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INDEMNITY CONTRACTS AND THE STATUTE OF FRAUDS:

THOMAS *v.* COOK VERSUS GREEN *v.* CRESSWELL

BY EARL C. ARNOLD*

THE statement is generally accepted that *Thomas v. Cook*¹ was overruled by *Green v. Cresswell*,² and that the latter case was in turn repudiated by *Reader v. Kingham*³ and *Wildes v. Dudlow*.⁴ Because American courts have given expression to the same opinion, this view is undoubtedly accepted by most jurisdictions, after much vacillation and without reference to any clear ground of principle.⁵ But it is submitted that the cases mentioned are distinguishable, and *Green v. Cresswell* did not necessarily overrule

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¹(1828) 8 Barn. & Cres. 728.

²(1839) 10 Ad. & Ell. 453.

³(1862) 13 C. B. N. S. 344.

⁴(1874) L. R. 19 Eq. 198.

⁵Of the problems arising out of the cases mentioned, the supreme court of Pennsylvania observed in *Nugent v. Wolfe*, (1886) 111 Pa. 471, 4 Atl. 15, that: "During the more than two centuries since its original enactment (the statute of frauds) the construction of this section, and its application to various forms of contract, have been constantly the subject of contention; and on no question, perhaps, has there been greater diversity and contrariety of judicial decision in this as well as in the parent country."

These expressions give an idea of the American view: *Stearns, Suretyship*, 3rd ed., sec. 32, says: "Such was the reasoning of *Green v. Cresswell*, which overruled *Thomas v. Cook*, but which was, in turn, repudiated by the later cases in England."

1 Williston, *Contracts*, 928, note 70: "But in later English cases, *Green v. Cresswell* seems overruled."

These authorities reflect a similar view in England: In *Wildes v. Dudlow*, (1874) L. R. 19 Eq. 198, it was said: "But I am happy to find that, the matter having been most carefully and elaborately considered in the case of *Reader v. Kingham*, when the full number of judges was present, the case of *Green v. Cresswell* was overruled, and the law as laid down by *Thomas v. Cook* restored."

Guild & Co. v. Conrad, [1894] 2 Q. B. 885,893; "Unquestionably it [*Thomas v. Cook*] was not followed by the Court of Queen's Bench in

Thomas v. Cook, in spite of the fact that Lord Denman said of the latter case that "the reasoning in this case does not appear to us to be satisfactory in support of the doctrine there laid down."⁶ However, one attempting to criticize the cases which are generally accepted to be orthodox must have the feeling of the sage of last century, who, faced with a similar self-imposed task, declared that his "observations are hazarded with great diffidence, as they apparently militate against great authorities."⁷

These two hypothetical cases, involving promises to indemnify one who becomes guarantor to a third person, will illustrate concretely the main problems presented by the cases considered: (a) A verbally states to B: "If you will sign C's note, as surety, payable to X, and are compelled to pay it, I will reimburse you." (b) A verbally states to B: "If you will sign a note with me, payable to X, and are compelled to pay it, I will reimburse you."

In *Thomas v. Cook*, W. Cook and Morris were in a partnership, which was dissolved by agreement, Morris retiring. Morris would, of course, be liable for the prior partnership debts, incurred while he was a member of it. To protect him, it was agreed between W. Cook and Morris, that W. Cook and two other persons should execute to Morris a bond of indemnity to save Morris from liability of these partnership debts. This bond of indemnity was given in accord with this understanding. Neither agreement yet mentioned was the subject of the suit in *Thomas v. Cook*. But, in order to induce the plaintiff to sign this bond of indemnity to Morris, along with W. Cook and the defendant, the defendant *verbally* promised the plaintiff, and in consideration therefor, that if the plaintiff would sign the bond of indemnity to Morris "*with the defendant and W. Cook,*" the defendant would save the plaintiff harmless from all damages and costs which the plaintiff might have to pay by reason of becoming liable on the indemnity bond to Morris, as obligee. The bond of indemnity was signed by the plaintiff and the defendant, as sureties for W. Cook, principal. The plaintiff was compelled to pay £400 to Morris on the bond of indemnity. Plaintiff then recovered £100 from the estate of W. Cook, he being since deceased. This left a deficiency of £300, and the

Green v. Cresswell and Cripps v. Hartnoll; but, notwithstanding the criticism of the learned judges in those cases, *Thomas v. Cook* was set on its feet again by the decision of the Court of the Exchequer Chamber in the latter case, and it has held its ground."

⁶Lord Denman in *Green v. Cresswell*, (1839) 10 Ad. & Ell. 453.

⁷Williams' Saunders, note, 211-c.

plaintiff brought this action of assumpsit against the defendant to recover on his verbal promise to save the plaintiff harmless from all payments he might incur by reason of the plaintiff signing the bond of indemnity to Morris. The defendant made two contentions: (a) that plaintiff could not recover on the verbal promise because of the fourth section of the statute of frauds, which provides that:

"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 person thereunto by him lawfully authorized."⁸

(b) The defendant contended that if he were liable at all, it was only as a cosurety for contribution on the count for money paid, which would limit his liability to £150. The trial court directed a verdict for the plaintiff for £300, holding the defendant liable on his verbal promise. The defendant obtained leave to move to reduce the judgment to £150, which would be the extent of his liability for contribution as a cosurety. But the rule nisi obtained for this purpose was discharged, and the defendant was held on his verbal promise, for the reason, stated Parke, J., that this was "an original contract between these parties, that the plaintiff should be indemnified against the bond."

In *Green v. Cresswell*,⁹ Reay had brought a civil action against Hadley, and Hadley failing to pay, a *capias* was issued, directing the sheriff to arrest Hadley. Bail was indorsed thereon in the sum of £35. The sheriff arrested Hadley as directed. To secure his release, the defendant requested the plaintiff to become bail and surety for Hadley on a bail bond, conditioned that Hadley would put in special bail. The plaintiff signed Hadley's bail. The effect was that the plaintiff bound himself either to satisfy the creditor of the claim for the debt and costs, or surrender Hadley into custody, provided judgment be against him in that action, and the debtor failed to pay. To induce the plaintiff to sign Hadley's bail bond, the defendant verbally promised that he would save the plaintiff harmless, and indemnify him for all costs and damages he might incur by such an act. The bail bond, which the plaintiff

⁸(1676) 29 Car. II, Sec. 4. American states have similar statutes, most of them differing but little in wording from the English statute of frauds.

⁹(1839) 10 Ad. & Ell. 453.

signed, was made to the sheriff, as obligee, but he assigned it to Reay, who sued the plaintiff, and recovered damages and costs. To recover the loss sustained by the plaintiff as a result of his signature of the Hadley bail bond, plaintiff brought this action of assumpsit on the defendant's verbal promise to save him harmless, and which formed the inducement for the plaintiff's signing the bond of Hadley. The trial court held this was a case outside the statute of frauds and that the defendant was liable on his promise. This judgment was arrested, and Lord Denman, contrary to the trial court, held the defendant was not liable because this was a case within the statute of frauds, and the promise should have been in writing in order to make the defendant liable.

These two cases were decided by the same court but eleven years apart. The form of action in each case was assumpsit. In spite of the general statement of the proposition of law in *Thomas v. Cook*¹⁰ by Bayley, J., that "a promise to indemnify does not, as it appears to me, fall within either the words or the policy of the statute of frauds," it is submitted the rule stated is not applicable to that case. And regardless of Lord Denman's criticism of the "reasoning" of *Thomas v. Cook*, some authorities contend that *Green v. Cresswell* did not overrule that case. The facts in the two cases are dissimilar, and it is believed the conclusion in each case might be supported if the correct principles were applied.¹¹

Thomas v. Cook is correct in the conclusion reached, said the

¹⁰(1828) 8 Barn. & Cres. 728.

¹¹The supreme court of New York, it must be admitted, eight years prior to *Green v. Cresswell*, concluded to the contrary, after considering very similar facts, on the ground that "this is clearly an original undertaking." But to decide that it is an original undertaking is no test, for what constitutes an original undertaking is the question. The defendant in the New York case requested the plaintiff to enter into an obligation under seal to enable a third person to procure credit. Plaintiff was compelled to pay, sued the defendant to recover on his verbal promise, which the court said was an original undertaking. *Chapin v. Merrill*, (1830) 4 Wend. (N. Y.) 657.

Such a view is clearly correct if the promisor had a pecuniary interest to serve in making the promise to indemnify another. The primary purpose is the benefit to the promisor, and the statute of frauds does not apply, even if incidentally it should be a promise to answer for the debt of another. *Boyer v. Soules*, (1895) 105 Mich. 31, 62 N. W. 1000; *Smith v. Delaney*, (1894) 64 Conn. 264, 29 Atl. 496.

Twenty-four years before *Green v. Cresswell*, the Massachusetts court used language contrary to it, in a case involving identical facts, except that the principal, who was imprisoned, gave property to the defendant to indemnify him. He was sued on his verbal promise to indemnify the plaintiff, who became bail, and was forced to pay. And while the court said this was an original promise, it is submitted that the fact that the defendant was given property to indemnify him differentiates the case from *Green v. Cresswell*. *Perley v. Spring* (1815) 12 Mass. 297.

highest court of New Jersey, not for the reason on which the opinion was placed, that it was a promise to indemnify, but because the defendant promised the plaintiff that if the plaintiff would sign the bond *with* him, the defendant, then the defendant would save him harmless.¹² The defendant was verbally promising to save the plaintiff harmless, if the plaintiff would become liable *with* the defendant and W. Cook on a bond to Morris. In other words, plaintiff, defendant, and W. Cook were to become liable simultaneously to Morris. It was not a promise, therefore, "to answer for the debt, default or miscarriage of *another person*," as provided by the statute of frauds, but a promise to answer for the *defendant's own default*.

All statutes in derogation of the common law are to be strictly construed.¹³ The statute of frauds was in derogation of the common law. Therefore, it is not applicable to any case unless clearly it comes within the provisions of the statute.

That a verbal promise by one to answer for his own debt, or to indemnify another who becomes bound on an obligation *with*

¹²See *Hartley v. Sanford*, (1901) 66 N. J. L. 627, 50 Atl. 454, 55 L. R. A. 206, in which it was said of *Thomas v. Cook* that "the promisor was himself a signer of the bond against which he promised to indemnify the promisee, and thus the promise was, in a reasonable sense, to answer for that which, as to the promisee, was the promisor's own debt."

In the report of *Green v. Cresswell* in 4 Jurist 169, 170, Lord Denman is recorded as having interpolated a similar observation during the argument of counsel, in answer to the contention that *Thomas v. Cook* there applied: "It [*Thomas v. Cook*] was the case of a cosurety." Patterson, J., made the same distinction: "I do not see in that case whose default or miscarriage the defendant had to answer for, except his own. The consideration for the promise moved from him; and all the parties, including the plaintiff were to be guilty of a default before the indemnity arose. There was no collateral security."

Browne, *Statute of Frauds*, 5th ed., sec. 161-a, says: "It is to be noticed that in *Thomas v. Cook* the plaintiff and defendant became cosureties, while in *Green v. Cresswell* the defendant was not himself on the bond; and this difference between the facts of the two cases has been supposed to distinguish them, upon the ground that where the defendant is cosurety he is, as such without any special promise, liable already to contribute, and that his special promise to pay the whole may be regarded as but a matter of regulation of contribution between the two sureties." See also *Rose v. Wollenburg*, (1896) 31 Ore. 269, 44 Pac. 382, 384, 39 L. R. A. 378, 65 A. S. R. 826.

1 Reed, *Statute of Frauds*, sec. 76, said of *Thomas v. Cook*: "... and the fact that a third person is to be surety jointly with the promisor and the plaintiff, and that the indemnity covers such person's obligation also, does not make it a guaranty; and it is important that this should be stated, because that case is sometimes cited as going on still another ground, viz., that a promise to indemnify one for becoming a surety is not within the statute of frauds."

¹³*Souter v. The Sea Witch*, (1850) 1 Cal. 162, 163; *Sibley v. Smith*, (1853) 2 Mich. 486, 490.

the promisor, is not within the statute, is well settled. As the Supreme Court of Ohio said many years ago:

" . . . if a surety on an obligation, upon his promise of indemnity, procures another to go surety with him on the same instrument, the promise is not within the statute, for the indemnity promised is to secure his own default."¹⁴

It is believed that the facts of the Ohio case cited are identical with *Thomas v. Cook*, and the general rule above quoted could have been the ground for the decision in the English case.

In *Green v. Cresswell*, the verbal promise of the defendant was to become effective contemporaneously with the commencement of the plaintiff's liability with Hadley—another person. To secure a benefit for Hadley was the prime purpose of the defendant's promise. There was no pecuniary interest of the promisor to be subserved by his verbal promise. It was, therefore, a promise to answer for the default of another person, and not that of the promisor, as it was in *Thomas v. Cook*.¹⁵

¹⁴*Ferrell v. Maxwell*, (1876) 28 Oh. St. 383, 386-387; *Horn v. Bray*, (1875) 51 Ind. 555, 19 Am. Rep. 744.

Unfortunately, this correct distinction was not followed in *Bissig v. Britton*, (1875) 59 Mo. 204, 21 Am. Rep. 379, where it appears the defendant signed the replevin bond with the plaintiff, to whom defendant made a verbal promise to indemnify. This was erroneously held to be within the statute, and the view was approved subsequently in *Hurt v. Ford*, (1897) 142 Mo. 283, 44 S. W. 228, 41 L. R. A. 823.

The Virginia court of appeals fell into the same error, partially by following as a precedent *Bissig v. Britton*, (1875) 59 Mo. 204, 21 Am. Rep. 379. *Wolverton v. Davis*, (1888) 85 Va. 64, 6 S. E., 619, 17 A. S. R. 56.

¹⁵This is the reasoning of the Pennsylvania supreme court. In *Nugent v. Wolfe*, (1886) 111 Pa. 471, 4 Atl. 15, to induce plaintiff to become bail for a stay of execution on judgment against Powers and Co., defendant verbally promised to save him harmless. Plaintiff was nonsuited in an action brought on the verbal promise. The court said: "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."

Frequent cases arise where to induce a qualified person to become surety for another on a replevin or attachment bond, the defendant verbally agrees to see him harmless. If the defendant does not sign the bond with the plaintiff, this promise is within the statute of frauds, and the defendant is not liable. *Easter v. White* (1861) 12 Oh. St. 219. See *Hartley v. Sanford*, (1901) 66 N. J. L. 627, 50 Atl. 454. If, however, the defendant also becomes liable with the plaintiff, the defendant is only promising to answer for his own debt, and not for that of another person. *Ferrell v. Maxwell*, (1876) 28 Oh. St. 383, 22 Am. Rep. 393. The obvious reason for this distinction is that "the statute requires that a special promise to answer for the debt, etc., of another shall be in writing; it does not require that a promise to answer for a debt which is not the

Subsequent opinions have stated that *Reader v. Kingham*¹⁸ overruled *Green v. Cresswell*. But nowhere in the former case is it indicated that any of the Justices felt *Green v. Cresswell* was being overruled. The facts there were different from those present both in *Thomas v. Cook* and *Green v. Cresswell*. In *Reader v. Kingham*, Malins had recovered judgment against Hitchcock for £34, and had a warrant of commitment issued for the debtor. The bailiff being about to arrest Hitchcock, the defendant Kingham, who was a relative, verbally promised the bailiff, who was the plaintiff, that if he would not commit Hitchcock, he the defendant, would on the next Saturday either pay £17 to the plaintiff or surrender Hitchcock. Defendant did neither. Malins previously had authorized the plaintiff to accept £17 *in satisfaction of the judgment*; but nowhere is there any fact indicating that Malins had authorized the plaintiff to accept that sum, or a security for that sum in consideration of postponement of serving his warrant. The court held the defendant liable. The promise was not within the statute of frauds. And the court's conclusion was correct for two reasons: (a) The promise was not made to the creditor, or one who would ever become the creditor of Hitchcock. The bailiff would not be entitled to reimbursement for the £17 from Hitchcock, as was the promisee in *Green v. Cresswell*. The promisee was a stranger. The court repudiated the argument that the plaintiff was acting as agent for Malins. (b) The promise to pay, or even the payment of the £17 did not, as the court emphasized, discharge Malins' demand against Hitchcock. It was not intended that it should. The promise of the defendant was that if the plaintiff would not then execute the warrant to arrest Hitchcock, the defendant would pay the plaintiff, who was not and would not become Hitchcock's creditor, the sum of £17. The forbearance to arrest Hitchcock was the consideration. And if the defendant had paid the plaintiff the £17 as agreed, *Malins could yet recover £34* from Hitchcock, for the £17 was intended to be in consideration of the forbearance to make the arrest, and not any part in payment of the judgment. It had no connection, collaterally or otherwise, with the debt owed by Hitchcock to Malins. As Earle, C., said: "The debts were totally distinct debts, as well

debt of another but is partly the debt of the promisor, shall be in writing." ¹ Beattie v. Dinnick, (1896) 27 Ont. Rep. 285, 294.

¹⁸(1862) 13 C. B. N. S. 343.

as the debtors."¹⁷ Nowhere in any of the opinions in that case is any language used showing that any justice intended to overrule *Green v. Cresswell*, which had been decided a quarter of a century previously, though that case was discussed.

But in 1868, six years after *Reader v. Kingham*, and twenty-nine years after *Green v. Cresswell* was decided, we find in *Wildes v. Dudlow*¹⁸ a conclusion reached, which applied to the facts, is admittedly contrary to *Green v. Cresswell*. But it was decided upon the assumption, believed to be incorrect, that "in the case of *Reader v. Kingham* when the full number of Judges was present, the case of *Green v. Cresswell* was overruled, and the law as laid down by *Thomas v. Cook* restored." A reading of the three cases should be convincing that, because of widely dissimilar facts, *Green v. Cresswell* never overruled *Thomas v. Cook*, and there is nothing in *Reader v. Kingman* which indicates an intention to overrule *Green v. Cresswell*, and the principles of law announced in the last two cases mentioned are entirely consistent.

In *Wildes v. Dudlow*, John Dudlow requested John N. Dudlow to sign a note with Wildes to enable Wildes to procure credit. John Dudlow verbally agreed with John N. Dudlow that if the latter would sign the note with Wildes, the former would indemnify John N. Dudlow from any loss. John N. Dudlow signed the note with Wildes and was compelled to pay it. The court held that John N. Dudlow could recover the £1,000 loss out of John Dudlow's estate, because the verbal promise was one of indemnity, and not within the statute of frauds. It must be admitted that *Wildes v. Dudlow* is contrary, both in reasoning and conclusion, to *Green v. Cresswell*; but it is believed to be erroneous in principle, even though it is the law of England today. (a) It was not a promise

¹⁷Of *Reader v. Kingham*, (1862) 13 C. B. N. S. 343, it was said in 1 Reed, Statute of Frauds, sec. 100: "The plaintiff, Reader, a bailiff, directed to arrest for contempt one H. A., a defaulting judgment debtor, and authorized by M, the creditor, to take half the debt in satisfaction, proceeded to arrest H. A., and Kingham, a relation of H. A., promised Reader that he would either pay the debt or produce H. A. by a certain time; this agreement was held to be exclusively between Reader and Kingham; M. could not have sued upon it, and though H. A. would not have been discharged by arrest under the process in question, and his debt to M. survived; yet the promise not having been made to the creditor M. it is not a guaranty, and Reader was not M's. agent to make such an arrangement. To summarize this case, it may be said that H. A. owed M., and Kingham owed Reader; that H. A. did not owe Reader, nor Kingham owe M., therefore the promise of Kingham to answer to Reader for H. A. was collateral to nothing."

¹⁸(1868) L. R. 19 Eq. 198.

of indemnity, but a guaranty, because the defendant's promise was collateral to Wildes' liability to John N. Dudlow. The latter could have reimbursed himself from Wildes, and thus the promise, if we follow the reasoning of the Mississippi court, hereinafter quoted, was made to John N. Dudlow as creditor and not as debtor. (b) The real basis for the opinion however, was the feeling that *Reader v. Kingham* overruled *Green v. Cresswell*. As previously pointed out, *Reader v. Kingham* did not necessarily or indirectly overrule it, and no language from the former opinion can be distorted to justify such a conclusion.

But English and American courts and writers have repeated the erroneous assumption from the opinion in *Wildes v. Dudlow*, to the effect that *Reader v. Kingham* overruled *Green v. Cresswell*, until it must be conceded, that both in England and a majority of the American jurisdictions, the courts take the view that *Green v. Cresswell* is not entitled to credit.

The only ground upon which the conclusion reached in *Green v. Cresswell* is vulnerable to attack, is to say that the promise was made to the *debtor*, and not to the creditor. It is well established that promises for a valid consideration made to the *debtor* are enforceable whether in writing or not, as such agreements are outside those contemplated by the statute of frauds.¹⁹ To cite authorities that a surety who pays the obligation of a principal has the right to recover the sum in an action at law against the principal, seems useless. That is the rule in all cases where one is a surety on a note or other obligation.²⁰ It is true of one who becomes bound on a bail bond in a civil action. It was the rule for one who became liable with the debtor for his appearance, at the time when the law permitted the debtor to be arrested for failing to pay his indebtedness.²¹ But because of public policy, the surety on

¹⁹*Eastwood v. Kenyon*, (1840) 11 Adol. & Ell. 438. *Alger v. Scoville*, (1854) 1 Gray (Mass.) 391. This argument was employed in *Aldrich v. Ames*, (1857) 9 Gray (Mass.) 76, where the plaintiff, at the request of the defendant, became bail for a third person, on which the defendant promised the plaintiff to indemnify him. The court said: "This is a promise by the defendant to another, to pay his debt, or, in other words, to save him from the performance of an obligation which might result in a debt. But it is a promise to the debtor to pay his debt, and thereby to relieve him from the payment of it himself, which is not within the statute of frauds."

²⁰*Chapin v. Lapham*, (1839) 20 Pick. (Mass.) 467.

²¹This was recognized by Lord Denman in *Green v. Cresswell*, (1839) 10 Ad. & Ell. 453 when he said: ". . . and, besides, may it not be said that the arrested debtor, who obtains his freedom by being bailed, undertakes to his bail to keep them harmless, by paying the debt, or surrendering?"

a criminal bail bond cannot recover against the person for whom he becomes responsible. And it is contended herein lies one great difference between the verbal promise to one who, as in *Green v. Cresswell*, becomes a surety on a civil bail bond, and such a verbal promise to one who is likewise liable on a criminal bail bond as in *Cripps v. Hartnoll*.²² It is true, plaintiff was the debtor of Reay

²²(1863) 4 B. & S. 415. This difference is there succinctly pointed out in this language: "Here the bail was given in a criminal proceeding; and, where bail is given in such a proceeding, there is no contract on the part of the person bailed to indemnify the person who became bail for him. There is no debt, and with respect to the person who bails, there is hardly a duty; and it may very well be that the promise to indemnify the bail in a criminal matter should be considered purely as an indemnity, which it has been decided to be. . . . This view of the subject creates, I think, a broad distinction between the present case and *Green v. Cresswell* . . . , which we are not called upon either to overrule or to say that we entirely support." Accord, *Holmes v. Knights*, (1839) 10 N. H. 175.

Of this distinction between civil and criminal bail in *Cripps v. Hartnoll*, (1863) 4 B. & S. 415 it was said, erroneously, it is submitted, in *Anderson v. Spence*, (1880) 72 Ind. 315, 318, that: "We confess, however, that it seems to us that there was a real conflict between the doctrine of *Green v. Cresswell* and that of *Cripps v. Hartnoll*, and that the distinction attempted to be made by the latter case was simply an effort to get rid of an unsound doctrine without expressly overruling it." The same error crept into the view expressed in the obiter in *May v. Williams*, (1883) 61 Miss. 125, 132, that: "We do not assent to the proposition that a principal in a bail bond is not under an implied contract to indemnify his surety."

Jones v. Orchard, (1855) 16 C. B. 617, said: "The rule was moved on the ground that a contract, in a criminal case, to indemnify the bail against the consequences of a default of the principal's appearance on the trial of the indictment, is contrary to public policy, and therefore that the law will not presume any such contract. It is unnecessary to decide that point on the present occasion, although we are inclined to think the objection well founded, and that such a contract would be contrary to public policy, inasmuch as it would be in effect giving the security of one person only, instead of two." The conclusion is reached, however, that "an express contract to indemnify against costs would not be illegal; and consequently there can be no reason why the law should not imply an indemnity under the circumstances."

Stearns, Suretyship, 3rd ed. sec. 279, says the surety on a bail bond has no right of indemnity against the principal, "except upon an express contract for indemnity." It is difficult to see why, if it is against public policy to imply such a contract, one may be made expressly which obviously would be against the same public policy.

In *Herman v. Jeuchner*, (1885) L. R. 15 Q. B. D. 561, this was stated: "When a man is ordered to find bail, and a surety becomes responsible for him, the surety is bound at his peril to see that his principal obeys the order of the court; at least, this is the rule in the criminal law; but if money to the amount for which surety is bound is deposited with him as an indemnity against any loss which he may sustain by reason of his principal's conduct, the surety has no interest in taking care that the condition of the recognizance is performed. Therefore the contract between the plaintiff and the defendant is tainted with illegality."

Speaking for the Supreme Court of the United States, Mr. Justice Bradley, in *United States v. Ryder*, (1883) 110 U. S. 729, 736, 28 L. Ed. 308, 4 S. C. R. 196 said of *Cripps v. Hartnoll*, (1863) 4 B. & S. 415, that

in *Green v. Cresswell*; but it was contemplated that as between plaintiff and defendant, in case the plaintiff was compelled to pay Reay, the plaintiff would be creditor of Hadley, who would be liable to the plaintiff for reimbursement. With this reasoning, the defendant made the promise to the *creditor*, and not to the debtor. In accord with this view is the reasoning of the Mississippi supreme court, which, if it were followed, would reconcile *Green v. Cresswell*, and harmonize other apparent contradictions:

"It cannot be said that the promise to indemnify the surety is made to him as debtor and not as creditor. It is true that both the principal and surety are bound to the fourth person, the state; but the contract of the promisor is not to discharge that obligation. He assumes no duty or debt to the state, nor does he agree with the promisee to pay the state the debt which may become due to it if default shall be made by the principal in the bond. It is only when the promisee has changed his relationship of debtor to the state and assumed that of creditor to his principal by paying to the state the penalty for which he and his principal were bound that a right arises to go against the guarantor on his contract. *It is to one who is under a conditional and contingent liability that the promise is made; but it is to him as creditor, and not as debtor, that a right of action arises on it.*"²³

In the view of the Mississippi court, had it been followed in the other cases, the promise would of course be made to the promisee as creditor and not as the debtor. It would aid in harmonizing

it had not been shaken "by any subsequent case in England or in this country," and added: "The object of bail in civil cases is, either directly or indirectly, to secure the payment of a debt or other civil duty; whilst the object of bail in criminal cases is to secure the appearance of the principal before the court for the purposes of public justice. Payment by the bail in a civil case discharges the obligation of the principal to his creditor, and is only required to the extent of that obligation, whatever may be the penalty of the bond or recognizance; whilst payment of the bail of their recognizance in criminal cases, though it discharges the bail, does not discharge the obligation of the principal to appear in court; that obligation still remains and the principal may at any time be retaken and brought into court."

²³May v. Williams, (1883) 61 Miss. 125, 48 Am. Rep. 80. Italics by the author.

This reasoning, though not followed, was recognized in this language in *Demeritt v. Bickford*, (1879) 58 N. H. 523: "... the law raises an implied promise of indemnity by the principal from the existence of the relation of principal and surety, to which the express promise of the promisor is collateral, and, therefore, within the statute."

The view of the Mississippi court, if noticed at all, was not followed by the High Court of Justice for Ontario, which said in *Beattie v. Dinick*, (1896) 27 Ont. Rep. 285, 293: "But where the promise is made to one who is not a creditor, that if he will incur a liability to some third person, the promisor will indemnify him against it, it is not made to him as creditor at all, but rather in the character which he is asked to assume of debtor to the third person."

the principles underlying the cases. But search of the authorities convinces that the Mississippi court, even if logical, stands alone. A number of jurisdictions hold with the principle applied in *Green v. Cresswell*, but it is obvious if they recognize the promisee as debtor to the third person, and not as creditor to another, their reasoning is not logical. The view seems established that the statute of frauds contemplated only such obligations of the third party as previously existed or were assumed by the promisee contemporaneously at the time the promisor became bound. Evidently, the courts do not favor the application of the statute to such obligations as come into existence only impliedly and as legal incidents of the contract entered into by the promisee and his obligee.²⁴

In *Thomas v. Cook*, it was needlessly stated that "a promise to indemnify does not fall within either the words or the policy of the statute of frauds." On the authority of this language, the generalization has been made that contracts of indemnity are not within the statute, and, therefore, need not be in writing.²⁵ But

²⁴In *Tighe v. Morrison*, (1889) 116 N. Y. 263, 22 N. E. 164, 5 L. R. A. 617, it was said: "Were there two concurrent liabilities in the case under consideration? There was the liability of the defendant, the 'special' promisor, to the plaintiff, the promisee, but there was no liability on the part of Dowdall, the third person, to the promisee at the time the promise was made or when the bond was executed. Dowdall, as already suggested, was under no legal obligation to the plaintiff until by his default he had compelled him to pay the bond, and then his liability arose not out of any promise on his part, but sprang by operation of law from the fact of payment only."

3 Col. L. Rev. 104, 105, says: "It is asserted that in these cases of indemnity the debt which the defendant engages to discharge is that implied obligation of the third party to the promisee which arises on the making of the parol promise, but it may well be doubted whether the statute was intended to include in its operation an obligation of a third person which exists or is to exist solely by virtue of and as incidental to the special contract which the plaintiff seeks to enforce." Accord, Browne, *Statute of Frauds* 5th ed., sec. 162.

See also *Allen v. Pryor*, (1821) 3 A. K. Marsh (Ky.) 305; *Pike v. Brown*, (1851) 7 Cush. (Mass.) 133, 136; *Goodwin et al v. Gilbert et al*, (1813) 9 Mass. 510, 514.

²⁵*Stearns*, 3rd ed., sec. 32: "If the promise is merely to indemnify another upon a liability which he incurs to a third, there is very little, if any, conflict of authority but that it is not within the statute and so need not be in writing."

See *Dunn v. West*, (1845) 5 B. Monroe (Ky.) 376; *George v. Hoskins*, (1895) 17 Ky. L. Rep. 63, 30 S. W. 406; *Vogel v. Means*, (1872) 31 Wis. 306.

¹ Reed on *Statute of Frauds*, sec. 144, says: "In the leading and much disputed case of *Thomas v. Cook* the ruling that an indemnity for a guaranty is not within the Statute of Frauds, while explicitly laid down, is in reality only dictum. . . . So that, admitting that later decisions, which undertook to reverse *Thomas v. Cook*, were wrong, and the

what constitutes a contract of indemnity? The word indemnity conveys at least four meanings: "First, in the sense of giving security; and second, in the sense of relieving a party from liability or damages already accrued;"²⁶ third, the right of one on paying the principal's obligation for which he became liable, to recover in an action of assumpsit against the principal;²⁷ fourth, the case of the indemnitor promising to save harmless the indemnitee against liability to a third person.²⁸ To illustrate the first: A promises B to save him harmless if he will sign C's note as a surety. The second meaning will be illustrated by a promise by A to B to pay him for a loss already suffered. If A were surety on a note payable to C of which B were principal, and A paid the note at maturity, he would have the right to recover from B the sum he paid C. This would illustrate the third meaning. In the fourth case, if A, a judgment creditor promises the sheriff, who refuses to seize the personalty of B, the debtor, without indemnity, that he, A, will save the sheriff and his sureties harmless from any loss resulting from such seizure, he will be bound, even though the promise is verbal.²⁹ Obviously, the obiter in *Thomas v. Cook* should be confined to cases which would fall within the fourth class. In that class the promise is not collateral to the liability of another person. It is original. To call a contract one of indemnity, will not make it one. Because in an agreement the word "indemnity" occurs, it cannot be said that it is unaffected by the statute of frauds any more than it can be asserted that an agreement to pay the debt of another must always be in writing because it is not a contract of indemnity. As Pollock said:

"Now it has been laid down, that a mere promise of indemnity is not within the statute of frauds, and there are many cases which would exemplify the correctness of that decision. On the other hand an undertaking to answer for the debt or default of another is within the statute of frauds, and no doubt some cases might be put where it is both the one and the other, that is to say where the promise to answer for the debt or default of another

latter case is now good law, it by no means follows that the statement therein sustaining an oral indemnity for a guaranty is anything but an erroneous dictum, given as a reason for a sound decision. The weight of the American decisions is perhaps in favor of applying the Statute of Frauds to these indemnities."

²⁶*Lawson v. Halifax-Tonopah Mining Co.*, (1913) 36 Nev. 591, 135 Pac. 611, 613; *Weller v. Eames*, (1870) 15 Minn. 461, 467, 2 Am. Rep. 150.

²⁷*Brandt, Suretyship and Guaranty* 3rd ed. Chapter IX.

²⁸*Brandt, Suretyship and Guaranty* 3rd ed. sec. 52c.

²⁹*Mays v. Joseph*, (1877) 34 Oh. St. 22.

would involve what might, very properly and legally, be called an indemnity. Where that is the case, in all probability the undertaking would be considered as within the statute of frauds if it were to answer for the debt or default of another, notwithstanding it might also be an indemnity."³⁰

Certainly the cases justify us in saying that one contract called an indemnity may in reality be a guaranty and another designated as guaranty may in truth be an indemnity contract.³¹ Truly, we may conclude that "indemnity contracts are of great variety."³² Where the statute of frauds is concerned, the question is usually whether the contract is one of indemnity or a guaranty, and suretyship agreements, as technically understood, are not concerned. Some of the recognized differences between indemnity and guaranty may well be enumerated, even though they overlap each other:

(a) In an indemnity contract, no debt is owed to the promisee by the third person. A contract of indemnity is an original and independent one. A guaranty, however, presupposes a debt owing to the promisee by a third person.³³

(b) The indemnitor engages to save another from loss upon

³⁰*Cripps v. Hartnoll*, (1863) 4 B. & S. 415. *Garner v. Hudgins*, (1870) 46 Mo. 399, 401, recognized this distinction: "It has been sometimes held that a promise to indemnify did not come within the statute, but it seems to be now well settled by the better authorities that where the promise is collateral merely, the promisor having no interest in the liability guaranteed against, and being under no obligations to pay it, it is not obligatory unless in writing." *Gansey v. Orr*, (1903) 173 Mo. 532, 73 S. W. 477.

"When the promise to indemnify is in fact a promise to pay the debt of another, then, clearly, such promise is within the statute; and the fact that it is in form a promise to indemnify will make no difference." *Cheesman v. Wiggins*, (1890) 122 Ind. 352, 23 N. E. 945.

³¹De Colyar's observation emphasizes the statement above made: "... while on the one hand, a contract, which is in substance a guarantee, will not cease to be one from being put into the form of an indemnity, so, on the other hand, one which is in substance an indemnity, and imports no primary liability, will not lose that character from being shaped as or termed a guarantee." De Colyar, *Principal and Surety* 3rd ed., p. 58. See *Rowlatt*, *Principal and Surety* 41; *Mallett v. Bateman*, (1864) 16 C. B. N. S. 530.

³²*Wolthausen v. Trimpert*, (1919) 93 Conn. 260, 105 Atl. 687, 688.

³³*Hall v. Equitable Surety Co.*, (1917) 126 Ark. 535, 191 S. W. 32, 34. These rules require compliance, according to the generalization from the cases, found in 23 Harv. L. Rev. 136, 137, in order to constitute a guaranty: (1) The promise must be collateral to some liability on the part of a principal. (2) The principal's default is a condition precedent to the promisor's liability. Therefore, the statute of frauds is inapplicable to a promise contemplating absolute liability. (3) The obligations of the principal and guarantor must be coextensive and of a similar nature. (4) The promisor must have a right to be reimbursed by the principal; otherwise, there is no guaranty.

some obligation he has incurred or is about to incur on account of a third person, while a guarantor's promise is to one to whom another is answerable.³⁴

(c) The contract of indemnity is an original one to save the indemnitee harmless against future loss or damage. The contract of guaranty is a collateral one, and presupposes some contract or transaction to which it is secondary.³⁵

(d) The indemnitor agrees to become liable whenever the promisee suffers loss; the guarantor's promise is to become liable conditionally when the principal debtor defaults.³⁶

(e) If the liability of the third person is *existing*, and *not merely in contemplation* at the time the defendant makes his promise, it cannot be an indemnity contract. It must be one of guaranty if the obligation of the third person, for whom the promisee becomes responsible, is preexisting.³⁷

(f) An indemnitee has no remedy on the contract against a third person. His remedy is by direct action against the indemnitor. In the case of a guaranty, the third person for whom the promisee became responsible, may be sued by the promisee for reimbursement, if he is damaged.³⁸

³⁴Texas Fidelity & Bonding Co. v. General Bonding and Casualty Co., Tex. Civ. App., (1916) 184 S. W. 238, 240-241; Hall v. Equitable Surety Co., (1917) 126 Ark. 535, 191 S. W. 32, 34; U. S. Fidelity & Guaranty Co. v. Bank of Hattiesburg, (1922) 128 Miss. 605, 91 So. 344, 346; Eastern Surety Co. v. Kelley, (1911) 27 S. Dak. 465, 131 N. W. 808.

³⁵Wolthausen v. Trimpert, (1913) 93 Conn. 260, 105 Atl. 687, 688; Brandt, Suretyship and Guaranty 3rd ed.; sec. 5.

³⁶See opinions by Lopes, L. J., and Davey, L. J., in Guild v. Conrad, [1894] 2 Q. B. 885, 895, and 896, respectively. The opinion of Lopes, L. J. is discussed in Beattie v. Dinnick, (1896) 27 Ont. Rep. 285, 292.

³⁷"The distinction between a promise to pay a debt already due a creditor, or one to be created upon the faith of the promise on the one hand; and a promise that if the promisee will incur a liability, the promisor will indemnify him against it on the other hand, is not at all a shadowy one, and when the terms of the statute and the interpretation placed upon it by undisputed cases are considered, the reasons for holding the latter class of promises to be unaffected by it, while holding the former class to be within it, seem to be unanswerable." Beattie v. Dinnick, (1896) 27 Ont. Rep. 285, 293; Falconbridge on Guarantees and the Statute of Frauds, 40 Can. Law Times 388, 397, 68 U. of Pa. L. Rev. 137, 155, says: "On the other hand, if the liability of the third party is existing, not merely in contemplation, at the time of the defendant's promise, it would appear to be impossible to regard the transaction as a contract of indemnity."

³⁸For this reason, a verbal promise to save the promisee harmless if he will go on the criminal bail bond of a third person, is outside the statute. There is no implied right of reimbursement. "The contract is an original and independent one, in which there is no debt or default toward the promisee, to which there are no collateral contracts, and in which there is no remedy against the third party. . . . The general rule running through almost all the cases is, that, if the third person is not

(g) Under an indemnity contract, no right of action accrues against the indemnitor until the indemnitee suffers the loss against which the contract protects him. The indemnitee has no rights against the indemnitor merely because he may possibly suffer loss, but it is the actual loss which entitles him to recovery. A guaranty, however, if it be a guaranty of payment, fixes the liability of the guarantor at the time when the principal debtor fails to pay at maturity.³⁹

It is believed that these distinctions between indemnity and guaranty justify the conclusions in *Green v. Cresswell*, and had the courts been discriminating in the sense in which the term "indemnity" was used, the century of conflict, confusion and groping would have been spared. By failing to apply the proper reasoning, and by blindly following an erroneous statement of an English opinion, both Scylla and Charybdis have been encountered. Verbal promisors will continue to be uncertain of their liabilities until the courts make some earnest effort at clarification of terminology. The suggestions here made point out some outstanding characteristics.

Certainly in *Green v. Cresswell*, the special promise of the defendant created "a new liability collateral to some liability already

liable, then the undertaking is not within the statute. This doctrine is exemplified in the great number of cases, which hold that a promise to answer for the debt or default of an infant or *feme covert* is not within the statute, because there is no third person bound." *Anderson v. Spence*, (1880) 72 Ind. 315, 321. If this be correct, then reimbursement could not be recovered in a case like *Watkins v. Perkins*, (1697) 1 Lord Raymond 224, for the same reason.

In *Administrators of Beaman v. Russell*, (1848) 20 Vt. 205, 49 Am. Dec. 775, it was said: ". . . it seems agreed in all the cases, that, if the promise is not collateral to the liability of some other person to the same party, it is not within the statute. . . . In this case, unless there was some person liable to indemnify the plaintiff for signing the notes to the Bank of Rutland, other than the defendant, his undertaking was an original and not a collateral one." (Author's italics.)

The general rule is stated in 28 Corpus Juris 892 to be that "a contract of indemnity is original and independent, to which there is no collateral contract and with respect to which there is no remedy against the third party." Corroborative of this general statement, this language was used: "The promise in an indemnity contract is an original, and not a collateral, undertaking. . . . The remedy of the indemnitee who has paid or incurred expense is by direct action against the indemnitor." *Bain v. Arthur*, (1911) 129 La. 143, 55 So. 743.

³⁹*Adler v. Sawyer*, (1919) 39 Cal. App. 778, 181 Pac. 817, 818.

From the above statement, it logically results that if it be a guaranty of payment, the statute of limitations begins to run against the promisee's right to bring the action against the guarantor as soon as there is a default in performance whether the promisee has suffered damage or not. If the promise be an indemnity, the statute will not begin to run until the promisee sustains pecuniary loss or is damaged. See note 126 A. S. R. 946.

existing or intended to be raised."⁴⁰ The defendant in that case became the promisor to the plaintiff, whose action was brought as creditor, but who was not permitted to recover because (a) the defendant's promise was verbal, and (b) it was a promise primarily for the benefit of another, for whom the promisee became responsible, and against whom, on his default, the plaintiff had a right of action for reimbursement.

While generally it is true, as stated in the obiter in Bayley's opinion in *Thomas v. Cook*, that contracts of indemnity are not within the statute of frauds, all which the courts have called indemnity contracts are not the same. If the indemnitee assumes the debt of another, it is then within the statute, as *Green v. Cresswell* decided,⁴¹ but not if the indemnitee has no right of reimbursement against the third person whose obligation he has assumed. But if the contract be made, even orally, to guaranty the fidelity of a person, it is not required to be in writing.⁴² Likewise, the promisor is liable if the promisee agrees to pay the debt of a third person, who, because of incapacity to contract, is not legally liable.⁴³

The cases referred to make it obvious that by whatever name the agreement is designated, the liability of the verbal promisor must depend upon (a) whether the original party remains liable; (b) whether there is any liability on the promisor except that cre-

⁴⁰2 Street, *Foundations of Legal Liability*, 187.

⁴¹*Sweet v. Colleton*, (1893) 96 Mich. 391, 55 N. W. 984, says: "The test to be applied is whether the party sought to be charged is the principal debtor, primarily liable, or whether he is only liable in case of the default of a third person; whether the party promising contracted an independent obligation of his own, or whether his position to the creditor was that of a surety merely."

⁴²Page, *Contracts*, 2nd ed., sec. 1249: "If A, in order to induce B to become surety for C, promises to indemnify him against any loss, arising out of such suretyship, the question of the application of the Statute of Frauds depends on the view of such transaction taken by the courts. A's promise may be regarded as a promise of B to pay B's debt to the obligee. If this view of the essential of the transaction is entertained, A's promise is not within the Statute of Frauds. Other authorities look on A's promise as a promise to pay C's debt to B if C does not, and hence within the statute."

⁴³*Quinn-Shepherdson Co. v. U. S. Fidelity and Guaranty Co.*, (1919) 142 Minn. 428, 172 N. W. 693. See *Tighe v. Morrison*, (1889) 116 N. Y. 263, 22 N. E. 164, 5 L. R. A. 617.

See a contrary view expressed in *Commonwealth v. Hinson*, (1911) 143 Ky. 428, 136 S. W. 912, Ann. Cas. 1912D 291, L. R. A. 1917B 139.

So a lawyer, who was so certain of his ability he made a verbal promise to the printer that if the latter would print the former's client's brief on appeal, the promisor would pay the printer's bill if the client lost the case, was compelled to keep his promise. The statute of frauds did not protect him. *Wilkie v. Marshall*, (1909) 77 N. J. L. 272, 72 Atl. 30.

⁴⁴1 Brandt, *Suretyship and Guaranty* 3rd ed., sec. 69, and cases there cited.

ated by the promise upon which reliance is had; and (c) whether there is any liability of the third party to indemnify the promisee.⁴⁴ If there is no duty, express or implied, on the third person to reimburse the promisee, the courts of England and America seem to agree that the promise is not one intended to be in writing by the statute of frauds. The disagreement is seen in those cases where there is an agreement, express or implied, on the part of the third person to reimburse the promisee.

One would be pertinacious, indeed, who would contend that the opinions during the last century, filling volumes on this subject, are reconcilable with each other. Obvious misapplication of principles has been made to facts, and courts have indulged in the great common law amusement of adhering to the rule of stare decisis by discriminating, rather than by frankly overruling a prior absurdity. But it is believed that all the cases are able to be grouped into one of these four classes:

(A) Cases where the promisor becomes bound with the promisee to pay the same obligation to a third person. The statute requires only those agreements to pay the debt or default "*of another person*" to be in writing. Those verbal contracts to pay the debt or default *of the promisor*, in whole or in part, are not affected by the statute, and are enforceable as they were at the common law. In this class should be placed *Thomas v. Cook*. The previous analysis of that case shows the defendant verbally promised to pay *his own* debt or default. In spite of the brief opinion referring to indemnity contracts, it is submitted this was not an indemnity contract to which that language should be applicable, and the ground for the opinion is inapplicable to the facts.⁴⁵

(B) Cases where the verbal promisor agrees to indemnify the promisee for any loss caused by a third person, there being no collateral obligation, express or implied, from the third person to reimburse the promisee. The promisor here is held liable. In this class *Reader v. Kingham* deserves to be placed.

(C) Cases where the promisor is not bound with the promisee, and the promisee becomes bound to pay the pre-existing or concurrently assumed obligation of a third person, the promisor's object being to protect the third person or secure for him credit.

⁴⁴*Beattie v. Dinnick*, (1896) 27 Ont. Rep. 285, 294; *Browne*, Statute of Frauds 5th ed. secs. 159; 161.

⁴⁵In this class also should be placed *Ferrell v. Maxwell*, (1876) 28 Oh. St. 383 and *Horn v. Bray*, (1875) 51 Ind. 555, 19 Am. Rep. 744. And while the conclusion reached is erroneous, in this class also should be placed *Bissig v. Britton*, (1875) 59 Mo. 204, 21 Am. Rep. 379, and *Wolverton v. Davis*, (1888) 85 Va. 64, 6 S. E. 619, 17 A. S. R. 56.

This class requires an obligor, an obligee, and a principal debtor. Such promise the statute requires to be in writing. Clearly, *Green v. Cresswell* should be classified here. The plaintiff there was the obligee to whom the defendant made the promise that Hadley would not default. Concurrently with the plaintiff's liability thereon, Hadley became liable to the plaintiff for reimbursement. "The original party remained liable; and the defendant incurred no liability except from his promise."⁴⁶ Therefore, the defendant verbally promised the plaintiff, who by Hadley's default became Hadley's creditor for the amount of the default, that he would be responsible for that loss. The defendant's object was to serve no personal or pecuniary interest. His object was to answer for the debt or default "of another person." It was correctly decided, and should not be cited as overruling *Thomas v. Cook*. And if some court recognizing the correct principle should overrule *Wildes v. Dudlow* it would deserve a place in this class also.

(D) Cases where the promisor does not become bound with the promisee, but the promisor becomes liable to pay the obligation of a third person, his main purpose in making the promise being to secure something of value for himself. To discuss the cases in this class would be outside the purview of this article.

Consideration of the cases convinces that by the employment of vague language and by lack of clarity of expression, the courts have left the law in hopeless confusion. The cases are not decided on principle in many instances, but by blindly following illogical precedents, the courts have arbitrarily decided each case. The law in many cases has been applied to facts to which it is unsuited. The view in England without question is that *Thomas v. Cook* was overruled by *Green v. Cresswell*, which in turn was overruled, and *Thomas v. Cook* reinstated. This is the majority view in the United States, though many states adhere to *Green v. Cresswell*.⁴⁷ *Thomas v. Cook* reached the correct conclusion, but the reasoning is not applicable to the facts, therefore improperly reasoned. *Green v. Cresswell* reached the correct conclusion by logical reasoning. *Reader v. Kingham* is correct both in its conclusion and ratio decidendi. *Wildes v. Dudlow* rests upon a false premise; therefore, it is both fallacious in its reasoning and erroneous in the result reached.

⁴⁶The concluding sentence of Lord Denman's opinion in *Green v. Cresswell*, (1839) 10 Ad. & Ell. 453.

⁴⁷2 Col. L. Rev. 104.