

02/71

## SUPREME COURT OF VICTORIA

**ROVERE v GAY**

Smith J

24 February 1971

CIVIL PROCEEDINGS – WORK AND LABOUR DONE AND MATERIALS PROVIDED – DAMAGE CAUSED BY MOTOR VEHICLE ACCIDENT – CONTRACT TO REPAIR CAR MADE BY PERSON OTHER THAN THE DEFENDANT – PERSON SAID HE WOULD PAY THE BILL – REPAIRS EFFECTED – REFUSAL TO PAY BILL – AGREEMENT TO PAY NOT IN WRITING – FINDING BY MAGISTRATE THAT CLAIM MADE OUT – WHETHER MAGISTRATE IN ERROR: *INSTRUMENTS ACT* 1958, s126.

**HELD:** Order nisi absolute. Magistrate's order set aside.

1. Where the promise, which was said to fall within the part of the *Statute of Frauds*, which was here relevant was an unconditional promise to pay the amount of another's indebtedness, and the liability of that other was then and there discharged by the new contract, the case was not within the statute. On the other hand, where there was an unconditional promise to pay the amount of another's indebtedness, and that other's liability was to remain alive, the case was within the statute and needed to be in writing.

*Edwards, Dunlop & Co Ltd v Harvey* [1927] VicLawRp 5; [1927] VLR 37, applied.

2. If, by the words 'there was no third party involved in this transaction', the Magistrate meant that there was a three party agreement entered into constituting a novation whereby the debt of the defendant's brother was extinguished and replaced by a debt payable by the defendant to the complainant, the finding was contrary to the evidence and was not open to him.

3. It was suggested, in the course of argument, that the defendant's promise might have been construed as an absolute and independent undertaking to pay to the complainant a sum of money equal to the amount of the cost of the repairs regardless of anything that might have transpired between the complainant and the defendant's brother. However, it appeared to be impossible to construe this language as conveying an intention on the part of the defendant to bind himself to pay the sum in question even if the amount should previously have been paid over by his brother or extracted from his brother, by process of law.

4. Upon the evidence which the Magistrate accepted, the only conclusion reasonably open to him was that the agreement between the complainant and the defendant was one which was required to be proved by written evidence in accordance with the *Instruments Act*. No such evidence was produced, and accordingly the Magistrate was bound in law to dismiss the complaint.

**SMITH J:** This is the return of an order nisi to review a decision of the Magistrates' Court at Cohuna given on 16 July 1970 in favour of a complainant who sought by special summons to recover the sum of \$545.55 for work and labour done and materials for the same provided.

The work in question consisted of repair works done to the car of one Guiseppe Rovere, a brother of the defendant Amadeo Rovere. The Magistrate made an order in favour of the complainant for the full amount claimed and it is now sought to review his decision on the following grounds:

"1. That by reason of the provisions of s126 of the *Instruments Act* 1958 relating to special promises to answer for the death, default or miscarriages of another person, the learned Stipendiary Magistrate ought to have dismissed the complaint herein.

2. That on the evidence accepted by the learned Stipendiary Magistrate the complainant was seeking to charge the defendant upon an oral special promise to answer for the debt or default of the defendant's brother, GG Rovere, in relation to repairs carried out by the complainant at the express or implied request of the said GG Rovere, to a motor car belonging to the said GG Rovere, and there was no note or memorandum of the said oral special promise as required by s126 of the *Instruments Act* 1958."

The Magistrate, in giving his reasons, said that he accepted the complainant's version of

the facts. That version included admissions that the original contract to repair the car was made with Guiseppe Rovere, the defendant's brother, that it was Guiseppe Rovere who had given the complainant the car to repair, and that it was Guiseppe Rovere's car. That account also showed that the defendant was an agent of the insurance company which had insured the car; that the company was declining to pay for the repairs to the car; that the defendant told the complainant that he was in a hurry for the car because his brother Guiseppe worked for the defendant and used the car in the defendant's business; that the complainant then, in order to secure his lien over the car, had one of its wheels taken off; that the defendant and his brother Guiseppe, the latter of whom, it may be observed, had practically no English, came to the complainant's premises; that the defendant said to the complainant, "I am an agent for VACC. They will pay. I will fix it up"; that the complainant replied, "That is not good enough"; that the defendant then said, "Send the bill to me and I will pay you"; and that the complainant replied, "Okay" and ordered the wheel to be put back on the car and allowed the car to be removed by the defendant and his brother.

The Magistrate, after stating that he accepted that version of this fact, went on to say that the fact that the defendant had stated he was in a hurry for the car because his brother used it in the defendant's business, showed that the defendant derived a benefit; that this constituted sufficient consideration to support an enforceable caveat; and that "as there was no third party involved in this transaction" it was not necessary to reduce the agreement to writing.

Now it is clear that where the promise, which is said to fall within the part of the *Statute of Frauds*, which is here relevant is an unconditional promise to pay the amount of another's indebtedness, and the liability of that other is then and there discharged by the new contract, the case is not within the statute. On the other hand, where there is an unconditional promise to pay the amount of another's indebtedness, and that other's liability is to remain alive, the case is within the statute and needs writing. I refer, in this regard to what was said by Dixon AJ as he then was, in the case of *Edwards, Dunlop & Co Ltd v Harvey* [1927] VicLawRp 5; [1927] VLR 37.

I have considerable difficulty in understanding precisely what the Magistrate meant by saying that no third party was involved in what he referred to as "this transaction". It was urged upon me, however, that the Magistrate may well have been influenced by the way in which this aspect of the law is dealt with in the Australian edition of *Cheshire & Fifoot on Contracts*, and that the proper view is that the Magistrate meant, by that part of his reasons, that there was a bargain made at the time the car was released by the complainant, the terms of which were such that thereafter there was no continuing liability in the defendant's brother for the debt for repairs to the car which he had incurred to the complainant.

It seems to me, however, to be hard to suppose that by the words 'there was no third party involved in this transaction', the Magistrate meant that there was a three party agreement entered into constituting a novation whereby the debt of the defendant's brother was extinguished and replaced by a debt payable by the defendant to the complainant. And if the Magistrate did mean this, then, in my view, the finding was contrary to the evidence and was not open to him.

It needs to be borne in mind that the complainant had a contractual right against the defendant's brother to be paid a substantial sum, and that his right was protected by a lien. The defendant was trying to persuade the complainant, who was negotiating from strength, to allow the car to be taken away, and thereby to give up his lien. The first bait offered to produce such action was an offer of a promise to procure the insurance company to make a payment to the complainant of the amount of the debt of the defendant's brother. That proposal was the debt of the defendant's brother.

That proposal was rejected as being not good enough. Then the defendant offered something more likely to be acceptable, namely, in promise that if the bill were sent to him, he himself would do what he had in the first place said he would get the insurance company to do; and it was this second proposal which was accepted by the complainant.

From first to last, there was no suggestion that the complainant should give up anything but the advantage which his possession conferred on him. The matter in debate was what would be given to him to induce him to give up possession; and in that situation it appears to me that it would be quite unreasonable to suppose that the idea occurred to anybody that by the words that

were exchanged the complainant was intending to give up his legal right to sue the defendant's brother, so that if it turned out he could not get payment from the defendant he would be left with no remedy at all.

I may add that it was suggested, in the course of argument, that the defendant's promise might be construed as an absolute and independent undertaking to pay to the complainant a sum of money equal to the amount of the cost of the repairs regardless of anything that might transpire between the complainant and the defendant's brother. But it appears to me to be impossible to construe this language as conveying an intention on the part of the defendant to bind himself to pay the sum in question even if the amount should previously have been paid over by his brother or extracted from his brother, by process of law.

For those reasons, it appears to me that, upon the evidence which the Magistrate accepted, the only conclusion reasonably open to him was that the agreement between the complainant and the defendant was one which was required to be proved by written evidence in accordance with the *Instruments Act*. No such evidence was produced, and accordingly the Magistrate, in my view, was bound in law to dismiss the complaint.

For these reasons this application to review succeeds. The order nisi is made absolute with costs to be taxed. The order below is set aside. [After further discussion] Liberty is reserved to either party to apply for an order for payment of costs in respect of the proceedings in the Magistrates' Court, or for an order substituting for the order below, an order for the costs of those proceedings. An indemnity certificate under the *Appeal Costs Fund Act* is granted.

**APPEARANCES:** For the applicant/respondent Burke: Mr H Nathan, counsel. Herbert Geer & Rundle, solicitors. For the defendant/complainant Gay: Mr MC Kimm, counsel. McNab and McNab, solicitors.

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