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1919

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Recommended Citation

Durfee, Edgar N. "Termination of a Continuing Guaranty." *Mich. L. Rev.* 17 (1919): 416-8.

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TERMINATION OF A CONTINUING GUARANTY.—Several persons jointly and severally guaranteed to a bank the present and future obligations of a customer, stipulating that “the bank may grant extensions without lessening the liability” of the guarantors, that “this shall be a continuing guaranty, and shall cover all the liabilities which the customer may incur or come under until the undersigned, or the executors or administrators of the undersigned, shall have given the bank notice in writing to make no further advances on the security of this guaranty,” and that “this guaranty shall not be affected by the death of the undersigned.” One of the guarantors died and his executor wrote a letter “revoking the guaranty.” Thereafter, the bank took renewals of the obligations then current and made fresh advances. What are the rights of the bank against the surviving guarantors and the executor of the deceased?

This question was presented to the Supreme Court of Alberta in *Northern Crown Bank v. Woodcrafts Ltd. et al.*, 11 Alberta L. R. 1. It was held that the executor's notice terminated the guaranty as to him, so that he was not liable for the fresh advances afterward made, but that, by reason of the provision authorizing extensions, he was not discharged, in respect of advances already made, by the renewals subsequently taken; and it was held that the notice in no way affected the liability of the surviving guarantors. No authority was cited except upon the last point. The executor and the surviving guarantors appealed to the Privy Council, whose judgment is reported under the name of *Egbert v. National Crown Bank*, [1918] A. C. 903. The judgment of the lower court was affirmed, but the opinion, by Lord Dunedin, squarely places the decision upon the ground that by the terms of the guaranty it was to remain in full force as to all of the guarantors “until there is notice given by each and all of the guarantors, the executors of any deceased co-signatory coming in his place.” No authorities were cited.

So far as concerns the liability of the surviving guarantors, the decision is clearly right. The Privy Council's position, which is simply strict construction of the revocation clause, is unquestionably sound thus far, that this clause does not reserve to each the power to revoke for all. Such reservation might, of course, be made, but it can hardly be construed out of this or any equally general stipulation, the interpretation naturally being confined to giving to each that power which is necessary for his own protection. Neither does the lower court's position, that the executor released himself, lead indirectly and through the general equities of suretyship to the release of the others, for each has, by hypothesis, stipulated for just this sort of discharge of his fellows. The case is clearly distinguishable from that of discharge of a cosurety by act of the creditor. *Beckett v. Addyman*, 9 Q. B. D. 783.

The case of the executor, however, upon which the courts differed so radically, is not equally clear. The Privy Council's construction of the revocation clause, as requiring unanimous action, is extreme. The result is harsh upon a guarantor who wishes to withdraw, but cannot secure the concurrence of all his brethren, and puts it in the power of the principal to collude with one guarantor against the rest. Again, it is objectionable to hold the estate of a deceased surety indefinitely under a contingent liability for future advances. *Coulthart v. Clementson*, 5 Q. B. D. 42; *Gay v. Ward*, 67 Conn. 147. We may assume that these considerations are not of sufficient weight to invalidate a specific provision in a guaranty requiring unanimous action, but, when we have to construe a stipulation as general in its terms as that before the court, we should resolve the doubt against the harsh and impolitic interpretation. It is submitted that the Privy Council's position is erroneous. It should be noted, however, that it cannot be relegated to the limbo of *obiter dicta*, though it goes beyond the case presented on appeal, for it supports the decision on the executor's liability for renewals, and is the only thing in the opinion which does support that decision. It must also be admitted that there is, apparently, no clear authority against it, though some support for the lower court's release of the executor from the fresh advances can be found. *Coulthart v. Clementson*, *supra*; *Beckwith v. Addyman*, *supra*; *Harris v. Fawcett*, 15 Eq. 311, 8 Ch. App. 866; *Ashby v. Day*, 54 L. T. 408; *Slagle v. Forney's Exr.*, 15 Atl. 427.

Assuming that the lower court was right in its construction of the guaranty as reserving to the executor the power to terminate the guaranty as to himself, so that he was not liable for the fresh advances, a nice question remains as to whether he should have been held liable for the prior advances subsequently renewed. This, too, resolves itself into a problem in construction. It would seem that, as a general rule, the revocation of a continuing guaranty, whether by notice or by death, has the effect of destroying its continuing character and converting it into a simple guaranty of the then obligations of the principal. From this it follows that a subsequent renewal of these obligations constitutes an extension of time, with the usual result. *Gay v. Ward*, *supra*; *National Eagle Bank v. Hunt*, 16 R. I. 148. Compare *Williams v. Reynolds*, 11 La. 230; *Wise v. Miller*, 45 Oh. St. 388. In our case, however, extensions were explicitly authorized by the guaranty and, if this authoriza-

tion survived the notice of revocation, the renewals are, of course, binding. We may assume that such an authorization might by explicit stipulation be made perpetual, though this would be open to some objections on the score of policy. Assuming this, the question comes to one of construction of the two clauses, the one authorizing extensions, the other reserving a power of revocation. Does the latter overreach the former, or does it not? The phraseology of this particular instrument is not significant, and there is little or nothing to vary the question as to how, in general, clauses of this type should be construed. One would like to limit the over-technical doctrine of discharge by extension of time, denying its application in any case from which it can be fairly excluded, as it can here by liberal interpretation of the extension clause. And one can argue that, in a continuing guaranty, such an extension clause is mere surplusage if it applies only to extensions preceding revocation. On the other hand, it may be said that the fault with the rule on discharge by extension is simply that it is too rigid, and that the remedy is not to arbitrarily exclude it from any case but to reform it by requiring negligence or bad faith on the part of the creditor and injury to the surety; but that here the stipulations either authorize all extensions or, being revoked, authorize none. It may be argued that, if this extension clause is not revocable by each upon notice, it is not revocable at all, for the revocation clause does not contemplate more than one kind of revocation; but, if the extension clause is irrevocable, this constitutes an unwholesome state of affairs. It is harsh upon the guarantors. It is objectionable in its effect upon the administration of the estates of deceased guarantors. It puts it in the power of the principal and creditor to make the guaranty a permanent foundation of credit over which, at the expense of the sureties, current business might be conducted indefinitely. The authorities upon this problem are as nicely balanced as the arguments. The decision of the Supreme Court of Alberta in our case, sustaining the extension clause, cannot be said to have been reversed by the Privy Council, for the latter simply carried farther the strict construction of the revocation clause. On the other hand, in a case practically identical with ours, though involving implied power of revocation by death and notice, the Supreme Court of Rhode Island held that the extension clause was revoked. *National Eagle Bank v. Hunt, supra.*

Possibly there is intermediate ground between these positions. We might hold that power of revocation by notice was here waived, as to extensions, and that power of revocation could be waived altogether, but that a perpetual continuing guaranty, either for new advances or for extensions, is contrary to public policy and cannot be tolerated, and that in cases where it is necessary, upon a bill filed for that purpose, a continuing guaranty can be wound up and discharged by decree of court. We find no more direct authority for such a proceeding than the familiar suits for exoneration, and, more remotely related, the whole body of equitable interference in the suretyship relation. But is that not enough?

E. N. D.