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CASEY *v.* MILLER. SUPREME COURT OF IDAHO.

Novation—Statute of Frauds.

Where G owes C, and M owes G, C demands payment of G. G gives him an order on M. C agrees to release G provided M accepts order. M accepts order and pays $45 thereon, and promises to pay balance at future time. M is released as G's debtor and becomes the debtor of C. M thereby accepts C as his creditor in place of G.

M, at request of G, agrees to pay to C money that he owes by contract to G. Such contract is not within the Statute of Frauds, requiring the promise to pay the debt of another to be in writing. M simply pays his own debt to a different person than the one he originally agreed to pay it to. He is paying his own debt, not the debt of another.

SYLLABUS BY THE COURT.

OPINION.

SULLIVAN, J. Miller was owing Gates, Gates was owing Casey, and Miller simply agreed to pay the sum of $315 due from him to Gates, to Casey, or, in other words, he had agreed to accept Casey as his creditor instead of Gates. Miller did not, under said agreement, agree to pay the "debt of another," within the meaning of that term as used in the Statute of Frauds, but simply agreed to pay the debt owing by himself to appellant instead of to Gates. In Barringer *v.* Warden,[1] the Court, in referring to the Statute of Frauds, said "that the statute requires the promise to pay the debt of another to be in writing expressing the consideration; but this requirement has no reference to the promise by A to pay money that he owes by contract with B, to C. This is his debt, and the mere direction in which he pays it does not alter the character of the contract from the

[1] 12 Cal., 311.

original obligation. There is no difference between a debtor promising to pay his creditor directly so much money which he owes him, or promising his creditor to pay a third person the same sum, by an agreement between the three. The promisor is paying his own debt and his own obligation, and not assuming another's. . . So, in the case at bar, Gates consented to such arrangement and gave Casey an order on the respondent. Casey assented to the arrangement by accepting the order; Miller assented by agreeing to pay the order."

WHAT PROMISES TO PAY THE DEBT OF ANOTHER ARE WITHIN THE STATUTE OF FRAUDS.

This recent case is a welcome one in its field, for by its clear language it helps to lessen the confusion which some less deliberate opinions in the long line of decisions on this subject have occasioned. The cases which have turned on the question whether a man is paying his own debt or another's are numerous, the decisions often conflicting, and the grounds on which the same conclusions are based, various.

The answer to the question is usually found by applying a test to the circumstances of each particular case. But, unfortunately, the authorities differ as to what that test should be. Sometimes it is the nature of the promise itself; if the promisor derives actual benefit from, or furthers his own interest by his promise, notwithstanding that he thereby discharges the debt of a third person, the first attribute prevails over the second, and his is a promise to pay his own debt, not within the Statute of Frauds, and need not be in writing. In some cases the fact of the third person continuing to be liable after the promise is made is supposed to be the proper criterion. The existence of a consideration received by the promisor, the nature of such consideration, and the fact of its being expressed in writing, or not, are other examples of what has influenced the courts.

The two classes of promises in this connection are conveniently, if not always accurately, distinguished by the terms "original" and "collateral." The former is thus defined by the Court in Nugent *v.* Wolfe, 111 Pa., 480: "When the leading object of the promisor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay or discharge the debt of another, his promise is not within the Statute of Frauds" and need not be in writing. "Collateral promises, where the object of the promisor is to become surety or guarantor of another's debt, or to obtain the release of the person or property of the debtor, or other forbearance or benefit to him, are within the Statute of Frauds and not valid unless in writing."

In the following cases the decisions appear to have been based principally on the nature of the promise itself.

Barringer *v.* Warden, 12 Cal., 311 (1859). A owed money by con-

tract to B, and verbally promised to pay it to C in consideration of his release by B. The court held that the Statute of Frauds has no reference "to a promise by A to pay money he owes by contract with B to C. This is *his* debt; the mere direction in which he pays it not altering the character of the contract from an original obligation. There is no difference between a debtor promising to pay his creditor directly so much money which he owes him, and promising his creditor to pay a third person the same sum by agreement between the three. The last promisor is paying his own debt, and creating his own obligation, not assuming another's." Barker *v.* Cornwall, 4 Cal., 16.

Barker *v.* Bucklin, 2 Denio, 45 (1846). Plaintiff held a bond of one F. Defendant promised plaintiff, in consideration of his forbearing to sue F on his bond, that defendant would pay to plaintiff a sum of money which he owed F for a pair of horses, such sum to be in part satisfaction of the debt F owed the plaintiff. The court held that this promise was not within the Statute of Frauds as it was not a promise to pay the debt of a third person, but the payment of the promisor's own debt to a person designated by the promisor's creditor, who had, in fact, a right to make such payment a part of the contract of sale.

Runde *v.* Runde, 59 Ill., 98 (1871). A owed B and gave him his note for amount exceeding the indebtedness, secured by mortgage worth full amount of the note. A then became indebted to C, but could not pay. They all met together and agreed, that, by virtue of the claim A had on B for the difference between the actual debt and the amount of the mortgage, B should pay such difference to C in satisfaction for what A owed C. *Held*, B's promise was an original undertaking to pay to C, not A's indebtedness to C, but his own indebtedness to A, and therefore not within the Statute of Frauds (Darst *v.* Bates, 95 Ill., 493).

McClaren *v.* Hutchinson, 22 Cal., 187 (1863). A was indebted to B for work done on A's farm. A sold his farm to C who agreed with A in writing to pay B what A owed him. Then B agreed verbally with C to release A from the debt and look to C for payment; B sues C. The Court ruled that the case was not within the Statute of Frauds. A being indebted to B for work done, and C being indebted to A for purchase money, A and C mutually agree that C shall pay A's debt and this arrangement is assented to by B. "Here is a mutual agreement by the parties interested, and it can make no difference that this mutual agreement was not perfected at the same moment of time, or that all were not present at the time of its completion. . . . . B's assent to the agreement between A and C gave them a right of action against the defendant." Rowe *v.* Whittier, 21 Me., 549.

Robinson *v.* Gilman, 43 N. H., 485 (1862). A was indebted to B on promissory notes, C promised to B that if B would not bring suit on said notes and summon C as trustee of A, he would see that the notes were paid. As C was answerable as trustee for a large amount of A's property, the Court held that the debt he promised to pay was also his own debt and therefore not within the Statute.

Nugent *v.* Wolfe, 111 Pa., 471

(1886). Bank had obtained judgment against Power & Co. Nugent went security for Power & Co. for stay of execution upon said payment, being induced to do so by Wolfe, who verbally promised, in consideration therefor, to indemnify and save him "harmless from any loss or liability, and from paying anything by reason of his so going security." Judgment for defendant. Appealed. Affirmed. "The only consideration for the alleged agreement disclosed by plaintiff's offer is the disadvantage to him of the risk he incurred by becoming bail for stay of execution on the judgment against Powers & Co. In consideration of the risk or contingent liability thus assumed by plaintiff at defendant's request, the latter promised and agreed to pay the judgment, or see that it was paid by Powers & Co., and thus save the plaintiff from the necessity of paying the same. . . . . If it is not an agreement to answer for the debt or default of Powers & Co., it would be difficult to say what it is. Their liability to the bank still remained. The only consideration moving between the promisor and promisee, as claimed by the latter, is the risk he incurred in becoming bail for Powers & Co. There is no testimony, nor was any offered, to show that defendant had any personal interest in the judgment on which bail was entered, or that he held property or funds that should have been applied to the payment thereof. So far as appears, it was the proper debt of Powers & Co., and the substance of defendant's agreement is, that he would see that they paid it; and if they failed to do so he would pay it for them. It was literally a promise to answer for the default of Powers & Co. Plaintiff's liability as bail for stay was merely collateral to the debt in judgment, and had in contemplation nothing but the payment thereof to the bank The promise of defendant is within the Statute, and cannot be enforced because it is not in writing:" Ware *v.* Morgan, 67 Ala., 467; Underwood *v.* Lovelace, 61 id., 155; Beal *v.* Ridgway, 18 id., 117; Stryon *v.* Bell, 8 Jones (N. C.), 225.

Brown *v.* Weber, 38 N. Y., 187 (1868). H had contracted in writing to build a mill for defendant, on defendant's land. After the frame had been erected, H contracted in writing with plaintiff that plaintiff should complete the building. Plaintiff began work but soon told defendant that he was afraid H could not pay him; defendant, by way of inducement, then verbally promised that if plaintiff finished the mill according to contract, he, defendant, would see that plaintiff would get his pay and lose nothing by it. *Held*, that the receipt or non-receipt of a consideration by the promisor was not always conclusive, and certainly not in this case. The question was whether the defendant made a *contract* with the plaintiff to finish the mill, or whether he merely became *security* that H should pay plaintiff for his work. The latter view accords with the facts of the case, and the promise not being an independent one, is void by the Statute of Frauds. It might perhaps be questioned if the defendant's interest in having the mill built on his own land is not sufficient benefit or advantage to himself to impart to his promise the character of an original promise: Read *v.* Nash, 1 Wils., 355; Fish *v.* Hutchinson,

2 Wils., 94; Simpson *v.* Patton, 4 Johns., 222; Shingerland *v.* Morse, 7 Johns. Rep., 463; Skelton *v.* Brewster, 8 Johns., 576; Gold *v.* Phillips, 10 id., 412; Meyers *v.* Morse, 15 id., 425; Olmstead *v.* Greenly, 18 id., 12.

In the following cases the courts have looked more toward the consideration as a means of settling the question. They have pointed out just how much or how little is necessary to constitute a consideration, which, when received by the promisor, will enable him to discharge what is apparently a third person's debt as if it were his own; that is, free from the statutory requirements governing the payment of another's debt.

Arnold *v.* Stedman, 45 Penna., 188 (1863). A sold land reserving the right of entry for non-payment of balance of purchase money on a certain date. Before this date S filed a mechanic's lien for building a barn for the vendee. A brought ejectment upon non-payment by vendee, which resulted in giving his vendee a year's more time in which to pay the balance; while this suit was in progress, A promised S that he would pay him the mechanic's lien when the property came back to him if S would stop proceedings on the lien. They agreed to this. Upon non-payment by the vendee when the time had elapsed, A sold the land to other parties, and S sued A for the amount of the lien. Judgment for plaintiff. Appealed. Affirmed. "Here, then, was a lien or claim upon property in which A had an interest, and it was a benefit to him that no proceedings should take place on the mechanic's lien held by S while his ejectment was in progress. The consideration, therefore, as regarded A for his promise was the benefit or advantage to himself arising from S's relinquishing proceedings upon his mechanic's lien. The consideration did not proceed from or to the debtor, but was an entirely new or fresh one between A and S, and was a new and original binding contract, A's object being not to answer for the debt of his vendee, but to subserve a purpose of his own. We do not, therefore, think the Act of 26th April, 1855, includes this case, and if such a defence were available, it would only sanction what would be a gross fraud on the part of the plaintiff in error."

Elkin *v.* Timlin, 151 Penna., 491 (1892). Defendant had contracted to sell his interest in land to plaintiff, and also the interest of a co-tenant. Plaintiff objected to taking deed of the co-tenant for fear there might be judgments against him. Defendant by way of inducement then promised to pay all of co-tenant's judgments. The Court held that this was not a promise to pay the debt of another, but "an original undertaking to indemnify based upon a sufficient consideration." That consideration was self-interest. Defendant "was, at least, interested in effecting the sale of Watt's (co-tenant's) interest in the land because the sale of his own interest depended on that. Plaintiff had agreed to buy both interests, but not either without the other." In line with this is the case of Alger *v.* Scoville, 1 Gray, 391.

See also Malone *v.* Keener, 42 Penna., 85; Stout *v.* Hine, 43 id., 30; Whitcomb *v.* Kephart, 50 id., 85; Townsend *v.* Long, 77 id., 143; Fehlinger *v.* Wood, 134 id., 525, where the promise was sustained;

and Allshouse *v.* Ramsey, 6 Whart., 331; Shoemaker *v.* King, 40 Pa., 107; Miller *v.* Long, 45 id., 350, where the promise was held to be void.

Emerson *v.* Slater, 1 Pet., 28 (1859). The plaintiff, a contractor, was under contract with a railroad company to build its road. Work ceased when company's credit was shaken. A stockholder of the company, the defendant, entered into a written contract with the contractor, that if the latter would pay him one dollar and complete the work as originally planned, he, the defendant, would pay him in cash and notes, the notes to be applied to the indebtedness of the railroad company to the plaintiff, and the agreement in no way to affect any contract of the plaintiff with the railroad. "Prior to the date," of the defendant's contract with plaintiff, "the railroad company had failed and was utterly insolvent, owning nothing, it seems, except the securities transferred to the defendant for his indemnity in this transaction, and the franchise of the road. Unlike what was exhibited in the former record, it now appears that the defendant had large interests of his own, separate from his relation to the company as a stockholder, which were to be promoted by the arrangement. He had loaned to the company railroad iron for the use of the road amounting in value to the sum of $68,000, and, as a security for payment, held an assignment of the proceeds of the road to that amount with interest, which was to be paid in monthly instalments of $5000. Now, unless the bridges were completed and the road put in a condition for use, there would be no proceeds; and as he had already taken into his possession all the available means of the company to secure himself for this new liability, should the road not be completed, the company could not pay for the iron. In this view of the subject it is manifest that the arrangement was mainly to promote the individual interest of the defendant. We think it is clear that the promise of the defendant was an original undertaking upon a good and valid consideration moving between the parties to the written agreement."

Anderson *v.* Davis, 9 Vt., 136 (1837). B, a builder, contracted with A, the defendant, to erect a building; afterward B engaged C as his partner and both worked until B fell ill, and worked ceased. A then promised C to pay him for *his* work already done and what he should afterward do. C sues A for both sums on the verbal promise. "There was no original privity between A and C. A employed B and B employed C. To B alone could C look for his labor up to the time of the defendant's promise to the plaintiff. . . . . If A became holden to C for this claim against B as collateral to B, and the claim still remained against B it (the promise) was within the statute. But if A was to assume the debt, and he alone be holden, and B to be discharged then the contract was not collateral, but independant, and not within the statute and required no note in writing, nor special action therefor. . . . . Assuming that the contract was that C was to have no further claim on B, and that this was what constituted the consideration for A's promise together with C's continuing his work, this brings us to another point in the case." (Judgment for defendant reversing court below on a point of evidence.)

Nelson *v.* Boynton, 3 Metc., 396

(1841). A son promised that in consideration that the holder of a promissory note of his father would not sue upon it, to pay it himself. The Court held that this was not an original, but a collateral promise, for its principal object was not to benefit the son but the father. "Forbearance to sue is a good consideration for a written promise, but not such a consideration that would make the promise an original undertaking. "This is a collateral promise to pay the debt of another and void because not in writing. In the mind of the Court, then, the filial interest of a son in preserving his father's credit and saving the family name and honor from the risk of suffering reproach in a public court-room is not such a 'self-interest' as will support his promise to pay his father's just debts." This case is approved and followed in Westheimer *v.* Peacock, 2 Iowa, 528.

Chandler *v.* Davidson, 6 Blackf., Ind., 367 (1843). A widow verbally promised to pay a debt owing to plaintiff by her late husband. "It is said, however, that considering her as being possessed of the goods under the will, she was under a moral obligation to pay the debts of the estate to the value of the goods, and that such obligation was a sufficient consideration for the express promise sued upon. . . . The promise was to pay, not the promisor's own debt, but a debt due by her deceased husband, and such a promise to be the foundation of a suit, must be in writing, by the Statute of Frauds unless the consideration be sufficient to give to the promise the character of an original undertaking. . . . . There are cases, however, in which a new consideration passes at the time of the promise between the newly contracting parties of such a character, that it would support a promise to the plaintiff for the payment of the same sum of money without reference to any debt of another. . . . . But it is evident that the moral obligation relied on in this case was not a consideration of that description."

Bumford *v.* Purcell, 4 Green, Iowa, 488 (1854). "B as principal and P as security signed a note to D for town lots purchased by B. Before the notes matured, B proposed orally that he would relinquish the lots to P if P would pay the note and save B harmless. B soon after left the State. After judgment was obtained against P on the note he paid the same; and subsequently in a suit against B for the amount, B proposed to prove by parol the agreement under which P was to pay the note, and B relinquished to him the lots." *Held*, parol agreement void. Judgment for plaintiff. Appealed. Affirmed. "P was legally liable as surety to pay the note to the holder, but that liability did not exist between P and B. No consideration or agreement in writing had passed between them. B agreed to relinquish his right to the lots, but did not do so. A promise to release is not a relinquishment. A promise to pay is not a payment. Even an agreement in writing to answer for the debt of another has been held to be void if no consideration move between the plaintiff and defendant, either of forbearance or otherwise. Elliot *v.* Giese, 7 Har. & J., 458; Leonard *v.* Vrendenbugh, 8 Johns., 29; Bailey *v.* Freeman, 4 Johns., 280; Tainney *v.* Prince, 4 Pick., 385.

The bill of exceptions shows that the parties agreed to make an agree-

ment, but the agreement was not closed. Consequently the relation between the parties was not changed. If the promise in this case had been complete and absolute and founded upon an actual legal transfer of the lots to P in writing, that transfer coupled with P's liability to pay the note as security or indorser, would remove the case from the statute. In Spann *v.* Baltzell, 1 Branch, 281, it is decided that an absolute promise by an indorser of a note founded on a new and valuable consideration to pay the amount of such note to the holder, is not within the Statute of Frauds. . . . As the bill of exceptions shows that the defendant in this case did not propose to prove an absolute promise to pay the note founded on a new and valuable consideration, the Court very properly refused to admit parol proof of such promise:"

Eddy *v.* Roberts, 17 Ill., 505.

Westheimer *v.* Peacock, 2 Iowa, 528 (1856). Peacock, Jr., had executed his promissory note and did not pay at maturity, whereupon the payees informed Peacock, Jr.'s, father that they would sue his son and attach the property. Father Peacock said he would pay the note if they would forbear to sue, and this was orally agreed to. Payees then assigned the note to plaintiff, who, relying on the verbal promise, brought suit against father Peacock. Verdict for plaintiff. Appealed. Reversed. "We think this is nothing more than one of those cases when A becomes the surety for the debt of B in consideration that the creditor will forbear to sue or to prosecute a suit already commenced. The agreement to forbear might be a good consideration to support the promise if in writing, but not a consideration of such a character as to make a new and original transaction between the parties. There is nothing to show that the defendant, when he made the promise, had in view or secured a benefit which accrued immediately to himself. On the contrary, his object was to obtain forbearance or benefit to his son. If for his own benefit the promise would not be within the statute; if for the debtor, it would. And this distinction we think important and clearly recognized by the authorities."

The language of Barker *v.* Bucklin, 2 Denio, 45, may imply that forbearance to sue *is* a consideration sufficient to uphold a promise of a third person. "An agreement on the part of a creditor to forbear to sue a debtor is a good consideration to uphold a promise of a third person to pay the debt." This case also lays down the rule that "to constitute a valid agreement to pay the debt of another, therefore, there must be not only a good consideration, but the agreement must be in writing and must express the consideration. Both ingredients must concur or the agreement will be void."

Blunt *v.* Boyd, 3 Barb., 209 (1848). A was indebted to B for lumber amounting to $87. C was indebted to A for work done. C agreed with A to pay the $87 to B, and deducted that amount from what C owed A, giving A his note for the balance. Two of the three judges held that as no new consideration passed from A to C for A's promise to pay B, this was a collateral promise to pay the debt of another without consideration, and, therefore, void under the statute. This seems hard to reconcile with the views ex-

pressed in Barringer *v.* Warden, *supra*, and Barker *v.* Bucklin, *supra*.

The dissenting opinion was that C's promise was founded on his existing indebtedness to A for work done, and the consideration for the promise was that $87 should be deducted from that debt to A, and his note made out for the balance. This practically amounts to saying that A's promise was an original distinct agreement to pay his own debt for a good consideration, and, therefore, was not within the Statute of Frauds. The latter view seems to be more in accord with the weight of authority.

Various examples of what the courts have declared to be valid considerations may be found in the following table, taken from Robins *v.* Gilman, 43 N. H., 485: "Cases where the promise has been held binding without writing: (1) where the debtor has put into the hands of the promisor the amount of his debt: Hilton *v.* Dinsmore, 21 Me., 413; Lawrence *v.* Fox 20 N. Y., 6 Smith, 268; Blunt *v.* Boyd, 3 Barb., 209; (2) or transferred to him property equivalent: Skelton *v.* Brewster, 8 Johns., 376; Gold *v.* Philips, 10 Johns., 412; Farley *v.* Cleveland, 4 Cow., 432; S. C., 9 Cow., 639; Elwood *v.* Monk, 5 Wend., 235; Barker *v.* Bucklin, 2 Denio, 45; Pike *v.* Brown, 7 Cush., 136; Alger *v.* Scoville, 1 Gray, 396; Preble *v.* Baldwin, 6 Cush., 552; Todd *v.* Tobey, 29 Me., 224; Dearborn, *v.* Parks, 5 Me., 83; Bird *v.* Gammon, 3 Bing. (N. C.), 883; Wait *v.* Wait, 28 Vt., 350; Olmstead *v.* Greely, 18 Johns:, 2; Meech *v.* Smith, 7 Wendell, 317; Gardner *v.* Hopkins, 5 Wend., 23; King *v.* Despard, 5 id., 277; (4) or where the promisee has transferred or released to the promisor some interest in the property of the debtor, as a lien given by law to a landlord upon the goods of his tenant for rent: Slingerland *v.* Morse, 7 Johns., 463; or of a bailee for services: Mallory *v.* Gillet, 7 Smith, 412; (5) or where the promisee has released to the promisor and holder of the property an attachment: Cross *v.* Richardson, 30 Vt., 642; (6) or where he has released to the promisor the right to attach the property of the debtor: Sampson *v.* Hobart, 28 Vt., 697; or where he has agreed to allow time to the debtor: Smith *v.* Ives, 15 Wend., 182; Watson *v.* Randall, 20 id., 201; or has discharged a suit against him: Rowe *v.* Whittier, 21 Me., 545."

The subsisting liability of the third person has sometimes become an important feature in the decision of a case.

Sternburg *v.* Callanan, 14 Iowa, 251 (1861). A was doing business in his own name, and was indebted to the plaintiff. B and C entered into a partnership with A, the new firm assuming a large amount of A's indebtedness. A was soon after discovered to be insolvent and shortly retired from the firm, his original debt to the plaintiff remaining still unpaid. Plaintiff sued on a verbal promise made to him by C, that the new firm would pay off A's indebtedness. Judgment for plaintiff. Appealed. Reversed. "It is well replied by defendants that this promise, not being in writing, was void under the Statute of Frauds, and upon this ground the plaintiff could not recover. A promise to pay the debt of another, he still remaining liable, is a collateral promise and void. A promise to pay the debt of another for

which, *after* the promise, the other still remains liable, is within the Statute of Frauds, and must be in writing, or it is void. Under our statute no evidence of a contract is admissible, wherein one person promises to answer for the debt of another, unless such contract be in writing and signed by the party charged, or his agent. But nothing in this provision shall prevent the party against whom the unwritten contract is sought to be enforced from being called as a witness by the opposite party, nor his oral testimony from being evidence. The plaintiff did not offer to bring this case within the exception by the introduction of the opposite party. If, therefore, C was authorized to act for the new firm, the contract sought to be enforced was within the Statute of Frauds, and the evidence tending to prove the parole promise should have been excluded."

Jackson *v.* Raymor, 12 Johns., 291 (1815). Payee of a promissory note was about to serve warrant on the maker upon default in payment, when the father of the maker informed him that "he would pay the debt, as he had taken his son's property, and meant to pay his honest debts." Payee then sued the father on this verbal promise. The Court said that the father was to be considered trustee for his son's creditor's, for he had received an assignment of his son's property in trust for the payment of his son's debts. "But, *the original debt of the son was still subsisting;* and, according to the decision in the case of Simpson and Patten (4 Johns. Rep., 422), and the authorities there cited, it seems well settled that a promise to pay the debt of a third person must be in writing, notwithstanding it is made on a sufficient consideration." Judgment for defendant below. Apparently the Court was of the opinion that the trusteeship of the father amounted to a consideration for his promise.

The language of this case seems to furnish authority for the principle that a promise in writing to pay the debt of a third person, and on a sufficient consideration, is void under the statute if the original debt still exists.

This view has been criticised in later cases (see Farley *v.* Cleveland, 4 Cow., 432 (*post*), and cases cited; Allen *v.* Thompson, 10 N. H., 32). Furthermore, the court seems to have unnecessarily gone out of its way to arrive at the conclusion that the promise was void on the ground of the continuing liability of the original debtor; it might have simply declared that here was a promise to pay the debt of a third person, not in writing, and that the trusteeship was not a consideration; for the father had not contracted a debt by becoming the assignee of his son's property for the benefit of creditors, nor did he himself receive any benefit or advantage by way of consideration: Barker *v.* Bucklin, 2 Denio, 58.

Farley *v.* Cleveland, 4 Cow., 432 (1825). A owed B on a note. C promised by parol to pay B, in consideration that A delivered to him (C) hay to the value of the debt. *Held*, not within the statute. "In all these cases founded upon a new and original consideration of benefit to the defendant, or harm to the plaintiff moving to the party making the promise, either from the plaintiff or the original debtor, the *subsisting liability* of the original debtor is *no objection* to the

recovery." On this point the court seems to differ from the opinions expressed in Simpson *v.* Patten, 4 Johns., 422; Jackson *v.* Rayner, 12 Johns., 291; but accords with the rulings in Skelton *v.* Brewster, 8 Johns., 376; Gold & Sill *v.* Phillips, 10 Johns., 412; Maule *v.* Buckwell, 50 Pa., 39.

Leonard *v.* Vredenburgh, 8 Johns., 29 (1811). One of the often-quoted cases on this subject is an early New York decision. A drew a promissory note in favor of B for the value of goods delivered to A from B. At the same time C went security, writing on the note, "I guaranty the above." The Court held: "It was all one original and entire transaction, and the sale and delivery of the goods to A, supported the promise of C as well as the promise of A. If the contract between A and B had been executed and perfectly *past* before C was applied to, so that his promise could not connect itself with the original communication, then the case would have been very different, and the undertaking of C would have required a distinct consideration. A mere naked promise to pay the already existing debt of another without any consideration, is void. But in the present case the promise was made at the time of the original negotiation between A and B. It was incorporated with that contract, and became an essential branch of it. The whole was one single bargain, and the want of consideration as between C and A cannot be alleged. "If there was a consideration for the entire agreement (and A's note purporting to be given for value received was evidence of it) *that* consideration was the aliment for the defendant's promise. . . . A's note given for value received, and of course importing a consideration on its face, was all the consideration requisite to be shown. The paper disclosed that C guaranteed this debt of A's; and if it was all one transaction the value received was evidence of a consideration embracing both promises." The promise is, therefore, not within the Statute of Frauds. This case is much criticised, and severely so in Maule *v.* Buckwell, 50 Pa., 52. "It is not true, as a general rule, that the promise to pay the debt of another is not within the Statute if it rests upon a new consideration passing from the promisee to the promisor. A new consideration for a new promise is *indispensable without the Statute*, and if a new consideration is all that is needed to give validity to a promise to pay the debt of another, the Statute amounts to nothing. Nor can it make any difference that the new consideration moves from the promisee to the promisor. . . . . There (Leonard *v.* Vredenburgh) it was laid down that cases are not within the Statute where the promise to pay the debt of another arises out of some new and original benefit or harm moving between the new contracting parties." That this proposition is inaccurate, however, is almost universally admitted, and, as we have already remarked, it practically denies all effect to the Statute. It cannot be admitted for a moment in the terms in which it was expressed: Approved in Townsend *v.* Long, 77 Pa., 148. (See, also, Dunn *v.* West, 5 B. Mon., 381; Lucas *v.* Chamberlain, 8 B. Mon., 276.)

The preceding cases, when placed side by side, reveal the diversity of methods adopted by the courts for

the determination of what is at first sight a simple question. To select one test that would answer equally well on all occasions seems to be of doubtful possibility, for all that have yet been tried are open to some objection.

The courts frequently choose the easier plan of picking out a salient feature of the case, such as the subsisting liability of the "third person," and base their decision on this comparatively narrow ground without touching upon the broader and more debatable ground of the consideration and nature of the promise. While this course may be satisfactory enough in certain individual cases, it does not advance our knowledge of the underlying principles, for the reason that it does not penetrate to the foundation from which every one of these cases springs, namely, the promise itself.

As a test, the subsisting liability of the third person must often fail, for it frequently happens that, while the third person continues liable, the ulterior personal benefit or advantage to the promisor, derived from his promise, is tenfold greater than the amount of that third person's liability; and common sense would show that such a promisor was not paying another's debt, but assuming a personal obligation of his own to his very great advantage.

The consideration for the promise, on the other hand, has more advantages: it is an important feature where it consists of money transferred to the promisor with the understanding that the debt is to be paid out of that fund alone. The objections to it as a basis of decision are, that it forces a line to be drawn as to just how much is necessary to constitute a consideration, thus leaving room for close and doubtful decisions, which will, in time, perplex rather than clarify the question. When the discussion is confined to the form or matter of the actual consideration which has passed, it is inevitable that cases should become narrowed down to fine distinctions, from which differences of opinion will not unnaturally arise.

It seems that the test which may be satisfactorily applied to the majority of cases is the nature and purpose of the promise itself. The various elements for consideration in this connection are the intent and object of the promisor in making the promise, the result to himself and the other parties to the transaction, the inducement he had to make it, the attendant, outlying, or prospective advantages that he has thereby obtained, or that he expected to obtain at the time he made it, it being immaterial whether they formed part of the actual consideration he received or not. It is plain that the nature of the consideration cannot affect the terms of the promise itself. The foundation on which the transaction is based is the promise; to examine all the circumstances which throw light on its purpose and character would seem to be the most natural and effective method of determining whether the promisor was paying his own debt or another's.

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