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Bissig v. Britton

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BISSIG v. BRITTON.[1]

Is a promise by one party to indemnify another against loss by his becoming surety for a third party, a promise to answer for the debt, default or miscarriage of another so as to bring the case within the provisions of the Statute of Frauds, or is it an original, independent agreement between the promisor and promisee and valid although merely an oral statement? As many learned writers attempt to explain, the problem concerns itself unnecessarily with the word indemnity. However, it is not this alone which determines whether the contract is within the Statute of Frauds, but the real liability of the promisor to reimburse the promisee irrespective of any duty owing from the principal or original debtor to the later surety. Williston, in a recent work on contracts, states that the important consideration is not the term indemnity but "the contingency against which the promisor undertook to indemnify. It is a primary question whether the promisor agrees not merely to indemnify but to indemnify for the debt, default or miscarriage of another."

It is universally conceded that the statute in question applies only to those promises made to a person to whom another is answerable. Nevertheless, it seems to be the reasonable view, that when one becomes surety for a debtor at the request of another this forms a special agreement between such surety and promisor, the consideration being the separate undertaking to reimburse, without which the surety would not have become a party to the transaction. In such cases, it is not the debtor's duty, express or implied, to compensate the surety which induces the latter to sign his bond or note, but the distinct obligation of the indemnitor to save

1. 59 Mo. 204.
2. 2 Esp. 404.
3. 8 B. & C. 728.

him harmless from any loss which he may subsequently incur.

The weight of modern English authorities maintains that such a promise of indemnity is not governed by the Statute of Frauds. The earliest case involving this question is that of Winkworth v. Mills,[2] which decided that a promise of indemnity was within the Statute. Later, there were three leading English cases decided respectively in 1828, 1839 and 1874, which show clearly the unsettled trend of opinion and afford a brief history of the situation. In the first of these, Thomas v. Cook,[3] the doctrine of Winkworth v. Mills was overthrown and the oral promise of the defendant to reimburse the plaintiff in becoming surety on a bond was held not to be within the Statute of Frauds and valid.

But the justices of England were not content with this doctrine. In 1839, Thomas v. Cook was overruled by Green v. Creswell,[4] in which a promise of the defendant to indemnify the plaintiff in joining on a bail bond was considered a promise to answer for the debt or default of another and within the Statute of Frauds. The former opinion which supported oral agreements to indemnify was repudiated as unsatisfactory and as tending to create the same mischief which the Statute had been enacted to overcome. It was not long, however, until the Court again reversed itself by the decision of Wildes v. Dudlow.[5] Here, the oral promise of A to save B harmless if he would guarantee C's debt was held to constitute an independent liability in A capable of enforcement regardless of the lack of a written statement.

Subsequent to this decision, the Courts of England have continued to abide by this ruling and have rallied to their view of a large majority of the State Courts. There are still a few American states, indeed a decided minority, which hold that such a promise of indemnity is within the Statute of Frauds. Those generally referred to as comprising this class are South Carolina, Tennessee, Pennsylvania, Ohio and Missouri.

4. 10 A. & E. 453.
5. L. R. 19 Eq. 198.

It certainly is not to be commended that Missouri should concur with those in the minority. Lawyers explain that the leading contra case of Bissig v. Britton[6] (1875), supplying the Missouri rule, supports Green v. Cresswell only because the later decision of Wiles v. Dudlow had not yet reached the state courts. The facts of the case were briefly these: The plaintiff at the defendant's request became surety on one Wisner's bond, with the oral assurance that the defendant would indemnify him against loss. The court decided that Wisner was primarily liable on the bond and that the defendant's promise was to answer for the default of another and thus within the Statute of Frauds.

Missouri Courts are not only among the minority on this question, but seem proud of the fact that they are consistently following an English precedent which had already been overruled at the time Bissig v. Britton was decided. The rule of this case has never been varied in the Missouri Courts. Following this opinion are Hurt v. Ford[7] in 1897, Fressell v. Williams[8] in 1901 and Gansey v. Orr[9] in 1902, which hold a promise of indemnity within the Statute of Frauds. It is to be hoped that Missouri will soon adopt the more reasonable and practical view, and thus bring to our courts on this question the same high esteem which has generally been accorded them by other American tribunals.

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6. 59 Mo. 204.
7. 142 Mo. 301.
8. 87 Mo. App. 528.
9. 173 Mo. 546.