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CONTRACTS - STATUTE OF FRAUDS - PROMISE TO ANSWER FOR DEBT OF ANOTHER

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CONTRACTS — STATUTE OF FRAUDS — PROMISE TO ANSWER FOR DEBT OF ANOTHER — The defendants owned stock in a corporation and controlled its affairs. The corporation purchased paper needed in its production of periodicals from the plaintiffs. The defendants prepared a budget showing that the corporation would incur a deficit over a six-month period in connection with the publication of a newly acquired magazine. They then informed the plaintiffs that they would place the corporation "in funds" to enable it to "finance the anticipated deficit" and requested the plaintiffs to extend credit not to exceed ninety days so as to allow the defendants more time to consider in what manner "to advance" the necessary sums to the corporation. The defendants orally agreed that if the plaintiffs would continue to sell paper to the corporation and extend such credit, that defendants "would advance" to the corporation sufficient moneys for "it to pay" for the paper and "to meet any deficit" in its operations. The plaintiffs agreed to this and performed their part of the agreement. The defendants failed and refused to advance moneys to the corporation, as a result of which it did not have sufficient funds to meet its expenses. The corporation was adjudicated a bankrupt and the plaintiffs received a dividend which they applied in reduction of their claim for the paper delivered on credit. The difference is the sum for which the plaintiffs brought suit. *Held*, the oral promise of the defendants was to answer for the debt of another and thus unenforceable, being within the statute of frauds.[1] *Bulkley v. Shaw*, 289 N. Y. 133, 44 N. E. (2d) 398 (1942).

In deciding whether or not a promise is within this section of the statute, embracing special promises to "answer for the debt, default or miscarriage of another person," courts have traditionally approached the problem by determining, first, whether the promise comes within the literal wording of the statute,[2] and if so, secondly, whether it is within the scope and meaning of the statute or whether it is without the statute by reason of certain special circumstances.[3] Thus, as to the first, the special promise may be to answer for the obligation of another in tort,[4] or for a contractual obligation other than a money debt.[5] However, the special promise must be to fulfill all or part of the obligation of the debtor, and one which does not assure this is not within the statute even though made for the purpose of rendering more certain payment of the original debt.[6]

[1] N. Y. Consol. Laws (McKinney, 1938), c. 41 "Personal Property Law," § 31 (2).

[2] 2 WILLISTON, CONTRACTS, rev. ed., §§ 453-460 (1936).

[3] Id., §§ 469-475.

[4] Baker v. Morris, 33 Kan. 580, 7 P. 267 (1885); Gibbs v. Holden, 137 Misc. 480, 244 N. Y. S. 10 (1930).

[5] Clay v. Walton, 9 Cal. 328 (1858); City of Elkins v. Elkins Elec. Ry., 87 W. Va. 350, 105 S. E. 233 (1920).

[6] WILLISTON, CONTRACTS, rev. ed., § 455 (1936); Towne v. Grover, 26 Mass. 305 (1830) (promise to notify creditor of debt owing to principal debtor so creditor might garnishee it); Meyer v. Moore, 72 Cal. App. 367, 237 P. 550 (1925) (promise to guarantee dividends of a corporation if the promisee would subscribe for stock); Clement v. Rowe, 33 S. D. 499, 146 N. W. 700 (1914) (promise to pay value of stock given by corporation as the purchase price of land, if the corporation failed to pay dividends).

As to the second inquiry, the existence of certain circumstances may permit treating the promise as not within the scope of the statute. It has been held that if there is a new consideration moving to the promisor which is beneficial to him, and if the consideration is such that the promisor thereby comes under an independent duty of payment, irrespective of the liability of the principal debtor, the promise is not within the statute.[7] Professor Williston suggests the true test should be whether or not the new promisor is a surety.[8] The court in the principal case adopts this criterion and concludes that the corporation remained the one who ought to pay and the primary obligor, since the debt was always to be its debt and not that of the defendants. A conclusion that the promise of the defendants is within the statute because the corporation remained the sole primary obligor seems to assume the premise that the promise was in its nature one coming within the literal terms of the statute. This assumption does not appear to be warranted in view of the fact that the promise of the defendants was merely to advance funds to the debtor and not a promise to fulfill all or part of the obligation of the debtor.[9] In support of its decision the court relies primarily upon two cases[10] wherein it was held that an oral promise to answer for the debt of another was unenforceable because in each the promisor did not come "under an independent duty of payment, irrespective of the liability of the principal debtor." But in contrasting the promises in those two cases[11] with that in the principal case, the assumption that they are equivalent is questionable. In the former two the promise was clearly to assume or answer for a debt.[12] As previously suggested, the defendants' promise in the principal case differs in its nature from that usually construed as being within the section of the statute under con-

[7] White v. Rintoul, 108 N. Y. 222, 15 N. E. 318 (1888); Richardson Press v. Albright, 224 N. Y. 497, 121 N. E. 362 (1918) (this case and the former were cited by the court in the principal case); Kampman v. Pittsburgh Contracting & Engineering Co., 316 Pa. 502, 175 A. 396 (1934); Corcoran v. Huey, 231 Pa. 441, 80 A. 881 (1911); Davis v. Patrick, 141 U. S. 479, 12 S. Ct. 58 (1891); Harris v. Frank, 81 Cal. 280, 22 P. 856 (1889). See also annotations, 8 A. L. R. 1198 (1920); 99 A. L. R. 79 (1935).

[8] WILLISTON, CONTRACTS, rev. ed., § 475 (1936).

[9] Note 6, supra.

[10] Richardson Press v. Albright, 224 N. Y. 497, 121 N. E. 362 (1918); Witschard v. Brody & Sons, 257 N. Y. 97, 177 N. E. 385 (1931).

[11] In the Richardson Press case, supra, the debtor company, in which the defendant was a stockholder and manager, was the publisher of a magazine printed by the plaintiff. When the defendant was informed by the plaintiff of the amount the debtor owed, the promisor said, "I will agree to pay you $1,500 in three payments. . . . I will further agree to pay each issue hereafter in cash, before you send it out." In the Witschard case, supra, the defendant, a firm which the debtor had contracted to do construction work for, told the officers of the plaintiff company that if they "continued to deliver the balance of materials needed [ordered by the debtor] . . . he [speaking for the defendant firm] would guarantee payment of what had already been delivered [to the debtor], and what was to be delivered in the future." In that case the court said, "the language of the promisor unmistakably indicates its intention to become a surety for the very promise relied upon is that it 'would guarantee payment.'" 257 N. Y. at 99.

[12] Supra, note 11.

sideration.[13] It bears a closer resemblance to the promise in another case wherein the defendant promised a creditor that he would advance money to a debtor so that the debtor might pay his obligation.[14] That promise was held to be outside the statute, and it would seem that there is reason for so treating the one in the principal case. If the defendants had advanced the money to the corporation, they would have fulfilled their contract. There was no promise on their part to pay anything to the plaintiffs absolutely nor on condition that the corporation failed to pay the plaintiffs. Therefore, construing this to be a promise to answer for the debt of another is at least a debatable conclusion. It would perhaps be more realistic to say that the defendants promised to make a loan. They have not performed this undertaking, and consequently the plaintiffs should be allowed to recover damages for breach of contract.[15]

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[13] In Brown v. Reinberger, 177 Ill. App. 297 (1913), the promisor said "he would personally stand good for the account" the debtor owed the promisee. The promise in Winne v. Mehrbach, 130 App. Div. 329, 114 N. Y. S. 618 (1909), was to "guarantee" and "make good" certain accounts. In South Spindletop Oil & Development Co. v. Toney, (Tex. Civ. App., 1929), 15 S. W. (2d) 688, the defendant promised plaintiff employees of debtor company that he would "stand good" for the wages which the company owed them and "would see" that they were paid. The promise "I will see you paid" is discussed in an annotation in 99 A. L. R. 79 at 85-93 (1935).

[14] Riley v. Springfield Sav. Bank, 86 N. H. 329, 168 A. 721 (1933). The defendant bank was contemplating taking a mortgage on the debtor's property and desired to have it free of prior encumbrances. The plaintiff agreed not to exercise his right to secure a lien on it for construction work he had done on condition the defendant would let him or the debtor "have eighteen hundred dollars and the rest when the barn was finished." The loan was accordingly made to the debtor but he paid the plaintiff only part of the debt out of it. The court held the defendant's undertaking was not a promise to answer for the debt of another, but that it was original. Its nature remained to be determined upon a new trial. The court suggested that the defendant might have undertaken to pay the plaintiff, assuming the debt as its own, or it might have merely promised to make the loan. In neither case would the promise be within the statute.

[15] The principal case has also been noted in 11 BROOKLYN L. REV. 235 (1942); 10 FORDHAM L. REV. 439 (1942).