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The Main Purpose Rule and the Statute of Frauds

EARL C. ARNOLD†

Prior to 1676, to form a valid simple contract required only competent parties, meeting of minds, consideration, and legality of subject-matter. Except contracts under seal, a writing was unnecessary, and if a contract were in writing it added nothing to its effectiveness. During the reign of Charles II, the statute of frauds was enacted, which, so far as it affected contracts of guaranty, provided that:

“No action shall be brought * * * whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; * * * unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some person thereunto by him lawfully authorized.”¹

It will be noted that this statute did not change the common law as previously understood except that to be enforceable “special promises to answer for the debt, default, or miscarriage of *another person*” must be in writing. Meeting of minds, competency of the parties, and consideration were still required. This statute merely imposed the additional requirement that special promises to answer for the debt of another must be evidenced by a writing, signed, not necessarily by both parties, but “by the party to be charged” or his agent.² Special promises to answer for the promisor’s own debt,³

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¹29 Car. II, sec. 4 (1676). American states have similar statutes, most of them differing but little in language from the English statute of frauds, quoted above.

Whether this section goes to the contract, and makes verbal agreements void, or whether it goes to the remedy and makes them unenforceable only, has been the subject, of some controversy. The original case holding that the words “no action shall be brought” made such contract unenforceable, but not void, was *Leroux v. Brown*, 12 C. B. (74 E. C. L.) 801 (1852). Upholding the same view in a well written opinion is *Heaton v. Eldridge et al.* 56 Oh. St. 87 (1897). This represents the decided weight of authority. For a criticism of this view see *Cochran v. Ward*, 5 Ind. App. 89, 29 N. E. 795 (1892). See Wharton on Conflict of Laws, Vol. II (3d ed. 1905), sec. 690-c, referring to the distinction in *Leroux v. Brown*, *supra*, between contracts which are void and those on which no action shall be brought, which says: “There is, however, a decided tendency to repudiate the distinction upon the ground that the difference in the phraseology upon which it is based is not sufficient to change the essential character of the provisions.”

²*Nelson v. Boynton*, 3 Met. (Mass.) 396, 37 Am. Dec. 148 (1841); *Furbish v. Goodnow*, 98 Mass. 296 (1867).

³*Ferrell v. Maxwell*, 28 Oh. St. 383, 22 Am. Rep. 393 (1876).

original promises,⁴ agreements to pay the promisee a sum received from a third person by the promisor,⁵ a novation,⁶ contracts with the promisee to pay the promisee's debt⁷ are among those which need not be in writing. Whether the consideration must be shown by the writing was a question on which American courts have not been in harmony.⁸ But whether the consideration was required to be in writing, the courts agreed that such written agreements, if they are not specialties, are parol, "and a consideration must be proved."⁹ "To bind one therefore for the debt or default of another, both must concur; first, a promise on good consideration, and secondly, evidence thereof in writing."¹⁰

What was the object of Parliament in enacting Section 4, so nearly universally copied by American legislatures? When ability to sign one's name was not a common accomplishment, it was not surprising that such written agreements were infrequent. But as ability to write became more generally possessed, naturally it was recognized that agreements preserved in writing were better evidence of that on which the parties' minds met than that to which each would testify *post litem motam*. A surety or guarantor makes himself liable solely because of his promise. It is difficult for him in every case to protect himself against perjury or inaccurate testimony if his promise is verbal. Fraudulent claims were presented to estates and perjured

⁴Watkins v. Perkins, 1. Ld. Raymond (Eng.) 224 (1697); Lakeman v. Mountstephen, L. R. 7 Eng. & Irish App. 17 (1874); Simpson v. Penton, 2 Crompt. & Mees. (Eng.) 430 (1834).

⁵Dock v. Boyd & Co., 93 Pa. 92 (1880); Ledbetter v. McGhees, 84 Ga. 227 (1889).

⁶Packer v. Benton, 35 Conn. 343, 95 Am. Dec. 246 (1868); Bird v. Gammon, 3 Bing. (N. C.) 883 (1837); Brandt on Suretyship (3d ed. 1905), sec. 73.

⁷Bastwood v. Kenyon, 11 Adolphus & Ellis (Eng.) 438 (1840); See Alger v. Scoville, 1 Gray (Mass.) 391 (1854).

⁸In England, Wain v. Warlters, 5 East 10 (1804), settled the rule that the consideration must be written, as well as the promise. This rule obtained there until the Mercantile Act, 19 & 20 Vict., ch. 97, sec. 3, enacted that the expression of consideration was not required.

In the United States now written evidence of the consideration is generally unnecessary, due to legislation. But the courts were at one time sharply divided. Among the cases holding consideration must be expressed in writing are: Patmor v. Haggard, 78 Ill. 607 (1875); Hutton v. Padgett et al., 26 Md. 228 (1866); Underwood v. Campbell, 14 N. H. 393 (1843); Laing v. Lee, 20 N. J. L. 337 (1845); Commercial National Bank v. Smith, 107 Wis. 574 (1900).

Cases holding the consideration need not be especially set out in writing: Sage v. Wilcox, 6 Conn. 81 (1826); Hargroves v. Cooke, 15 Ga. 321 (1854); Levy et al. v. Merrill et al., 4 Greenleaf (Me.) 180 (1826); Gilligan v. Boardman, 29 Me. 79 (1848); Packard v. Richardson et al., 17 Mass. 121 (1821); Reed v. Evans, 17 Ohio 128 (1848).

⁹Rann v. Hughes, 7 T. R. (Eng.) 350, 6 Eng. Rul. Cas. 1 (1778); Cook v. Bradley, 7 Conn. 57, 61, 18 Am. Rep. 79, 82 (1828).

¹⁰Nelson v. Boynton, 3 Met. (Mass.) 396, 400, 37 Am. Dec. 148, 149 (1841); Barker v. Bucklin, 2 Denio (N. Y.) 45 (1846).

testimony given to bolster verbal agreements until the legislative branch of the government enacted the statute to prevent such wrongs. Again, when the statute was passed, the parties to an action were incompetent to testify in court. In consequence, the facts could not be ascertained from those who would naturally know of them. Large interests depended in some cases on corrupt witnesses. This appealed to the enactors of the statute. Its purpose was "to secure defendants against unfounded and fraudulent claims."¹¹ As an early American jurist expressed it:

"The object of the statute manifestly was, to secure the highest and most satisfactory species of evidence, in a case, where a party, without apparent benefit to himself, enters into stipulations of suretyship, and where there would be great temptation, on the part of a creditor, in danger of losing his debt by the insolvency of his debtor, to support a suit against the friends or relatives of a debtor, a father, son, or brother, by means of false evidence; by exaggerating words of recommendation, encouragement to forbearance, and requests for indulgence, into positive contracts."¹²

The purpose of the original Act of Parliament, as well as that of the American legislatures which have reenacted the statute of frauds, was to prevent fraud and perjury. It was based upon moral grounds.¹³ It represented "temporary phenomenon in the evolution of contract law."¹⁴ Since the parties have become competent to testify in any case in which they are interested, it has been contended that the need for the statute is not so great as it was when enacted. At present, a party, being able to testify, cannot be proven easily to have made a contract which he never made. On the other hand, the statute aids him in escaping a liability which he expressly assumed. These observations, together with the assumption that the statute is in derogation of the common law, and therefore must be strictly construed, have caused the courts to look at it critically, and to limit its application. The statute was regarded as being reactionary, as

¹¹Williston on Contracts, sec. 448. As the Supreme Court of the United States expressed it in *Davis v. Patrick*, 141 U. S. 479, 487, 35 L. Ed. 826, 12 Sup. Ct. 58 (1891): "The purpose of this provision was not to effectuate, but to prevent wrong."

¹²*Nelson v. Boynton*, 3 Met. (Mass.) 396, 399, 37 Am. Dec. 148, 149 (1841). See *Crawford v. Edison*, 47 Oh. St. 239, 13 N. E. 80, 82 (1887).

¹³Wharton on Conflict of Laws (3d ed. 1905), sec. 690. It was said in *Nugent v. Wolfe*, 111 Pa. 471, 4 Atl. 15, 56 Am. Rep. 291 (1886), approved in *Hartley v. Sanford*, 66 N. J. L. 627, 632, 55 L. R. A. 206 (1901), that "the object of the statute is protection against 'fraudulent practices commonly endeavored to be upheld by perjury,' and it should be enforced according to its true intent and meaning, notwithstanding cases of great hardship may result therefrom."

¹⁴Street on Legal Liability, vol. II, p. 196 (1906).

interfering with the natural lines of evolution of contract law, and contrary to a principle on which it had been developing.¹⁵

While Section 4 of the statute of frauds is recognized as having a permanent place in our legislation, it is also true that "the courts, especially in modern times, have exercised the greatest ingenuity in order to enable them to withdraw from the operation of this clause as many contracts as possible."¹⁶

Special promises to answer for the debt of another person presuppose three parties involved: (a) the promisor, or obligor, or guarantor, as sometimes called, whose promise is secondary or collateral to that "of another person;" (b) the principal debtor, sometimes referred to as the principal, who, as the name implies, owes the primary obligation or duty, and under the statute is "another person" for whose obligation the guarantor becomes collaterally liable; (c) the obligee, or creditor, to whom the promises of both the guarantor and the principal debtor are made.

Special promises which are original are enforceable even if not written. Collateral agreements are subject to the defense of the statute of frauds. The terms original and collateral are not found in the statute itself, but distinguish between those cases to the enforcement of which the statute of frauds is a defense and those to which it is no defense.¹⁷ If the promisor says to the plaintiff, "Let A have these goods, and I will pay for them," there is no other debtor than the promisor. A was never liable for payment. The promise, therefore, is an original one. The verbal promisor is liable therefor. But if he says to the plaintiff, "Let A have these goods, and if he doesn't pay you, I will pay for them," the promisor's liability is collateral, because primarily A is liable as principal debtor.¹⁸ There is no universal interpretation given to ambiguous language, and if the promisor says "Let A have these goods, and I will see that you are paid for them," his liability will depend upon whether it is found as a fact that A was primarily liable for them. If by saying "I will see you paid" is meant that the promisor will pay if A does not, then the

¹⁵Street on Legal Liability, vol. II, pp. 196-198 (1906). Best, C. J., said in *Proctor v. Jones*, 2 C. & P. 532, 12 E. C. L. 248, 249 (1826): "The statute of frauds and the statute of limitations were both so much objected to at the time when they were passed, that the judges appeared anxious to get them off the statute book; but in later times they have become desirous to give them their full effect."

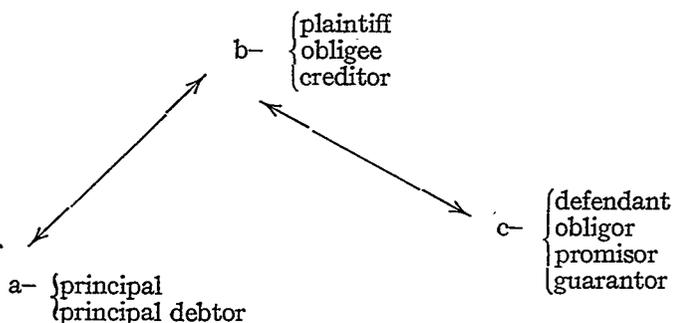
¹⁶Street on Legal Liability, vol. II, p. 188 (1906).

¹⁷*Nelson v. Boynton*, 3 Met. (Mass.) 396, 400, 37 Am. Dec. 148 (1841); *Barker v. Scudder*, 56 Mo. 272, 275 (1874).

¹⁸*Watkins v. Perkins*, 1 Ld. Raymond (Eng.) 224 (1697); *Buckmyr v. Darnall*, 2 *Ibid.*, 1085 (1704); *Taylor v. Lee*, 121 S. E. 659 (1924). See *Brandt on Suretyship* (3d. ed.), 1905, sec. 88.

defendant is not bound on his verbal promise, because it is collateral to A's liability to pay the same debt as principal debtor. If it was not intended that the plaintiff should look to A at all for his payment, then the verbal promisor is liable, because it is an original promise.¹⁹

But a promise by the defendant may be original and yet not an absolute one. All promises, where there is no principal debtor, are original and absolute on the part of the verbal promisor. But some promises are original, when there is an existing liability of a principal debtor. Such promises are original, but not absolute.²⁰ Such cases are illustrated by those coming within what is occasionally referred to as the main purpose rule, hereinafter discussed in detail.



Usually it may be stated as a rule, referring to the above diagram, that if the promise represented by the line a—b exists, then the promise represented by the line b—c, being collateral to a—b, and intended to be effective only if the promise a—b is not fulfilled, in order to be enforceable, must be evidenced by writing signed by the defendant. In fact, at one time it appears the arbitrary test was that if the third party remained liable, the defendant could not be held on a verbal promise.²¹

¹⁹Simpson v. Penton, 2 Crompt. & Mees. (Eng.) 430 (1834).

²⁰Brown v. Weber, 38 N. Y. 187, 190 (1868). It was correctly said in Richardson Press v. Albright, 224 N. Y. 497, 121 N. E. 362, 364 (1918), that: "When the primary debt continues to exist, the promise of another to pay the debt may be original, or it may not be; but it is regarded as original only when the party sought to be charged clearly becomes, within the intention of the parties, a principal debtor primarily liable."

²¹In the opinion in White v. Rintoul, 108 N. Y. 222, 224, 15 N. E. 318 (1888), it is stated: "When, by some authorities, it was said that a verbal promise to pay the debt of another was always collateral and invalid if the primary debt continued to exist concurrently with the promise, a simple and easy test was furnished to determine whether the statute did or did not apply. But when that test was discarded, and it became the law that a promise to pay another's debt might be original, although that debt subsisted, and was in no manner extinguished, the presence of such continued liability raised a cloud of doubt and ambiguity which, perhaps, will never be entirely dissipated."

But suppose that the line a—b continues in existence, and the defendant *verbally* makes a promise, represented by the line b—c, to be responsible for the indebtedness of the principal, but the defendant's promise was induced by a consideration consisting (1) of a detriment to the plaintiff—obligee-creditor; (2) by a consideration which is incidentally a benefit to the defendant-obligor-promisor-guarantor; (3) by a consideration which is principally beneficial to the defendant-obligor-promisor-guarantor, and gives him some property, money, or advantage of great value; would the defendant be liable? Without attempting to refine, we may accept the brief popular definition of consideration to be "a detriment incurred by the promisee or a benefit received by the promisor at the request of the promisor."²² It is thus seen that so far as the requisites are concerned, speaking very generally, consideration is sufficient to sustain a contract if there is either a detriment to the promisee or a benefit to the promisor. But let us analyze the cases to see whether in the classes of cases mentioned, the consideration is sufficient to render unnecessary a writing in order to hold the promisor under Section 4 of the statute of frauds.

I. WHERE THE CONSIDERATION IS A DETRIMENT TO THE PROMISEE

For example, suppose the plaintiff had a valid claim against A, or that he had a lien on A's property. The defendant, in consideration of the plaintiff's forbearance to sue A, which plaintiff had a legal right to do, verbally promised the plaintiff to pay A's debt. The plaintiff forebore to sue A, and the defendant failing to pay, the plaintiff brought an action on the defendant's verbal promise. Here the defendant would not be liable, because it came within the cases intended by the statute to be in writing.²³ It will be noted here that the lines a—b and b—c coexist, and the promise is a legal detriment to the plaintiff, because he gave up the right he had to proceed against A.

But suppose the defendant verbally agreed that if the plaintiff would not proceed with his proposed action against A, he, the defendant, would pay the plaintiff \$50. The fact may be that this \$50 was exactly the sum A owed the plaintiff. Now, the defendant's promise was not to pay A's debt, but to pay the plaintiff \$50 if the plaintiff would not proceed with his threatened action against A. True, A's debt continued, but the defendant's promise to pay the \$50 was not to pay *the* \$50 which A owed. The line a—b existed, so did

²²Williston on Contracts, sec. 102 (1920).

²³Kirkham v. Marter, 2 B. & A. 613 (1819); Krutz v. Stewart, 54 Ind. 178 (1876).

b—c, but the defendant's promise was not collateral, because it was not to pay A's debt, but \$50, an entirely different obligation. Therefore, the defendant is liable, because he was not agreeing to pay the debt of another person.²⁴ It so happens that the consideration for the defendant's promise here was a detriment to the promisee, yet the defendant was liable because his liability was not collateral to that of A. A principal debtor for the identical obligation in whole or in part which the defendant promised to assume is required in order for the statute of frauds to operate.

It is not essential that the obligation represented by the line a—b be the promise of the principal obligor. If it be a *debt* it is sufficient. For instance, if the plaintiff have a lien on property of the principal debtor, the defendant's verbal promise to assume its payment in consideration of the plaintiff's forbearance to proceed to foreclosure on the property of the principal obligor, is not enforceable.²⁵ Sufficient consideration exists. But as it is merely forbearance to sue, it does not come within any exception recognized by the cases, and the defendant's promise will not make him liable unless it is in writing and signed by the promisor or his agent.²⁶

The cases would seem to authorize the rule that where there is a prior existing or concurrently assumed debt or obligation by the principal debtor, or a lien on the principal's property held by the obligee, and the defendant-guarantor-obligor-promisor, in consideration of a detriment to the promisee, there being no benefit to the defendant, verbally promises to pay the debt or lien of the principal, the defendant is not liable, unless his promise is in writing and signed by him or by his authorized representative.

²⁴Read v. Nash, 1 Wilson (Eng.) 305 (1751). See explanation of Read v. Nash in Williams v. Leper, 3 Burr. (Eng.) 1886 (1766).

In Edwards v. Kelley, 6 Maule & Sel. (Eng.) 204, 208, 105 Eng. Reports Rep. 1219 (1817), E. K., being plaintiff's tenant, on March 13, 1815, plaintiff distrained for rent in arrears. Defendant verbally promised to pay all rent which would be due by December 25 next. Held, the plaintiff recovered, as this was not a promise to answer for another's debt, on this reasoning: "After the plaintiff had distrained, he held in his own hands his remedy for recovering the rent, and the tenant was at that time no longer indebted; for so long as the landlord held the goods under distress the debt due from the tenant was suspended. * * * I think that the present case is neither within the letter nor mischief of the Act of Parliament, which was aimed at cases where a debt being due from one person, another engaged to pay it for him. But here, for the reason above stated, at the time when the promise was made, the debt was not owing from the tenant."

²⁵Mallory v. Gillett, 21 N. Y. 412 (1860).

²⁶But see Townsend v. White, 102 Iowa 477 (1897), which held that an agreement between a vendor and vendee of materials that the vendor's lien for the materials should be subordinated to a mechanics' lien, was not within the statute of frauds, and the liens attached as agreed by the parties.

II. WHERE THE CONSIDERATION IS AN INCIDENTAL BENEFIT TO THE PROMISOR

This class will be confined to those cases where the consideration inures to the advantage of the promisor, but no property or pecuniary advantage is acquired by him as a result. The principal's debt coexists with the defendant's promise to pay, and the incidental effect is to benefit the defendant, but the principal object of the defendant's promise is to benefit the principal debtor.

That the defendant has received some benefit as consideration for his promise does not take the case without the operation of the statute of frauds. Unless the debt or lien on the property of the principal, which the plaintiff relinquishes, at the same time, and because of the defendant's promise, directly inures to the defendant's advantage, so as in effect to be a purchase by the defendant of the plaintiff's right to such debt or lien, it is required to be in writing in order to be enforceable. For example, suppose the defendant, having a previous mortgage on the principal's personalty, verbally promises that he will pay the principal's debt in consideration that the promisee will not attach the same property, it is not enforceable, because the statute requires it to be in writing.²⁷ The forbearance of the plaintiff to attach here does not inure to the benefit of the defendant, because the defendant's mortgage, being prior, already was a lien on the property. The principal's debt was not extinguished, and any legal benefit of the promise inures to the benefit of the principal debtor. True, there is an incidental benefit to the defendant in that by the withdrawal of the action to attach, he is saved expense of asserting his rights, or having the temporary custody of the mortgaged property in the hands of another; but this was not the principal object of the defendant in making his promise. It would be an entirely different case, however, if the defendant owned the personalty on which there was a lien incurred by a former owner, and the plaintiff forebore to sue on the defendant's promise to pay the obligation.²⁸ A promisor who is a stockholder in a corporation which receives the direct and immediate benefit from a contract is not bound by his agreement, where the original debtor remains liable.²⁹

²⁷*Ames v. Foster*, 106 Mass. 400 (1871). Compare *Scotte v. White*, 71 Ill. 287 (1874).

²⁸*Fears v. Story*, 131 Mass. 47 (1881).

²⁹*Mechanics and Traders' Bank v. Stettheimer*, 116 App. Div. (N. Y.) 198, 101 N. Y. Sup. 513 (1906); *Richardson Press v. Albright*, 224 N. Y. 497, 121 N. E. 362 (1918); *Turner v. Lyles*, 68 S. C. 392, 48 S. E. 301 (1903); *Hurst Hardware Co. v. Goodman*, 68 W. Va. 462, 69 S. E. 898, 32 L. R. A. (N. S.) 598, Ann. Cas. 1912 B, 218 (1910).

III. WHERE THE CONSIDERATION IS PRINCIPALLY BENEFICIAL TO
THE VERBAL PROMISOR, AND GIVES TO HIM SOME PROPERTY
OR ADVANTAGE OF GREAT PECUNIARY VALUE

Any intelligible discussion of this class of cases requires a consideration of the historical development, which, in turn, makes necessary a reference to certain selected and leading cases. Where the motivating purpose of the defendant's verbal promise is the benefit conferred on him by the promisee, the third person continuing liable, not all the cases can be reconciled.

I. THE NEW CONSIDERATION THEORY

An early English case blazed the trail along which certain American jurisdictions subsequently pioneered, when it announced that:

" * * * the modern determinations have made a distinction between a promise to pay the original debt, and on the foot of the original contract, and where it is on a new consideration."³⁰

Sometimes the view expressed in this case is referred to as the "new consideration" theory. In 1811, in one of the earliest expressions on the subject by an American court, Chief Justice Kent, basing his statement in part on the authority of *Tomlinson v. Gill, surpa*, as having clearly settled the doctrine, said:

"But if a promise to pay the debt of another be founded on a new and distinct consideration, independent of the debt, and one moving between the parties to the new promise, it is not a case within the statute. It is considered in the light of an original promise."³¹

This doctrine, while followed in some jurisdictions, it is submitted is unsound in principle,³² and has been repudiated by the same court.

³⁰*Tomlinson v. Gill, Amb. (Eng.) 330, 27 Eng. Rep. Reprint 221 (1756)*. See *Williams v. Leper, 3 Burrow 1886 (1766)*.

³¹*Leonard v. Vredenburgh, 8 Johns. (N. Y.) 28, 39 (1811)*. Accord, *Chapline v. Atkinson & Co., 45 Ark. 67 (1885)*; *Wright v. Smith, 81 Va. 777 (1886)*; *Lookout Mountain Railroad Co. v. Houston, 85 Tenn. 224, 226 (1886)*; *Templeton v. Bascom, 33 Vt. 132 (1860)*.

³²*Brandt on Suretyship (3d ed. 1905), sec. 80*, observed of Kent's statement quoted: "The proposition of the learned judge was not necessary to a decision of the case in which it was laid down, and, as stated by him, cannot be supported on principle, or by the later and best-considered authorities. There must be a consideration for every contract of surety or guaranty; and to hold that in every case where the consideration moves from the creditor to the surety or guarantor, the promise is not within the statute, would be to repeal the statute altogether in a very large class of cases."

Muller v. Riviere, 59 Texas 640, 642-643 (1883), says: "What is to be regarded as a sufficient consideration, however, to take the promise out of the operation of the statute of frauds, involves the determination of the relation which the consideration in the contract bears to the transaction itself. It is not sufficient that the consideration is merely a good one, to support a promise to pay a debt of the

Over 75 years later, the same court in *Rintoul v. White*³³ traced the cases in that state and showed the limitations which had been placed upon Kent's dictum. First, *Mallory v. Gillett*,³⁴ by a divided court, "shut out at once from the class of original promises all those in which the consideration of the promise was harm to the promisee, and the resultant benefit moved to the debtor, instead of the promisor."³⁵ Then in *Brown v. Weber*³⁶ the view was taken that "a promise might still be collateral even though the new consideration moved to the promisor, and was beneficial to him. It was distinctly said that the existence of those facts would not, in every case, stamp the promise as original, but the inquiry would remain whether such promise was independent of the original debt or contingent upon it."³⁷ Hence it is apparent that the New York court no longer adheres to the new consideration theory.

2. THE MAIN PURPOSE THEORY—IN GENERAL

Chancellor Kent's view diverged from that of Chief Justice Shaw, who, in a celebrated Massachusetts case, held that neither a detriment to the promisee nor a new consideration to the promisor would necessarily prevent the operation of the statute of frauds, if the original debtor remained primarily liable. In this case of *Nelson v. Boynton*³⁸ the defendant verbally promised the plaintiff that if the plaintiff would discontinue a suit against the defendant's father, and withdraw an attachment against the father's realty, the defendant would pay

promisor to the promisee as an original undertaking, but the promise being one to pay the debt of another, if a new and distinct consideration for the promise alone would take the case out of the statute, the statute would be entirely nullified."

Browne on Statute of Frauds (5th ed. 1895), sec. 212, says of Kent's view: "However respectable the countenance it has received, this doctrine, if unqualified, must be repudiated as not based upon authority, and as, to a great degree, nullifying the statute."

See *Maule v. Bucknell*, 50 Pa. 39, 53 (1865).

³³*White v. Rintoul*, 108 N. Y. 222, 15 N. E. 318 (1888). The New York cases are also well analyzed in *Hurst Hardware Co. v. Goodman*, 68 W. Va. 462, 69 S. E. 898, 32 L. R. A. (N. S.) 598, Ann. Cases 1912 B, 218 (1910), and also in *Kiernan v. Kratz*, 42 Ore. 474, 478-482, 69 Pac. 1027 (1902). The reader will be well repaid to study the exhaustive and learned article on "Suretyship and the Statute of Frauds" by Professor Charles K. Burdick of the Cornell Law School in 20 Col. L. Rev. 153 (1920), in which he considers the New York cases. They are also discussed in *Browne on Statute of Frauds* (5th ed. 1895), secs. 166 b-172.

³⁴1 N. Y. 412 (1860).

³⁵*White v. Rintoul*, 108 N. Y. 222, 226, 15 N. E. 318, 319 (1888).

³⁶38 N. Y. 187 (1868).

³⁷*White v. Rintoul*, 108 N. Y. 222, 226, 15 N. E. 318, 319 (1888). See *Ackley v. Parmenter*, 98 N. Y. 425, 433 (1885).

³⁸3 Met. (Mass.) 396, 402, 37 Am. Dec. 141 (1841). Accord, *Frohardt v. Duff*, 156 Ia. 144, 135 N. W. 609, 40 L. R. A. (N. S.) 242, Ann. Cases 1915 B 254 (1912).

the amount due on the notes on which the father was then, and continued to remain, liable. The court held this promise of the defendant was within the statute, and while sufficient consideration for it existed, the statute of frauds prevented its enforcement. It was pointed out that "the leading object and purpose were the relief and benefit of the father, and not the son." In that early case, Chief Justice Shaw stated this general rule of law:

"The rule to be derived from the decisions seems to be this: that cases are not considered as coming within the statute, when the party promising has for his object a benefit which he did not before enjoy, accruing immediately to himself; but where the object of the promise is to obtain the release of the person or property of the debtor, or other forbearance or benefit to him, it is within the statute."³⁹

This generalization, contrary to the view of Kent, is in accord with the modern view, and the New York court seemingly approved of *Nelson v. Boynton* in *Rintoul v. White*,⁴⁰ in which it was said the doctrine of the New York courts can be thus stated:

"That where the primary debt subsists, and was antecedently contracted, the promise to pay it is original when it is founded on a new consideration moving to the promisor and beneficial to him, and such that the promisor thereby comes under an independent duty of payment irrespective of the liability of the principal debtor."

The first question naturally arising in the mind of the student in connection with the generalization by Chief Justice Shaw, which seems to be the modern trend, is that here are two different persons concurrently liable to the plaintiff for the same debt, default, or miscarriage. The original debtor, in cases considered under this third general class, continues liable, and the defendant, who verbally agrees to pay the debt of the principal debtor, assumes a liability. The obligation represented by the line a—b coexists with that represented by the line b—c in the prior diagram. Does not this make the verbal promisor's liability a collateral one? Is he not agreeing to answer for the debt, default, or miscarriage "of another person?"

³⁹Conversely stated, to be within the statute of frauds, "the main, or immediate, object of the agreement between the parties must be to secure the payment of a debt, or the fulfillment of a duty, by a third person." De Colyar on "Law of Guarantees" (3d ed. 1897), p. 144.

⁴⁰108 N. Y. 222, 227, 15 N. E. 318 (1888). Previously, the same court in *Prime v. Koehler*, 77 N. Y. 91, 94 (1879), had made this statement of its view: "And when the purpose of the promise is to secure a benefit to the promisor, by relieving his property from a lien, or securing and confirming his possession, the promise is original and not collateral although a third person may be personally liable for the debt, and the promise may be in form a promise to pay such debt, and although the performance of the promise may result in discharging the debt."

At first blush, it might seem an affirmative answer to these questions would be required. But in reality, under the view of Chief Justice Shaw, which has been followed generally, the verbal promisor has not agreed to pay the debt of "another person," but *his own debt*.⁴¹ When the real object of the defendant's verbal promise is to subserve a purpose of his own, and he agrees to pay off another's obligation, he is really assuming such other's liability as a part of his own debt.⁴² True, the other continues liable, but the defendant does something more than to agree to pay another's debt; he agrees to pay his own. And it has always been recognized that where the defendant agrees to be responsible for an obligation in part his own and in part that of a third person, the statute of frauds does not require it to be in writing.⁴³ This is the language from the opinion of a leading English case:

" * * * if there be something more than a mere undertaking to pay the debt of another, as, where the property in consideration of the giving up of which the party enters into the undertaking is in point of fact his own or is property in which he has some interest, the case is not within the provision of the statute, which was intended to apply to the case of an

⁴¹*Birchell v. Neaster*, 36 Ohio St. 331, 337 (1884). *Mankin v. Jones*, 63 W. Va. 373, 60 S. E. 243, 15 L. R. A. (N. S.) 214, 223 (1908), says: " * * * if he (the verbal promisor) himself gets property or other pecuniary benefit, he is not merely and only paying the debt of another, but his own. In such case, where his promise is based on consideration going to him, the statute of frauds has really nothing to do with the case." Similarly, the reasoning was advanced in *Fullman v. Adams*, 37 Vt. 391, 397 (1864), that the verbal promisor is liable because by his arrangement he becomes the holder of a fund or security with which he agrees to pay his debt, and a duty or trust is imposed on him, which the law will enforce at the instance of the promisee. Therefore, the promise is an original one.

⁴²Motive and object must be differentiated. As Vaughn Williams, L. J., observed in the course of his opinion in *Harburg India Rubber Comb Co. v. Martin*, (1902) 1 K. B. 778, 786: " * * * it is not a question of motive—it is a question of object. You must find what it was that the parties were in fact dealing about. What was the subject-matter of the contract? If the subject-matter of the contract was the purchase of property—the relief of property from liability, the getting rid of incumbrances, the securing greater diligence in the performance of the duty of a factor, or the introduction of business into a stockholder's office—in all these cases there was a larger matter which was the object of the contract. That being the object of the contract, the mere fact that as an incident to it—not the immediate object, but indirectly—the debt of another to a third person will be paid, does not bring the case within the section."

Browne on Statute of Frauds (5th ed. 1895), sec. 214a, says: "It is not the motive of the promisor nor the nature of the consideration for his promise, but the substance of the transaction between him and the promisee, that must be regarded in determining whether the promise is within the statute."

⁴³*Horn v. Bray*, 51 Ind. 555, 19 Am. Rep. 744 (1875); *Ferrell v. Maxwell*, 28 Ohio St. 383 (1876). And had *Thomas v. Cook*, 8 Barn. & Cress. (Eng.) 728 (1828), been decided on the proper reasoning, it would have recognized the same rule. The Supreme Court of the United States in *Davis v. Patrick*, 141 U. S. 479, 487, 35 L. Ed. 826, 12 Sup. Ct. 58 (1891), referring to the statute of frauds, said: "It does not apply to promises in respect to debts created at the instance and for the benefit of the promisor, but only to those by which the debt of one party is sought to be charged upon and collected from another."

undertaking to answer for the debt, default, or miscarriage of another, where the person making the promise has himself no interest in the property which is the subject of the undertaking."⁴⁴

More explicit is this from the opinion of a Canadian court:

"When the plaintiff, in consideration of the promise to pay, has relinquished an execution under which some advantage or security exists or is likely to be realized, and when the effect of relinquishment is that such interest or advantage accrues to the defendant who has made the promise, then no writing is required, for the transaction is substantially one for the purchase of the execution. But, if the promise is given in consideration of forbearance for a time, and the execution is, as here, withdrawn, yet, as no direct benefit therefrom has arisen to or was contemplated by the promisor, it is simply a promise to pay the debt of another, which is valid enough so far as the consideration is concerned, but is not enforceable because not put into writing."⁴⁵

These authorities show that recent cases involving the interpretation of the statute of frauds are not concerned with the form of the promise. It is the substance of the defendant's promise which the court examines. In most of the cases which have been presented, the form of the promise was to answer for the debt of another; but if in substance the principal benefit was to accrue to the verbal promisor, the courts have held his unwritten promise bound him, because the evils of making such a promise were not those which the statute was enacted to prevent.⁴⁶

⁴⁴*Fitzgerald v. Dressler*, 7 C. B. (N. S.) 374, 141 Eng. Rep. Reprint 861, 868 (1859).

⁴⁵*Young v. Milne*, 20 Ont. L. R. 366, 368 (1910).

⁴⁶Speaking for the Supreme Court of the United States, Mr. Justice Brewer, in *Davis v. Patrick* 141 U. S. 479, 487, 35 L. Ed. 826, 12 Sup. Ct. Rep. 58 (1891), said: "The reason of the statute is obvious, for in the one case if there be any conflict between the parties as to the exact terms of the promise, the courts can see that justice is done by charging against the promisor the reasonable value of that in respect to which the promise was made, while in the other case, and when a third party is the real debtor, and the party alone receiving benefit, it is impossible to solve the conflict of memory or testimony in any manner certain to accomplish justice. There is also a temptation for a promisee, in a case where the real debtor has proved insolvent or unable to pay, to enlarge the scope of the promise, or to torture mere words of encouragement and confidence into an absolute promise: and it is so obviously just that a promisor receiving no benefits should be bound only by the exact terms of his promise, that this statute requiring a memorandum in writing was enacted. Therefore, whenever the alleged promisor is an absolute stranger to the transaction, and without interest in it, courts strictly uphold the obligations of this statute. But cases sometimes arise in which, though a third party is the original obligor, the primary debtor, the promisor has a personal, immediate, and pecuniary interest in the transaction, and is therefore himself a party to be benefitted by the performance of the promisee. In such cases the reason which underlies and which prompted this statutory provision fails, and the courts will give effect to the promise."

Two leading cases decided by the United States Supreme Court, adhering to the main purpose rule, following the view of Chief Justice Shaw, and the more recent New York cases, require consideration. *Emerson v. Slater*⁴⁷ was the first one in which this court dealt with the situation. The plaintiff agreed with the defendant in writing, in consideration of one dollar, and the promise of the defendant to pay, to complete certain bridge work for the Boston and New York Central Railway Company by a certain time. Before the time for completion arrived, the defendant extended the time for completing the work, and verbally agreed to substitute a later date for the plaintiff to complete his contract, and the plaintiff within this extended time completed the work. The defendant objected to testimony of this extension of time, because, among other grounds, the agreement for the extension, not being in writing, was not enforceable under the statute of frauds. The defendant was a large stockholder in the railroad for which the work was being done, and held a large quantity of bonds secured by a mortgage of the road to the trustees. It was held that the defendant's promise was an original undertaking, and the plaintiff might proceed on the common count. The court announced this rule, similar to the one which Massachusetts had previously stated through Chief Justice Shaw:

“But whenever the main purpose and object of the promisor is not to answer for another, but to observe some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability.”⁴⁸

In *Crawford v. Edison*, 45 Ohio St. 239, 245, 13 N. E. 80, 82 (1887), it was stated: “it will be seen that the statute, by its terms, operates on cases where there is a primary or original debt or obligation upon which is based a collateral promise of another person to answer for such primary or original debt or obligation. Hence if there be in fact no such primary debt or obligation, or the same is extinguished and discharged, or if the promise be not to answer for such primary debt or obligation, but itself be a primary or direct promise for a sufficient consideration, the statute does not apply, or require the promise to be in writing. “The statute contemplates the mere promise of one man to be responsible for another, and cannot be interposed as a cover and shield against the actual obligations of the defendant himself.”

⁴⁷22 How. (U. S.) 28, 43 (1859).

⁴⁸See criticism of the language used by the Supreme Court here by John D. Falconbridge, 68 U. of Pa. L. R. 1, 7-8.

It is noted the Supreme Court in the opinion quoted used the language “pecuniary or business purpose of his own.” (1) What is meant by business? Is it business prestige or advantage? (2) Again, must the consideration move from the promisor? In *Maule v. Bucknell*, 50 Pa. 39 (1865), plaintiff and others, controlling directors in a corporation, resigned and transferred their stock to the defendants in consideration that the defendants might become directors, and pay

It will be noted that "damage to the other contracting party" is not said to take the agreement out of the statute of frauds, unless the "main purpose and object of the promisor" is "to observe some pecuniary or business purpose of his own." It is the "main purpose and object" to which the court looks, and not the consideration exclusively. Detriment to the promisee may furnish consideration; but unless there concurs (1) sufficient consideration and (2) the main and primary purpose of the defendant's verbal promise is to benefit himself, the defendant is not liable, if his promise is not in writing and signed, within the rule of *Emerson v. Slater*.

The second leading expression of the Supreme Court was given by Mr. Justice Brewer in *Davis v. Patrick*.⁴⁹ The rule from *Emerson v. Slater*, above quoted, was referred to with approval. In *Davis v. Patrick*, the defendant was a large creditor of the Flagstaff Mining Co. for money advanced to it. The Flagstaff Mining Co. was, by an agreement with the defendant, to deliver a large quantity of ore as security for this loan. The Flagstaff Mining Co. also agreed to place the mine under the sole management of the plaintiff, and gave to the plaintiff a power of attorney. The plaintiff not being paid for his services, the defendant verbally promised to see him paid if he would continue his employment. The defendant was held to be liable on his verbal promise. The court pointed out that a different rule applied in case

plaintiff certain rents due from the corporation. The defendant's promise was verbal. The court held the defendant's promise was within the statute and unenforceable. (1) The transfer of the stock to the defendants and the resignation of the plaintiff were to enable the defendants to become directors, and not to place in the defendant's hands funds with which to pay the debts. Obviously there was a "business purpose of his own," but the sense in which it is used must be limited to cases where something more than business control is gained. Interest in the business, with the agreement to pay debts therewith, is necessary. (2) The court said (p. 51): "Nor can it make any difference that the new consideration moves from the promisee to the promisor."

⁴⁹141 U. S. 479, 488, 35 L. Ed. 826, 12 Sup. Ct. Rep. 58 (1891). Accord, see *U. S. Mine & Smelter Supply Co. v. Stockgrowers' Bank*, 173 Fed. 863, 98 C. C. A. 229 (1909); *Guaranty Trust Co. v. Koehler*, 195 Fed. 669, 679, 115 C. C. A. 475 (1912); *Prout v. Webb*, 87 Ala. 593, 6 So. 190 (1888); *Clay v. Wilton*, 9 Cal. 328 (1858); *Borchsemus v. Canutson*, 100 Ill. 82 (1881); *Mills v. Brown*, 11 Ia. 314 (1860); *Pratt v. Fishwald*, 121 Ia. 649, 96 N. W. 1092 (1903); *Alger v. Scoville*, 1 Gray (Mass.) 391, 396 (1854); *Wills v. Brown*, 118 Mass. 137 (1875); *Colbath v. Clark Seed Co.*, 112 Me. 281, 91 Atl. 1007 (1914); *State ex rel. Tutton v. Eberhardt*, 14 Neb. 201 (1883), with which compare *Morrisey v. Kinsey*, 16 Neb. 17 (1884); *Rice v. Hardwick*, 17 N. M. 78, 124 Pac. 800 (1912); *Whitehurst v. Hyman*, 90 N. C. 487 (1884); *Crawford v. Edison*, 45 Ohio St. 239, 13 N. E. 80 (1887); *Arnold v. Stedman*, 45 Pa. 186 (1863); *Gaines v. Durham*, 117 S. E. (S. C.) 732 (1923); *Housley v. Strawn Merchandise Co.*, 253 S. W. (Tex.) 673 (1923); *Howell v. Harvey*, 65 W. Va. 310, 22 L. R. A. (N. S.) 1077 (1909); *Hurst Hardware Co. v. Goodman*, 68 W. Va. 462, 69 S. E. 898, 32 L. R. A. (N. S.) 598, Ann. Cases 1912 B 218 (1910).

But see *Warner v. Willoughby*, 60 Conn. 468, 25 Am. St. Rep. 343 (1891); *Miles v. Driscoll*, 201 Mass. 318 (1909).

the verbal promisor is a stranger to the transaction, than where he has a pecuniary interest in it. As to a stranger, Justice Brewer said, "courts strictly uphold the obligations of this statute." Where the promisor is given an advantage even though a third person continues to be liable, he adds:

"But cases sometimes arise in which, though a third party is the original obligor, the primary debtor, the promisor has a personal, immediate and pecuniary interest in the transaction, and is therefore himself a party to be benefitted by the performance of the promisee. In such cases the reason which underlies and which prompted this statutory provision fails, and the courts will give effect to the promise."

That a detriment is incurred to the promisee or a benefit to the promisor is not the test. True, there must be the one or the other in order to have the necessary consideration. But "whether the debt is that of another is the true test."⁵⁰ If the object of the verbal promisor is to subserve a pecuniary or proprietary interest of his own by participating in the main contract, then he is promising to pay his own debt, and the mere fact that another is also liable is not affected by the statute of frauds, for the defendant is primarily liable.⁵¹ The distinction is clear between the inducement to enter the contractual relation and a beneficial participation in it.⁵² "The directness of the expected benefit is, however, evidential of the 'main purpose' of making the promise."⁵³ Consideration so beneficial to the promisor as to constitute the object of the promise may impart to it the character of an original undertaking.⁵⁴ As a leading American opinion, in which the views here discussed were considered, observed:

"It must however be constantly borne in mind that the question under the statute is not whether there is a sufficient

⁵⁰Hurst Hardware Co. v. Goodman, 68 W. Va. 462, 466, 69 S. E. 898, 32 L. R. A. (N. S.) 598, Ann. Cas. 1912 B 218 (1910).

⁵¹But see Clay v. Walton, 9 Cal. 328, 335 (1858). In Peterson v. Creason, 47 Ore. 472, 81 Pac. 574 (1905), Mr. Justice Bean said in the opinion for the court: "In such cases the contract is an original, and not a collateral, undertaking. It is not the promise of one person to answer for the default or miscarriage of another, but is, in substance, the original contract of the promisor."

It was said in Richardson Press v. Albright, 224 N. Y. 497, 502, 121 N. E. 362, 364 (1918); "When the primary debt continues to exist, the promise of another to pay the debt may be original, or it may not be; but it is regarded as original only when the party sought to be charged clearly becomes, within the intention of the parties, a principal debtor primarily liable." See Dyer v. Gibson, 16 Wis. 580, 583 (1863).

⁵²Stearn on Suretyship (3d ed. 1922), sec. 39.

⁵³Note, 33 Yale L. J., 884.

⁵⁴Ackley v. Parmenter, 98 N. Y. 425, 433 (1885).

consideration for the defendant's promise, but whether that promise is to answer for the debt of another."⁵⁵

The enactors of the statute of frauds intended to refuse a remedy to all verbal promises to answer for another's debt, i. e., promises made *for that purpose*. They never intended to permit the defendant to set up the statute as a means of escaping *his own* obligations simply because involved in his verbal promise was the discharge of the debt of a third person.⁵⁶

We must conclude, therefore, that the "main purpose rule" is a misnomer, for "neither such mere new consideration, however good and valuable, nor the mere fact alone that the leading object of the promisor is a benefit to himself, affords a test whereby to determine that the promise is not within the statute."⁵⁷

(a) THE PROPERTY CASES⁵⁸

As part of the main purpose rule, and in order to clarify it, a brief discussion of the so called property cases would seem to be required. This class consists of "cases in which either the person who made the promise had property which he wished to relieve from liability, or there was property which he wished to acquire."⁵⁹ It is to be noted that a creditor's or stockholder's interest by the defendant in the property of the principal debtor is not sufficient to take the promise out of the statute. But if the defendant has a substantial interest in the property, a promise made by him to pay an obligation thereon for which another is also liable, will make the defendant responsible. That was the view of Cockburn, C. J., in the language heretofore

⁵⁵*Fusbish v. Goodnow*, 98 Mass. 286, 297 (1867). It is thus stated in *Wills v. Brown*, 118 Mass. 137, 138 (1875): " * * * when the plaintiff has, in consideration of the promise by the defendant, relinquished some lien, benefit or advantage for securing his debt, and transferred that interest, or some equivalent benefit, to the defendant, it is a new and independent contract between the parties, although the result is that the payment of the debt of another is incidentally and indirectly effected." See also *Fears v. Story*, 131 Mass. 47 (1881).

⁵⁶*Browne on Statute of Frauds*, (5th ed. 1895), sec. 212; *Malone v. Keener*, 44 Pa. 107, 109 (1862).

⁵⁷*Muller v. Riviere*, 59 Tex. 640, 645 (1883).

⁵⁸This classification was first suggested in *Harburg India Rubber Comb Co. v. Martin*, *supra*, n. 42, p. 784, involving "cases in which either the person who made the promise had property which he wished to relieve from liability, or there was property which he wished to acquire." The same classification was subsequently followed by the Court of Appeal of Ontario in *Adams v. Craig*, 24 Ont. L. R. 490, 500 (1911), which observed, after quoting the above language from the *Harburg India Rubber Case*, that: "But reference to other portions of his judgment and of that of the other Lords Justices shows that they understood the rule to extend to cases in which the person making the promise had an interest merely, as well as cases in which he had an absolute property in goods of which the release was sought." See criticism of this classification by Professor C. D. Henning in 57 U. of Pa. L. R. 611, 625.

⁵⁹*Harburg India Rubber Comb Co. v. Martin*, *supra*, n. 42, p. 784.

quoted.⁶⁰ In the case before him the verbal promisor had a property in certain linseed, on which the plaintiff had a vendor's lien, for which a third person was also responsible. The opinion presented the correct view, that since the defendant had a property in the seed, and the plaintiff gave up a lien thereon, in reality the defendant promised to pay off an obligation for which his own property was responsible.

But if the defendant verbally promises to pay a lien on property on which he holds a prior mortgage, in consideration of the plaintiff's forbearance to sue for the amount of the lien, the promise is not enforceable, even if the plaintiff withdraws his threatened action, because he acquired no interest by the plaintiff's release which he did not before possess. One cannot be an original promisor, where a principal debtor remains liable, unless he obtains some advantage not existing without the promise.⁶¹ The liability to which one is held who promises verbally to pay the continuing debt of another, where his property is benefited, is in entire accord with the general statement of the main purpose rule in leading English and American cases.

(b) THE DOCUMENT CASES.

The rule applicable to this class of cases is not different from the one in property cases or the general rule. Because of reference to this as a special class in a leading case, its recognition would seem to be justified.⁶² The classification is perhaps unjustified in principle.⁶³

Where the plaintiff had a lien on certain insurance policies for his principal for whom he had given his acceptances, and the defendant, needing the possession of the policies, in order to collect the money from the underwriters for the principal, verbally promised plaintiff that he would provide for the acceptance as they became due to the plaintiff, in consideration that the plaintiff deliver to the defendant the policies, the plaintiff was allowed to recover. The opinion states that:

"This is to be considered as a purchase by the defendant of the plaintiff's interest in the policies. It is not a bare promise to the creditor to pay the debt of another due to him, but a promise by the defendant to pay what the plaintiff would be liable to pay, if the plaintiff would furnish him with the means of doing so."⁶⁴

The same principle is involved in the well established line of cases holding that where a debtor induces his creditor to take in settlement

⁶⁰See quotation from *Fitzgerald v. Dressler*, *supra*, n. 44.

⁶¹*Ames v. Foster*, 106 Mass. 400 (1871).

⁶²*Harburg India Rubber Comb Co. v. Martin*, *supra*, n. 42, p. 793.

⁶³See *Falconbridge on Guarantees and Statute of Frauds*, 68 U. of Pa. L. R. 1, 15 (1919).

⁶⁴*Castling v. Aubert*, 2 East (Eng.) 325, 332 (1802).

of his obligation the note of a third person, and the debtor verbally guarantees the payment of the note, it is in effect a promise to pay his own debt, and even though incidentally he guarantees another's obligation, it is not within the spirit of the statute. The defendant is therefore liable on his verbal promise. The form was a guaranty, but in fact the guaranty was to pay the promisor's own debt.⁶⁵

(C) THE DEL CREDERE CASES⁶⁶

A *del credere* agreement is one by which an agent, in consideration of an additional payment, guarantees the solvency of the debtor and the punctual discharge of the debt.⁶⁷ Clearly, the purchaser is primarily liable for the debt, and the agent is but secondarily liable.⁶⁸ The line b—c coexists with the line a—b. Yet the authorities are quite uniform that a verbal promisor is liable because "this debt or duty is his own, and arises from an adequate consideration."⁶⁹ The principal object of the defendant in making his promise was the extra compensation. As Parke, B., observed concerning such verbal promises:

⁶⁵Eagle Mowing & Reaping Co. v. Shattuck, 53 Wis. 455, 40 Am. St. Rep. 780 (1881); Milks v. Rich, 80 N. Y. 269, 36 Am. St. Rep. 615 (1880); Malone v. Keener, 44 Pa. 107 (1862); Kiernan v. Kratz, 42 Ore. 474, 69 Pac. 1027 (1902).

⁶⁶Referred to by Vaughn-Williams, L. J., in Harburg India Rubber Comb Co. v. Martin, *supra*, n. 42, 784, as being "of a different species not of a different genus" than the property cases. See Falconbridge on "Guarantees and the Statute of Frauds," 68 U. of Pa. L. R. 1, 15 1919.

⁶⁷1 Bouvier's Dictionary (3d ed. 1914), 818.

⁶⁸In Guidre v. Kean, 7 Misc. (N. Y.) 582, 28 N. Y. Sup. 4, 5 (1894), it was said: "Notwithstanding the *del credere* agreement, the purchaser continued to be the principal's primary debtor, the factor's liability under such an agreement being that of a surety only.

⁶⁹Wolff v. Koppel, 5 Hill (N. Y.) 458, 459, (1843). Wolff v. Koppel was approved in Sherwood v. Stone, 14 N. Y. 267, 269 (1856), in which case it was pointed out that the English courts had changed their view and explained the ground for divergence between the English and American courts as follows: "In England they understand the guaranty to be a contract to pay if the money cannot be collected of the purchaser. Here it is understood to be a contract, directly with the principal, to pay him on the expiration of the time of credit, whether the purchaser be solvent or not; that is the whole contract between the factor and his principal, and is an original undertaking, without any relation to the debt or liability of another." See also Bradley v. Richardson, 23 Vt. 720, 731 (1851).

See the article by Professor C. K. Burdick of the Cornell Law Faculty on "Suretyship and the Statute of Frauds" in 20 Col. L. R. 153, 156-157 (1920), where he says various authorities have given three different grounds for holding the verbal promisor liable in the *del credere* cases. (1) The *del credere* agent is in substance the debtor to whose obligation that of the purchaser is added subsequently. (2) The factor, being a bailee, his promise was to account, which was not understood to be a "special promise" when the statute was enacted. (3) The main purpose theory, the principal object being to establish the relationship of principal and agent between the contracting parties, to which the promise to answer for the purchaser's debts is merely incidental.

“ * * * though it may terminate in a liability to pay the debt of another, that is not the immediate object for which the consideration is given.”⁷⁰

In the *del credere* cases, the main object is a pecuniary benefit to the promisor. It is not controlling that as an incident to the defendant's promise, there is a coexisting liability of a third person. The statute of frauds never was intended to require written evidence of promises to pay one's own obligations; and whenever the promisor agrees to become responsible on the payment of a premium, he does so because he recognizes it as his own debt, even though another's obligation may be incidentally assumed. His promise is original.⁷¹

CONCLUSION

The purpose of the enactment of the statute of frauds 250 years ago was to protect a promisor from fraud where he answered for the debt, default or miscarriage “of another person.” By special promise was meant a promise especially directed to this end. Every promise where there is no principal debtor, is original. No case ever intimated otherwise. To have a contract of guaranty or suretyship, three persons are required—the principal, creditor, and guarantor. Usually, but not always, if the principal debtor remains liable, the promise of the guarantor is collateral, and must be in writing. If there is a principal liable, a verbal promise is not enforceable if the consideration consists (1) of a detriment to the promisee, or (2) of an incidental benefit to the promisor, because it is a special promise within the meaning of the statute. If the promisor in fact agrees to pay another's liability as an incident to obtaining property, money, or advantage for himself, then in fact he is agreeing to pay his own debt, and not that of another, and he is bound even though his promise is verbally made. His promise is then an original and not a collateral undertaking. This is the meaning of the so-called “main purpose rule.”

⁷⁰Couturier v. Hastie, 8 Exch. 40, 155 Eng. Rep. Reprint 1250 (1852). Since this case, Bowen, L. J., said in the course of the opinion written for the court by him in *Sutton & Co. v. Grey*, 69 L. T. R. 354, 355 (1893), that it was the settled view that “the terms of a *del credere* agency, which included a guarantee for the future debt of the person to whom goods were to be sold, was really to be regarded, rather as a contract, the object of which was not to guarantee the debt, but to settle the terms upon which the agent should be employed to sell.”

⁷¹Swan v. Nesmith, 7 Pick. (Mass.) 220, 224 (1828).