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unpaid balance of rent. Now, apart from the other peculiar circumstances of the present case, that is exactly what has occurred here. We find that if the amount of remission, which the co-sharers other than the plaintiff had consented to, be treated as payment (and of course it must be taken as a payment in respect of their interest only, the plaintiff not having agreed to it), then the amount which the plaintiff may claim will represent the amount of unpaid balance to which he himself is entitled; and the circumstances besides were very peculiar. The principal defendants had obtained from the other co-sharers a remission of their rent, and this remission being obtained during an interval of time when the present plaintiff had been ousted from possession of his share on the ground that he had been dismissed or expelled from his office of Mohunt, the person who dismissed him joined with the other co-sharers in granting the remission. That being so, there really seem to be circumstances in the case which might have justified the bringing of this suit, even if the coincidence which I have mentioned between the amount paid and the amount of unpaid balance did not exist, and under any circumstances I should have thought the preferable course to take would be to allow the plaintiff to amend his plaint so as to make the suit for the whole amount of rent. Taking this view of the case, we think that the judgment of the District Judge is erroneous, and, in so far as it reverses the judgment of the Munsif, it ought to be set aside, and the judgment of the Munsif restored with costs.

Appeal allowed.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Markby.

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Aug. 2.

NICHOLLS AND OTHERS (PLAINTIFFS) *v.* WILSON (DEFENDANT).

Guarantee—Appropriation of Payments.

In consideration that the plaintiffs would advance a certain sum to a limited company, two of the directors agreed that the plaintiffs should repay themselves the amount "from the first moneys received by them on account of the said company," and each of them agreed to hold himself personally responsible

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for the payment of half the amount of any deficiency of the amount realized by the plaintiffs in the manner above described. At this time the plaintiffs were the bankers of the company, and were regularly paying and receiving money for them. The plaintiffs, instead of applying the first moneys coming to their hands in liquidation of the amount advanced under the guarantee, applied such moneys towards the payment of other debts due to themselves from the company. In an action against the executrix of one of the directors,—*Held*, upholding the decision of the Court below, that the plaintiffs, as between themselves and the guarantors, were bound to appropriate the first receipts to the payment of the guaranteed debt, and that as they had not done this, the guarantee was discharged.

APPEAL from a decision of WHITE, J.

This was a suit to recover the sum of Rs. 6,556-14-8, alleged to be due upon the following guarantee:—

"The undersigned directors of the Corinthian Theatre Company, Limited, hereby agree that, if Messrs. Nicholls & Co. pay the passage-money (from Melbourne to Calcutta, including Railway fares, if any) of the Company engaged by Messrs. Freyberger and Anderson, Messrs. Nicholls & Co. shall repay themselves the amount from the first moneys received by them on account of the said Corinthian Theatre Company, Limited; each of these two directors agrees to hold himself personally responsible for the payment of half of the amount of any deficiency (should there be any) of the amount realised by Messrs. Nicholls & Co. in the manner above described."

CALCUTTA, 14*th July* 1875. (Sd.) ARTHUR SHANKS.
C. H. B. WILSON.

The suit was brought against the widow and executrix of C. H. B. Wilson. The plaintiffs paid the sum of Rs. 13,113-13-4 for the passage-money of the actors, and Mr. Shanks re-paid half of this sum, and the plaintiffs now sued for the balance. The defendant pleaded that the plaintiffs without the knowledge or consent of her testator entered into an arrangement with the Company, whereby moneys which ought to have been applied in reduction of the guaranteed amount, were applied to other purposes, and that, consequently, the testator's estate was discharged from all liability; and this contention was borne out

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by the evidence adduced at the hearing. The learned Judge of the Court below (Mr. Justice White) found that the plaintiffs were bound to repay themselves the amount of their loan out of the first moneys coming to their hands, and that as they had not done this, the guarantors were discharged, and he dismissed the suit.

From this decision the plaintiffs appealed.

Mr. *Branson* and Mr. *Phillips* for the appellants.—The guarantee means that Messrs. Nicholls & Co. were to repay themselves not out of the first moneys that they actually received from the Company, but out of the first moneys that they could appropriate to that purpose. The result of taking the first moneys that came into their hands would have been to prevent the Company from going on at all, and it would have been *ultra vires* on the part of the directors to enter into an agreement alienating any portion of the corporate assets essential to the continued active existence of the corporation: *Brice on Ultra Vires*, 603. The presumption that when a variety of transactions are included in one general account, the items of credit are to be appropriated to the items of debit in order of date in the absence of other appropriation, may be rebutted by circumstances of the case showing that such could not have been the intention of the parties.—*The City Discount Co.* v. *Mclean* (1). The guarantee must be construed with reference to the surrounding circumstances. "First receipts" may mean first gross or first net receipts.

Mr. *J. D. Bell* and Mr. *Stokoe* for the respondents were not called upon.

The judgment was delivered by

GARTH, C. J. (MARKBY, J., concurring).—We think that this is a very clear case; and it would almost have been sufficient to say, that we entirely agree with the learned Judge in the Court below.

(1) L. R., 9 C. P., 692.

The whole question depends upon the meaning of the guarantee upon which the suit is brought.

The plaintiffs' firm had acted since the year 1874 as the agents or bankers of the Corinthian Theatre Company. That Company were importing in August 1875 several actors from Australia, who were to play at the Corinthian Theatre; and the Company had a difficulty about paying the expenses of their passage. Under these circumstances the Company applied to the plaintiffs to advance the passage-money; but the plaintiffs were not content to make the advance upon the responsibility of the Company only, and desired to have the personal security of two of the directors. Upon this, Messrs. Shanks and Wilson entered into the guarantee in question, which is in these words. (His Lordship read the guarantee as set out above.)

It then appears, that in the months of August, September, and October 1875, the plaintiffs did pay sums for the passage of the actors, amounting altogether to Rs. 13,113-13-4. Half of this amount has been since paid by Mr. Shanks; and this suit is brought to recover the other half from the defendant who is the executrix of Mr. Wilson, the other party to the guarantee.

Her defence is, that after these moneys were advanced, the plaintiffs did in fact receive moneys from the Company, far exceeding altogether the amount paid for passage-money; and that they were legally bound by the terms of the guarantee to have reimbursed themselves out of those moneys.

In answer to this, it is contended by the plaintiffs, that although the guarantee says, that Messrs. Nicholls and Co. are to repay themselves from the first moneys received by them on account of the Company, that does not mean "the first moneys that they might actually receive," but "the first moneys available for that purpose." Mr. Branson in his argument went so far as to say, that the plaintiffs had no right to appropriate the moneys which they were receiving day by day towards payment of the debt due for passage-money,—because by doing so the business of the theatre might be stopped; and that if it were doubtful whether the business would be ultimately successful, the plaintiffs might go on to the end of the season, appropriating the Company's moneys to other debts and

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objects, and only repay themselves this particular debt in case there were a balance in the Company's favor at the end of the season available for that purpose.

But we think, having regard to the terms of the guarantee, and the circumstances under which it was given, that this argument is wholly untenable.

We must construe the guarantee, as we should any other instrument, according to its natural and ordinary sense and meaning; and we have no right, as against the defendant, to distort or amplify the language in order to put an unnatural construction upon it, to suit the views of the plaintiffs or of the Company.

At the time when the guarantee was given, the plaintiffs had been acting for some time as the bankers or agents of the Company, advancing money to them from time to time, and paying and receiving money for them almost daily, and keeping a regular cash account with them, which was regularly entered in the plaintiffs' ledger. The guarantors knew this perfectly well. They knew that the Company had not then sufficient assets to pay the passage-money; and they said in effect to the plaintiffs by this guarantee: "If you will advance the necessary money for the Company, and will repay yourselves the amount out of the first moneys of theirs, which may come to your hands, we will guarantee you against any loss, if you should not receive enough to cover your advances."

Under these circumstances we think it clear, that the words "the first moneys" can have but one meaning; and that the plaintiffs were bound to appropriate the first moneys of the Company which they received towards payment of this particular debt. Instead of this, it appears that they have applied these moneys towards payment of other debts due to themselves. Thus for example, we will take the first items on the credit side of the cash account on and after the 3rd of August, on which day the plaintiffs made the first payment for passage-money, *viz.*, Rs. 4,800. On that day the plaintiffs received from the Company Rs. 450 for calls on shares, and on the 6th and 11th of August Rs. 750 and Rs. 250, also for calls, in all Rs. 1,450. Instead of appropriating this sum towards payment of the Rs. 4,800, passage-

money, they applied it, as appears from the account, in part payment of a balance of Rs. 2,452-7-9, which was then due to themselves for prior advances to the Company. And this is what they seek to do now. They are attempting to appropriate the moneys which they have since received from the Company to the payment of other sums which they have paid on the Company's account, and to postpone the payment of this particular debt for passage-money to the payment of those other debts.

We consider that they have no right to do this. As against the guarantors they were bound to appropriate the first receipts to the payment of this debt, and if they omitted to do so, it was at their own risk. As they have in fact received sufficient to pay the amount of the passage-money, the guarantee is discharged.

Another point was then made by Mr. Branson, that the cash account was not an ordinary debtor and creditor account kept by the plaintiffs as bankers or agents, but as treasurers of the Company.

But this really makes no difference. Whether the plaintiffs were treasurers or not, this was an account kept by them with the Company, in which receipts and payments were regularly entered, and which was posted, like the other accounts of the plaintiffs' customers, in their ledger. No other account was kept by the plaintiffs with the Company but this; and as the guarantee clearly had reference to some account which was being kept between the plaintiffs and the Company, it is plain that this was the account which both parties had in view when the guarantee was given. It cannot be pretended that whatever the account may have been called, the plaintiffs had not a right to retain any sums received by them on that account against debts due to them from the Company.

Mr. Branson called our attention to the case of *The City Discount Co.* v. *Mclean* (1), but this case has really no application to the present. It only decides, that the well known rule laid down in *Clayton's case*, that payments credited on one side of an account should in the absence of any specific

(1) L. R., 9 C. P., 602.

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appropriation go to discharge in order of date the earlier items on the debit side, is not an arbitrary and inflexible rule, but that it may be modified or departed from, under special circumstances.

In this case the guarantee itself expressly provides the proper mode of appropriation, and the plaintiffs are of course bound by the terms of it.

We consider the case to be perfectly clear; and we dismiss the appeal with costs on scale No. 2.

Appeal dismissed.

Attorneys for the appellants: *Orr* and *Harriss.*

Attorneys for the respondents: *Trotman* and *Watkins.*

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Tottenham.

1878
Dec. 21.

TILUCK CHAND (DEFENDANT) *v.* SOUDAMINI DASI (PLAINTIFF).*

Wrongful Possession—Sums paid during Wrongful Possession, Right to recover.

Where a person has wrongfully taken possession of an estate and held it adversely to the true owner, and has, during his possession, paid certain sums for Government revenue on the supposition that he was the lawful owner (being however, in reality, nothing more than a trespasser and wrong-doer), he is not entitled to recover, as against the true owner, any sums so paid even though such payments may have enured to the benefit of the true owner, but must be content to bear the burden of his own wrong.

THE facts of this case are sufficiently set out in the following judgment of the High Court.

Baboo *Taruck Nath Sen* for the appellant.

Baboo *Rash Behari Ghose* for the respondent.

* Regular Appeal, No. 264 of 1877, against the decree of C. D. Field, Esq., Judge of Zilla East Burdwan, dated the 4th of June 1877.