

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Bank of British North America v. Cuvillier and others, from the Court of Queen's Bench for Lower Canada; delivered on the 6th February, 1861.*

---

Present:

LORD CRANWORTH.

LORD KINGSDOWN.

LORD JUSTICE KNIGHT BRUCE.

LORD JUSTICE TURNER.

IN this case the Judges of the Court in Canada appear to have given very great attention to the subject, and were it not that in consequence of the length of the arguments we had an opportunity of considering the matter in the course of the last evening, and have also had before us in print a full report of all the reasons of the Judges, we might have thought it due to them and to ourselves to take time to consider what course we should pursue; but having had all these advantages, and having come to a clear opinion upon the subject, we do not think it right to delay the parties in the announcing of our judgment.

The first thing which their Lordships notice is this: they have come clearly to the conclusion that the whole question turns upon the construction of the instrument of guarantee. The facts can hardly be said to be in any respect in dispute. The question is, what is the meaning of this deed of guarantee? In the judgment reported to have been given by Mr. Justice La Fontane, he says, "La question de l'effet du cautionnement est une question qui doit être décidée par le droit Français exclusivement."

We, early in the argument, asked whether it was contended that there was any difference between the

French law on this subject and the English law ; but it was answered that there was not ; and, indeed, it was pretty certain that there could not be ; therefore the question, what is the meaning of this deed, will be the same whether it is to be decided by French law or by English law.

Now, the majority of the Judges have considered that the effect of this guarantee, though general in its operative terms, is to be limited by the recital which controls, in their opinion, that generality ; and the question is whether that is the right view of the case or not. But with all deference to the majority of the learned Judges below, who decided in favour of the Defendants, and having given the fullest attention to their reasons, which are very ably and briefly put forth, we have come to the conclusion that that is an erroneous view of this deed.

We think that whatever limited motive there might be, the way that limited motive was to be accomplished was by a general engagement. It often happens that an engagement is given more extensive than is absolutely necessary for the limited object for which it was required ; but it does not follow therefrom that the general engagement is necessarily to be cut down.

In this case we think, attending to all the language of the deed, that what is stated in the recital is merely stated as the motive, not as anything which is to control what is afterwards done in the operative part of the instrument, and so that the limited object stated cannot cut down the effect of the guarantee itself.

But going much beyond that, and even supposing it had been said in this deed that the guarantee was to be a guarantee solely for the objects " hereinbefore recited," still we should have felt it very difficult to say that the motive or object stated was not a motive which included the object for which this money was, in fact, advanced. The motive stated was to enable Maurice Cuvillier to carry on trade and commerce at Montreal and elsewhere if he should think fit.

For what purpose, then, was the money from time to time advanced ? It was advanced for the purpose of enabling Maurice to carry on the trade which he was then carrying on in partnership with the two firms

of Cuvillier and Co., and Bull and Co. Probably he did not distinctly understand at his father's death what his commercial relations were. He had been in partnership with his father and brother; the father had died, and the brother was absent, with whom alone, from his father's death, he carried on business until he afterwards took in another partner.

What was there in the deed which was to confine the trading of Maurice, which it was meant to encourage, to the object of carrying on trade as a sole trader? Nothing that their Lordships can discover. The cases in which there is a guarantee with a firm, and that guarantee has been affected or annihilated by the firm afterwards becoming a different firm, have no bearing upon this case. The question here is not whether Maurice carried on trade alone, or with others; but whether he carried on trade and commerce, and if he did carry on trade and commerce, the advances for that purpose, even if that were necessary or material to the action, sufficiently answer the object of the guarantee whether he carried on trade alone or in partnership.

On this short ground, that the whole question turns on the construction of the instrument, and that there is nothing in the recital which controls the effect of the engagement so as to exclude from its operation the advances actually made by the Bank, we think the judgment ought to have been for the Appellants, the Plaintiffs below, and, consequently, that the judgment of the Court of Queen's Bench in Canada must be reversed with costs, and that judgment will be for the Plaintiffs accordingly.

---