[HIGH COURT OF AUSTRALIA.]

HARVEY . . . . . APPELLANT;
DEFENDANT,

AND

EDWARDS, DUNLOP AND COMPANY LIMITED RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Mar.* 18, 21.

SYDNEY, *April* 13.

Knox C.J., Isaacs, Higgins, Gavan Duffy and Starke JJ.

Contract—Guarantee—Parol agreement to answer for the debt of another—Memorandum in writing—Liability imposed on particular asset—Statute of Frauds (29 *Car. II.* c. 3), *sec.* 4—*Instruments Act* 1915 (*Vict.*) (*No.* 2672), *sec.* 228.

The respondent entered into an oral agreement with the appellant and a company in which the appellant was interested, whereby it was agreed that in consideration of the respondent refraining from signing judgment in an action against the company the appellant would execute a power of attorney authorizing the attorney to sell certain property of the appellant in Scotland at such time and upon such terms as would allow the attorney to pay the sum for which the company was sued to the respondent at its London office before a certain date, and the appellant would so instruct the attorney. An implied term of the agreement was that the appellant had not done and would not do anything calculated to impede the sale. In an action in the Supreme Court of Victoria by the respondent against the appellant for a breach of this agreement, *Dixon* A.J. held that the agreement was not a special promise to answer for the debt of another within the meaning of sec. 228 of the *Instruments Act* 1915 (Vict.) and that therefore no note or memorandum in writing of it was necessary, and he gave judgment for the respondent. On appeal to the High Court,

Held, that the appeal should be dismissed :

By *Knox* C.J., *Gavan Duffy* and *Starke* JJ., on the ground that, whether the agreement was or was not a special promise to answer for the debt of another, certain correspondence which took place between the solicitors of

the parties and the power of attorney were so connected together as to constitute a memorandum in writing containing all the terms of the agreement, which was sufficient to satisfy sec. 228;

By *Higgins* J., on the ground that the agreement was not a special promise to answer for the debt of another.

Decision of the Supreme Court of Victoria (*Dixon* A.J.): *Edwards, Dunlop & Co.* v. *Harvey*, (1927) V.L.R. 37; 48 A.L.T. 125, affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by Edwards, Dunlop & Co. against James Allen Harvey in which, by its statement of claim, the plaintiff alleged that the defendant was at all material times a substantial shareholder in the Inter-State Stationery Manufacturing Co. Pty. Ltd., and that the plaintiff had instituted proceedings against the Inter-State Stationery Manufacturing Co. Pty. Ltd. in the County Court to recover payment for certain goods bought by the Inter-State Stationery Manufacturing Co. Pty. Ltd. from the plaintiff. Certain alternative agreements between the plaintiff and the defendant were then alleged, the only material one being stated as follows (par. 5) :—" In consideration of the plaintiff agreeing not to proceed to judgment against the Inter-State Stationery Manufacturing Co. Pty. Ltd. before 28th February 1926, the defendant agreed to himself pay to the plaintiff a sum of £480 0s. 9d., the amount claimed by the plaintiff against the aforesaid Inter-State Co., together with interest thereon at the rate of 8 per cent per annum from 1st March 1925 until payment by forwarding to one Douglas David Urquhart of Dundee, Scotland, solicitor, a power of attorney to make such payment out of the proceeds of sale of certain property of the defendant and by maintaining such power of attorney in full force and effect and abstaining from revoking such power of attorney or doing anything, or failing to do any necessary thing, whereby the said power of attorney might cease to be effective or the said payment might not be made as agreed." The plaintiff further alleged that, in reliance on that agreement it did not proceed to judgment but the defendant had failed to pay the sum of £489 0s. 9d. as agreed or at all and had revoked or rendered ineffective the power of attorney. The defendant, by his defence, alleged (*inter alia*) that there was no agreement in writing nor was there any note or memorandum in writing of it as required by sec. 228 of the *Instruments*

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Act 1915 (Vict.). It appeared that a power of attorney was executed under seal by the defendant on 6th November 1925 by which he appointed Douglas David Urquhart his attorney and authorized him to sell certain land of the defendant at Paisley in Scotland and "out of the proceeds . . . to pay to the London office of Edwards, Dunlop & Co. Ltd. the sum of £489 0s. 9d. together with interest thereon at 8 per cent per annum from 1st March 1925 to the date of payment." Certain correspondence took place between the solicitors for the plaintiff and the solicitors for the respondent, which included the letters set out in the judgments hereunder, and a letter of 28th September 1925 (referred to by *Higgins* J. in his judgment) written by the defendant's solicitors to the plaintiff's solicitors, which was as follows:—"Dear Sirs—Without prejudice—The Inter-State Stationery Manufacturing Co. Ltd. ats. Edwards, Dunlop & Co. Ltd.—Following our telephone conversation with you on Thursday and your reply that your clients would not accept the suggestion made but intended to proceed with the summons herein, we have seen Mr. Harvey, who desires us to again urge that this matter be settled in the manner suggested. We are enclosing herewith for your reference copy letter just received by Mr. Harvey from his solicitors in Scotland together with draft of the proposed power of attorney. Mr. Harvey's property is unencumbered and the sale price would undoubtedly far more than cover your client's claim. If the matter is proceeded with at the present time against the Inter-State Stationery Co. it will only mean their going into liquidation, which we feel certain your clients do not wish. Now that we have taken the matter in hand you can rely that the power of attorney will be executed without any delay and immediate instructions given to Messrs. Urquhart & McWalter." The power of attorney was sent to the attorney under power in Scotland, but the plaintiff revoked it before any payment was made under it.

The action was heard by *Dixon* A.J., who found, in substance, that on 13th October 1925 an oral contract was made between the plaintiff, the Inter-State Stationery Manufacturing Co. and the defendant, by which in consideration that the plaintiff would refrain from signing judgment against the Inter-State Stationery Manufacturing Co. the defendant agreed to execute the power

of attorney in the form approved, to send it to the attorney under power without unreasonable delay, and to instruct him to sell in such time and upon such terms as would allow him to pay principal and interest at 8 per cent to the plaintiff at its London office before the end of February 1926. He also found that a term was necessarily implied in this contract that the defendant had not done and would not do anything calculated to prevent or impede the sale taking place and the proceeds being applied in payment of the amount owing to the plaintiff in manner provided. He held that this agreement was not a special promise to answer for the debt, default or miscarriage of another, and he gave judgment for the plaintiff for £537 14s. 9d.: *Edwards, Dunlop & Co.* v. *Harvey* (1).

From that decision the defendant now appealed to the High Court.

H. I. Cohen K.C. (with him *Claude Robertson*), for the appellant. The agreement found by *Dixon* A.J. was a special promise to answer for the debt of another and is within sec. 228 of the *Instruments Act* 1915. The fact that the promise was to pay out of a particular sum or in a particular way does not make the promise any the less a promise to answer for the debt. If this agreement is within sec. 228, there is no sufficient memorandum in writing of it. The letters which passed between the solicitors are not sufficiently connected with one another to constitute a memorandum. They do not show a concluded bargain between the parties (see *Thomson* v. *McInnes* (2)). Where the parties, even though they have agreed upon every term, agree that there is to be another document which is to set out all the terms, there is no concluded agreement (*Chillingworth* v. *Esche* (3)). Those of the documents which can be connected with one another do not contain all the terms.

C. Gavan Duffy (with him *Phillips*), for the respondent. The power of attorney and the correspondence between the solicitors afford a sufficient memorandum of the contract (*Thomson* v. *McInnes* (4); *Baumann* v. *James* (5)). All that there need be in the memorandum is something which shows that it relates to a completed

(1) (1927) V.L.R. 37; 48 A.L.T. 125.
(2) (1911) 12 C.L.R. 562.
(3) (1924) 1 Ch. 97.
(4) (1911) 12 C.L.R., at p. 569.
(5) (1868) L.R. 3 Ch. 508.

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contract and a statement of the terms of that contract with sufficient accuracy from a business standpoint (*Agnew on the Statute of Frauds*, p. 229; *Halsbury's Laws of England*, vol. xv., pp. 464, 465; *Haydon* v. *McLeod* (1)). The agreement found is not one to which sec. 228 applies. In order to fall within the section there must be a complete promise to answer in any event. Here there was no promise by the respondent to pay. The appellant would have performed the whole of his promise if the property in Scotland had realized only £50. His promise was only to answer out of a particular asset, and sec. 228 operates only on a promise to pay out of any assets the promisor may have (see *Forth* v. *Stanton* (2); *Fitzgerald* v. *Dressler* (3); *Mountstephen* v. *Lakeman* (4); *Green* v. *Cresswell* (5); *Orrell* v. *Coppock* (6); *Stephens* v. *Squire* (7); *Davys* v. *Buswell* (8); *Read* v. *Nash* (9)).

[ISAACS J. referred to *Harburg India Rubber Comb Co.* v. *Martin* (10).

[KNOX C.J. referred to *Macrory* v. *Scott* (11).]

H. I. Cohen K.C. in reply, referred to *Morley* v. *Boothby* (12); *Andrews* v. *Smith* (13); *Thomas* v. *Williams* (14); *Chater* v. *Beckett* (15); *De Colyar on Guarantees*, 3rd ed., pp. 143, 170, 173.

Cur. adv. vult.

April 13.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. On the trial of this action *Dixon* A.J. found that on 13th October 1925 an agreement had been made orally between the appellant, the respondent and the Inter-State Stationery Co. Ltd. by which, in consideration that the respondent would refrain from signing judgment against the company, the appellant agreed to execute a certain power of attorney in the form approved, to send it to the attorney under power without unreasonable delay and to instruct him to sell in such time and on

(1) (1901) 27 V.L.R. 395; 23 A.L.T. 95.
(2) (1668) 1 Wms. Saund. 220.
(3) (1859) 7 C.B. (N.S.) 374.
(4) (1871) L.R. 7 Q.B. 196; (1874) L.R. 7 H.L. 17.
(5) (1839) 10 Ad. & El. 453.
(6) (1856) 26 L.J. Ch. 269.
(7) (1696) 5 Mod. 205.
(8) (1913) 2 K.B. 47.
(9) (1751) 1 Wils. 305.
(10) (1902) 1 K.B. 778.
(11) (1850) 5 Ex. 907.
(12) (1825) 3 Bing. 107.
(13) (1835) 2 Cr. M. & R. 627.
(14) (1830) 10 B. & C. 664.
(15) (1797) 7 T.R. 201.

such terms as would allow him to pay principal and interest at 8 per cent to the respondent at its London office before the end of February 1926. He held further that a term was necessarily implied in this contract that the appellant had not done and would not do anything calculated to prevent or impede the sale taking place and the proceeds being applied in payment of the amount owing to the respondent in manner provided. At the trial it was argued for the appellant that this agreement was a special promise to answer for the debt of another within the meaning of sec. 228 of the *Instruments Act*, but this contention was overruled. Consequently the question whether there was a sufficient note or memorandum of the agreement to satisfy the requirements of the section did not then arise. On the opening of this appeal two questions only were suggested for argument: (1) Whether the agreement was within the provisions of sec. 228, and (2) If so, whether there was a sufficient note or memorandum of it to satisfy the requirements of the section. Another argument attacking the finding of *Dixon* A.J. and the authority of solicitors to act for the appellant was attempted in reply, but the Court refused at that stage of the case to entertain it.

In the view which we take of the second question we find it unnecessary to consider whether the first was correctly decided in the Supreme Court. The *Statute of Frauds* requires (a) an agreement in writing or (b) a memorandum in writing of agreement. It is well settled that any document signed by the party to be charged or by some person authorized by him which contains all the essential terms of the agreement is a sufficient memorandum. It is also well settled that the memorandum "need not be contained in one document; it may be made out from several documents if they can be connected together." They may be connected by reference one to the other; but further, "if you can spell out of the document a reference in it to some other transaction, you are at liberty to give evidence as to what that other transaction is, and, if that other transaction contains all the terms in writing, then you get a sufficient memorandum within the statute by reading the two together" (*Stokes* v. *Whicher* (1)).

(1) (1920) 1 Ch. 411, at p. 418.

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In the present case an agreement in fact is established. That agreement was arrived at in the course of conversations between the solicitors for the respondent and Messrs. Crisp & Crisp, solicitors, who were acting on behalf of the appellant and with his authority, and was completed on 13th October. On 14th October the respondent's solicitors wrote to the appellant's solicitors a letter in the words following :—" Dear Sirs,—Edwards, Dunlop & Co. v. Inter-State Stationery Co. Ltd.—We write to confirm our telephone conversation of 13th inst. Our client is prepared to withhold the signing of judgment herein on the following terms :—1. Power of attorney as drawn by you to be sent to Scottish solicitors with instructions to sell in time to have money paid to our client's London house by 28th February 1926. Interest to be at 8 per cent instead of 7 per cent as proposed. 2. Consent to sign judgment to be given by you on our undertaking not to use the same before 28th February 1926 unless the action of your client in Melbourne or anything in connection with the Scottish transaction justifies its use. Our client's London solicitors to have liberty to inquire into the Scottish transaction and our client to act on their advice. 3. The above case to be adjourned from month to month pending settlement. We enclose your draft power of attorney as requested by you. Please let us have your consent to judgment. We will also require to see the documents duly signed before they are sent to Scotland.—Yours faithfully, Eggleston & Eggleston." We regard this letter as a confirmation in writing of the verbal contract already concluded on 13th October and not as an offer of new terms. On 4th November 1925 the appellant's solicitors wrote to the respondent's solicitors a letter in the words following: —" Dear Sirs,—Inter-State Stationery Co. Ltd. and Edwards, Dunlop & Co. Ltd.—We are forwarding herewith power of attorney duly executed by Mr. Harvey. Kindly return same to us to-day as we are anxious it should catch the first mail to Scotland. We are preparing the consent to judgment and will let you have same together with the letter accepting terms of settlement as early as possible. The property in Scotland we understand has already been sold, so that there should not be any difficulty whatever about your clients being paid by due date.—Yours faithfully, Crisp &

Crisp." On their face the letters of 14th October and 4th November refer to the same transaction, namely, a proceeding between Edwards, Dunlop & Co. and the Inter-State Stationery Co. Ltd. This connects the two letters together; and reference to the terms of the letters adds to this connection, for the later letter deals with the very matters spoken of in the earlier letter. Then a power of attorney is referred to, which, upon being examined, is found to authorize the attorney for the appellant to sell certain real property in Scotland and out of the proceeds of sale to pay to the London office of the respondent the sum of £489 0s. 9d. with interest from 1st March 1925 till payment. Some question arose as to the rate of interest set forth in the power of attorney, for on 5th November the respondent's solicitors returned the power of attorney as requested by the letter of 4th November and stated that "the power of attorney meets with our approval except as to the rate of interest which you have undertaken to alter from 7 per cent to 8 per cent." The appellant's solicitors acknowledged this letter on 7th November and stated that they had altered the rate of interest from 7 per cent to 8 per cent and had forwarded the power of attorney to Scotland. They repeated these statements in a letter of 9th November written in reply to a letter of respondent's solicitors dated 6th November asking for formal notification of the alteration of the rate of interest and the despatch of the power of attorney. On 18th February 1926 appellant's solicitors wrote to the respondent's solicitors informing them that the instructions given under the power of attorney had reached the solicitors acting in Scotland, and that the property had been sold but that the money could not be handed over until receipt of a disposition executed by the appellant; and on 24th February they wrote that the disposition had been sent to the appellant's solicitors in Scotland and that "the matter ought to be settled in London by the end of this month." All these letters expressly refer to the same transaction, namely, Edwards, Dunlop & Co. Ltd. and Inter-State Stationery Co. Ltd., and are connected up as a correspondence by reference to preceding letters in the correspondence and by the subject matter dealt with. Finally on 23rd March 1926 the solicitors wrote enclosing consent to judgment under the seal of the company. In these letters,

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connected together in the manner indicated, the solicitors for the appellant acknowledge and recognize, in our opinion, an agreement between the parties and the terms of that agreement can be gathered from them. They contain all the terms of the agreement found by *Dixon* A.J., and so are sufficient to satisfy the requirements of the *Statute of Frauds*.

For these reasons we are of opinion that the appeal should be dismissed.

ISAACS J. I have had the opportunity of seeing the joint judgment of the Chief Justice and *Gavan Duffy* and *Starke* JJ. In the view taken by my learned brothers it would be futile to offer any opinion as to whether the agreement was within sec. 228 of the *Instruments Act* 1915.

As to whether there is, by internal connection, a sufficient memorandum within that section, I have doubts. But, as my opinion, in the circumstances, would not affect the result, and as in this case I am sure no injustice can be caused by deciding the second question in the affirmative, I do not feel constrained to consider the matter further.

HIGGINS J. If the agreement of 13th October 1925 was such that it must satisfy the requirements of the *Statute of Frauds* (sec. 228 of the Victorian *Instruments Act* 1915) I am not at all satisfied that those requirements have been satisfied. I need not give a laborious explanation of this statement, as I think that the agreement is not touched by the *Statute of Frauds*; but I may say, generally, that the letters, with the power of attorney incorporated by reference, do not, without the aid of extrinsic verbal evidence, show that the defendant was guaranteeing the debt of the Inter-State Stationery Manufacturing Co. Pty. Ltd. due to the plaintiff.

It should be noticed that the power of attorney of 6th November 1925, although it authorizes the payment of £489 0s. 9d. to the London office of the plaintiff company, does not show what the payment was for; and that the letter from Crisp & Crisp of 28th September 1925 is not in any way referred to in the letter from Eggleston & Eggleston of 14th October 1925. The latter letter

takes a conversation by telephone of 13th October as the starting-point. The connection between the two letters does not appear except by oral evidence ; and such evidence is inadmissible for the purpose of the statute. For aught that appears in the writings, which are connected on their face and may legitimately be used, the payment of £489 0s. 9d., with interest, *may* have been to free the defendant Harvey of an actual, or supposed, personal liability for his company's debt. In short, there is no memorandum in writing of the contract.

But, in my opinion, the agreement in fact made—as found by the learned Judge of first instance, and not here impugned—was not a "special promise to answer for the debt default or miscarriages of another person" within the statute. The contract, as found by the learned Judge (1), was made between the plaintiff, the Interstate Stationery Manufacturing Co. Pty. Ltd., and the defendant, "by which in consideration that the plaintiff would refrain from signing judgment against the" (Inter-State) "Company the defendant agreed to execute the power of attorney in the form approved, to send it to the attorney under power without unreasonable delay, and to instruct him to sell in such time and upon such terms as would allow him to pay principal and interest at 8 per cent to the plaintiff at its London office before the end of February 1926. A term was necessarily implied in this contract that the defendant had not done and would not do anything calculated to prevent or impede the sale taking place and the proceeds being applied in payment of the amount owing to the plaintiff in manner provided."

Now, the Act requires a writing for an enforceable contract when there is a special promise to *answer for* the debt, default or miscarriage of another person. What does "*answer for*" mean ? It must mean to answer for personally—to impose on the promisor and his assets generally a liability for the debt. It cannot mean to impose a mere liability on a particular asset, as when B pledges his shares for the payment of A's overdraft without undertaking any personal liability. In the present case the liability is imposed only on the proceeds of the sale of some property in Paisley. There is nothing to bind the defendant to pay out of his assets generally any deficiency,

(1) (1927) V.L.R., at p. 45; 48 A.LT., at pp. 127-128.

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should those proceeds be insufficient for the debt. The defendant has not *promised to answer for* the debt of the company, although he may have promised that his Paisley property shall, in a popular sense, answer for that debt. The case cited by the Chief Justice (*Macrory* v. *Scott* (1)) seems to be very relevant. There, *Parke* B. pointed out that an agreement to the effect that property already pledged as security for one debt should remain in pledge for another was not an agreement that required a writing under the *Statute of Frauds*. I know of no case in which the statute has been held to apply in which an action for assumpsit (or covenant) would not lie.

This was substantially the view taken by the learned Judge; but so much time was taken up in the argument before us as to the sufficiency of the letters for the purpose of the *Statute of Frauds*, that this view has not received the attention which it deserved. I concur with the judgment of *Dixon* A.J. where it states (2): "The agreement was not in my opinion a special promise to answer for the debt, default or miscarriage of another." The judgment goes on to add: "It was an agreement to take certain definite steps which were expected to result in the *debt of another* (for which or some part of which the promisor was already liable or thought himself liable), *being answered out of specific property of the promisor*." It surely tends more to certainty in the law if a Court of appeal, when agreeing with the ground on which the decision below was given, adhere to that ground instead of exploring for another ground which is more debatable. No case has been cited that in the slightest degree tends to qualify the natural meaning of the statute; and we are free to follow the natural meaning.

In my opinion the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Crisp & Crisp.*

Solicitors for the respondent, *Eggleston & Eggleston.*

B. L.

(1) (1850) 5 Ex. 907.

(2) (1927) V.L.R., at p. 57; 48 A.L.T., at p. 133.