1931 *Present :* **Macdonell C.J. and Dalton J.**

FERNANDO *v.* ABEYEGOONESEKERA.

295—D. C. Kandy, 40,341.

Novation—Promise to pay father's debt—No guarantee—Ordinance No. 7 of 1840, s. 21.

Where a person agreed to pay a debt due from his father, after the death of the latter,—

Held, that the agreement constituted a novation of the debt and was enforceable without a writing.

THIS was an action to recover a sum of Rs. 325 from the defendant upon a verbal promise made by him to pay the debts of his father, due to the plaintiffs, as value of goods supplied. The learned District Judge gave judgment for the plaintiffs.

E. B. Wikramanayake (with him *Molligoda*), for defendant-appellant.—This is an agreement whereby a person charges himself with the debt of another. Under section 21 of 7 of 1840, such an agreement cannot be enforced unless it is in writing. The fact of part payment makes no difference. The doctrine of part performance does not apply in Ceylon (*Arsekuleratne v. Perera* [1]).

[Counsel for the respondent objected that the issue had not been raised in the lower Court.]

The issue is an issue of law and can be raised in appeal. It is not an issue that can be met with evidence. See the *Tasmania* case [2]. The principles laid down in the *Tasmania* case have been followed in Ceylon (*Manian v. Sanmugam* [3]). In any case a Court is bound to apply statute law whether an issue is raised on it or not (*The Attorney-General v. Punchirala* [4]).

H. V. Perera (with him *Rajapakse* and *Alles*) for plaintiff, respondent.—The issue is not a pure issue of law. If it had been raised evidence might have been led that the original debt had been discharged. The point has been discussed by counsel in the lower Court but the issues seem to have been deliberately framed without reference to it. The appellant cannot therefore raise the point in appeal. The contract sued on is not a contract of guarantee. It is either a novation or an indemnity. No writing is therefore required. See *Anson on Contracts, p. 77.* The evidence of the defendant himself makes it quite clear that he stepped into the shoes of the deceased. The contract would therefore be a novation, *4 Thambyah 75, S. C. 172, D. C. Colombo, 25,651, S. C. Minutes, October 12, 1928.*

Wikramanayake, in reply.—A party is not bound in appeal by an admission on a point of law in the lower Court (*Perera v. Samarakoon* [5]). The issue is a pure issue of law. It is merely the construction of a statute. The whole case in the lower Court was fought on the basis that there was no writing. This is also obvious from the pleadings and the evidence. It does not matter whether the contract is a guarantee or a novation. English authorities are not applicable here. There is a difference in language between the English Statute of Frauds and Ordinance No. 7 of 1840. Under our Ordinance the test is clearly this: whose (*i.e.*) was the original debt? If the original debt was somebody else's, the party taking it upon himself cannot be sued unless there is a writing. The terms of section 21 of Ordinance No. 7 of 1840 are wide enough to include even a novation.

August 15, 1932. MACDONELL C.J.—

In this appeal it appeared that the defendant had given plaintiffs a verbal promise to pay certain debts of his father, deceased, owing to the

[1] *29 N. L. R. 342, P. C.*
[2] *(1890) 15 A. C. 223.*
[3] *22 N. L. R. 249.*
[4] *21 N. L. R. 51.*
[5] *23 N. L. R. 502.*

plaintiffs and the question for decision was, whether this promise was enforceable wanting anything from the defendant in writing.

The facts were as follows:—The defendant's father in his lifetime owned two stores at Watumulla and Nildandahena respectively, and was in the habit of obtaining goods for these stores from the plaintiffs, wholesale merchants in Kandy. At the time of the father's death in March, 1930, he was indebted to plaintiffs on account of the Watumulla store in the sum of Rs. 825.84. On January 20, 1930, shortly that is before his death, he conveyed by notarial instrument certain lands to his son, the defendant, for a consideration of Rs. 1,500. The attestation clause certifies "that the consideration has been set off as follows: Rs. 477.79 to be paid to Messrs. P. S. Fernando & Co. of Kandy, Rs. 529.51 to be paid to M. K. A. Mohamed Muttaliff's shop, Rs. 32 to be paid to A. M. Mohamed's shop, Rs. 317 to be paid to Abubakker Ali Mohamed's shop on account of debts due by the vendor, and the balance for the payment of salaries due to the salesmen presently working; which sums the vendee has agreed to settle . . . . . ". The sums stated total, it will be seen, Rs. 1,356.30 out of the named consideration of Rs. 1,500. It is not disputed that defendant entered into possession of the lands so conveyed him by his father. It further appears that in June, 1930, some three months that is after his father's death, he paid to the plaintiffs not the Rs. 477.79 mentioned in the attestation clause of the conveyance but the sum of Rs. 500. The defendant in his evidence maintained at first that what he really paid was the Rs. 477.79 named in the attestation clause and that the balance Rs. 22.21 was due to him in reconvention (he did not explain why he did not ask for change when paying the Rs. 500). In cross examination he said "I went to plaintiffs' firm and said I would pay my father's debts . . . . I paid Rs. 500 and agreed to pay outstandings, if any, in excess of Rs. 500. Otherwise I wanted change . . . . I made a guess at the amount due from my father and paid that" and in re-examination he said "I told plaintiff to let me know how much due to them. I did not know what was named in the deed". The learned District Judge gave judgment for the plaintiffs for Rs. 325.84, being the balance of the father's debt of Rs. 825.84 and the sole reason argued to us on appeal as to why the decision was wrong, was that this promise of defendant was a guarantee and bad under Ordinance No. 7 of 1840, section 13, for lack of writing.

This point was not raised either in defendant's answer or in the issues framed. On a separate sheet of the record there occur the following words:—

"For defendant. 1. A guarantee must be in writing. 2. Not sued as heir. For plaintiff. Novation of debt—not a guarantee", and one concludes that these matters were debated by counsel at the trial but there is no trace of them in the issues. The point that does seem to have been raised for the defendant was prescription; it is pleaded, an issue was framed on it, and the judgment decides this plea against the defendant. It was not a point argued to us at all. It is difficult to collect from the record before us that the point on which this appeal was argued to us,

namely, guarantee bad because by parol merely, was ever really before the Court of trial. There are words in the judgment that suggest that the Court did consider it but they are almost equally consistent with the conclusion that what the Court really was considering was the plea of prescription. It seems to be a point raised for the first time in the case when it is on appeal.

The rule as to a new point, raised for the first time in the Appeal Court, will be found in the judgment of Pereira J. in *Appuhàmy v. Nona*[1]. He says—

> "It was held (*Sc.* in the case of *The Tasmania*) that a Court of Appeal ought only to decide in favour of an appellant, on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been offered them when in the witness box. I am not sure that this ruling would apply to a system of procedure in which the framing of issues at the trial is an essential step except to the extent of admitting a new contention urged for the first time in the Court of Appeal, which, though not taken at the trial, is still admissible under some one or other of the issues framed. Under our procedure all the contentious matter between the parties to a civil suit is, so to say, focussed in the issues of law and fact framed. Whetever is not involved in the issues is to be taken as admitted by one party or the other, and I do not think that under our procedure it is open to a party to put forward a ground for the first time in appeal unless it might have been put forward in the Court below under some one or other of the issues framed, and when such a ground, that is to say, a ground that might have been put forward in the Court below, is put forward in appeal for the first time, the cautions indicated in the case of *The Tamania*[2] may well be observed".

See also per Bertram C.J. in *Manian v. Sanmugam*[3]. This rule seems subject however to the qualification contained in the judgment of de Sampayo J. in *Attorney-General v. Punchirala*[4]. Counsel for respondents, he says, had "argued that as no issue had been stated as to whether the talipot, even if genuine, satisfied the requirements of section 6 of the Ordinance (No. 12 of 1840), the action must, as the District Judge himself appears to have thought, fail, in view of the finding as to the genuineness of the talipot. This is taking a very narrow view of the nature of a trial in the Court of first instance. The issue said to be necessary would have reference merely to the construction of an Ordinance, and no Court should refuse to apply statute law, even though there be no formal issue stated on the point. If necessary, the Court should, in pursuance of the provision of the Civil Procedure Code in that behalf, frame an issue

[1] *(1912) 15 N. L. R. 311.*
[2] *(1890) 15 A. C. 223.*
[3] *(1920) 22 N. L. R. 251.*
[4] *(1919) 21 N. L. R. 51.*

before delivering judgment". The effect seems to be that a point of law which is a point of law and nothing else can be raised for the first time in a Court of Appeal. But the point that was argued to us in this case does not seem to be a pure point of law. Writing or no writing is a question of fact, and though there is nothing in the evidence to suggest that the defendant did give anything in writing, still in the absence of any issue on the point or of anything suggesting that it was a point really present to the mind of the Court when trying the case, it is impossible to be certain that there was no writing. If, therefore, I give an opinion on this point, it must not be taken as a ruling that it was one that the appellant could raise on the appeal in this case.

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 Edition, page 77,* citing *Goodman v. Chase*[a]. Here is 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 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.

For the foregoing reasons, I am of opinion that this appeal must be dismissed with costs.

DALTON J.—I agree.

Appeal dismissed.