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STUDIES IN THE LAW OF THE STATUTE OF FRAUDS.

I. *The effect which the nature of the consideration for a guaranty may have in determining the question whether such promise is or is not within the statute.*

IN a number of American cases following the lead of the early decision of *Leonard v. Vredenburg*, 8 Johns. 39, KENT delivering the opinion of the court, a rule was laid down to the effect that where a guaranty is given upon a new consideration moving to the promissor, the promise is not within the Statute of Frauds: *Townsend v. Sumrall*, 8 Pet. 182; *Myers v. Morse*, 15 Johns. 425; *Creel v. Bill*, 2 J. J. Marsh. 211, and cases cited in Fell on Guar. 20-22 notes. Burge, in his work on Suretyship, relying upon 3 Kent Com. 121-2, and cases there cited, none of which, except *Leonard v. Vredenburg*, support the proposition, says: "But if the promise to pay the debt of another arises out of some new and original consideration of benefit or injury moving between the newly-contracting parties, it is not then a case within the statute." A distinction in this relation was taken at one time between a consideration moving to the promissor—*i. e.* a positive benefit to him—and a loss to the promisee. See Smith on Contracts, 3 Amer. ed. 117 (* p. 47), n. 1, and some of the authorities cited *infra*, as supporting the rule of *Leonard v. Vredenburg*. As to this the same arguments will apply as are used below against the kindred fallacy begotten by Chancellor KENT. In *Farley v. Cleveland*, 4 Cow. 492 (affirmed 9 Cow. 630), the doctrine of *Leonard v. Vredenburg* is re-asserted. And dicta to the same effect are to be found in the following cases: *Blount v. Hawkins*, 19 Ala. 100;

McKenzie v. Jackson, 4 Ala. 230; *Elder v. Warfield*, 7 Harr. & Johns. 39; *Dearborn v. Parks*, 5 Greenl. 81; *Stewart v. Campbell*, 58 Me. 439; *French v. Thompson*, 6 Vt. 60; *Lutz v. Adams*, 7 Eng. 174; *Doyle v. White*, 26 Me. 341; *Cooper v. Chambers*, 4 Dev. 261 (this case, with *French v. Thompson*, is properly determinable on the principle of *Goodman v. Chase*, 1 B. & Ald. 297, which decided that a promise by the defendant to pay the debt of another who has been taken in execution for it on condition of his discharge, is not within the statute, because by the discharge from execution the original debt is extinguished); *Brown v. Curtiss*, 2 Com. 226, cites *Leonard v. Vredenburg*, but comes within the different principle of *Johnson v. Gilbert*, 4 Hill (N. Y.) 178, given thus by Browne (Browne on the Statute of Frauds, § 165): "The common case of the holder of a third person's note assigning it for value with a guaranty. * * * The assignor owes the assignee, and that particular mode of paying him is adopted: he guarantees in substance his own debt." *Maxwell v. Haynes*, 41 Me. 659, relies on *Leonard v. Vredenburg*, but comes within a different principle. See the cases collected in *Farley v. Cleveland*, and as to this latter authority see Browne, § 187. See also *Jennings v. Webster*, 7 Cow. 256, and *Hetfield v. Daw*, 3 Dutcher 447. Parsons, in his work on Contracts, Vol. II., p. 9, seems by a statement which is not very felicitously expressed to support the doctrine of *Leonard v. Vredenburg*; *sed vide* Id. III., p. 24.

In *Fell on Guaranty* 20-2, a new consideration is apparently regarded as taking the promise out of the statute: the language is far from clear, however: *vide* p. 485-7, for collection of cases. Judge SHAW, in *Nelson v. Boynton*, 3 Metc. 402, says that "The rule to be derived from the decisions seems to be this, that cases are not considered as coming within the statute when the party promising has for his object a benefit which he did not before enjoy accruing immediately to himself." See also *Curtis v. Brown*, 5 Cush. 491, for another statement on this subject, by the same eminent judge, and *Garner v. Hudgins*, 46 Mo. 399. *Allen v. Thompson*, 10 N. H. 34, supports the rule of *Leonard v. Vredenburg*; in upholding the verbal promise the court seemed to have assumed that the transaction was primarily for the defendant's own benefit, a fact which in no way appears. In *Hall v. Rogers*, 7 Humph. 536, the decision was rested on the doctrine of *Leonard v. Vredenburg*, but actually the promise was not in any sense a guaranty,

but was a conditional payment. A. paid B. with a non-negotiable note of C.'s, which he, A., held. He further promised by parol that if C. did not pay the amount of the note he would. C. proved insolvent, and B. sued A. on the verbal promise, and was held to recover. In *Hindman v. Langford*, 3 Strob. 207, the promise was to answer for the debt of a third person still continuing liable, but was, said the court, founded on a new and distinct consideration *co-extensive with it* and moving not to the third person but to the person who made the promise. The consideration was not of mere loss to the promisee but of benefit to the promissor himself. The case was held to come within the principle of those which are taken out of the statute on the ground that there was the purchase of an interest and not a mere undertaking to pay the debt of another. This in its mixture of truth and error seems to mark the boundary between the earlier cases following *Leonard v. Vredenburg*, and those later ones which say that where the promissor is put in funds to answer his guaranty, or where the original debt in consequence of the new contract comes to relate to the promissor's own property, the Statute of Frauds does not apply. *Hite v. Wells*, 17 Ill. 88, uses the language of *Leonard v. Vredenburg*, but so qualifies it as to make it a safe definition of what may constitute an original promise. *Griffin v. Derby*, 5 Greenl. 476, cites the ruling of *Leonard v. Vredenburg*, but was on other principles a clear case of an original promise. *Scott v. Thomas*, 1 Scam. 58, by a loosely worded dictum would also seem to confirm this doctrine; for a demonstration of whose unsoundness, see *Maule v. Bucknell*, 14 Wright 39; *Bristow v. Silence*, 4 Seld. 207; *Fullam v. Adams*, 4 Am. L. Reg. N. S. 460, s. c. 37 Vt. 391; *Emerick v. Sanders*, 1 Wis. 101 (where the learned judge who delivered the opinion does not appear to have seen the distinction between cases of primary and those of merely secondary position in the transaction on the part of the person whose debt is guaranteed); *Barber v. Bucklin*, 2 Denio 59; *Kingsley v. Balcolme*, 4 Barb. 135; *Hatfield v. Daw*, 3 Dutch. 447; *Stewart v. Campbell*, 58 Me. 439; *Lampson v. Hobart*, 28 Vt. 697; *Eddy v. Roberts*, 17 Ill. 505; *Durham v. Arledge*, 1 Strob. 5; *Ames v. Foster*, 106 Mass. 402; Browne Stat. of Frauds, §§ 163, 168, 207; Throop on Validity of Verbal Agreem. § 592, *et. seq.* The doctrine of *Leonard v. Vredenburg*, we may here say, when reduced to its essence amounts to this, that whenever a guaranty is founded on a consideration it is with-

out the Statute of Frauds; *i. e.* all guaranties are without the statute, for a guaranty, like all other contracts, if destitute of a consideration, has no recognised legal existence.

If then all guaranties are without the statute, what subject has that section of it, which requires written evidence of every promise to answer for the debt, &c., of another, to operate upon? If there is any distinction to be taken in this connection between a consideration which consists in benefit to promissor and that which consists in a loss to the promisee, it is for those who make the assertion to show it: none is apparent. See *Stewart v. Campbell* for a collection of cases which hold those guaranties to be without the statute which are made in consideration of funds placed in the promissor's hands. See *Olmstead v. Greenly*, 18 John. 12; *Stoudt v. Hine*, 45 Pa. St. 30 (with cases cited); and *Jack v. Morrison*, 48 Pa. St. 113, to the same effect. See also *McKenzie v. Jackson*, 4 Ala. 230; *Hilton v. Dinsmore*, 21 Me. 410; *Todd v. Tobey*, 29 Me. 219; *Elwood v. Mann*, 5 Wend. 235; *Hindman v. Langford*, 3 Strob. 207; *Lee v. Fontaine*, 10 Ala. 755; *Hall v. Rogers*, 7 Humph. 536; *Wait v. Wait*, 28 Vt. 350; *Stanley v. Hendricks*, 13 Ired. 86 (citing *Drangham v. Bunting*, 9 Ired. 10); *Eddy v. Roberts*, 17 Ill. 505; *Drakely v. DeForest*, 3 Conn. 272; *Olymer v. DeYoung*, 54 Pa. St. 118. *Whitcomb v. Kephart*, 50 Pa. St. 85, is as follows: A. gave a contract of labor to B., B. gave a sub-contract to C.; B., C. and D. (the latter, the paying agent of A., but not contracting as such), upon difficulties arising, agreed that C. should go on with his work, and that D. should pay him the amount of the original sub-contract price, deducting, however, the amount of any payments made by B. D., whose consideration was the trade which he drove with the employees of the contractors, was to reimburse himself out of the funds which A. from time to time advanced him to pay B. The court, though regarding this as an absolute promise on D.'s part, and one not confined to the funds placed in his hands, yet held the Statute of Frauds not to apply. In fact the funds were sufficient to meet the claim of C., the plaintiff. There seems to have been no privity between A. and C., in either the original or the subsequent contract. See, however, *Shoemaker v. King*, 40 Pa. St. 107. A. and B., a firm, conveyed partnership property to C., who promised to pay the firm debts. D., a partnership creditor, not party to this arrangement, sued C. The Statute of

Frauds was held a good defence, A.'s and B.'s liability continuing to subsist. See also *Furbish v. Goodnow*, 98 Mass. 106, which seems to decide that the receipt by the defendant, from the debtor answered for, of a consideration sufficient to cover the debt guaranteed will not alone take the promise out of the statute, but that this consideration must have been especially made a fund out of which the guaranty was to be met and to which the liability was to be confined. See *Mallery v. Gillett*, 21 N. Y. 412, where *Jackson v. Raynor*, 12 John. 291, relied upon in *Furbish v. Goodnow*, was thought to have gone too far. For a very able discussion of this point see Throop (Index "Fund").

The true principle, it is conceived, is that ordinarily if the person whose debt is guaranteed still remains liable, the promise to answer for such debt should be in writing. But that if the giving of the guaranty was to accomplish a purpose of the guarantor's, and the payment of the third person's debt was subsidiary and incidental to this, the fact of such payment need not make the undertaking less an original one on the promissor's part. See the language of SHAW, C. J., in *Nelson v. Boynton*, quoted above. See Parsons on Contracts, III., p. 24. Mr. Throop (Val. of Verb. Agr. § 615) combats this proposition in the more unqualified form in which it is usually stated as amounting to the doctrine of *Leonard v. Vredenburg*, and says of it that its extended recognition has been due to the frequency of cases where it practically coincides with the well-settled principle that the statute does not apply when the substance of the promise is an engagement to pay the promissor's own debt or one resting on his property. As to this see the two recent cases of *Tallman v. Bressler*, 65 Barb. 378, and *Holmes v. Kearns*, 40 Ind. 124. See to the same effect Browne on St. of Fr., § 214. See, however, Roberts on the St. of Fr. (Am. ed. 1823) pp. 23, 29. It may be questioned, however, whether Throop's formula is not too narrow, and whether such a case as for example *Lampson v. Hobart*, 28 Vt. 697, condemned by him, is not in conformity with a liberal view of that common-sense enactment, the Statute of Frauds. The plaintiff, in *Lampson v. Hobart*, had a claim against H. & D. which he was about to secure by an attachment of their property, when the defendant who had against H. & D. a larger claim than the plaintiff, promised that if the plaintiff would not attach and make costs, he, the defendant, would pay to the plaintiff the debt of H. & D. The plaintiff forbore and as-

sisted the defendant in securing the latter's debt by an attachment. The court, per REDFIELD, J., comparing this case to that of the surrender of a lien, held it a new contract the interest of which was chiefly to the defendant, and though H. & D. remained liable to the plaintiff, the defendant's promise was an original one and not within the Statute of Frauds. It is to be noted that the defendant's engagement seems to have been absolute in form, yet as there can be no doubt that if the plaintiff had got the amount from H. & D. the defendant would have been discharged, the latter substantially answered for H. & D.'s failure to pay. It comes now to be rather a question of words than anything else, but it must again be said of Mr. Throop's statement that it is somewhat narrow and possibly calculated to mislead. It is narrow in that it excludes cases where though the debt guaranteed cannot fairly be said to be the promisor's own, or one resting on his property, the whole transaction in which the guaranty plays a minor part, may eminently be his, he, as it happens, being the person carrying the affair on. Ordinary good sense would be apt to hold an engagement like that in *Lampson v. Hobart*, to be in kind as well as degree different from a guaranty, and to say that it would be absurd to give it the protection of an act which was to apply to liabilities for the indebtedness of others. It is also to be considered whether the definition, "a promise to pay the promissor's own debt *in substance* or one resting on his property," is the proper way of describing such an engagement. That this is not technically such a promise is not open to dispute, and it is for the student to consider whether the words "in substance" are wide enough in their natural meaning to comprehend such a case as the above, and whether a broader if more indefinite definition is not here necessary to fulfil the spirit of the Statute of Frauds. Mr. Throop cites and mainly relies on in support of his view the cases of *Maule v. Bricknell* and *Fullam v. Adams*. The language of the former, however, as will be seen, is much wider than our author's, as for example, the following: "And as the cases referred to show it" (the promise to answer for the debt of another) "may be unaffected by the statute though the original debt remains, if the promissor has received a fund, &c., for the payment of the debt. But except in such cases and others perhaps of a kindred nature in which *the contract shows an intention of the parties that the new promissor shall become the principal debtor and the old debtor become but secondarily liable*, the rule,

&c.," is that while the old debt remains the promise is within the statute. Judge STRONG, it is true, goes on to say that in a majority of such cases there was some liability of the promissor or his property, independent of his express promise (see *Fish v. Thomas*, 5 Gray 45, and *Arnold v. Steadman*, *supra*), which is certainly the fact, and should always be stated in qualification of what we hold the more practical rule, which is after all only a little more comprehensive statement of Mr. Throop's own doctrine. *Fullam v. Adams* refutes *Leonard v. Vredenburg*, and the position taken in *Mallory v. Gillett*, 21 N. Y. 412, viz. that "A., for any consideration agreed upon between him and B., may verbally undertake that C. shall pay his debt to B." The learned Judge POLAND, who delivered the opinion of the court in *Fullam v. Adams*, goes on to lay down a rule much more restricted than Throop's own. "We believe," he said, "it will be found that in all cases regarded as sound, where it has been held that a parol promise to pay the debt of another is binding, the promissor held in his hands funds, securities or property devoted to the payment of the debt, and his promise to pay, attached upon his obligation or duty growing out of the receipt of such fund."

A promise, for example, by one wishing to purchase a chattel subject to a lien, that if the lien-creditor will release the lien so that the promissor may acquire, with the purpose perhaps of transmitting, an absolute title, he, the intending purchaser, will answer for the lien-debtor's debt: or a promise by one having his goods mingled with those of a judgment-debtor's, that if the judgment-creditor will not issue execution, he, the promissor, will answer for such debt, do not in strictness fall within Mr. Throop's language, and yet are certainly very different from ordinary guaranties. In *Hopkinson v Davis*, 5 Phila. 147, the defendant was interested in A.'s business, and in consideration of the plaintiff's forbearing to sue A. guaranteed A.'s note, the Statute of Frauds was held not to apply; HARE, J., saying: "Besides, the weight of authority would seem to be that when a promise to be answerable for the debt of another is based not only upon a new consideration but upon a consideration which moves to and benefits the promissor by inducing delay in the institution of proceedings, that might otherwise sweep away his property or break up a business in which he is interested, the obligation is in fact his own debt, notwithstanding its form, and consequently not within the Statute of Frauds." In

the actual case the consideration of the note was work done upon A.'s shop, but it does not appear how far, if at all, the defendant's interest in A.'s business could have made him liable for the value of the work. The point for the jurist's consideration is whether or not it would be better to look at the whole transaction between the parties, and if it be in reality an original one between them, then to hold that the mere fact that a guaranty is the pivot upon which it turns should be no reason for drawing it within the operation of the Statute of Frauds. As to *Lampson v. Hobart*, see *Waldo v. Emerson*, 13 Mich. 396, directly opposite in its ruling.

II. *Under what circumstances other than those already considered, the original liability of the person whose debt is answered for in a guaranty continuing to subsist, the Statute of Frauds is held not to apply.*

We have seen that where the guarantor is put in funds, and where the transaction is his own, the verbal promise has been decided to be valid, though the original liability of the person answered for did not cease to exist. There is a further class of cases where there is a double liability, but where the statute is nevertheless considered not to apply, on the ground that the two obligors are to be considered rather as joint-debtors than as collaterally bound, and it is this class that we now propose to examine. In *Gibbs v. Blanchard*, 15 Mich. 299, *assumpsit* for the price of a mare on the common counts against D. and G., the following charge was held correct, that "if it was the understanding of the parties that D. was the purchaser, that he should give his note to the plaintiff for the price and that G. should sign so as to be liable as endorser, the plaintiff must fail" (no such endorsement was made in fact). "If, however, the understanding of the parties was at the time that G. and D. were the buyers of the mare, and that both were to be liable as purchasers for the purchase-price and accordingly should become joint-makers of a promissory note for its payment, though D. was less relied upon by the plaintiff than G., and though in point of fact it was understood that the mare when bought should belong to D., the plaintiff is entitled to recover." *Vide Swift v. Pierce*, 13 Allen 136, for a converse proposition. See *Rowe v. Whittier*, 21 Me. 550; *Ware v. Stephenson*, 10 Leigh 167; *Noyes v. Humphreys*, 11 Grattan 636; *Curtis v. Brown*, 5 Cush. 491; *Cutler v. Hinton*, 6 Randolph 509; *Matthews v. Milton*, 4 Yerger

.576; *Tileston v. Nettleton*, 6 Pick. 509; *Skinner v. Conant*, 20 Vt. 453; *Larson v. Wyman*, 14 Wend. 246; *Kurtz v. Adams*, 7 Eng. 174; *Payne v. Baldwin*, 14 Barb. 570; *Peabody v. Harvey*, 4 Conn. 119, for a consideration of the general proposition that where there is a subsisting liability on the part of the person answered for, such promise to answer is a guaranty and within the statute. In *Wainright v. Straw*, 15 Vt. 275, S. and C. came to the plaintiff's agent and said that they wanted to buy a stove for S., but that both would be responsible, and on the joint responsibility the agent sold the stove: C.'s promise held to be original. In *Eshelman v. Beecher*, 6 Leg. Gaz. 220, Supreme Court of Penna., a promise was made by C. to A. that if A. would hasten to finish work he was doing for B., he, C., would settle for what would be due on the account. A., who had previously charged the goods to B., now charged them to B. & Co., meaning thereby to include C. The Statute of Frauds held to apply. C. would seem, however, to have been a principal and to have had an interest in the transaction. In a number of cases will be found the bald statement that whenever the whole credit is not given to the party sought to be charged he is a guarantor and his engagement must be evidenced by a writing. A doctrine which is open to great exception, as will be seen by a reference to the note to *Birkmyer v. Darnell*, 1 Smith's Lead. Cas., Hare & Wallace's notes, Vol. I., Part II.

An analysis of the authorities cited for this proposition will show that the contracts respectively in question were clearly guaranties for other reasons than the one just given. In *Rogers v. Kneeland*, 13 Wend. 121, the ruling was *obiter dictum*. In *Cahill v. Bigelow*, 18 Pick. 369, the goods whose payment was answered for were charged in the first instance to the principal only and not to the surety. *Brady v. Sackrider*, 1 Sand. 515; *Elder v. Warfield*, 7 Harr. & J. 397; *Taylor v. Drake*, 4 Strob. 431; *Leland v. Crogan*, 1 McCord 100; *Smith v. Montgomery*, 3 Tex. 199, and *Carville v. Crane*, 5 Hill 483, are in the same category as *Cahill v. Bigelow*. In *Blake v. Parlin*, 22 Me. 395, and *Moses v. Norton*, 36 Me. 113, a piece of real property was leased to one and the rent answered for by the defendant. In *Aldrich v. Jewell*, 12 Vt. 126, the defendant told the plaintiff that if he would work for A., he, the defendant, would pay him, if A. did not. In *Smith v. Hyde*, 19 Vt. 56, the plaintiff rendered services to A., at his, A.'s, request and upon his credit; while doing so B. agreed "to

be holden" to the plaintiff for these services. The court cited *Barber v. Fox*, 2 E. C. L. 386, for the doctrine that if the whole credit was not given to the party answering for another, the engagement was collateral (no authority for the statement). In *The Proprietors v. Abbot*, 14 N. H. 159, the court said that under the authority of *Holmes v. Knight*, 10 N. H. 177, they would be obliged to follow this doctrine, but that the case before them did not call for its application. In *Holmes v. Knight*, a dictum goes to the full extent of saying that if any credit is given to the person answered for the promise must be in writing, but deprecates, as well it might, an extreme application of such a rule. *Eddy v. Roberts*, 17 Ill. 505, is not, in spite of its syllabus, an authority for the unqualified doctrine that in all cases of subsisting liability on the part of the third person whose debt is answered for, the Statute of Frauds applies. "If," says STORY, J., in *Townsend v. Sumrall*, 2 Pet. 182, "A. says to B., pay so much money to C. and I will repay you, it is an original independent promise. * * * And damage to the promisee constitutes as good a consideration as benefit to the promissor." "If," says the same judge, in *D'Wolf v. Rabaud*, 1 Pet. 500, "A. agrees to advance B. a sum of money for which B. is to be answerable, but at the same time it is expressed that C. will do some act for the security of A., and enter into an agreement with A. for that purpose, it would scarcely seem a case of mere collateral undertaking, but rather, if one might use the phrase, a trilateral contract * * *. The credit is not given solely to either but to both, not as joint contractors in the same contract but as separate contractors upon co-existing contracts forming part of the same general transaction." How far this refinement is sound or useful, there exist, it is believed, no adjudged cases to show. *Gibbs v. Blanchard*, 15 Mich. 299, and *Wainwright v. Straw*, 15 Vt. 275, are cases of joint-contract. For authority supporting these two cases see *Nelson v. Dubois*, 13 John. 175, where the following contract was held to be original, viz. A., at C.'s request, sold a horse to B. and took B.'s note endorsed by C. B. was a minor with little property, and the note when due was presented to C., who promised to pay it. The court cited and relied on *Hunt v. Adams*, 5 Mass. 358, and *White v. Howland*, 9 Mass. 314.

HENRY REED.