CHARLES W. GORDON (DEFENDANT).... APPELLANT; 1926

AND *Oct. 12, 13.

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WILLIAM ARTHUR HEBBLEWHITE, CARRYING ON BUSINESS UNDER THE FIRM NAME OF "WINNIPEG FINANCIAL CORPORATION" (PLAINTIFF) RESPONDENT; *Jan. 4.

AND

LOUNT ENGINEERING COMPANY LIMITED, C. T. LOUNT, JOHN L. LYON (DEFENDANTS).

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Surety—Promissory note endorsed by surety for certain purpose and on certain terms, known to creditor—Surety's rights—Creditor dealing with note—General hypothecation of note by creditor to bank—Inadmissibility of extrinsic evidence as to meaning and effect of hypothecation—Alteration of surety's position—Inapplicability of s. 26 (r) of King's Bench Act, Man. (R.S.M., 1913, c. 46)—Surety's obligation undertaken on terms that note be used only for advances by a bank and for advances to a certain required amount—Non-fulfilment of terms—Release of surety—Creditor's obligation as to application of payments.

Plaintiff took a promissory note as collateral security for advances by him to L. Co., which note had been endorsed by defendant G. As found by the court, G. had endorsed the note on the terms and conditions, known to plaintiff, that it would be delivered as collateral security to a bank for a loan to be made by the bank to L. Co. of $10,000, in five advances of $2,000 each, to be used for payment of agreed upon instalments to L. Co's. creditors, and that repayment was to be secured by an assignment to the bank of whatever government ditching contracts L. Co. might secure in 1923. Plaintiff hypothecated the note to his bank, by a general hypothecation in the bank's usual form, as collateral to his own account with his bank.

Held, that the case, on the evidence, if not falling within the class of "those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor is a party," at least fell within the class of "those in which there is a similar agreement between the principal and surety only, to which the creditor is a stranger." In a case of the latter class the surety has against the debtor the rights of a surety, and the creditor receiving notice of his claim to those rights, is not at liberty to do anything to their prejudice. (*Duncan, Fox, & Co.* v. *North & South Wales Bank,* 6 App. Cas. 1 at pp. 11, 12).

Held, further, that the effect of the plaintiff's hypothecation to his bank was to expose G. to be held liable to the bank, as holder in due course,

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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to the extent of his *ex facie* obligation under his endorsement, not merely for whatever indebtedness of L. Co. he had undertaken to guarantee, but for any indebtedness of plaintiff to the bank; and this obvious alteration in G.'s position involved a substantial extension of his responsibility which released him from liability to the plaintiff. The principle of *Archer* v. *Hudson,* 7 Beav. 551, and other cases cited applied.

Plaintiff's unsupported testimony by which he sought to modify or restrict the plain meaning and effect of his general hypothecation to the bank, was wholly inadmissible and ineffectual. (*Forman* v. *Union Trust Co.* [1927] S.C.R. 1).

S. 26 (*r*) of *The King's Bench Act,* Man. (providing that "giving time to a principal debtor, or dealing with or altering the security held by the principal creditor, shall not of itself discharge a surety or guarantor * * *") did not apply. The security held by the creditor to which the enactment refers is not the obligation either of the debtor or of the surety, nor the instrument evidencing such obligation, but some other security held by the creditor for its performance. Here the charge against the plaintiff was not that of having dealt in an unauthorized manner with any such security, but rather that he had so dealt with the very instrument evidencing the surety's contractual obligation itself.

Held, further, that the facts, known to plaintiff, that G. endorsed the note only for use as collateral to a bank, and would not have endorsed it had he known it was to be used for advances to be made by plaintiff, a money lender, vitiated G.'s consent and prevented any obligation arising on his part in favour of the plaintiff. *Smith* v. *Wheatcroft,* 9 Ch. D. 223, at p. 230, and other authorities, cited.

Held, further, that as G. endorsed the note for the sole purpose of being used for a loan of $10,000 to be made in five advances of $2,000 each to L. Co., which advances were necessary to carry out an arrangement with creditors, the plaintiff, who knew these facts, by refusing and failing (as found by the court) to advance the final $2,000 promised, declined to fulfil an essential condition of G.'s undertaking of his obligation of guarantor, and thereby discharged him from his liability. (*Burton* v. *Gray,* 8 Ch. App. 932; *Whitcher* v. *Hall,* 5 B. & C. 269, at p. 275).

The burden of proving that the note was to be a general continuing collateral security, as alleged by plaintiff, was on him. (*In re Boys,* L.R. 10, Eq. 467; *Tatam* v. *Haslar,* 23 Q.B.D. 345, at p. 348).

Further, the court was inclined to hold that, assuming that plaintiff could claim against G. for the $8,000 advanced on the note, the claim was satisfied, partly by certain payments, by his appropriation of which the plaintiff was bound, and partly by a payment on a Government contract obtained by L. Co. and assigned to plaintiff. Though, as against L. Co., plaintiff might have a right to apply the payment received on the Government contract first against other moneys advanced to L. Co. to enable it to carry out that contract, yet he had no such right as against G. who was entitled to have his stipulation as to Government contract moneys (see first paragraph *supra*) carried out. (*Newton* v. *Chorlton,* 10 Hare, 646, at p. 653). Failure to apply these moneys as stipulated for by the surety would amount to a variation in the contract which would release him. (*Can. Bank of Commerce* v. *Swanson,* 33 Man. R. 127; *Pearl* v. *Deacon,* 1 DeG. & J., 461).

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APPEAL by the defendant Gordon from the judgment of the Court of Appeal for Manitoba, which, reversing the judgment of Galt J., held him liable to the plaintiff in the sum of $11,401.03 and costs. The plaintiff's claim against the said defendant was as endorser, and guarantor of payment, of a promissory note held by the plaintiff, dated 8th November, 1922, and delivered to the plaintiff on the 4th December, 1922, made by the defendant the Lount Engineering Co. Ltd., in favour of the defendant Lount, and endorsed by him and by the defendant (appellant) Gordon and by the defendant Lyon. The note was a demand note for $10,000 payable at the Royal Bank of Canada, Winnipeg, with interest at 8 per cent. per annum as well after as before maturity. The facts of the case and the questions in dispute are sufficiently stated in the judgment now reported. The appeal was allowed.

E. Lafleur K.C. and *E. D. Honeyman* for the appellant.

W. L. Scott K.C. for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—The evidence presents this case as falling either within the first or the second of the three classes of suretyship defined by Lord Chancellor Selborne in *Duncan, Fox & Co.* v. *North & South Wales Bank* (1). If not, as seems most probable, within the first class, namely

those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor is a party,

it is, at least, within the second class, thus defined by His Lordship;

those in which there is a similar agreement between the principal and surety only, to which the creditor is a stranger.

Of a surety of the latter class the Lord Chancellor says (p. 12) that he has against the debtor

the rights of a surety; and that the creditor receiving notice of his claim to those rights, will not be at liberty to do anything to their prejudice.

The evidence establishes express notice to the respondent of the appellant's position as a surety and guarantor for the Lount Engineering Company—the debtor—and of

(1) (1880) 6 App. Cas. 1, at p. 11.

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the terms and conditions on which that position was assumed by him.

The law affecting the relations of creditor and surety is materially modified in the Province of Manitoba by s. 26 (*r*) of *The King's Bench Act*, R.S.M., 1913, c. 46:—

> Giving time to a principal debtor, or dealing with or altering the security held by the principal creditor shall not of itself discharge a surety or guarantor; in such case a surety shall be entitled to set up such giving of time or dealing with or alteration of the security as a defence, but it shall be allowed only in so far as it shall be shown that the surety has thereby been prejudiced.

Because it introduces a new principle in derogation of the ordinary legal rights of a surety this statute must be taken to alter the law only in so far as its terms clearly express legislative intent to do so. The security held by the creditor to which the enactment refers is not the obligation either of the debtor or of the surety nor the instrument evidencing such obligation, but some other security held by the creditor for its performance. Here the charge against the respondent is not that of having dealt in an unauthorized manner with any such security, but rather that he has so dealt with the very instrument evidencing the surety's contractual obligation itself. Except in the case of merely giving time to the principal debtor, nothing in the section under consideration interferes with the legal effect of a variation in the contractual obligation either of the debtor or of the surety effected without the surety's assent and any such change (not obviously unsubstantial) resulting from the action of the creditor will still discharge the surety in Manitoba as it does in other provinces where English law prevails. *Holme* v. *Brunskill* (1).

It is common ground that the promissory note, on which the appellant is sued as endorser and in respect to which he held, to the knowledge, and probably by the agreement, of the respondent, the position of a surety, was given to, and taken by, the respondent as collateral security either for a specific part (according to the appellant's contention) or for the whole (according to the contention of the respondent) of the indebtedness of the Lount Engineering Company to the respondent. That note was, nevertheless, hypothecated by the respondent to the Royal Bank of

(1) (1878) 3 Q.B.D. 495, at pp. 505-6.

Canada, by a general hypothecation in the bank's usual form, as collateral to his own account with the bank. The respondent admittedly had a large "line of credit" with the Royal Bank which was, at times, drawn against to its limit. The effect of the hypothecation was to expose the appellant to be held liable to the bank, as holder in due course, to the extent of his *ex facie* obligation under his endorsement, not merely for whatever indebtedness of the Lount Engineering Company he had undertaken to guarantee, but for any indebtedness of the respondent to the bank, which might, of course, be entirely disconnected with the Lount Engineering Company. The unsupported testimony of the respondent by which he sought to modify or restrict the plain meaning and effect of this general hypothecation to the bank was wholly inadmissible and ineffectual. *Forman* v. *Union Trust Co.* (1). This obvious alteration in the surety's position involved a substantial extension of his responsibility which, in our opinion, released him from liability to the respondent. Such a case is not within s. 26 (*r*) of the Manitoba *King's Bench Act,* R.S.M. 1913, c. 46. The principle of the following decisions applies: *Archer* v. *Hudson* (2); *Pybus* v. *Gibb* (3); *Finch* v. *Jukes* (4); *Newton* v. *Chorlton* (5). See too *Bank of Montreal* v. *Normandin* (6).

While this appeal might be disposed of on the short ground above stated, we think it proper to rest our judgment for the appellant as well on other grounds subjoined.

Other variations in the contract of the principal debtor —(1) by charging bonuses on advances which made the rates of interest exorbitant—well over 100 per cent. per annum on an eight months' basis of credit in the case of the first advance and over 75 per cent. in the case of the two later advances ("payment accordingly"; *vide infra*) —and (2) providing for interest at 20 per cent. on the notes finally taken to cover the balances due by the company, are also invoked by the appellant as grounds for release.

(1) [1927] S.C.R. 1.
(2) (1844) 7 Beav., 551, at pp. 561-4.
(3) (1856) 6 E. & B., 902, at p. 914.
(4) [1877] W.N. 211.
(5) (1853) 10 Hare, 646, at pp. 652-3.
(6) [1925] S.C.R. 587.

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But no specified rate of interest to be paid by the principal debtor on its borrowings would seem to have been stipulated for by the surety; and the 20 per cent. rate on the last notes taken does not appear to have been pleaded as a ground for discharge. We accordingly do not treat these variations, if they be such, as entitling the appellant to relief. Yet, while they may not serve as specific grounds of defence, these excessive interest charges imposed by the respondent make very clear the materiality to the appellant of his understanding (hereinafter dealt with) that he was guaranteeing the repayment of advances to be made by a bank and not by a note-shaving money-lender.

The respondent's testimony is unsatisfactory and cannot be relied upon when in conflict with that of other witnesses. This seems to have been the view of the learned trial judge; upon it he rejected the respondent's story as to the purpose for which the note in suit was taken by him; and a careful study of the record discloses that that view of Galt J. was fully justified.

While some of the testimony of the defence witnesses, Lount, Lyon, Williams and Gordon, detailing conversations between themselves in the absence of the plaintiff, may have been improperly received, there is enough admissible evidence to establish that the appellant Gordon endorsed the $10,000 note sued on upon the distinct understanding

(*a*) that it would be delivered as collateral security to a bank for advances to be made by the bank to the Lount Engineering Company;

(*b*) that it was to be collateral security only for a loan of $10,000, to be made in five advances of $2,000 each, to the Lount Engineering Company, and to be used for the payment of agreed upon instalments to its creditors;

(*c*) that repayment of these advances was to be secured by an assignment to the bank of whatever ditching contracts the debtor company might secure during the year 1923 from the Manitoba Government.

The respondent denies knowledge that the obligation undertaken by the appellant was subject to these terms and insists that the note sued on was handed to him by Lount, secretary of the Engineering Company, as a gen-

eral and continuing collateral security for any indebtedness which that company might incur to him and that he took the note without notice of any restriction affecting Lount's right so to use it.

(*a*) That both the appellant Gordon and his solicitor McWilliams were insistent with Lount that the note should be used to enable the company to borrow from a bank and that studied and successful efforts were made by Lount to conceal from Dr. Gordon that advances to the Lount Engineering Company were to be obtained not from a bank, but from the respondent, is made very clear in the evidence.

Lount says that Hebblewhite knew that his interest in the matter was being concealed from Dr. Gordon—that he told Hebblewhite that "we could not get Mr. McWilliams to recommend that Dr. Gordon go on the note unless the money were to be procured from the bank." This is, of course, denied by the respondent. The note now sued upon bears stamped above the endorsements of Lount, Lyon and Gordon the words: "Pay to the order of the Winnipeg Financial Corporation" (the respondent's business name) and below these endorsements, but above a second set of the same signatures, the words stamped: "I hereby waive protest, notice of protest and presentation of the within note and guarantee payment of the same." The respondent swore that both these stampings were put on the back of the note when he drew it up, according, he says, to his usual custom. His evidence when first given was rather in the nature of an inference from that custom than of an act of remembrance; but, when recalled in rebuttal he swore he positively remembered this fact; whereupon the learned trial judge significantly observed that he had become more explicit. It is abundantly proved that the first, or upper, stamping was not on the note when endorsed by Dr. Gordon, whereas the second, or lower, stamping was then upon it; and, in view of the respondent's evidence as to his "policy" of putting these stampings on all his notes when preparing them for signature, these incidents are most significant and strongly corroborative of Lount's statement that the respondent was fully cognizant of—indeed they suggest that he actively connived in—the concealment from Dr. Gordon of the fact that Hebblewhite

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was to be given the $10,000 note as collateral for advances to be made by him to the company. There can be no doubt that Hebblewhite was fully aware, when he took the $10,000 note, that Dr. Gordon had endorsed it only for use as collateral at a bank and that he would not have endorsed it had he known that it was to be used for advances to be made by Hebblewhite. The identity, in the sense of the character, of the person to whom he was to contract an obligation as endorser was so material as an inducement to Dr. Gordon that mistake as to it vitiated his consent and prevented any obligation arising on his part in favour of Hebblewhite. *Smith* v. *Wheatcroft* (1); *Said* v. *Butt* (2); Pothier, Traité des Obligations, s. 19; *Gordon* v. *Street* (3); *Cundy* v. *Lindsay* (4). If such a mistake as to person so induced will preclude an effective consent in the case of an ordinary contract, *a fortiori* must it do so in the case of a contract *strictissimi juris*, as is that of guarantee. *Owen* v. *Homan* (5).

(*b*) The sole purpose of the giving of the $10,000 note as collateral security was, to the knowledge of the respondent, to enable the Lount Engineering Company to carry out an agreement made with its creditors, whose claims aggregated some $50,000, whereby they agreed in consideration of the receipt of certain instalments, aggregating $2,000 monthly for five months, not to enforce the balances of their claims for a year. To carry out this arrangement $10,000 was necessary; no smaller sum would suffice. All this was fully explained by Lount to the respondent, who, at first, asked for a collateral note of $15,000 or $20,000, but, when told that Dr. Gordon would not endorse for more than $10,000, agreed to accept a note for the latter sum, telling Lount, not that he would have to take a smaller advance, but "that he would have to pay accordingly." And "accordingly" bonuses of $2,500 on the first advance of $4,000 and of $1,000 apiece on each of the two later advances of $2,000 were charged. The burden of proving that the $10,000 note was to be a general continu-

(1) (1878) 9 Ch. D., 223, at p. 230.
(2) [1920] 3 K.B. 497.
(3) [1899] 2 Q.B. 641, at p. 647.
(4) (1878) 3 App. Cas. 459.
(5) (1851) 3 Mac. & G., 378, at pp. 396-9.

ing collateral security was on the plaintiff: *In re Boys* (1); *Tatam* v. *Haslar* (2).

Lount deposes:—

* * * I spoke to Mr. Hebblewhite about getting the money, and he demanded that in addition to the order for any works which we might procure from the Provincial Government, that I get a collateral note signed by the other directors, as a further security for this loan.

Q. Did Mr. Hebblewhite, prior to the date of Exhibit No. 1, ask you to obtain from your co-defendant directors a collateral note for some $15,000 or $20,000?—A. When I went to Mr. Hebblewhite for the money he said that he would like a note of that size. I told him that it would be utterly impossible to get it, and he suggested $10,000, and I then endeavoured to get it.

Q. What did you say to him? Did you tell him how much money you wanted?—A. Yes. We had a table prepared—in fact we had taken it up with the creditors, and got letters from them, stating that on receipt of a proportion of it—the indebtedness of the company to them—which would amount to about $10,000, that they would withhold any action until the fall of 1923. I told Mr. Hebblewhite I thought that it would be impossible to get such a note. However, he insisted that he could not make the loan without it.

Q. You say that you told him as to the amount of money which you required for the purpose of satisfying the creditors of the defendant company, and that Mr. Hebblewhite insisted that you should get a note for the $10,000 that you required, endorsed by the other two directors of the company, Mr. John N. Lyon and Dr. C. W. Gordon, and you told him that you thought that it would be impossible to get such a note?—A. Yes.

Q. Did you tell him why?—A. I pointed out that they were not receiving any good—benefit—from the proposition, and, further, that Mr. McWilliams was very much averse to Dr. Gordon going on * * * I pointed out to Mr. Hebblewhite that Mr. R. F. McWilliams, who was acting for Dr. Gordon, seemed very much averse to the doctor going on any further with any guarantees whatever. However, I couldn't get the loan without this and, finally, after preparing a statement showing how we were going to spend the money, Mr. McWilliams authorized Dr. Gordon to take such a step.

* * *

Q. You had some discussion with Mr. Hebblewhite as to how the loan he was making should be returned?—A. Yes. It was to be made in five monthly payments of $2,000 each for four months, with the understanding that it be renewed for a like amount.

Q. You say that you had some discussion with Mr. Hebblewhite as to how the loan he was making was to be returned—repaid—and it was to be made in five monthly payments of $2,000 each, for four months, with the understanding that it be renewed for a like amount?—A. Yes, for a like period. That would bring it into the operating period of the dredge, from which we expected to pay it back. We expected a large Government contract.

(1) (1870) L.R., 10 Eq., 467.

(2) (1889) 23 Q.B.D., 345, at p. 348.

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His LORDSHIP: The $10,000 to be advanced?—A. Yes. Q. Not all at once?—A. Of $2,000 per month, and that would extend the time of repayment into the operating period of the summer months of the machine, and we expected to get a large ditching contract from the Government, out of which we were going to pay this money back, and the contractors are paid in (by) monthly instalments by the Government.

Mr. HONEYMAN: Did you explain to Mr. Hebblewhite out of what fund the advance could be repaid?—A. Yes. It was to be repaid out of the ditching work.

Q. I show you Exhibit No. 36. You signed that document, I understand?—A. Yes.

Q. That is a letter addressed to the Winnipeg Financial Corporation, dated the first of December, 1922, which reads as follows:

"We hereby agree, upon being awarded a contract, or contracts, from the Manitoba Government, to give you an order on them, authorizing the Government to pay direct to you, all estimates for work performed. We agree to make this order read that it shall remain in force until cancelled by you, or the account is liquidated.

"We further certify that we have received a letter from each creditor, stating that upon receipt of certain small payments, which have been arranged, the balance will be carried until dates ranging from October 1, to November 30, 1923."

His LORDSHIP: It was not carried out that way, because you got $4,000 on the note?—A. That was arranged because we had arranged to pay the creditors that payment in November on negotiations direct as to these small payments, and we were able (*sic*) to do it, and, consequently, we were made two payments, and two more (payments) were carried out, and the fifth was not made.

His LORDSHIP: There were some other monthly payments?—A. Yes.

Mr. HONEYMAN: Q. How did you come to sign Exhibit No. 36, which I have just read to you?—A. Well, we had agreed to do that; the negotiations were practically through, and I gave Mr. Hebblewhite that letter.

* * *

The WITNESS: I told Mr. McWilliams that I would be getting the money through a bank.

Mr. HONEYMAN: Q. Mr. Lyon was there?—A. Yes; I didn't say anything about the Winnipeg Financial Corporation.

His LORDSHIP: He didn't know anything about the Winnipeg Financial Corporation?—A. No; he knew nothing.

Mr. HONEYMAN: Q. Did you tell Mr. McWilliams how the repayment of the moneys was to be secured to the lender?—A. On the Government contract for ditching, which we expected to get.

Q. Did you tell him what amount had been arranged for—what amount?—A. Yes, $10,000, $2,000 a month.

Q. And that was to be repayable how?—A. That was to be repaid out of the ditching work.

Q. On what terms, and at what times?—A. Well, in eight months from the time that the payments were made, so that it would go into the payments that we would be receiving.

His LORDSHIP: Q. These notes were to be at what length of time?—A. Four months, and renewable for four months.

Mr. HONEYMAN: You say that you didn't say anything of Mr. Hebblewhite?—A. No, certainly I did not.

Q. Why?—A. Well, I didn't think the loan would go through and the company needed it very badly, I concealed that fact.

Q. Mr. Lyon was present when you met Mr. McWilliams, and when you told him that?—A. Yes.

His LORDSHIP: Did he know anything about Mr. Hebblewhite?—A. I think not, my lord.

* * *

Mr. HONEYMAN: Q. Under what terms did you give that $10,000 note to Mr. Hebblewhite?—A. As a collateral security to the advances that he was to make. He was to advance $10,000 at the rate of $2,000 a month. He had at that time received an order, or assignment, of any work that we might get, or any contract we might get, and I gave a note for $6,500 I think, and received the first two months (advances) in advance.

His LORDSHIP: He was to advance the whole $10,000?—A. Yes.

Mr. HONEYMAN: In January what happened?—A. Mr. Hebblewhite made the next advance of $2,000.

Q. And took a note for $3,000?—A. Yes.

Q. That note is already in?—A. Yes.

Q. In February what happened?—A. He made a further advance of $2,000.

Q. Through the note which is already filed, for $3,000?—A. Yes.

Q. In March what happened?—A. He stated——

Q. You saw Mr. Hebblewhite in March?—A. Yes.

Q. What for?—A. To get the $2,000 to hold the final promise to the creditors.

Q. About what time in March was it?—A. I can't say that definitely. I presume it was around the first, as usual, though.

Q. What did he say then?—A. He said that he didn't have sufficient security to make the advance, and he couldn't do so.

Q. What did you say to that?—A. I pointed out that it was disastrous to us; that we had entered into an arrangement, and certainly we would be in a very bad shape if we didn't make the final payment to our creditors.

Q. What did he say?—A. Well, he had to have further security, or another note from Dr. Gordon, and I knew that that was utterly impossible to get it.

* * *

Q. When you were negotiating with Mr. Hebblewhite in the Fall of 1922 for the loan of $10,000, was there a discussion respecting other advances which he might have to make?—A. No. We believed that that contract would put us on our feet.

Q. Was there a discussion in the Fall of 1922, when the note in question, Exhibit No. 1, was being arranged, concerning your building contract, a building contract of the company, in the spring of 1923?—A. Do you mean the houses?

Q. Yes.—A. No.

Q. You heard what Mr. Hebblewhite said in respect of the note, Exhibit No. 1, being given to him as a collateral continuing security for all advances to be made by the company to him?—A. Yes.

Q. What do you say as to that?—A. There was no question of a continuing security. We were getting a loan of $10,000, which, as far as I was concerned, was to be the final loan.

Q. What would you say as to Mr. Hebblewhite's statement that he did not agree to loan any specified sum at all to you when you left the

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collateral note with you (him), and that he would only do what financing he could at the bank on it?—A. I don't recollect that statement. We went ahead on the basis of getting $10,000 to hold off our creditors.

* * *

Q. Did you ever get the last $2,000 upon the $10,000 advance from Mr. Hebblewhite, upon the security of the collateral note?—A. Not on the original security, no.

Q. Have you had any discussion with Mr. Hebblewhite subsequent to the handing over of Exhibit No. 1, the collateral note for $10,000, as to its being used for security for other advances?—A. No.

Q. When did you first learn that Mr. Hebblewhite was claiming that this note in question (Ex. No. 1) was given as security for all advances made the company?—A. After this action was started.

Q. Up to that time what had you thought?—A. I hadn't thought anything about it. It was put up originally for the one guarantee.

Q. For the one guarantee of what?—A. $10,000.

Q. Of which how much was advanced?—A. $8,000.

* * *

Q. How did you come to sign Exhibit No. 13?—A. According to the agreement that we made with Mr. Hebblewhite when he advanced us the $10,000, or agreed to advance it.

Q. That is, in accordance with the letter of December 1, you mean, is it?—A. Yes (Ex. No. 36). Yes. We had given a letter at the time we got, or about the time we got, the advance, that assignment of any contracts that we got.

Q. Exhibit No. 36 is the letter that you refer to?—A. Yes.

* * *

Q. In the fall of 1922, when you were discussing the collateral note with Mr. Hebblewhite, what outstanding accounts were there in connection with building accounts?—A. There were no outstanding accounts in connection with houses.

Q. What did you tell Mr. Hebblewhite about building in the summer of 1923?—A. I have no recollection of discussing housing operations at all. We were counting on the ditching work.

Q. How did you know that there was going to be a ditch built—did you tell Mr. Hebblewhite?—A. Oh, yes, we knew it. It was in the papers as well that this work was coming up.

Q. And you were anticipating getting it?—A. Yes; we certainly did.

Q. If you had got it, what building would you have done in 1923?—A. The ditching contract was very large and it would have taken up every moment I had. It was "some size."

While the respondent, on every opportunity and although not at all responsively to the question put to him, interjects the statement that the $10,000 note was given and taken as continuing collateral to the general indebtedness of the Lount Engineering Company to himself, not a little corroboration of Mr. Lount's evidence to the contrary, and as to the actual bargain made, is to be found in the following passages from Hebblewhite's testimony:—

Mr. HONEYMAN: Q. The only sum which Lount wanted you to advance, when he came to you in the fall of 1922, was the $10,000 which

he required to pay off his past due debts with certain creditors. Isn't that so? And isn't that correct?—A. That was all for the moment, yes. Q. You didn't discuss advancing any further sums either, did you, at that time?—A. I can't just remember. I think there was some little discussion at that time, and I think the housing scheme was discussed at that time. I am not sure about that, of course.

Q. You advanced $8,000?—A. Yes.

Q. In December, January and February of 1922, 1923, that is, is it not?—A. Yes.

Q. And you say that Mr. Lount came to you in March and asked you for the final $2,000, did he not?—A. Yes,—he couldn't. There was no such arrangement made, and I couldn't undertake to guarantee to give him the money, when I had to look to the bank for the money.

Q. Didn't he ask you for $2,000 in March?—A. Yes; he asked me for $2,000 in March, and I refused to give it to him.

* * *

His LORDSHIP: I would like to know what the bargain was first of all. A man doesn't hand over a note for $10,000 you know, without there being some arrangement about it?

Mr. THOMSON: Q. What was the arrangement—what was your arrangement with regard to the matter?—A. The arrangement was, when Mr. Lount told me that he could not induce one of the endorsers, Dr. Gordon, to endorse a note for $15,000 or $20,000, but thought that he could arrange for a note for $10,000 and when he made that statement to me I informed him that he would have to pay accordingly. And he subsequently brought in a note for $10,000, with interest at eight per cent (8%) signed (Exhibit No. 1) by the defendant company, by himself personally, and endorsed by Mr. John N. Lyon * * *

Q. Why was it—the note in question—made for $10,000?—A. Because Lount couldn't obtain a note for any larger amount endorsed by the individual endorsers.

* * *

His LORDSHIP: They (the advances mentioned) were for the purposes of meeting the outstanding debts of the company at that time?—A. Yes, to pay the pressing creditors of the company, and the money was used for that purpose.

Q. The $4,000 was part of that?—A. Yes, that was part of it. That was the first advance I made, and Mr. Lount pointed out to me that he would require about $2,000 a month. Why he wanted it in that way I, of course, did not know. It was satisfactory to him anyway.

* * *

Q. You say that in December, 1922, or November, 1922, when you were first approached by the defendant company for the loan out of which this transaction grew, there was no money owing to you by the defendant company, that all previous transactions had been cleaned up? —A. Yes.

Q. And Lount approached you for a loan for a certain purpose, did he not?—A. Yes.

Q. He wanted money for the purpose of keeping the creditors quiet until next year, did he not?—A. Yes.

Q. And he required for that purpose, he told you, $10,000?—A. Yes.

Q. And he arranged with his creditors that certain sums be paid to them monthly?—A. Yes.

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Q. And the total monthly payments to his creditors, in order to keep them quiet, totalled $2,000?—A. That was his statement to me, yes.

Q. He told you how he hoped to repay the $10,000 loan, which he required?—A. From the profits of their business, which he hoped to be able to do.

Q. During the year, or summer of 1923, the ensuing summer?—A. Yes.

* * *

Q. When did you arrange that the $2,000 monthly advances which you were asking for, and which you did eventually get them to make from time to time, were to be repaid?—A. It was to be repaid from any contracts which they undertook; there was no definite time set for that —there couldn't be any, but Mr. Lount made the statement to the manager of the bank that he hoped to clean up all the notes under discount at the bank by the fall of 1923.

Q. It was specifically mentioned at that time that there would be at least one renewal?—A. No. Oh no. There was no such arrangement made in regard to one renewal at all, in regard to the payment of the notes. Mr. Lount understood that in regard to certain charges which were being made, that there would be no further charges in the next renewal.

Q. Mr. Lount told you that he understood, that he believed, that they had fairly definite arrangements made whereby they would get large ditching contracts in the summer of 1923, did he not?—A. He didn't put it as broadly as that. He hoped to get a contract in February, 1923, from the Provincial Government, which he did not get.

Q. And it was evidently out of the profits that he would make out of the ditching that he hoped to pay you, he told you?—A. Not only that, but any other contracts, any contracts from any other source from which they made their money.

Q. There was no sum mentioned in the discussion about the ditching contracts, when you were discussing the amount of the loan of $10,000.—A. Nothing beyond the fact that he hoped to get this Government contract in February, 1923, which he did not get.

Q. And you were going to be paid out of that?—A. If he got the contract—why not?

Q. You took an assignment of his company's contracts with the Provincial Government at that time, did you not?—A. I did.

Q. Did you not take an agreement to assign?—A. I did not. He gave me a letter, I think, stating that he would give me an assignment of any contracts that he got.

Q. Before you got the note, Exhibit No. 1, which has been put in evidence here, you took this letter from the defendant company, did you not?—A. Before making any advances to the defendant company I wished some assurance from them that I would get the orders, or the assignment against the work, and I wanted something definite on file.

* * *

Q. And you got it, the letter, before you got Exhibit No. 1 the note in question here, did you not?—A. Yes—I am not sure of that, of course. That was immaterial, anyway. All that I wanted was a letter and I wanted that assurance from Lount first, and I didn't care when I got it, but I was going to get it before I made any advances.

* * *

Mr. HONEYMAN: You have already told us, I think, that you got Exhibit No. 1 on the 4th of December, 1922.—A. Yes. I received Exhibit No. 1 on the 4th day of December, 1922.

His LORDSHIP: They must have put through an arrangement earlier, because it is dated the 8th of November, and your negotiations must have been going on all that time?

The WITNESS: Yes. They began in November, and it was then that he was afraid that he could not obtain Dr. Gordon's endorsement to the note, and that caused the delay, I understand.

Q. You drew the note on or about the 8th of November, I think, 1922—its date, I suppose, did you?—A. Yes.

Q. You gave it to Lount for what purpose?—A. For the purpose of obtaining the endorsement of Mr. John N. Lyon and Dr. Gordon.

Q. You asked him to get the endorsement of Dr. Gordon and Mr. Lyon to the note previously to that?—A. Yes. Mr. Lount first suggested obtaining these endorsers, and I told him if he couldn't do any better that would be satisfactory.

Q. Of course you knew that this note, Exhibit No. 1, would be endorsed as an accommodation note, endorsed as such by the two men mentioned—Dr. C. W. Gordon and John N. Lyon——?—A. It would be endorsed as a collateral note, and a continuing security, absolutely.

Q. You knew that it was an accommodation note that you were asking Dr. Gordon and Mr. Lyon for?—A. No. They were directors of the defendant company, and they were interested in the defendant company.

Q. And that was the only way that they were interested? They didn't owe any $10,000 to the Lount Engineering Co., did they?—A. Oh no, not that I know of.

Q. They were loaning their names. Isn't that what you thought?—A. They were endorsing the note.

* * *

Q. You were not taking much risk when you got Dr. Gordon's endorsement? We may figure that you were not?—A. I hoped not. I was taking the note as good security, endorsed by Dr. Gordon.

* * *

Q. And in January you advanced $2,000 to the defendant company pursuant to the arrangement you made with Mr. Lount for these monthly advances, did you not?—A. Yes.

* * *

Q. And that was a four months' note, was it not?—A. Yes.

* * *

Q. I say you knew Mr. Lount wanted $10,000 with which to hold off his creditors, and you promised them, the defendant company, that? You knew that he wanted that amount of money in order to keep his creditors quiet?—A. He told me that, yes. This was at the beginning of the negotiations.

Q. And, consequently, $1,000, or $2,000, or $3,000, or $4,000, would be of no use whatever?—A. Oh, I don't know about that. He didn't tell me that, but apparently it would not suit his purposes.

* * *

Q. It might have been possible that you would not be able to advance him any more than $4,000?—A. That is it exactly; I didn't know that I could give him more than the $4,000.

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Q. You want us to think that Mr. Lount would embark on that enterprise, try to get $10,000 in one month, and only get $4,000 the next, and run the chances of being put out of business, and not be able to pay his creditors?—A. That was exactly the risk that he would take.

Q. Did you say that you promised to get on that $10,000 note ($10,000 on that note (?))? Did you tell him that?—A. No. I told him that I would do my best to obtain the money, to obtain what money I could against this advance of $10,000 note given as collateral security.

Q. How much did you get?—A. Well, he got, altogether, up to and including April, $11,500.

Q. In March what?—A. $8,000.

Q. When he applied to you, what?—A. It was $8,000.

Q. You told him that he could not get any more?—A. He asked me, I think, for an additional $2,000, and I said no, Lount, and that was all that there was to it.

* * *

Q. You told him that you would do what you could on the collateral note?—A. I told him that I would do the best I could with the collateral note with the Royal Bank of Canada, and I didn't know what that would be.

Q. You didn't do what you could, not what you could, because you didn't approach the bank for any more money when he approached you for that extra $2,000?—A. I was quite determined I would not, and there was no contract or agreement to that effect and if there were I should have lived up to it.

* * *

Q. In your examination for discovery were you asked this question:

"All you had in mind, in other words, at the time, was advancing of moneys to pay off his creditors, and accounts that were overdue?—A. Yes as against his collateral note."

That is correct?—A. Yes, that is correct. I was not interested in anything else at that time. There was only that to finance, as I have explained to you.

Q. Now question No. 371:

"And is the purpose for which you took the collateral note as you say?—A. Oh, I required security before I would make these advances, and he gave me that collateral note as security."

Q. That is correct?—A. Yes.

In his examination-in-chief the plaintiff divided his total advances to the Lount Engineering Company, aggregating $32,547, into three groups:—

Mr. THOMSON: Q. The first group of loans amounted to $8,000 in connection with the note, Exhibit No. 1, alone. Is that correct?—A. Yes.

Q. And the next group of loans amounted to $15,545.50?—A. Yes.

Q. All in connection with notes on the housing scheme?—A. Yes, orders taken in connection with the housing scheme.

Q. And the third group of loans was in connection with Exhibit No. 1, and the assignment, Exhibit No. 13. Is that correct?—A. Yes, clear enough.

Q. First $8,000, and then $15,545.50, and then $8,000 added?—A. Yes.

The last figure, $8,000, should be $8,912.71. He had said a little earlier:—

Q. What was the security for the $15,545?—A. The orders against the mortgage loans which were being placed on houses which Lount, or the defendant company, was building.

On careful consideration of all the relevant admissible testimony the only reasonable conclusion is that the plaintiff took the $10,000 note (which, when endorsed by Dr. Gordon, he regarded as "good security") as collateral security only for five advances of $2,000 each to be made monthly and which he definitely agreed to make and that he well knew and understood that Dr. Gordon's endorsement had been obtained on that basis and none other—save that Dr. Gordon also understood that the arrangement would be made with a bank and not with such a lender as Hebblewhite. The evidence fully warranted the findings to that effect made by the trial judge, and, with respect, they should not have been disturbed.

The evidence also fully supports the finding by the trial judge that only $8,000 was advanced against the note in question and that the respondent refused early in March, when it was due, to make the final advance of $2,000. The finding of the learned judge who delivered the judgment of the Court of Appeal that this balance was in fact advanced during March and April rests upon a misunderstanding of the first question and answer in the following passage from Lount's evidence:—

HIS LORDSHIP: Did you get the last $2,000 in some other way?—A. Yes. We had by that time found that we were not going to get the contract that we had been counting on, and I had started my houses, and I went to Mr. Hebblewhite and got money from him, both to carry on the houses and to pay off these creditors, and I used the money for both purposes.

Q. In that way you got your final $2,000?—A. Yes for a period of time. The first money I got in March was not all used to pay the creditors with.

MR. HONEYMAN: The money which you got in March was advanced upon what?—A. On an order on the mortgage loan upon the houses I was building.

Q. That is the houses you were building in your own name?—A. Oh, yes.

Q. And that is the $1,000 in this exhibit which the plaintiff says that he advanced, the $1,000 on the 7th of March, 1923?—A. Yes.

Q. And that would be the $1,000 that you got by giving the order upon the houses which you were building personally, was it?—A. Yes.

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What the witness clearly meant was that he had obtained by other means the last $2,000 needed to pay the March instalment to the creditors and not that the respondent had advanced that $2,000 on the security of the collateral $10,000 note. Lount's evidence, on the contrary, is that Hebblewhite positively and distinctly refused to make that final advance and that in fact he never advanced more than $8,000 against the $10,000 note. The money actually lent in March and April is included in the $15,545 which was all secured by orders against the mortgages under the housing scheme.

By refusing to advance the final $2,000 promised against the $10,000 collateral note the respondent declined to fulfil an essential condition of the appellant's undertaking of his obligation as guarantor and thereby discharged him from his liability. *Burton* v. *Gray* (1); *Whitcher* v. *Hall* (2).

(c) Without going at all fully into this phase of the case, we incline to think that the learned trial judge was also right in finding that any claim of the plaintiff, assuming him entitled to hold the defendant Gordon for repayment of the $8,000 advanced against the note sued on, was fully satisfied. *Kinnaird* v. *Webster* (3).

A Manitoba Government contract—the only one obtained by the Lount Engineering Company—was duly assigned to the plaintiff in September, 1923, as promised in the letter of December 1st, 1922, and from it he received $5,762.08. He alleges that he made advances amounting to $8,912.71 to the company to enable it to carry out this contract and asserts the right to repayment of these advances before crediting the $5,762.08 of receipts against the earlier advances of $8,000 guaranteed by the note sued on. Against the Lount Engineering Company he may have such a right, but not, we think, against the appellant. As between him and the respondent the stipulation agreed to that the proceeds of any Manitoba Government contract assigned by the company to the respondent should be applied to the repayment of the advances made as against the note endorsed by the appellant was never in any way departed from or qualified. The appellant is en-

(1) (1873) 8 Ch. App. 932. (2) (1826) 5 B. & C., 269, at p. 275.
(3) (1878) 10 Ch. D., 139.

titled to have it carried out. *Newton* v. *Chorlton* (1). Failure to apply these moneys as stipulated for by the surety would amount to a variation in the contract which would release him. *Canadian Bank of Commerce* v. *Swanson* (2); *Pearl* v. *Deacon* (3).

Having voluntarily appropriated three other payments aggregating $4,648.40—$2,738.40, $1,000, $900—of the Lount Engineering Company's moneys toward payment of the notes taken for advances made against the $10,000 note now in suit, the plaintiff should not be heard to say that such appropriations were a mere matter of book-keeping and were not meant to extinguish *pro tanto* the liability for which alone the $10,000 note was collateral.

As to the item of $2,738.40 the plaintiff asserts that that was in fact paid out of the proceeds of another loan or advance made by him to the company and that he got no benefit from it and on this ground the Court of Appeal held him not bound to give credit for that sum. But the evidence shows that such other loan was in itself fully repaid to the plaintiff by the receipt of moneys from the Lount Engineering Company. This fact, or its significance, would seem to have escaped the attention of the Court of Appeal. The plaintiff is in our opinion bound by the appropriation of the three amounts above specified towards satisfaction of the $8,000 of the Lount Engineering Company's indebtedness secured by the $10,000 collateral note. The fact, though not strictly relevant, may also be noted that the advances made in March and April were fully repaid by the proceeds of housing-scheme orders.

For these reasons we are, with great respect, of the opinion that this appeal should be allowed with costs here and in the Court of Appeal and that the judgment of the learned trial judge, in so far as it dismisses the action with costs as against the defendant Gordon (who alone appealed to this court), should be restored.

Appeal allowed with costs.

Solicitors for the appellant: *McWilliams, Gunn & Honeyman.*

Solicitors for the respondent: *Thomson, Thomson & Thomson.*

(1) (1853) 10 Hare, 646, at p. 653. (2) (1923) 33 Man. R. 127.
(3) (1857) 1 DeG. & J., 461.