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Guaranty–Promise of Banker "To Insure" Deposit

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seems to support the principal case.¹⁶

Some states, including West Virginia, have enlarged the privilege by statute. An early Virginia law privileged the members "from all arrests, attachments, executions and all other process whatsoever". By this law it was possible to issue civil process, but it could not be served until the end of the privilege.¹⁷ West Virginia, with a constitutional privilege similar to that in the federal constitution,¹⁸ has a statute which allows the service of civil process but declares that, "no trial shall be had or judgment rendered in any such suit, nor shall any execution or attachment be levied upon the property of such member during the sessions of the legislature or for ten days immediately before or immediately after session."¹⁹ If any such action is taken it will be held invalid and set aside.²⁰ If we accept the interpretation of the principal case it would seem that the statute is broader than the constitutional base on which it rests. Yet a similar provision has been declared valid.²¹

—RALPH M. WHITE.

GUARANTY — PROMISE OF BANKER "TO INSURE" DEPOSIT — STATUTE OF FRAUDS. — Plaintiff went to the Bank of F, fearing it was insolvent, and intending to withdraw her deposit. Defendant, a director, stockholder, and depositor in the Bank of F, who was a man of means, known to plaintiff a long time, said to plaintiff, "I will insure your money. It is safe here." The bank subsequently failed, and plaintiff sued defendant on his promise. *Held*, defendant's promise was original, upon sufficient consideration,

¹⁶ Howard v. Citizens Bank and Trust Co., 12 App. D. C. 222 (1898); Merrick v. Giddings, *supra* n. 15; Kimberly v. Butler, 14 Fed. Cas. 499 (1869); Doble-Kidd Dry Goods Co. v. Munn., 151 Ark. 629, 238 S. W. 40 (1922); Phillips v. Browne, 270 Ill. 450, 110 N. E. 601 (1915); Berlet v. Weary, 67 Neb. 75, 93 N. W. 238 (1903); Worth v. Norton, 56 S. C. 56, 33 S. E. 792, 45 L. R. A. 563 (1898); Bartlett v. Blair, 68 N. H. 232, 38 Atl. 1004 (1894); Rhodes v. Walsh, 55 Minn. 542, 57 N. W. 212, 23 L. R. A. 632 (1893); Gentry v. Griffiths, 27 Tex. 461 (1864); Johnson v. Offutt, *supra* n. 6; Catlett v. Morton, 4 Litt. 122 (Ky. 1823); see Wilder v. Welsh, 1 MacArthur 566 (D. C. 1874).

¹⁷ McPherson v. Nesmith, 3 Gratt. 237 (Va. 1846).

¹⁸ W. VA. CONST., art. VI, § 17.

¹⁹ W. VA. REV. CODE (1931) c. 4, art. 1, § 3.

²⁰ Pittinger and Pugh, Ex'rs v. Marshall, 50 W. Va. 229, 40 S. E. 342 (1901).

²¹ See Phillips v. Browne, *supra* n. 16; noted in (1916) 16 COL. L. REV. 249. (The statute was held unconstitutional, however, as violating a provision against local or special legislation). What of the "guaranty" of speedy justice in all cases? W. VA. CONST., art. III, § 17.

and thus a guaranty not within the statute of frauds. *Garren v. Youngblood*.¹

Ordinarily, once the consideration for a promise has been established, it is irrelevant in the further interpretation of the contract, and the scope of the promisor's obligation is measured by its express language and intent. However, in the case of a promise to pay the debt of another, which is within the statute of frauds,² the character of the consideration is used to stamp the promise as original or collateral.³

There is authority for the proposition that surrender to the new promisor of property which was held by the creditor as security for his claim takes the promise out of the statute.⁴ These cases have furnished the foundation for an inroad upon the statute in the United States. Deserting the first test the courts devised for determination of a collateral promise, "Did the original debtor still remain liable on his promise?"⁵ in 1811 Chancellor Kent, of New York, dangerously lessened the scope of the statute by holding that it did not bar a promise where there was a new consideration of benefit or harm moving between the newly contracting parties.⁶ This rule would make binding almost any promise based upon valid consideration,⁷ and is obviously too broad. Hence it has been discredited and abandoned,⁸ even by New York,⁹ in favor of the more limited extension made by Massachusetts and the

¹ 176 S. E. 252 (N. C. 1934).

² N. C. CODE ANN. (Michie, 1927) § 987: "No action shall be brought . . . to charge any defendant upon a special promise to answer the debt, default, or miscarriage of another person, unless . . . some memorandum or note thereof be in writing." This provision is common to most of the state statutes of frauds.

³ Note (1920) 8 A. L. R. 1199.

⁴ *Cassels v. Alabama City, G. & A. Ry. Co.*, 198 Ala. 250, 73 So. 494 (1916); *Westmoreland v. Porter*, 75 Ala. 452 (1883); *Manning v. Anthony*, 208 Mass. 399, 94 N. E. 466 (1911); *Williams v. Leper*, 3 Burr. 1886, 97 Eng. Rep. 1152 (1766).

⁵ *White v. Rintoul*, 108 N. Y. 222, 225, 15 N. E. 318 (1888). This test, the easiest and most obvious, though discarded, is still mentioned in *West Virginia: Mankin v. Jones*, 63 W. Va. 373, 60 S. E. 248 (1907); *Johnson v. Bank*, 60 W. Va. 320, 55 S. E. 394 (1906).

⁶ *Leonard v. Vredenburgh*, 8 Johns. 29, 5 Am. Dec. 317 (N. Y. 1811).

⁷ *Maule v. Bucknell*, 50 Pa. St. 39 (1865); *Williston on Contracts*, (2d ed. 1920) § 472.

⁸ *Hurst Hardware Co. v. Goodman*, 68 W. Va. 462, 69 S. E. 898 (1910); *Mankin v. Jones*, *supra* n. 5; *Mine & Smelter Supply Co. v. Stockgrowers' Bank*, 173 Fed. 859 (1900); *White v. Rintoul*, *supra* n. 5. However, vestiges of Kent's rule remain in a few states: *Brinkley Car Works & Mfg. Co. v. Smith*, 110 Ark. 325, 161 S. W. 1065 (1913); *Marrow v. White*, 151 N. C. 96, 65 S. E. 746 (1909); *Ellis v. Carroll*, 68 S. C. 376, 41 S. E. 679 (1904).

⁹ *White v. Rintoul*, *supra* n. 5; *Brown v. Weber*, 38 N. Y. (11 Tiff.) 187 (1868).

United States Supreme Court, *viz.*, an oral promise to pay the debt of another may be enforced, if given for any consideration which is beneficial to the promisor, and desired by him to promote some interest of his own.¹⁰ While the American Law Institute accepts this proposition,¹¹ the English courts still reject such a conservative view.¹²

On facts similar to those of the instant case, Missouri has held that the promise of the director is collateral, since the debt of the bank still exists, the main object being forbearance in behalf of the bank, and any benefit to the promisor is merely incidental.¹³ Alabama has held that such a promise by the cashier, in writing, is collateral, and not original.¹⁴ In a West Virginia decision the promise of the president of a business corporation was treated as collateral.^{14a}

In the instant case, the court purports to base its decision on the doctrine that receipt by the new promisor of a beneficial consideration removes the promise from the statute, which proposition, Williston states, cannot be accepted as a matter of theory.¹⁵ Certainly a subjective test is applied to the promise, involving the motive of the promisor,¹⁶ which is contrary to the general contracts rule. It is submitted that this results, in the instant case, in grave distortion of the ordinary meaning of the word "insurer". A further *quaere* is, does the "beneficial consideration" involved here create sufficient evidence of a promise to satisfy the policy of the statute in regard to the prevention of perjury?

Furthermore, it is generally held that the mere interest of a

¹⁰ *Emerson v. Slater*, 22 How. 28, 16 L. Ed. 360 (1859); *Alger v. Scoville*, 67 Mass. (1 Gray) 391, 396 (1854); *Curtis v. Brown*, 59 Mass. (5 Cush.) 488 (1850).

¹¹ RESTATEMENT OF THE LAW OF CONTRACTS, § 184: "Where the consideration for a promise that all or part of a previously existing duty of a third person to the promisee shall be satisfied is in fact or apparently desired mainly for his own pecuniary or business advantage, rather than in order to benefit the third person, the promise is not within Class II of § 178 (Contracts with an obligee to answer to him for the debt, default, or miscarriage of his obligor) unless the consideration is merely a premium for the promisor's insurance that the duty shall be discharged."

¹² *Davys v. Buswell* [1913] 2 K. B. 47; *Harburg India Rubber Comb Co. v. Martin* [1902] 1 K. B. 778.

¹³ *Walther v. Merrell*, 6 Mo. App. 370 (1878).

¹⁴ *Edwards v. Bryan*, 214 Ala. 441, 108 So. 9 (1926).

^{14a} *Hurst Hardware Co. v. Goodman*, *supra* n. 8.

¹⁵ WILLISTON ON CONTRACTS § 472.

¹⁶ *Garren v. Youngblood*, *supra* n. 1, at 254: "The real character of a promise does not depend altogether upon form of expression, but largely upon the situation of the parties, and upon whether they understood it to be a collateral or direct promise." *Cf.*, *Dillard v. Walker*, 204 N. C. 16, 167 S. E. 636 (1933).

stockholder and officer in a corporation is incidental only, and not a sufficiently independent benefit to the promisor to take the case out of the statute.¹⁷ Thus, if we cannot establish a benefit to the defendant here as a depositor, the result must be explained by Chancellor Kent's erroneous doctrine of "new consideration of benefit or harm", based on plaintiff's forbearance to withdraw her deposit.

As a result, however, the instant holding may be desirable, in the light of current legal tendencies adding to the responsibilities of bank officials. Since rather vague words are sometimes construed by the courts to be promises, the instant holding might be deemed to impose too heavy a burden on bank officials asked about the condition of a bank, but do not both honesty and fairness to depositors require that their answers be accurate and discreet?

—HERSCHEL H. ROSE, JR.

INSURANCE — LIABILITY INSURANCE — EXCEPTED RISKS — EFFECT OF ABSENCE OF CAUSATIVE CONNECTION. — A collision policy provided for insurance against loss or damage to the insured's automobile occasioned by accidental means. There was a provision that it should not apply "when the automobile was being used or maintained by any person in violation of the law as to age or by any person under the age of sixteen years." The car was damaged while being driven by the insured's son, aged fifteen. Twelve years was then the legal age for drivers in South Carolina. No causal connection between the age of the driver and the accident was shown. Plaintiff brought suit and defendant's demurrer was overruled and defendant appealed. *Held*, in order for the company to be relieved from liability, there must be some causative connection between the accident and the fact that the car was being driven by a minor. *Affirmed. McGee v. Globe Indemnity Company.*¹

Since an insurer normally has the right to select the particular risks to be assumed, certain exceptions are usually set forth in the policy. The exception operates to exclude a specified risk²

¹⁷ *Hurst Hardware Co. v. Goodman*, *supra* n. 8; *Edwards v. Bryan*, *supra* n. 14; *Walther v. Merell*, *supra* n. 13.

¹ 175 S. E. 849 (S. C. 1934).

² *Boston v. American Mutual Accident Association*, 92 Wis. 83, 65 N. W. 861 (1896). *VANCE, INSURANCE* (2d ed. 1930) 822.