

transactions in real estate, or upon an account stated as the result of all their joint dealings; but such new proof should not be allowed except upon payment by the claimant of the costs already incurred in this proceeding, nor except upon a statement in detail of the account of the joint transactions since the last actual settlement between the parties, upon which any balance may be claimed; and in any proceedings for the re-examination of such new proof of debt, if made, the testimony already taken, or any part thereof, may be used by either party.

DUMONT and others v. FRY, Trustee, etc., and others.

(Circuit Court, S. D. New York. November, 1882.)

1. BANKRUPTCY—SURETY GUARANTYING ANY UNPAID BALANCE—APPROPRIATION OF DIVIDEND.

C. & Son hypothecated certain bonds to S. & Sons upon agreement that the bonds to the extent of \$100,000 should be held by the latter as a continuing security for *any overdraft or unpaid balance* that might arise upon the account of the New Orleans National Banking Association with S. & Sons. The New Orleans National Banking Association and S. & Sons having gone into bankruptcy, the claim of S. & Sons against said association, amounting to \$195,315.13, was proved, and a dividend of 55 per cent. thereon paid to their trustee. *Held*, that the whole of this dividend should be applied to discharge the unsecured portion of the claim of S. & Sons against the banking association, and not ratably upon that part secured by the collaterals as well as upon that part unsecured.

2. SAME—GUARANTY OF PART OF DEBT.

Where a surety guaranties a limited part of a debt and not the unpaid balance of a debt, with a limitation as to the amount of the liability in case of insolvency, whatever is paid as a dividend arising from that part of the debt must be applied to discharge that portion; but when the guaranty contemplates the protection of the creditor against *any* ultimate balance that may arise upon the dealings between the debtor and the creditor, this rule does not apply.

*E. A. Hutchins*, for complainants.

*Platt & Bowers* and *Man & Parsons*, for defendants.

WALLACE, C. J. The question now raised upon the settlement of the decree was not suggested at the hearing of the cause or upon the briefs of counsel, doubtless upon the assumption that there would be no controversy in regard to it, the principal contention being disposed of. It was decided that the hypothecation of the collaterals made by Cavaroc & Son to Schuchardt & Sons was upon the agreement that the bonds, to the extent of \$100,000, should be held by the latter as a continuing security for any overdraft or unpaid balance that might arise upon the account of the New Orleans National Banking Associa-

tion with Schuchardt & Sons. The bonds were held by Schuchardt & Sons pursuant to the terms of the hypothecation until the suspension of the banking association, when the latter went into liquidation. As was subsequently ascertained, the unpaid balance of the account due from the banking association to Schuchardt & Sons was the sum (adding interest) of \$195,315.63. The comptroller of the currency, pursuant to the provisions of the laws of congress respecting national banking associations, proceeded to appoint a receiver of the New Orleans National Banking Association, and to wind up its affairs. By section 5236, Rev. St., the comptroller is required to make a ratable dividend of the moneys arising from the assets of such associations upon all claims proved to his satisfaction. Fry, as trustee in bankruptcy of Schuchardt & Sons, proved their debt of \$195,315.63 against the banking association to the satisfaction of the comptroller. The comptroller thereafter declared a dividend of 55 per cent. to the creditors of the banking association, and paid Fry such a dividend upon the claim proved by him. The question now is whether Fry can apply the whole payment thus received, first, to discharge the unsecured portion of the claim of Schuchardt & Sons against the banking association, or whether he must apply it ratably upon that part secured by the collaterals as well as upon the part unsecured.

Obviously this is not the ordinary case when a creditor holding two demands against his debtor, one of which is secured and the other is not, may exercise his right to appropriate a payment in the absence of any application made by the debtor at the time. Nor is it the case where, neither party having made application of a voluntary payment, it devolves upon the court to make the just and equitable appropriation. The payment here was not made by the debtor, and the case, therefore, is not controlled by the rules ordinarily governing the appropriation of payments made to creditors by debtors. The payment here was made by the law—the statutes of congress which vested the comptroller of the currency with authority to distribute the assets of the banking association, and which prescribed the mode of distribution. Neither the debtor nor the creditor could exercise the right to determine the application of the dividends. If the case turned merely upon the law of the appropriation of payment, it would not be a doubtful one. The general rule is that where the payment is not a voluntary one, but is made under legal proceedings, it is to be appropriated to all the demands against the debtor ratably, (*Blackstone v. Hill*, 10 Pick. 129; *Com. Bank v. Cunningham*, 24 Pick. 270;) and it would seem clear that as each dollar of the demand

earned its ratable proportion of the sum realized from the assets of the debtor, the sum earned by one portion of the demand could not be credited to the other, but should be applied ratably upon each dollar of the demand, whether secured or unsecured.

But the question here depends, not upon the law of the appropriation of payments, but upon the effect of the agreement between the sureties and the creditors. If Cavaroc & Son had become sureties for \$100,000 of any advance that Schuchardt & Sons should make to the New Orleans National Banking Association, and the Schuchardts had advanced \$200,000, it would be plain, upon authority, that the dividend earned by the whole advance should be applied ratably. As between the surety and the creditor that would be a case where the latter held two distinct demands, and a dividend arising from one of them could not be applied to the other without diverting it from its proper fund. But here the Cavarocs agreed with the Schuchardts that the latter might advance any sum they might see fit to the New Orleans National Banking Association, and that the Cavarocs' bonds, to the extent of \$100,000, should be security for any unpaid balance of the advances. The law can make no application of the payments received on account of the advances contrary to the agreement between the parties; and, as it was agreed that the Cavarocs should be sureties to the extent of \$100,000 for any unpaid balance arising between the primary parties, the general doctrines of the appropriation of payments cannot be invoked to defeat the agreement. A careful reading of the English authorities supports this conclusion. The result is determined by the character of the undertaking of the surety in each case. *Ex parte Hope*, 3 Montagu, D. & D. 720; *Midland Banking Co. v. Chambers*, 38 Law J. Ch. 478.

As is held in *Ellis v. Emmanuel*, 1 L. R. Exch. Div. 157, "it is a question of construction on which the court is to say whether the intention was to guaranty the whole debt, with a limitation on the liability of the surety, or to guaranty a part of the debt only."

In *Hobson v. Bass*, 6 L. R. Ch. App. 792, the undertaking of the surety was construed as though it read: "I guaranty the payment of all goods supplied, but my liability is not to be increased by their amount exceeding £250."

In *Ex parte Rushforth*, 10 Ves. Jr. 409, the same interpretation, substantially, was placed on the undertaking of the surety.

In *Paley v. Field*, 12 Ves. Jr. 434, the engagement of the surety recited the intention of the parties to be that the bankers should not be indemnified by the surety for any loss which they should sustain

by giving credit to the principal debtor beyond the sum of £1,500. The master of the rolls says: "The instrument marks distinctly that the sum for which the surety was to be answerable was as against him to be considered as the whole amount of the creditor's demand." *Bardwell v. Lydall*, 5 Moore & P. 327, is decided on the authority of *Paley v. Field*, but upon the facts cannot be reconciled with it, the guaranty being to secure a running balance of account.

In *Raikes v. Todd*, 8 Adol. & E. 846, and in *Thornton v. McKewan*, 1 Hem. & M. 525, the guarantee was to hold the plaintiff harmless for advancing a specified sum to the debtor from time to time, as he might require.

In *Gee v. Pack*, 33 Law J. (N. S.) 49, a note was pledged as security to repay an advance of £300 "now or hereafter to be made" on a banking account with a third person. COBURN, C. J., holds that the "document amounts to a promise to be liable for an advance to the extent of £300," and "not a general promise to pay £300 on any balance, however arrived at, or that may remain due on a general advance to the principal."

In all these cases an advance was made in excess of the sum guaranteed, and upon the debtors becoming insolvent the creditor received a dividend on the whole advance, and it was held that the dividend was to be applied ratably on the secured and unsecured portion of the whole demand. They all proceed upon the distinction that the surety had guaranteed a limited part of a debt, and not the unpaid balance of a debt, with a limitation as to the amount of liability,—a distinction which seems subtle, but which rests on the supposed intention of the parties. In a guaranty of a limited part of a debt the parties to it do not contemplate, as between themselves, any augmentation of the debt. Whatever is paid, therefore, as a dividend arising from that part of the debt must be applied to discharge that portion. As between the surety and creditor it is as though no other debt were held by the creditor against the debtor.

To apply the same rule when the guaranty contemplates the protection of the creditor against any ultimate balance that may arise upon the dealings between the debtor and creditor, would be to ignore the intention of the parties to the guaranty.

The conclusion is therefore reached that the bonds of the Caverocs, having been pledged to secure any unpaid balance arising upon the account of the New Orleans National Banking Association to Schuchardt & Sons, it is quite immaterial to the former how, when, or by whom part of that balance has been paid, so long as \$100,000 re-

mains unpaid. If, however, the dividends reduce the balance below the amount of the pledge, the sureties are to have the benefit of the reduction, because upon payment of the debt they would be subrogated to the creditor's lien upon the bonds.

See S. C. 12 FED. REP. 21; 13 FED. REP. 423

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INGALLS v. TICE.

(Circuit Court, S. D. New York. May 2, 1882.)

PATENTS FOR INVENTIONS.

Where the patentee entered into an agreement whereby he granted to complainants the sole right to sell the patented articles within certain specified territory, it does not grant any part of the legal estate in the patent. The right of the patentee, not only to make and use, but to authorize others to make and use, the articles within the specified territory, remains intact.

*F. H. Angier*, for plaintiff.

*Kuntzman & Yeaman*, for defendant.

WALLACE, C. J. The demurrer must be sustained on the ground that the bill does not show the complainants to have such an interest in the patent as is necessary to enable them to maintain suit for an infringement. The allegation of the bill in this behalf is that the patentee, for a valuable consideration, entered into a written agreement with the complainants "whereby the patentee granted unto said complainants the sole and exclusive right to sell said patented articles" within certain specified territory. The written agreement is not set forth. Its legal effect cannot be extended by inference beyond the fair purport of its terms as alleged. It does not purport to transfer to the complainants the right to manufacture the patented articles in the territory described, or the sole right to use the article in that territory. Not being a transfer of an undivided part of a whole patent, or of the exclusive right to the whole patent, for a particular territory, it is simply a license. *Gayler v. Wilder*, 10 How. 477. It is a grant or permission for a limited use of the invention within certain territorial limits. The complainants did not acquire any part of the legal estate in the patent. They could not authorize others to make the patented articles. The right of the patentee, not only to make and use, but to authorize others to make and use, the articles within the specified territory, remains intact. As the patentee is not a party to the suit, the complainants cannot maintain their bill.

Demurrer sustained.

## THE AUSTRIA. (Two Cases.)

(District Court, D. California. January 31, 1882.)

## 1. ADMIRALTY—INJURY AT PIER—INEVITABLE ACCIDENT.

Inevitable accident is where a vessel is pursuing a lawful avocation in a lawful manner, using proper precautions against danger, and an accident occurs. It is enough that the caution exercised should be reasonable under the circumstances; such as is usual in similar cases, and which has been found sufficient, by long experience, to answer the end in view—the safety of life and property. The highest degree of caution that can be used is not required.

## 2. SAME—CASE STATED.

Where a vessel,—made fast to a wharf by a competent band of stevedores by fasts which, through long experience, are deemed by them sufficient,—through the action of the winds and waves, breaks her fastenings and drifts towards a schooner, placing the schooner in such imminent peril that in moving to a place of safety she is capsized and founders, it is a case of inevitable accident.

*M. Andros*, for libelants.

*W. H. L. Barnes*, for claimants.

HOFFMAN, D. J. On the eighth of March, 1881, the ship *Austria* and the scow-schooner *Modoc* were lying at a pier on the north side of a slip in Oakland Long Wharf. The *Modoc* arrived at about 12 or 1 o'clock, and made fast to the wharf astern of the *Austria*—the latter being further up the wharf, towards its head. At about 4 o'clock P. M. the *Modoc* moved further up the slip to a position south and abreast of the *Austria*, with the object of getting under her lee, as the weather had become threatening. She put out several lines to the wharf forward and astern of the *Austria*, and attached one to the latter vessel about amidships. The wind continued, as night came on, to increase in violence, and at about 8 o'clock the *Modoc* was hailed from the *Austria* to let go the line attached to that vessel. Before, however, this could be done, the line was cast off by the *Austria*'s crew. The *Modoc* then hauled off to the south side of the slip to a position to the south of and not far from abreast of the *Austria*.

A short time afterwards the schooner was hailed from the *Austria* to get away, as the latter was drifting. She had in fact parted her forward fasts, and her bow was beginning to swing round towards the south before the northerly gale. There seemed to be imminent danger that the schooner would be crushed between the *Austria* and the wharf. She therefore commenced hauling out between the *Austria*'s stern and the stern of the *Transit*, a large steamer which was attached to the southerly pier of the slip. In so doing her boat was crushed, but whether by contact with the *Austria*, or by the falling