

(3) In question (2) would it make any difference if the proceeds of note had gone to Smith's credit, he having discounted it?

\$100.

ELMIRA, ONT., 2nd Jan'y, 1900

Three months after date I promise to pay to the Federal Bank or order at the Federal Bank, here, the sum of one hundred dollars.

Value received.

JNO. JONES

Endorsed:

For value received I hereby waive notice of protest of within note and guarantee payment of same.

JOHN SMITH

ANSWER.—As the law at present stands, Smith is not liable as endorser, and the fact that the proceeds of the note had gone to Smith's credit would not make any difference in this respect; but if it could be shown that the transaction was a loan to Smith on the security of the note, he would be liable, as borrower, to repay the loan, but not as endorser.

The question as to Smith's liability as guarantor is by no means easy to answer. The Statute of Frauds makes it necessary to the validity of a contract of guarantee that it should be in writing, signed by the guarantor or his authorized agent. The courts have held that under this statute all the essential parts of a contract must appear in writing. The contracting parties and the consideration are, of course, essential parts of every contract. In the case of a guarantee a subsequent statute provided that the consideration need not appear in the writing but might be proved by other evidence, but it is still necessary that the contracting parties should appear. Assuming that both the face and the back of the note may be looked at for the purpose of showing the contract in writing, the question: With whom is the contract of guarantee made? appears to be left in doubt. "I hereby guarantee payment of the within note." To whom is payment guaranteed? It is not necessarily the Federal Bank, as the promise is to pay the Federal Bank or order, and the guarantee simply means that John Jones will pay the note in accordance with his promise. If the intention was to guarantee to the holder for the time being that the note would be paid, it can hardly be said that the parties to the contract appear in the writing.

Again, it might be quite consistent with the transaction that the guarantee was made with a third party who was interested in the payee of the note and who might have given him credit on the strength of the guarantee that Jones' note would be paid. The fact that the writing does not necessarily show the person with whom the contract of guarantee is made makes it necessary to give verbal evidence, and this is what the statute prevents being given.