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Franklin T. Dupree Jr.

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Statute of Frauds—The Main Purpose, Doctrine in North Carolina.

In determining whether or not an oral promise to answer for the debt of another is within the statute of frauds¹ many courts have applied the "main purpose rule," the essence of which doctrine is that if the promisor has a personal, immediate, and pecuniary interest in the transaction in which a third party is the obligor, the promise is original and not within the statute. This doctrine seems to have had its origin in Massachusetts,² but the cases most frequently cited in support of it are two decisions of the United States Supreme Court.³ This doctrine has been accepted and applied in North Carolina.⁴ Thus it has been held in this state that the promisor's interest was sufficient to take his oral promise out of the statute where he agreed to pay his grantor's purchase money mortgage;⁵ where he promised to pay a subcontractor for hauling logs to his mill;⁶ where he agreed to pay the creditor who furnished a boiler to his contractor to be used in making slabs for use in the promisor's business;⁷ and where a bank president made an oral guaranty of deposits, it appearing that the bank was on the verge of insolvency and that the promisor stood to lose heavily in that event.⁸ In a case where a group of citizens agreed to waive the provisions of a tax assessment statute in order that a street might be improved, it was held that the interest the leader of the group had in having the street past his property improved was sufficient to take out of the statute of frauds his promise to obtain waivers from the remainder of the adjoining owners, and he was held responsible for the payment by them.⁹ With the exception of this last case the principal debtor remained liable in all of these cases.¹⁰

¹ N. C. CODE ANN. (Michie, 1931) §987 provides in substance that "no action shall be brought . . . to charge any defendant on any special promise to answer the debt, default, or miscarriage of another person unless the agreement on which such action is brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized."

² *Nelson v. Boynton*, 3 Metc. 396, 37 Am. Dec. 148 (Mass. 1841) Chief Justice Shaw, in discussing cases not within the statute, said, "where although the effect of the promise is to pay the debt of another, yet the leading object of the undertaker is to subserve some interest or purpose of his own, the promise is not within the statute."

³ *Emerson v. Slater*, 63 U. S. 28, 16 L. ed. 360 (1859); *Davis v. Patrick*, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. ed. 826 (1891).

⁴ *Dale v. Gaither Lumber Co.*, 152 N. C. 651, 68 S. E. 134 (1910).

⁵ *Coxe v. Dillard*, 197 N. C. 344, 148 S. E. 545 (1929).

⁶ *Dale v. Gaither Lumber Co.*, 152 N. C. 651, 68 S. E. 134 (1910).

⁷ *Kelly Handle Co. v. Crawford Mill Supply Co.*, 171 N. C. 495, 88 S. E. 514 (1916).

⁸ *Dillard v. Walker*, 204 N. C. 16, 167 S. E. 636 (1933).

⁹ *City of Charlotte v. Alexander*, 173 N. C. 515, 92 S. E. 384 (1917).

¹⁰ The statute of frauds is no defense if there has been a release of a third person in consideration of the promise. *Shepherd v. Newton*, 139 N. C. 533, 52 S. E. 143 (1905); *Jenkins v. Holley*, 140 N. C. 379, 53 S. E. 237 (1906).

The court, however, has not been altogether consistent in its application of the rule. In a recent case it was indicated in a very strong dictum that a person who is president, director, and stockholder of a corporation does not have such an interest in the successful and profitable operation of that corporation as to take his oral promise to answer for its debt out of the statute of frauds.¹¹ In an opinion filed on the same day it was held that the interest of one who is vice-president, director, stockholder, and depositor of a bank is such as will take out of the statute his oral promise to indemnify a depositor against loss by reason of the bank's insolvency.¹² Neither of these cases refers to the other. The court in the first case argues that there the promisor's interest is no more personal and immediate than the interest of the landlord in the success of his tenant's farming operations and cites *Peele v. Powell*.¹³ In that case the landlord promised to stand for supplies furnished his tenant. In the action against the landlord on this promise a judgment of nonsuit was affirmed on the ground that the oral promise was within the statute of frauds. Wherever this case has been cited the fact generally has been overlooked that the court on a rehearing of the case reversed its former ruling and held the facts sufficient to be submitted to the jury.¹⁴ The case is therefore no authority for the proposition that a landlord does not have sufficient interest in the successful operation of his farm by a tenant to take a promise to pay the tenant's debt out of the statute of frauds. As a matter of fact the court has expressly held otherwise.¹⁵

The main purpose rule has its justification in the fact that when it can be shown that the promisor has a personal and pecuniary interest in the transaction, it is likely that the promise was in fact made. It is obvious that the strict construction of the statute advocated by some authorities¹⁶ will make the statute an instrument for the perpetration of

¹¹ *Gennett v. Lyerly*, 207 N. C. 201, 176 S. E. 275 (1934).

¹² *Garren v. Youngblood*, 207 N. C. 86, 176 S. E. 252 (1934).

¹³ 156 N. C. 553, 73 S. E. 234 (1911).

¹⁴ *Peele v. Powell*, 161 N. C. 50, 76 S. E. 698 (1912).

¹⁵ *Whitehurst v. Padgett*, 157 N. C. 424, 73 S. E. 240 (1911); *Taylor v. Lee*, 187 N. C. 393, 121 S. E. 659 (1924); *Tarkinton v. Criffield*, 188 N. C. 140, 124 S. E. 129 (1924).

¹⁶ In *McCord v. Edward Hines Lumber Co.*, 124 Wis. 509, 102 N. W. 334 (1905) the court said: "There are many dicta and some decisions indicating that this result may be escaped if there is a new consideration for the guaranty, or if such consideration consist of benefit to the guarantor. The statute, however, recognizes no such exception." Cf. *Ames v. Foster*, 106 Mass. 400 (1871); *Lang v. Henry*, 54 N. H. 57 (1873); *Muller v. Riviere*, 59 Tex. 640 (1883). The main purpose rule does not apply in England: *Harburg Comb Co. v. Martin*, (1902) 1 K. B. 778. The contention of this group seems to be that if the promisor's promise is to pay the debt of another, it is within the statute regardless of the promisor's beneficial interest in the transaction; that if the promise is in effect to pay the promisor's own debt, then it is immaterial that payment has the incidental effect of extinguishing the liability of another. 1 BRANDT, SURETY-

fraud rather than the prevention of it. The main purpose rule has an important place in the North Carolina law of contract. It would indeed be a surprise to the hundreds of merchants who extend credit to tenant farmers on the landlord's promise to stand for the debt to learn that the landlord was not responsible unless there was a writing evidencing his promise. But if we are to retain the doctrine, it is submitted that there should be an attempt to harmonize the decisions so as to prevent such incompatible rulings as those presented by the two recent cases noted.

FRANKLIN T. DUPREE, JR.

United States—Suits against the Government— Cancellation of Air Mail Contracts.

In February, 1934, Postmaster General Farley cancelled government mail contracts of three air transportation companies; and, under authority from President Roosevelt, turned over the task of carrying the air mail which the companies had been performing, to army planes and pilots. One of these companies brought suit against Farley to force the restoration by him of its cancelled contract. *Held*, bill dismissed for want of jurisdiction in a suit substantially one against the United States.¹

There are, in this and similar cases, three possible lines of procedure: (1) The injured party may sue the official in a strictly personal action for damages. This redress is open only in cases where the officer has committed a tort.² Such an act must have been done without authority; but apparent authority will not protect a defendant.³ (2) If Congress has given its consent, the plaintiff may sue the United States.⁴ This has generally been allowed only in cases on contract brought in the Court of Claims.⁵ (3) Finally, as in the principal case, the aggrieved may sue the officer in a quasi-private capacity and ask that the particular act be restrained, or, in case of non-action, compelled.

In cases of this last type, granted that the official acted either (1) without authority, or (2) illegally, or (3) in an attempt to enforce an

SHIP (3rd ed. 1905) §81; 1 WILLISTON, CONTRACTS (1920 ed.) §470; Arnold, *The Main Purpose Rule and The Statute of Frauds* (1924) 10 CORN L. Q. 28; Falconbridge, *Guarantees and the Statute of Frauds* (1919) 68 U. PA. L. REV. 1.

¹ Transcontinental and Western Air Lines, Inc. v. Farley, 71 F. (2d) 288 (C. C. A. 2d, 1934); *certiorari denied* U. S. Supreme Court, Oct. 14, 1934.

² Elliot v. Swartwout, 35 U. S. 137, 9 L. ed. 373 (1835).

³ Little v. Barreme, 6 U. S. 170, 2 L. ed. 243 (1804).

⁴ U. S. *ex rel.* Levey v. Stockslager, 129 U. S. 470, 9 Sup. Ct. 382, 32 L. ed. 785 (1888); Minnesota v. Hitchcock, 185 U. S. 373, 22 Sup. Ct. 650, 46 L. ed. 945 (1902) (Consent had been given).

⁵ The jurisdiction of the Court of Claims is defined in 28 U. S. C. A. §250 (1928). It is said that the next move of the airlines will be to sue in this court. U. S. News Weekly, Oct. 22, 1934, p. 14.