, as the Court of Appeal for Ontario has adjudged, of which extension of time extending over

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six months there is abundant evidence, has still to be considered, and as the consideration of this question seems to me to throw some light upon the question as to the continuing character of the guarantee, I propose to consider these two questions together. The authorities relating to the question of continuance of the guarantee, notwithstanding the death of Patrick, have been so fully reviewed by the Divisional Court and the Court of Appeals that I do not propose to refer to them further than to say that the principle to be collected from them and which governs this case is, that the question whether or not the guarantee is to be construed as continuing in force after the death of Patrick is to be solved by ascertaining, upon a full consideration of the whole instrument, giving effect as far as possible to all of its clauses and provisions, what was the intention of the parties as appearing expressed in the instrument containing the guarantee, or to be gathered by necessary implication therefrom. I entirely agree with the majority of the Court of Appeals for Ontario that the clause which declares that it was mutually agreed upon that the defendant should be a continuing security

> To the said parties of the first part or to the member or members for the time being constituting the said firm of Cosgrave & Sons to the amount of $5,000 to cover and protect any sales or advances now or hereafter to be made by the said parties of the first part, or any member or members of the said firm of Cosgrave & Sons, to the party of the second part (Quinn) so long as they may mutually deal together.

and that portion of the clause containing the covenant of the defendant to the effect that in default of payment by Quinn for all goods sold to him at the times that might be agreed upon for the payment therefor, the defendant

> Will to the extent of five thousand dollars be liable to, and pay, the said parties of the first part, or the member or members for the time being constituting the said firm of Cosgrave & Sons

do seem to manifest the intention of the parties to have

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been that the guarantee should continue in force not only for the benefit of the three persons then parties of the first part who then constituted the firm of Cosgrave & Sons, but for the benefit also of some other persons, who, as was contemplated should, in the future, for the time being, constitute the firm, regarding it as having a continuing existence with a varying constituency; the whole instrument, however, must be taken together, and if there be some other clauses and provisions in the instrument which are inconsistent with this construction their effect may be to require a modification of the construction, to the extent even, if necessary, of wholly eliminating the words "or to the member or members for the time being constituting the said firm of Cosgrave and Sons," wherever they occur. It is quite impossible, in my opinion, to construe them in the connection in which they are found with the words "the said parties of the first part," as meaning, as has been contended, the said Patrick, John and Lawrence Cosgrave or any or either of them. If the other clauses of the instrument require us to hold that the guarantee must determine upon and by reason of the death of Patrick, no sensible meaning can, I think, be attached to the above words and they must be wholly rejected. Whether or not they must be so rejected is the question. The construction of the instrument containing the guarantee is, as the plaintiffs contend, not merely that the defendant is surety for Quinn and guarantees the payment by him for all ale, porter, &c., sold to him by the firm of "Cosgrave and Sons," as it was constituted when the instrument was executed, but that he continues to be such surety for all sales made to him by the firm as constituted after the death of Patrick; and that the instrument being under seal the defendant's liability under it could not be terminated so long, as the firm, however constituted, should continue dealing

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with Quinn or at least not without payment, as a condition of such termination, of all moneys then remaining unpaid upon the sales made to him; and further, that the defendant is not merely guarantee for payments being made by Quinn at the expiration of the credit upon which the goods should be sold to him, but that it should be competent for the firm, however constituted from time to time, indefinitely, to give to Quinn extension of time for payment upon his promissory notes or acceptances, and that the defendant shall not be discharged by such extension of time being given, but shall continue liable to pay all such paper, however indefinitely renewed and even though the firm continued renewing after the notice of the 5th April was given and for such length of time as seemed pleasing to the firm. The right of the defendant to terminate by notice all liability for any goods that might thereafter be sold to Quinn cannot be doubted. It is well settled upon the authority of *Orford* v. *Davies* (1), *Coulthart* v. *Clementson* (2), and *Lloyd* v. *Harper* (3). In the last case the distinction is pointed out between a guarantee for a thing done once for all as upon the appointment of a person to an office or employment guaranteeing his trustworthiness and fidelity during such employment and a guarantee like the present one for payment of goods to be sold from time to time to one upon whose behalf the guarantee is entered into, in which case the guarantee is divisible and attaches to each sale when made as a separate transaction; as to the payment for all previous sales being a condition precedent to, or concurrent with, the notice taking effect; no case in support of that contention has been found; however, in the present case defendant's liability as to those sales had not attached on the 5th of April, 1882,

(1) 12 C. B. N. S. 748. (2) 5 Q. B. D. 46.
(3) 16 Ch. D. 314.

for at that time they were all covered by notes of Quinns then current which had been discounted by Cosgrave & Sons.

Now the second clause of the instrument, which immediately follows that which declares the agreement of the parties as to the continuance of the security, provides as follows:

And further, it is hereby agreed between the said parties hereto, that until all such sales and advances and every part thereof shall have been paid in cash, that these presents shall continue to be a good and valid security at law and in equity to the said firm of Cosgrave & Sons to the amount of $5,000, notwithstanding that they may from time to time receive other security, notes, bonds, deeds, conveyances or assignments of lands or goods or either of them, from the said party of the second part or any other person or persons as further security for the said sales or advances or any part thereof, and notwithstanding that they, the said parties of the first part or any of them, may extend the time of payment of the moneys due or any part thereof for any such sales or advances, and notwithstanding that they, the said parties of the first part, or any of them, may do any act, matter or thing that would release the said party of the third part at law or in equity from these presents were it not for stipulations herein contained.

"The said firm of Cosgrave & Sons," in this clause must, I think, be construed as referring only to the firm, as then constituted, namely, Patrick, John and Lawrence, who are described in the first clause of the instrument as carrying on business as brewers under the name style and firm of Cosgrave & Sons of the first part; and the persons who may extend to Quinn the time for payment of the moneys due on sales to him are expressly declared to be "the said parties of the first part or any of them," these words "or any of them" in this connection having no more force than declaring that any of them may do what, the said parties of the first part that is to say, what the three of them might together do. Then in the next clause Quinn, the party of the second part to the instrument, in consideration of what has gone before, "agrees with the

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"said parties of the first part" to pay the price of all advances and sales of ale, porter and lager beer and of all casks, &c., &c., that may from time to time be sold to him "by the said parties of the first part, or any of "them," at the times that may be agreed from time to time for the payment thereof, and also to pay all notes, &c., &c, that may be given for the same.

"The said parties of the first part" in this clause must be construed as referring to the same Patrick, John, and Lawrence Cosgrave, and by this clause it is manifest that the only persons whom Quinn covenants to pay for all goods contemplated as to be sold to him on the faith of the instrument are "the said parties of "the first part." This covenant can only be construed as a covenant by Quinn with the parties to the instrument of the first part; that is, with Patrick, John and Lawrence Cosgrave jointly, to pay them the price of all goods to be sold by them, or any of them on behalf of all, to Quinn, and also to pay all notes, &c., &c, as may from time to time be given for the same goods. Then follows the covenant of the defendant that Quinn "will pay for all such sales," which words must be referred to the sales mentioned in the previous clause containing Quinn's covenant, that is to say, the sales to be made by the three persons who were the said parties of the first part, or any of them on behalf of all, and also all notes, &c., &c., that may be given for the same. Then as to these notes, &c., &c., in default of payment by Quinn the covenant contains these words:

And also that in default of payment by the said party of the second part of all or any notes, &c., &c., that may be given by him to the said parties of the first part as security for any such sales or advances, or any part thereof, that he (the defendant) will pay the same.

This latter clause in connection with that first above extracted in full, seems to place beyond all doubt that the only persons who were competent to extend the time to Quinn for payment of goods sold to him, by

from time to time taking notes, &c., &c., from him, without thereby discharging the surety, were "the said "parties of the first part," to whom alone the notes were to be given, that is to say, Patrick, John and Lawrence Cosgrave, or any of them, acting on behalf of the three of them; and as it appears by the instrument, as I think it does, to have been the clear intention of the parties that the power of extending the time for payment of the price of the goods to be sold must belong to "the said parties of the first part," it follows that if the power of extending to Quinn the time for payment be limited, as I think it clearly is upon the sound construction of the clauses and provisions above extracted to Patrick, John and Lawrence Cosgrave jointly or to any of them on behalf of them all, it follows that they must be the only persons who are dealt with by the instruments as the vendors to whom alone the defendant became Quinn's guarantor and that therefore the guarantee came to an end upon the death of Patrick. The clauses and provisions which I have above extracted seem to me so plainly to demonstrate that the defendant only became guarantor to Patrick, John and Lawrence Cosgrave in respect of their joint sales to Quinn, that I do not think any effect can be given to the words, "to the member or members for the time being constituting the said firm of Cosgrave and Sons," which have created all the difficulty and we must regard them as having been inadvertently introduced by the draftsman of the instrument. I am of opinion, therefore, that the appeal must be allowed with costs both in this court and in the Court of Appeal for Ontario and that the judgment for the defendant in the Divisional Court must be reinstated.

Appeal allowed with costs.

Solicitors for appellant: *O'Gara & Remon.*

Solicitors for respondents: *Boswell & Eddis.*