

1928

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Recommended Citation

Arant, H.W., "A Rationale for the Interpretation of the Statute of Frauds in Suretyship Cases" (1928). *Minnesota Law Review*. 1413.
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A RATIONALE FOR THE INTERPRETATION OF THE
STATUTE OF FRAUDS IN SURETYSHIP CASES

By H. W. ARANT*

IT is a long way from Lord Nottingham's statement that the statute of frauds was "so wise and beneficial to the public that it deserved a subsidy"¹ to the recent suggestion that the provisions of section four "are not only not expedient, but even actively harmful."² None of these has received more attention from courts and writers than the provision that special promises to answer for the debts, defaults and miscarriages of other persons must be evidenced by a writing.³ Yet, the complaint was recently made that "in the year of grace, 1913, we have to go to the court of appeal to obtain a decision on so much of section 4 as relates to guaranties"⁴ and an examination of the current reports or digests indicates that the end is not yet. Notwithstanding, however, this provision continues to be a part of the law in practically every American state and appears to be in no imminent danger of repeal.⁵

In order to understand the enactment of this provision, it will be necessary to recall some of the rules of procedure and evidence obtaining at the time of its passage. Trial by jury was in a transition state. The medieval method of controlling the jury by writ of attainr was obsolete and the sixteenth and early seventeenth century method of controlling it by fine and imprisonment had been held illegal,⁶ because the jury might still decide a case from its own knowledge of facts. The device of obtaining an order for a new trial when the verdict was against the evidence, so widely used now, was then in its infancy. The requirement

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¹See *Popham v. Eyre*, (1774) Lofft 800. Commenting upon this encomium, Lord St. Leonards said: "We know every line of it has cost a subsidy." *Real Property Statutes* (1862) Preface.

²6 Holdsworth, *History of English Law* 390, 396. See also 29 L. Quart. Rev. 247; 1 L. Quart. Rev. 1-8; Willis, *The Statute of Frauds: A Legal Anachronism*, 3 Ind. L. J. 427.

³(1676) 29 Car. II, sec. 4.

⁴(1913) 29 L. Quart. Rev. 247. Compare 1 L. Quart. Rev. 1, 7-8.

⁵In this article, "statute of frauds" or "statute" will be understood to mean the particular provision here being discussed.

⁶*Bushell's Case*, (1670) Vaughan's Rep. 135.

that certain transactions should be proved only by written evidence placed a desirable limitation upon this uncontrolled discretion of the jury. Furthermore, the rule disqualifying parties to the action, their husbands or wives and persons interested in the result of the litigation often prevented the person who knew most about the facts from testifying. The requirement that the promise be proved by writing signed by the promisor resulted in much more satisfactory proof and made success in actions upon fabricated promises unlikely, if not impossible.⁷

Before discussing the different types of cases involving the applicability of this provision, it will be profitable to throw into as bold relief as possible the specific danger that led to its enactment. In a leading American case, it was stated as follows:

"The object of the statute manifestly was, to secure the highest and most satisfactory species of evidence, in a case, where a party, without apparent benefit to himself, enters into stipulations of suretyship, and where there would be great temptation, on the part of a creditor, in danger of losing his debt by the insolvency of his debtor, to support a suit against the friends or relatives of a debtor, a father, son, or brother, by means of false evidence; by exaggerating words of recommendation, encouragement to forbearance, and requests for indulgence, into positive contracts."⁸

But why was a suit upon a false promise to answer for the "debt, default or miscarriage of another" especially menacing to the defendant? Practically the only suggestion of the real reason that the writer has seen is found in the following quotation from Professor Williston:

"It is of assistance in the construction of the next provision of the statute to have in mind the probable purpose of the legislature in providing that such promises to answer for the debt of another must be in writing. Why should such promises, more than others, be subject to that requirement? Doubtless because the promisor has received no benefit from the transaction. This circumstance may make perjury more likely, because while in the case of one who has received something the circumstances themselves which are capable of proof show probable liability, *in the case of a guaranty nothing but the promise is of evidentiary value*. Moreover, as the lack of any benefit received by the guarantor increases the hardship of his being called upon to pay, it also increases the importance of being very sure that he is

⁷See 6 Holdsworth, History of English Law, 388.

⁸Per Shaw, C. J., in *Nelson v. Boynton*, (1841) 3 Metc. (Mass.) 396, 399. See also *Davis v. Patrick*, (1891) 141 U. S. 479, 487, 12 Sup. Ct. 58, 35 L. Ed. 826.

justly charged. If these are the reasons for this clause of the statute it is not a mere technicality to require as the fundamental element in a valid oral promise to discharge another's liability the receipt by the promisor of a quid pro quo, or beneficial consideration; and whatever conflict there may be in the decisions, it is at least true that without consideration of this kind, such a promise is unenforceable."⁹

If C alleges a sale of goods upon credit to P in reliance upon the promise of S that he will pay for them if P does not, or, if he alleges that P owed him and he forbore to sue him or attach his property because S promised to pay the debt, when S in fact made no such promise, it is necessary for him to prove but one important fact by false testimony to win his case. Either delivery of the goods to P or forbearance to sue him or attach his property would be ample consideration for the promise alleged and some one of these facts had always occurred. Because of this, it was unnecessary for the creditor to use false testimony to prove the consideration alleged. But such facts have no special tendency to suggest that S induced their occurrence. The goods may have been sold to P because C had full confidence that he would pay or he may have refrained from suing P because he believed he would pay if given time or because he believed a suit would be a waste of time and money. Yet, it was always possible that the facts alleged could have been caused by the promise alleged. There is some plausibility to C's claim because such promises as he alleges are sometimes made to accommodate debtors and to secure for them just such consideration as C alleges that P received. If the making of the alleged promise is proved, the inference that C gave the consideration alleged in reliance upon it would be almost necessary. But it will be noted that the promise alleged must be inferred solely from the testimony of such witnesses as the parties produce. The special danger, therefore, in the type of situation contemplated by the statute, was due to the fact that the consideration usually alleged in support of a false promise had always occurred and, whether induced by a promise of the defendant or not, it was always consistent with the plaintiff's claim that it was and it would be inferred that it was, if the defendant's promise was proved. Since it was only necessary for the plaintiff to prove the making of the promise by false testimony and the defendant could not know in advance when or

⁹ 1 Williston, Contracts, sec. 452. (Writer's *italics*.)

where the plaintiff's witnesses would testify that he made the promise, it is clear that the plaintiff had a decided advantage and not surprising that an unscrupulous creditor was able to produce false testimony that would convince a jury that the defendant had promised as alleged.¹⁰

Inasmuch as it is generally agreed that the legislature had no purpose in enacting this provision other than the protection of defendants from being compelled to pay damages for breach of promises never made, it is reasonable, in construing it, to assume that it was intended to describe and include only those situations presenting the special danger pointed out. This is true where the plaintiff makes the defendant appear to promise solely for another's benefit, but where circumstances leading up to or accompanying the making of the promise, are alleged that are not particularly susceptible to proof by perjury and such circumstances indicate that the defendant's interest was promoted by the passage of the consideration alleged, the special danger that the plaintiff may prove a false promise by perjury disappears because the basis of the inference that the defendant promised is broadened and is not confined to the testimony of witnesses that they heard him promise. Whenever this is true, the statute should be inapplicable. But a disposition to examine its words in somewhat microscopic fashion and attribute to them technical meaning has at times resulted in its misapplication and this is believed to be chiefly responsible for the suggestion that it promotes more fraud than it prevents. Most of this would have been avoided if it had always been borne in mind that its language was used for the purpose of describing in necessarily short and concise fashion a situation where written evidence appeared to be necessary to protect the defendant from the aforementioned danger of having to pay damages for breach of a promise that he did not make. That it has been so generally adopted, and nowhere repealed, is believed to be due to the fact that the courts, on one ground or another, have generally confined its operation to cases presenting the special danger pointed out. This will appear from the following discussion of some of the established principles governing its application.

The promisee must be a creditor or obligee of a third person. One of the requirements for the applicability of the statute among the

¹⁰The writer of the most recent attack upon the statute, like most of its other critics, seems to have been unaware of the existence of this special danger in this type of promise. Willis, *The Statute of Frauds: A Legal Anachronism*, 3 Ind. L. J. 427.

earliest to become well settled was that the promise must be made to a creditor or obligee of some third person.¹¹ Its language is broad enough to include a promise to anyone to pay the debt of "another person" than the promisor. But, to have held a promise to anyone other than a creditor to be within the statute would have brought within its operation situations presenting none of the dangers at which it was aimed.¹² The unscrupulous creditor was not falsely claiming and proving by perjury that the defendant promised the debtor to pay him. Even if the creditor could have sued on such a promise, the debtor, without temptation to swear falsely, would have been a competent witness and his testimony would have been conclusive. But, if he were dishonest also, it would still be necessary to show a consideration for the promise. Since it would be unnatural for the defendant to make such a promise unless he received a benefit, the consideration alleged would almost necessarily consist of a benefit conferred upon the promisor and this is not particularly susceptible to proof by perjury.¹³ The strongest reason, however, for the view that such a promise is not within the statute is that the creditor could have maintained no action at law upon it. His only recourse would have been a suit in equity.¹⁴ These obstacles to success make it clear that no dishonest creditor would have thought of fabricating a promise to anyone except himself. The courts accordingly have held promises not made to creditors to be without the statute because they could never have given rise to the danger from perjury at which it was aimed.

A third person must owe an obligation that will be satisfied by the promisor's performance. It has generally been held that a promise conditioned upon nonperformance of an act by a third person or a promise to pay a third person's debt cannot be within the statute if the third person owes the promisee no duty.¹⁵ The

¹¹Browne, Statute of Frauds, 5th ed., 238.

¹²Tomlinson v. Gill, (1756) Ambler, 330; Eastwood v. Kenyon, (1840) 11 Ad. & Ed. 438, 3 Per. & Dav. 276, 9 L. J. Q. B. 409, 4 Jur. 1081. See 1 Williston, Contracts, sec. 460.

¹³In Tomlinson v. Gill, (1756) Ambler 330, Lord Hardwick said: "The modern determinations have made a distinction between a promise to pay the original debt, on the foot of the original contract, and where it is on a new consideration." This language indicates that, at this early date, it was understood that the danger contemplated by the statute could not exist where it was necessary to prove a consideration that could not as plausibly be attributed to some inducement other than the promise alleged.

¹⁴Tomlinson v. Gill, (1756) Ambler 330.

¹⁵1 Williston, Contracts, sec. 454; Browne, Statute of Frauds, 5th ed., sec. 156.

cases where this rule is applied fall into three general categories.

In the first, the third person has made no promise and there is no other reason to believe that he owes a duty. For example, the defendant selected and received articles for the funeral of Mrs. Bradley, saying: "Charge them to the estate of Dr. Bradley and as soon as his nephew comes to town he will pay for them, or I will." Here the defendant received the articles herself and made no profession of authority to charge the account of anyone else. The passage of the consideration could not have been due to reliance upon any other person's promise; it points to the defendant alone as the person who induced it and was correctly held to be without the statute.¹⁶ Again, a promise to get M to sign a specified guaranty that P would pay freight, when M has made no promise, has been held to be without the statute.¹⁷ But, a promise to sign a guaranty is held to be within the statute¹⁸ and a promise to get another to sign would seem to be within it also;¹⁹ particularly where, as in the case referred to, the consideration alleged was the plaintiff's allowing his vessel that was chartered to P to sail, an event without suggestion that the defendant induced its occurrence, since it did not appear that he was interested in the ship's sailing. P did owe a duty to pay freight and the defendant's promise, being in substance a conditional guaranty that P would pay, was really within the statute but the defendant was correctly held liable because his promise was written. The decision, however, could not be put on this ground because it has been erroneously held that the statute required the writing to express the promise and the consideration as well.²⁰ On the same ground, an oral promise to repay plaintiff

¹⁶Mease v. Wagner, (1821) 1 McCord (S.C.) 395. See also Lake-man v. Mountstephen, (1874) L. R. 7 H. L. 17.

¹⁷Bushell v. Beavan, (1834) 1 Bingham, N. C. 103.

¹⁸Hayes v. Burkham, (1875) 51 Ind. 130.

¹⁹See the criticism of Bushell v. Beavan in Carville v. Crane, (1843) 5 Hill (N.Y.) 483, 485.

²⁰Wain v. Warlters, (1804) 5 East. 10, 1 Smith K. B. 299. Since it was the promise and not the consideration that was being proved by perjury, when the statute was passed, it could hardly have been intended to require that the writing express the consideration. If the defendant actually promises, as it is known that he did when his promise is written, it is generally safe to infer that his promise in some measure induced the plaintiff; it is not necessary that it be the sole inducement. The view here criticized is based on the assumption that "agreement" is used in the technical sense which includes both promise and consideration. In *Ex parte Gardom*, (1808) 15 Ves. 26, 287, Lord Eldon said: "Until the case of *Wain v. Warlters* was cited some time ago, I had always taken the law to be clear, that, if a man agreed

the price paid for stock, in case it should become worthless, was not within the statute because no one else would owe the plaintiff such a duty.²¹ The stock might become worthless as a result of wilful mismanagement but the same could occur without breach of duty by anyone. While the purpose of such a promise is to protect the plaintiff from loss, it is not limited to or mainly directed to loss resulting from another's breach of duty. But, it appeared that the defendant was an officer directing the affairs of the corporation, that it was in serious need of funds and that the plaintiff had previously declined an offer by the defendant to secure him by a second mortgage upon the corporate property if he would purchase the stock. These facts make almost necessary the inference that the plaintiff's subsequent purchase of stock in an embarrassed corporation was due to some inducement from the defendant.

In the second class, a promise has been made by a third person to whom the consideration moved but the obligation contemplated does not come into existence, because of some incapacity. For example, a guaranty that a married woman will perform her contract is within the statute, notwithstanding the fact that married women's contracts at common law were void.²² The

in writing to pay the debt of another, it was not necessary that the consideration should appear upon the face of the writing." In 1856, the doctrine of *Wain v. Walters* was abolished by statute. 19 & 20 Victoriae, chap. 97, sec. 3.

²¹*Kilbride v. Moss*, (1896) 113 Cal. 432, 45 Pac. 812, 54 Am. St. Rep. 361; *Moorehouse v. Crangle*, (1880) 36 Oh. St. 130, 38 Am. Rep. 564. But in a similar case the supreme court of Missouri reached the opposite conclusion, saying: "The word 'miscarriage' was clearly intended to have a broader meaning than either 'debt' or 'default', and should be so construed as to include the failure by a third party, in this case the William A. Orr Shoe Company, to succeed in the proposed, business, regardless of the fact whether its failure to do so would entitle the plaintiff to an action at law or not.

"The requirement that an actionable duty shall exist was made first by the court in cases of 'debt'—because, unless there was a 'debt' owing by the third party, that part of the statute clearly did not apply. The same requirement was later extended to 'default,' meaning 'default in any duty,' and for the same reason. But the reason does not exist in case of 'miscarriage,' i.e., the act of a third party, whether actionable or not, and the requirement should not be made.

"In other words, if any meaning or force at all is to be given to the word 'miscarriage,' it must mean something different from or broader than 'debt' or 'default,'—and this is the only distinction that can be made." *Gansey v. Orr*, (1903) 173 Mo. 532, 545, 73 S. W. 477.

²²*Maggs v. Ames*, (1928) 1 Moo. & P. 294, 4 Bing. 470; 6 L. J. Q. S. C. P. 75; *Miller v. Long*, (1863) 45 Pa. St. 350. There are dicta contra in *Anderson v. Spence*, (1880) 72 Ind. 315, 321, and *King v. Summit*, (1881) 73 Ind. 312, 38 Am. Rep. 145. Some writers assert

same view obtains as to a guaranty of an infant's contract, where it is frequently said that the contract is voidable and the infant bound until he disaffirms.²³ That a married woman was privileged not to perform her promise is obvious. For this reason, it seems improper to say that she owes a debt or is guilty of a default in not performing. The same may be said of an infant. Failure to perform a promise where performance is expected by a promisee, who has given consideration for it, may be termed "miscarriage" and guaranties of such contracts should be held to be within the statute because they present the precise danger at which it was aimed. In such cases, only the making of the promise need be proved by false testimony. The married woman or infant has received the consideration in return for an actual promise of which the promisee expects performance. The fact that the creditor had no right to the expected performance would make the temptation to fabricate a promise by another perhaps stronger than in the ordinary guaranty where the creditor at least had a right to performance.²⁴ Such cases are clearly within the intent of the statute.

In the last class of cases, a third person once owed a debt which the plaintiff alleges he discharged in reliance upon the defendant's promise to pay it. Such a promise is generally agreed to be without the statute.²⁵ The reason usually given is that there

that the oral guaranty is valid if the third person's contract is "void," as distinguished from "voidable." 1 Williston, Contracts, sec. 454; Browne, Statute of Frauds, 5th ed., sec. 156; Arnold, Suretyship and Guaranty, sec. 53.

²³Dexter v. Blanchard, (1865) 11 Allen (Mass.) 365; Clark v. Levy, 10 N. Y. Legal Obs. 184; Brown v. Farmers' and Merchants' Bank, (1895) 88 Tex. 265, 31 S. W. 285, 33 L. R. A. 359. Contra, See Harris v. Huntback, (1757) 1 Burr. 373, 2 Keny. 28; Chapin v. Lapham, (138) 20 Pick. (Mass.) 467; King v. Summit, (1881) 73 Ind. 312, 38 Am. Rep. 145; Roche v. Chaplin, (1830) 1 Bailey (S.C.) 419.

²⁴The general view seems to be that an agent's oral guaranty of a corporation's ultra vires contract is binding. 1 Williston, Contracts, sec. 454. His promise is said to be "original" under such circumstances. See Drake v. Llewellyn, (1858) 33 Ala. 106; Kilbride v. Moss, (1896) 113 Cal. 432, 45 Pac. 812; Coris v. Star City Bldg. Ass'n, (1898) 20 Ind. App. 630, 50 N. E. 779. Though the court in the foregoing cases said that the statute was inapplicable because no third person was bound, there was a better reason in each for so holding. See Harker v. Russell, (1886) 67 Wis. 257, 30 N. W. 358.

²⁵Bird v. Gammon, (1837) 3 Bing. N. C., 883; 3 Hodg. 224, 5 Scott 213, 6 L. J. C. P. 883; Hill v. Grat, (1923) 247 Mass. 25, 141 N. E. 593; Smith v. Brown-Crummer Investment Co., (1922) 112 Kan. 201, 210 Pac. 477. Whether the third person is released or not is a question of fact. Slotnick v. Smith, (1925) 252 Mass. 579, 147 N. E. 737.

is no debt of a third person. The conclusion is undoubtedly correct because the dangers at which the statute was aimed are absent. The discharge of the debt is sufficient consideration for the defendant's promise and, while a creditor could in his records create an appearance of having discharged the debtor, his claim that it was done in reliance upon a promise of the defendant could not be proved to the ordinary mind without showing some reason for the defendant's assuming the debt. In such cases, it is generally alleged that the defendant received some consideration from the debtor or is indebted to him. If the defendant received consideration from the debtor, the chances are that he promised as alleged but a false allegation of such consideration could hardly be proved by perjury because the debtor could testify whether and why he gave it. If it were claimed that the defendant, being indebted to the plaintiff's debtor, promised to pay in consideration of his discharge, no jury would believe the plaintiff's claim, unless he showed that it had been agreed that the defendant's performance to the plaintiff would satisfy his own obligation to the debtor. The reliable testimony of the latter would always show whether this was true.

The promise must be to pay out of the promisor's own substance.

It has nearly always been held that a promise is not within the statute unless the promisor undertakes to pay out of his own substance.²⁶ Frequently a defendant in possession of property belonging to a third person, or indebted to him, is alleged to have promised to pay the plaintiff's claim against the third person from the proceeds of such property or from such indebtedness. Such a promise is within the letter of the statute but also without its intent because of the absence of the danger at which it was aimed. There was no particular temptation to fabricate such a promise because it would rarely increase the creditor's probability of collection, inasmuch as it only made available to him property or claims belonging to the debtor. These he could usually reach by attachment, execution or garnishment anyhow. But, it would always be necessary to show consideration for such a promise. This might consist of forbearance to attach or levy upon the

²⁶Platt v. Foster, (1913) 7 Ala. App. 402, 62 So. 299; Hall v. Lincoln Sav. & Tr. Co., (1908) 220 Pac. 485, 69 Atl. 994; Browne, Statute of Frauds, 5th ed., secs. 177, 178, 186, 187. 1 Williston Contracts, secs. 455-456. But see Scott v. Thomas, (1832) 1 Scam. (Ill.) 58; Campbell v. Weston Basket & Barrel Co., (1915) 87 Wash. 73, 151 Pac. 103.

debtor's property and, if an intent to attach or levy were shown to have been abandoned, this fact would have a special tendency to suggest that the plaintiff was induced to abandon it by the defendant, because he was in possession of the property and normally more immediately interested in his possession not being disturbed than anyone else. If the consideration alleged was merely the duty resulting from the arrangement between the debtor and the defendant, it could not be proved contrary to fact because the debtor was always a competent witness. Furthermore, such a promise could not subject the defendant to such danger of ultimate loss as would a promise of the sort contemplated by the statute, where the plaintiff usually claimed that the defendant promised to pay when it was certain that the debtor would not pay. In such a case, the defendant would rarely be able to get reimbursement from the worthless debtor, if he were entitled to it. But, if the defendant is made to pay damages for breach of a spurious promise to pay out of the debtor's property the value of the property would measure the maximum recovery and his possession would secure reimbursement in most cases.

The promise must be such that its performance will satisfy a third person's obligation. Another well settled rule is that a promise is not within the statute unless its performance will satisfy a third person's obligation.²⁷ For example, S, indebted or about to become indebted to P, is alleged to have promised C to notify him when the time arrives to pay P so that C could garnishee him or in some other way collect from P before he made away with the money. The statute is inapplicable to such a promise.²⁸ There would be little temptation to fabricate it inasmuch as garnishment would generally produce the result desired. But such a promise requires consideration and, if the consideration alleged was a benefit moving from the plaintiff to the defendant, it could hardly be proved contrary to fact and, when proved, would itself suggest that it was induced by the defendant. If the consideration alleged moved to a third person, the danger contemplated by the statute would not exist, if the plaintiff alleged circumstances preceding or accompanying the promise not susceptible to proof by perjury and specially indicative of a promise by the defendant. In the case above, the plaintiff alleged that he had furnished material to N to build a

²⁷1 Williston, Contracts, sec. 455.

²⁸Towne v. Grover, (1830) 9 Pick. (Mass.) 306.

house for the defendant, that he refused to furnish more because N had not paid and that he subsequently furnished the rest of the necessary materials.

A promise is not within the statute if the promisor becomes a debtor. At one time the action of debt would not lie unless the promisor received the consideration from the promisee but for more than two hundred years it has been settled that any consideration that would make one a debtor if he received it himself will make him a debtor if another receives it at his request.²⁹ So the oral promise of S to pay for goods delivered to P at his request is valid, because S alone is obligated.³⁰ The statute is likewise inapplicable where, for a single consideration, P and S promise in the same terms. For example, S orally promises to sign a note with P for a horse to be delivered to P, if P likes the horse when he sees him. Delivery of the horse makes a debtor of S as well as P.³¹ In a certain sense, the promise of S is a promise to pay P's debt. His payment will extinguish P's obligation as well as his own, but, as far as C is concerned, S is as much his debtor as is P³² and his promise to C is no more a promise to pay P's debt than his own. Where this is the conse-

²⁹Ames, Lectures on Legal History 93.

³⁰Vicksburg Infirmary v. Hines, (1913) 134 Miss. 162, 98 So. 530.

³¹Gibbs v. Blanchard, (1867) 15 Mich. 292.

³²In fact, it is generally assumed that there is only one debt. "One quid pro quo can never give rise to two debts." Ames, Lectures on Legal History 94. "This seems generally assumed in the cases." 1 Williston, Contracts, sec. 466, n. 97. Nevertheless it seems doubtful whether this assumption was ever justified. "How can two persons be liable as original principal debtors, under a parol contract, not in writing, for the entirety of the same debt? To state the proposition seems its best refutation. If the liability of the one is complete by itself, and not dependent upon or collateral to the other, then payment by one would not be payment for both, and the fortunate possessor of such an undertaking might enforce double satisfaction for the same debt. If the undertakings be not independent, one must be collateral to the other, and that which is thus collateral must be subject to the operation of the statute." Whelply, J., in Hetfield v. Dow, (1859) 27 N. J. L. 440, 451. If this argument were sound, P and S could not be original debtors where they jointly and severally promise C in writing; payment by one could not be a payment for both and "double satisfaction for the same debt" might be enforced in such a case also. Yet, it is well settled that P and S could be sued separately in debt and payment by either operates as a condition subsequent to the other's duty, because so intended. It makes no difference who received the consideration or whether the promises were oral or written in the form of a specialty that may have been conceived of as giving rise to the "debt." The only unvarying and indispensable element essential to the existence of a debt is the passage of a quid pro quo from the promisee and the form of the promise or promises by which it is induced appears to be the

quence of the transaction, the statute is inapplicable³³ but this result cannot follow where S promises to pay, if P does not. Such a promise would not make S a debtor according to popular usage nor would debt or indebitatus assumpsit lie upon it at common law.³⁴ It has been suggested that, where the consideration moved to a third person, the statute was intended to include the promise only when its terms were such that neither debt nor indebitatus assumpsit would lie.³⁵ This is doubtless correct. It seems to be justified by its language as well as the fact that only such promises could be fabricated with any hope of success. Whether promises to pay if another does not and promises to pay another's debt already due are necessarily within the statute will be discussed presently but it is generally agreed that a promise is never within the statute if the promisor is a debtor.

A promise is not within the statute if the promisor's main purpose is to subserve some purpose of his own. From the foregoing discussion, it seems to be clear that the danger contemplated by the statute existed only where a third person received all of the consideration and the promise alleged was all that the plaintiff had to prove by false testimony. When parties were disqualified as witnesses, it has been seen that the unscrupulous plaintiff had a decided advantage. It is still possible that the false testimony of the plaintiff and a dishonest clerk may be believed by the jury when the defendant alone testifies to the contrary but the removal of the disqualification of parties as witnesses has undoubtedly greatly decreased the danger from perjury in all kinds of litigation. Because of this, courts may consider the statute less necessary now and may appear to have restricted its operation some-

only factor of importance in determining who the debtor is or whether there is more than one. See *Bennington Lumber Co. v. Attaway*, (1916) 58 Okla. 229, 158 Pac. 566.

³³Whether the promise of S is within the statute is sometimes said to depend upon whose credit the promisee relied upon. *Browne. Statute of Frauds*, 5th ed., sec. 197. "If the whole credit be not given to the person who comes in to answer for another, his undertaking is collateral and must be in writing." 3 Kent, Commentaries, 323. This statement is misleading and erroneous where the promises of P and S are in the same terms, as where they jointly or jointly and severally promise. Even though C believed that P would pay, the consideration moves in reliance upon both promises and each promisor becomes a debtor. The danger from perjury is absent in such a case because S could hardly make such a promise without P's knowledge and he would be a competent witness.

³⁴*Rozer v. Rozer*, (1691) 2 Ventris 36; *Jones v. Cooper*, (1774) 1 Cowper 227, Lofft 769.

³⁵1 Williston, Contracts, sec. 463.

what but it is the writer's belief that few cases now held to be without the statute would at any time have presented the special danger that prompted its enactment. In order to proscribe an evil believed to be inherent in a situation and prescribe change that would remove it, the situation had to be described. Since it was a special danger to the defendant that caused the enactment of the statute, it may be assumed that it was intended to apply only where this danger existed. But the simple and concise language used to describe this situation, if literally interpreted, would include many situations where the danger contemplated could not exist and its application to such cases could only promote injustice. Fortunately, however, the courts generally have not so dealt with it. On one ground or another they have held to be without its scope cases where a dishonest plaintiff would have little or no chance to succeed by the use of false testimony.

Importance of the consideration alleged. It must not be forgotten that the dishonest plaintiff at whom this provision was aimed succeeded because he always alleged a promise of such tenor that it was unnecessary for him to prove a separate and distinct consideration for it. Only because of this was there sufficient hope of success to tempt him to begin a suit. It must have been the general appreciation of this that led Lord Hardwick, in 1756, to say that "the modern determinations have made a distinction between a promise to pay the original debt, on the foot of the original contract, and where it is on a new consideration."³⁸ If the new consideration alleged consisted of a benefit conferred upon the promisor, there would be no more danger from perjury than in an action upon any other promise. The fact that the promise sued upon related to another person's debt or obligation would make no difference, as far as the danger from perjury is concerned. But, it is otherwise if the new consideration alleged consists of mere detriment to the promisee and a third person, already indebted to the promisee, receives all the corresponding benefit, as where the plaintiff alleges that he forebore to sue P in reliance upon the defendant's promise to pay the debt. Such forbearance is ample as consideration but it alone provides no protection against perjury in an action upon a false promise because it has actually taken place but could as well have been due to inducement by P; its occurrence is not suggestive of inducement by the defendant.

³⁸Tomlinson v. Gill, (1756) Ambler, 330.

It must always be borne in mind that the purpose of examining the consideration alleged is to determine whether it removes the danger from perjury. This depends, first, upon the susceptibility of the fact alleged to proof by perjury and, second, upon its tendency, when proved, to indicate a promise by the defendant. If the fact alleged as consideration is such that it benefits the defendant alone, or more immediately than anyone else, its occurrence can seldom be proved contrary to fact and the natural inference is that it was probably induced by the person solely or immediately benefited.

Other facts that remove the danger of perjury. But, even where the consideration alleged does not solely, immediately or especially benefit the defendant, other circumstances unsusceptible to proof by false testimony may almost as strongly indicate that the defendant's promise induced the occurrence of the fact alleged as consideration. Such circumstances often forbid the inference that the consideration, principally or immediately beneficial to a third person, moved in reliance upon his promise alone. They nearly always indicate that the protection or promotion of some interest of the defendant required the consideration alleged and suggest, if they do not clearly show, that the plaintiff would not have given it but for some inducement from the defendant; they negative the inference that the defendant promised simply to accommodate some one else. Since promises generally are made to promote the promisor's own interest or desire, the plausibility of the plaintiff's claim is greatly enhanced when he alleges facts preceding or accompanying the alleged promise that show this to have been the defendant's purpose.

For example, the plaintiff alleged that he was called to treat the defendant's adult son, who owed an old bill; that he found him suffering from pneumonia but informed the defendant that he would not treat him unless defendant agreed to pay him for this service, as well as the old bill; that the defendant so promised and he treated the son. This promise was not within the statute.³⁷ It will be noted that the services here were rendered to the son. They could have been rendered in return for a promise to pay by either the son or the father, or both, or for the father's promise to pay, if the son did not. But the allegation that the plaintiff told the defendant that he would not treat his son is material and would have to be proved before it would be believed that his

³⁷Evans v. Shaw, (Tex. Civ. App. 1925) 268 S. W. 1037.

subsequent rendition of services was in reliance upon the promise alleged. While the treatment of the son on the occasion would normally be on the basis of a promise to pay for that treatment, it is ample consideration for a promise to pay any other amount, if so intended. The fact that the son owed an old debt was itself corroborative of the plaintiff's claim that he refused to treat him unless the defendant promised to pay the old bill as well as the new. The plaintiff's refusal, being known to the defendant, renders it probable that he offered whatever inducement was necessary to obtain the treatment his son needed. The court said that the son was not liable for the services rendered him on this occasion. As to the promise to pay the old bill, apparently a promise to pay the debt of another and within the statute, the court, holding otherwise, quoted as applicable the following rule:

"Wherever the main purpose and object of the promisor is, not to answer for another, but to subserve some purpose of his own, 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 the liability of another."

It then said:

"The son was in a helpless condition, unable on his own responsibility to secure treatment by the appellee. There was a moral obligation and duty on the part of the appellant to secure such treatment, and no doubt appellant felt very keenly this moral obligation on his part, and so, for the purpose, not primarily, of paying or securing his son's debt, but to subserve a purpose of his own—the performance of this moral obligation to his son—he agreed unconditionally to pay, not only for future treatments, but also the old bill of \$102."

The court considered the promise alleged to have been satisfactorily proved by the evidence and, in determining the applicability of the statute, emphasized the defendant's purpose in making the promise. But the legislature had no concern as to why promises to answer for the debts or defaults of others were made. Its only concern was to provide a reasonable guaranty that defendants were not made to pay damages for breach of such promises unless they made them. In the foregoing case, the court reached the correct result as to the applicability of the statute by what many would regard as an erroneous application of the general rule by which the court justified its conclusion. It is unfortunate that the court did not say that the promise to pay the debt was not within the statute because the facts alleged by the plaintiff were

specially indicative of a promise by the defendant and not susceptible to proof by perjury.

A typical and leading case, illustrative of the general rule relied upon in the foregoing case is *Davis v. Patrick*.³⁸ In this case, Davis had advanced £5,000 to the Flagstaff Mining Company and it had sold and agreed to deliver to him 5,195 tons of ore. This ore was paid for in advance and Davis agreed to advance additional money if needed. The written agreement between Davis and the Company, setting forth the foregoing arrangement, also provided that the mine should be put under the sole management of Patrick to be worked and controlled by him until the ore sold had been delivered and all money borrowed repaid with interest. It also gave Patrick a full power of attorney and provided that his control was irrevocable save at the instance of Davis. Patrick took control of the mine and subsequently, more than once, complained to Davis that he was not being paid. On each occasion, Davis told him to transport the ore and he would see that he was paid. The Company having failed to pay him, Patrick sued Davis to recover the amount due him for his services. The court said that, if it were not for the statute of frauds, "there would be no question, for obviously there was both promise and consideration." It pointed out that the Company was indebted to Patrick for his services but that his services had enured to the benefit of Davis as well as the Company. The Company had no property other than the mine and was embarrassed financially. The undisputed facts showed that Davis' interest required Patrick's continued operation of the mine because its entire output belonged to him until he was paid. The Company's embarrassed condition made plausible Patrick's claim that he had intended to leave its service. Moreover, Davis had control, as long as he was unpaid, of Patrick's operation of the mine. The inferences to be drawn from these various facts were corroborative of the testimony of the witness and clearly justified the statement of the court that "obviously there was both promise and consideration." There was no danger whatever of the sort contemplated by the statute, where the inference that the defendant promised had to be drawn solely from the testimony of witnesses and received no support from the "relations of the parties" or other circumstances. The court said:

³⁸(1891) 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826.

"The thought is, that there is a marked difference between a promise which, without any interest in the subject-matter of the promise in the promisor, is purely collateral to the obligation of a third party, and that which, though operating upon the debt of a third party, is also and mainly for the benefit of the promisor. The case before us is in the latter category. . . . In such cases the reason which underlies and which prompted this statutory provision fails, and the courts will give effect to the promise."

While professing to recognize the distinction between original and collateral promises, the court pointed out that "the real character of a promise does not depend altogether upon the form of the expression but largely upon the situation of the parties." The conclusion that the statute was inapplicable is sound but it is unfortunate that the court emphasized the purpose of the defendant's promise without suggesting that the circumstances indicative of this purpose were also suggestive of a promise by the defendant and unsusceptible to proof by perjury and, because of this, removed the danger contemplated by the statute.

Four other types of cases, not within the statute for the foregoing reason but frequently dealt with as if they were controlled by special considerations, remain to be considered.⁴⁰

The "Property Cases." The distinguishing characteristic of these cases is that either property belonging to the promisor or property that he wishes to acquire is subject to a lien or mortgage to secure the debt of a third person. A promise to pay the debt in consideration of the discharge of the lien or mortgage is generally held to be without the statute.⁴¹ The leading case is *Williams v. Leper*.⁴² In that case, Taylor had conveyed all his effects for the benefit of his creditors to the defendant, who was in possession and about to sell, when the plaintiff distrained for rent. The plaintiff alleged that, in consideration of his leaving the defendant's possession undisturbed, the defendant promised to pay the rent and this promise was without the statute. Neither the change of possession normally involved in the surrender of a lien upon personalty to the defendant nor the acts incident to the discharge of a lien or mortgage upon his realty is particularly susceptible

³⁹In the various other cases where the same rule has been applied, it was unnecessary to infer that the defendant promised solely from testimony that he promised.

⁴⁰See *Harburg India Rubber Comb Co. v. Martin* [1902] 1 K. B. 778, 71 L. J. K. B. 529, 86 L. T. 505, 50 W. R. 449, 18 T. L. R. 428, 46 Sol. Jo. 357.

⁴¹Williston, *Contracts*, sec. 472.

⁴²(1766) 3 Burrow 1886.

to proof by perjury. Such acts, being a direct benefit to the defendant, suggest that they were induced by him. In the ordinary case, there would be little reason to suppose that the inducement could have come from anyone else. The danger contemplated by the statute existing only where the consideration alleged might as easily be attributed to inducement from the principal debtor or someone else as from the defendant, promises supported by a consideration specially benefitting the defendant are without its intent. But, where the plaintiff had a lien for repairs upon a boat belonging to a third person, the defendant's promise to pay the debt in consideration of the surrender of the boat to the owner was within the statute.⁴³ Proof that the defendant promised depended solely on oral testimony. Delivery of the boat to the owner did not appear to promote any interest of the plaintiff and afforded no basis for an inference that the defendant induced it. If, however, it had been surrendered to the defendant, the resulting advantage would argue some inducement by him.

Another type of case is almost equally clear. P contracted to build a house for the defendant and the plaintiff furnished P material but he alleges that, having refused to furnish more, because of P's failure to pay, and having threatened to put a lien upon the property, the defendant promised to pay the past and future indebtedness of P, if he would furnish P further materials and not put a lien on his property.⁴⁴ Under ordinary circumstances the furnishing of materials to P, as well as failure to put a lien on the property, might be attributed to a belief that P would pay. The special circumstances alleged, however, that must be proved in order to establish a consideration for the promise alleged are not susceptible to proof by perjury. P's arrears, the plaintiff's refusal to supply further materials and his threat to put a lien on the property clearly negative the inference that further materials were furnished P on his credit alone. The defendant's knowledge of the foregoing facts, the furnishing of further materials and forbearance to put the lien on together suggest that the defendant probably promised to pay the past and future indebtedness of P. His promise is frequently said to be without the statute because his main purpose is the promotion of

⁴³Mallory v. Gillett, (1860) 21 N. Y. 412.

⁴⁴Cincinnati Traction Co. v. Cole, (C.C.A. 6th Cir. 1919) 258 Fed. 169; Voska, et al. v. Ruland, (1916) 172 App. Div. 616, 158 N. Y. S. 780. Compare Raabe v. Squier, (1895) 148 N. Y. 81, 42 N. E. 516. See (1916) 2 Corn. L. Quart. 209.

his own interest. The real reason appears to be that the special circumstances that must be shown in order to prove consideration are not susceptible to proof by perjury.

Another related class of cases to which the statute is often held to be applicable arises where an officer of a corporation is alleged to have induced the plaintiff to extend credit to the corporation by guaranteeing that it would pay.⁴⁵ Such extension of credit is normally induced solely by the corporation's promise to pay. Where, however, it appears that the plaintiff refused credit to the corporation, it must be inferred that his subsequent extension of credit was induced by someone else. But, since the consideration finally benefits other officers and stockholders proportionately as much as it does the defendant, it alone does not suggest that the defendant, rather than some other interested party, induced its passage. But if, for example, the defendant was the majority stockholder and controlling the affairs of the corporation and had unsuccessfully negotiated for credit for the corporation, there is special reason to believe that he induced the plaintiff to extend credit.⁴⁶ Circumstances so suggestive and not susceptible to proof by perjury are correctly held to take the case without the statute.

The "Document Cases." Another type of case, sometimes referred to as the "document cases," is without the statute for the same reason. The plaintiff alleges that he was induced to take P's note in return for goods delivered to the defendant, or in payment of his debt, by his oral guaranty that P would pay the note. It is generally said that such a promise, though in form a guaranty, is really a promise by the defendant to pay his own debt.⁴⁷

In the vast majority of cases where paper is transferred the transferor agrees to stand back of it. Because such agreement is one of the ordinary inducements to accept a transfer of commercial paper, it is reasonable to assume that the plaintiff was

⁴⁵*Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K. B. 778, 71 L. J. B. 529, 86 L. T. 505, 50 W. R. 449, 18 T. L. R. 428, 46 Sol. P. 357; *Hurst Hardware Co. v. Goodman*, (1910) 68 W. Va. 462, 69 S. E. 898, 32 L. R. A. (N.S.) 598. But see *Enterprise Trading Co. v. Bank of Crowell*, (Tex. Civ. App. 1914) 167 S. W. 296; *Am. Wholesale Corp'n v. Mauldin*, (1924) 128 S. C. 241, 122 S. E. 576.

⁴⁶See *Am. Wholesale Corp'n v. Mauldin* (1924) 128 S. C. 241, 122 S. E. 576.

⁴⁷*Hargreaves v. Parsons*, (1844) 13 M. & W. 561, 14 L. J. Ex. 250, 4 L. T. O. S. 213; *Cardell v. McNeil*, (1860) 21 N. Y. 336; *Brown v. Curtis*, (1849) 2 N. Y. 225.

induced by it. At any rate, the alleged promisor, who has received whatever consideration the plaintiff gave, is not made to appear to accommodate the maker, who received no consideration from the plaintiff. But it has been held that the reasoning applicable to the foregoing case does not apply where the debtor prevails upon the plaintiff, his creditor, to accept in payment of his debt a note of P made directly to the plaintiff. In such a case, it is said that there is no debt of anyone except the third person and the promise of the defendant must be to pay a third person's debt. This decision is illustrative of the error that results where the words of the statute are construed without due reference to the evil at which it was aimed.⁴⁸ There is as much reason to believe that the creditor would expect a supplemental promise in such a case as where the note was owned by the defendant and transferred to the creditor as conditional payment and there is no reason to believe that the defendant would be less willing or apt to make the supplementary promise in the one case than in the other. Neither should be held to be within the statute because neither presents the dangers contemplated by it.⁴⁹

The del credere agent's promise. A del credere agent receives possession of goods from the owner for sale upon commission, guaranteeing that all persons to whom he sells on credit will promptly pay for the goods. Title remains in the owner and he bears the risk of loss as long as the agent takes reasonable care of the goods. The agent usually sells the goods in his own name but the purchaser becomes indebted to the owner as undisclosed principal. The agent may sue for the price or receive payment, in which case he probably holds the proceeds in trust for the owner.⁵⁰ The owner may sue for the purchase price after the due date but, if the goods have been properly sold on credit, he has no cause of action against the agent unless he fails to receive payment in accordance with the purchaser's promise.⁵¹ "Upon non-payment by the vendor the debt falls absolutely on

⁴⁸Dows v. Swett, (1883) 134 Mass. 140, 45 Am. Rep. 310. One learned writer justified this decision on the ground that, the plaintiff being payee of the note, it was not transferred by the defendant. Browne, Statute of Frauds, 5th ed., sec. 165a.

⁴⁹Sheldon v. Butler, (1878) 24 Minn. 513; Crane v. Wheeler, (1892) 48 Minn. 207, 50 N. W. 1033. Eagle, etc., Machine Co. v. Shattuck, (1881) 53 Wis. 455, 10 N. W. 690, 40 Am. Rep. 780.

⁵⁰See Cushman v. Snow, (1904) 186 Mass. 169, 71 N. E. 529.

⁵¹See the general discussion of del credere commissions in 2 Mechem, Agency, sec. 2534.

the factor."⁵² Such being the nature of the *del credere* agent's undertaking, it is clear that he does undertake to "answer for the debt or default of another person." His promise is made to a prospective creditor and no one denies that the purchaser becomes a debtor of the promisee or that the agent's performance of his duty terminates his promisee's right against the purchaser. Yet, no recent case has held that such a promise is within the statute.⁵³

In justification of this general view, one distinguished writer says:

"The case of the *del credere* bailiff or factor is merely a particular species of accountability. The terms of any bailment to account are provable by parol. The defence was always permissible in account before the auditors that although the goods had been sold that the vendee's debt was uncollectible by the bailiff; provided he had authority to sell on credit and had not been negligent.

"A *del credere* factorship was merely one in which this usual defense was by agreement denied to the bailee. The words, 'No action shall be brought upon any special promise to answer for the debt, etc., of another person' cannot properly apply to an action to enforce an accounting for the reason that the action of account is here brought on the bailment to account and there is no action brought upon the guaranty. The guaranty is only one of the terms of the defendant's accountability."⁵⁴

Another has said that "the weight of authority in the United States is undoubtedly in support of the rule that a factor who sells by virtue of his employment, under a *del credere* commission is liable not collaterally merely, but absolutely as principal, and that if the debt be not paid when due, *indebitatus assumpsit* will lie against him at once for the amount."⁵⁵

⁵²Wolff v. Koppel, (1843) 5 Hill (N.Y.) 458, 460.

⁵³Wolff v. Koppel, (1843) 5 Hill (N.Y.) 458, 460; Bullowa v. Orgo, (1898) 57 N. J. Eq. 428, 41 Atl. 494.

⁵⁴Hening, A New and Old Reading on the Fourth Section of the Statute of Frauds, 57 U. Pa. L. Rev. 611, 632.

⁵⁵2 Mecham, Agency, sec. 2534.

"Instead of paying cash, the factor prefers to contract a debt or duty which obligates him to see the money paid. This debt or duty is his own, and arises from an adequate consideration. It is contingent, depending on the event of his failing to secure it through another—some future vendee, to whom the merchant is first to resort." Cowen, J., in Wolff v. Koppel, (1843) 5 Hill (N.Y.) 458, 459.

The courts were clear that the promise was not within the statute, but the generally accepted view that the purchaser from the agent became a debtor of the principal and could be sued by him presented a real obstacle. The only way to evade it was to hold that the agent became a debtor. If his receipt of the goods had this consequence, his promise was not within the statute even though the

To a much earlier writer the *del credere* agent's promise did not seem to satisfy the language of the statute. "It does not appear to be a promise to answer for the debt or default of *any particular person*; for there was no debt in existence at the time the contract was made. . . . There is no debtor or person proposing to become a debtor, to whom the term 'another person' can apply."⁶⁶

The reason most often given for the view that the *del credere* agent's promise is not within the statute is that the guaranty is merely incidental to his agency; the main object of his promise is to fix the terms of his compensation rather than to answer for the debt of another person. "The statute," it is said, "applies only to a 'special' promise to answer for the debt, default or mis-carriage 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."⁶⁷

same transaction made of some other person a debtor also. Delivery of the goods to the agent could make no one else a debtor because he might never sell them. If it made the agent a debtor, the goods would belong to him, his later sale would make the purchaser his debtor and there would be no reason to permit the original owner to sue the purchaser. Yet it is clear that the purchaser is liable to the original owner and the factor is not, as long as he uses care to preserve the goods, unless he sells them. These appear to be serious objections to the theory that delivery to the agent makes him a debtor.

In *Sherwood v. Stone* (1856) 14 N. Y. 267, this ingenious, but apparently unsound, account for the existence of the debt is found: "A guaranty by a factor differs very especially from a promise to pay the debt of another in another particular; the principal transfers a right (although not the exclusive right) to the factor to sue for and recover the money in his own name, and to collect the debt and hold the money, accounting only for the net balance of the account between the parties. Thus the debt of the purchaser is to some extent made the property of the factor, and he to that extent becomes the purchaser of it, and so far substitutes his liability in place of that of the purchaser. The effect of this generally is to make the factor practically the owner of the debt, and this is almost invariably so, if he remains solvent and on just terms with his principal. Then the principal is unknown to the purchaser." The principal's transferring a right to sue, when he delivers the goods, is beset with one obvious difficulty. At this time, since there has not been and may never be a sale of the goods, he has no such right or power himself, nor does he have a power to create such in the agent. At most, the principal could only promise to permit the agent to sue. But such a promise would not be such a *quid pro quo* as would give rise to a debt. Moreover, if the principal should sue the subsequent purchaser, as he clearly may, there would be a failure of consideration and the agent, for this reason, would not be liable on his promise. But the law is clearly otherwise.

⁶⁶Throop, *Validity of Verbal Agreements* 660. The learned author expressed the opinion that the statute would apply if the buyer was named.

What the principal object of such a guaranty is depends upon the point of view. From the agent's point of view, it is to secure additional compensation but the creditor's main object is to acquire a security against loss. The fact that the guarantor has a purpose of his own scarcely justifies calling him a debtor or denying that he promises to answer for the debt of another. Nevertheless, the well established view that the promise of a *del credere* agent is not within the statute is sound because it presents practically no danger that spurious claims may be established by false testimony.

It has been seen that the danger contemplated by the statute existed only where the third person's receipt of the consideration alleged left the defendant's promise the only fact essential to recovery that had to be established by perjury. That this was not so in an action upon a *del credere* agent's promise is clear from the foregoing analysis. The promisee parted with his goods to the agent in consideration of his promise alone and he, without consulting the owner, determined whether the prospect of payment was such as to justify a sale upon credit. Consideration consisting of such facts could not be proved by false testimony and, when proved, affords substantial basis for the inference that the agent was to stand back of his judgment that the purchaser would pay. This inference, being corroborative of the plaintiff's claim, makes it unnecessary to infer the defendant's promise solely from the testimony of the plaintiff's witnesses.

Promises to indemnify. The decided preponderance of judicial opinion is that a promise to indemnify is not within the statute.⁵⁷ Practically all the cases acknowledge the source of this view to be the statement of Bayley, J., in *Thomas v. Cook*⁵⁸ that "A promise to indemnify does not . . . fall within either the words or the policy of the statute of frauds." This statement was unnecessary to the decision inasmuch as the only question was whether the promise sued on was a promise "to answer for the debt, default or miscarriage of another." If it was not, the statute was inapplicable. Unfortunately, courts have seemed to regard the statement as correct and of importance. Quite often, if the

⁵⁷Falconbridge, *Guarantees and the Statute of Frauds*, 68 U. Pa. L. Rev. 1, 17; 1 Williston, *Contracts*, sec. 484; Browne, *Statute of Frauds*, 5th ed., sec. 213.

⁵⁸Browne, *Statute of Frauds*, 5th ed., secs. 159-162; 1 Williston, *Contracts*, sec. 482.

⁵⁹(1828) 8 B. & C. 728, 3 Man. & Ry. 444, 7 L. J. O. S. K. B. 49.

promise alleged contains the word "indemnify" or "indemnity" and the applicability of the statute is in question, the courts say that the promise is a promise to indemnify and regard the applicability of the statute as necessarily decided. The statement of Bayley, J., is made the major premise of a syllogism and, if it is decided that the promise alleged is a promise to indemnify the conclusion inevitably follows that it is not within the statute.⁶⁰ This method of approach is objectionable. Only promises to answer for the "debts, defaults or miscarriages" of others are within the statute and the sole inquiry should be whether the promise alleged is such a promise. No practical harm, however, would result if a "promise to indemnify" was never a "promise to answer for the debt, default or miscarriages of another." But the former is a term of wider meaning than the latter and may include it.⁶¹ Professor Williston has said:

"The greatest confusion exists in regard to the question whether promises to indemnify are within the statute. It has been pointed out that part of the confusion is due to an attempt to treat all promises of indemnity alike, an attempt which is indicated in speaking of promises to indemnify, by emphasizing the word 'indemnify' without consideration of the contingency against which the promisor undertook to indemnify. A promise to indemnify a creditor against loss if he sells goods to another, or advances money to him, is certainly a promise to answer for the debt or default of another, and of course within the statute; yet the use of the word indemnify in such a transaction is entirely proper. It is therefore a primary question whether the promisor agrees, not merely to indemnify, but to indemnify for the debt, default or miscarriage of another. If not, there can be no question of the statute."⁶²

If the statement of Bayley, J., is to be used as a premise from which to reason as to the applicability of the statute, it should be understood as referring to such a promise as was sued on in

⁶⁰"The promise is, in my opinion, clear; and the court below has found that the promise was a promise to indemnify, and therefore not within the Statute of Frauds. That decision is, in my opinion, right, and therefore the appeal must be dismissed." Lindley, L. J., in *Guild & Co. v. Conrad*, [1894] 2 Q. B. 885, 894, 63 L. J. Q. B. 721, 71 L. T. 140, 42 W. R. 642, 10 T. L. R. 549, 38 Sol. Jo. 579. "In my opinion this was a promise to indemnify, and therefore not within the statute." Davey, L. J., s. c. 896.

⁶¹"Of course in one sense all guaranties, whether they come within sec. 4 or not, are contracts of indemnity." Vaughan Williams, L. J., in *Harburg Indian Rubber Comb Co. v. Martin*, [1902] 1 K. B. 778, 784, 71 L. J. K. B. 529, 86 L. T. 505, 50 W. R. 449, 18 T. L. R. 428, 46 Sol. Jo. 357.

⁶²1 Williston, *Contracts*, sec. 482.

Thomas v. Cook. In that case, the plaintiff alleged that the defendant induced him to join him as surety for a third person on a bond to a fourth by orally promising to save him harmless. Eleven years later, the plaintiff, in *Green v. Creswell*, alleged that the defendant induced him to become surety for a third person on a bond to a fourth by orally promising to save him harmless,⁶³ and this promise was held to be within the statute.⁶⁴ In *Wildes v. Dudlow*,⁶⁵ where the facts were practically identical, the promise was held to be without the statute and it was said that *Green v. Creswell* had been overruled by *Reader v. Kingham*.⁶⁶ It has been pointed out that this was not necessarily the result of the latter case and a few states now adhere to the rule of *Green v. Creswell*. The great majority, however, profess allegiance to the broad statement of Bayley, J., that a promise to indemnify is not within the statute. It may be pertinent, therefore, to inquire whether this view is correct. If so, it is not because such promises are promises to indemnify but because they are not promises to answer for the debts or defaults of others or, if they are, the statute is inapplicable because there are special circumstances accompanying or preceding the promise, essential to its proof, that are unsusceptible to proof by perjury and suggestive that the defendant probably made such a promise as the plaintiff alleges.

There appears to be no difficulty where the promisor is alleged to have induced the promisee to become surety for him to C by orally promising to indemnify or save him harmless. Such a promise would be implied from the request, if followed by a compliance, and would give rise to the surety's right of exoneration. A breach of this duty, followed by the surety's payment, entitles him to reimbursement, generally called the surety's right of indemnity. It is generally agreed that such a promise is not within

⁶³It is of prime importance to determine whether "indemnify" or "save harmless" indicates that the promisor undertakes so to perform that the promisee will never be out of pocket or merely to reimburse him in case he is called upon to pay. The former was said to be its meaning in *Guild & Co. v. Conrad*, [1894] 2 Q. B. 885, 894, 63 L. J. Q. B. 721, 71 L. T. 140, 42 W. R. 642, 10 T. L. R. 549, 38 Sol. Jo. 579. See Arnold, *Indemnity Contracts and Statute of Frauds: Thomas v. Cook versus Green v. Creswell*, 9 MINNESOTA LAW REVIEW 401.

⁶⁴(1839) 10 Ad. & El. 453, 2 Per. & Dav. 430, 9 L. J. Q. B. 63, 4 Jur. 169.

⁶⁵(1874) L. R. 19 Eq. 198, 44 L. J. Ch. 341, 23 W. R. 435.

⁶⁶(1862) 13 C. B. N. S. 344, 1 New Rep. 94, 32 L. J. C. P. 108, 7 L. T. 789, 9 Jur. N. S. 797, 11 W. R. 366.

the statute.⁶⁷ Such a promise is to satisfy one's own obligation and there is no obligation of another.

The confusion arises where it is alleged that the promisor induced the promisee to become surety for P by promising to save him harmless or indemnify him. Such a promise is made for the immediate purpose of inducing the promisee to become C's obligor, as in the preceding case. But, in doing so, he becomes a prospective obligee of P, unless he enters into the relation officiously, enjoying against P immediately the rights of exoneration and indemnity. A promise to a debtor, as has been seen, is not within the statute and the same view should obtain as to a prospective debtor. But a promise to a creditor, actual or prospective, to pay another's debt is generally within the statute. It is this that has caused the difficulty for those courts that follow *Green v. Creswell*. When the promisee accepts the offer by becoming surety for P, he becomes C's debtor and P's prospective creditor. Does the fact that the latter consequence accompanies the former necessarily bring the case within the statute? The promise is collateral to the implied promise of P but this feature has caused no difficulty in the "main purpose" and "del credere" cases and the writer believes that, notwithstanding its existence in the so-called indemnity promises, they are correctly held to be without the statute. The danger from perjury is absent because the plaintiff cannot establish the promise without proving facts, preceding or accompanying it, that are unsusceptible to proof by false testimony and that are indicative of an inducing promise by the defendant.

If the promise to indemnify is made after the promisee has become surety for P, it would require a special consideration. If the consideration alleged was some benefit moving to the promisor from the promisee, it could hardly be proved contrary to fact and, when proved, would itself suggest some sort of inducement by the defendant. If the consideration were a mere detriment to the promisee, it would be otherwise.

But the promise to indemnify is generally alleged to have induced the promisee to become surety for P. It is in these cases that the difference of opinion has arisen. It must be admitted that in the "indemnity" cases the promisor's plan to further some purpose or desire of his own is somewhat less obvious than in the "main purpose" and "del credere" cases, yet the danger contemplated by the statute appears to be absent.

⁶⁷1 Williston, Contracts, sec. 482.

If one receives goods upon request, he becomes a debtor and the same result follows where goods are delivered to P at the promisor's request. A promise to indemnify one who becomes surety for the promisor at his request—generally agreed to be without the statute—is analogous to the receipt of goods upon request. The request that the promisee expose himself to a risk for the benefit of the promisor by becoming his surety is enough to impose the obligation to indemnify without an express promise. If the promisor requests the promisee to become surety for P, in whom the promisee may have no interest whatever, the request may not be sufficient to constitute a basis for the implication of a promise to indemnify in all cases but it is sufficiently indicative that S promised to prevent the existence of the danger contemplated by the statute. Stated otherwise, the defendant's request is not particularly susceptible to proof by perjury and, when established, it affords a basis for the inference that the person requesting probably agreed to save the person requested harmless. This is so far corroborative of the plaintiff's claim that the inference that the defendant promised as alleged does not depend solely on the testimony of the plaintiff's witnesses.

Is there less reason to believe that the defendant promised to indemnify the plaintiff, when the defendant requests him to become surety for P and P also requests him so that it is clear that he also is bound to indemnify the plaintiff? In such a case, a single consideration supports both promises as where goods are delivered by C to P for which both S and P promise to pay. It has been seen that such a promise by S is not within the statute, even though C knew that he promised in order to enable P to get the goods. The promise of each was in the same terms and the resulting duty similar. In the case last supposed, when the promisee becomes surety for P, his implied promise to save the plaintiff harmless and the defendant's express promise are identical in terms. Where the consideration gave rise to similar duties in the promisor and another, it has been pointed out that the evil contemplated by the statute did not exist. Dishonest creditors alleged that the consideration moved to P because the defendant promised to pay, if P did not. But, in an indemnity promise, the more general view is that the terms of the defendant's promise are such that they give rise to a duty similar to that of the person for whom the plaintiff becomes bound. Where such consideration is in response to the requests of both the defendant and P, there is reason to be-

lieve that each undertakes to indemnify and the alleged promise of the defendant cannot be within the statute because it is no more a promise to pay another's debt than his own.

Conclusion. It is generally conceded that the removal of the disqualification of parties as witnesses has greatly decreased the need of written evidence of promises generally but the dishonest plaintiff still appears to have a special advantage in an action upon a false promise to pay another's debt because he needs to prove only the promise by false testimony. But the writer doubts whether creditors sue on promises, known to be false, sufficiently often to create any substantial danger. The main usefulness of the provision will be seen in the occasional case where the promisee perhaps honestly mistakes "words of recommendation, encouragement to forbearance or request for indulgence" for a promise. Because there has been no general feeling that such promises need be written, the provision may have operated more often to enable debtors to escape performance of actual promises than to protect them from spurious promises. Whether this actually has been so or not is a matter about which there can be only conjecture. Much of the criticism of the statute undoubtedly has been the result of a too literal interpretation of its language and its consequent application to situations presenting none of the special danger discussed in the foregoing pages. Whether, when properly confined, the provision will do more harm than good, can be known only when the number of cases where written evidence was essential to the defendant's protection has been compared with the number of cases where the requirement has enabled defendants to escape performance of actual promises.