

FISHER,
C.J.
&
STUART,
P.J.
1923

[FISHER, C.J. AND STUART, P.J.]

A. G. PATIKI AND Co.

v.

THE BANK OF ATHENS.

June 7

INDEMNITY GUARANTEE—LOST CHEQUES—INDEMNITY TO THE SATISFACTION OF
THE COURT. C.C.J.O., 1882, CLAUSE 38—COSTS.

This is an action by Plaintiffs claiming (1) that the Defendant Bank be ordered to give to Plaintiffs duplicates of eight cheques for a sum of £1,300, or that the defendant Bank be ordered to pay to Plaintiffs the sum of £1,300, the Plaintiffs standing ready in either case to give indemnity to the satisfaction of the Court or Judge, against the claims of any other person upon these cheques, (2) that the defendant Bank be ordered to pay to the Plaintiffs legal interest from the date when the Defendant's London office credited the defendant Bank with the value of the cheques above referred to, (3) costs of action.

The facts are as follows:—

Plaintiffs obtained eight cheques from defendant Bank on various dates for payment in Greece to the plaintiffs' firm there. Plaintiffs state they did not endorse the cheques and that they posted them in the usual way. The cheques went astray. Plaintiffs ask the Bank to issue new cheques, offering to give, if required, security to the Bank according to Law. Defendant Bank agreed to issue the cheques only upon an undertaking by plaintiffs that they would have no claim against the Bank for paying the original cheques on forged endorsements or for any other negligence. Plaintiffs assert these terms are too harsh and hence this action.

The District Court gave judgment in the following terms:—

It has not been proved to our satisfaction that the cheques in question have been lost. The only evidence on this point adduced before us is that Mr. Patiki who stated that he himself put these cheques into envelopes addressed to their office at Trikala, which he handed to one of his messengers, whose name he cannot remember and he cannot state whether the letter was actually posted or not: but states he has had no receipt from the Trikala office.

In the circumstances we cannot assume that the cheques are not in circulation and accordingly we cannot say that the Bank has been freed from its liability to pay on these cheques in the ordinary course of business. The Bank has expressed its willingness to issue duplicate cheques under certain conditions which are embodied in a letter dated 19th July, 1922, from the Alexandria branch of the Bank to the Limassol branch.

We find that these conditions are harsh, inasmuch as they impose upon plaintiffs, whole and complete responsibility, free from legal redress, even in case of improper payment of these cheques, by the Bank, which is not equitable. We consider the equitable form of security to be a mortgage, or other satisfactory security, to cover the value of the cheques, in case the original cheques are presented within six years from the date of their issue, and paid by the Bank in the ordinary course of business and in good faith. As to the claim for interest we do not find that the parties arrived at any definite agreement and we therefore decline to make any order as to this, but we hope the manager will see his way to adjust this matter.

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We therefore give judgment for the plaintiffs as against the defendant Bank for the issue of duplicate cheques of the same tenor as the originals, on the plaintiffs giving security by mortgage or otherwise to the satisfaction of the defendant Bank, to cover the amount of the cheques, and to be executed only in the event of the originals being presented to and paid by the defendant Bank in good faith and in the ordinary course of business; or in default of the issue of such duplicates, that the defendant Bank do pay to the plaintiffs the sum of £1,300 on the same conditions of indemnification as above mentioned.

As no unconditional tender of indemnity was made before suit by the plaintiff, we think in following the judgment given in *King v. Zimmerman* (1871) L.R. 6, C.P. 466, by Willes J., we must order the plaintiffs to bear the costs of this action.

From this judgment Defendant Bank appealed.

For Appellant Bank *Russell, King's Advocate.*

For Respondents *Lanitis.*

Judgment: Varying the judgment of the District Court:

THE CHIEF JUSTICE: Subject to two small points I think the judgment of the District Court was right. The plaintiffs obtained from the defendant Bank certain cheques drawn by the Bank on their London branch and payable on demand to the order of the plaintiffs. These cheques owing to reasons for which the Bank are not responsible have gone astray. As to their whereabouts there is no information but in the absence of any evidence of their destruction, they cannot be presumed to be no longer in existence, and the right of action upon them is not barred until six years from the date on which they were drawn. Under these circumstances the plaintiffs ask the Bank to issue new cheques and offered on the writ "indemnity to the satisfaction of the Court or

FISHER, “ Judge,” and at the issue “ security by way of mortgage on immoveable
C.J. “ property situated in Cyprus in a sum sufficient to cover the value
& “ of the cheques.” The plaintiffs on the writ invited the Court to
STUART, “ settle the terms of the indemnity they were to give, and had the Court
P.J. approved a mortgage and embodied the particulars of it in the judgment
A. G. PATIKI I do not think we should have been entitled to interfere with it at all.
& Co. But in so far as the Court has put the approval on the defendant Bank,
v. I think they have delegated their duty and in that respect I think the
THE BANK judgment must be amended, and for that purpose must be remitted to
OF ATHENS the District Court for evidence to be heard as to the proposed security,
 and for the decision of the Court as to the adequacy of the security to
 be embodied in the judgment. There is another matter in which the
 judgment must be amended, namely, the ordering of the plaintiffs to
 pay all the costs. This is in conflict with clause 38 of the Cyprus Courts
 of Justice Order, 1882. I think the judgment should be remitted for
 the purpose mentioned and that the costs from and after the hearing
 of the issue should be paid by the plaintiffs together with the costs of
 this appeal.

PUISNE JUDGE: I concur.