

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Black v. the Ottoman Bank, from Her Majesty's Consular Court at Constantinople; delivered 16th July, 1862.*

Present:

- LORD KINGSDOWN.
- JUDGE OF THE ADMIRALTY COURT.
- SIR EDWARD RYAN.

THIS case comes before us upon appeal from a decision of the Judge of a Tribunal recently constituted in Constantinople called the "Supreme Consular Court."

In the year 1857 a person named Pisani was employed by the Plaintiffs to act for them in receiving moneys from the Ottoman Government upon engagements called "Serghis," or Government Bonds. It was his duty to receive, and to account for, and to pay over to the Plaintiffs the moneys which he might receive.

On the 17th June, 1856, he signed an agreement for the due discharge of those duties, and undertook to give an approved guarantee for the due fulfilment of his engagement, and as security for the safe custody of any securities or funds entrusted to him.

A gentleman of the name of Ede became security for him, but was discharged in the month of April 1857, and thereupon the present Appellant executed a bond, dated the 9th April, 1857, by which he bound himself in the sum of 5,000*l.* as surety for Pisani, and guaranteed that Pisani should honestly discharge the several obligations explained in the agreement to which we have referred, a copy of which is annexed to the bond.

The bond expresses that it is intended only to

guarantee and secure the Company from all acts of dishonesty in the transaction of business entrusted to him, or of malversation or misappropriation of the moneys or valuable securities given or coming into his possession in the service confided and undertaken respectively. And, further, that this bond shall not have reference to or incur any obligation in regard to operations already undertaken under a former bond of security, but shall only begin from the date hereof. It shall be revocable at any period on giving six months' notice; but, notwithstanding such notice, the bond is to remain in force till Pisani shall have rendered a just account of his charge, and full payment and satisfaction shall have been made to the Company by Pisani of all moneys, bills, notes, bonds, books, securities, and effects, which he shall, previously to the expiration of such notice, have been entrusted with, or received, or obtained for or on account of, or by the permission of, the Company.

Pisani, having misappropriated funds of the Company, and being indebted to them in a large amount, they sued the Appellant upon his bond.

Their plaint alleged that, subsequently to the date of the bond, and while it remained in force, certain "Serghis" were entrusted by the Bank to Pisani, which he undertook to encash, and to pay the proceeds to them, and which operations were not undertaken by Pisani under any former bond of security. It then alleged that he had received on account of the Company, and dishonestly misappropriated large sums of money and securities, by which the bond became forfeited.

The Defendant, after a formal plea denying the bond, pleaded that, after the date of the bond, no "Serghis," or Government securities, were entrusted to Pisani by the Plaintiffs.

He filed two other issuable pleas, and a fifth to which the Plaintiffs demurred.

The demurrer on argument was overruled and the parties went to trial on the other pleas, and the Judge ordered judgment to be entered for the Plaintiff for the sum of 5,000*l*.

From these judgments the present appeal was brought to Her Majesty.

We will dispose first of the judgment on the demurrer.

The fifth plea is in these words:—

“And further, I say that the officers of the said bank were guilty of negligence, and want of due care in checking and properly examining the accounts of the said Pisani, and in requiring payment, from time to time, of the moneys received on its behalf; and that, by and owing to such negligence and want of care as aforesaid, the default alleged in the petition arose, whereby I was released and discharged from the penalty of the bond in the petitioner’s instrument.”

The reply of the Plaintiff, which is styled “demurrer,” was in these terms:—

“The said fifth plea shows no defence to the action, inasmuch as the condition of the bond upon which this action is brought, in no way limits its operation to such acts of dishonesty committed by Pisani, as might have been prevented by the exercise of the amount of care and diligence in the said plea referred to.”

The first point to be considered is, what is the matter which this demurrer admits. It clearly admits that the Plaintiffs did not exercise as much vigilance as they might have done in checking and examining the accounts of Pisani, and in requiring payment from time to time of his balances, and that the loss was owing to such omission.

But it was contended by the Appellants that the admission goes further, and is an admission not only that the Plaintiffs did not check and examine the accounts and receive payment, but that it was their duty towards the Defendant to make such examination, and require such payment, and that it is, therefore, an admission that the loss arose from a breach of duty on the part of the Plaintiffs towards the surety.

It was said that negligence is admitted, and there was no negligence if there was no duty. Their Lordships would not be disposed to apply to this case any technical rules of special pleading. The Order in Council of Her Majesty establishing this Court directs that the rules of procedure shall be so framed as to secure, as far as may be, that cases shall be decided on their merits, according to substantial justice, without excessive regard to technicalities of pleading. They think the question ought to be decided on what appears to be the real meaning of

the parties, and they think that the point really intended to be asserted on the one side, and admitted on the other, was only this, that if reasonable care had been used by the Plaintiffs in the particulars referred to, no loss would have occurred.

This appears to have been the understanding of the Defendant himself.

In his petition of appeal, he insists not that the Plaintiff has admitted that it was his duty to check and examine the accounts and require payment, but that the law would imply such obligation from the terms of the bond and the nature of the transaction, and the point now insisted on is not raised in the Appellant's reasons of appeal.

The terms of the Plaintiff's demurrer, as it is called, show that he does not admit the supposed duty, for he insists that no such duty is imposed by the bond.

The question, therefore, is, whether this obligation is to be implied by law, it clearly not being expressed in the bond.

The principles applicable to the case seem to be quite established by the authorities referred to in the argument: the *Trent Navigation v. Harley* (10 East 64); *Mc Taggart v. Watson* (3 Cl. and Fin.); *Dawson v. Lawes* (1 Kayes 280); to which may be added the authority of Lord Eldon in the cases of *Samuel v. Howarth* (3 Mer. 278), and *Eyre v. Everett* (2 Russ. 381); and of Lord Cottenham in *Creighton v. Ranham* (7 Cl. and Fin. 346).

From these cases it is clear that, upon the point now in dispute, the rule at law and in equity is the same,—that the mere passive inactivity of the person to whom the guarantee is given, his neglect to call the principal debtor to account in reasonable time, and to enforce payment against him, does not discharge the security; that there must be some positive act done by him to the prejudice of the surety, or such degree of negligence as, in the language of Vice-Chancellor Wood in *Dawson v. Lawes*, to imply connivance, and amount to fraud.

The surety guarantees the honesty of the person employed, and is not entitled to be relieved from his obligation because the employer fails to use all the means in his power to guard against the consequences of dishonesty.

The cases referred to upon bills of exchange turn

upon a different principle, viz., that, by mercantile usage, a contract is implied by the holder to give notice of dishonour, within a certain time, to the drawer or indorser who stands in the situation of surety for the acceptor.

The objection taken to the judgment on the trial is this: that the Judge has held the Defendant liable under the bond not only for moneys received by Pisani upon "Serghis" delivered to him after its execution, but for moneys received upon "Serghis" delivered to him before that time, and permitted to remain afterwards in his possession. It was said that the Defendant expressly stipulated that he would not be liable in regard to obligations already undertaken under a former security; and that the "Serghis" in question were delivered while a former bond was in force, which was cancelled when the present bond was executed. It was further said that the Plaintiff, in his plaint or declaration confined his claim to moneys received in respect of "Serghis" entrusted to Pisani subsequently to the date of this bond, and that this must mean "Serghis" delivered to him after the date of the bond.

But their Lordships cannot adopt this construction. The "Serghis" left in his hands after the date of the bond were just as much entrusted to him after that date as if they had been delivered after that date; the moneys which he received upon them after that time were moneys for which he became responsible after the obligations of the former bond had ceased; and by the concluding passage in the bond the surety is to be liable for all moneys which he shall have received on account of the Company previous to the expiration of three months after notice to revoke the bond.

Upon both points, therefore, their Lordships agree with the judgment of the Court below; and they can see no ground either for reducing the amount of damages or granting a new trial. They think the mode in which the case has been dealt with by the learned Judge is extremely creditable to him. They must humbly advise Her Majesty to affirm the judgment complained of, with costs to be paid by the Appellant.