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

IN RE HECTOR ELEUTHERIADES, DECEASED, A BANKRUPT.

EX PARTE B. S. PETRIDES.

CONTRACT—NOVATION—DISCHARGE OF GUARANTOR THROUGH CREDITOR AND PRINCIPAL DEBTOR ENTERING INTO FRESH AGREEMENT—MEJELLE, ARTS. 655, 662.

If the parties to an agreement enter into a fresh agreement in substitution thereof a guarantor of the original agreement, unless the substitution takes place with his consent, is discharged.

SEMBLE: *He is not discharged if the effect of the new agreement is merely to enlarge the time for the payment of a sum due under the agreement.*

SEMBLE: *If a person guarantees an order for a certain article, and subsequently the purchaser and the vendor agree that in place of the article ordered another article of the same type but of superior quality and greater cost shall be substituted, the guarantor in the event of default cannot be held responsible for the price of the substituted article* pro tanto.

A merchant ordered from the applicant certain machinery and the order was guaranteed by the bankrupt. Subsequently, without the consent of the guarantor, the applicant and the merchant arranged for the substitution of certain other machinery of the same type but of greater horse power and enhanced cost. Afterwards the merchant having made default in the payment of part of the amount due on the dates fixed, an account was stated with reference to this and another order and without the guarantor being consulted an arrangement was made for liquidating the balance with interest by instalments.

HELD: *That the intention of the parties being that the new agreement should be substituted for the old, the guarantor was discharged.*

This was an appeal from an order of the District Court of Nicosia, granting an application made in the bankruptcy.

The facts upon which the application was based were as follows:

On 17th September, 1908, one Michael Andoniou ordered certain machinery from the applicant, and the deceased bankrupt guaranteed the amount due in respect of the order. Among the items originally ordered was an oil engine, of 7½ horse power (price £90), with an extra wheel, (price £8). Subsequently, by arrangement between the applicant and Michael Antoniou this item was varied, and a similar engine of 10 horse power was substituted at a price of £100, with an extra wheel at a price of £10. The bankrupt was not consulted as to this variation.

The total amount of the order was £169 18*s.* 0*cp.* and the terms of payment were; 10 per cent. on order, 10 per cent. on arrival, and the remainder in monthly instalments of £5 with 7 per cent. interest on amounts in arrear. The machinery was duly delivered, but the terms of payment not being fully complied with, on June 24th, 1909,

a fresh arrangement was made. The amount due in respect of this order, both for principal and interest, was consolidated with the balance due in respect of another order, and, interest having been calculated on this total for a period of three years, the amount of this interest was added thereto, and it was agreed that the whole sum was to be paid in instalments, spread over the period of three years. On default being made in the payment of one instalment, the whole was to become due.

The deceased bankrupt was not consulted as to this arrangement being at this time on his deathbed.

Michael Antoniou having made default in complying with this new arrangement, and the estate of the deceased Hector Eleutheriades having been declared insolvent the applicant claimed to prove against the estate upon his guarantee.

The Syndics disallowed the claim, and the Juge Commissaire accordingly referred the application to the Court.

The District Court allowed the claim.

The Syndics appealed.

Paschales Constantinides for the Appellants. The arrangement of June 24th, 1909, constituted a novation, and the guarantor under the old agreement, (even if not already discharged by the variation as to the oil engine) was thereby released.

Stavrinides for the Respondent. There was no novation. The obligation guaranteed remains. Only the manner of its discharge has been varied.

The Court allowed the appeal.

Judgment: THE CHIEF JUSTICE: The first point in the case is this. The applicant agreed to sell amongst other things an engine of 7½ horse power for the price of £98, and the bankrupt guaranteed the payment of the purchase price. Afterwards without consulting the guarantor, the applicant and the purchaser arranged to substitue an engine of 10 horse power at the price of £110. It is argued that the bankrupt was responsible for the purchase price of this new machine, which he never guaranteed, to the extent of the price of the old machine which he did originally guarantee.

It seems to me that to state that proposition is to answer it.

But it is not necessary to decide the case on this point, for a subsequent transaction took place which affects the whole guarantee.

On June 24th a new agreement was made, which differs very largely from the old agreement. Considering the terms of that new agreement, it seems to me that if Mr. Petrides had sued the purchaser for the instalment due in May, 1909, the purchaser could have replied: "It is true that I was originally bound to pay this amount, but we "have made a new contract which releases me from my original "obligation."

In other words the principal debtor was released from his liability under the old contract and could no longer be sued upon it.

It follows therefore that the guarantor was released also, and the appeal must therefore be allowed with costs.

BERTRAM, J.: The only question in this case is whether there was or was not a novation.

There are two points which I mention only to put aside.

An order was given and guaranteed. Subsequently the purchaser varied the order. In place of the machine whose price the guarantor had guaranteed, he ordered a different machine of the same type but of a more expensive price. What was the effect of this variation upon the liability of the guarantor? It is a question whether the guarantor would remain liable at all. But we need not decide this point. Let us assume that he remained liable for the order up to the limit of his original guarantee.

The second point is this. Supposing that after the guarantee the merchant makes a fresh agreement with the purchaser, in which he gives him time,—simply gives him increased facilities, by enlarging the time within which payment is to be made. In such a case it may well be that there is no novation. (See *Planial, Droit Civil*, Vol. 1, par. 541.) As is well said by M. Planial, the obligation remains; it is only the execution of it that is affected. There is no extinction of the old obligation, or constitution of a new one. Such is the law of France, and it seems that in Ottoman law also a surety is not released by the giving of time to his principal.

But this case is not that case. In this case the parties made up their accounts; the amount paid on account, and the amount paid on account of principal and the amount due in respect of interest are ascertained. Then the balance is added to the balance of another account. Then a calculation is made as to the interest due upon this total in three years and this amount (which includes interest upon interest) is added to the combined total. This new total is to be paid in instalments, and if default is made in the payment of one instalment, the whole (including the interest not yet due), is to become payable at once.

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I cannot help feeling that this is an entirely different contract, that it was intended to release the principal debtor and did so release him, and that it placed him under a new obligation which might be more onerous than the original one. The amount due was changed, as well as the time of payment.

I conclude therefore that there was a novation and that the guarantor was released, and I agree therefore that the appeal must be allowed with costs.

Appeal allowed.

TYSER, C.J. & BERTRAM J. 1910 *Feb.* 14

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

AYSHE ALI AGHA AND OTHERS, *Plaintiffs,*

v.

SALIH ALI AGHA AND OTHERS, *Defendants.*

CIVIL PROCEDURE—EXECUTION—WRIT OF PARTITION—OBSTRUCTION OF OFFIC OF COURT—CYPRUS COURTS OF JUSTICE ORDER 1882, ARTS. 39, 212—CIVIL PROCEDURE LAW, 1885, SEC. 92.

An official of the Land Registry Office executing a writ of partition is for the time being an officer of the Court, and any person obstructing him is liable to be punished summarily.

This was an application arising out of a judgment of the Supreme Court.

The judgment had ordered that a certain house should be partitioned, and 7/24 registered in the name of one Plaintiff and 3/24 in the name of another.

Upon this judgment being given, the Plaintiffs applied to the Land Registry Office for a division of the house and the registration of their shares in their names. An official proceeded to the village to inspect the house, but though he produced the order of the Supreme Court, the Defendant on three successive occasions refused to admit him, and locked the door against him.

The Plaintiffs now applied to the Court under Art. 39 of the Order in Council for an endorsement on its order in the terms of the sub-clause (i).

Myriantheus for the Applicants.

The Respondents in person.

Judgment: This application is made under Art. 39 of the Order in Council, asking us to endorse upon our judgment a memorandum that unless the Defendants obeyed the order within the time appointed, they will be liable to be arrested and have their property sequestered.