CASE NOTE

H. ROWE & CO. PTY LTD v. PITTS[1]

Bills of Exchange — Two bills of exchange drawn by creditor on debtor company — Bills accepted by debtor and indorsed in blank by debtor's managing director with intention of making himself liable to creditor if bills dishonoured — Bills dishonoured by acceptor — Action on bills by creditor against managing director — Bills of Exchange Act 1909-1971 (Cth)[2] ss. 34-36, 42, 43, 60(2), 61, 62.

Bills of exchange other than cheques are being used increasingly today in domestic transactions to provide a form of security for credit extended to corporate borrowers. The lender draws a bill of exchange made payable to itself and due at some later date on the borrowing company. In addition to the company's acceptance, the lender requires that the company's representative agree to be personally liable to the lender if the acceptor fails to honour it. The company representative is said to "back" the bill by signing the back of the instrument as well as signing the acceptance on the front for the company, and he is regarded as having personally indorsed the bill to the drawer-payee. The advantage of having a bill backed is that the additional security given to the bill by the personal indorsement of the company representative (the surety-indorser) will enable the drawer-payee to discount it more readily. Further, if the company does not honour the bill, then the person to whom it has been discounted will look to the drawer-payee for payment, and the drawer-payee in turn can demand payment from the surety-indorser. This method of securing a loan has not been used exclusively in regard to corporate borrowers, but nevertheless it can be seen to be particularly appropriate where the borrower is a corporation since such a borrower will have at its disposal persons such as its directors and officers who will agree to act as sureties for it.

While the obligation to the drawer-payee undertaken by the surety-indorser in this type of transaction appears to be unambiguous, dealings of this kind have given rise to a steady stream of litigation in which the surety-indorser has disputed his liability to the drawer-payee. The outcome of the majority of these cases has been to give effect to the clear intentions of the parties to the transaction[3] and, pragmatically at least,

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1 [1973] 2 N.S.W.L.R. 159. Supreme Court of N.S.W.; Sheppard J.

2 References to sections in this Case Note are to sections of this Act unless the contrary is stated.

3 *Steele* v. *M'Kinlay* (1880) 5 App. Cas. 754; *Jenkins & Sons* v. *Coomber* [1898] 2 Q.B. 168 and *M. T. Shaw & Co. Ltd* v. *Holland* [1913] 2 K.B. 15 are the only cases in which the drawer-payee has not succeeded against the surety-indorser. *Steele* v. *M'Kinlay* has been distinguished on the ground that it was a special case in which there was insufficient evidence of the parties' intentions: *Durack* v. *West Australian Trustee Executor & Agency Co. Ltd* (1944) 72 C.L.R. 189, 205-206 *per* Starke J.; *Byles on Bills of Exchange* (23rd ed. 1972) 172-173. The other two cases have been overruled by subsequent decisions: *Durack's* case (1944) 72 C.L.R. 189, 206 *per* Starke J.; *Byles, op. cit.* 173 n. 49.

this area of law is quite certain today—in most cases the surety-indorser will be found to have incurred liability to the drawer-payee. However, the cases also demonstrate that the lines of reasoning adopted by the courts to reach this conclusion have been extremely complicated and not wholly consistent.

The complexities involved in analysing the liability of the surety-indorser to the drawer-payee seem to have arisen in the first place for reasons which are now largely historical. The relationship which this relatively new type of transaction attempts to create between the surety-indorser and the drawer-payee by means of the bill of exchange does not fit easily into the usual framework of legal relationships created by bills of exchange. Thus, in *Steele* v. *M'Kinlay*,[4] which was decided in 1880 and is the first in this series of cases, the Court regarded the central problems which it faced as being first, how to categorise the surety-indorser as a party to the bill, and secondly, how to apply rules governing the liability of parties to bills of exchange which were developed in cases when it was appropriate for the drawer-payee as the prior party to be subject to the claims of subsequent holders to the reverse situation where it is the drawer-payee who claims against the surety-indorser on the ground that the latter is an indorser of the bill.

In regard to the first of those questions, Lord Watson in *Steele* v. *M'Kinlay* held that the character in which such a person became a party to the bill was that of an indorser.[5] However, in relation to the second question, His Lordship held that since the surety-indorser was to be regarded as an indorser, the general rule that an indorser is only liable to subsequent holders determined the liability which he incurred.[6] Hence the surety-indorser was not liable to the drawer-payee since the latter was a prior party.

The appropriateness of this general rule when applied to the case of the surety-indorser *vis-à-vis* the drawer-payee in a transaction of this kind has never been directly questioned in the later cases. Rather, the courts have preferred to adopt the circuitous means of a complicated legal fiction in order to hold that the surety-indorser is liable to the drawer-payee. While the drawer-payee is a party prior to the surety-indorser, he can become a subsequent holder if the bill is negotiated back to him. So the general rule is circumvented by treating the drawer-payee as having indorsed the bill to the surety-indorser who has indorsed it back to the drawer-payee,[7] and the latter party thus becomes a subsequent holder.

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[4] (1880) 5 App. Cas. 754.

[5] *Id.* 782.

[6] *Ibid.* Chalmers (*Bills of Exchange* (8th ed. 1919) 214, 215-217, 226) regarded s. 56 of the Bills of Exchange Act 1882 (Eng.) (s. 61 of the Australian Act) as restating the decision of Lord Watson in *Steele* v. *M'Kinlay.*

[7] *Glenie* v. *Bruce Smith* [1907] 2 K.B. 507, 512 *per* A. T. Lawrence J.; *Gerald McDonald & Co.* v. *Nash & Co.* [1924] A.C. 625; *In re Gooch* [1921] 2 K.B. 593, 601 *per* Lord Sterndale M.R.; *McCall Bros Ltd* v. *Hargreaves* [1932] 2 K.B. 423, 430 *per* Goddard J.; *Byles, op. cit.* 173; Chappenden, "H. Rowe & Co. Pty Ltd v. Pitt [*sic*]: Old and New Problems as to Bills of Exchange" (1975) 49

However, it is submitted that this fiction has outlived any utility it might have originally had. Today a realistic appraisal of the development of the law in this area must result in the conclusion that the courts have in fact recognised this type of case as an exception to which the general rule has no application. Equally clearly, the basis for distinguishing the liability incurred by a surety-indorser in a transaction of this kind from the ordinary liability of an indorser is the manifest intentions of the parties to the transaction. *Rowe's* case is extremely important in this regard in that it supports this appropriately straight forward analysis of the reasons why the surety-indorser does incur liability to the drawer-payee in lieu of the cumbersome fictional approach adopted in earlier cases.

Rowe's case is the most recent Australian case in which the liability of the surety-indorser to the drawer-payee has been considered. The plaintiff was a supplier of electrical goods and the defendant was the managing director of C Co., an electrical contractor to which the plaintiff supplied goods on credit. In 1971 the plaintiff became concerned about the state of C Co.'s account, and in March and again in August of that year the plaintiff drew bills of exchange on C Co. covering the company's then indebtedness. In each case the bill was accepted by C Co. and indorsed by the defendant with the admitted intention of making himself personally liable for the amount of the bill should it be dishonoured. In fact both of these earlier bills were paid by C Co. In November 1971 the plaintiff was again concerned about the extent of C Co.'s indebtedness, and arrangements were made for another two bills, payable at different times, to be drawn on the company to cover the amount. It was agreed that the defendant would personally indorse the bills and the plaintiff would discount them with an accepting house. The bills were signed on the front and indorsed on the back on behalf of the plaintiff and sent to the defendant. The defendant signed the acceptance on the front in his capacity as managing director and also signed the back of the bills in the space provided below the signatures of the plaintiff's representatives. The bills were then forwarded to the accepting house.

Each bill was dishonoured on its due date and, in anticipation of this, the plaintiff paid the accepting house in respect of the dishonoured bills which were then returned to the plaintiff. The defendant was sued by the plaintiff on the bills and the action was tried before Sheppard J. in the Supreme Court of New South Wales. The substance of the defendant's argument was that, to the plaintiff's knowledge he had only signed on behalf of the company. Sheppard J. held against the defendant on this question of fact.[8] Indeed, it is clear that only in a rare

A.L.J. 173, 175; "The Liabilities of the Irregular Indorser" (1941) 50 Yale Law Journal 841, 843.

[8] His Honour made two observations on the facts. First, in view of the fact that the defendant had expressly agreed that his signature on the back of the bill of August 1971 made him personally responsible to the plaintiff, what could he have thought was the necessity for him to sign the back of each of the bills of November if not to incur personal liability. Secondly, in the light of the

case involving a transaction of this kind will the surety-indorser be found, as a matter of fact, not to have intended to incur personal liability to the drawer-payee on the bill.[9] Accordingly, judgment was given in favour of the plaintiff.

Though it might seem to be a complete defence, no submission appears to have been made by the defendant that, regardless of whether he was found in fact to have intended to be personally liable to the plaintiff, his liability on the bills was limited to subsequent holders and did not extend to the drawer-payee.[10] However, Sheppard J. did give consideration to this problematical question of the basis and extent of the liability incurred by a surety-indorser.

This vexed question arises because the surety-indorser is not an indorser of the bill in the ordinary sense in which the term is used in the Act since he is not himself a holder within section 4.[11] Strictly speaking, indorsement is a means of negotiating the bill and this can only be done by the holder who is the person with the property in the bill. Yet, unless the drawer-payee can prove that an extrinsic contract of guarantee existed,[12] he must sue the surety-indorser on the basis of that party's personal indorsement of the bill. But, while the surety-indorser is not an indorser in the ordinary sense, since Lord Watson's decision in *Steele* v. *M'Kinlay*,[13] a distinction has been made by the courts between a person who by definition can indorse a bill (that is, the holder who has a right to the bill) and a stranger who "indorses" with the intention of becoming liable though he has no property in the bill, but who nevertheless incurs the liability of a proper indorser to subsequent holders.[14] This latter type

defendant's admitted knowledge of the implications of his indorsement of the earlier bill, if his intention really had been not to expose himself to personal liability to the plaintiff on the later bills it was incredible that he did not take extreme care to see that he only signed these bills on behalf of the company: [1973] 2 N.S.W.L.R. 159, 166.

[9] As to the general circumstances in which directors will be held to have intended to incur personal liability when their signatures appear on legal documents including bills of exchange see: *Black* v. *Smallwood* (1966) 117 C.L.R. 52, 60-61; *Electrical Equipment of Australia Ltd* v. *Peters* (1957) 57 S.R. (N.S.W.) 361, 363; *Chapman* v. *Smethurst* [1909] 1 K.B. 73; *Elliott* v. *Bax-Ironside* [1925] 2 K.B. 301; ss. 21, 36(5), 31(1) and 31(2) of the Act.

[10] [1973] 2 N.S.W.L.R. 159, 168. A further submission of the defendant, which was also rejected by Sheppard J., was that proper notice of dishonour of the second bill had not been given. For a discussion of this point see Chappenden, *op. cit.* 178-180.

[11] *Chalmers on Bills of Exchange* (13th ed. 1964) 186-187; *Durack's* case (1944) 72 C.L.R. 189, 194 *per* Latham C.J.

[12] In most cases involving this type of transaction the extrinsic contract will be verbal and in all States except New South Wales, where the relevant provisions of the Statute of Frauds have been repealed, it will be unenforceable. One effect of the judgment of Sheppard J. is that in New South Wales the plaintiff will have to elect to bring his action on either the bill or the contract of guarantee. The existence of an independent contract will not assist the plaintiff if he chooses to sue on the bill rather than the contract since this alternative basis for his action will not be allowed: [1973] 2 N.S.W.L.R. 159, 169.

[13] (1880) 5 App. Cas. 754, 782.

[14] *Byles on Bills of Exchange* (23rd ed. 1972) 169.

of party to a bill of exchange has come to be known as what Chalmers calls a "quasi-indorser".[15]

The quasi-indorser, as he shall be now called, has usually been considered to be liable as a party to the bill under one of the following two sections of the Act: (a) either he is liable as a true indorser to a holder under section 60(2), or (b) he has incurred the liability of an indorser to a holder in due course under section 61. But irrespective of under which of these two sections the quasi-indorser is considered to become a party to the bill, there is a further difficulty in holding the quasi-indorser liable to the drawer-payee. This stems from the nature of the liability incurred by an ordinary indorser. As has already been noted, it is a firmly established general rule that an indorser is not liable to a prior party[16] and, upon a realistic view of the transaction, the drawer-payee is a party prior to the quasi-indorser. It is upon the question of the application of this general rule to the situation of the quasi-indorser that Sheppard J.'s decision is most significant and for this reason is worth quoting at length:

> much discussion took place in argument as to the basis of the defendant's liability to the plaintiff. In *Byles on Bills of Exchange* 23rd ed., p. 170, the learned authors say . . . "the third person comes under an obligation to all subsequent holders precisely similar to that of the drawer. The indorsement, however, does not impose a similar obligation to prior parties, except, it is submitted, in the case of a drawer-payee who is the holder".
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> The authority cited for this passage is a reference to the judgment of Lord Blackburn in *Steele* v. *M'Kinlay*. His Lordship's judgment is not, however, authority for the last sentence of the passage cited from Byles, but that sentence is clearly supported by a number of other cases, most, but not all, of which deal with the authority of a drawer or payee to complete a bill or a promissory note by indorsing it subsequently to indorsement by a person who has backed the bill or note. These cases include *Wilkinson & Co.* v. *Unwin; Gerald McDonald & Co.* v. *Nash & Co.; National Sales Corporation Ltd* v. *Bernardi; McCall Bros Ltd* v. *Hargreaves; Durack* v. *West Australian Trustee Executor & Agency Co. Ltd* and *Lombard Banking Ltd* v. *Central Garage and Engineering Co. Ltd.* The sentence is also supported, at least indirectly, by the judgment of Lord Watson in *Steele* v. *M'Kinlay*. *What it comes down to is that a person who signs a bill in order to back it will be liable to the drawer, in the event of dishonour, if it was his intention to make himself so liable when he signed the bill.*
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> *Here there can be no question that the defendant intended to make himself liable not only to subsequent holders in due course of the bills but to the drawer-payee, that is the plaintiff.*[17]

While in at least one of the judgments cited by Sheppard J. resort was made to the fictional transaction between the quasi-indorser and the

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[15] *Chalmers on Bills of Exchange* (13th ed. 1964) 186; *Durack's* case (1944) 72 C.L.R. 189, 194 *per* Latham C.J.

[16] *Steele* v. *M'Kinlay supra* n. 13; *Ferrier* v. *Stewart* (1912) 15 C.L.R. 32, 37 *per* Griffith C.J.; *Durack's* case (1944) 72 C.L.R. 189, 195 *per* Latham C.J.

[17] [1973] 2 N.S.W.L.R. 159, 167-168 (italics added).

drawer-payee,[18] His Honour expressly interpreted those cases as turning upon the paramount consideration of the parties' intentions.[19] Sheppard J. did not find it necessary to rely upon the fictional transaction between the drawer-payee and quasi-indorser in order to hold that, notwithstanding the general rule that indorsement only imposes liability to subsequent holders on an ordinary indorser, the quasi-indorser did incur liability to the drawer-payee. Thus, in order to decide the case in favour of the plaintiff, but without reference to the fiction, Sheppard J. must have regarded the general rule as having no application to the quasi-indorser *vis-à-vis* the drawer-payee in a transaction of this kind simply because the quasi-indorser clearly intended to be liable to the drawer-payee.

It has already been noted that this approach has the merit of being both simple and direct. But if this is not regarded as being sufficient for preferring it to the fictional analysis then, as will be seen from an examination of the fiction itself, the latter analysis either cannot work or is redundant. It has been noted elsewhere[20] that the fiction described earlier[21] appears to be subject to a logical flaw which will bring about the operation of section 42. While the drawer-payee as indorsee has an action against the quasi-indorser, the latter in turn will have an action against the drawer-payee as drawer. Section 42 provides against possible circuity of action by denying the drawer an action against an intervening party when that party has negotiated the bill back to him. Thus, in order to avoid the operation of section 42, the drawer-payee has had to show that he was not liable to the indorsee on the original indorsement.[22]

Whether the operation of section 42 would prevent the drawer-payee from recovering has depended largely upon how the decision in *Wilkinson & Co.* v. *Unwin*[23] is interpreted. In that case both Bramwell and Baggallay L.JJ. held that if the quasi-indorser *intended* to be liable to the drawer-payee then he did not have an action against the drawer-payee on the original indorsement.[24] Brett L.J. was the only member of the Court who held that if no *consideration* was given for the original indorsement to the quasi-indorser then the latter had no action against the drawer-payee and thus section 42 would provide no defence.[25] The argument advanced by Chappenden that the difficulty created by section 42 is illusory[26] must be taken to be based on the judgment of Brett L.J. although Chappenden cites *Wilkinson & Co.* v. *Unwin* generally as supporting the following proposition:

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18 *McCall Bros Ltd* v. *Hargreaves* [1932] 2 K.B. 423, 430 *per* Goddard J.

19 *Wilkinson & Co.* v. *Unwin* (1881) 7 Q.B.D. 636, 638 *per* Bramwell L.J., 639 *per* Baggallay L.J.; *Gerald McDonald & Co.* v. *Nash & Co.* [1924] A.C. 625, 632 *per* Viscount Haldane L.C.; *National Sales Corporation Ltd* v. *Bernardi* [1931] 2 K.B. 188, 191-192; *Durack's* case (1944) 72 C.L.R. 189, 203 *per* Rich J., 207 *per* Starke J., 212 *per* McTiernan J.; *Lombard Banking Ltd* v. *Central Garage & Engineering Co. Ltd* [1963] 1 Q.B. 220, 229.

20 Chappenden, *op. cit.* 176.

21 *Supra* p. 77.

22 *Wilkinson & Co.* v. *Unwin* (1881) 7 Q.B.D. 636, 637 *per* Bramwell L.J.

23 (1881) 7 Q.B.D. 636.

24 *Id.* 638, 639 (respectively).

25 *Id.* 640.

26 Chappenden, *op. cit.* 176.

> The drawer-payee, in his capacity as indorsee, has given value to the quasi-indorser for his promise to pay. The quasi-indorser, however, has not given consideration to the drawer-payee for his signature, and between the immediate parties on a bill the absence of consideration can constitute a defence.[27]

On this view of *Wilkinson & Co.* v. *Unwin*, in order that the fictional transaction might operate to the drawer-payee's advantage, the quasi-indorser must receive value from the drawer-payee for his promise to back the bill. But, unless the quasi-indorser has some personal interest in the underlying transaction it is difficult to see what consideration he can be said to have received from the drawer-payee in return for his promise to back the bill in his personal capacity. Moreover, even if the quasi-indorser can be said to have received value from the drawer-payee, there is still a problem in avoiding the operation of section 42 in this way for it can be argued that the quasi-indorser can always be regarded as having given consideration to the drawer-payee for the latter's signature. That the quasi-indorser has given valuable consideration can be seen from the purpose of obtaining individual "backing" for instruments as explained by *Byles on Bills of Exchange*:

> The object of backing a bill is to increase its value by reason of the additional credit which it derives from the signature of the third person. . .[28]

Thus, the drawer-payee should not be able to avoid the operation of section 42 by arguing that no consideration was given by the quasi-indorser. However, if the majority view in *Wilkinson & Co.* v. *Unwin* is adopted, then section 42 is no longer an obstacle to the drawer-payee since it will almost always be found that the quasi-indorser had intended to be liable to him.

It is only by adopting the majority view that the fiction can operate so as to give the drawer-payee a remedy against the quasi-indorser. But this fact has a further implication. The fiction to which the courts have resorted in order to avoid the general rule (that an indorser is not liable to a prior party) can only be made workable by restating the primary finding of fact (that the quasi-indorser intended to be liable not only to subsequent holders but also to the drawer-payee). The fiction would therefore appear to be redundant since the liability of the quasi-indorser to the drawer-payee must still be decided on the primary question of the parties' intentions. Thus the fiction is at best unnecessary and at worst unworkable. Moreover, it is a tortuous and unduly complicated way of analysing the respective rights and liabilities of parties to a relatively unambiguous commercial agreement.

There has been discussion in most cases as to whether the quasi-indorser is liable as a true indorser to a holder under section 60(2) or

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[27] *Ibid.* Support for Chappenden's interpretation of the case is perhaps found in *In re Gooch* [1921] 2 K.B. 593, 600 where Lord Sterndale M.R. cited *Wilkinson's* case as supporting the proposition that, since sufficient consideration had moved from the drawer-payee to the quasi-indorser, the latter could not set up the defence against the drawer-payee arising from the prior indorsement.

[28] *Byles, op. cit.* 170.

has incurred the liability of an indorser to a holder in due course under section 61. There is conflicting authority on this point, although it would appear that in Australia today the general view of the courts is that a quasi-indorser incurs liability under section 60(2). Which one of these two sections applies goes to the first question raised by the Court in *Steele* v. *M'Kinlay*, that of how to categorise the quasi-indorser as a party to the bill. The attitude of the Australian courts has been to treat this question as not affecting the drawer-payee's ultimate right to recover,[29] and the courts have invariably held that one of these two sections will apply in order to found the action. The courts have rightly not allowed the technical difficulties which arise in applying either section to defeat the clear intentions of the parties. Nevertheless, the issue has not been satisfactorily settled.

Problems arise in adopting either section. In regard to section 61, the unanimous decision of the House of Lords in *R. E. Jones Ltd* v. *Waring & Gillow Ltd*[30] that the original payee of a bill cannot be a holder in due course would appear to effectively prevent the quasi-indorser's liability being based upon section 61 since the rights conferred by that section are limited to a holder in due course. Notwithstanding that decision, in the English cases which have adopted the view that the quasi-indorser incurs liability under section 61,[31] it has been argued that the drawer-payee satisfies the requirements of the definition of a holder in due course in section 34(1). The irregularity on the face of the bill—that in these cases it had not been signed in blank by the drawer-payee before it was signed by the quasi-indorser—is remedied by virtue of section 25 and its retrospective effect. However, although the point does not appear to have been raised in these cases, the drawer-payee cannot satisfy the further requirement of section 34(1)(b)—that he take the bill without notice of any defect in the transferor's title—since the drawer-payee knows that the quasi-indorser has no property in the bill.

On the other hand, founding the quasi-indorser's liability on section 60(2) involves regarding the quasi-indorser as a true indorser. Clearly he is not as he does not own the property in the instrument nor sign with the intention of negotiating it. Thus, to hold that he is liable under section 60(2) involves a distortion, or at least a fictional view, of the character in which he becomes a party to the bill and the purpose for which he signs. Moreover, if it is correct to say that the general rule governing the liability of a true indorser has no application to the quasi-indorser who intends to be liable to the drawer-payee, then it would only seem to confuse the issue to say that the character in which

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[29] *Ferrier* v. *Stewart* (1912) 15 C.L.R. 32, 38 *per* Griffith C.J.; *Trimper* v. *Frahn* [1925] S.A.S.R. 347, 353-354 *per* Angas Parsons J.

[30] [1926] A.C. 670; also *Ayres* v. *Moore* [1940] 1 K.B. 278. For critical comments on *Jones's* case see: (1927) 3 Cambridge Law Journal 84; (1927) 36 Yale Law Journal 608; (1927) 36 Yale Law Journal 1005; (1926) 74 University of Pennsylvania Law Review 831; (1926) 6 Boston University Law Review 124.

[31] *Yeoman Credit Ltd* v. *Gregory* [1963] 1 W.L.R. 343, 348-350; *Glenie* v. *Bruce Smith* [1908] 1 K.B. 263, 268-269 *per* Fletcher Moulton L.J.

he becomes a party to the bill is that of an indorser. This objection equally applies to section 61 where the quasi-indorser is deemed to have incurred the liability of an indorser.

Thus, before examining the conflicting authorities on this question, it is important to note that neither of these two sections seems to provide a basis for the quasi-indorser's liability as a party to the bill. The quasi-indorser should be deemed to be a party to the bill in order that the drawer-payee might have an action against him on the instrument. But this should be recognised as being an extension of the Act since the quasi-indorser does not incur the liability of an ordinary indorser.

It would appear from the most recent English cases[32] that the quasi-indorser incurs liability under section 61 notwithstanding the decision in *Jones's* case. As has already been noted, some English cases have adopted the view that the quasi-indorser incurs liability under section 61 since the drawer-payee satisfies the requirements of the definition of a holder in due course in section 34(1). In *Glenie* v. *Bruce Smith*[33] it was further held that section 35(2) places the onus of disproving that the drawer-payee is a holder in due course on the quasi-indorser since the drawer-payee is a "holder" within section 4.[34] Fletcher Moulton L.J. in *Lloyd's Bank Ltd* v. *Cooke*[35] also adopted this line of reasoning, but it was rejected by the Court of Appeal in *Talbot* v. *Von Boris*,[36] although Farwell L.J. in that case considered that his decision was not inconsistent with the general principle that the original payee of a bill can be a holder in due course.[37] In *Jones's* case the House of Lords also rejected Fletcher Moulton L.J.'s interpretation of sections 34(1) and 36 in favour of Lord Russell's construction of those sections in *Lewis* v. *Clay*.[38] Lord Russell considered that the original payee of a bill could not be a holder in due course since the bill had not been "negotiated" to him within the meaning of the Act.[39] In *Gerald McDonald & Co.* v. *Nash & Co.*[40] Lord Dunedin rejected the application of section 61 on the ground that the drawer-payee was not a holder in due course since he did not really take the bills from the quasi-indorser, the latter having no property in them.[41] On the other hand, Viscount Haldane L.C. held that section 61 applied.[42] In *National Sales Corporation Ltd* v. *Bernardi*,[43] Wright J. held that liability was based on section 60(2),[44]

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[32] *Yeoman Credit Ltd* v. *Gregory* [1963] 1 W.L.R. 343; *Lombard Banking Ltd* v. *Central Garage & Engineering Co. Ltd* [1963] 1 Q.B. 220.

[33] [1908] 1 K.B. 263.

[34] *Id.* 266 *per* Cozens-Hardy M.R., 269 *per* Fletcher Moulton L.J.

[35] [1907] 1 K.B. 794.

[36] [1911] 1 K.B. 854.

[37] *Id.* 865-866.

[38] (1897) 67 L.J.Q.B. 224.

[39] *Id.* 227.

[40] [1924] A.C. 625.

[41] *Id.* 635-636.

[42] *Id.* 632.

[43] [1931] 2 K.B. 188.

[44] *Id.* 195-196.

and *Byles on Bills of Exchange*[45] appears to take the view that this approach is preferable to that of Scarman J. in *Lombard Banking Ltd* v. *Central Garage & Engineering Co. Ltd*[46] where liability was based on section 61. In both the *Lombard Banking* case and *Yeoman Credit Ltd* v. *Gregory*[47] no reference was made to the decision in *Jones's* case, but neither was that case relied upon in *Bernardi's* case.

The authorities in Australia are equally conflicting. In *Ferrier* v. *Stewart*[48] Griffith C.J. held that liability attached under section 61 assisted by the statutory estoppel of section 60(2),[49] and Barton J. agreed with this construction.[50] On the other hand, Isaacs J. approved *Lewis* v. *Clay* and held that liability must be under section 60(2).[51] The view of Griffith C.J. was followed in *Trimble* v. *Thorne*,[52] *Trimper* v. *Frahn*[53] and *Sydney & North Sydney Lime Burners Ltd* v. *Phillips*.[54] However, in *Durack* v. *West Australian Trustee Executor & Agency Co. Ltd*,[55] Latham C.J. held that these cases were overruled to the extent that they were inconsistent with *Jones's* case[56] and McTiernan J. also followed *Jones's* case.[57] On the other hand, Starke J. held that, notwithstanding *Jones's* case, liability could be based on section 61.[58] In *Rowe's* case Sheppard J. held that the drawer-payee could not be a holder in due course and so could not rely on section 61, basing his decision, having regard to the fact that the plaintiff was the original payee, on *Jones's* case and *Durack's* case.[59]

The facts of *Rowe's* case differ from those of most other cases in which the availability of section 61 has been considered in that there was a genuine negotiation of the bills back to the drawer-payee by the accepting house which was a holder in due course.[60] However, in regard to this aspect of the transaction, Sheppard J. found that the plaintiff was not a holder in due course because, on the facts of the case, the plaintiff had notice of the acceptor's dishonour when this negotiation was made.[61] His Honour noted the possibility of arguing that since the plaintiff derived its title to the bills from a holder in due course by virtue of

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45 *Byles, op. cit.* 173. However, *Byles* is not consistent on this point since (at 170) approval also appears to be given to the decision in *Yeoman Credit Ltd* v. *Gregory* [1963] 1 W.L.R. 343.

46 [1963] 1 Q.B. 220, 230.

47 [1963] 1 W.L.R. 343.

48 (1912) 15 C.L.R. 32.

49 *Id.* 37-38.

50 *Id.* 41.

51 *Id.* 42.

52 [1914] V.L.R. 41, 51-52.

53 [1925] S.A.S.R. 347, 353-354, 356-357.

54 (1931) 31 S.R. (N.S.W.) 505, 508.

55 (1944) 72 C.L.R. 189.

56 *Id.* 197.

57 *Id.* 212.

58 *Id.* 207-208. While Latham C.J. and McTiernan J. delivered dissenting judgments in *Durack's* case, Starke J. was the only member of the majority who considered this point.

59 [1973] 2 N.S.W.L.R. 159, 168.

60 *Id.* 169.

61 *Id.* 168.

section 34(3) it became a holder in due course itself, irrespective of the notice of dishonour. However, His Honour found it unnecessary to decide this point.[62] In *Byles on Bills of Exchange* it is said that where a holder takes from a holder in due course then by virtue of section 34(3) it is immaterial that he had notice since he stands in the shoes of the person from whom he takes.[63] But the commentary in *Byles* upon section 34(3) appears to be confined to the usual case where the person who derives title from a holder in due course has not been a party to the bill prior to this negotiation. In *The Law of Negotiable Instruments in South Africa* Cowen specifically considers whether section 34(3) perfects the title of a holder who has already been a party to the bill at an earlier stage:

> A difficult question arises where a bill or note is negotiated by a holder in due course back to a prior indorser, or to the drawer in the case of a bill. The question is whether a person whose title is defective can better it by negotiating the instrument to a holder in due course and subsequently reacquiring it. It is clear that a negotiation back to a prior party, there being no intermediate holder in due course, will not purge defects of title which attached to the instrument when it was previously in his hands, or which have come into existence thereafter. And there is authority for the view that the result is the same even where the instrument has been reacquired by a prior party from a holder in due course, but this view is not free from doubt.[64]

The authorities which Cowen cites as casting doubt upon that last proposition are decisions of the South African and American courts. *In re Gooch*[65] appears to be the only other Anglo-Australian case apart from *Rowe's* case in which there has been a genuine negotiation back to the drawer-payee by a discounter. However, in that case the drawer-payee appears not to have had notice of the dishonour of the bill by the acceptor when the bank negotiated it back to him, and for this reason it was unnecessary to raise section 34(3). Nevertheless, Lord Sterndale M.R. and Scrutton L.J. emphasised that the defendant's liability attached under section 60(2) and not section 61.[66] On the basis of those judgments, it would appear that even if section 34(3) did render the drawer-payee's notice immaterial he would not be regarded as a holder in due course and would not be able to rely on section 61.

While Sheppard J. held that section 61 did not apply, his judgment differs from all previous decisions in that rather than finding that the defendant incurred liability under the alternative section 60(2), he held that sections 43 and 62 were sufficient to enable the plaintiff to succeed in his capacity as holder. It is difficult to understand how Sheppard J. might have reached this conclusion. Section 43 deals only with the right

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[62] *Ibid.*

[63] *Byles, op. cit.* 189.

[64] Cowen, *The Law of Negotiable Instruments in South Africa* (4th ed. 1966) 286.

[65] [1921] 2 K.B. 593.

[66] *Id.* 601, 607 (respectively).

of the holder to sue on the bill and not with his right to recover,[67] that is, with the matter which is in issue in these cases. Section 62, in so far as it is relevant, merely provides: "Where a bill is dishonoured . . . the holder may recover from *any party liable on the bill*".[68] The application of that section involves the assumption that the quasi-indorser is a party liable on the bill but the section does not indicate precisely where in the Act he acquires that status. Thus, sections 43 and 62 would not seem to be sufficient to provide a basis for the drawer-payee's claim against the quasi-indorser. However, since Sheppard J. did expressly reject the plaintiff's submission that the defendant was liable under section 61, this might be taken as necessarily implying that the defendant's liability attached under section 60(2) since this would appear, from the authorities which were examined by His Honour, to be the only other way in which the defendant could have been liable as a party on the bill.[69]

On the other hand, in avoiding any reference to section 60(2) as providing a possible alternative to section 61, His Honour's judgment might be construed as implying that neither section really covered the case of the quasi-indorser. Whether or not this is the correct conclusion to draw from the decision, in holding two apparently irrelevant sections of the Act to be sufficient to enable the plaintiff to succeed His Honour's judgment has added to the already conflicting and unsatisfactory authority on this point.

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[67] *Chalmers on Bills of Exchange* (13th ed. 1964) 128.

[68] Italics added.

[69] Chappenden, *op. cit.* 178. A third way in which the defendant could have been liable as a party on the bill is as an "accommodation indorser", that is, as a person who has signed the bill as an indorser with the intention of lending the credit of his name to the acceptor (s. 33(1)) and who is liable on the bill to a holder for value (s. 33(2)). *Trimper* v. *Frahn* [1925] S.A.S.R. 347 appears to be the only Anglo-Australian case in which the liability of the surety-indorser has been based upon s. 33. The same technical difficulties which arise under s. 61 appear to arise under s. 33. First, the surety-indorser is regarded as an indorser of the bill. Secondly, although the section states that the accommodation indorser is liable to a holder for value, the American courts, which have given more consideration to this basis for the surety-indorser's liability, have interpreted s. 29 of the Negotiable Instruments Law as only allowing a holder who has notice of the want of consideration between the accommodation party and the party accommodated *but who is in other respects a holder in due course* to recover from the accommodation indorser: *National City Bank* v. *Parr* (1933) 185 N.E. 904, 906. However, this interpretation does not *ipso facto* exclude the drawer-payee from recovering against an accommodation indorser since the American courts have also held that the drawer-payee can be a holder in due course: (1926) 6 Boston University Law Review 124, 126; (1926) 74 University of Pennsylvania Law Review 831, 832. For further comments on the problems involved in the interpretation of the vague provisions of the American equivalent of s. 33 see: Ames, "The Negotiable Instruments Law" (1900) 14 Harvard Law Review 241, 248-250; Brannan, "Some Necessary Amendments of the Negotiable Instruments Law" (1913) 26 Harvard Law Review 493, 494, 498; Behrens, "The Status of an Accommodation Indorser under Section 29 of the Uniform Negotiable Instruments Law" (1949) 23 St. John's Law Review 333, 338.

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