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Statute of Frauds-Oral Promise to Answer for the Debt of Another-Construction of "Assume and Agree to Pay . . ."

STATUTE OF FRAUDS—ORAL PROMISE TO ANSWER FOR THE DEBT OF ANOTHER—CONSTRUCTION OF "ASSUME AND AGREE TO PAY . . ."—The defendant contracted with state to build a road; and with a gravel firm to furnish defendant with gravel for the project. The gravel firm became involved with its creditors, whereupon the gravel firm and the defendant called a meeting of creditors, at which the affairs of gravel firm were placed in hands of a creditors-committee, who were to carry out the contract to furnish defendant with gravel. The defendant orally agreed at this meeting to pay all persons and laborers engaged in delivering gravel. On suit to enforce defendant's promise, defendant pleaded the statute of frauds (Section 8045 of '26 Burns); that his promise was a promise to answer "for the debt of another." *Held:* The defendant is liable for all laborers engaged in delivering gravel, since when the gravel firm failed and the creditors took charge they did so for the benefit of all parties, and from then on all parties continued to work for the defendant, and therefore the promise of defendant was not a promise to answer for the debt of another, but to answer for his own debt. *Davis Construction Company v. Petty*, Appellate Court of Indiana, Nov. 18, 1929, 168 N. E. 769.

The authorities in accord are many. *Edwards v. Van Cleave*, 94 N. E. 596; *Miller v. State*, 35 Ind. App. 379, 74 N. E. 260; *Gibson County v. Cincinnati Steam Heating Company*, 128 Ind. 240, 27 N. E. 612, 12 L. R. A. 502.

And on principle the case is sound. The federal rule has generally been stated to be "Where the main purpose of the new arrangement is to subserve the interest of the new promisor, the agreement is not within

the statute." *Emerson v. Slater,* 22 Howard 28; *Davis v. Patrick,* 141 U. S. 479. It has been stated that under the statute the real question as to whether the new promisor is liable or not should be the question of whether the new promise can be said to be one creating an obligation in him independently of whether the original obligor is still liable, so that the new promisor comes under an independent duty of payment irrespective of the duty of the original obligor; or whether it is a promise to answer for the debt of another. Whether the consideration comes from the original obligor to the new promisor should only be evidence, more or less strong, as to whether a new and independent obligation has been created. Arnold, Suretyship and Guaranty Sec. 60; 27 C. J. 160. Willis: The Statute of Frauds: A Legal Anachronism, 3 Indiana L. J. 427.

But it is difficult to reconcile the rationale of this Petty Case with *Harvey v. Lowry,* 152 N. E. 839 (1926). There a judgment debtor had conveyed land subject to the judgment, and a deed to a remote grantee provided that the grantee assumed and agreed to pay the judgment as part of the purchase price. The court by implication stated that the act of acceptance of such deed of assumption was not an agreement on the part of the grantee to pay the judgment. No case is cited. "The acceptance of a deed, whether poll or inter parties, containing a covenant on the part of the grantee is equivalent to an agreement on his part to perform the same and it is immaterial that the deed is not signed by him." 16 C. J. 1211, citing many an Indiana case. Section 388 of Tiffany on Real Property is to the same effect, citing Co. Litt., 230 C. Butler's note; Shepard's Touchstone, 177 and cases. The court stated by dictum: "even if the grantee by the provision in the deed had agreed to pay the judgment and such agreement had been made for the judgment debtor's benefit, the agreement not being signed by the grantee was within the statute of frauds prohibiting an action on a promise to answer for the debt of another, unless the same or some memorandum thereof is in writing and signed by the party to be charged." The court cites no cases on this point.

The principle in the Lowry case seems not essentially different from that in the Petty case. Both are instances where heretofore the cases had seemed uniform that the assumption of the debt was the creation of a new and independent obligation on the part of the one who assumes by reason of the fact that he "serves his own interest," thus taking the case out of the statute. The rule is stated to be that an oral promise by the purchaser of lands subject to a mortgage or other incumbrances to assume and pay off the incumbrances as part of purchase price is not within the statute. 27 C. J. 163. *Lowe v. Hamilton,* 31 N. E. 1117, 132 Ind. 406; *Gregory v. Arms,* 48 Ind. App. 562, 96 N E. 196; *Lowe v Turpie,* 147 Ind. 652, 44 N. E. 25, 36 L. R. A. 233; *Berkshire v. Young,* 45 Ind. 461; *McDill v. Gunn,* 43 Ind. 315; *Helm v. Kearns,* 40 Ind. 124; *Southern Ind. Loan, etc., v. Roberts,* 42 Ind. App. 653, 86 N. E. 490.

It would seem that on principle the dictum of the Lowry case is unsound J. V. H.