1942
April 17

THE POLICE
v.
PERICLES
PAPA
IOANNOU.

At Common Law it was necessary that the forger should intend not merely to deceive, but also to defraud. But Statute law has specified many kinds of instruments which it makes it criminal to forge even for the purpose of merely deceiving, without any intention of defrauding. In most forgeries, however, an intention to defraud is necessary; hence in England, the necessity to allege in general terms an intention to defraud or deceive, as the case may be. In Cyprus, however, forgery is defined by section 319 of the Cyprus Criminal Code as "the making of a false document with intent to defraud". Hence the word "forgery" in Cyprus law bears a different meaning to forgery in English Law, as in our law the word itself implies that the act must be done with intent to defraud or it is not forgery.

For this reason the insertion in a charge of forgery of the words "*with intent to defraud*" would be unnecessary and redundant.

The conclusion at which we have arrived is, that the learned President, District Court, took a wrong view of the law in not calling upon the accused on Charges 1, 2, 5 and 6. We therefore remit the case to the District Court.

Appeal allowed.

[CREAN, C.J. AND GRIFFITH WILLIAMS, J.]

1942
July 31.

THE OTTOMAN BANK OF LIMASSOL, *Appellant*,

v.

BERNHARD LOUIS CARSON, *Respondent.*

(*Civil Appeal No.* 3723.)

Guarantee—Action against surety where principal debtor protected by the Agricultural Debtors Relief Law, 1940*—Right to sue for full amount of the debt.*

The appellant bank sued the respondent as guarantor of an overdraft given to a customer, by which guarantee the respondent undertook to pay the amount owing on the current account being closed at any time, without the necessity of the bank first instituting legal proceedings against the principal debtor. Before this action was commenced the principal debtor filed an application with the Debt Settlement Board in accordance with the provisions of the Agricultural Debtors Relief Law, 1940, for settlement of his debts. The appellants then filed their claim with the Debt Settlement Board. The respondent based his defence to the action, *inter alia*, on the ground that an application having been made to the Debt Settlement Board by the principal debtor the Court was debarred by section 30 of the Agricultural Debtors Relief Law from entertaining this claim; and also that the appellants by filing a claim against the principal debtor with the Debt Settlement Board had elected to have their claim decided by the Board and could not also sue for it in Court.

Held: Where a surety has guaranteed to pay a debt without proceedings being taken in the first instance against the principal debtor, section 70 (2) (c) of the Agricultural Debtors Relief Law, 1940, will not deprive the creditor of his right to sue the surety for the whole of the debt. Nor will the fact that the creditor has filed a notice of his claim against the principal debtor with the Debt Settlement Board affect this right. Section 30 of the Agricultural Debtors Relief Law, 1940, does not oust the jurisdiction of the Court to adjudicate between creditor and surety where proceedings have not in the first instance to be taken against the debtor.

Appeal from a judgment of the District Court of Limassol.

J. Clerides for appellants.

M. Houry for respondent.

The Court took time for consideration.

1942
July 31

THE OTTOMAN BANK OF LIMASSOL v. BERNHARD LOUIS CARSON.

CREAN, C.J. : This appeal is from the District Court of Limassol in an action instituted by Ottoman Bank of Limassol against Bernhard Louis Carson.

The action arose out of a contract in writing whereby the defendant guaranteed the overdraft of one Jacob Szek up to a sum of £750 with interest thereon as set out in the letter of the Bank of the 3rd of March, 1939. The whole agreement is set out in this letter and it is signed by the defendant Bernhard Carson and Zygfryd Karp Vel Holsten who, in consideration of an overdraft of £750 with interest being granted to Jacob Szek, jointly and severally guaranteed to pay that sum without the necessity on the part of the Bank of proceeding first against the principal debtor, the above-named Jacob Szek.

The principal debtor Jacob Szek failed to pay the interest on the overdraft granted to him by the Bank, and so the Bank wrote to him on the 13th January, 1941, for the full payment of the amount due on foot of it, namely, £777. 8*s*. 4*p*. On the 16th of the same month Jacob Szek acknowledged their letter and admitted that the sum of £777. 8*s*. 4*p*. was the correct amount due by him to them.

The defendant Bernhard Louis Carson was written to on the 13th of January, 1941, asking him as guarantor of the principal debtor Jacob Szek to pay the above amount. But to this letter of the Bank there does not appear to have been any reply, and so on the 2nd of July, 1941, this action was instituted by the Bank on foot of the above guarantee.

From what Mr. Houry counsel for the respondent says, the defendant, his client Bernhard Louis Carson, comes from Scotland and Zygfryd Karp Vel Holsten, his co-guarantor of this debt, comes all the way from Poland. It does not appear that any action has been taken against Zygfryd so far, and that may be due to the fact that he does not reside within the jurisdiction of the Cyprus Courts.

The above guarantee was given to the Bank in consideration of their opening a current account with Jacob Szek and guaranteed any debit balance due by him for a period of 5 years and not exceeding the specific sum of £750 plus any sums for interest, commission or charges thereon.

In his defence filed on the 17th September, 1941, Bernhard Louis Carson, the respondent herein, sets out several grounds. But it seems to me that he defended the case mainly on the ground that prior to the action being instituted the principal debtor had filed an application with the Debt Settlement Board for the adjustment of his debts and as the debt of the appellants was included therein the action could not proceed, as section 30 of Law 12 of 1940 establishing the above Board enacts that no Court of Law shall entertain any action against a debtor in respect of any debt included in an application under section 9 or in a statement under section 15 (1) by a creditor. As an alternative defence Bernhard Louis Carson says that if he is liable to the Bank with Jacob Szek, the principal debtor, then his liability should be co-extensive with that of the principal debtor Jacob Szek, as so determined by the Board. And this ground of defence is brought forward by virtue of section 10, ss. 2 (*c*) of the above Law 12 of 1940.

The learned trial judge in his judgment seems to have directed his mind almost exclusively to the above-mentioned section 10, ss. 2 (*c*). On this point Mr. Clerides argued before him, that even

if that section could deprive the appellants of their common law right to sue for the debt due on this guarantee something must happen before he can be so deprived. It is submitted by him that the liability of the principal debtor must be determined before the section comes into operation, and as there has been no such determination the section cannot be a bar to the filing of the present action.

The view of the trial judge on this submission is set out in his judgment; and although I have to admit that the reasoning therein is not very clear to me, it is obvious that the argument of Mr. Clerides had no effect as the appellant's action was dismissed on the ground that it was premature.

This point, although dealt with at some length by the learned trial judge, does not appear to me to be the one of outstanding importance in the case. It does, however, appear from the wording of the section an indispensable condition to its operation that the liability of the applicant or principal debtor must be determined before the liability of the surety can be considered and as there was no evidence that the liability of the applicant had been determined then it would seem that the respondent, the surety herein, is not in a position to take any refuge within that section.

I do not know of any law which could prevent the Bank from suing the guarantor on the contract signed by him in this case. In this contract the surety, the respondent herein, guarantees the overdraft of the principal debtor up to £750 with interest and he agrees to pay the amount due on foot of it without the necessity of the Bank first proceeding against the principal debtor. And if the Bank had brought their action without having lodged a claim against the principal debtor with the Debt Settlement Board, I think it is clear they would have been entitled to judgment without any question.

The filing of this claim with the Debt Settlement Board, however, appears to me to complicate the position; for, at the first glance one would naturally ask if the Bank can bring an action against the surety for the amount of the debt he has guaranteed, and at the same time file a claim for the same debt with the Debt Settlement Board against the principal debtor who has filed an application with, and sought the assistance of the Debt Settlement Board in the adjustment of his debts.

The Debt Settlement Board was no doubt established to give relief to agricultural debtors who could not pay their debts in full, and in this, it is somewhat analogous to a bankruptcy matter. It can extend the time for payment of the debts and it can reduce the amounts of the debts which is the equivalent of paying a composition of so much in the pound. If a creditor files his claim in bankruptcy for a debt which is guaranteed it usually indicates that he has elected to give up his rights against the guarantor.

But counsel for the appellants argues that he was forced to file this claim with the Debt Settlement Board; for if he had not his debt according to section 15 of the above law was not recoverable. And lest there might be a possibility of prejudicing the guarantor—the respondent herein—by not filing a statement with the Board and for fear of the wording of this section the Bank lodged a statement that the amount of £777. 8*s*. 4*p*. was due by the debtor.

1942
July 31

THE OTTOMAN BANK OF LIMASSOL v. BERNHARD LOUIS CARSON

On this particular point in the case it is also argued for the appellants that as the respondent, the surety, was not a creditor it was the duty of the appellants to notify the Debt Settlement Board that this debt was due in order not to prejudice the future position of the surety. The surety was not a creditor of the debtor and therefore, he would get no notice to file a claim. But the Bank was, and as such got notice of the application of the debtor, and having got that notice it must be said they were bound to do what was in their power to safeguard the interest of the surety; as they intended to look to him solely for the payment of the debt due on the guarantee. It was evidently contemplated by the Bank that subrogation would take place, that is, the legal operation by which a third person who pays a creditor succeeds to his rights against the debtor as if he were his assignee. And if that were the purpose of the Bank, which I think it must have been, and if their communication to the Board was in effect a notification of the existence of the debt and not a claim for it out of the estate of the debtor then in my opinion what the Bank did in regard to it was only equitable and fair to the surety, and does not debar them from suing on the guarantee signed by the respondent Bernhard Louis Carson.

Another point raised by the appellant in the argument of this case, and it seems to me to be one of substance is, that there must be express words in a statute to that effect, before the right of a party to bring an action at common law on a contract can be taken away. And as there are no express or specific words in Law 12 of 1940 positively depriving a party of that right it is submitted by counsel for the Bank that it cannot be assumed from the general tenor of a statute that such a deprivation has taken place.

This argument seems to me to be one of weight, and it is apparently supported by the case of Walsh against the Secretary of India, 11 English Reports, House of Lords, page 1076: particularly where Lord Wesbury says, "And it follows of necessity that, consistently with every rule by which these Acts of Parliament ought to be interpreted, especially the rule that they should be so interpreted as in no respect to interfere with or prejudice a clear private right or title, unless that private right or title is taken away per directum the right of action under the covenant remains unaffected".

The above case is an authority for holding that the Bank cannot be deprived of their right to sue; as there are no specific words in subsection 3 of Law 12 of 1940 to that effect. Consequently on this authority and for the other reasons I have given I think this appeal ought to be allowed with costs.

GRIFFITH WILLIAMS, J.: This is an appeal by the Ottoman Bank of Limassol against a judgment of the District Court of Limassol dismissing their claim against the respondent Bernhard Louis Carson.

The facts shortly were as follows:— On 3rd March, 1939, at the request of one Jacob Szek, hereafter called the principal debtor, the appellant bank agreed to allow him to overdraw his account for the sum of £750 on the terms and conditions of his letter to the appellant bank of that day. At the same time the respondent in consideration of the appellants allowing this overdraft guaranteed jointly and severally (together with one Zygfryd Karp Vel Holsten who signed on 21st March, 1939) the principal debtor, and gave an undertaking in the following words: "Notwithstanding that the

limit of the said account is at any time or times exceeded to pay to you (the appellants) at once on your closing the account either before or on the expiration of the agreed period and without the necessity of your (the appellants) proceeding first against the principal debtor any debit balance of the said current account not exceeding £750 plus any sum to be due by way of interest and/or commission and/or charges thereon whether such interest, commission or charges are as originally agreed or are modified without any knowledge or consent but by simple notice in writing to the principal debtor ".

By the terms of para. 3 (c) of the said letter by the principal debtor to the appellants the principal debtor agreed that the appellants could at any moment by notice in writing posted to him at his address call on him to pay the debit balance due within 10 days, and that thereupon he would be bound to pay such balance at once.

The appellants opened a current account for the principal debtor in conformity with his letter, and on the 13th January, 1941, he was indebted to the appellants on this account in the sum of £777. 8*s*. 4*p*. plus interest from 31st December, 1940. On the 13th January, 1941, the appellants wrote to the principal debtor calling on him to repay the amount of his said overdraft and at the same time sent a copy of their letter to the respondent. On 16th January, 1941, the principal debtor wrote to the appellants acknowledging that the amount of his overdraft was £777. 8*s*. 4*p*.

Before this action was started the principal debtor submitted an application to the Debt Settlement Board and in it he set out his liability of £777. 8*s*. 4*p*. to the appellants. The Debt Settlement Board sent a notice in due course to the appellants calling on them to submit a statement of their debt; and this the appellants did.

On the 2nd July, 1941, the appellants started this action against the respondent as guarantor for payment of the sum of £777. 8*s*. 4*p*. due to them by the principal debtor.

The learned President, District Court, who tried the case decided that as the application of the principal debtor to the Debt Settlement Board was still pending it was impossible to tell the amount at which the debt would be assessed, and that under section 10 (*c*) of the Agricultural Debtors Relief Law (12 of 1940) the surety would not be liable to pay more than the amount assessed against the principal debtor, and that therefore the action against the respondent herein was premature.

In the absence of the provisions of the Agricultural Debtors Relief Law it is apparent that the respondent would have no answer to the claim herein of the appellants; indeed his whole defence is based upon section 10 (*c*) of this Law. The section is as follows:—

> " Provided that (*c*) where the applicant is a principal debtor and any such other person as aforesaid is a surety for such debt and the liability of the applicant in regard to the debt has been determined by such order, the liability of such surety shall be co-extensive with the liability of the applicant as so determined, or as so determined and as subsequently settled in consequence of any amicable settlement or compulsory settlement or reduction thereof approved or made by the Board in virtue of the provisions of section 21 or 23, as the case may be ".

1942
July 31

THE OTTOMAN BANK OF LIMASSOL v. BERNHARD LOUIS CARSON.

Any legislation which purports to divest a man of his legal rights, must be construed very strictly. In this case the appellants had a perfect legal right to bring their action and recover against the respondent the sum claimed, consequently unless this section I have quoted takes away their right either expressly or by necessary implication that right still subsists. But this section refers only to orders already made, debts that have already been determined, that is to say, it refers only to time subsequent to the making by the Debt Settlement Board of its award. There is nothing in it to take away the legal rights of a creditor against a surety to a debt even if the principal debtor has filed his application with the Debt Settlement Board.

It has been argued that as the appellants have filed with the Debt Settlement Board a statement of debt against the principal debtor they have thereby submitted themselves in advance to have their claim, including that against the guarantor, decided by the Board. It seems to me, however, that the mere fact of filing a statement of debt against the principal debtor could not in any way affect their legal position. The filing of a statement of debt is not an attempt to enforce a legal claim, since the Debt Settlement Board is not a Court of Law and does not enforce legal rights in fact it exists to deprive people of their legal rights. The statement was filed because the appellants were called upon by the Board to file one. Had the appellants failed to do so their debt might have been cancelled under section 15 (2) of the Agricultural Debtors Relief Law.

If the appellants were to secure judgment against the respondent, the guarantor, he would be subrogated into the position of the creditor appellants, and would be qualified to file a statement of debt. This statement has already been filed by appellants, so the guarantor merely would have to prove that he had paid the debt to be treated by the Board as the principal debtor's creditor for the amount paid. The appellants therefore had reason to contend that the filing by them of the statement of debt was in fact a protection for the respondent; since otherwise the liability of the principal debtor for payment thereof might have been annulled by the Board. Whether or not this is the case, it does not seem to me to alter in the least the legal right of the appellants to proceed against the respondent for payment.

There was no question of the appellants having to elect to have their rights determined by one of two distinct tribunals, the Court, or the Debt Settlement Board. Their rights against the guarantor were totally unaffected by the provisions of the Agricultural Debtors Relief Law, 1940, and I think their appeal should be allowed with costs.