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*May 10.
*June 24.

JOHN FLEMING AND JAMES DOUGLAS (PLAINTIFFS) ..... } APPELLANTS;

AND

WILLIAM McLEOD (DEFENDANT) .... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Promissory note—Protest in London, England—Notice of dishonour to indorser in Canada—Knowledge of address—First mail leaving for Canada—Notice through agent—Agreement for time—Discharge of surety—Appropriation of payments—Evidence.

Notes made in St. John, N.B., were protested in London, England, where they were payable. The indorser lived at Richibucto, N.B. Notice of dishonour of the first note was mailed to the indorser at Richibucto, and, at the same time, the protest was sent by the holders to an agent at Halifax, N.S., instructing him to take the necessary steps to obtain payment. The agent, on the same day that he received the protest and instructions, sent, by post, notice of dishonour to the indorser at Richibucto. As the other notes fell due, the holders sent them and the protests, by the first packet from London to Canada, to the same agent, at Halifax, by whom the notices of dishonour were forwarded to the indorser, at Richibucto.

Held, Idington and Duff JJ. dissenting, that the sending of the notice of dishonour of the first note direct from London to Richibucto, with the precaution of also sending it through the agent was an indication that the holders were not aware of the correct address of the indorser and the fact that they used the proper address was not conclusive of their knowledge or sufficient to compel an inference imputing such knowledge to them. Therefore, the notices in respect to the other notes, sent through the agent, were sufficient.

Per Idington and Duff JJ. dissenting, that the holders had failed to shew that they had adopted the most expeditious mode of having the notices of dishonour given to the indorser.

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*PRESENT:—Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

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The maker of the note gave evidence of an offer to the holders to settle his indebtedness, on certain terms and at a time some two or three years later than the maturity of the last note, and that the same was agreed to by the holders. The latter, in their evidence, denied such agreement and testified that, in all the negotiations, they had informed the maker that they would do nothing whatever in any way to release the indorser.

Held, that the evidence did not shew that there was any agreement by the holders to give time to the maker and the indorser was not discharged. If the existence of an agreement could be gathered from the evidence, it was without consideration and the creditors' rights against the sureties were reserved.

Per Idington and Duff JJ. that a demand note given in renewal of a time note and accepted by the holders is not a giving of time to the maker by which the indorser is discharged.

Judgment of the Supreme Court of New Brunswick (37 N.B. Rep. 630), reversed.

APPEAL from the judgment of the Supreme Court of New Brunswick (1), affirming the judgment of His Lordship, Chief Justice Tuck, at the trial, by which the plaintiffs' action was dismissed with costs.

The material circumstances of the case are stated in the head-note and the questions at issue on this appeal are discussed in the judgments now reported.

Teed K.C. for the appellants.

W. D. Carter for the respondent.

THE CHIEF JUSTICE.—This appeal is allowed with costs. I concur in the judgment delivered by Mr. Justice Davies.

DAVIES J.—This appeal arises in an action brought by the appellants the payees of four promissory notes

(1) 37 N.B. Rep. 630.

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given to them by George K. McLeod, all dated at St. John, N.B., 1892, falling due respectively September 30th, 1893, 1894, 1895 and 1896, and all indorsed by respondent W. H. McLeod. The first three are for £1625 sterling each, and the last one for £1705 16s. sterling.

The defendant in his pleas denied (1) presentation; (2) notice of dishonour; and alleged; (3) an agreement by the appellant with the maker, Geo. K. McLeod, to give him time for payment of all the notes whereby respondent as surety became discharged; and (4) payment.

The appellants are merchants carrying on business in London, England, and it is conceded that the notes as they respectively fell due were properly presented and protested for non-payment.

The substantial contests are whether or not proper notices of dishonour were sent to respondent and whether or not, even if so, he was discharged by a valid agreement between appellants and the maker of the notes, Geo. K. McLeod, giving him time for payment.

It appears in evidence that the defendant, respondent, lives in Richibucto, New Brunswick, but there is no evidence of knowledge by the appellants of that fact, unless the inference of such knowledge should be drawn from the fact that when the first note fell due a notice of the dishonour of the same was sent to defendant by the appellants, from London, the following day, addressed to Richibucto. At the same time and by the same mail, the appellants forwarded the protest of the non-payment of that note to their agent, the manager of the Merchants' Bank of Halifax, Nova Scotia, instructing him to take the

necessary preliminary steps to obtain from the maker and from respondent W. H. McLeod, payment of the note.

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Pursuant to these instructions Duncan, their agent, on the same day that he received by mail this letter from appellants, in Halifax, sent by post notice of dishonour to W. H. McLeod at Richibucto. The fact of the appellants having taken the precaution of sending the protested note to their agent Duncan in Halifax, and having a notice of dishonour sent by him to McLeod, rather rebuts the inference sought to be drawn from the sending of the notice to him from London to Richibucto direct and indicates an uncertainty on the part of the appellants as to McLeod's proper address which goes to rebut knowledge. The fact that they hit upon the proper address is by no means conclusive of their knowledge, or sufficient to compel an inference imputing such knowledge to them. With respect to all the other three notes the practice adopted by appellants was to send the dishonoured note and protest by the "first Canadian mail leaving London for Canada" after the day of the dishonour of the note, to their agent Duncan the manager of the Merchants' Bank, Halifax, by whom notices of dishonour were forwarded to defendant.

The evidence of Wrampe, the appellants' clerk, with respect to the forwarding of these letters from London on the dishonour of the first note leaves no room for doubt on that point. He says, speaking of the notices sent with respect to the first note:

> The mail direct for Canada closed on Thursdays. *There was no mail leaving for Canada between Sept. 30th and Oct. 4th,* so that both of these letters C.H.C. 6 and C.H.C. 7 were posted in time to *catch the first mail leaving for Canada* after Sept. 30th.

His evidence with respect to the sending of the protests of the other three dishonoured notes to Duncan at Halifax to have the notices of dishonour sent

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to McLeod is to the same effect, namely, that they were posted in time "for the first mail leaving for Canada after the note became due." The evidence of Ferand, an official of the general post-office, London, was to the same effect, so far as proving the days when the mail left England for Canada direct. These witnesses were not cross-examined and the only evidence given even suggesting that these mails by which the protested notes were forwarded to Duncan were not the first mails leaving London for Canada after the dishonour of the notes was that of Geo. K. McLeod who of late years had lived in New York and did not profess to have accurate knowledge on the subject. He says that, *so far as his knowledge was concerned,*

> mails leave London for *North America,* Tuesday, Wednesday, Thursday and Saturday as a rule and that (he should think) three-quarters of the Canadian mails came by way of New York.

But whether he was speaking with reference to the postal arrangements of the year when his evidence was given or to the years 1893, 1894, 1895 and 1896, when the notices were sent does not appear.

I have no hesitation in holding on this evidence that the appellants cannot be held to have had knowledge of the defendant W. H. McLeod's address; that they were therefore justified in forwarding the protests of the dishonour of the notes to their agent Duncan in Halifax in order to have the necessary inquiries made and notices of dishonour sent to his proper address, and if as a consequence of so forwarding these protests and notes to their agent any necessary delay occurred (of which fact I am bound to say I see no evidence) the appellants were justified and excused under the law of England which is the law applicable

to this case in respect to such delay. Duncan's evidence is clear and undoubted that he forwarded on from Halifax to McLeod at Richibucto the proper notices of dishonour the *same day* he received the protests in each case from the plaintiffs in London, and there is the further evidence from the post-office clerk at Richibucto of the day the defendant McLeod took the notices out of the post-office at Richibucto they being registered notices. The evidence given on these points, in my opinion, satisfies the requirements of the law as to the giving of proper notices of dishonour and no evidence beyond the quite unsatisfactory general statement of Geo. K. McLeod was given with respect either to the knowledge by appellants of his brother's address or as to the mails leaving London for Canada. W. H. McLeod himself was not examined as a witness.

Then with respect to the defence that there was an agreement between the appellants and the maker of the note Geo. K. McLeod whereby the latter was given time for payment, I am quite unable to conclude that any such agreement existed.

It appears Geo. K. McLeod was in London in the autumn of 1898 negotiating with the appellants for a settlement of his account with them. These negotiations continued for some time until, as McLeod in his evidence says, they culminated in a letter written by him on 12th December, 1898, to the appellants which was put in evidence. This letter professes to state certain terms of settlement as having been proposed by appellants to McLeod which he says he will accept; amongst them was the payment by McLeod of a much smaller sum than he admittedly owed appellants

in full and final settlement of the indebtedness to your firm of my brother and myself.

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The letter winds up with the following:

> You will agree to give me an extended time of payment of sum agreed upon until Dec. 31st, 1900, by which date this settlement is to be finally completed by me. If you will kindly confirm the terms as herein stated you will oblige me.

There was no written confirmation of the terms stated or proposed in this letter, but McLeod says that he had several subsequent interviews with the appellants and that at one of these the partner with whom he was negotiating consented to accept these terms of settlement.

The trial of the case was postponed after this evidence to enable the evidence of appellants to be obtained on this point and that of John Fleming, the senior partner in the firm was obtained by Commission and read in evidence when the hearing was resumed. In his evidence Mr. Fleming says, that his firm had

> provisionally agreed in March, 1898, to accept the sum of £3,250 plus interest in settlement of Geo. K. McLeod and William H. McLeod and George McLeod's indebtedness, but George K. McLeod wanted to reduce this amount as stated in his letter of 12th December, 1898, now before the court. Robinson Fleming & Co. (appellants) never at any time either in writing or verbally agreed to any such desired reduction and they rejected the proposal made in the letter of 12th December, 1898.

He goes on to state further that in all the negotiations his firm informed McLeod they

> would do nothing whatever in any way to release William McLeod or George McLeod, Sr.

until whatever sum which might be agreed upon as a compromise was paid in cash, and he produced another letter to his firm from Geo. K. McLeod dated 1st Sept., 1899, which was read in evidence wherein he, McLeod,

withdraws his previous letter of 12th December, 1898, the terms of which he had stated had been accepted, and submitted new and different proposals for settlement and amongst them one that he George

engaged to do his best to get necessary consents of W. H. McLeod and of his father (and any other necessary parties if any) to this proposed settlement.

Fleming further states that

ll these negotiations with Geo. K. McLeod were merely proposals nd without prejudice to Robinson Fleming & Co., and it was con-inuously clearly understood that W. H. McLeod's responsibility as ndorser remained intact till Robinson, Fleming & Co., were in eceipt of the cash.

Geo. K. McLeod was personally present at the adourned hearing of the case. He was then further exmined on behalf of the defendant and stated that he ad heard Mr. Fleming's evidence taken on commission ead. He gives however no contradiction of any kind o the specific statements of Mr. Fleming which I have et out above or any explanation or statement respectng them.

With this letter of Geo. K. McLeod's in evidence of he date 1st Sept., 1899, unexplained, withdrawing his revious offer of 12th December, 1898, which he had reviously stated appellants had accepted, and with he uncontradicted evidence of Mr. John Fleming enying that the negotiations had resulted in any setled agreement or that they were anything more than nere proposals of Geo. K. McLeod's which, if carried ut, they were willing to accept and explicitly stating hat "it was clearly continuously understood" by all arties that W. H. McLeod's responsibility as indorser vas to remain intact, I cannot entertain any doubt pon this branch of the case.

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I conclude from the evidence clearly that there was no binding agreement of compromise made between appellants and Geo. K. McLeod whereby he was given time for payment of the debt he owed appellants; that if any such agreement could be spelled out of the evidence the reservation of appellants' rights against the sureties was a part of it; and that in any event the suggested agreement was without consideration and not binding.

See as to the reservation of rights against sureties, *Gorman* v. *Dixon*(1).

There remains only the question of the balance due upon the notes sued on. No difference of opinion apparently exists as to the credits to which Geo. K. McLeod is entitled in his accounts with the appellants. But there is a dispute as to the manner in which these credits ought to be appropriated having reference to the notes and defendant's liability upon them. As we have all the materials before us to enable us to deal with the point in dispute there is no reason for referring the case back again in order to have the proper calculations and appropriations made.

Counsel on both sides have submitted statements shewing how the balance would stand if the accounts are made up according to their several contentions. When once the defendant's liability on the four notes sued on is determined the only substantial difference of opinion seems to be whether the first payments received by the appellants should be appropriated to the payment of the interest due under the agreement of the 2nd November, 1891, in pursuance of which agreement these notes were given or whether the defendant has the right to have these payments strictly appro-

(1) 26 Can. S.C.R. 87.

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priated to the notes ignoring the interest payable under the agreement.

I do not think there can be any reasonable doubt on the point. The 5th and 13th clauses of the agreement seem conclusive that interest is to be calculated and payable upon the amount of the account as then settled every six months, and that any moneys collected from insurance for total loss on any of the properties referred to in the agreement

> should be applied in liquidation of first payments due by Geo. K. McLeod under this agreement.

The first moneys due were the half yearly accruing interest and the account should be settled upon that basis, and the moneys collected from insurances on total loss

> appropriated first to the payment of this interest as provided by the agreement.

I think also that they should be settled on the basis of a debt of £6,580 only as due by Geo. K. McLeod to appellants, namely, the £5,000 cash advance and the old debt of Geo. McLeod, Sen., of £1,500, and excluding the subsequent advances of £1,600 made by appellants to Geo. K. McLeod.

Calculated on this basis the balance due on the notes and for which the appellants are entitled to recover I think amounts to the sum of $30,717.57 up to the 1st day of June, 1907, as submitted by appellants' counsel in one of his tabulated statements.

The appeal should be allowed with costs in all the courts and for the purpose of arriving at the actual balance due and recoverable by appellants on the notes sued on a reference should be made to the Registrar of this court, and judgment entered for the amount

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found to be due by him on the basis above referred to together with costs as above.

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IDINGTON J. (dissenting).—The appellants sued the respondent as indorser upon four promissory notes which fell due in the years 1893, 1894, 1895, 1896, respectively. His chief defences are want of notice of dishonour and that time was given the maker of the notes by a binding agreement for the payment of the said notes.

It seems that the principal debtor was unable to pay his debts in full and sought to compromise with the appellants or their predecessor in title in regard to the debts represented by the notes now sued upon. It is alleged by the principal debtor in his evidence that there was, incidentally to the negotiations therefor, such an agreement as set up. I doubt whether what he says was sufficiently definite to constitute an agreement. Besides there evidently was no consideration for any agreement down to the proposal of 1st September, 1899, and he is contradicted as to what he alleges prior to that date.

The proposal of September, 1899, was followed by the acceptance of a deed and a demand note from the principal debtor to the plaintiffs.

The question is raised whether we can fairly infer from the whole of the evidence, including the letter of September, that an understanding had been come to, that time would be extended until the 31st December, 1900 (the time for payment of the £3,250 which was to be taken in satisfaction of the entire debt), in consideration of George K. McLeod giving his demand note and the deed of the property. I am, after giving it the best consideration I can, unable to infer there-

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from any agreement for time. Amongst other considerations that press upon me in consideration of this question, I think it is clearly implied in the letter that the creditors had not, up to the date of the letter, accepted, or intended to accept any proposition by which they would release the sureties.

Can we infer from the giving of the deed to facilitate future sales of property, applicable to the liquidation of the debt, that the demand note referred to was to be demanded only at some future time? We may suspect that such was the arrangement in consideration of getting the deed. I cannot see my way to infer it as a fact. See *Twopenny* v. *Young*(1), in features of fact not unlike this. Then, is a renewal by demand note a giving of time?

The renewal by a promissory note payable at *a future date* assuredly is in itself a giving of time.

But how can a demand note which is instantly due the moment delivered, and can be sued upon then, and upon which the statute of limitations runs from the date or instant of delivery, if they differ and delivery be later, be held to be a giving of time?

If the demand note, either by expressions on its face, importing necessity of a future demand, or by agreement outside of it, was not instantly payable, the defendant should have so shewn to maintain his plea.

I think the defendant fails on this branch of the case.

Then we come to the defence of want of notice of dishonour. It is conceded that it fails on the facts regarding the first note.

The facts relative to the notice of dishonour given

(1) 3 B. & C. 208.

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in respect of the other notes require more consideration. It is not alleged in evidence that the address of the indorser was unknown to the holders when the notes respectively fell due. It cannot be so inferred. No one has asked us to do so. To get the benefit of such ignorance by way of excuse it must be affirmatively proven.

The address of the indorser was known and acted upon when the first note was protested and, as it remained unpaid the knowledge, I would presume, continued, especially as the address was in fact the same throughout and the same parties held the other notes as they fell due.

The appellants' knowledge and means of acquiring further knowledge of the indorser's address were such that I am surprised that we have no attempt at explanation of why these means were not used or this knowledge acted upon. The same clerk who gives evidence as to what was done in relation to the protesting and notice of dishonour seems to have been in charge of that part of the business during the whole time, and I have no doubt knew the address or he would have excused himself in his evidence.

The Halifax agent was not specifically asked regarding indorser's address or residence as he would have been if want of knowledge of residence had troubled the holders. Clearly, the holders ignored the necessity for notice of dishonour and seemed to suppose something else was needed.

Instead, however, of sending a notice of dishonour to that address which was known, none was sent in respect of the three later notes from London, in England, where they fell due.

We find in reported cases many unusual methods

to have been adopted in transmitting notice to indorsers, but none upheld that were not shewn to have been the result of ignorance of the address or at least as expeditious as if sent by the ordinary mail service from the place of dishonour.

Here the method adopted was simply to have the note protested without the usual notice to indorsers of its dishonour and then the protest and note were sent by mail to an agent in Halifax with instructions to do what was necessary to collect and protect the legal rights of the holders. When the agent at Halifax received these instructions there, he sent, on the respective days on which he received them, a dunning letter by mail from Halifax to the defendant at Richibucto, where he lived, notifying him. Whether the dates of the respective receipts by the agent at Halifax of such instructions were the same day as mail reached Halifax, we are left to guess.

There is no evidence of how long it would have taken these notices, if mailed in London, as they should have been, on the respective dates of protest, directed to the defendant at Richibucto, to have reached there.

Nor is there anything to shew how long it would, in the ordinary course of mail service between Halifax and Richibucto, have taken the notices, mailed as they were at Halifax, to have reached Richibucto, or the defendant at Richibucto, in the respective years of such mailing. We are, in short, without any means of comparison between the time of transmission by proper methods and those which were adopted.

How can we, without some evidence shewing ignorance of residence or address, or that the irregular or unusual method resulted or probably resulted in de-

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fendant's receipt of such notices within the same time as if the business had been properly attended to, assume what we are asked to assume in order to overcome the defence in question?

The burthen of proving notices or excusing want of such rested on the appellants and, when they chose, without excuse, to adopt an unusual method, they were bound to shew that it was quite as effective in regard to time as if they had adopted the ordinary and proper method.

I have tried to get from a tabulation and comparison of the postal results in evidence something to help, but the meagre data we have renders it hopeless.

When I consider that the only evidence we have leaves us entirely in the dark as to the course of transmission of the mails from England to Canada, it is, I respectfully submit, absurd to try and give effect to notices from Halifax.

For aught I know, or appears in evidence, the notices of dishonour, if they had been mailed properly in London, might have reached Richibucto before they could have reached Halifax. A table is given of dates of closing in London of certain mails. Whether the "direct packet for Canada" spoken of in the evidence means a vessel for Halifax or Quebec or Montreal, I know not. Where such packet's mail bags for Halifax, in those years in question, would have been dropped in Canada, I do not know and am not told. If dropped elsewhere than at Halifax, it does not appear whether or not there were direct means of transmission from that point to Richibucto without going via Halifax. Why was Halifax selected for the purpose of following or finding a man that was last heard of at Richibucto in another province than where Halifax is?

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Are we to assume, without proof or a tittle of evidence, that notice re-mailed, for example, from Winnipeg or elsewhere to Richibucto or any other place in the wide Dominion of Canada would be proper and be held good? Are we to assume diligence in selecting Halifax instead of, say Saint John, either to find the man or his address?

In going via Halifax, we are not told how much time would have been lost by re-sorting, or by re-sorting and delivering there, before a re-mailing by Mr. Duncan, the plaintiffs' agent, could take place. Can we assume that Mr. Duncan was at home on each occasion and received on each occasion the several instructions so sent so soon as mail reached Halifax?

Can we venture under such circumstances to say that the most expeditious way was adopted, even if it were proper to adopt an irregular means of transmission? For aught that appears, a re-mailing from Quebec or Saint John, or any other place than Halifax might have been more expeditious than a re-mailing at Halifax.

In the face of the positive neglect in London, which I have pointed out, in regard to trying to find the indorser's address, and the facts that we have not a single precedent that I can find, for adopting such peculiar means of inquiry for a man's address and such postal means of transmission as were adopted here, and of what we know such postal interruption means, in handling and re-mailing, I fear it would be going rather far to uphold this notice, without evidence clearly shewing it was the best that could have been done.

Chief Justice Tuck points out that the usual mail route from London to the Province of New Brunswick

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is by way of New York and coupling mail service that way with what is in evidence as to mail direct to Canada there would be four mails each week from London. In view of what transpired in court, when Mr. McLeod was giving his evidence on that point, and that counsel did not object to the learned Chief Justice intimating his right to act upon what was common knowledge to him and to them, I am inclined to think, in view of the silence conceding consent, that he was entitled to use such general knowledge as he possessed, though possibly not strictly, in legal phraseology, "common knowledge." Certainly he was in a better position to know than we. He had some warrant for doing so from what transpired in court. We have none for using what information we can get on the subject.

Without saying that the case of *Muilman* v. *D'Eguino* (1), is no longer law, I may be permitted to remark that a good many changes have taken place in this world since that decision. Its bearing may need reviewing.

The only remaining question is whether or not the first of these four notes has been paid.

The notes were given pursuant to an agreement in writing of 2nd November, 1891, between George K. McLeod and Robinson, Fleming & Co., to whom George K. McLeod's father was indebted in the sum of £1,580 16s. And in consideration of George K. McLeod assuming the debt, Robinson, Fleming & Co. were to advance him £6,000. It was agreed that defendant should become indorser for the notes which were to be given for the entire sum including old debt and

(1) 2 H. Bl. 565.

new advance. The agreement provided for the payments of this entire sum being by £1,000 on or before 30th September, 1892, and four equal payments in each succeeding year thereafter.

Owing to a fire destroying part of the security, which the agreement also provided for being given, the proposed advance of £6,000 was cut down to £5,000.

That left a debt of £6,580 18s. to be paid and the four notes now in question of £1,625 each were given therefor on 30th January, 1893.

I observe they would not exactly cover it, but also observe that no explanation is given and no point made of the fact. Some allowance in the way of rebate or interest between the date of agreement and advance is probably the explanation of this discrepancy.

The defendant was, beyond all question, a surety. He was entitled, as surety, to have the moneys derived from any securities his principal gave for the debt, applied to the payment of what he had become surety for, and to be thereby discharged.

To secure these debts, the principal mortgaged vessels, and other property, and in compliance with the agreement, insured vessels so mortgaged. The result was the receipt by appellants of $6,801.79, £423 9s. of which was received 22nd April, 1894, and £960 of it, 25th May, 1894.

I venture to hold, notwithstanding Mr. John Fleming's sworn interpretation of clause 13 of the agreement, that this money, as well as that received later, was applicable to, and only to, the payment of the said note which was the only one then past due, saving any question of appropriation for interest on the

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whole, which the agreement, by paragraph 5, provides is to be paid at 5 per cent. every six months.

After this, in the same spring of 1895, another property known as the Kouchibouguac property, applicable in the same way, was sold for $3,250. Though not a cash sale, I think, as between parties to this suit, it must be treated as if cash, as the appellants took for the credit part of it an interest-bearing mortgage to themselves.

In this way it is clear that, even if out of the moneys thus realized the interest on the debt is taken every six months, there were balances which, applied to the first note, as I think they must be, fully extinguished it.

Evidently by the appellants' advances to George K. McLeod, later on or in some other way, which had no relation to the agreement so far as this phase of it is concerned, they became his creditors for other large sums remaining unpaid, besides those secured by defendant's indorsement.

It seems as if they had felt entitled to treat all their claims as if on the same footing.

The second clause of the agreement seems as clear as the English language can make it that this was not so.

It reads:

> 2. For the better securing to Messrs. Robinson, Fleming & Co. the *repayment of the said advance of* £6,000 *and said past due debt* of £1,580 16s, George K. McLeod agrees to give, etc., etc.

Then the above and other securities are specified. Whatever may have transpired between appellants and George K. McLeod after these securities were thus

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specifically hypothecated for the purposes of the debts now in question herein, there could not be anything done by them to the detriment of the surety, now respondent herein.

The only possible question that could have arisen up to the spring of 1895, as to appropriation of payments received from these securities, on account of the principal, would be as between the first and second notes.

The facts here present no such difficulty for the creditors did not seek to prefer in the way of appropriation the second note to the first, so far as the evidence before us shews.

Nor do I think it ever was open, as against the surety, for the creditors here under this agreement, to appropriate in any other way than according to the order of time of same having fallen due.

The case of *Kinnaird* v. *Webster*(1), presents an application of the principles to be observed in such cases, so far as I have proceeded.

The result of adhering to the terms of the agreement in question, and the observance of the principles applicable, render the result to my mind clear. Had the progress of events been somewhat different, one can easily see some interesting questions regarding a surety's right in regard to appropriation of payments, as likely to have arisen.

I think the appeal should be dismissed with costs.

MACLENNAN J.—I concur in the opinion of Mr. Justice Davies.

(1) 10 Ch. D. 139.

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DUFF J. (dissenting).—I concur in the opinion of Mr. Justice Idington.

Appeal allowed with costs.

Solicitor for the appellant: *C. J. Coster.*

Solicitor for the respondent: *William D. Carter.*