

1965

*Oct. 20, 21
Dec. 14

ADELAIDE MOTORS LIMITED
(Plaintiff)

APPELLANT;

AND

JAMES BYRNE (Defendant)RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEWFOUNDLAND
(ON APPEAL)

Guarantee—Cars purchased by taxi company—Promissory note—Defendant's personal guarantee of payment—Company's indebtedness increased by subsequent transaction—New promissory note signed—Refusal to increase guarantee—Defendant's liability.

The defendant, who along with another person formed a taxi company, negotiated the purchase of nine used cars from the plaintiff for a purchase price of \$19,382.40. The taxi company gave a promissory note to the plaintiff for the amount of the purchase price and the defendant gave his personal guarantee of payment. The plaintiff discounted the note with the Bank of Nova Scotia and the latter informed the parties that the limit of its lending on this account would be \$20,000.

After having made four payments of \$1,000 each to the bank, the taxi company purchased five new cars from the plaintiff for a total sum of \$13,672.50. It traded in five of its fleet of used cars and received a credit of \$7,982.50, leaving a balance owing on the deal of \$5,690. As part of the same deal the taxi company paid direct to the plaintiff the sum of \$1,000, so that the amount of indebtedness would not exceed the \$20,000 limit set by the bank. A new note was signed for \$19,855.60, which, in turn, was discounted with the bank. The defendant, however, refused to extend his liability on the guarantee to cover the new indebtedness. The taxi company made further payments to the bank amounting to \$4,000.

Subsequently, the taxi business failed and some months thereafter the bank charged back to the plaintiff the amount of the note which was then outstanding. The plaintiff, at the defendant's request, had taken possession of the cars and those that could be repaired were sold. The plaintiff later sued the defendant on his guarantee. The amount allowed by the trial judge was varied on appeal, and an appeal by the plaintiff was then brought to this Court.

Held: The appeal should be allowed.

The plaintiff was entitled to judgment for the balance remaining of the original indebtedness of \$19,382.40 less the principal payments of \$8,000 and less the sum of \$200 which was realized on the four original cars. It was also entitled to interest at the contractual rate on the diminishing sum after giving credit for these payments.

The \$1,000 paid on the new deal was not a payment on the guaranteed indebtedness. Nor could the total proceeds from the sale of the cars be applied on that indebtedness. The defendant was only entitled to be subrogated to the security on the four original cars. As guarantor he had no interest in the five new cars purchased in the second

*PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

transaction. Also, the defendant's contention that non-compliance with *The Conditional Sales Act*, 1955 (Nfld.), c. 62, excused the taxi company entirely from the whole indebtedness failed. The plaintiff did not repossess under the terms of its conditional sales contracts; on the contrary, there was a voluntary surrender of the cars and the plaintiff was instructed to make the best of the situation.

The defendant also failed in his submission that when the new note was signed, the indebtedness represented by the old note or the balance owing on the old note disappeared. The reduced sum owing at the time of the new purchase was incorporated in the new note, but the defendant's liability as guarantor was limited to the reduced sum only.

APPEAL from a judgment of the Supreme Court of Newfoundland (On Appeal)¹, varying a judgment of Dunfield J. in an action on a guarantee. Appeal allowed.

B. A. Crane, for the plaintiff, appellant.

G. J. Gorman, for the defendant, respondent.

The judgment of the Court was delivered by

JUDSON J.:—Adelaide Motors Limited sued James Byrne on a guarantee which he had given to that company for the indebtedness of A.B.C. Taxi Cabs Limited. The company obtained a judgment at trial which, on the reference directed, would have resulted in an assessment of \$15,519.89. On appeal¹ judgment was given for \$2,399.90. The Appellate Court took a different view from the trial judge concerning the application of certain payments made on account of the taxi cab company's indebtedness. This makes necessary a review of the dealings among the three parties.

Early in 1958, Byrne, along with one other person, incorporated A.B.C. Taxi Cabs Limited. He intended to go into the taxi business and he negotiated the purchase of nine used cars from Adelaide Motors for a purchase price of \$19,382.40. These were sold under conditional sales contracts and, in addition, Byrne gave his personal guarantee of payment in the following terms:

St. John's Nfld.
June 30th, 1958.

Adelaide Motors Ltd.,
St. John's Nfld.
Dear Sirs,

This is to advise you that in view of the accommodation which you arranged through the Bank of Nova Scotia for \$19,382.40 on behalf of the A.B.C. Cabs Ltd., I give you my personal guarantee that I will see that this indebtedness is paid off according to the arrangements made and that your interests are protected at all times.

(sgd) James E. Byrne

¹ (1964), 49 M.P.R. 197.

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“The arrangements made” referred to in the guarantee were that monthly instalments of \$1,000 each would be paid in accordance with the terms of the conditional sales contract.

When the cars were purchased the taxi cab company had given a promissory note to Adelaide Motors for the purchase price of \$19,382.40. Adelaide Motors had discounted this note with the Bank of Nova Scotia and the bank had informed the parties that the limit of its lending on this account would be \$20,000. In August, September, October and November of 1958 the taxi company paid to the bank four payments of \$1,000 each. There is no question that these payments must be applied on the \$19,382.40, the guaranteed indebtedness, in reduction of Byrne’s liability under the guarantee.

In December 1958, the taxi cab company purchased five new cars from Adelaide Motors for a total sum of \$13,672.50. It traded in five of its fleet of used cars and received a credit of \$7,982.50, leaving a balance owing on the deal of \$5,690. With \$15,000 plus interest still outstanding on the original purchase, if this sum of \$5,690 had been added to the outstanding indebtedness any consolidated new note taken would have been over the \$20,000 limit set by the bank. Therefore, as part of the same deal, the taxi cab company paid direct to Adelaide Motors the sum of \$1,000. Byrne now says that this \$1,000 should be credited on the guaranteed indebtedness. When these new cars were purchased Byrne had refused to extend his liability on the guarantee to cover this new indebtedness. The \$1,000 cash paid on the new deal is in the same position as the credit of \$7,982.50. It was not a payment on the guaranteed indebtedness any more than the \$7,982.50 credit for the old cars which were traded in. Both the credit and the \$1,000 cash payment were part and parcel of the purchase of the new cars. Up to this point, therefore, Byrne is entitled only to a credit of \$4,000 on the original guaranteed indebtedness of \$19,382.40.

In 1959, the taxi cab company paid to the bank in February, March and April three payments of \$1,000 each, and in August and September two payments of \$500 each. These payments were made in accordance with the terms of the guarantee and the surety is entitled to have these

credited on the original amount. Therefore, the total principal payments on the original note of \$19,382.40 amount to \$8,000, and Byrne, as guarantor, is entitled to these credits. From the date of each payment interest runs on a diminishing sum which will have to be calculated.

The taxi cab company did not prosper and its cars deteriorated rapidly. After September 1959 no further payments were made on account of its liabilities to Adelaide Motors and it went out of business in October or November. In May of 1960 the bank charged back to Adelaide Motors the amount of the note which was then outstanding. This note, of course, included not only the original indebtedness but the \$4,690 by which the original indebtedness had been increased as a result of the purchase of the new cars in December of 1958 and for which Byrne was not liable on his guarantee.

After the failure of the taxi cab company, at Byrne's request Adelaide Motors took possession of the cabs. Again at the suggestion of Byrne, those cars that could be repaired were sold and the proceeds amounted to \$1,713.32. Byrne is claiming this sum to be applied on the guaranteed indebtedness. He is in error in this submission. He was only entitled to be subrogated to the security on the four original cars that were left. As guarantor he had no interest in the five new cars purchased in December 1958. He had not increased his guarantee to cover this purchase. He also says that non-compliance with *The Conditional Sales Act*, 1955 (Nfld.), c. 62, excuses the taxi cab company entirely from the whole indebtedness but the evidence shows that Adelaide Motors did not repossess under the terms of its conditional sales contracts; that, on the contrary, there was a voluntary surrender of these cars and that Adelaide was instructed to make the best of the situation. They did repair the cars and sold them privately. It was agreed by counsel that the four original cars in which Byrne was interested as guarantor realized approximately \$50 each. Byrne is entitled to a further credit on the guaranteed indebtedness of \$200.

Byrne also urged that when the new cars were purchased and a new note was signed for \$19,855.60, the indebtedness represented by the old note or the balance owing on the old note disappeared. Again, this is incorrect. What Byrne guaranteed was a specific indebtedness of \$19,382.40. This

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indebtedness was not paid off. The reduced sum owing at the time of the new purchase in December 1958 was incorporated in a new note which, in turn, was discounted with the bank. But the liability of Byrne as guarantor was limited to only the reduced sum owing. The offsetting entry in the books kept by Adelaide Motors was in no sense a payment in full of the old indebtedness which discharged Byrne's liability under his guarantee.

I would allow the appeal with costs of the trial and the appeal to this Court. There should be no order for costs on the first appeal. Adelaide Motors is entitled to judgment for the balance remaining of the original indebtedness of \$19,382.40 less the payments of \$8,000 above referred to and less the sum of \$200 realized on the sale of the four cars. It is also entitled to interest at the contractual rate on the diminishing sum after giving credit for these payments.

Appeal allowed with costs.

Solicitor for the plaintiff, appellant: P. D. Lewis, St. John's.

Solicitor for the defendant, respondent: N. S. Noel, St. John's.
