1943 *Present :* **Howard C.J. and Wijeyewardene J.**

RODRIGO *et al.* Appellants, *and* EBRAHIM, Respondent.

182—D. C. Colombo, 9,517.

Novation—Agreement to substitute one debtor for another—Promise to pay debt of another—New consideration—Prevention of Frauds Ordinance (Cap. 57), s. 18.

Where, by agreement, one debtor is substituted for another with the consent of the creditor there is a novation of the debt and such an agreement falls outside the scope of section 18 of the Prevention of Frauds Ordinance.

Where the promise to pay the debt of another is based upon a new consideration such an undertaking is regarded as an original promise and is not within the section.

Fernando v. Abeyegoonesekera (34 N. L. R. 160) followed.

APPEAL from a judgment of the District Judge of Colombo.

H. V. Perera, K.C. (with him *C. Thiagalingam* and *C. Ranganathan*), for the defendants, appellants 2A and 2B.

N. E. Weerasooria, K.C. (with him *E. G. Wickremanayake*), for the plaintiff, respondent.

Cur. adv. vult.

October 5, 1943. HOWARD C.J.—

This is an appeal from a decision of the District Judge of Colombo, entering judgment for the plaintiff as claimed for the sum of Rs. 2,569.88 and costs. The plaintiff maintained that this sum became due from the defendants in the following circumstances. The plaintiff had contracted with the first defendant to supply labour for the transport of merchandise discharged from steamers calling at Colombo under the agency of Messrs. Narottam & Pereira, Ltd. On June 27, 1938, there was due under

this contract to the plaintiff a sum of Rs. 2,769.88. On August 5, 1938, the defendants entered into a deed of partnership to carry on the business of the first defendant under the firm name of Muniswamy & Company. On this deed the appellants contracted with the first defendant to pay in full all debts that had been incurred by the first defendant up to the date of the said deed. It was also alleged by the plaintiff that, immediately after the execution of the said deed, the appellants requested the plaintiff to carry on the work of loading and transporting merchandise from the said steamers and stating that they would pay the amount due from the first defendant. The plaintiff states that he accepted this undertaking to pay the said sum and continued the work of loading and transporting merchandise. It was further averred by the plaintiff that, in pursuance of this agreement a sum of Rs. 200 was paid by the appellants to the plaintiffs in part payment. In finding in favour of the plaintiff the learned Judge held—

(*a*) that the appellants undertook to pay the debt due by the first defendant to the plaintiff ;

(*b*) that the plaintiff agreed to accept from the appellants payment of the sum due to him ;

(c) that there was a novation of the debt due by the first defendant to plaintiff by reason of the plaintiff agreeing to recover the debt from the appellants ;

(*d*) that the first defendant is released from liability, but the debt has been taken over by the firm of Muniswamy & Co., consisting of the three defendants.

Counsel for the appellants has challenged the decision of the learned Judge on two grounds as follows:—(*a*) That it has not been established that the appellants undertook to pay the debt of the first defendant to the plaintiff (*b*) That the first defendant was not released from his obligation to pay the plaintiff and hence there was no novation of his debt. In these circumstances the undertaking by the appellants, even if given, was an agreement for charging them with the debt of the first defendant. Not being in writing, it was, by virtue of section 18 of the Prevention of Frauds Ordinance (Cap. 57) of no avail in law. I am of opinion that there is no substance in (*a*). It was a pure question of fact and it is impossible to say that in arriving at the conclusion he did, the learned Judge has misdirected himself.

The main argument of Mr. Perera has been concentrated on (*b*). Section 18 of the Prevention of Frauds Ordinance is worded as follows :—

" No promise, contract, bargain, or agreement, unless it be in writing and signed by the party making the same, or by some person thereto lawfully authorised by him or her, shall be of force or avail in law for any of the following purposes :—

(*a*) for charging any person with the debt, default, or miscarriage of another ;

(*b*) for pledging movable property, unless the same shall have been actually delivered to the person to whom it is alleged to have been pledged ;

(c) for establishing a partnership where the capital exceeds one thousand rupees:

Provided that this shall not be construed to prevent third parties from suing partners, or persons acting as such, and offering in evidence circumstances to prove a partnership existing between such persons, or to exclude parol testimony concerning transactions by or the settlement of any account between partners."

The first point that arises for consideration is whether the agreement made by the appellants charged them with the debt of the first defendant to the plaintiff. If it cannot be regarded in law as so doing, then there is no necessity to determine whether such agreement is in writing and signed by the appellants. Mr. Weerasooria has referred us to Evans translation of *Pothier's Law of Obligations.* "Novation" is dealt with in Vol. I., Part III., chapter 2, p. 380 *et seq.* and the various kinds of novations are particularised. The second kind, according to the author, is that which takes place by the intervention of a new debtor, where another person becomes a debtor in my stead, and is accepted by the creditor, who thereupon discharges me from it. The person thus rendering himself debtor for another, who is in consequence discharged, is called expromissor and this kind of novation is called *expromissio.* The expromissor differs entirely from a surety who is sometimes called in law *adpromissor.* For a person by becoming a surety does not discharge, but accedes to, the obligation of his principal, and becomes jointly indebted with him. At page 385 the author states that in order to constitute a novation, the consent of the creditor is requisite. The question as to whether an agreement which constituted a novation of the second kind referred to by Pothier was considered in *Fernando v. Abeyegoonesekera* [1]. In this case the defendant had given the plaintiffs a verbal promise to pay certain debts of his father, deceased, owing to the plaintiffs, and the question for decision was, whether the promise was enforceable wanting anything from the defendant in writing. In the judgment of Macdonell C.J. I find the following passage:

"It seems to me, however, that if the evidence of the defendant-appellant is rightly apprehended, what he did was not to guarantee the debt of his deceased father but to assume that debt himself; it was a case of novation not of guarantee, and if a novation, no writing was required. 'If there be an existing debt for which a third party is liable to the promisee, and if the promisor undertakes to be answerable for it, still there is no guarantee if the terms of the arrangement are such as to effect an extinguishment of the original liability: If A says to X, give M a receipt in full for his debt to you, and I will pay the amount, this promise does not fall within the statute, for there is no suretyship, but a substitution of one debtor for another'—*Anson on Contract, 12th ed. page 77,* citing *Goodman v. Chase.* Here it certainly seems as if there had been a substitution of one debtor for another, of the defendant-appellant for the estate of his deceased father. If so, it is a case of novation and not of guarantee, and it has never been

[1] *34 N. L. R. 160.*

suggested that the Statute, Ordinance No. 7 of 1840, enacted that a novation to be valid must be in writing. It can be by parol merely and still be perfectly valid."

Applying the reasoning formulated by Macdonell C.J. to this case, it seems to me that what the appellants did was not to guarantee the debt of the first defendant but to assume it themselves. There was therefore a substitution of one debtor for another. The fact that the plaintiff continued the work of unloading on the undertaking given by the appellants, that he has accepted Rs. 200 from the appellants in part payment of the debt due by the first defendant and that he has sued the appellants, indicates that this was a case of novation *vide Kader Saibu v. Teverayan*[1]. The joinder of the first defendant as a party does not, in my opinion, affect the legal position of the appellants. Even if there is no evidence, express or implied, to suggest the release of the first defendant, there is still the substitution of one debtor for another, namely the firm of Muniswamy & Co. for the first defendant. It was a case of novation, not of guarantee. Hence the agreement can be parol and still be perfectly valid.

A reference to the *18th Edition of Anson on Contract, pp. 64-66,* reveals the fact that English law formulates the same principles. A promise of guarantee or suretyship is always reducible to the form : "Deal with X, and if he does not pay you, I will". A promise of guarantee must, moreover, be distinguished from one of indemnity. In this connection another illustration that appears on page 65 is very much in point: If two come to a shop and one buys, and the other, to gain him credit, promises the seller "If he does not pay you, I will", this is a collateral undertaking and void without writing by the Statute of Frauds. But if he says, "Let him have the goods, I will be your paymaster" or "I will see you paid", this is an undertaking as for himself, and he shall be intended to be the very buyer and the other to act as but his servant. It has not been suggested in this case that the plaintiff supplied the labour for loading and transporting merchandise on a collateral undertaking by the appellants to pay the previous amount due only if the first defendant failed to do so. The undertaking given was for the appellants themselves.

The facts in the case of *Ex parte Lane in re Lendon* (*(1846) 10 Jurist, 382*) bear a striking similarity to those in the present case. The headnote is as follows:—

> "A being a creditor of B, B and C enter into Partnership, and, by verbal agreement among the Parties, A is treated as the creditor of B and C. Such an agreement is not impeached or affected by the Statute of Frauds. On the bankruptcy of B and C, A's debt is proveable against their joint Estate."

The following paragraph from the judgment is very much in point :—

> "I am of opinion, upon the evidence, that the impression of Miss Lane, the creditor, and of Mr. Lendon the elder, the debtor, was of that description, with reference to the debt that was due to her from him in the year 1838, when he admitted his son into partnership.

[1] *4 N. L. R. 165.*

I think it very probable, treating the debt in the way that I have mentioned, that all parties considered the trade as changed by the admission of the son into that business, and that it was considered that the trade was indebted, and is still indebted, to Miss Lane for the money. I am of opinion that that understanding was communicated to Miss Lane by the uncle and cousin, or one of them with the assent of both, and that Miss Lane distinctly acceded to it. I am of opinion, that, from thenceforth, all transactions between them proceeded upon that basis."

There is no doubt that in the present case that the debt due by the first defendant to the plaintiff was after the partnership agreement was executed and regarded by all parties as one due, if not by the appellants only, by the partnership. Hence there was a novation.

The promise by the appellants to pay the debt due by the first defendant was, moreover, made upon the condition that the plaintiff should carry on with the work of loading and transporting merchandise. It was, therefore, founded upon a new consideration and was not merely for the debt of the first defendant. "Such an undertaking, though in effect it be to answer for another person, is considered as an original promise and not within the Statute", *vide 7th Edition of Leake on Contracts, p. 165.*

For the reasons I have given the appeal is dismissed with costs.

WIJEYEWARDENE J.—I agree.

Appeal dismissed.