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# "A Promise to Answer for the Debt Default or Miscarriage of Another"—When Consideration is Beneficial to Promisor

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## "A PROMISE TO ANSWER FOR THE DEBT, DEFAULT OR MISCARRIAGE OF ANOTHER"—WHEN CONSIDERATION IS BENEFICIAL TO PROMISOR.

In Leonard v. Vredenburgh[1] Chief Justice Kent divided the cases falling within the section of the Statute of Frauds dealing with promises to answer for the debt, default or miscarriage of another into three classes:

"1. Cases in which the promise is collateral to the principal contract, but is made at the same time and becomes an essential ground of the original credit.

"2. Cases in which the collateral undertaking is subsequent to the creation of the debt, and was not the inducement to it, though the subsisting liability is the ground of the promise.

"3. A third class of cases in which the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties.

"The first two classes are within the statute, but the last is not." This article will deal only with the third class of cases mentioned above.

Chief Justice Kent's statement is undoubtedly too broad. Construing this statement literally the Statute of Frauds would be entirely defeated, since any new consideration would take the case without the statute. Obviously this was not Judge Kent's intention. A consideration is necessary for every simple contract, and it is just as essential to a contract within the statute as to one to which the statute is not applicable. The purpose of the statute is to render contracts unenforceable, if not in writing, which would otherwise have been valid and enforceable. Kent's broad statement has been

1. 8 Johnson 29.

restricted and the true rule laid down by Chief Justice Shaw in Nelson v. Boynton[2], as follows: "Cases are not considered as coming within the Statute of Frauds when the party promising has for his primary object a benefit which he did not before enjoy accruing immediately to himself; but where the object of the promise is to obtain the release of the person or property of the debtor, or other forbearance or benefit to him it is within the statute." This section of the Statute of Frauds when passed in 1672, was intended to prevent the perpetration of fraud upon the promisor, but when the main object of the promise is to secure a direct benefit to the promisor, the element of fraud disappears and the statute is unnecessary.

It would seem obvious that if the actuating motive of the promise is to obtain for the promisor some direct benefit, such as the relinquishment of a lien on property of which he is the owner or the completion of work in which he is interested, then such promise is an original one, and the mere fact that incidentally it guarantees another's debt will not bring it within the operation of the Statute of Frauds. But if his promise, although induced by a pecuniary consideration moving directly to him, is made mainly for the benefit of the debtor, to guarantee his debt, it is within the statute and must be in writing. Such is the case with contracts made with surety companies.

This rule has been consistently followed in England and in the majority of the United States. This article can only attempt to show its application in a few important jurisdictions.

In our own State ever since Walther v. Merrill[3], there has been no break in the chain of decisions on this subject, and the rule is well established. Kansas City Sewer Pipe Co. v. Smith;[4] Martin v. Harrington.[5] In Moore v. McHaney,[6] A held a chattel mortgage on mules belonging to B, who was

2. 3 Metcalf 396.
3. 6 Mo. App. 370 (1878).
4. 36 Mo. App. 608, l. c. 625, 626.
5. 174 Mo. App. 707, l. c. 709, 710 (1913).
6. 191 Mo. App. 686 (1915).

using them to do work for C. B defaulted and C, who was desirous of having the work completed, in consideration of A's refraining to foreclose, promised to pay the mortgage. The court unanimously held that since the primary object of C's promise was to directly benefit himself, it made no difference that B's debt remained, and C's promise was not within the Statute of Frauds, although incidentally it was a promise to pay another's debt.

The same consistency of opinion appears in the New York decisions following Leonard v. Vredenburgh, *supra*, but, as in Massachusetts, the rule is somewhat restricted. Farley v. Cleveland;[7] Mallory v. Gillett;[8] Schultz v. Cohen;[9] Mannetti v. Doege.[10] In Sinkovitz v. Applebaum,[11] plaintiff, a subcontractor, refused to complete the work on defendant's house because of the contractor's failure to pay; whereupon defendant, in consideration of plaintiff's completing the work, promised to pay him. Held, not within the Statute of Frauds because defendant's promise was based on a new and independent consideration consisting of a direct benefit to him, which was the sole motive for his promise.

The Massachusetts cases follow Nelson v. Boynton, *supra*. Ames v. Foster;[12] Manning v. Anthony.[13] In the last case A held a mortgage on a certain piece of land placed thereon by B, defendant's grantor. Defendant, also owner of the equity of redemption, promised that if A would forbear foreclosing the mortgage against the land he (Defendant) would pay the mortgage note. Held, defendant's promise was not within the Statute of Frauds since it was made for his own benefit, irrespective of the fact that B's debt was thereby incidentally guaranteed.

Clifford v. Luhring,[14] lays down the same rule for Illinois.

7. 4 Cowen 432 (1825).
8. 21 N. Y. 412, l. c. 418-420.
9. 13 Misc. 638.
10. 48 App. Div. 567 (1900).
11. 56 Misc. 527 (1907).
12. 106 Mass. 400, l. c. 403.
13. 208 Mass. 399.
14. 69 Ill. 401 (1873).

Also in accord are Murto v. McKnight;[15] Blasdell v. Erickson.[16]

The Supreme Court of the United States in Emerson v. Slater,[17] approved the rule as stated above. In this case plaintiff was a contractor under contract to build a railroad for C, a corporation, of which defendant was a creditor. The payment of C's debt to the defendant depended upon the success of the road when completed and in operation. Plaintiff, failing to receive his monthly salary, refused to continue the work. Defendant then orally promised to pay plaintiff if he would complete the work. Held, that this promise was not within the scope of the Statute of Frauds because the consideration for it was a direct benefit to the promisor (Defendant). In accord with this case are Davis v. Patrick[18]; Mine and Smelter Supply Co. v. StockGrowers' Bank. [19]

In the jurisdiction where the Statute of Frauds originated the decisions clearly show that the judges are convinced that such a promise is not within the mischief provided against by the statute, Castling v. Aubert;[20] Fitzgerald v. Dressler.[21]

The textbook authorities on this subject are numerous, including Wood on the Statute of Fraud,[22] and Parsons on Contracts.[23]

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15. 28 Ill. App. 238, l. c. 246
16. 157 Ill. App. 615, l. c. 618
17. 22 Howard 28 (1859).
18. 141 U. S. 479.
19. 173 Fed. 859, l. c. 863.
20. 2 East 325, l. c. 331.
21. 7 C. B. (N. S.) 374, l. c. 392.
22. Pages 224—225.
23. Pages 24-27 (Eighth Edition).