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CONTRACTS OF INDEMNITY AND THE STATUTE OF FRAUDS

A RULE of law is a statement of uniformity of behavior, whether of planets or atoms or men — a statement by which their future behavior can be predicted with reasonable assurance. Many such statements turn out to be inaccurate or even wholly worthless, for predictions do not always come true. If the stated rule is part of the common law, it purports to represent past experience, and is based upon a uniformity of action by judicial and executive officers of the state. It enables one to predict like action in the future by such officers. That such predictions have some measure of accuracy is witnessed by the fact that a large legal profession can make a living, not only as advocates in a litigation but also as advisory counsel to prevent litigation and to lay such a foundation that future litigation will be successful. If the stated rule is statutory law, it purports to direct human behavior for the future, and again enables one to predict the action of judicial and executive officers. These predictions also have a certain amount of accuracy, an amount that should increase as the statute grows older and its effect upon judicial and executive action becomes a part of experience.

In the case of the common law rules new and disturbing elements continually appear, turning old rules that once were a sound basis of prediction into empty and lifeless formulas or worse. Ordinarily the change occurs slowly; and acute lawyers who know the life around them as well as mere verbal formulas can take the changes into account in making their advisory

predictions for clients. Statutory rules in the beginning usually create an illusion of certainty; with experience the illusion vanishes. Safe prediction as to the exact operation of the statute must await actual experience in its application. It is always true that along the boundaries of its application the statutory rule varies and is recreated exactly the same as a common law rule, and for the very same reasons. This is not judicial usurpation; it is merely inevitable necessity.¹

The Statute of Frauds has now been a part of the law of the land for one quarter of a millenium. It has been interpreted and applied by the courts in tens of thousands of cases. Surely there have been experience and time enough to create uniformity and to make prediction a pleasure. It is safer, however, merely to say that they have sufficed to destroy the illusion. The legislative words usually are, "No action shall be brought whereby to charge. . . ." If this was meant to prevent the "bringing" of actions, how great the disappointment! The bulky contents of the reports and the digests suggest that an action has in fact been brought in almost every instance where a "special promise" of the prescribed classes has been made and has not been performed, as well as in great numbers of cases where the alleged promise has not been made at all. In the latter cases the statute may have

¹ In *Hanau v. Ehrlich*, [1911] 2 K. B. 1056, 1069, Buckley, L. J., said: "It is now two centuries too late to ascertain the meaning of s. 4 by applying one's own mind independently to the interpretation of its language. Our task is a much more humble one; it is to see how that section has been expounded in decisions and how the decisions apply to the present case." No doubt the same could be said of almost any written constitution or statute, but usually with a lesser degree of truth.

In *Reeve v. Jennings*, [1910] 2 K. B. 522, 529, Coleridge, L. J., said: "The Statute of Frauds has been much buffeted about by decisions, but its life is not quite extinct." In the case before him he held that the statute made the promise unenforceable.

SMITH, *CONTRACTS* (1847) 32, commenting upon Lord Nottingham's statement that every line of the statute was worth a subsidy, observes: "Every line has cost a subsidy, for it is universally admitted that no enactment of any Legislature ever became the subject of so much litigation."

"This provision comes to us from the original statute of frauds, 29 Car. II, of which it has been said by an enthusiast that every line was worth a subsidy, and by a cynic that every line has cost a subsidy to interpret. The latter statement has been gaining force as the ingenuity of greed has, through centuries, been strained to escape this apparently plain provision, until its application is now surrounded by such a cloud of decisions as to defy exhaustive examination." *McCord v. Edward Hines Lumber Co.*, 124 Wis. 509, 510, 102 N. W. 334, 335 (1905).

been an added safeguard for the innocent against the dishonest; in the former cases it offers a possible refuge for contract breakers. If the statute was meant as a basis for predicting the behavior of plaintiffs and their lawyers, the best that we can say of the legislature is that it "meant well." Of course, it is possible to assert that but for the statute many more cases would have been brought, especially fraudulent ones; no one can prove what would have been had there been no statute. It is at least as certain that but for the statute there would have been fewer broken promises and less litigation.²

If the legislature meant to lay a basis not for predicting the behavior of plaintiffs but for predicting the behavior of judges when actions are brought on the special promises described in the statute, the disappointment is also very great. There is much conflict and lack of uniformity. Two conflicting tendencies have been evident for the whole two hundred and fifty years. One of these is to regard the statute as a great and noble preventive of fraud and to apply it against the plaintiff with a good conscience even in cases where no doubt exists that the defendant made the promise with which he is charged.³ The other and much more frequent one is to enforce promises that a jury would find to have

² "He rests his defence on the statute of frauds, which probably generates as many frauds as it prevents." *Lamborn v. Watson*, 6 Har. & J. 252, 255 (Md. 1824). "The whole argument is grounded on the interpretation of the Statute of Frauds, that unfortunate statute, the misguided application of which has been the cause of so many frauds. Like any other statute, it is to be read with common sense and understanding." Bacon, V. C., in *Morgan v. Worthington*, 38 L. T. (N. S.) 443, 445 (1878).

³ As might be expected, Lord Kenyon was all for a strict application. In *Chater v. Beckett*, 7 T. R. 201, 204 (1797), he said: "I lament extremely that exceptions were ever introduced in construing the statute of Frauds; it is a very beneficial statute and if the Courts had at first abided by the strict letter of the act it would have prevented a multitude of suits that have since been brought."

In *Woollam v. Hearn*, 7 Ves. 211, 218 (1802), Sir William Grant said: "Thinking, as I do, that the Statute has been already too much broken in upon by supposed equitable exceptions, I shall not go farther in receiving and giving effect to parol evidence, than I am forced by precedent." But more than a century later, the Privy Council held in direct conflict with his decision and did not even mention the case. *United States v. Motor Trucks, Ltd.*, [1924] A. C. 196.

In *Dunphy v. Ryan*, 116 U. S. 491, 498 (1886), Woods, J., said: "The statute of frauds is founded in wisdom and has been justified by long experience." But he added: "Courts of equity, to prevent the statute from becoming an instrument of fraud, have in many instances relaxed its provisions."

been in fact made, and if necessary to this end to narrow the operation of the statute.⁴ This narrowing of application was sometimes accompanied by general words of encomium for the great statute; but in recent years the courts nearly always say nothing on the subject except what may be necessary to the business actually in hand, the enforcement of the promise. The narrowing process has been in part one of supposed interpretation of language and in part one of permitting the jury to determine the application of the statute by a general verdict under instructions that do not in fact hamper the jury in its effort to do "justice."⁵

The statutory clause forbidding an action on a promise that "is

⁴ In many cases the courts have worked indefatigably to prevent a defendant from using the statute to defeat the enforcement of his promise. In *Bader v. Hiscox*, 188 Iowa 986, 174 N. W. 565 (1919), the plaintiff had been seduced by the defendant's son and had brought civil and criminal proceedings. The defendant promised to convey land to the plaintiff if she would marry the son and dismiss the proceedings. The plaintiff fully performed her part, and the court enforced the defendant's oral promise. To do this, the court avoided the marriage clause by holding that marriage was not the consideration because it was not the "end to be attained" but was a mere necessary "incident"; it avoided the land clause by holding that full performance of the consideration by the plaintiff took the case out of the statute; and it avoided the clause dealing with defaults of another by the bare assertion that "the defendant did not undertake to answer for the debt or default of his son. . . . The obligation assumed by him was primary and upon his own credit." This was a most meritorious decision in a case where to apply the statute would have done grave injustice. The antecedent decisions were such as to enable the court to hurdle three different clauses of the statute, all three of which seem applicable to the defendant's promise.

⁵ The South Carolina judges have shown some interesting changes of attitude toward the statute. "No statute has been so much, and, in my opinion, so justly eulogized for its wisdom as the statute of Frauds. This branch of it tends to repress evil practices which would otherwise spring up to the insecurity of all. But for the salutary influence of this statute, thousands would tumble into ruin by having their estates taken from them to answer for the debts, defaults, and mis-carriages of others. So far therefore from believing that this branch of the statute of Frauds has a tendency to produce injustice and wrong, I think it the only bulwark of security to shield men from those evils which the statute was intended to remedy." *Leland v. Creyon*, 1 McCord 100, 105 (S. C. 1821).

In *Hillhouse v. Jennings*, 60 S. C. 373, 380, 38 S. E. 599, 601 (1901), the court said: "Hard cases arise when this provision of our law is applied; but this Court does not make the law, but it does enforce it in sorrow over its rigor in some instances." The South Carolina court has avoided some of its sorrow by largely nullifying the statutory provision affecting promises to answer for the debt of another person. It has sustained a verdict for the plaintiff on the oral promise of a landlord to guarantee payment of money loaned to his tenant. *Farmers Bank v. Eledge*, 126 S. C. 517, 120 S. E. 362 (1923); *Gaines v. Durham*, 124 S. C. 435, 117 S. E. 732 (1923).

not to be performed within the space of one year" has been so interpreted as not to apply to contracts where either party can and does perform his own part within one year although the other cannot,⁶ or to contracts that can on any remote contingency be performed within a year but that in fact have been in course of performance for a great many years before bringing suit.⁷ In many hundreds of cases a defendant has been held on his oral promise to answer for the debt of another by instructing the jury that the defendant is bound if "sole credit" was given to him and none to the third person.⁸ Under such an instruction, if the jury believes that the promise was made and relied upon, a verdict is rendered for the plaintiff and sustained on appeal. There is more or less variation in the form of instruction given to the jury.

It is these conflicting tendencies that may be in part responsible for the conflict that exists in regard to promises of indemnity; but it is also in part due to differences in definition of the word "indemnity" and to mental confusion arising out of the complexity of legal relations in cases involving at least three parties and often more than three. The statute itself does not contain the word "indemnity"; it does not say "any special promise to indemnify another." A promise of indemnity is within the statute only in case it is held to be a promise to answer for the debt or default of another person. When will it be so held?

In the first place, it is clear that a promise of indemnity is not within the statute if there is no duty owed by a third person to the promisee that would be discharged by the performance of the new promisor, or the performance of which would discharge the new promisor. Thus, if *A* says to *B*: "If you will buy 100 shares of *X* stock, I will indemnify you against loss," *A*'s promise is not within the statute, since there is no third person who owes any-

⁶ *Donellan v. Read*, 3 B. & Ad. 899 (1832); *Diamond v. Jacquith*, 14 Ariz. 119, 125 Pac. 712, L. R. A. 1916D 880 (1912); *Bird v. Bilby*, 202 Mo. App. 212, 215 S. W. 909 (1919); *Pierce v. Paine's Estate*, 28 Vt. 34 (1855).

⁷ *Warner v. Texas & Pacific R. R.*, 164 U. S. 418 (1896) (contract enforced after 13 years); *Quirk v. Bank of Commerce*, 244 Fed. 682 (C. C. A. 6th, 1917) (service for life); *Myers v. Saltry*, 163 Ky. 481, 173 S. W. 1138 (1915) (to rear and educate a child).

⁸ *Hammond Coal Co. v. Lewis*, 248 Mass. 499, 143 N. E. 309 (1924); *Hines & Smith Co. v. Green*, 121 Me. 478, 118 Atl. 296 (1922); *Myer v. Graffin*, 31 Md. 350 (1869); *Simpson v. Penton*, 2 Cr. & M. 430 (1834); *Darnell v. Tratt*, 2 C. & P. 82 (1825).

thing to *B*, the promisee.⁹ The same reason applies to promises to indemnify an officer who seizes goods at the promisor's request,¹⁰ or one who brings or defends a suit in which the promisor has some interest,¹¹ or one who is induced to make an entry or a user that may turn out to be tortious.¹² A promise to a debtor or other obligor to pay his debt or save him harmless from his obligation is a promise of indemnity not within the statute.¹³

Secondly, it is equally clear that a promise of indemnity is within the statute if it is made to a creditor of some third person and for that person's benefit and accommodation, and if performance by either the third person or the new promisor will discharge the duty of the other to the creditor. In such a case the word indemnify is being used in exactly the sense of "guarantee" or "be surety for." Such use of the term is not bad English, although it ought to be avoided in law. Thus, if *S* says to *C*: "Lend money to *P* and I will indemnify you against loss," the promise of *S* is a promise to answer for *P*'s debt to *C* and is within the statute.¹⁴

⁹ *Kilbride v. Moss*, 113 Cal. 432, 45 Pac. 812 (1896); *Merchant v. O'Rourke*, 111 Iowa 351, 82 N. W. 759 (1900); *West v. King*, 163 Ky. 561, 174 S. W. 11 (1915); *Green v. Brookins*, 23 Mich. 48 (1871); *Trenholm v. Kloepper*, 88 Neb. 236, 129 N. W. 436 (1911) (promise to pay back the purchase price); *Patrick v. Barker*, 78 Neb. 823, 112 N. W. 358 (1907); *Crook v. Scott*, 65 App. Div. 139, 72 N. Y. Supp. 516 (1901), *aff'd*, 174 N. Y. 520, 66 N. E. 1106 (1903); *Moorehouse v. Crangle*, 36 Ohio St. 130 (1880); *Clement v. Rowe*, 33 S. D. 499, 146 N. W. 700 (1914); *Bain v. Lovejoy*, 234 S. W. 1096 (Tex. 1921); *Lingelbach v. Luckenbach*, 168 Wis. 481, 170 N. W. 711 (1919) (promise to buy the shares back at the same price).

A promise to indemnify one who gives over money to the promisor to invest is not a guaranty if the investment does not consist of a loan to a third person. The same is true if the promise is made to induce an investment to be made by the plaintiff himself. See *Partin v. Prince*, 159 N. C. 553, 75 S. E. 1080 (1912).

¹⁰ *Lerch v. Gallup*, 67 Cal. 595, 8 Pac. 322 (1885); *Stark v. Raney*, 18 Cal. 622 (1861); *Tarr v. Northey*, 17 Me. 113 (1840); *McCartney v. Shepard*, 21 Mo. 573 (1855); *Thompson v. Coleman*, 1 South. 216 (N. J. 1818); *Mays v. Joseph*, 34 Ohio St. 22 (1877).

¹¹ *Marcy v. Crawford*, 16 Conn. 549 (1844); *Wilson v. Smith*, 73 Iowa 429, 35 N. W. 506 (1887); *Goodspeed v. Fuller*, 46 Me. 141 (1858); *Knight v. Sawin*, 6 Me. 361 (1830); *Wells v. Mann*, 45 N. Y. 327 (1871); *Evans v. Mason*, 1 Lea 26 (Tenn. 1878); *Dorwin v. Smith*, 35 Vt. 69 (1862); *Adams v. Dansey*, 6 Bing. 506 (1830).

¹² *Marcy v. Crawford*, 16 Conn. 549 (1844) (entry to try title); *Weld v. Nichols*, 17 Pick. 538 (Mass. 1836) (user of party wall); *Allaire v. Ouland*, 2 Johns. Cas. 52 (N. Y. 1800) (entry).

¹³ *Conkey v. Hopkins*, 17 Johns. 113 (N. Y. 1819).

¹⁴ In *Mallet v. Bateman*, L. R. 1 C. P. 163, 171 (1865), the court said: "That

There is one type of case, however, that presents special difficulties and that has resulted in much conflict of decision. This is a promise to indemnify one who is a surety, a guarantor, or bail for a third person. The following are illustrations: *A* says to *S*, (1) "Indorse *P*'s note to *C* as surety and I will indemnify you"; (2) "Guarantee *P*'s debt to *C* and I will save you harmless"; (3) "Lend *P* your credit in the purchase of goods from *C* and I will see that you lose nothing." In cases like these the clear weight of authority is that *A*'s promise is not within the statute;¹⁵

is, in substance, an engagement by which the buyers of the goods are not to be exonerated, but the defendant is to indemnify the seller against their default. That is clearly a contract within the Statute of Frauds." See also *Bennighoff v. Robbins*, 54 Mont. 66, 166 Pac. 687 (1917).

¹⁵ *Godden v. Pierson*, 42 Ala. 370 (1868) (but see *Posten v. Clem*, *infra* note 16); *Reed v. Holcomb*, 31 Conn. 360 (1863); *Smith v. Delaney*, 64 Conn. 264, 29 Atl. 496 (1894); *McCormick v. Boylan*, 83 Conn. 686, 78 Atl. 335 (1910) (Compare *Clement's Appeal*, 52 Conn. 464 (1885), a particularly bad decision, inadequately considered.); *Clark v. Toney*, 17 Ga. App. 803, 88 S. E. 690 (1916); *Resetter v. Waterman*, 151 Ill. 169, 37 N. E. 875 (1894) (stating that the principal debtor owed the plaintiff no duty of indemnity); *Stoltenberg v. Johnson*, 163 Ill. App. 422 (1911); *Anderson v. Spence*, 72 Ind. 315 (1880); *Mills v. Brown*, 11 Iowa 314 (1860); *Patton v. Mills*, 21 Kan. 163 (1878); *Dunn v. West*, 5 B. Mon. 376 (Ky. 1845); *Lucas v. Chamberlain*, 8 B. Mon. 276 (Ky. 1848); *George v. Hoskins*, 17 Ky. L. R. 63, 30 S. W. 406 (1895); *Dyer v. Staggs*, 217 Ky. 683, 290 S. W. 494 (1927); *Smith v. Sayward*, 5 Me. 504 (1829); *Alger v. Scoville*, 1 Gray 391 (Mass. 1854); *Aldrich v. Ames*, 9 Gray 76 (Mass. 1857); *Hawes v. Murphy*, 191 Mass. 469, 78 N. E. 109 (1906); *Boyer v. Soules*, 105 Mich. 31, 62 N. W. 1000 (1895); *Fidelity & Casualty Co. v. Lawler*, 64 Minn. 144, 66 N. W. 143 (1896); *Esch v. White*, 76 Minn. 220, 78 N. W. 1114 (1899); *Minick v. Huff*, 41 Neb. 516, 59 N. W. 795 (1894); *Holmes v. Knights*, 10 N. H. 175 (1839); *Demeritt v. Bickford*, 58 N. H. 523 (1879); *Warren v. Abbett*, 65 N. J. L. 99, 46 Atl. 575 (1900); *Cortelyou v. Hoagland*, 40 N. J. Eq. 1 (1885) (overruled in *Hartley v. Sandford*, 66 N. J. L. 627, 50 Atl. 454 (1901)); *Chapin v. Merrill*, 4 Wend. 657 (N. Y. 1830); *Barry v. Ransom*, 12 N. Y. 462 (1855); *Sanders v. Gillespie*, 59 N. Y. 250 (1874); *Tighe v. Morrison*, 116 N. Y. 263, 22 N. E. 164 (1889) (a good discussion); *Jones v. Bacon*, 145 N. Y. 446, 40 N. E. 216 (1895); *Rose v. Wollenberg*, 31 Ore. 269, 44 Pac. 382 (1896) (cases well reviewed); *Alphin v. Lowman*, 115 Va. 441, 79 S. E. 1029 (1913) (overruling *Wolverton v. Davis*, 85 Va. 64, 6 S. E. 619 (1888)); *Faulkner v. Thomas*, 48 W. Va. 148, 35 S. E. 915 (1900) *semble*; *Shook v. Vanmater*, 22 Wis. 532 (1868); *Vogel v. Melms*, 31 Wis. 306 (1872); *Thomas v. Cook*, 8 B. & C. 728 (1828); *Reader v. Kingham*, 13 C. B. (N. S.) 344 (1862); *Wildes v. Dudlow*, L. R. 19 Eq. 198 (1874); *In re Bolton*, 8 T. L. R. 668 (1892); *Guild & Co. v. Conrad*, [1894] 2 Q. B. 885; *Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K. B. 778, *semble*.

In *Hall v. Equitable Surety Co.*, 126 Ark. 535, 191 S. W. 32 (1917), the court held that a defendant who had promised to indemnify a surety was not himself a

but a good many decisions have been *contra*,¹⁶ and some law writers agree with them.¹⁷

The majority decisions already cited are supported by many cases holding that one who becomes a surety on the oral promise of a co-surety to indemnify him can enforce that promise.¹⁸ In this case it is true that the promisor is usually bound to the credi-

surety and therefore was not discharged by the failure of the surety to sue his principal at the defendant's request. This is a correct holding.

Of course a promise by the principal debtor himself to indemnify his surety is not within the statute, for it is a promise of a performance that the law would require of him even if he made no promise, and no third party is under obligation to the promisee. See *Robertson v. Wilhoite*, 157 Ky. 58, 162 S. W. 563 (1914); *Kaigler v. Brannon*, 137 Ga. 36, 72 S. E. 400 (1911) (promise of principal to indemnify his agent); *Potter v. Brown*, 35 Mich. 274 (1877).

¹⁶ *Posten v. Clem*, 201 Ala. 529, 78 So 883, 1 A. L. R. 381 (1918); *May v. Williams*, 61 Miss. 125 (1883); *Craft v. Lott*, 87 Miss. 590, 40 So. 426 (1906); *Bissig v. Britton*, 59 Mo. 204 (1875); *Hurt v. Ford*, 142 Mo. 283, 44 S. W. 228, 41 L. R. A. 823 (1898); *Hartley v. Sandford*, 66 N. J. L. 627, 50 Atl. 454 (1901); *Draughan v. Bunting*, 9 Ired. L. 10 (N. C. 1848); *Easter v. White*, 12 Ohio St. 219 (1861); *Nugent v. Wolfe*, 111 Pa. 471, 4 Atl. 15 (1886); *Bayard v. Penna. Knitting Mills*, 137 Atl. 910 (Pa. 1927); *Simpson v. Nance*, 1 Spear 4 (S. C. 1842); *Macey v. Childress*, 2 Tenn. Ch. 438 (1875).

¹⁷ WILLISTON, *CONTRACTS* (1920) § 482; ARNOLD, *OUTLINE OF SURETYSHIP AND GUARANTY* (1927) §§ 65-74.

Holding the view supported herein, see STEARNS, *SURETYSHIP* (1922) § 33; COSTIGAN, *CASES ON CONTRACTS* (1921) 1254, n. 18; BISHOP, *CONTRACTS* (2d ed. 1907) § 1265; ANSON, *CONTRACTS* (Corbin's ed. 1924) § 97; 2 STREET, *FOUNDATIONS OF LEGAL LIABILITY* (1906) 186; Burdick, *Suretyship and the Statute of Frauds* (1920) 20 COL. L. REV. 153; Steinmetz, *Contracts of Guaranty and Indemnity and Credit Insurance* (1910) 44 AM. L. REV. 736. And see BROWNE, *STATUTE OF FRAUDS* (5th ed. 1895) § 162.

¹⁸ *Jones v. Shorter*, 1 Ga. 294 (1846); *Horn v. Bray*, 51 Ind. 555 (1875) (overruling *Brush v. Carpenter*, 6 Ind. 78 (1854)); *Hoggatt v. Thomas*, 35 La. Ann. 298 (1883); *Blake v. Cole*, 22 Pick. 97 (Mass. 1839); *Weeks v. Parsons*, 176 Mass. 570, 58 N. E. 157 (1900); *Boyer v. Soules*, 105 Mich. 31, 62 N. W. 1000 (1895); *Noyes v. Ostrom*, 113 Minn. 111, 129 N. W. 142 (1910); *Apgar v. Hiler*, 24 N. J. L. 812 (1854); *Wilson v. Hendee*, 74 N. J. L. 640, 66 Atl. 413 (1907); *Barry v. Ransom*, 12 N. Y. 462 (1855); *Ferrell v. Maxwell*, 28 Ohio St. 383 (1876); *Rose v. Wollenberg*, 31 Ore. 269, 44 Pac. 382 (1897); *Mickley v. Stocksleger*, 10 Pa. Cty. Ct. 345 (1891); *Anderson v. Peareson*, 2 Bailey 107 (S. C. 1831); *Sloan v. Gibbes*, 56 S. C. 480, 35 S. E. 408 (1899) (prior indorser was allowed to hold subsequent indorser on parol promise that he would be co-surety); *Clevenger v. Commercial Bank*, 183 S. W. 65 (Tex. 1916); *Alphin v. Lowman*, 115 Va. 441, 79 S. E. 1029 (1913) (overruling *Wolverton v. Davis*, 85 Va. 64, 6 S. E. 619 (1888)); *Handsaker v. Pedersen*, 71 Wash. 218, 128 Pac. 230 (1912); *Thomas v. Cook*, 8 B. & C. 728 (1828). *Contra*: *Posten v. Clem*, 201 Ala. 529, 78 So. 883 (1918); *Bissig v. Britton*, 59 Mo. 204 (1875); *Draughan v. Bunting*, 9 Ired. L. 10 (N. C. 1848).

tor to pay the whole debt, although his duty to a co-surety is merely to pay his *pro rata* share; but it is also true that the promisee is a surety for another person who owes to such promisee the duty of exoneration and indemnity. Direct support is also found in most of the cases dealing with promises to indemnify bail. These are discussed separately below.

An accommodation indorser has power to limit the extent of his undertaking with respect to any prior indorser or any subsequent one with notice. He can make himself a surety for other indorsers instead of a co-surety with them, thus making it their duty to indemnify him without any promise on their part.¹⁹ Where he has such power, his signing in reliance on the other indorser's oral promise to indemnify him should have the agreed effect, wholly irrespective of the Statute of Frauds. Indeed it has been held that if one surety signs at the mere request of another this makes it the duty of that other to indemnify him.²⁰ Such a holding is a clear authority for the rule that an express promise to indemnify is not within the statute.

In certain contracts of "reinsurance" the problem is also involved, although not actually discussed. In the cases previously cited herein, the surety (*S*) originally became such at the request of the promisor (*A*), and in return for the promise of *A* to indemnify and save him harmless. It is not unusual, however, for a surety company that has already executed its surety bond to "reinsure" a part or all of its risk with another surety company. The "reinsurance" contract, like other undertakings of surety companies, is nearly always in writing, so that the question of the Statute of Frauds seldom arises; but the promise of the reinsuring surety made to the antecedent surety has been held not to be within the statute.²¹ This is in spite of the fact that the promisee is an ordinary surety for some other person as principal, with full rights of exoneration and reimbursement against that person. It seems quite clear that the "reinsurer" should not have the pro-

¹⁹ *Chapeze v. Young*, 87 Ky. 476, 9 S. W. 399 (1888); *Oldham v. Broom*, 28 Ohio St. 41 (1875); *Houck v. Graham*, 123 Ind. 277, 24 N. E. 113 (1890); *Craythorne v. Swinburne*, 14 Ves. 160 (1807).

²⁰ *Turner v. Davies*, 2 Esp. 479 (1796).

²¹ *National Surety Co. v. Equitable Surety Co.*, 242 S. W. 109 (Mo. App. 1922).

tection of the Statute of Frauds, although by a technical interpretation of the statute his promise can be brought within it.²²

A bail bondsman is a surety; and a promise to indemnify him against loss by reason of his going bail is in almost all respects like a promise to indemnify other kinds of sureties.²³ Indeed, there is no difference whatever in the case of a bail bondsman in a civil case, although a bail bond in a civil case is not so common as it once was in the days of imprisonment for debt. All the decisions are to the effect that a promise to indemnify *S* if he will go bail for *P* in a civil case brought against *P* by *C* is not within the statute. This is true even though we assume that in such cases *P* is bound to exonerate and to reimburse *S*, just as in other cases of suretyship.

The same result is reached in the case of a bail bondsman in criminal cases. A promise to indemnify the bondsman is not within the statute. This may be supported, however, on a ground not applicable to civil bail cases. It has been held, though not universally, that if *S* bails out *P* in a criminal case, *S* has no right that *P* shall exonerate or reimburse him in case of *P*'s default in appearance; this is on the ground that *P* is in *S*'s custody and the public welfare requires that *S* should have the utmost interest in surrendering *P* back into custody of officers of the law for trial. The policy of this rule may be regarded as doubtful, particularly in cases where a cash deposit is accepted as the equivalent of a personal bond of a surety. But in any jurisdiction holding that the bail bondsman has no right against the person for whom he

²² Of course, both surety companies receive a beneficial premium as compensation for the risk undertaken; but this has not yet been held to take their promises out of the statute. See *Commonwealth v. Hinson*, 143 Ky. 428, 136 S. W. 912, L. R. A. 1917B 139 (1911); *Everley v. Equitable Surety Co.*, 190 Ind. 274, 130 N. E. 227 (1921); *Stratton v. Hill*, 134 Mass. 27 (1883) (for \$50 paid, defendant guaranteed title to a horse sold by another); *Lang v. Henry*, 54 N. H. 57 (1873). It would not be surprising if the courts turn about and reverse the rule of these cases.

²³ As in other indemnity cases, a promise to indemnify the bondsman is regarded as a promise to a debtor, not to a creditor, and not within the statute. *Aldrich v. Ames*, 9 Gray 76 (Mass. 1857); *Keesling v. Frazier*, 119 Ind. 185, 21 N. E. 552 (1889); *Gonzalez v. Garcia*, 179 S. W. 932 (Tex. Civ. App. 1915); *McCormick v. Boylan*, 83 Conn. 686, 78 Atl. 335 (1910); *Anderson v. Spence*, 72 Ind. 315 (1880). See also *Perley v. Spring*, 12 Mass. 297 (1815). *Contra*: *May v. Williams*, 61 Miss. 125 (1883).

goes bail, it is certain that a promise to indemnify the bail bondsman is not within the statute.²⁴

In the case of a promise to indemnify a surety it is obvious that the party who is promised indemnity, here called *S*, is himself a promisor. At the request of *A* and for the benefit of *P*, he makes a promise to *C* to answer for the debt or default of *P*. He is a surety for *P* so far as concerns the Statute of Frauds. The difficulty, with respect to the promise of *A* to indemnify *S*, is this: the promisee *S* is both an obligor and an obligee. His position as an obligor is the more obvious one; and it is this fact that may have largely influenced the majority decisions. *A*'s promise to indemnify *S* is clearly a promise made to a debtor or obligor to pay or otherwise save him from having to perform a duty that he is undertaking at *A*'s request. If this were the whole story, the problem would be easy. But it is possible that *S* may be an obligee also, as well as an obligor. One who is a surety for another has, under ordinary circumstances, a right against the principal that the latter shall exonerate him and save him utterly harmless. The principal's duty of exoneration is regarded as existing from the very moment that the surety becomes bound as such;²⁵ and when the surety's duty to the creditor has matured and payment is due he can get a decree against the principal ordering him to pay the creditor and thus to save the surety from having to pay.²⁶ Furthermore, if the surety has to pay the creditor, or to render other performance on the principal's account, the principal at once becomes the surety's debtor for the amount paid and the surety can get judgment for full reimbursement. These facts show, assuming that in the cases under discussion *S* is truly a surety for *P*,²⁷ that *A*'s promise to *S* is a promise to one who is also an obligee or creditor; and hence in one aspect *A*'s promise is a promise to a

²⁴ *Cripps v. Hartnoll*, 4 Best & S. 414 (1863); *Holmes v. Knights*, 10 N. H. 175 (1839).

²⁵ See *Appleton v. Bascom*, 3 Metc. 169 (Mass. 1841). This means merely that the operative facts have nearly all occurred at that time. Before a legal sanction is available to the surety, further time must elapse and the principal must default in performance of his duty to the creditor.

²⁶ See AMES, CASES ON SURETYSHIP (1901) 583 *et seq.*

²⁷ There is some doubt whether *S* is in all respects a surety for *P*, as will be indicated below. See *infra*, pp. 705-06. *S* may not have any right against *P*. But the matter will first be discussed on the assumption that *S* has such a right, an assumption that is usually made in discussions of this problem.

creditor (*S*) to answer for the default of his debtor (*P*), a third person. In this respect the promise of *A* appears to be within the statute.

What is the solution of the difficulty? It is believed that mere logic and mere verbal interpretation of the statute afford no certain solution. It must be solved chiefly by a consideration of the policies involved. In considering these policies, the writer ranges himself unhesitatingly with the majority decisions: *A*'s promise should be held not to be within the statute. In reaching this result he may be somewhat influenced by the conclusion, based upon a reading of many hundreds of cases, that the Statute of Frauds should now be regarded as mainly an *in terrorem* statute to cause important agreements to be reduced to writing and should be allowed to operate as a technical defense in actual cases as seldom as is consistent with uniformity and a reasonable degree of certainty of law. In view of the fact that most of the courts have already held that *A*'s promise to indemnify *S* for becoming surety for *P* is not within the statute, lawyers can predict with reasonable certainty for their clients; and the present type of case being *sui generis*, there is no harmful inconsistency in distinguishing it from the ordinary cases of suretyship that fall within the statute.

The first and most fundamental reason underlying the majority decisions is that it is a horrid injustice to let the defendant escape his duty to indemnify after inducing the plaintiff to undertake the suretyship obligation for another person. If the courts have seen reason in so many other classes of cases to narrow the operation of the statute in order to prevent contract breakers from escaping the just penalty, there is certainly no less reason in the present case where the promisee has been induced by the promisor to bind himself for another person in whose welfare he has no interest and to do so on the sole credit of the promise of indemnity.

A second reason is that in these cases there is usually little danger of successful perjury and fraud. If the defendant truthfully denies making the promise the circumstances will corroborate him. The past relations of the promisee with the person for whom he becomes surety can be proved and compared with those between the promisor and such person. Usually it appears that the promisee did not have a sufficient motive for becoming surety for the

other person in the absence of indemnity promised, but that the promisor did have such a motive. The "mischief" against which the statute is supposed to be directed is less menacing in these cases than in others to which the statute is applied.

A third reason is that the Statute of Frauds was drawn for the protection of persons in the position of the plaintiff rather than those in the position of the defendant. The plaintiff is the surety, not the defendant. At the defendant's request the plaintiff has undertaken to answer for the debt or default of another; and if it happens that that other person is under a duty to exonerate and indemnify the plaintiff,²⁸ this is a mere accidental accompaniment of and is caused by the defendant's request and promise. The defendant's promise did not grow out of and was not caused by the undertaking of the other person to exonerate and indemnify the plaintiff, making the defendant's promise a mere collateral accompaniment of that other's duty to exonerate and indemnify. The plaintiff in signing as surety is not giving credit to another person for whom the defendant is becoming a surety; instead, he is becoming bound to a creditor of that other person and is doing so in sole reliance on the defendant's promise to save him harmless from his undertaking. This is the aspect in which the transaction presents itself to both the plaintiff and the defendant; and even if they know that the statute requires a surety's promise to be in writing, it does not occur to them that the defendant is a surety for anybody or that his promise needs to be in writing.

The court should, and generally does, look at an agreement with the eyes of the contracting parties themselves. In the present instance the parties do not ordinarily focus their minds on any possible duty of the third person (*P*) to exonerate or indemnify the promisee (*S*); nor do they regard the defendant's promise of indemnity as one to answer for the possible default of *P* to *S*. Instead, the promisor is asking *S* to become an obligor or debtor to *C*, and it is *S*'s duty to *C* that both parties have in mind. *A* is promising *S* to indemnify *S* with respect to his duty to *C*, not to answer for *P*'s default to *S*.²⁹ As stated above, *P* may be under a

²⁸ As appears below, this is not always the case; and if it is not, the only supporting prop is knocked out from under the minority doctrine. See *infra*, pp. 705-06.

²⁹ Thus, in *Tighe v. Morrison*, 116 N. Y. 263, 268, 22 N. E. 164, 166 (1889), the court said: "He did not promise to pay the plaintiff if Dowdall did not pay

legal duty to exonerate *S*; but this duty is one of which the parties are not even aware.

Of the right of reimbursement after payment, as opposed to the right of exoneration before payment, the parties are much more likely to be aware. But it is certain that the promise of indemnity to *S* should not be interpreted as a mere promise to answer for *P*'s default in reimbursing *S* — a mere promise to reimburse *S* if *P* does not do so after *S* has been compelled to pay *C*.

A promise to indemnify and save harmless one who becomes a surety for another is very clearly more than a mere promise to reimburse the promisee if he has to pay. As the word is here used by the parties, indemnity is not mere reimbursement; it is complete exoneration. A promisee who is obliged to sacrifice his property in order to raise money to discharge an obligation is not saved "harmless" by a mere subsequent reimbursement of the money that he has paid. As said by Lord Justice Lindley, in *Guild v. Conrad*,³⁰ the promise of the defendant to the plaintiff was that "if he would accept those batches of bills he, the defendant, would take care that they should be met, and that he himself would provide funds to meet them." If the defendant's promise to *S* is a promise that *S* shall never have to pay *C*, then it is clearly not a promise to answer for the default of *P* in failing to reimburse *S*; and not being such a promise when it is made, it does not become such a promise when it is broken. If *S* is compelled to pay *C*, doubtless *P* will owe him a debt for money paid

him, but, in substance, to pay him if in consequence of Dowdall's failure to observe the condition of the bond, plaintiff should have to respond to the People."

In *Dunn v. West*, 5 B. Mon. 376, 383 (Ky. 1845), the court said: "The plaintiff did not promise to pay West if his son did not pay him, but to pay him if in consequence of his son's failure to pay the original debt to another, West should have to pay that debt."

"Nor is it to answer for the default of Webster, [the principal] in not indemnifying the plaintiff. It has no reference to any duty on the part of Webster to indemnify the plaintiff, in case he should make default. That duty the defendant took upon himself." *Holmes v. Knights*, 10 N. H. 175, 180 (1839).

³⁰ [1894] 2 Q. B. 885, 896. The court further said: "In my opinion, there is a plain distinction between a promise to pay the creditor if the principal debtor makes default in payment, and a promise to keep a person who has entered, or is about to enter, into a contract of liability indemnified against that liability independently of the question whether a third person makes default or not."

to *P*'s use; but the defendant's promise to indemnify *S* and save him harmless is not to answer for this future debt of *P*; it is to prevent it from ever existing. The performance that the defendant promises is not one that will discharge this future debt of *P* to *S*; instead, it will entirely prevent its existence. A promise by the defendant that *P* shall never owe *S* a money debt is not a promise to pay a money debt or to answer for a default of *P*.

Nearly all of the cases holding the minority view are weakened by various considerations. Some of them rest on the early cases in England, New York, and Indiana that have been overruled.³¹ Others have themselves been overruled or have been distinguished for reasons that show no fundamental difference.³² Still others expressly indicate a desire to make a rigid application of the statute that is out of harmony with the strong judicial current and with the needs and social conditions of modern times.³³

³¹ See *Bissig v. Britton*, 59 Mo. 204 (1875) (one of the better reasoned of the minority cases); *Hurt v. Ford*, 142 Mo. 283, 44 S. W. 228 (1897) (bare statement of the rule); *Easter v. White*, 12 Ohio St. 219 (1861).

³² The following cases have been overruled: *Green v. Cresswell*, 10 A. & E. 453 (1839); *Kingsley v. Balcome*, 4 Barb. 131 (N. Y. 1848); *Brush v. Carpenter*, 6 Ind. 78 (1854); *Wolverton v. Davis*, 85 Va. 64, 6 S. E. 619 (1888). *Brand v. Whelan*, 18 Ill. App. 186 (1885), is not consistent with *Resseter v. Waterman*, 151 Ill. 169, 37 N. E. 875 (1894).

The case of *Easter v. White*, 12 Ohio St. 219 (1861), one of the best of the minority cases, was distinguished in *Ferrell v. Maxwell*, 28 Ohio St. 383 (1876), holding that a promise by one surety to indemnify his co-surety is not within the statute. *Hartley v. Sandford*, 66 N. J. L. 627, 50 Atl. 454 (1901), was distinguished the same way in *Wilson v. Hendee*, 74 N. J. L. 640, 66 Atl. 413 (1907). *Simpson v. Nance*, 1 Spear 4 (S. C. 1842), cannot be reconciled in principle with *Sloan v. Gibbes*, 56 S. C. 480, 35 S. E. 408 (1900), or with *Anderson v. Pearson*, 2 Bailey 107 (S. C. 1831). *Nugent v. Wolfe*, 111 Pa. 471, 4 Atl. 15 (1886), was distinguished in *Mickley v. Stocksleger*, 10 Pa. Cty. Ct. 345 (1891), a co-surety case, and in *Elkin v. Timlin*, 151 Pa. 491, 25 Atl. 139 (1892), without discrediting it; in *Nugent v. Wolfe*, *supra*, the court cited five earlier cases, none of which was clearly in point and two of which were practically overruled by a third.

In two states there have been changes in the wrong direction. *Cortelyou v. Hoagland*, 40 N. J. Eq. 1 (1885), was overruled in *Hartley v. Sandford*, 66 N. J. L. 627, 50 Atl. 454 (1901), but the latter case was itself distinguished as indicated above. *Godden v. Pierson*, 42 Ala. 370 (1868), was not followed in *Posten v. Clem*, 201 Ala. 529, 78 So. 883 (1918), but it was not overruled; instead the court attempted a distinction, an attempt that was entirely incorrect on the facts of the earlier case. The later case followed a mere dictum in *Brown v. Adams*, 1 Stew. 51 (Ala. 1827).

³³ *Hartley v. Sandford*, 66 N. J. L. 627, 631, 50 Atl. 454 (1901), classifies the cases well, but rests upon a narrow interpretation of the statute, saying: "Others

The minority decisions in the indemnity cases have in a few instances been supported as follows: The words of the statute are "promise to answer for the debt . . . of another person." They do not say to whom that debt is owing. Now if *A* asks *S* to become surety for *P* on a debt to *C* and promises to indemnify *S*, *A* is clearly promising *S* to pay *C*. That is, person No. 1 is promising No. 2 to answer for the debt or default of No. 3 to No. 4.³⁴ So far as the mere words of the statute are concerned they may not illogically be regarded as including this case. It is very doubtful, however, that there is much danger of perjury and fraud in this sort of case; it is not "within the mischief" aimed at by the statute. And at all events, the cases are overwhelming to the effect that a promise is not within the statute unless it is to pay a debt that some third person owes to the promisee, not a debt that some third person owes to a fourth person; and the contrary contention is hardly worth considering.

If the defendant's promise to indemnify *S* is made by him for the reason that he was already bound to indemnify *P* as well, the defendant requesting *S* to become surety for *P* as a part of the process of performing his duty to *P*, the promise is not within the statute.³⁵ The defendant is not a surety; instead, with respect to *P* he is the principal obligor. It is equally certain, as has been

appear to have been induced by the injustice of a refusal to enforce a promise on the strength of which the promisee incurred his liability, rather than by a ready purpose to execute the will of the legislature." But did any legislature ever foresee these indemnity cases and express its "will" concerning them?

Macey v. Childress, 2 Tenn. Ch. 438 (1875), says that it is better "to construe the statute rigidly" and "to adhere to the letter than to attempt to follow the erring spirit"; but the case involved other matters, and the alleged promise was found not to have been made. Those who have heard that "the letter killeth" will hardly be moved by the court's argument.

In *Simpson v. Nance*, 1 Spear 4 (S. C. 1842), the point is assumed, the discussion being on other matters. *Clement's Appeal*, 52 Conn. 464 (1885), is not reconcilable with *McCormick v. Boylan*, 83 Conn. 686, 78 Atl. 335 (1910), and it also erroneously held that the promisor's attempt to carry out his oral promise was in fraud of other creditors of the principal. In *May v. Williams*, 61 Miss. 125 (1883), it was said that "the statute ought not to be refined or frittered away."

³⁴ *Easter v. White*, 12 Ohio St. 219 (1861) (one of two alternative views); *Nugent v. Wolfe*, 111 Pa. 471, 4 Atl. 15 (1886).

³⁵ *Harrison v. Sawtel*, 10 Johns. 242 (N. Y. 1813). In *Smith v. Sayward*, 5 Me. 504 (1829), and *Garner v. Hudgins*, 46 Mo. 399 (1870), the plaintiff became surety for one who was defendant's agent and whom defendant was bound to indemnify.

stated above, that the defendant's promise to indemnify *S* cannot properly be held to be within the statute in any case where *P* is not bound to exonerate or reimburse *S*. There are, indeed, some decisions indicating that if *S* is induced to become surety for *P* in reliance solely upon the defendant's promise of indemnity, the law will create no right of indemnity in *S* against *P*.³⁶ A surety's right of indemnity against his principal is, in the absence of an actual agreement between them, quasi-contractual (that is, non-contractual) in character and is based on a theory of unjust enrichment of *P*; and in some cases it has been held that justice does not require one who has directly benefited by another's performance to reimburse that other if he undertook the performance solely at the request of a third person and in reliance upon that person's promise of compensation or indemnity.³⁷ This is certainly a general rule in the law of quasi-contracts. There is no quasi-contractual duty of paying for benefits that are received as an incident of the performance of a contract between two other persons. This seems to be applicable in the indemnity cases, although no discussion of it has been found. If, without any

³⁶ In *Perley v. Spring*, 12 Mass. 297 (1815), the plaintiff had become bail for one Dearborn on the defendant's promise to indemnify and save him harmless, Dearborn having deposited with the defendant sufficient property to indemnify him. The court thought, perhaps rightly, that Dearborn owed no duty to the plaintiff. If so, the defendant was clearly not promising to answer for any third person's default.

In *Holmes v. Knights*, 10 N. H. 175, 178 (1839), the court said: "But the case does not find that Webster requested the plaintiff to recognize for him, or that the plaintiff acted upon any such request. From the nature of the case, Webster must have assented that the plaintiff should become his surety; but mere assent, without any request or promise, and when there was a request by a third party, and an express promise by him to indemnify, is not sufficient to raise an implied promise."

In *Tighe v. Morrison*, 116 N. Y. 263, 22 N. E. 164 (1889), the defendant, being one of two executors, asked the plaintiff to sign their executors' bond and promised to save the plaintiff harmless. The defendant argued that his promise was in part to answer for the default of his co-executor, Dowdall; but the court said that the plaintiff had not signed at Dowdall's request and that Dowdall owed the plaintiff no duty of exoneration. See also *Chapin v. Lapham*, 20 Pick. 467 (Mass. 1838), where the defendant promised to indemnify the plaintiff for becoming surety in business for the infant son of the defendant. In *Beaman v. Russell*, 20 Vt. 205 (1848), it was said that in the absence of evidence the promisee will be presumed to have no remedy against any third party.

³⁷ *Coleman v. United States*, 152 U. S. 96 (1894); *Hatfield Special School Dist. v. Knight*, 112 Ark. 83, 164 S. W. 1137 (1914); *Cahill v. Hall*, 161 Mass. 512, 37 N. E. 573 (1894).

agreement with *P*, the promisee (*S*) becomes a surety for *P* at *A*'s request and in return for *A*'s promise of indemnity, it may well be that *P* owes to *S* no duty of exoneration or indemnity. If he does not, there is no duty of a third person to *S* to which *A*'s promise can be collateral. But the conclusion that the promise of indemnity is not within the statute is not at all dependent upon the absence of a right of exoneration in the promisee against a third person.

Where one person buys goods for the benefit of another, the beneficiary cannot be made to pay for the value so received unless before delivery to him he expressly or tacitly promised to pay. Sole credit was given to the buyer, not to the beneficiary; and the seller must be content with the obligation of the party for whose promise he contracted, even though that obligation turns out to be a broken reed. It has even been held that if the beneficiary should, after delivery, expressly promise the seller to pay the price or value of the goods consumed by him, he is promising to pay the debt of another (the buyer) and his promise is within the statute.³⁸ If this is true of goods purchased, it is equally true of services performed at the defendant's request but for the benefit of another. If the promisee (*S*) signed as surety for *P* at the defendant's request and on the "sole credit" of the defendant, it seems doubtful that he should have any right against *P*. If he has not, there is no longer even the most technical ground for saying that the defendant's promise of indemnity is within the statute.

If the promise that the defendant makes to *S* is, as indicated above, to answer for and indemnify against the obligation of the promisee (*S*) to his creditor *C*, it should be and generally is held not to be within the statute. The parties may, however, have a different intention and make that intention clear. Thus, if *A* makes the following promise to *S*, it should be held to be within the statute: "If you will become surety for *P* on his debt to *C*, I assure you that *P* will reimburse you if you have to pay and I will do so if he does not."³⁹ This expresses clearly an intention to

³⁸ *Hendricks v. Robinson*, 56 Miss. 694 (1879).

³⁹ This is on the assumption that *P* is bound to reimburse *S*. Otherwise, the promise will not be within the statute, even though it is in terms conditional upon non-payment by the third person. See *Mease v. Wagner*, 1 McCord 395 (S. C. 1821); *Ledlow v. Becton*, 36 Ala. 596 (1860).

answer for *P*'s default to *S*. The promise is not a promise to "save harmless"; and it is a promise of indemnity only in the sense of reimbursement.⁴⁰ Doubtless the same result should be reached if the defendant should promise *S* as follows: "Become surety for *P* on his debt to *C* and I will guarantee that *P* will exonerate you." The conflict in the cases may be partly due to this possibility of giving two different interpretations to a promise of *A* to indemnify *S*: (1) it may be a promise that *S* will not have to pay *C* without reference to any duty of *P* to exonerate or reimburse; (2) it may be a promise that if *S* pays *C* and is not reimbursed by *P* the promisor *A* will reimburse him. The minority cases usually give the second interpretation, however far removed it may have been from the expressed intention of the parties.⁴¹

Whether the Statute of Frauds does more harm than good is an open question; but there is no doubt that the courts are taking all cases out of its operation when they can give an apparently reasonable ground for doing so. In the case of a promise to indemnify a surety, there are grounds so reasonable, grounds that have appealed to so many courts and writers as sound, that there can be little doubt that such a promise will continue to be held not within the statute. The future behavior of courts can be predicted with reasonable assurance.

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⁴⁰ In *Green v. Cresswell*, 10 A. & E. 453 (1839), the court said: "The promise in effect is, 'If you will become bail for *Hadley*, and *Hadley*, by not paying or appearing, forfeits his bail bond, I will save you harmless from all the consequences of your becoming bail. If *Hadley* fails to do what is right towards you, I will do it instead of him.'" In the two sentences quoted the learned court has stated two different undertakings. The second sentence clearly states a mere promise to reimburse if *Hadley* does not do so; this promise is one of suretyship and is within the statute. The first sentence, on the other hand, is stated in the form of an indemnity against an obligation undertaken by the promisee without any reference whatever to any obligation on the part of *Hadley*. A promise in such a form should be held not to be within the statute, and it is generally so held.

After the principal has defaulted and the surety has had judgment against him, it is clear that the principal then owes a duty to the surety; and a promise by another person thereafter to pay and indemnify the surety is a promise to answer for the default of the principal to his surety. *Miller v. Denny*, 115 Wash. 635, 197 Pac. 936 (1921).

⁴¹ The view that the promise to indemnify a bail bondsman is a promise not to save the bondsman from having to pay the state but to answer for the principal's

failure to reimburse the bondsman after the latter has paid the state is held in *May v. Williams*, 61 Miss. 126 (1883). On such an interpretation, the promise is within the statute if the "principal" is also bound to reimburse the promisee; but such an interpretation of the ordinary promise to indemnify a surety is much too narrow.

"Looked at as *res nova*, it seems indisputable that the defendant's promise was within the statute; it was to respond to the plaintiff in case the defendant's son should make default in the obligation which he would come under to the plaintiff as soon as the plaintiff became surety for him, an obligation either to pay the debt for which the plaintiff was to be surety or to reimburse the plaintiff if he paid it. In this statement of the nature of the promise there is, I think, every element which seems necessary to bring a case within the purview of the statute." *Hartley v. Sandford*, 66 N. J. L. 627, 629, 50 Atl. 454, 455, 55 L. R. A. 206, 207 (1901).

"The principal is always liable to remunerate his surety for all moneys paid in his behalf, and if the promise be regarded as one to make good by repayment any loss incurred as surety for Wisner and others, still it would only amount to an undertaking that if Wisner and others should be in default in remunerating the plaintiff as their surety, that the defendant would, in Wisner's and others' stead, answer for their default by saving the plaintiff from such loss." *Bissig v. Britton*, 59 Mo. 204, 213 (1875).