

COURT OF APPEAL, ENGLAND

Wegg-Prosser *v.* Evans

Where there is an unsatisfied judgment in respect to a dishonored cheque given by one of two guarantors for the amount of the guarantee, the creditor is not debarred from proceeding against the co-surety for payment of the amount due under his contract.

This was an appeal from the judgment of Mr. Justice Wills on a guarantee given by the defendant Evans, for the payment of the rent of a farm, for which one Williams was joint surety with one Thomas. The plaintiff applied to Thomas for half a year's rent which was in arrears, and received Thomas' cheque for the amount. The cheque was dishonored, whereupon he sued Thomas and got judgment, which, however, remained unsatisfied. He then brought the present action against Evans to recover the half year's rent. The defendant contended that as the plaintiff had already recovered judgment against the other joint guarantor, the cause of the action against himself was extinguished. The Court held that the cheque was not taken in payment of the debt, but only as a conditional payment, and that the proceedings on the cheque did not affect the plaintiff's right to look to the defendant under his contract of surety. The judgment of the Court was delivered by Lord Esher, M.R.:

When the tenant of the farm did not pay the rent the plaintiff might have brought an action upon the guarantee against both the joint guarantors. If he had sued one joint guarantor upon the guarantee, the one sued could have taken out a summons to have the other joint guarantor joined as defendant. The plaintiff, instead of suing upon the guarantee, took a cheque from Thomas, one of the joint guarantors. Taking that cheque was not a satisfaction of the debt, but only a conditional payment. If the cheque were paid, that would be payment of the guarantee, and the present defendant could not have been sued upon the guarantee, though he would have been liable to a claim by Thomas for contribution. The present defendant's position was not altered in the slightest degree by the cheque being given. The cheque, however, was dishonored, and judgment was obtained upon it against Thomas, but that judgment was unsatisfied. The cause of action on the cheque was that Thomas had failed in his promise to pay the amount of the cheque on demand. It was said that there was a rule of law which prevented the plaintiff from suing the defendant upon the guarantee. That rule of law was mere technicality, and, unless he (the Master of the Rolls) was bound by some decision, he would