Privy Council Appeal No. 80 *of* 1928.

Dorothy Valentine Burnard - - - - - - - *Appellant*

v.

William Douglas Lysnar - - - - - - - *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH JUNE, 1929.

Present at the Hearing:
THE LORD CHANCELLOR.
LORD SHAW.
LORD CARSON.
LORD BLANESBURGH.
LORD TOMLIN.

[*Delivered by* LORD BLANESBURGH.]

The action out of which this appeal arises was in 1927 commenced in the Supreme Court of New Zealand by the appellant as plaintiff against the respondent and his brother, George Henry Lysnar, as defendants. Its purpose was to enforce so far as then unperformed the obligations of the defendants under a deed of security and joint and several covenant dated the 21st December, 1923, and made by them in favour of one Charles John Dunlop Bennett, to whose rights thereunder the appellant had succeeded by a deed of transfer duly registered on the 7th August, 1924. The defendant George Henry Lysnar at the trial submitted at last to judgment, and he has disappeared from the subsequent proceedings. The respondent's main defence was that he was no more than a surety for his co-defendant in respect of their joint and several covenants contained in the deed, and that he had been discharged from all liability thereunder by reason of a certain arrangement for giving time alleged to have been come to between the appellant and the principal debtor

without the respondent's "approval or consent," a somewhat ambiguous phrase.

The Courts of the Dominion, perhaps accepting the allegation at its face value, assumed, as it would appear, without any definite inquiry into the circumstances, that the arrangement alluded to was one for which George Henry Lysnar was solely responsible, and they did not concern themselves to ascertain how far, in fact, the respondent was cognisant of and had become bound by its terms. In consequence they occupied themselves chiefly with the question—in their eyes the most important—whether notice of the position of the respondent as a surety only could properly at the date of the arrangement be imputed to the appellant. And in the result these Courts were in difference as to the proper answer. The learned Trial Judge held that such notice could not be so imputed and decreed the action against the respondent. The Court of Appeal, on the other hand, being of opinion that the appellant must at the critical date be fixed with notice of the respondent's position as between his brother and himself, adjudged the respondent to be discharged by the arrangement referred to from all further liability under the deed, and by an order of the 18th October, 1927, dismissed him from the action with costs. Hence the present appeal.

In the course of the arguments before the Board, not only this question on which the Dominion Courts were divided, but many others of interest in connection with the law of suretyship, were fully canvassed. A review of the whole case has served, however, to make it clear to the Board that such questions may not survive for determination by them if an affirmative answer is, on investigation, given to the fundamental inquiry not so far judicially pronounced upon, viz., whether the respondent must not be held to be as completely committed to and bound by the arrangement referred to as was his co-defendant who concluded it. In the review of the facts to which their Lordships now proceed they will not stop until they have examined those upon which the answer to this preliminary and, it may be, decisive inquiry must depend.

The debt secured by the deed of the 21st December, 1923, originated in a promissory note for £5,215 1*s.* 10*d.*, dated the 24th May, 1922, made by George Henry Lysnar, and endorsed by the respondent, in favour of a firm of Bennett & Sherratt. The note was for the price of goods supplied to George Henry Lysnar. On the subsequent dissolution of the firm of Bennett & Sherratt the above-named Charles John Dunlop Bennett became its holder in due course. Default was made, and on the 26th October, 1923, Mr. Bennett, having failed to obtain payment, commenced an action against both of the Lysnars for the amount of the note.

No defence was put in by the defendants, and the plaintiff being thus in a position to enter judgment for the amount claimed, intimated to each defendant by identical letters of his solicitors,

Messrs. Burnard & Bull, that, failing payment by the morning of the following 20th December, 1923, judgment would be entered and proceeded upon without delay.

These letters brought both defendants to the solicitors' office on the date named. There they had an interview with Mr. Burnard, in the course of which the respondent explained that it was then inconvenient to find cash for the amount due, and he offered to furnish security from his own property if time for payment were given and judgment in the action not taken. This was agreed to by Mr. Burnard on Mr. Bennett's behalf subject to the execution by the respondent and his brother of a deed embodying the terms then foreshadowed. Instructions to prepare such a deed were given by Mr. Burnard to his partner, Mr. Bull, and the actual deed of the 21st December, in which the final terms are embodied, shows on its face the alterations before execution made in the draft as so prepared.

The deed executed is expressed to be made between the two brothers, as grantors, of the one part, and Mr. Bennett, as grantee, of the other part. It recites that the respondent is the owner of the chattels scheduled to the deed: that "the grantors are jointly and severally indebted to the grantee in the sum of £5,280," and witnesses that in consideration of that sum now owing by the grantors to the grantee "(as they do and each of them doth hereby admit)," the respondent assigns to the grantee the scheduled chattels by way of mortgage only for the purpose of securing its repayment with interest in the manner thereinafter provided, and the grantors jointly and severally covenant *inter alia* for repayment on or before the 20th December, 1926, of the £5,280 in manner following:—

(*a*) £1,000 on or before 20th January, 1924.
(*b*) £1,000 on or before 20th January, 1925.
(*c*) £1,000 on or before 20th January, 1926.
(*d*) The balance on or before 20th January, 1927.

The principal moneys outstanding are also expressed to carry quarterly payments of interest at the rate of 10 per cent. per annum, reducible on punctual payment to 8 per cent.

It is not questioned—it has, indeed, been admitted by the respondent—that the deed on its face contains no indication or suggestion that his position thereunder is that of a surety only. On the contrary, his part in the transaction is to all appearance that of protagonist. His name is first in the order of liability. It is his separate property which is made security for a debt recited as being one for which each obligant is at the moment of execution jointly and severally liable. And the significance of all this is the more marked when it is remembered that the liabilities of the respondent to the grantee were not by the deed being assumed for the first time. Indeed, to their Lordships it seems clear that the liability which was then being dealt with was treated as the equivalent of the liability on the part of the

grantors which would have been constituted by the mere formality of entering judgment against them in the pending action. In other words, their former obligations in respect of the note were treated as having ripened into a joint and several debt of agreed amount immediately exigible. If that debt was not at once to be enforced, then, in respect of it, new obligations had to be entered into and security for its repayment provided. All of which was the purpose of the deed.

To meet these obstacles to the success of his main defence the respondent at the trial was concerned to prove that as between himself and his brother he had been and that, in respect of the new covenants, he remained, no more than a surety, and, further, that notice of that fact was expressly given by him to Mr. Burnard prior to the execution of the deed. Upon much of this, as it turned out, there was no real contest. It was not seriously disputed that the respondent's original liability under the promissory note transaction had been that of a surety only, while his statement that, by later arrangement with his brother, it so continued under the deed was not seriously challenged. Further, it may be inferred from the evidence of Mr. Bennett that the position of the respondent as surety under the promissory note ought to have been known to him and also, although this was disputed, to Mr. Burnard as his solicitor. Finally, the appellant accepted the position that any notice or knowledge imputable to her husband was equally imputable to herself.

But here real conflict began. No attempt was made by question or otherwise to establish that Mr. Bennett, on receiving the deed of 1923, had any reason to suppose that as between the grantors the obligations thereby undertaken were other than they thereby appeared, and the evidence of the respondent, which sought to establish that he had brought home to Mr. Burnard by express statement the fact that he remained a surety only in the transaction was not accepted by the learned Trial Judge. The respondent's recollection, given in evidence, was that in the draft of the deed shown him there appeared a recital that he was a principal debtor, that he insisted on the deletion of that statement, and that after heated words Mr. Burnard agreed to such deletion. But both Mr. Burnard and his partner, Mr. Bull, denied that any draft with any such statement in it ever existed. The only draft was that which became the deed, and alterations made in it before execution showed on examination that it had never contained any such statement as the respondent had deposed to. And Mr. Burnard went further. Not only was no such statement made to him as the respondent had asserted, but had he himself supposed the respondent to be a surety he would have had to take his client's instructions before he accepted any security which did not, like a banker's mortgage, relieve the creditor from all consequential embarrassments. And the learned Trial Judge accepted Mr. Burnard's evidence on this matter, and his findings have not since been questioned. And it was not

suggested to him, nor has it with any effect been suggested since, that notice of the respondent's position of suretyship under the deed was at any relevant subsequent date given or imputable to Mr. Burnard, or, through him or otherwise, to the appellant his wife. The question, therefore, whether notice of the respondent's suretyship in respect of the covenants in the deed may properly be imputed to Mr. Burnard at the date of the arrangement, in a moment to be referred to, must now, in the face of his accepted statement that he did not suspect it, be made to depend entirely upon the fact that he knew, or must be taken to have known, that the relation of surety and principal existed between the respondent and his brother in relation to the liability under the promissory note, and that, notwithstanding the obligation into which that liability had ripened, and notwithstanding the readiness of the respondent to execute a security which appeared to negative the continued existence of the relationship, Mr. Burnard was bound to presume that suretyship persisted until by inquiry he ascertained that it had ceased.

Their Lordships have thought it right to review in detail the facts with reference to which this question of imputed notice must in this case be decided. They have done so because, as they see these facts, the resulting proposition of law is very different from that discussed by the Court of Appeal when that Court decided this issue in the respondent's favour.

But having said so much, their Lordships pass on. They will return to this question if, having examined the later history, they find that any decision of theirs upon it is called for.

That subsequent history is simplified if the fact be borne in mind that, beyond his liability under the deed to Mr. Bennett, Mr. George Henry Lysnar had mortgaged certain of his properties to Messrs. Burnard & Bull to secure a separate indebtedness of his own. With that indebtedness the respondent was in no way concerned, but it is from time to time referred to in, and had considerable influence upon, the correspondence to which attention will presently be directed.

As to the first instalment of £1,000 payable under the deed, no question arises. It was duly satisfied as arranged. No interest, however, was paid in 1924, and on December 22nd of that year the respondent and George Henry Lysnar were notified by Mr. Burnard in identical letters that £1,000 principal was due on the 20th January, 1925, and that, in addition to the overdue interest, payment of that amount would be required on that day. To this demand upon each of them no response was made either by the respondent or George Henry Lysnar.

On January 21st, 1925, a further letter was addressed by Mr. Burnard to George Henry Lysnar, and a copy of it sent by him at the same time to the respondent. In that letter Mr. Burnard complained that his letter of the 22nd December had been ignored: interest amounting to £428 had accrued: matters could not be

allowed to stand over any longer in that unsatisfactory state, and the security was now overdue: provided, however, that £400 was paid by George Henry Lysnar in respect of his personal mortgage to the writer's firm, and the sum of £428 interest and £600 principal upon the security from the respondent and himself paid, the writer would be prepared to treat that security as current and allow a further three months for payment of the balance of overdue principal, £400. The letter concluded as follows :—

> "You will understand that if this proposal is not strictly complied with I shall be obliged to take steps to enforce the security."

It is not suggested that either obligant had any answer to the demand made by the letter of the 22nd December, and the last passage in the letter of January 21st must have shown the respondent, when he read it, that in the absence of some arrangement for postponement the security furnished by himself was at serious risk. In other words, the demand made upon him was direct, and the consequences of neglect serious.

In the similar situation of December, 1923, the demand then made brought, as has been seen, both the respondent and his brother to Mr. Burnard's office, with the result already stated. On this occasion the demands brought George Henry Lysnar alone, and he had several interviews with Mr. Burnard. The arrangement of which so much has been heard in these proceedings was reached at the last of these interviews on the 27th March, 1925. Throughout them all, their Lordships cannot doubt, George Henry Lysnar was present, not only on his own account, but with full knowledge of the respondent, and intent on making, on behalf of both, as he purported to do, the best arrangement possible for postponing payment of what was due.

The arrangement for postponement reached between Mr. Burnard and George Henry Lysnar on the 27th March is correctly embodied, as is agreed, in the memorandum of its terms prepared by Mr. Burnard and sent by him on the same day to George Henry Lysnar in order, as he says, that the signatures of the respondent and himself might be attached thereto, and the document be then exchanged for one in like terms signed by himself.

By the first clause of the memorandum the interest then accrued is agreed at £581. Clauses 2 and 3 are as follows :—

> "2. The Messrs. Lysnar are to pay £120 on account of such accrued interest, leaving the sum of £461 to be paid on 1st December next.
>
> "3. The Messrs. Lysnar desire the principal sum of £1,000, which fell due on 20th January last, to remain on until 1st December next. It is agreed that the Messrs. Lysnar shall pay £80 by way of premium and shall pay the said sum of £1,000 on 1st December next, together with the above sum of £461, being the sum of £1,461 in all."

By the final clause it is provided that all further payments of interest and all other obligations under the security are to be duly performed and observed.

The memorandum was accompanied by the following letter addressed to George Henry Lysnar :—

"W. D. AND G. H. LYSNAR TO L. T. BURNARD.

"We enclose herewith statement of agreement regarding this security, the understanding being that, provided your order for £600 on Messrs. Common, Shelton & Co. is duly met, and the sums of £400 owing to Messrs. Burnard & Bull under Memorandum of Mortgage, and of £80 and £120 mentioned in attached memorandum [paid], then the agreement contained in such memorandum shall take effect."

It is not necessary to look beyond this memorandum and its accompanying letter to see that the only agreement there recorded was one with both obligants and that it originated in the expressed desire for postponement, not by one, but by each of them. That such was its nature has never been denied by George Henry Lysnar, who negotiated it, and, as it seems to the Board, it was, in these circumstances, only natural that the record of the agreement as adjusted should be sent to George alone.

It is, however, unfortunate that the precaution of sending copies to the respondent was not taken, for the omission has in these proceedings been magnified by him into a circumstance of decisive importance.

Yet truly it was in the result of no consequence whatever. The respondent has never alleged that because no such duplicates were sent to him he remained in ignorance either of the terms of the documents or of what had happened. Indeed, before the Board he stated that he was willing that his case should be determined on the footing that everything that had passed between Mr. Burnard and George Henry Lysnar was at once communicated to him. And this conclusion their Lordships would themselves have reached, even if the respondent had not expressed his willingness that they should assume it. They have seen the respondent and have had the opportunity of appreciating his intelligence, and they cannot doubt that he speedily informed himself, through his brother, of the terms upon which alone Mr. Burnard's demand for immediate payment and his threat to enforce the security had been withdrawn. Any doubt their Lordships might otherwise have entertained on this subject is dispelled by the respondent's reception of Mr. Burnard's succeeding letters to himself. These letters, as the respondent agreed when the question was put to him, are written by one who is assuming, as a matter of course, both the knowledge of the agreement and the adhesion of the respondent to it. And from the respondent there is neither protest against nor disclaimer of that position.

The letters are so striking that their Lordships think it right to refer to them specifically. They feel a satisfaction that their conclusions on this part of the case do not have exclusively to depend on concessions made in the course of argument by a respondent in person.

The first letter is as early as the 1st April, 1925—written, that is to say, before the agreement of March 27th had ceased to

be conditional. Messrs. Common, Shelton & Co. had refused to pay over the £600. The letter goes on :—

> " This is completely contrary to Mr. George Lysnar's statement to the writer that the matter had been definitely arranged with Mr. Smallbone, and will make it impossible for the matter to be completed on the lines arranged.
>
> " Under these circumstances, we have to notify you that, failing the matter being carried out as previously arranged by 10 a.m. on Friday next, 3rd inst., we will be obliged to take immediate steps to enforce the security."

This letter the respondent received in silence. Later George Henry Lysnar paid the £600 in two instalments, and on June 25th, 1925, after payment of the second of these, Mr. Burnard sent to the respondent a memorandum of the moneys due to date. " You will recollect," the letter says, " that under the arrangement made on the 27th March last the arrears of principal and interest due to that date were allowed to stand over until December 1st next, the sum of £1,461 to be paid on that date."

To this letter again the respondent made no response. There is no correction, protest, nor disclaimer. There is merely the continued enjoyment by himself of the benefits secured by the agreement referred to.

In December the moneys promised were not paid, and on March 26th, 1926, Mr. Burnard again wrote the respondent. After saying that Mr. George Lysnar had made a definite promise towards the end of November that the matter would be settled by the middle of December, he continues : " Unless payment is made by 10 o'clock on Thursday next, the 1st April, I shall have to proceed to enforce the security."

Again no reply from the respondent. But on April 14th, 1926, a sum of £1,750 on account was paid to Mr. Burnard, being part of a larger sum of £2,500 then, although unknown to Mr. Burnard, raised for the purpose by George Henry Lysnar on the guarantee of the respondent. And on the same 14th April, 1926, there was sent to the respondent a statement of account showing £3,465 2*s*. 0*d*. still covered by the deed, after credit given for the £1,750. Again no response or disclaimer of any kind from him.

And so matters on this subject remained until, this action having been commenced in consequence of further defaults, the respondent in his statement of defence for the first time alleged that the agreement of the 27th of March, 1925, having been made without his approval or consent, he as a mere surety was thereby discharged from all liability under the deed sued on.

Their Lordships on the above review of the facts can have no doubt that this allegation of the respondent's has not been made good. Whether the arrangement was made without his previous approval or consent—which may be all the allegation is intended to convey—they do not pause further to inquire, because they are satisfied that if the arrangement in terms made on his behalf as a party thereto was not previously authorised, it was subsequently ratified by him, so that it became an arrange-

ment with himself as completely as if his signature had been in the event attached thereto. It is only thus that without attributing to the respondent a dishonourable silence which their Lordships would be slow to impute to him, his failure to dissociate himself from the agreement, as an answer to Mr. Burnard's successive letters, can be understood. It is only thus that his joining with George Henry Lysnar as late as 1926 in raising money towards meeting Mr. Burnard's demands can be explained.

The respondent sought to account for his silence and action by suggesting that until by service of the writ a direct demand for payment by himself was made, he had not troubled to investigate and did not really know the facts. It was only after the inquiry which he then made that he came to realise that he had by the arrangement of March, 1925, been completely discharged.

The respondent does not in this statement do himself justice. Direct demands upon him for payment had been made, as has been seen, before the arrangement, on the 22nd December, 1924, and the 21st January, 1925, and, after it, on the 1st April, 1925, and the 26th March, 1926. His knowledge of the arrangement itself he has never denied. This inquiry of his after writ could not have brought him knowledge of any relevant fact that he had not thoroughly known all along. What may well have been suggested to him by it was the view of the law, since apparently entertained by him, that, notwithstanding all the circumstances just stated, he was as a surety discharged because notice of the arrangement had not been directly sent him on the appellant's behalf, and because he had not expressly agreed to be bound by its terms after such notice had been so given him. And this was his contention before the Board.

But the view of his legal position, as so contended for by him, has, in their Lordships' view, neither principle nor authority to support it. An arrangement made on behalf of a surety by an agent in that behalf previously authorised or whose purported authority is afterwards ratified is as binding upon the surety as if in the first instance the arrangement had been made by himself and none the less because the surety's representative in the arrangement with the creditor was, as here, the principal debtor himself.

Their Lordships accordingly do not find it necessary, so far as this defence of the respondent is concerned, further to consider the question of notice which they have reserved.

Nor, although for a different reason, is this necessity imposed upon them by a further defence to the claim against him put before the Board by the respondent, but not dealt with either by the learned Trial Judge or by the Court of Appeal. George Henry Lysnar had, the respondent suggested, at a later date been given further time by the appellant without his knowledge or consent, and he, as a surety, was thereby discharged. On April 14th,

1926, when Mr. Burnard was paid by George Henry Lysnar, as above appears, £1,750 on account, there was then due, not only principal and interest in arrear amounting in all to £2,474 2*s*. 0*d*., but the whole amount secured by the deed. That had become immediately payable by reason of default in payment of the overdue instalments. In these circumstances, so the respondent contended, not only did Mr. Burnard agree that the balance then due of £724 2*s*. 0*d*. should stand over until the 20th January, 1927, but he renounced his right to immediate payment of the whole debt then unpaid. To all of which the answer is that no such agreement to postpone has either been proved or found, while, as to the so-called renunciation, a reference to the deed already set forth shows quite clearly that default in payment of instalments at their due date does not accelerate any instalment not then payable.

Before the Board the respondent also rested this part of his case on a statement of Mr. Burnard's in a letter to George Henry Lysnar of November 27th, 1927: "We are, however, prepared to wait until 20th January for payment of the whole of the remaining principal." And that money was due and payable, so says the respondent, on the previous 20th December, 1926.

To which the answer is that it was not so payable, and that the view of George Henry Lysnar in his letter of 26th November, 1926, and accepted by Mr. Burnard, was quite correct. Whatever effect might have to be given to the provision of the deed that the principal sum of £5,280 as one sum was to be paid on the 20th December, 1926—its retention in the deed is an obvious oversight when the original is looked at—it remains the fact that for payment of the last instalment as such no date earlier than the 20th January, 1927, is fixed.

Moreover, their Lordships can in this statement find no agreement at all to postpone—certainly none supported by any consideration. This contention, which was almost trivial, fails the respondent also, and no other answer to the claim against him being put forward by the respondent before the Board, it follows that the appeal succeeds.

To the respondent's case the appellant had further answers, to which no allusion has here been made. It is not, in the circumstances, necessary for the Board further to consider these.

On the whole case their Lordships are of opinion that the order of the Court of Appeal of the 18th October, 1927, should be discharged, and that the order of the learned Trial Judge of the 12th April, 1927, should for the reasons just given, be restored. And their Lordships will humbly advise His Majesty accordingly.

The respondent must pay to the appellant her costs in the Court of Appeal and of this appeal.

In the Privy Council.

DOROTHY VALENTINE BURNARD

v.

WILLIAM DOUGLAS LYSNAR.

DELIVERED BY LORD BLANESBURGH.

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