[TYSER, C.J. AND BERTRAM, J.]

TYSER, C.J. & BERTRAM J. 1909 June 22

ANTONIOS IOANNIDES, AS ADMINISTRATOR OF THE ESTATE OF DEMETRI HAJI CHRISTODOULOU, POLYBIOS, IANNAKOS, AND KATINA, MINOR CHILDREN OF EIRENE DEMETRI, REPRESENTED BY N. CABABE, *Plaintiffs*,

v.

LOIZOS PETRIDES AND PANAGIOTES PERDIOU, *Defendants*.

SURETYSHIP—FORMS OF SURETYSHIP—MEJELLE, ART. 647—CONTRIBUTION—INFANTS' ESTATES ADMINISTRATION LAW, 1894—IRREGULARITIES.

The forms of suretyship recognised by the Mejellé considered.

Where several sureties guaranteed the same debt, the guarantees may be either separate or joint and several.

The question is in each case a question of fact to be decided according to the intention of the parties.

PER BERTRAM, J.: *Where two guarantors enter into a contract of suretyship by signing the same document, the presumption is that each intended to be responsible for a proportionate part of the whole debt, unless it appears that they intended to guarantee the debt either separately, or jointly and severally.*

The principle of contribution between sureties according to the Mejellé considered and explained.

Two sureties successively signed a document in which they guaranteed the payment of a debt. The signatures were affixed to the document at different times and in different places.

HELD: *That each guaranteed half of the whole sum.*

A person who has entered into an obligation with reference to moneys forming part of an infant's estate is not entitled to repudiate his obligation because the transaction has not been carried out in accordance with the Infants' Estates Administration Law, 1894.

This was an appeal from the District Court of Nicosia.

The action was brought upon a bond for £100, signed by one Miltiades Kyprianides, as principal, and Loizos Petrides and Efthyvolos Constantinides as guarantors. The Defendant Perdios had however been substituted for Efthyvolos under circumstances explained below. The principal debtor made default and the fulfilment of his obligation was claimed from the Defendants as his guarantors in equal shares. The Defendants however maintained that the Defendant Perdiou was introduced as a guarantor not by way of substitution, but by way of addition; that Efthyvolos was not discharged, and that consequently they themselves were each liable for only one-third of the debt. This amount they paid and the action was brought for the difference between this one-third and the one-half claimed.

The facts more fully stated were as follows: The transaction was in fact an investment of money belonging to the estate of certain infants.

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The guardian appointed under the Infants' Estate Law, was the Plaintiff, Antonios Ioannides. The bond was not however made out in his favour, but in favour of the Registrar of the Court, Mr. Cababe, who seems himself to have conducted the transaction throughout. The bond was in the following form:

"£100

"On the expiration of one year from to-day I, the undersigned "Miltiades Kyprianides of Nicosia, am bound to pay to the order of "Polybios, Iannakos, and Katina the orphan children of Eirene "Demitriou of Nicosia, represented by Mr. Naoum Cababe, as "Registrar of the District Court of Nicosia, the above amount, one "hundred pounds sterling (£100), as the equivalent for cash received.

"And I am further bound to the payment of interest at the rate of "9 per cent. from to-day until satisfaction, and in the event of litigation "generally to all costs.

"Nicosia, April 5th, 1902. M. KYPRIANIDES,
N. CABABE.

"Sureties for the payment of the above sum until satisfaction,
LOIZOS PETRIDES,
EFTHYVOLOS CONSTANTINIDES."

It appeared from the evidence that the bond having been executed by Kyprianides, was first signed as guarantor by Petrides, and subsequently, (it did not appear at what precise interval), taken to Efthyvolos Constantinides, and was there signed by him.

The evidence was as follows: "This bond was made at Chry- "saphines's office. Then it was taken to Loizos's shop and he signed "it, and then to Efthyvolos's shop and he signed it."

On May 12th, 1905, Mr. Cababe, having reason to be dissatisfied as to one of the sureties, Efthyvolos Constantinides, arranged with him and with the principal debtor for the substitution of the Defendant Perdiou. Perdiou thereupon signed his name under those of Loizos Petrides and Efthyvolos Constantinides. A note was made on the bond by Mr. Cababe that Perdiou was substituted as guarantee instead of Efthyvolos, and this note was marked as approved by the President of the District Court. No notice of this arrangement was given to the other guarantor, the Defendant Loizos Petrides.

The District Court, consisting of Holmes, P.D.C., and Mitzes, J., made the following findings:

1. That Miltiades Kyprianides signed the bond as principal and Loizos Petrides and Efthyvolos Constantinides as guarantors.

" It appears from the writing that each of the above signed with a " different kind of ink, and the principal debtor confirms this by " saying that they signed at different times and places."

2. That Perdiou was substituted for Efthyvolos.
3. That the guarantors having signed the bond at different times each guarantor was liable for the whole.

Upon these findings Holmes, P.D.C., held that Loizos Petrides not having assented to the release of Efthyvolos and being entitled to contribution against him, was discharged from any liability on the bond. Mitzes, J., held that Loizos Petrides not being in any way prejudiced by the substitution, was not discharged.

The conclusion of the Court that the guarantors having signed the bond at different times were each liable for the whole seems to have been based in some measure upon a translation of Art. 647 of the Mejellé referred to in the judgment of the Chief Justice. The conclusion of Holmes, P.D.C., that under such circumstances each surety is entitled to contribution against the other was apparently based upon an *obiter dictum* of Hutchinson, C.J., in *Taliadoros v. Heirs of Lampe* (1901) 5 C.L.R., 65. His conclusion that under the circumstances Loizos Petrides was discharged was based upon a reference to the case *Ward v. National Bank of New Zealand* (1883) 8 A.C., 755. Subsequently to judgment however he found that the reference in question had given him an erroneous impression of the true effect of the case, and he appended a note to this effect.

In the view taken of the case taken by the Supreme Court, it was not necessary to consider the questions of contribution, and the effect of the omission to notify Loizos Petrides.

The District Court being equally divided judgment was entered for the Defendants.

The Plaintiffs appealed.

Chrysaphines for the Appellants. On the findings of fact of the Court we were entitled to judgment.

Theodotou for Loizos Petrides. The whole transaction is irregular and no action can be brought upon the bond. It was in fact an investment of part of an Infants' Estate. The only person entitled to invest these moneys was not Mr. Cababe, but the guardian (Infants' Estates Administration Law, 1894, Sec. 39). Mr. Cababe having taken upon himself the responsibility of dealing with these moneys, it was not competent to the President of the Court to sanction the substitution. Further, inasmuch as the guardian was no party to the bond, on what ground is he a party to the action.

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Neoptolemos Paschales for the Defendant Perdiou.

The Court allowed the appeal.

Judgment: THE CHIEF JUSTICE: This is a case in which there seems to have been a good deal of irregularity, and I am not certain whether the administration of the infants' estate in this case was conducted in altogether the right way. This however is not for us to consider. The question is, what is the effect of what was done.

The case mainly turns on the facts and the question is what inference we are to draw from the evidence.

The facts are these: Mr. Cababe, as Registrar of the District Court invests certain moneys belonging to an orphans' estate on personal security, that is to say, on a bond. He was not however satisfied with the security of one person only and required two sureties. On getting these he advanced the money.

This is the first step. Now the question is, at this stage what was the liability of the sureties, for some time elapsed before the next stage was reached.

For the determination of this question we are referred to Article 647 of the Mejellé. It is possible that the translation of that Article, for which I am partly responsible may be a little misleading. There are three cases considered. The first is where persons have become sureties "*bashqa bashqa*" (بشقه بشقه)—separately, that means I take it, ordinarily speaking, by separate contracts. In that case each is liable for the whole debt. The second case is where the sureties contract "*m'an*" (معاً)—jointly, together at the same time. In that case each is liable for his share. The third case is where each surety is liable for his own share and at the same time guarantees the share of the others *yekdigere kefil* (يكدیگره کفیل)

There is no express mention made in the Mejellé of the question of contribution, and the only way in which I can see that it arises (under the Mejellé) is this—that if one guarantor is a surety for the other, then on discharging the liability of that other he is entitled to recover from him the amount paid, on the principle that a guarantor is entitled to be indemnified by his principal.

Now in this case the conclusion I have come to is that the two guarantors entered into a contract "*m'an*"—that is to say, on the terms that each was liable for a half share.

Some years after this Mr. Evthyvolos wanted to get released, and for whatever reason Mr. Cababe wanted to release him. He was in fact a person they wanted to get rid of. An interview took place, and the Court found that it was agreed that the Defendant Perdiou should be substituted for Mr. Evthyvolos.

This is the finding of the Court and it is entirely consistent with common sense. It would be strange that they should be content to make him liable for one-third of the bond instead of one-half.

If then the parties intended to carry out this substitution was there anything to prevent their doing so.

Mr. Theodotou argues that the method of carrying out the investment being irregular, the whole transaction was bad, and that the Court had no power under the Infants' Estates Law to sanction the substitution of one party for another in such a transaction.

This however is not the true principle. If a person assumes the management of an infants' estate, and acts irregularly, this may make him personally liable. But can another person who enters into a contract with him in that capacity and has received all the benefit of the contract afterwards turn round and say "because you did what was wrong, I am not bound by my contract." The contention only requires to be stated for one to see that it is unarguable.

As to the right of the parties to sue in this case, the infants and Mr. Cababe sued as the payees in the bond, Mr. Cababe describing himself in the same way as he is there described. Mr. Ioannides was added as a Plaintiff apparently to show that as guardian of the infants he endorsed the action which had been taken with reference to their estate. At any rate no extra costs have been caused by his addition as Plaintiff, so no real question arises on this point.

The appeal must therefore be allowed with costs here and below.

BERTRAM, J.; The first point, what we have to decide in this case is a question of fact. Under which of the three heads of suretyship does the transaction come? Was the suretyship

(1) "Several,"—"bashqa bashqa" (بشقه بشقه)—*ἰδιαιτέρως*"; or

(2) "Proportionate"—m'an (معا)—"*ἀπὸ κοινοῦ*"; or

(3) "Joint and several"—"*yekdigere kefil*" (يكديكره كفيل) "*ἀλληλεγγύως*"?

It seems to me clear that this case comes within the second.

The District Court seems to think that it is conclusive that the document was not signed at the same moment, or in the same room. This is however not the test. The test must be the intention of the parties. *Prima facie*, it seems to me, if two guarantors sign the same document, unless there is some indication that they sign either *ἰδιαιτέρως* or *ἀλληλεγγύως*, they must be presumed to sign *ἀπὸ κοινοῦ*.

I therefore hold that Loizos was, and remained responsible for half the debt.

The next question is also a question of fact. When Perdiou was introduced was he introduced by way of substitution, or by way of addition? If Perdiou came in by way of addition, he came in in one of two ways—either (*a*) he came in under an arrangement—by which he assumed one-third of the whole debt and Mr. Cababe released the other two proportionately. This is perhaps possible in law, but it is extremely unlikely from the point of view of Mr. Cababe. It would not protect the orphans. The ground of Mr. Cababe's action, partially at any rate, was that, rightly or wrongly, he suspected the solvency of one of the guarantors. Why then should he leave this person responsible for one-third of the whole debt? Or, in the alternative (*b*), Perdiou came in as a guarantor of the whole debt. This is highly unlikely from the point of view of Perdiou.

It is a question of fact. The Court below has found that he came in by way of substitution for Efthyvolos, and I think that their finding was justified not only by the evidence but also by the inherent probabilities of the case.

The result is that Perdiou and Loizos, having only paid one-third each, and being each liable for one-half, must now each pay an additional one-sixth.

Mr. Theodotou seems to think that because the proceedings in this matter were irregular they are altogether a nullity. This is however a misapprehension. If the transaction was not carried through in accordance with the law, the parties concerned may lose the protection which the law gives them and may involve themselves in certain responsibilities. But the transaction itself is a perfectly valid one. It is a transaction of a very ordinary description, and the rights and liabilities of the parties arising out of it must be determined by the ordinary law independently of the statute.

I agree that the appeal must be allowed with costs.

Appeal allowed.