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GUARANTEES AND THE STATUTE OF FRAUDS.

The object of this article is to consider, in the light of recent English decisions, the application of the Statute of Frauds to the contract of guarantee or suretyship,[1] and to suggest some principles for a classification of the cases.

The statute, 29 Car. 2, c. 3, so far as is material to the present subject, is as follows:

> 4. No action shall be brought . . . whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

A guarantee is defined by de Colyar[2] as "a collateral engagement to answer for the debt, default or miscarriage of another person." The definition is obviously borrowed, almost *verbatim*, from the Statute of Frauds—the word "collateral" being substituted in the definition for the word "special" in the statute. There is some advantage in borrowing the language of the statute, because the cases with regard to the application of the statute involve an analysis of the nature of the contract itself, and it simplifies the terminology of the subject if, as far as possible, a guarantee

[1] In accordance with English and Ontario usage, the words "guarantor" and "surety" will be treated as synonyms.

[2] The Law of Guarantees and of Principal and Surety, 3rd ed. (1897), p. 1.

is so defined as to coincide with the promise mentioned in the statute.

It is not, of course, intended to suggest that every contract of guarantee falls within the statute. There have been many cases in which the contrary has been held. On the other hand in many other cases it has been sought without success to make the statute applicable to contracts which are not guarantees. The cases fall into two main classes. There are, firstly, certain promises which either are or include true contracts of guarantee, that is, promises which give rise to collateral liability on the promisor's part for the debt, default or miscarriage of another person, but which have been held on special grounds not to be within the statute. Cases of this class form an exception to the general rule that *prima facie* the statute applies to contracts of guarantee. There are, secondly, certain promises which in some respects resemble contracts of guarantee, but which really give rise to original or principal liability on the promisor's part, and are essentially not contracts of guarantee at all. Cases of this class include the contract commonly called a contract of indemnity,[3] as well as other contracts which do not comply with the essential requirements of a guarantee. The failure to observe the fundamental distinction between these two main classes of cases has sometimes resulted in confusing language in the reports.

The five rules stated in Halsbury's Laws of England,[4] embodying in slightly revised form the rules stated in de Colyar's earlier work,[5] may conveniently be taken as the basis of discussion.

These rules are as follows:

1. To bring a case within S. 4 of the Statute of Frauds, the primary liability of another person or the promisee for the debt, default or miscarriages to which the promise of guarantee relates must exist or be contemplated, otherwise the statute does not apply,

[3] Cf. Harburg India Rubber Comb Co. v. Martin, (1902) 1 K. B. at pp. 784, 792.

[4] Vol. 15, pp. 458 ff.

[5] *Op. cit.*, pp. 65, 66.

and the promise is then valid, and can be sued on, though not in writing.[6]

2. The statute does not apply to any promise to be answerable for another, unless such promise is made to the creditor, that is to say, to the person to whom another is already, or is thereafter to become, liable, and who can enforce such liability by action.[7]

3. The statute does not apply to any case, unless there is an absence of all liability on the part of the promisor (the surety), or of his property, except such as arises from his own express promise.[8]

4. The main or immediate object of the agreement between the parties must, to bring a case within the statute, be to secure the payment of a debt, or the fulfillment of a duty by a third party.[9]

5. Whenever the transaction between the promisor and the creditor, to whom the promise is made, amounts to a sale or surrender by the latter, to or for the benefit of the former, of a security for the debt of another or of the debt itself, the statute does not apply.[10]

I. Of the five rules, I propose for the moment to pass over the first two and to confine my discussion to the last three. Rules 3, 4 and 5 relate to one phrase of the subject and may be considered together.

In order to emphasize the relation between these three rules I suggest the following restatement of them:

A promise to answer for the debt, default or miscarriage of another person is *prima facie* within the Statute of Frauds, but by way of exception the statute does not apply to an agreement between the surety and the creditor if the promise by the former to the latter to answer for the debt, default or miscarriage of another person is merely one incident of the agreement, which has some other main or immediate object;

And, in particular, the statute does not apply (1) if, when the promise is made, there already exists any liability on the part of the promisor (the surety) or of his property except such as arises from his own express promise, or

(2) if the transaction between the promisor (the surety) and the promisee (the creditor) amounts to a sale or surrender by the latter to or for the benefit of the former of a security of the debt of another or of the debt itself.

This restatement is intended to show on its face that the general rule is that which requires, in the case of a prom-

[6] Halsbury, *op. cit.*, vol. 15, par 889; De Colyar, *op. cit.*, p. 65, rule 1.
[7] Halsbury, *op. cit.*, vol. 15, par. 891; De Colyar, *op. cit.*, p. 66, rule 2.
[8] Halsbury, *op. cit.*, vol. 15, par. 892; De Colyar, *op. cit.*, p. 66, rule 3, omits "or of his property," and inserts "or interest" after the word "liability."
[9] Halsbury, *op. cit.*, vol. 15, par. 893; De Colyar, *op. cit.*, p. 66, rule 4.
[10] Halsbury, *op. cit.*, vol. 15, par. 894; De Colyar, *op. cit.*, p. 66, rule 5.

ise falling within the statute, that the main or the immediate object of the agreement between the parties shall be the answering for another. It is also intended to suggest that the subsidiary rules are merely particular examples of the general rule—examples which may to some extent serve as a guide in determining the scope of the general rule.

An instructive modern case on the question when a contract of guarantee is not within the Statute of Frauds is that of Harburg India Rubber Comb Co. v. Martin.[11]

The plaintiff had recovered judgment in an action against the Crowdus Accumulator Syndicate and had placed a writ of *fieri facias* in the sheriff's hands, upon which however he had failed to realize, the syndicate's place of business being closed and the works being stopped. After this the defendant Martin orally promised the plaintiff's agent to endorse two bills of exchange, each for one-half the judgment debt, payable at three and six months after date respectively, and on the faith of this promise the plaintiff withdrew the writ. The present action was brought for breach of the defendant's promise.

The defendant was the largest shareholder in the syndicate, and was therefore in a popular sense interested in its property, but he had nothing in the way of a charge[12] upon the property and in a legal sense had no interest in the goods which were about to be seized under the plaintiff's execution, when the promise was made. The plaintiff's counsel argued "forcibly and ably" that although the defendant had no legal right to or interest in the goods he had an interest in them in a business sense, but the court held that the "interest" required to take the case out of the statute must be an interest which the law recognizes.

It was also argued that the object of the defendant's promise was really to secure a benefit for himself and not to secure forbearance for the syndicate, but the court would not agree with this argument. "It seems to me," says

[11] (1902) 1 K. B. 778.

[12] As to the effect if the defendant had had a charge, see Davys v. Buswell, *infra*.

Cozens-Hardy, M. R., "to involve a confusion between object and motive. I cannot doubt that the object of the promise which was made by the defendant was to secure the forbearance of the plaintiff, for three months and six months, in enforcing the debt due from the Syndicate." In order to see what is the object of a contract in a legal sense, we must look at the contract itself and see what is its subject matter, and not at the defendant's motive for entering into the contract.

An Ontario case, somewhat similar to Harburg v. Martin is that of Young v. Milne.[13] The plaintiff had issued execution against the Lentz Lumber Co. Before anything was done under the writ, the defendant (according to the evidence of the plaintiff's solicitor) offered to pay $250 on account and to pay the balance in four weeks provided the execution was withdrawn. The sum of $250 was paid by the check of the company and the plaintiff withdrew the execution. The defendant denied having made any promise that he himself would pay. The action was dismissed. Boyd C. at p. 368 said, "The confusion of evidence and recollection exemplifies the value of the rule of law which requires that the promise to pay the debt of another should be manifested in writing. The sole question is, does this promise, even giving credit to the solicitor's version, fall within the Statute of Frauds, which is pleaded. The authorities are, according to the latest exposition, in favor of the defendant. When the plaintiff, in consideration of the promise to pay, has relinquished an execution under which some advantage or security exists or is likely to be realized, and when the effect of the relinquishment is that such interest or advantage accrues to the defendant who has made the promise, then no writing is required, for the transaction is substantially one for the purchase of the execution. But if the promise is given in consideration of a promise of forbearance for a time, and the execution is, as here, withdrawn, yet, as no direct benefit therefrom has arisen to or was con-

[13] (1910), 20 O. L. R. 366.

templated by the promisor, it is simply a promise to pay the debt of another, which is valid enough as far as the consideration is concerned, but is not enforceable because not put in writing. The execution against the Lentz Company is still outstanding and enforceable and that company is liable for this judgment debt."

Modern judicial commendation of the Statute of Frauds is not common, and undoubtedly the statute helps to mar the uniformity of the English law of contract, which in most cases enforces the formless agreement. The judgment last quoted from, is therefore noteworthy in the suggestion it gives of a justification for the particular statutory provision now in question. Street[14] has indeed pointed out that the collateral promise of guarantee—like the promise of an executor personally to pay the debts of the estate of which he is executor—may well be subjected to restrictions in the way of proof. In the case of a promise under the second clause of the fourth section of the Statute of Frauds, as well as in the case of a promise under the first clause, the defendant is asked to pay something which is not in itself chargeable to him, but the same cannot be said of the other clauses of the statute. In the ordinary simple contract where the promisor is bound by a good consideration and himself gets the benefit of the contract, there is no reason for requiring written evidence—especially since the parties may now give evidence on their own behalf. The thing delivered or the act done or the counterpromise given is generally capable of easy proof, and the claim is not more likely to be bolstered up by perjury, than any other cause of action. In suretyship (as in the case of the executor), on the other hand, the liability of the defendant is founded wholly upon the alleged promise, and he cannot usually protect himself against a misrepresentation of language by an appeal to the facts out of which the main liability grew. The surety may be held merely upon proof that the sale was made at his instance and on his credit or that he promised to pay

[14] Foundations of Legal Liability (1906), vol. 2, pp. 183, 188–9.

if the purchaser should not. When the guarantee is given after the sale a new consideration is indeed necessary, but it may consist of a real or pretended forbearance on the part of the vendor. It is therefore not unreasonable that writing should be required in the ordinary case of a guarantee, but the reason ceases to exist when it is proved that the guarantee is merely subsidiary to a larger contract or is merely incidental to another object which itself is the real subject matter of the defendant's promise.

The reason underlying the statute is clearly stated, in language which need not be quoted here, by the Supreme Court of the United States in Davis v. Patrick,[15] in which it is pointed out that the reason for the statute fails in a case in which

"the promisor has a personal, immediate, and pecuniary interest in the transaction, and is therefore himself a party to be benefited by the performance of the promise."

As was said by the same court in the earlier case of Emerson v. Slater,[16]

"Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability."

It is only with the greatest diffidence that a Canadian lawyer should question the correctness of dicta of members of the Supreme Court of the United States, and I should hesitate to do so at all if I could not appeal for support to judges and writers.

The two passages above quoted are, however, open to criticism in view of what seems to be the better view of the scope and meaning of the Statute of Frauds. The passage quoted from Emerson v. Slater in particular has, as is well known, been made the basis of many subsequent judgments

[15] (1891) 141 U. S. 479, Ames' Cases on Suertyship, 89. See further observations as to this case, *infra*.

[16] (1859) 22 How. 28, at p. 43.

in state courts, and as so applied has, it is respectfully submitted, had the effect of taking out of the statute many a case which should have been held to be within the statute.

Even if it is admitted that the state courts have given a wider meaning to the passage in question than was intended by the Supreme Court, it would seem that the language of the Supreme Court lends itself to misinterpretation when read apart from the limitations stated in the decided cases upon which it is based.[17] The statement that a promise is not within the statute

"if the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party."

seems too vague in its reference to the "pecuniary or business purpose" of the promisor to be subserved by the making of the promise, and tends to encourage that confusion between object and motive which was condemned in the judgment in Harburg v. Martin, *supra*. The form of the reference to the benefit to the promisor or the detriment to the promisee is also open to criticism because it suggests, without actually authorizing, the doctrine that the statute does not apply if there is a new consideration, distinct from the debt, moving between the creditor and the surety.[18]

There are of course judgments in the reports in favor of the last mentioned doctrine,[19] which, as Browne says, by its too free and unqualified assertion, has done much to darken and complicate the law upon this branch of the

[17] It is not quite clear that the Supreme Court itself bore these limitations sufficiently in mind.

[18] My excuse for referring at all to the last mentioned doctrine is that in its effect it is hardly to be distinguished from the doctrine that a case is taken out of the statute by the fact that the promisor's object is to benefit himself. If one doctrine is erroneous, the other is equally erroneous unless it is subjected to some fairly definite limitations.

[19] See, *e. g.*, the English cases referred to in De Colyar, *op. cit.*, p. 132. Some of the heretical American judgments, especially in the state of New York, are based upon a dictum of Kent, C. J. (afterwards Chancellor) in Leonard v. Vredenburgh (1811) 8 Johns. 29, which was not necessary to the decision of the case. Cf. Brandt, Suretyship and Guaranty, 3rd ed., §80. As to the subsequent development of the doctrine in New York, see also 20 Cyc. 188 ff.; Mallory v. Gillett (1860) 21 N. Y. 412, Ames' Cases on Suretyship, 76; Prime v. Koehler (1879) 77 N. Y. 91, Ames' Cases on Suretyship, 87; White v. Rentoul (1888) 108 N. Y. 222.

statute.[20] Some of the judgments in which the doctrine has been stated can, it is true, be supported on other grounds, but the doctrine itself has the effect of making a dead letter of the statute in many cases of promises to pay the pre-existing debt of a third party.[21] It has been vigorously condemned in various cases, and it seems clear that in order to take a case out of the statute there must be some element other than a new consideration moving between the creditor and the surety.[22]

It is a still more obviously insufficient ground for excluding the operation of the statute that there is a new consideration moving between the debtor and the promisor,[23] but the case of the debtor transferring property to the promisor to be applied by the latter in payment of the creditor is of course in a different category.[24]

It is therefore important to ascertain the real scope of the exceptions from the operation of the statute indicated by the three rules with which we are immediately concerned,[25] and for this purpose it is instructive to consider the specific classes of cases in which a promise which involves the answering for another has been held to be outside the statute.

These cases have been conveniently sub-divided into the "property cases," the "document cases" and the "*del credere* cases."[26]

(a) *The Property Cases.*

The leading case is Fitzgerald v. Dressler.[27] A sold goods to B, A retaining possession by virtue of his vendor's lien. B afterwards sold the same goods to C. C was under

[20] A Treatise on the Construction of the Statute of Frauds, 5th ed. (1895) §168, p. 214. In §§207 ff. the learned author discusses the doctrine very fully.

[21] Browne, *op. cit.*, §207, p. 266.

[22] See, *e. g.*, Fullam v. Adams (1864) 37 Vt. 391; Maule v. Bucknell (1865) 50 Pa. St. 39; Ames v. Foster (1871) 106 Mass. 400, Ames' Cases on Suretyship, 85; Bailey v. Gillies (1902) 4 O. L. R. 182, at p. 190.

[23] Furbish v. Goodnow (1867) 98 Mass. 296, Ames' Cases on Suretyship, 33.

[24] See Williams v. Leper (1766) 3 Burr. 1886, Ames' Cases on Suretyship, 72, discussed below.

[25] That is, De Colyar's third, fourth and fifth rules which I endeavored to restate towards the beginning of this paper.

[26] Cf. Cozens-Hardy, M. R. in Harburg v. Martin (1902) 1 K. B. 778, at pp. 792-3.

[27] (1859) 7 C. B. N. S. 374.

terms to pay B for the goods before the time fixed for payment by B to A. In order to induce A to hand over the goods before the time fixed for payment by B, C orally promised A that B should pay on the day named. A accordingly gave up possession of the goods. It was held that the promise was not within the statute. "At the time the promise was made," says Williams, J., at p. 394, "the defendant was substantially the owner of the linseed in question, which was subject to the lien of the original vendors for the contract price. The effect of the promise was neither more nor less than this, to get rid of the incumbrance, or, in other words, to buy off the plaintiff's lien. That being so, it seems to me that the authorities clearly establish that such a case is not within the statute."

Cockburn, C. J., in the same case[28] quotes with approval from Williams' notes to Forth v. Stanton[29] as follows:

> "There is considerable difficulty in the subject, occasioned by unguarded expressions in the reports of the different cases; but the fair result seems to be, that the question, whether any particular case comes within this clause of the statute or not, depends, not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise."

Cockburn, C. J.'s approval of the passage just quoted was expressed to be conditional upon the concluding words being considered an integral part of the proposition, that is to say, that in order to take the case out of the statute the property which is the subject of the defendant's undertaking must be in point of fact his own or must be property in which he has some interest.

Emphasis was laid upon the same point, and perhaps a disposition to restrict this exception from the operation of the statute was shown, in the more recent case of Davys v. Buswell.[30] The defendant counterclaimed upon a promise by the plaintiff to be answerable for the price of goods sup-

[28] 7 C. B. N. S. 374, at p. 392.
[29] (1668) 1 Wms. Saunders, 211 e (p. 233, ed. 1871).
[30] (1913) 2 K. B. 47.

plied by the defendant to a limited company. The defendant had been supplying goods to the company, but there being a balance owing he had refused to supply any more goods until this balance was paid. The plaintiff then made an oral promise, the effect of which, according to the finding of the jury, was that the plaintiff agreed to pay if the company made default. The jury also found that the plaintiff was induced to enter into this agreement by the fact (*inter alia*) that he had a debenture charge upon the assets of the company.[31]

It had been pointed out by Stirling, C. J., in Harburg v. Martin[32] that the defendant in that case had nothing in the way of a charge on the property of the syndicate and therefore no "interest" in the legal sense in the goods which were about to be seized under the plaintiff's execution. Apparently with special regard to the implication to be drawn from Stirling, C. J.'s judgment that if the promisor had a legal charge upon the property of the company the promise would be enforceable although there was no writing, Lord Coleridge, J., in Davys v. Buswell held that the case was taken out of the statute by the promisor's interest in the company's property. This decision was reversed by the Court of Appeal, virtually on the ground that this case, like Harburg v. Martin, was not analogous to the "property cases," in which a person who has purchased or has an interest in certain goods which are subject to a lien obtains a discharge of the lien by undertaking to be responsible for payment of the debt in respect to which the lien exists. The motive of Davys in making the promise was doubtless to improve his own position, because if more goods were supplied to the company the value of the property covered by his charge in the event of the winding up of the company would be greater, but the object of the promise was simply to guarantee the company's debt.

Fitzgerald v. Dressler was a clear case of a promise the object and effect of which was to free specific goods, the

[31] This charge was of the kind known as a "floating" charge, but nothing turned on the fact that the charge was an equitable, not a legal, charge.

[32] (1902) 1 K. B. 778, at p. 791.

property of the promisor, from a lien, and which was therefore not primarily a promise to answer for another. The courts in England have, however, refused to extend the exception from the application of the statute to a case in which the promisor had merely an interest in a business sense as chief shareholder of the principal debtor (Harburg v. Martin), or even to a case in which the promisor had a general debenture charge upon the assets of the principal debtor (Davys v. Buswell). Strictly in accordance with the doctrine of the English cases it was held in Massachusetts that the statute applied in a case in which the owners of a ship were indebted to the plaintiffs for wood and coal supplied, and when the plaintiffs threatened to attach the ship, the defendant, a mortgagee of a three-fourths share in the ship, promised to pay the bill if the plaintiff would not attach the ship.[23]

It is interesting to compare these cases, especially that of Davys v. Buswell, with the case of Davis v. Patrick,[24] already mentioned, decided by the Supreme Court of the United States. A comparison of the cases seems to indicate a divergence between the view of that court and the most recently expressed views of the English Court of Appeal. The latter court seems to be inclined to draw the line more strictly in excepting cases from the operation of the statute. In Davis v. Patrick the promisor had bought from the principal debtor and had paid for a large quantity of ore. The object of his promise was in part at least to secure the transportation and delivery to him of this ore, his own property. So far as the judgment against him was based on this ground it is unexceptionable—the case falling clearly within the "property cases." In the judgment, however, much stress is laid also on the circumstance that the promisor was a creditor of the principal debtor with some measure of control over the mine operated by the principal debtor, and it is said that the object and effect of the promise was to help

[23] Ames v. Foster (1871) 106 Mass. 400, Ames' Cases on Suretyship, 85.
[24] (1891) 141 U. S. 479, Ames' Cases on Suretyship, 89.

the principal debtor to pay its debt to the promisor, because the payment of the debt depended upon the continued and successful working of the mine. In other words the dicta referred to seem to recognize as valid the argument which was condemned in Harburg v. Martin and Davys v. Buswell, namely, that it is sufficient, in order to take a case out of the statute, that the promisor should have an interest in a merely business sense in the property of the principal debtor.

The Pennsylvania case of Goodling v. Simon,[35] seems to be inconsistent with the English cases. The plaintiffs were holders of a note made by a company, of which the defendants were shareholders and creditors, as well as being respectively president and treasurer. The plaintiffs having threatened suit on the note, the defendants promised to pay the plaintiff's claim upon condition that the plaintiffs would not proceed further against the company. It was held that the promise was not within the statute, on the ground that the main object of the promise was not to answer for the debt of another but to further and protect the defendant's own interests, by enabling them to dispose of their individual interests in the company, which to the knowledge of all the parties to the suit was insolvent.

In the earlier Pennsylvania cases cited in the judgment in Goodling v. Simon, there is manifest the same inclination to except from the operation of the statute any promise made for the purpose of subserving the promisor's own interests, without imposing any such strict limitation upon the exception as has been imposed by the English cases.

In the interval between the decision in Harburg v. Martin and that in Davys v. Buswell, the Ontario case of Adams v. Craig and the Ontario Bank[36] was decided. The defendant Craig made a sale of goods with a view of reducing his overdraft with the defendant bank. Included in these goods were certain goods contracted to be purchased by him from the plaintiff, and in order to obtain the plaintiff's

[35] (1913) 54 Pa. Superior Ct. 125.
[36] (1911) 24 O. L. R. 490.

acquiescence in the sale, an oral promise was made on behalf of the bank that upon the sale being completed and the purchase money being placed to the credit of Craig, the bank would pay the amount of a cheque drawn by Craig upon the bank in the plaintiff's favour. It was held that the circumstances brought the promise within the "property cases" and that the bank was liable upon the oral promise to pay the cheque. It seems, however, doubtful whether the decision is consistent with the strict view of the "property cases" adopted in Davys v. Buswell, unless indeed the transaction may be regarded as being a purchase of the goods by the bank from the plaintiff in order that they might be sold by Craig together with his own goods.

(b) *The Document Cases.*

The clearest direct authority on this class of cases is Castling v. Aubert.[37] The plaintiff, a broker, had effected certain policies of insurance for his principal, and had a lien thereon in respect to bills of exchange accepted by the plaintiff for the accommodation of the principal. A loss occurred under the policies, and the defendant, in order that he might collect on behalf of the principal the amount due from the underwriters, promised the plaintiff to provide for the payment of the acceptances as they became due, upon the plaintiff giving up to him the policies. The plaintiff sustained damages by the breach of the defendant's promise. The defendant having collected on the policies a larger amount than the plaintiff's claim, it was held that the plaintiff was entitled to recover on the count for money had and received, but it was also held that the defendant's promise was not within the statute, the transaction rather being a purchase by the defendant of the securities which the plaintiff held in his hands. This, as Lord Ellenborough, C. J., observed,[38] was "quite outside the mischief provided against by the statute; which was that persons should not by their own unvouched undertaking without writing charge themselves

[37] (1802) 2 East 325.
[38] 2 East 325, at p. 331.

for the debt, default or miscarriage of another." Lawrence, J., says,[39] "This is to be considered as a purchase by the defendant of the plaintiff's interest in the policies. It is not a bare promise to the creditor to pay the debt of another due to him, but a promise by the defendant to pay what the plaintiff would be liable to pay (*i. e.*, the acceptances), if the plaintiff would furnish him with the means of doing so."

The "document cases" are discussed by Cozens-Hardy, M. R., in Harburg v. Martin[40] as being entirely distinct from the "property cases," but Vaughan Williams, L. J.'s definition of the latter, already noted, clearly include the former, and the advantage of making two classes is doubtful. The defendant's promise is either a contract for the release of property which is his own or in which he has an interest or a contract for the purchase of property.

(c) *The Del Credere Cases.*

A contract for the employment of a *del credere* agent need not be in writing, although it incidently involves the answering for the debt, default or miscarriage of another person.

The leading case in England is that of Couturier v. Hastie.[41] Parke, B., delivering the judgment of the Court of Exchequer, said,[42] "The other and only remaining point is, whether the defendants are responsible by reason of their charging a *del credere* commission, though they have not guaranteed by writing signed by themselves. We think they are. Doubtless, if they had for a percentage guaranteed the debt owing, or performance of the contract by the vendee, being totally unconnected with the sale, they would not be liable without a note in writing signed by them; but being the agents to negotiate the sale, the commission is paid in respect of that employment; a higher reward is paid in consideration of their taking greater care in sales to their cus-

[39] 2 East 325, at p. 332.
[40] (1902) 1 K. B. 778, at p. 793.
[41] (1852) 8 Exch. 40, reversed on other grounds, 9 Exch. 102, 5 H. L. C. 673.
[42] 8 Exch. 40, at pp. 55, 56.

tomers, and precluding all question whether the loss arose from negligence or not, and also for assuming a greater share of responsibility than ordinary agents, namely, responsibility for the solvency and performance of their contracts by their vendees.

This is the main object of the reward being given to them; and though it may terminate in a liability to pay the debt of another, that is not the immediate object for which the consideration is given, and the case resembles in this respect those of Williams v. Leper,[43] and Castling v. Aubert.[44] We entirely adopt the reasoning of an American judge (Mr. Justice Cowen) in a very able judgment on this very point in Wolff v. Koppel."[45]

The principle of Couturier v. Hastie was applied and possibly extended in the case of Sutton & Co. v. Grey.[46] The plaintiffs, who were stockbrokers, entered into an oral agreement with the defendant, who was not a member of the stock exchange, that he should introduce clients to them, and that the plaintiffs should transact business on the exchange for the clients thus introduced, upon the terms that, as between the plaintiffs and the defendant, the defendant should receive one-half of the commission earned by the plaintiffs in respect of any transactions for such clients, and that the defendant should pay to the plaintiffs one-half of any loss which might be incurred by them in respect of such transactions. The plaintiffs sued the defendant for one-half of the loss incurred in transactions entered into on behalf of one of the clients introduced by the defendant. It was held that the Statute of Frauds did not apply because the defendant had an equal interest in the transaction with the plaintiffs, or, alternatively, because the main object of the agreement was not to guarantee payment of the debt of another, but to regulate the terms of the defendant's employment by the plaintiffs. It was not strictly the case of

[43] (1766) 3 Burr. 1886, Ames' Cases on Suretyship, 72.
[44] (1802) 2 East 325.
[45] (1843) 5 Hill 458, Ames' Cases on Suretyship, 67.
[46] (1894) 1 Q. B. 285, Ames' Cases on Suretyship, 70.

the employment of a *del credere* agent nor was it strictly a partnership, but it was held that the principle of the *del credere* cases applied.

It will be observed that when the *del credere* cases were in Couturier v. Hastie first decided not to be within the statute, the ground given for the decision was the broadest principle applicable to the circumstances—a principle amply broad enough to cover the somewhat different circumstances of Sutton & Co. v. Grey—broad enough also to cover the very different circumstance of the other cases previously discussed. As pointed out by Vaughan Williams, L. J., in Harburg v. Martin,[47] the property cases (including the document cases) and the *del credere* cases are cases of different species, but all members of one genus. In each of these cases there is a main contract—a larger contract—and the obligation to pay the debt of another is merely an incident of the larger contract. It is not a question of motive—it is a question of object. The question in each case is, what is the subject matter of the contract? If the subject matter is the purchase of property, the getting rid of an encumbrance, the securing of greater diligence in the performance of the duty of a factor, or the introduction of business into a stock-broker's office—in all these cases there is a larger matter which is the object of the contract. The mere fact that as an incident to that contract—not as the immediate object, but indirectly—the debt of another person will be paid, does not bring the case within the statute. The form of the promise is not conclusive. Whether the promisor in terms engages to answer for the debt of another or not, it is the substance, not the form which is to be regarded. The statute applies only to a "special" promise to answer for the debt, default or miscarriage of another person, that is, a promise specially directed to this end. It does not apply to a promise made with some other main or immediate object.

The case of Williams v. Leper,[48] cited in the judgment of Parke, B., in Couturier v. Hastie, is a good illustration of

[47] (1902) 1 K. B. 778, at pp. 784, 786.
[48] (1766) 3 Burr. 1886, Ames' Cases on Suretyship, 72.

the broad principle. One Taylor, a tenant of the plaintiff, being in arrear for rent and insolvent, conveyed all his effects for the benefit of his creditors. They employed the defendant to sell the effects and accordingly he advertised the sale. On the morning advertised for the sale, the plaintiff came to distrain the goods in the house. The defendant having notice of the plaintiff's intention to distrain, promised to pay the arrears of rent if he would desist from distraining, and the plaintiff did thereupon desist. It was held that the promise was not within the Statute of Frauds.

Wilmot, J. considered the distress as being actually made, and said that the defendant made the promise to discharge the goods. That is only another way of saying that the object of the promise was not to answer for the debt of another, but to protect the goods of the creditors for whom the defendant was trustee, and this seems to be the simplest and broadest ground upon which the decision can be based.[49]

It is only a particular application of the broader principle to say that the defendant was liable on his promise because he was virtually a purchaser of the goods[50] or because he had an interest in the goods apart from his promise[51] or because his liability did not arise wholly out of his express promise.[52] But if there is no actual right of distress at the time the promise is made, as for instance where the promise is made in respect of future rent,[53] the case is within the statute—not being within the exception based on the general principle as broadly stated, or any of its particular applications.

Lord Mansfield in Williams v. Leper based his decision on the ground that the defendant was trustee for all the creditors and therefore obliged to pay the landlord who had the prior lien. This is not a promise to pay the debt of

[49] Cf. Mathew, J. in Harburg v. Martin (1902) 1 K. B. 778, at p. 779.

[50] De Colyar, Law of Guarantees, 3rd ed. 160.

[51] De Colyar, *op. cit.*, 138.

[52] See Stirling L. J. in Harburg v. Martin, *ubi supra*, at p. 790, treating Williams v. Leper as a type of one of the classes of cases falling within the general principle that if the promisor or his property is already liable to the promisee, the promise is not within the statute.

[53] Thomas v. Williams (1830) 10 B. & C. 664, Lord Tenterden, at p. 670.

another. Wilmot, J., said that the defendant was in the nature of a bailiff for the landlord, and, if the defendant had sold the goods and received money for them, an action for money had and received for the plaintiff's use would have lain. In this connection it is to be noted that Aston, J. thought that if the goods had not sold for so much as the plaintiff's rent, the defendant would be liable for no more than they sold for.

De Colyar[54] cites Williams v. Leper as one of the class of cases which may be considered referable to the principle that the statute applies only where there is a principal debtor, and in particular as an illustration of the principle that a promise made to a third person's creditors to pay the debt of that third person out of the proceeds of a sale of that third person's goods is not within the statute.[55] Such a promise is not a promise to answer for the debt of another person, but a promise to answer for the sufficiency of a certain fund, or for the due application of the fund, as the case may be. In such a case you undertake or promise *not* for *another*, but for *yourself*. You undertake, not that *another* shall pay out of the proceeds of the sale, but that you yourself will do so. Consequently, there is no one liable, or to become liable, in the first instance, to do that which you promise or undertake to do, and therefore the operation of the statute is excluded. This belongs, however, to the second main class of cases, which I propose next to discuss.

John Delatre Falconbridge.

(*To be continued.*)

[54] *Op. cit.*, pp. 78–81.
[55] Cf. Dock v. Boyd & Co. (1880) 93 Pa. 40, Ames' Cases on Suretyship, 40.