DESERET EVENING NEWS.

TRUTH AND LIBERTY.

VOL. VII. SALT LAKE CITY, UTAH TERRITORY, MONDAY EVENING, MAY 25, 1874. NO. 156.

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d124 tf

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d74 1y

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SUPREME COURT DECISION.

Guarantees to Pay the Debts of Others.

Opinion of Associate Justice P. H. Emerson, Chief Justice James B. McKean and Associate Justice J. S. Boreman concurring.

First National Bank of Utah, A Corporation, Plaintiff, *vs.* M. Kinner, Defendant. } Supreme Court of Utah Territory.

Marshal and Royle for Plaintiff.

Robertson and McBride for Defendant.

OPINION OF EMERSON, J.

This case comes up on appeal on the part of the defendant from a judgment of the Third District Court overuling the demurrer to the complaint.

As shown by the record the case is substantially as follows: On the 20th of March, 1872, Nounnan and Gilmer made their joint promissory note by which, for value received, they promised to pay to the order of A. Godbe, cashier of the plaintiff corporation, fifteen hundred dollars, on the first day of September, A. D. 1872, with interest at two per cent. per month.

This note was delivered to and discounted by the bank, and on the 7th of May following, and before maturity, was taken up by Nounnan, one of the makers. On the succeeding 7th of June, and when nearly three months of the current time of the note remained unspent, Nounnan reproduced it to the bank, and at his request they re-discounted it. When it became due and payable according to its tenor, Nounnan applied to the bank for an extension until the 1st of January, A. D. 1873. The extension was agreed upon, but as a part of this arrangement the defendant was to guarantee the payment of the note at the expiration of the time agreed upon. The complaint states that the defendant, with full knowledge of such agreement, "and for a valuable consideration to him moving, as well as in further consideration of the said extension of time, did guarantee the payment of said note," in the following terms—"For value received I hereby guarantee the payment of the within note."

The complaint sets up the carrying out of the agreement on the part of the bank, and the failure of the payment. The suit is on the guaranty. The defendant demurs, and the only matter of consequence arising on the demurrer is the validity of the guaranty. Upon the face of the complaint the written undertaking does not specify the time when the payment was to be made, and does not explain the consideration. If the case was on trial and verbal evidence should be offered that the agreement was for payment on the 1st day of January, A. D. 1873, there would be some ground for the objection that it was proposed to vary the legal effect of the writing by parol—since, as the note was part due, the written guaranty would import an agreement to pay in a reasonable time, and not on the 1st day of January, A. D. 1873.

There is a peculiarity about this proceeding that impressed me from the very outset, and which was not removed at the close of the elaborate argument of counsel.

Taking it for granted that the defendant intended to go upon the idea that the doctrine applicable, where the statute of frauds prevails, should be administered, I am unable to see how he can raise the question supposed to be aimed at, by resorting to a demurrer, to the complaint. Whenever the statute of frauds is recognized, or in force, so far as I know, the plaintiff is not required to set forth that the guaranty was in writing and signed, etc. It is considered as a matter of evidence, and the want of it as a matter of defence.

If the defendant demurs he thereby confesses that the agreement was in writing and he precludes the plaintiff from giving legal evidence. (Gould's Plead. chp. 4, ss. 45; 2 Saunder's Plead. and Ev. 546; Campbell *vs.* Wilcox, 10 Wall. 421.

Waiving this consideration how ought the case to be viewed.

The demurrer is understood as implying two general propositions. The first is that the essential portion of that branch of the statute of frauds which relates to guarantees is in force in this Territory as common law. The second is, that by force of that law the defendant's undertaking as set forth was not binding. The second proposition may be first considered. Supposing the principles of the statute to be law in this Territory it is requisite to ascertain what they are so far as they could be held to bear on this case.

It may be assumed that the operation of the statute, admitting it to be recognized as common law, is to save any one from being charged upon a promise to answer for the debt, default or miscarriage of another, unless the agreement to so answer is in writing signed by the guarantor or by his authority. This statement is intended to recognize the statute as most stringently framed and expounded.

A sound of the States, Michigan among the number, the consideration is not required to be expressed in the writing. In England and in the State of New York it must be in it. According to the exposition of the statute in some States, where it is most rigidly applied, it has been held that if the object of the guaranty is a benefit to the guarantor which he did not before possess, a benefit accruing immediately to himself, and the basis for his undertaking is a consideration going directly to him, the case is not within the statute. This doctrine is stated with great precision by Chief Justice Savage in Early *vs.* Cleveland 4 Cow. 432; and S. C. in error 9 Cow. 639. Referring to those cases which he says do not fall within the statute, and are within the third class of cases, as this branch of the statute of frands was divided and classified by Chief Justice Kent, in Leonard *vs.* Bredenburg, (8 John 29), he observes, "In all those cases founded on a new and original consideration of benefit to the defendant, or harm to the plaintiff, moving to the party making the promise, either from the plaintiff or original debtor, the subsisting liability of the original debtor is no objection to a recovery. In the case just referred to (8. C. in error 9 Cow. 639.) the reporter's note expresses the doctrine of the decision in very clear and concise language. It is as follows: "Where promise to pay the debt of a third person arises out of some new consideration of benefit to the promisor, or harm to the promisee, moving to the promisor either from the promisee or the original debtor, such promise is not within the statute of frauds, although the original debt still subsists and remains entirely unaffected by the new agreement. See Mallory *vs.* Gillett, 21 N. Y. 412; Fusbush *vs.* Goodnow, 98 Mass. 296; Nelson *vs.* Boynton, 3 Met., 396; where the doctrine is much considered. In as much as upon a fair construction of this complaint, it must be held that it alleges a benefit to the defendant, and a new consideration going to him, as a basis for his promise, I was at first inclined to the opinion that the doctrine as above stated applied to the case made by the complaint. But upon a more careful study of the cases referred to, with a more extensive comparison with other decided cases, I am satisfied, that, admitting the statute of frauds to be in force, the case made by the compaint would come within it.

In all the above cases the plaintiff surrendered and the defendant received, a fund or security charged with the payment of the plaintiff's debt, and all come within the class of Williams *vs.* Leper 3 Bun. 1886, which is the starting point in all this class of cases; and Castling *vs.* Aubert 2 East. 325, which followed it, and upon the same ground with them, were no doubt properly held not to fall within the statute. I have found no case where the parol promise of one to pay the subsisting debt of another, has been sustained by the courts upon any other consideration than the receipt of some fund or security either from the debtor or creditor charged with the payment of the debt. So that in making the payment of the debt he was really fulfilling an obligation of his own.

It seems to me that to carry the doctrine so far as to apply it to the case made by the complaint, and that it is not within the statute, would be virtually a repeal of the statute. Donnan, C. J., in in Green *vs.* Cresswell 10 Ad. and Ellis 453.

In regard to the promise to pay money, which goes in discharge of the subsisting debt of another, the the true test, whether within the statute or not, is that it is made and accepted by the creditor as an original undertaking and not merely as subsidiary to that of another. In the present case I regard the defendant's promise as one for the payment of a preexistiug and still subsisting debt of another, and therefore within the terms of the statute.

If the effect of the promise or contract of the defendant had been to discharge the original debt and he become the sole debtor, and there was no debt of another to which his promise was collateral, then the contract was not within the purpose and spirit of the statute and it need not have been in writing. The complaint, as before said, alleges the contract to have been in writing, and the demurrer admits it. Even where the statute is most stringently applied it is held that the words "value receved" sufficiently explain the consideration going to the guarantor. Douglas *vs.* Howland 24 Word 35, Miller *vs.* Cook 23 N. Y. 495. But however this may be, what opinion ought to be found of the proposition, that this branch of the statute of frauds is in substance a part of the Territorial laws.

In American Insurance Co. *vs* Canter (1 Pet. 511) the court by Judge Marshal, say substantially that the laws of Florida as they were when the Territory was ceded, so far as not inconsistent with the constitution and laws of the United States, continued in force until altered by the newly created power of the State. See also United States *vs.* Powers (11 How. 570), Strathers *vs.* Lucas (12 Pet 410, 426). This appears to be the settled doctrine in regard to conquered and ceded territory, in the absence of special treaty stipulations. It applies to territory acquired from Mexico, since the treaty of Guadaloupe made no special provision on the subject. Utah was embraced in that acquisition. As in Florida, the pre-existing law was Spanish, so in Utah it was Mexican; and in both cases the laws were derived mainly from the laws of Rome. In neither did the English common law or the statute of frauds prevail. Congress made no special change, and the Territorial legislature, upon whom authority was conferred, have made no express enactment upon the subject.

The Territory was first settled in 1847, and from that time up to the acquisition and treaty in 1848, the settlers were comparatively few in number. There were no settled laws, usages and customs among them. They came here as American citizens, under the flag and claiming the protection of the United States government. The particular class of persons forming the greater, if not entire, bulk of emigrants claim to have furnished troops from among their own numbers to assist this government in its war against Mexico. At the time of the acquisition and treaty they could not claim Mexican citizenship, and have never adopted its laws and customs.

Soon after the change of sovereignty by the treaty, emigrants in large numbers flocked from the States and surrounding Territories, and for many years there has been an organized community.

When we turn to the communities from whence these emigrants proceeded, we find that they differed one from another more or less in regard to their laws and institutions. No two are alike. In the most it is true, many common law principles and doctrines were in force. Still the body of the common law in each was peculiar to the particular state, and it was rather the common law of the state than the English common law. In some the English statutes had been received as common law, in others not.

These diverities make it impossible to assume that any specific body of the common law was transplanted to the Territory by the fact of emigration. But one course was open, and that was for the whole body of the people to agree expressly or tacitly upon a common measure. It was to be expected that the emigrants would not be contented with the loose and alien institutions of an outlying Mexican department, and they have not been.

They have tacitly agreed upon maxims and principles of the common law suited to their conditions and consistent with the constitution and laws of the United States. And these only wait recognition by the courts to become the common law of the Territory. When so recognized they are laws as certainly as if expressly adopted by the law making power.

The judgement of the court below is affirmed, and a remittiter ordered to issue forthwith to the Third District Court, the defendant to have ten days after notice served upon him or his attorney of the filing of the remittiter in that court to answer the complaint.

McKEAN AND BOREMAN, J. J., concurred.

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3d " " Jeter Clinton;
4th " " John Sharp;
5th " " Alex. C. Pyper.

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(OFFICIAL.)

Arrivals and Departures of Mails.

ARRIVALS.

East—Through mail, daily..... 7 40 p m
Local — Ogden, Echo City, Wasatch and Morgan County, daily..... 7 40 p m
Summit and Wasatch counties, Tuesday and Thursday, 7 40 p m
Alta, Tuesday, Thursday and Saturday..... 7 10 p m
West—Through ma.., daily..... 10 10 a m
Local—West Jordan and Herriman, Thursday..... 7 10 p m
Ophir, Tooele City, daily, except Sunday..... 8 00 p m
Grantsville, Saturday..... 8 00 p m
Bingham, daily, except Sunday..... 7 10 p m
North—Idaho, Montana, Oregon and Washington Ter. daily..... 10 10 a m
Local—Davis and Box Elder counties, daily..... 10 10 a m
Cache county, Thursday and Saturday..... 10 10 a m
Rich county, Monday and Thursday..... 7 40 p m
South—To Pioche, daily..... 7 10 p m
St. George and Arizona, alternate days..... 7 10 p m
Sanpete county, Tuesday, Thursday and Saturday..... 7 10 p m
Fairfield and Cedar Valley, alternate days..... 7 10 p m

CLOSING.

East—Through mail, daily..... 9 00 pm
Local—Ogden, Morgan county, Echo City and Wasatch, daily..... 9 00 p m
Summit and Wasatch counties, Monday and Wednesday, 9 00 p m
Alta, Monday, Wednesday and Friday..... 5 30 a m
West—California, Nevada and Ogden, (through mail) daily.... 1 30 p m
Local—West Jordan and Herriman, Thursday..... 5 30 a m
Ophir, Tooele, Stockton and Grantsville, daily, except Sunday..... 6 30 a m
Bingham, daily, except Sunday..... 5 30 a m
North—Idaho, Montana, Washington and Oregon, daily..... 1 30 p m
Local — Davis and Weber counties, daily..... 9 00 p m
Box Elder county, daily..... 1 30 p m
Cache county, Sunday, Tuesday and Thursday..... 1 30 p m
Rich county, Tuesday and Thursday, via Evanston..... 6 00 p m
South—Pioche, etc., daily..... 5 30 a m
St. George and Arizona, alternate days..... 5 30 a m
Sanpete county, Sunday, Tuesday and Thursday..... 5 30 a m
Fairfield and Cedar Valley, Wednesday..... 5 30 a m

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41139 From Deep Creek to Shellbourne, (Nev.,) 30 miles and back, once a week.

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Thomas Smith, alias Spillane, born in Ireland, aged about 28, complexion light, hair light and cut short, eyes blue or grey, teeth good, nose large, chin short and receded, height about 5-7½, heavy set, weighs about 160 lbs., face smooth, nose, when escaped, No. 8 stogra shoes, light hat, grey undershirt and drawers marked No. 3 on front part, striped overshirt and pants.

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