

SOME EXCEPTIONS TO THE SURETYSHIP STATUTE OF FRAUDS: A TALE OF TWO COURTS

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INTRODUCTION

Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:...(2) Is a special promise to answer for the debt, default or miscarriage of another person.¹

So reads the suretyship part of the New York Statute of Frauds, in language not substantively different from that enacted in England in 1677.² Its purpose was never better stated than by Chief Justice Lemuel Shaw³ of Massachusetts in *Nelson v. Boynton*:⁴

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.⁵

If the consideration is merely forbearance from suing the principal debtor, the circumstances usually do not reliably

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¹ N.Y. GEN. OBLIG. LAW § 5-701(2) (McKinney 2001).

² See An Act For The Prevention of Frauds and Perjuries, 1677, 29 Car. 2, c. 3, § 4 (Eng.).

³ Shaw's distinguished career is the subject of LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW (1957).

⁴ 44 Mass. (3 Met.) 396 (1841).

⁵ *Id.* at 399.

corroborate the creditor's oral testimony.⁶ The evidentiary function of the statute is supplemented by a cautionary one: the formality of a writing brings home to a would-be guarantor the serious burden of such a commitment. Finally, the danger of faulty fact-finding is aggravated where the defendant received no personal benefit and may in consequence be exposed to forfeiture.⁷

Nelson is the fountainhead of a great compromise rule that attempted to distinguish between cases that fell within both the letter and spirit of the statute and cases that, while within the letter of the law, did not entail the mischief the statute was designed to suppress. As with many of the early leading cases, the rule was announced in light of facts that fell well short of satisfying it. The plaintiff had sued the promisor's father and attached his property. The son orally promised his father's creditor that if the action was discontinued he would pay the debt. The creditor agreed but payment was not made. In upholding the son's statute of frauds defense, Chief Justice Shaw noted that while the creditor gave consideration, the son received no benefit from it. In a much quoted passage he wrote:

The terms original and collateral promise, though not used in the statute, are convenient enough, to distinguish between the cases, where the direct and leading object of the promise is, to become the surety or guarantor of another's debt, and those where, although the effect of the promise is to pay the debt of another, yet the leading object of the undertaker is, to subserve or promote some interest or purpose of his own.⁸

This case is credited with originating what is usually called the "main purpose" or "leading object" rule, according to which some persons who are unquestionably sureties are denied the protection of the statute. The rule recognizes that the evils

⁶ See Crawford D. Hening, *A New and Old Reading on the Fourth Section of the Statute of Frauds*, 57 U. PA. L. REV. 611, 616 (1909).

⁷ Courts have been similarly aware of the heightened danger of fraud in cases under the "one year" statute of frauds where employees seek renewal commissions in the indefinite future after their employment has terminated. The danger of fraud is high when only the defendant has a duty of further performance. Compare *Cohen v. Bartgis Bros. Co.*, 264 A.D. 260, 261, 35 N.Y.S.2d 206, 208 (1st Dep't 1942), *aff'd*, 289 N.Y. 846, 47 N.E.2d 443 (1943), with *N. Shore Bottling Co. v. Schmidt & Sons, Inc.*, 22 N.Y.2d 171, 177, 239 N.E.2d 189, 192, 292 N.Y.S.2d 86, 90 (1968).

⁸ *Nelson*, 44 Mass. (3 Met.) at 400. The result in this case has a counterpart in New York. See *Mallory v. Gillett*, 21 N.Y. 412 (1860).

against which the statute was aimed are greatest when the promisor acts to accommodate a friend or relative and gets no benefit from the transaction. Contrariwise, when the promisor acts in his self-interest and derives a benefit, the danger of fraud is minimized, and the surrounding circumstances often corroborate the making of the promise.

An examination of two major jurisdictions with differing lines of development may yield some interesting results. New York and Massachusetts represent contrasting approaches to the issues presented by the “main purpose” exception. Widely adopted, this rule has made little overt headway in New York, at least not under that label. According to the New York Court of Appeals, “The rule is not recognized in this state.”⁹ The rule in New York does not have a convenient label and must be synthesized from several leading cases. And, despite the deceptively simple label, the law in Massachusetts has not always meant the same thing. This Article will examine the New York cases in several typical types of transactions involving the statute and compare the results with the *Restatement*, which embraces the “main purpose” rule,¹⁰ and especially with Massachusetts, the jurisdiction credited with originating the rule.¹¹ In examining these fact patterns, an attempt will be made to keep in view the purpose of the statute—a purpose sufficiently strong to have survived the large-scale repeal that took place in

⁹ *Martin Roofing, Inc. v. Goldstein*, 60 N.Y.2d 262, 269, 457 N.E.2d 700, 704, 469 N.Y.S.2d 595, 598 (1983); accord 4 ARTHUR LINTON CORBIN & CAROLINE N. BROWN, CORBIN ON CONTRACTS § 16.1 (Joseph M. Perillo ed., rev. ed. 1997) (“Only New York has refused to apply the ‘main purpose’ or ‘leading object’ rule as it is commonly understood.”). The last major synthesis attempted by the Supreme Judicial Court of Massachusetts was seventy years ago. See *Colpitts v. L.C. Fisher Co.*, 193 N.E. 833, 855 (1935). As will be seen in this Article, that court has since expanded the “main purpose” exception to the statute bit by bit, not always with close analysis or respect for precedent.

¹⁰ See RESTATEMENT (SECOND) OF CONTRACTS § 116 (1981); RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 11(3)(c) (1996).

¹¹ See *Nelson*, 44 Mass. (3 Met.) at 400. In comparing New York with Massachusetts, I follow the precedent of Corbin, who singled out these two jurisdictions for separate treatment in his study of contract beneficiaries. See generally Arthur L. Corbin, *Contracts for the Benefit of Third Persons*, 27 YALE L.J. 1008 (1918). The kind of scholarship that analyzes actual doctrine, developed by cases in identified jurisdictions, is not much in favor nowadays. Theoretical and ideological speculation is the order of the day. Without objective referents, such punditry cannot be falsified and humbug flourishes. This article is written without apology in the conviction that, in time, traditional standards of law review writing will rise again.

England in 1954.¹²

The typical suretyship case involves three parties: the debtor, for whose possible default the surety is answering; the surety, who undertakes to answer for the debtor's default; and the creditor, to whom the promise is made. For ease of reference, this Article will call the alleged debtor "D," the alleged surety "S," and the creditor "C." I emphasize the adjective "alleged" as a reminder not to prejudge the outcome of any particular case. A person called S in a statement of facts may turn out not to be a surety at all; a person called D may turn out not to be a debtor at all. As a further convention, I will follow the usage of most courts and call a surety's promise "collateral" and a non-surety's promise "original." These terms are, of course, shorthand for the conclusion of a suretyship problem, not guidelines to reaching a conclusion.

There are some differences, as well as similarities, between cases where S promises C at the same time the principal debt is contracted by D, and usually for the same consideration moving from C, and other cases where the debt already exists and S comes in by way of a subsequent separate transaction. It will be convenient to examine the first mentioned group of cases as a preamble to the somewhat more complex issues presented by the second.

I. THE DEBTOR AND THE ALLEGED SURETY PROMISE TOGETHER

A. *A Little Legal History*

The Statute of Frauds, as enacted in 1677, applied to "agreements" not to be performed within one year, and a "contract" for the sale of land. But section 4(2) covered "any special promise" to answer for the debt of another person.¹³ To understand the significance of the term "special promise," we must recall the difference between the kind of obligation enforced by the writ of debt and that redressed by the action of *assumpsit*. The heading of this paragraph says a "little" legal history, so at this point, it is only necessary to say that early *assumpsit* focused

¹² See Law Reform (Enforcement of Contracts) Act, 1954, 2 & 3 Eliz. 2, c. 34, § 1 (Eng.).

¹³ See An Act for the Prevention of Frauds and Perjuries, 1677, 29 Car. 2, c. 3, § 4 (Eng.).

on harm to a promisee, while debt focused on benefit to a promisor.¹⁴ Debt was the remedy for someone who had performed his half of a bargain—one who had given the other party a quid pro quo. So, if a smith promised to shoe a horse for an agreed price and either hurt the horse or failed altogether to do what he promised, assumpsit lay.¹⁵ If the smith did the work and had to sue for his pay, debt lay. Further, after *Slade's Case*,¹⁶ when debt migrated to “indebitatus assumpsit,” the ordinary form of assumpsit came to be called “special assumpsit” to distinguish it from indebitatus.

B. Applying the Debt/Special Assumpsit Distinction to Suretyship

Continuing with the example stated above, suppose that the horse belonged to a drayman who was engaged in carrying a farmer's goods to market, and further, that neither the drayman nor the farmer had ready cash. If the drayman asked the smith “please shoe my horse,” and the farmer said, “shoe the drayman's horse and I will pay you if he does not,” the drayman, having received the benefit of the quid pro quo, was liable for a debt, while the farmer could only be liable in special assumpsit.

Suppose, however, that the farmer asked the blacksmith to shoe the drayman's horse and said, “I will pay for it.” Now, who has received the quid pro quo? The drayman got the benefit of having his horse shod, but the farmer got the indirect benefit of getting his goods to market. In addition, the only express promise to pay was made by the farmer. No common law lawyer would suggest that both were severally liable for the debt. By fundamental dogma, a single quid pro quo could only produce a single debt; two debts could not arise from the blacksmith's work.¹⁷ Although the early common law had trouble envisioning an indirect quid pro quo, it came to be firmly settled that anything that would be a sufficient quid pro quo to establish a

¹⁴ See 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 1.6 (3d ed. 2004).

¹⁵ WILLIAM F. WALSH, HISTORY OF ANGLO AMERICAN LAW § 179 (2d ed. 1932).

¹⁶ 76 Eng. Rep. 1074 (K.B. 1602); see also 1 FARNSWORTH, *supra* note 14, § 1.6. Plaintiffs favored assumpsit because the facts were tried to a jury; in actions in debt, the defendant could rely on wager of law. See 1 FARNSWORTH, *supra* note 14, § 1.6.

¹⁷ See *Marriot v. Lister*, 95 Eng. Rep. 731, 732 (K.B. 1762).

debt,¹⁸ if done for a person himself, would suffice if done for another at his request. So a father became indebted for goods supplied to his daughter at his request,¹⁹ and likewise, a mistress for a gown made for a servant.²⁰

After making the concession that debt could arise in the manner stated above, the courts drew a strict line. If the third party, such as the drayman, who got the direct benefit of the quid pro quo, incurred express or implied liability for it, he was deemed the debtor, notwithstanding the farmer's promise to pay for it. This was thought a necessary corollary of the rule that only a single debt could arise from a single quid pro quo. If the benefited party became a debtor, the farmer's promise was necessarily collateral to the debt and actionable only in special assumpsit.²¹ This rule was manifest in old strict pleading cases. If a declaration in debt alleged that a father promised that, if the plaintiff would lend his son money, he would repay it, the declaration was held bad: the allegation that the plaintiff "loaned" money to the son entailed the conclusion that the son borrowed it and was liable for repayment. The son being indebted to the lender, the father could only be collaterally liable in special assumpsit.²² To uphold a declaration in indebitatus, the plaintiff should have declared that he loaned the money to the father and, at his direction, "paid it" to the son.²³ What fun it must have been to be a lawyer in those days and bandy the quillits and quiddits of the common law!

Prior to the enactment of the Statute of Frauds in 1677, the fine distinction illustrated by the case of the loan to the son only involved skillful pleading and persuasive testimony in court. After that time, a line was marked between facts that were actionable based on oral evidence, and facts that required written evidence to be actionable. Modern cases where a plaintiff provided goods or services to one based on the oral promise of

¹⁸ Not everything done at a person's request qualified as a "quid pro quo." For example, passive forbearance from prosecuting a debtor, even if done at a third party's request, would not create a new debt. See Hening, *supra* note 6, at 617.

¹⁹ *Stonehouse v. Bodvil*, 83 Eng. Rep. 1041 (K.B. 1663).

²⁰ *Lady Shandois v. Simson*, 78 Eng. Rep. 1104 (K.B. 1601); see JAMES BARR AMES, LECTURES ON LEGAL HISTORY AND MISCELLANEOUS LEGAL ESSAYS 94 (1913).

²¹ A surety could not be liable in debt or indebitatus assumpsit. *Quin v. Hanford*, 1 Hill 82 (N.Y. Sup. Ct. 1841).

²² *Marriot*, 95 Eng. Rep. at 731.

²³ *Butcher v. Andrews*, 91 Eng. Rep. 611 (K.B. 1698).

another are too numerous to canvass individually; there is no difference between New York and Massachusetts law on this point: S's promise lies outside the statute only if he was the sole obligor.²⁴ There are cases that stretch the evidence to find that credit was extended solely to S if the merits are otherwise with the plaintiff.²⁵ A look at one well-known case from Vermont will suffice to show how fact-sensitive the issue often was. In *Lawrence v. Anderson*,²⁶ plaintiff physician provided emergency medical care for the defendant's father, who had been severely injured in an accident at a place called (of all things) "Williston Road." A witness testified that the victim's daughter, who was at the scene when plaintiff arrived, told him, "I want my father taken care of...I will pay for it." The Court reasoned that if the plaintiff had relied solely on the daughter's promise in treating the father, she would have been liable as a principal debtor. But there was uncontradicted evidence that the plaintiff chose to give credit to the father, and after his death, sent bills to his estate before suing the daughter. The Court sustained a directed verdict for the defendant, holding that the plaintiff had a perfect right to look to his patient for payment, but having done so, the father became the debtor primarily liable and the daughter's obligation was necessarily collateral and unenforceable without a writing.²⁷

If the daughter's statement to the physician is read narrowly, she only offered to be a primary obligor and never agreed to be collaterally responsible. If so, in choosing to extend credit to the father, the plaintiff simply failed to accept the

²⁴ Typical instances in New York are: *Cowdin v. Gottgetreu*, 55 N.Y. 650 (1873); *Rogers v. Kneeland*, 13 Wend. 114 (N.Y. 1834) (dictum); *Chase v. Day*, 17 Johns. 114 (N.Y. Sup. Ct. 1819); *Mechanics & Traders' Bank v. Stettheimer*, 116 A.D. 198, 101 N.Y.S. 513 (1st Dep't 1906); *Fitzgerald v. Tiffany*, 9 Misc. 408, 30 N.Y.S. 195 (N.Y. Buffalo Super. Ct. Gen. T. 1894). In Massachusetts, *Irving Tanning Co. v. Shir*, 3 N.E.2d 841 (Mass. 1936); *Hammond Coal Co. v. Lewis*, 143 N.E. 309 (Mass. 1924); *Bugbee v. Kendricken*, 130 Mass. 437 (1881); *Swift v. Pierce*, 95 Mass. (13 Allen) 136 (1866); *Stone v. Walker*, 79 Mass. (13 Gray) 613 (1859); *Cahill v. Bigelow*, 35 Mass. (18 Pick.) 369 (1836); *Sudbury Pines Nursing Home v. Murphy*, No. 9050, 1990 WL 254932 (Mass. App. Div. 1990) (holding as collateral a son's oral promise to pay for mother's nursing home care).

²⁵ See *Barrett v. McHugh*, 128 Mass. 165 (1880) (finding sufficient evidence of an original promise, although C's witness testified that S promised to pay if D did not.).

²⁶ 184 A. 689 (Vt. 1936).

²⁷ *Id.* at 689-90.

daughter's offer, and there was no need to reach the statute of frauds issue.²⁸ In not deciding the case under the rules of offer and acceptance, the *Lawrence* court apparently read the daughter's offer liberally as embracing a willingness to be either a sole obligor or a collateral one, at the choice of the offeree; all she wanted was to get medical aid for her father. By his actions, the plaintiff accepted the daughter's responsibility as collateral and ran afoul of the statute of frauds. Note that the unconditional form of the daughter's promise was not conclusive.

Suppose the daughter made an unconditional promise to pay for medical services provided to the father, who at the same time orally promised the physician to guarantee the daughter's obligation. Would the father's promise be enforceable? In *Joan Briton, Inc. v. Streuber*,²⁹ plaintiff decorator was hired by a man to redo his fiancée's apartment. The fiancée allegedly orally assured the decorator that he would be paid. After paying \$45,000, the man found romance elsewhere, leaving over \$33,000 of unpaid bills. In the decorator's action against the former fiancée, the Appellate Division affirmed the trial court's denial of defendant's motion for summary judgment, holding that a claim in unjust enrichment was disclosed, and in dictum, that defendant's promise might be considered original under the statute of frauds.³⁰ The dissent invoked the *Restatement of Restitution* section 110 to the effect that where a plaintiff confers benefits on X pursuant to an express contract with Y, his only recourse is against Y, not X.³¹ The Court of Appeals affirmed without opinion.

²⁸ See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 19.4 (4th ed. 1998).

²⁹ 36 A.D.2d 464, 321 N.Y.S.2d 195 (1st Dep't 1971), *aff'd*, 30 N.Y.2d 551, 281 N.E.2d 555, 330 N.Y.S.2d 612 (1972).

³⁰ *Id.* at 465–66, 321 N.Y.S.2d at 196.

³¹ *Id.* at 466–67, 321 N.Y.S.2d at 197 (Steuer, J., dissenting); see *RESTATEMENT OF RESTITUTION* § 110 (1937); see also *Prestige Caterers v. Kaufman*, 290 A.D.2d 295, 736 N.Y.S.2d 335 (1st Dep't 2002) (holding that caterer had no claim against bride and groom where bride's father contracted with caterer for wedding reception and father's debt was discharged in bankruptcy). Thus, absent a promise, a subcontractor cannot recover in quasi contract from the owner for beneficial work done pursuant to a contract with the general contractor. *Brick Constr. Corp. v. CEI Dev. Corp.*, 710 N.E.2d 1006, 1008 (Mass. App. Ct. 1999); *Clark-Fitzpatrick, Inc. v. Long Island R.R.*, 70 N.Y.2d 382, 389, 516 N.E.2d 190, 193, 521 N.Y.S.2d 653, 656 (1987); *Woodruff v. Rochester & Pittsburgh R.R.*, 108 N.Y. 39, 45–47, 14 N.E. 832, 833–34 (1888); *Custer Builders, Inc. v. Quaker Heritage, Inc.*, 41 A.D.2d 448, 451, 344 N.Y.S.2d 606, 609 (3d Dep't 1973).

The decorator's claim seems within the line of cases holding restitution available for benefits conferred under an oral contract barred by the statute of frauds.³² The fact that defendant made an oral guarantee promise seems to take the case out of the *Restatement* rule section 110, which is based on the idea that the provider of the benefit looked solely to the express promisor. Finally, the case is in accord with the long line of suretyship cases that hold the direct recipient of a quid pro quo to be a debtor where the creditor relies to any degree upon that person's credit.³³ If so, under the facts, the man who hired the decorator was the surety and his fiancée the debtor.

Before leaving this branch of the Article, one complication must be noted. It is obvious that the clear-cut alternative making the promisor either a debtor or a guarantor rested on the rule that a single quid pro quo moving from the creditor could produce only one debt. This rule coexisted with what might be called a counter rule deriving from the distinction between joint and several obligations. If the recipient of the goods or service and the other promisor each said, "I will pay," two separate obligations arose and only one could be the debtor. But if both said, "we will pay," this was held to yield a single debt for which two people were jointly liable. The result was that both parties could be sued together as debtors and the promise of neither was collateral. From the earliest times, courts have held the statute inapplicable to joint obligors.³⁴ This is one legacy of legal history

³² *Twomey v. Crowley*, 137 Mass. 184, 185 (1884); *Riley v. Williams*, 123 Mass. 506, 509 (1878); *Wilson v. LaVan*, 22 N.Y.2d 131, 134–35, 238 N.E.2d 738, 740, 291 N.Y.S.2d 344, 347–48 (1968); *King v. Brown*, 2 Hill 485, 487 (N.Y. Sup. Ct. 1842); see also 2 GEORGE E. PALMER, *THE LAW OF RESTITUTION* § 6.1(b) (1978). *Contra* *Worlock Paving Corp. v. Camperlino*, 207 A.D.2d 975, 976, 617 N.Y.S.2d 87, 89 (4th Dep't 1994) (denying restitution to subcontractor). Restitution was also awarded in *U.S. East Telecomms., Inc. v. U.S. West Communications Servs., Inc.*, 38 F.3d 1289, 1298–99 (2d Cir. 1994). See also *Farash v. Sykes Datatronics, Inc.*, 59 N.Y.2d 500, 503, 452 N.E.2d 1245, 1246–47, 465 N.Y.S.2d 917, 918–19 (1983) (holding that plaintiff may recover for bargained-for efforts that placed him in a worse position without gain to defendant.); *supra* notes 29–33 and accompanying text.

³³ See *Nelson v. Boynton*, 44 Mass. (3 Met.) 396, 400–01 (1841); *Mallory v. Gillet*, 21 N.Y. 412, 419–22 (1860). This assumes that both promises were made at the same time, a fact not clear from the report. *But see* *Colbath v. Everett D. Clark Seed Co.*, 91 A. 1007, 1008–09 (Me. 1914) (applying the main purpose rule where goods ordered by D were shipped by C directly to S, who orally guaranteed D's debt).

³⁴ *Ward v. Hasbrouck*, 169 N.Y. 407, 418, 62 N.E. 434, 437 (1902) (semble); *Durham & Moulthrop v. Manrow*, 2 N.Y. 533, 544 (1849). Only strictly joint obligations were excluded from the statute. If the parties intended a joint and

that, to this writer, seems eminently dispensable.³⁵

II. THE ALLEGED SURETY GUARANTEES A PREEXISTING DEBT: BASIC EXCLUSIONS FROM THE STATUTE

A. *Need for a Principal Debtor*

There must exist a principal debtor in order for the secondary obligation known as suretyship to arise. This also applies to the cases discussed previously in Part I.³⁶ Whatever the form of the defendant's promise, if there is no principal debtor, the defendant's obligation is original and valid without a writing.³⁷ For example, the subject of the guarantee may be something for which no other person is liable. Where the sellers of stock "guaranteed" that the purchasers would receive dividends at the rate of 7% per annum, the promise was held original. Judge Andrews said, "The company was under no legal obligation to declare dividends to stockholders, and, least of all, to declare dividends of any particular amount."³⁸

Consider the case of *Mills v. Wyman*,³⁹ a casebook favorite on "past consideration." Plaintiff had cared for defendant's adult son who was ill for several weeks before he died. Defendant wrote a letter to plaintiff expressing his gratitude and promising

several duty, that statute applied to bar enforcing the promise of the party who did not receive the quid pro quo. RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 11(2)(a)(i) illus. 6 (1996); LAURENCE P. SIMPSON, HANDBOOK ON THE LAW OF SURETYSHIP 133 (1950). *Doodlesack v. Superfine Coal & Ice Corp.*, 198 N.E. 773 (Mass. 1935) involved both novation and joint liability. C was constructing a building for D. D transferred his sole proprietorship to a new entity composed of himself and S, who both orally promised C that if C released D from his former contract, then D and S would be jointly responsible. Held, valid. *Id.* at 774-76.

³⁵ See CORBIN & BROWN, *supra* note 9, § 15.16.

³⁶ RESTATEMENT (SECOND) OF CONTRACTS § 112 illus. 6 (1981) ("In consideration of the delivery of goods by C to D at S's request, S orally promises to pay the price of them. S's promise is not within the Statute of Frauds, since D is under no duty.").

³⁷ See *Blaine Personnel, Inc. v. Raymond Lee Org., Inc.*, 76 Misc. 2d 110, 114, 349 N.Y.S.2d 930, 934-35 (N.Y. Civ. Ct. N.Y. County 1973) (enforcing an employer's promise to pay employee's share of placement agency's fee where employee never agreed to pay a fee to the agency).

³⁸ *Kernochan v. Murray*, 111 N.Y. 306, 309, 18 N.E. 868, 870 (1888); *accord* *Duca v. Lord*, 117 N.E.2d 145, 146 (Mass. 1954); *Mease v. Wagner*, 12 S.C.L. (1 McCord) 395, 397 (1821).

³⁹ 20 Mass. (3 Pick.) 207 (1825); *accord* *Sharp v. Hoopes*, 64 A. 989 (N.J. 1906).

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to reimburse plaintiff's expenses.⁴⁰ The Court held that the promise was void for lack of consideration, emphasizing that acts performed previously by plaintiff, which in themselves imposed no duty on defendant,⁴¹ could not serve as consideration for his subsequent promise.⁴² But, suppose the son's sister originally induced the plaintiff to care for him by an oral assurance that she would pay if the father did not. Because the father's subsequent promise was legally void, the sister's promise would be held original, by default as it were, even though the form of the promise appears collateral.⁴³ As an example of deductive logic, this conclusion appears impeccable. When the purpose of the statute is consulted, it is more open to question. As Professor Simpson wrote, "The temptation to claim falsely that the defendant promised to pay, if the third person does not do the act specified, is even greater where the third person is under no enforceable obligation to do the act."⁴⁴

⁴⁰ Interestingly, if the son incurred a quasi contractual duty to reimburse plaintiff, the father would be a surety. *Schoenberg v. Rose*, 145 N.Y.S. 831, 834 (N.Y.C. Mun. Ct. N.Y. County 1914). His letter would have satisfied the statute, but the lack of consideration would nevertheless prevent a recovery; the statute is in addition to the substantive elements of a contract at common law, not in lieu of them.

⁴¹ If the events previous to a person's promise gave rise to a duty to pay, a subsequent express promise to pay is binding. RESTATEMENT (SECOND) OF CONTRACTS § 82(1). For example, in *Earl v. Peck*, 64 N.Y. 596 (1876), plaintiff, a housekeeper, held an unliquidated claim for services rendered. On his deathbed, her employer gave her a \$10,000 promissory note in payment. The note was enforced against the maker's estate, the Court refusing to inquire whether the amount was in excess of the value of the previous services. *Id.* at 599; *accord* *Schechner v. Zipser*, 89 N.Y.S.2d 354, 355 (1949), *aff'd*, 277 A.D. 843, 97 N.Y.S.2d 914 (1st Dep't 1950). *Contra* *Conant v. Evans*, 88 N.E. 438, 439 (Mass. 1909) (holding that a promise to pay a specific sum for a prior unliquidated obligation was not binding). However, if past services were rendered gratuitously, the subsequent promise to pay, while not one of suretyship, lacks consideration. *See* *Blanshan v. Russell*, 32 A.D. 103, 104, 52 N.Y.S. 963, 964 (3d Dep't 1898), *aff'd*, 161 N.Y. 629, 55 N.E. 1093 (1899).

⁴² *See* *Mills*, 20 Mass. (3 Pick.) at 210.

⁴³ RESTATEMENT (SECOND) OF CONTRACTS § 112 cmt. b, illus. 4; 4 CORBIN & BROWN, *supra* note 9, § 15.11. The hypothetical sister was not a debtor because she did not receive a quid pro quo. At common law, she would be sued in special assumpsit. Yet her promise is held to be original, not collateral. This unusual case shows that the application of the statute is not always congruent with the common law forms of action. *See generally* 4 CORBIN & BROWN, *supra* note 9, § 16.15.

⁴⁴ SIMPSON, *supra* note 34, at 127. Courts naturally confine this exclusion narrowly. If D's duty is merely voidable, or otherwise imperfect, S's promise is collateral. *See* *Webster v. Kowal*, 476 N.E.2d 205, 208 (Mass. 1985) (barring D's duty by the statute of limitations; S's promise is collateral).

B. Novation

The defendant (S) may agree with the creditor (C) that if C discharges the original debtor (D), S will take his place. This is called a novation, and it is everywhere settled that the statute does not apply.⁴⁵ This is not so much an exception to the statute as an exclusion from it based on pure logic: if the old debt is extinguished by the defendant's new promise, there is no longer a principal debt to which the new promise can be collateral. The logic behind the novation cases has much in common with the logic behind the cases in Part I: no principal debtor, no surety. However, a different policy consideration arises here. An unscrupulous creditor may be tempted to perjure himself into the novation exclusion and inflict forfeiture upon an innocent defendant who had no benefit from either the debtor or the creditor.⁴⁶ In this respect, the issue is similar to the cases in Part I above. If courts are willing to uphold an oral promise of payment where goods are delivered to another as long as the other incurs no responsibility on the facts of the case, then it comes as no surprise that they enforce a subsequent promise to pay if the jury finds that a preexisting original obligation was extinguished.⁴⁷ Both situations are pregnant with the mischief the statute was intended to suppress, yet it is absolutely settled that the statute does not apply.⁴⁸ It must surprise a layperson, unschooled in the niceties of the law, that release of an insolvent, worthless debtor will render S's oral promise to pay the debt enforceable, while release of a valuable security, ample to satisfy

⁴⁵ See *Hill v. Grat*, 141 N.E. 593 (Mass. 1923); *Wood v. Corcoran*, 83 Mass. (1 Allen) 405 (1861); *Meriden Britannia Co. v. Zingsen*, 48 N.Y. 247, 250 (1872); *Watson v. Randall*, 20 Wend. 201, 204 (N.Y. Sup. Ct. 1838) (dictum).

⁴⁶ Compare *Berg v. Spitz*, 87 A.D. 602, 84 N.Y.S. 532, (2d Dep't 1903) (finding an indirect benefit to new obligor), with *Am. Wire & Steel Bed Co. v. Schultz*, 43 Misc. 637, 88 N.Y.S. 396 (Sup. Ct. App. T. 1st Dep't 1904) (holding there was no material benefit to new obligor, the mother of the old obligor). It seems that D's participation and consent is unnecessary. 4 CORBIN & BROWN, *supra* note 9, § 15.20; SIMPSON, *supra* note 34, at 127-28; 3 SAMUEL WILLISTON & WALTER H.E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 477 (3d ed. 1960).

⁴⁷ In *Fitzgerald v. Tiffany*, 30 N.Y.S. 195 (N.Y. Buffalo Super. Ct. Gen. T. 1894), C made a suit of clothes for D. When D then asked for credit, C refused to deliver the suit on D's credit. When D brought S, C asked, "Will you pay for these clothes?" S replied, "Certainly I will pay for them," whereupon C let D have the suit. The court found that C had released D and substituted S as debtor. *Id.* at 196. The similarity to the situation in Part I is apparent.

⁴⁸ E. ALLAN FARNSWORTH, CONTRACTS § 6.3 (4th ed. 2004).

the debt, will not.⁴⁹

Even where the new promisor receives some benefit, injustice may occur. As an example, consider one of the most prolific sources of litigation: the case of an owner, a general contractor who is under contract to build a house, and a subcontractor. Courts have differed over how to decide cases where the unpaid subcontractor claims that the owner orally promised to pay him. I will examine those cases later.⁵⁰ For now, I simply note that all of the technical difficulties disappear if the jury can be brought to believe the subcontractor's testimony that he gave up his claim on the general in exchange for the owner's promise to pay for everything.⁵¹ This may be another case where the policy behind the statute is sacrificed to formal logic.

III. THE ALLEGED SURETY GUARANTEES A PREEXISTING DEBT: CONSIDERATION MOVING FROM CREDITOR TO SURETY

A. *The Debt Payment Cases*

If S is the holder of D's note, he may transfer the note to C in payment of a debt he owes C. If the transfer is accompanied by S's oral guarantee that the note will be paid, the statute is held inapplicable. The note is accepted as conditional payment of either a preexisting debt of S to C,⁵² or one created on the spot by C giving S property as a quid pro quo.⁵³ For example, in *Cardell v. McNiel*,⁵⁴ S bought a horse from C and made part payment with a promissory note made by D. The Court enforced S's oral guarantee of the note, reasoning that as the note was given in payment of S's debt for the horse, his oral guarantee was

⁴⁹ See *Mallory v. Gillett*, 21 N.Y. 412, 416 (1860).

⁵⁰ See *infra* Part III.D.

⁵¹ This way around the statute has been perfected in Massachusetts. See *Slotnick v. Smith*, 147 N.E. 737, 738 (Mass. 1925) (providing scant evidence); *Pope & Cottle Co. v. Wheelwright*, 133 N.E. 106, 107 (Mass. 1921); *Jewett v. Warriner*, 129 N.E. 296, 297 (Mass. 1921); *McNulty v. Cruff*, 98 N.E. 512, 512 (Mass. 1912); *Griffin v. Cunningham*, 67 N.E. 660, 661–62 (Mass. 1903); *Eden v. Chaffee*, 35 N.E. 675, 675 (Mass. 1893); *Walker v. Penniman*, 74 Mass. (8 Gray) 233, 236 (1857) (finding an implied novation). The general's self-interest tempts him to back up the subcontractor's testimony. See *Anderson v. Davis*, 9 Vt. 136, 137–38 (1837).

⁵² See *Brown v. Curtiss*, 2 N.Y. 225, 229 (1849); *Johnson v. Gilbert*, 4 Hill 178, 179 (N.Y. Sup. Ct. 1843).

⁵³ *Bruce v. Burr*, 67 N.Y. 237, 242 (1876); *Cardell v. McNiel*, 21 N.Y. 336, 340 (1860); *Durham & Moulthrop v. Manrow*, 2 N.Y. 533, 540–41 (1849).

⁵⁴ 21 N.Y. 336 (1860).

essentially for his own debt.⁵⁵ There is no denying that S is a surety.⁵⁶ As between S and D, D ought to pay, and if S is forced to pay, he can subrogate to C's right against D; if D pays C, S's duty is discharged. But in relation to C, S is a debtor for the price of the horse, and the guaranteed note is only an indirect way of paying his own debt through the agency of another. This is a situation where the collateral form of S's promise ("I will pay if D does not") is not an accurate reflection of party intent. Indeed, the fact that D is legally bound on the note is not a material part of the exchange between S and C. The relation between S and C is the same as if S said, "I am going to ask my father to pay you for this, but I will pay you unless he pays first," with no pretense that the father is in any way obligated.

In holding S's promise original, courts often juxtapose a denial that it is collateral, as if it had to be either one or the other. In fact, it is both. An accurate statement of the law is that where performance of S's promise will satisfy a debt from S to C, the further fact that it is also collateral to D's debt does not implicate either the policy or the terms of the statute. In the language of the old common law, it is not a "special promise" to answer for D's debt.

In all of the early cases, the third-party note appears to have been taken by C as the equivalent of cash. Indeed, even without a guarantee, assuming it is received in conditional payment of S's debt to C, if the note is not paid C can proceed against S on the original debt or the original price of goods sold and delivered.⁵⁷ The cases, however, have not been limited to such situations. They have been extended to situations where the third-party note was not regarded as the equivalent of money, but as itself a commodity to be bought and sold for money. In *Milks v. Rich*,⁵⁸ the holder of a promissory note (S), made by a person named Marsh, sold it to C with an oral guarantee that it would be paid. The court cited several cases where the third-party note was

⁵⁵ *Id.* at 340.

⁵⁶ RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 1(c) cmt. i, illus. 15 (1996).

⁵⁷ *Tyler v. Stevens*, 11 Barb. 485, 487 (N.Y. Sup. Ct. 1851); *Monroe v. Hoff*, 5 Denio 360, 362–63 (N.Y. Sup. Ct. 1848); *Butler v. Haight*, 8 Wend. 535, 537 (N.Y. Sup. Ct. 1832). Where C accepted D's note as unconditional payment of S's debt, *Dows v. Swett*, 120 Mass. 322 (1876) held that S's oral guarantee fell within the statute—a very technical holding. *Id.* at 323.

⁵⁸ 80 N.Y. 269 (1880).

taken at its nominal value as payment of S's debt to C and holding the oral guarantee valid. The court said:

Here the money [paid by the plaintiff] was delivered to the defendant for his own benefit, and the Marsh note was delivered to and received by the plaintiff as a mode of paying the plaintiff for the money thus had. The defendant's promise may be regarded, in effect, not as a collateral promise to answer for the default of Marsh, but as a promise to pay the plaintiff for the money he had had, in case Marsh did not pay him, like the promise of one to pay his own debt, in case a third person did not pay it.⁵⁹

The court did not specify either the face amount of the note or what price the plaintiff paid for it. If C paid the face amount of the note, perhaps with a slight discount as a service charge, it might be rightly said that the guarantee was just an indirect way of paying S's own indebtedness for money advanced to him.⁶⁰ But, suppose the note was for \$500 and the buyer (C) paid the seller (S) \$300. Does this establish a \$500 "debt" of the defendant (S)?⁶¹ Without an endorsement, the economics of the transaction place the risk of nonpayment on the new holder (C); the only apparent reason for the steep discount is to compensate C for the risk that D may not pay.⁶² Enforcing an oral guarantee by the assignor (S) who did not receive an equivalent quid pro

⁵⁹ *Id.* at 272. Oral guarantees in connection with the sale of a third-party note were routinely enforced without discussion of possible disparity in value. *See, e.g.*, *Huntington v. Wellington*, 12 Mich. 10 (1863); *Brookline Nat'l Bank v. Moers*, 19 A.D. 155, 45 N.Y.S. 997 (1st Dep't 1897); *Wyman v. Goodrich*, 26 Wis. 21 (1870).

⁶⁰ Equivalence of values appears in *Booth v. Eighmie*, 60 N.Y. 238 (1875). C had a mortgage on D's land, in the form of a deed, to secure a debt of D. C released the lien, by conveying the land by deed to D, in exchange for a pledge of corporate bonds from S, coupled with S's oral promise to redeem the bonds at par value within one year. The Court enforced S's promise. *See id.* at 242.

⁶¹ This objection was influential in *Spicer v. Norton*, 13 Barb. 542, 549 (N.Y. Sup. Ct. 1852), which was presumably overruled by *Milks v. Rich*, 80 N.Y. 269.

⁶² Compare the sale of mortgaged property by a deed without warranties to a grantee who takes subject to the lien but does not assume its payment. If the amount of the mortgage is deducted from the price paid, it is presumed that the grantee is the principal debtor to the extent of the value of the land, and if compelled to pay to prevent foreclosure, has no recourse against the grantor. *See generally* *Johnson v. Zink*, 51 N.Y. 333, 336–37 (1873); GEORGE E. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES § 278 (2d ed. 1970). Contrariwise, if the amount of the encumbrance is not deducted and the grantee pays full market value. Here, if the grantee suffers foreclosure, she has recourse against the grantor. *See generally* *Ryer v. Gass*, 130 Mass. 227, 230–31 (1881); *Wadsworth v. Lyon*, 93 N.Y. 201, 214 (1883); WILLIAM F. WALSH, A TREATISE ON THE LAW OF MORTGAGES § 52 (1934).

quo entails the mischief that the statute was designed to suppress,⁶³ yet the law upholds the assignor's oral guarantee without qualification.⁶⁴

How the statute is implicated may be seen in the reverse of the situation under discussion. Ordinarily, the promise of an assignee of a debt is not collateral.⁶⁵ As Williston said, "The purchaser does not promise to pay the debt; he promises to pay a price for it; and it is contemplated that the claim shall continue in existence."⁶⁶ Corbin observed that the outward form of an assignment might be a camouflaged suretyship contract:

Suppose that a father, whose son is in default, goes to the creditor and asks for terms of settlement; whereupon the creditor says that he will sell the claim to the father for 50 cents on the dollar and the father promises to pay that sum. In such a case it is still a question of fact what the parties mean the transaction to be; but the inference is nearly irresistible that the father is promising to pay his son's debt and is not purchasing it. If that inference is drawn, the father's promise is within the statute.⁶⁷

Professional compensated sureties (S) routinely write performance bonds for owners (C) who are having construction work done by contractors (D). One does not see cases involving the statute of frauds in these situations, because the professional sureties always take care to contract in writing. But it is well understood that the statute would render an oral contract of S unenforceable. Nor would the bar of the statute be lifted by the fact that S's "main purpose" is purely its own business self-interest and that it receives a benefit in the form of a commission

⁶³ See 3 WILLISTON & JAEGER, *supra* note 46, § 473 (emphasizing this point); see also *Stratton v. Hill*, 134 Mass. 27 (1883) (holding that the statute applied where S, for a price of \$50, guaranteed the vendor's good title of a horse sold by D to C).

⁶⁴ RESTATEMENT (SECOND) OF CONTRACTS § 121 (1981); 4 CORBIN & BROWN, *supra* note 9, § 16.20 (reminding that other statutory writing requirements might apply).

⁶⁵ RESTATEMENT (SECOND) OF CONTRACTS § 122; RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 11(3)(f) (1996).

⁶⁶ 3 WILLISTON & JAEGER, *supra* note 46, § 480.

⁶⁷ 2 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 392, at 351 (1950); accord RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 11(2)(c); see also *Weisberg v. Breidbart*, 119 Misc. 400, 401-02, 196 N.Y.S. 680, 681-82 (Sup. Ct. App. T. 1st Dep't 1922) (holding that a purported assignment of D's debt held a disguised attempt to answer for it).

to pay for the risk of D's default.⁶⁸ The disparity between the commission and the face amount of S's guarantee is so great that no one can suggest that S's promise is in payment of a "debt" represented by the money paid as the commission. Of course the case of a note broker is different in that, in the words of *Milks v. Rich*, the amount the transferee pays may be "a promise to pay the plaintiff for the money he had had, in case Marsh did not pay him, like the promise of one to pay his own debt, in case a third person did not pay it."⁶⁹ But to the extent that the payment is diminished by the risk of D's default, the analogy of the compensated surety is at least relevant.

B. The Lien Cases

Suppose D is indebted to C, and the debt is secured by a lien on D's real or personal property. It was held in a famous early case that if C releases the lien in exchange for S's oral promise to pay the debt, the statute makes S's promise unenforceable. The Court emphasized the fact that while C's release of the lien benefited D, it did not benefit S.⁷⁰ This naturally leads to the next question: what if the lien is on property of which S is now the beneficial owner? In *Fish v. Thomas*,⁷¹ C had done work for D, who had a contract to build a boat for S. C had a possessory lien on the boat. S was anxious to get the boat profitably out to sea and orally promised C to pay D's debt if C would give S possession of the boat, which C did. In enforcing the oral promise, Chief Justice Shaw's opinion reasoned:

⁶⁸ See RESTATEMENT (SECOND) OF CONTRACTS § 116 cmt. c; RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 11(3)(c) cmt. m, illus. 21.

⁶⁹ *Milks v. Rich*, 80 N.Y. 269, 272 (1880). In *Wilson, Van Saun & Co. v. Hentges*, 12 N.W. 151 (Minn. 1882), S made C an exclusive distributor of a certain machine and assigned to C a contract by which D agreed to manufacture the machine. In making the assignment, S orally guaranteed C that D would perform. Held, valid. It appears to be presumed that for full consideration, the assignor is undertaking primary responsibility for providing the machines to its distributor through the agency of D, just as in *Cardell v. McNiel*, where the buyer of the horse was paying his own debt through the agency of the third-party note. Oral guarantees by an assignor to an assignee are recognized as valid in RESTATEMENT (SECOND) OF CONTRACTS § 121(1) cmt. a, and RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 11(3) cmt. q. (1996). *Accord* *Booth v. Eighmie*, 60 N.Y. 238, 241–42 (1875) (holding that assignor received full equivalent consideration for promise to redeem bonds at par value).

⁷⁰ See *Mallory v. Gillett*, 21 N.Y. 412, 432–33 (1860).

⁷¹ 71 Mass. (5 Gray) 45 (1855).

If it was not the defendant's own debt, capable of being enforced by a personal suit against him, it was a debt for which the defendant's property stood hypothecated; his obvious purpose was, to get a release of his own property without additional expense. It was a consideration moving directly from the plaintiffs to the defendant. It was not a promise to pay the debt of another, in the sense of the statute of frauds; it was a promise to pay a debt for which his property was responsible, and which was therefore his debt *sub modo*.⁷²

In another similar case, Chief Justice Shaw reasoned as follows: "In such cases, although the result is, that the payment of the debt of a third person is effected, it is so incidentally and indirectly, and the substance of the contract is the purchase, by the defendant of the plaintiff, of the lien, right, or benefit in question."⁷³

New York appears to be in accord with early Massachusetts law in this area in result, if not in rationale.⁷⁴ In *Prime v. Koehler*,⁷⁵ S owned land subject to a mortgage for which he was not personally responsible. One semiannual interest payment that accrued during S's tenure was unpaid, and the mortgagee (C) threatened to foreclose. S orally promised that if C would forbear, he would pay the next semiannual installment of interest as it came due, and also the one past due. C assented, but S never paid the interest. The court, in an opinion by Judge Andrews, held S's promise binding, reasoning that S "was enabled by virtue of the agreement to take and control the rents

⁷² *Id.* at 48; *accord* Griffin v. Derby, 5 Me. 476 (1829) (regarding conditional seller's relinquished right to repossess); Wills v. Brown, 118 Mass. 137 (1875) (regarding chattel mortgagee's promise to carrier to pay freight charge in order to obtain release of the goods); Landis v. Royer, 59 Pa. 95 (1868) (regarding materialman's lien on S's house).

⁷³ Curtis v. Brown, 59 Mass. (5 Cush.) 488, 492 (1850); *accord* Fears v. Story, 131 Mass. 47, 49 (1881).

⁷⁴ *See generally* Becker v. Torrance, 31 N.Y. 631 (1864); Fay v. Bell, Hill & Den. 251 (N.Y. Sup. Ct. 1843) (semble); Slingerland v. Morse, 7 Johns. 463 (N.Y. Sup. Ct. 1811) (regarding goods distrained by landlord); Biener Contracting Corp. v. Elberon Rest. Corp., 7 A.D.2d 391, 183 N.Y.S.2d 756 (1st Dep't 1959); Cox v. Halloran, 82 A.D. 639, 81 N.Y.S. 803 (2d Dep't 1903); Alley v. Turck, 8 A.D. 50, 40 N.Y.S. 433 (3d Dep't 1896); Cooper v. Kelly & Kelley, 164 N.Y.S. 828 (Sup. Ct. App. T. 1st Dep't 1917); Hudson Wrecking & Lumber Co. v. Aldrich, 94 Misc. 250, 157 N.Y.S. 1046 (Sup. Ct. App. T. 1st Dep't 1916) (dictum); Kleinman v. Auerbach, 82 Misc. 436, 143 N.Y.S. 1033 (Sup. Ct. App. T. 1st Dep't 1913) (regarding promise by mortgagee); Schnauffer v. Ahr, 53 Misc. 299, 103 N.Y.S. 195 (Sup. Ct. App. T 1907).

⁷⁵ 77 N.Y. 91 (1879).

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and profits of the land during the time specified therein, and the plaintiffs meanwhile forbore to enforce their rights as mortgagees.”⁷⁶ Judge Andrews concluded:

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.⁷⁷

It will be noted that the consideration was regarded by the court as the economic equivalent of S's undertaking⁷⁸ and that S's promise “to pay” was unconditional.⁷⁹ The passage quoted from Judge Andrews' opinion reflects at least a version of the main purpose rule. In contrast, Massachusetts pursued a version of the rule that was more favorable to those who sought to avoid the statute. There are cases in that commonwealth where owners of land subject to a mortgage, as in *Prime*,⁸⁰ orally promised the mortgagee that in exchange for forbearance for a time, they would personally pay the principal amount of the mortgage debt. These promises have been enforced, being made for the promisor's own benefit.⁸¹ In *Prime*, the benefit of C's forbearance

⁷⁶ *Id.* at 94.

⁷⁷ *Id.* at 94–95.

⁷⁸ In *Biener Contracting Corp. v. Elberon Rest. Corp.*, 7 A.D.2d 391, 183 N.Y.S.2d 756 (1st Dep't 1959), plaintiff (C) sold restaurant fixtures to D on credit, reserving a lien thereon. Upon D's default, S, who held a lien on other fixtures, told C that he wanted to take over the business and that if C would forbear foreclosing, he would pay what D owed C. S did take over the business and paid part of the debt, but failed to pay the rest. The court held that the “definite business benefit” made S “independently liable for the balance due on plaintiff's fixtures.” *Id.* at 393. If, when S took over D's business, he obligated himself to D to pay C, the promise would be valid under the principle that when a promise is the consideration or condition upon which a third party receives the debtor's property, the promisor thereby makes the debt his own, assuming an independent duty to pay, irrespective of the liability of the principal or original debtor. See *infra* note 172 and discussion *infra* Part IV.

⁷⁹ When Judge Andrews said that the owner's promise was “in form a promise to pay such debt,” he referred to the owner's unconditional promise to pay the mortgagor's debt; the owner did not promise to pay it if the mortgagor did not. *Prime*, 77 N.Y. at 94–95.

⁸⁰ *Id.* at 93.

⁸¹ See *Johnson v. Huffaker*, 162 P. 1150, 1152 (Kan. 1917); *Rainault v. Evarts*, 7 N.E.2d 145, 148 (Mass. 1937); *Kahn v. Waldman*, 186 N.E. 587, 588 (Mass. 1933) (promise by junior mortgagee to senior mortgagee); *Washington & Devonshire Realty Co. v. Lewis Diamond Co.*, 161 N.E. 883, 885 (Mass. 1928) (holding new

equated with the scope of S's promise—interest on the mortgage debt during that time—including the half-year prior to S's promise, during which S had the benefit of ownership.⁸² If the mortgagee in the Massachusetts cases had irrevocably released the mortgage lien in exchange for the owner's promise to pay the debt, the situation would be closer to *Fish v. Thomas* and *Prime*.⁸³ But the Massachusetts mortgage cases enforced an oral promise to pay the entire principal in exchange for brief forbearance. If a benefit disproportionately small in relation to the scope of S's promise is enough to avoid the statute, it may well be said that “[a] test as vague as the main purpose rule provides no forward step in certainty or predictability.”⁸⁴ Where the beneficial consideration is regarded by the parties as the equivalent of S's undertaking, it is more likely that S intended to assume the debt himself, regardless of any other person's liability. As said long ago by Judge Blackford:

There are cases, however, in which a new consideration passes, at the time of the promise, between the newly contracting parties, of such a character that it would support a promise to the plaintiff for the payment of the same sum of money, without reference to any debt from another.⁸⁵

Where a court can confidently regard S as a principal debtor, the policy of the statute is preserved, and S is held not to have made “a special promise” to answer for the debt of another.

tenant to oral promise to pay overdue rent of previous tenant—main purpose rule applied); *Manning v. Anthony*, 94 N.E. 466 (Mass. 1911) (regarding a promise by owner to mortgagee).

⁸² *Prime*, 77 N.Y. at 93–94.

⁸³ See *Fish v. Thomas*, 71 Mass. (5 Gray) 45, 46 (1855); *Prime*, 77 N.Y. at 93.

For example, where S, having bought a stock of goods valued at \$16,000 from P, upon which C has a mortgage lien to secure a \$6,000 debt due from P, orally promises C to pay the debt in consideration of C's surrender of lien on the goods, upon such surrender the value of S's ownership has increased from \$10,000 to \$16,000. In other words, as beneficial consideration for his oral promise to pay P's debt of \$6,000, S has received \$6,000 of value from C, for which S has given C his obligation to pay an equal amount. There can be no doubt that any court would hold S's promise outside the statute.

SIMPSON, *supra* note 34, at 149.

⁸⁴ SIMPSON, *supra* note 34, at 139. Cf. *Pyburn v. Fishery Prods., Inc.*, 426 N.E.2d 1169, 1171 (Mass. App. Ct. 1981) (using essential object rule to uphold general contractor's promise to pay the debt of another subcontractor); *Young v. French*, 35 Wis. 111, 116–17 (1874) (using leading object rule to uphold oral promise by agent to pay one who had a lien on logs a debt of \$285 to release lien to facilitate sale of logs for which agent would receive a commission of \$15).

⁸⁵ *Chandler v. Davidson*, 6 Blackf. 367, 368–69 (Ind. 1843).

Thus, if New York can be said to have some version of the main purpose rule, it is a strict one.

In the lien cases, there is authority that the intent of the parties is critical. If we may assume that party intent is accurately reflected in the form of the promise, then the form is critical. If S says, “release the lien on my property and I will pay,” the oral promise is binding even though his payment will satisfy D’s debt to C. If S says, “release the lien and I will guarantee that you will be paid,” the oral promise is bad.⁸⁶ Why is this? Recall the debt payment cases discussed in Part III.A above. If C sells S a horse and S pays with D’s promissory note, his oral promise is binding, even if he says, “I will pay if D does not.”⁸⁷

In the horse sale case, S is the original creditor of D and assigns the debt to C at face value to pay for goods bought of C. The collateral form of S’s promise does not detract from the fact that S is personally liable for the price of the horse, including the portion represented by D’s note. In *Fish*, D was originally indebted to C.⁸⁸ If S makes an absolute promise to pay D’s debt to relieve his property from an encumbrance, he is in effect buying an assignment of the debt for full value.⁸⁹ It is like a reverse novation. In an ordinary novation, C remains the same and the debtors are switched; in an assignment, D remains the same and the creditors are switched. In either case the original debtor-creditor relation is extinguished and a new one substituted, leaving no debt to C to which S’s promise could be collateral.⁹⁰ From then on, D owes S, not C, and it is perfectly

⁸⁶ See *Warner v. Willoughby*, 22 A. 1014, 1015 (Conn. 1891); *Lampson v. Estate of Hobart*, 28 Vt. 697, 701 (1856). 1 SAMUEL WILLISTON, *THE LAW OF CONTRACTS* § 473 (1920) (“It is probable also that most jurisdictions would hold that any promise, where the consideration is of this sort, falls within the statute if it is in terms conditional on a prior default by the original debtor.”).

⁸⁷ *Cardell v. McNiel*, 21 N.Y. 336, 339 (1860).

⁸⁸ 71 Mass. (5 Gray) at 48.

⁸⁹ See *Lazarus v. Rosenberg*, 70 A.D. 105, 107, 75 N.Y.S. 11, 13 (1st Dep’t 1902); 1 GEORGE W. BRANDT, *THE LAW OF SURETYSHIP & GUARANTY* § 76 (3d ed. 1905). It is not a reasonable inference that S intended to pay C the full amount of the debt without becoming the owner of it. See *RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES* § 5.4(b) (1997). Nor is it reasonable to suppose that S purchased the lien independently of the debt, leaving C free to collect both the price from S and the debt from D. Without an assignment of the debt, the purchase of a lien that secures it is a nullity. See *Merritt v. Bartholick*, 36 N.Y. 44, 45 (1867). Upon S’s purchase of the debt, the lien merges to the benefit of S. WALSH, *supra* note 62, § 44.

⁹⁰ See *Wilson, Van Saun & Co. v. Hentges*, 12 N.W. 151, 152 (Minn. 1882); First

accurate to say that S's promise is to pay his own debt for what he bought from C.⁹¹ On the other hand, if S's promise is conditional on D's failure to pay C, then C remains the creditor, and D should pay C. If D defaults, S's only recourse would be to subrogate to C's rights against D.⁹² It is as if S said to C, "I will swap my personal security for your property security." As between D and S, D ought to pay. As between C and S, D ought to pay. No matter from whose perspective S's position is viewed, D remains the principal debtor; S is collaterally liable, and subject to the statute.⁹³

C. Some Leading New York Cases

In the debt payment cases discussed in Part III.A and the lien cases in Part III.B, the consideration for S's promise moved from C to S. There have been several notable cases from New York involving various kinds of consideration moving from C to S and various forms of S's return promise. It is interesting to compare cases from the jurisdiction credited with originating the leading object rule with cases from the jurisdiction said to reject the rule.

Nat'l Bank of Cranberry v. Dohm, 19 A. 258, 259 (N.J. 1890); BRANDT, *supra* note 89, § 77. Note that no type of novation occurs in the case where the buyer of a horse pays with an orally guaranteed third-party note. The transaction results in a debt from D to C to which S's promise is collateral.

⁹¹ Anstey v. Marden, 132 Eng. Rep. 406, 409 (C.P. 1804); RESTATEMENT (SECOND) OF CONTRACTS § 122 (1981); RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 11 cmt. f (1996); *see also* Chester Nat'l Bank v. Rondout Marine, Inc., 46 A.D.2d 985, 986, 362 N.Y.S.2d 268, 271 (3d Dep't 1974). When a claim is assigned, "[t]he purchaser does not promise to pay the debt; he promises to pay a price for it; and it is contemplated that the claim shall continue in existence." 9 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 22:32 (4th ed. 1999).

⁹² *See* Mathews v. Aikin, 1 N.Y. 595, 604-05 (1848); SIMPSON, *supra* note 34, § 47. An ostensible purchase of a debt is within the statute if the purchaser's oral promise is conditioned on the debtor's failure to pay. RESTATEMENT (SECOND) OF CONTRACTS § 122 cmt. b; RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 11(2)(c) illus. 10. (1996).

⁹³ RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 11(2)(c) indicates that the statute applies if the assignee's promise to pay is conditional on the debtor's default. In a release of lien case, a loose version of the main purpose rule would enforce S's promise even if it is collateral. *See* Colbath v. Everett D. Clark Seed Co., 91 A. 1007, 1009 (Me. 1914) (holding D's oral assurance as binding under the main purpose exception, where D offered to buy goods from C to be shipped directly to D's customer, S).

1. *Mallory v. Gillett*

In *Mallory v. Gillett*,⁹⁴ C released a lien on a boat belonging to D in exchange for S's oral promise to pay the debt at a certain future time. The court held that, as S had no interest in the boat and received no benefit from release of the lien, his promise to pay D's debt was barred by the statute.⁹⁵ The long opinion emphasized lack of benefit to S to the neglect of the intent or form of S's promise.⁹⁶ The court implied that the result would have been different if S owned the property subject to the lien. The discussion in Part III.B indicates that such an inference would have been justified, provided that S's promise was unconditional, as it appears to have been in *Mallory*.

2. *Brown v. Weber*

Mallory's failure to pay attention to the kind of promise made by S was corrected in *Brown v. Weber*,⁹⁷ a case that involved the familiar trio of property owner (S), general contractor (D), and subcontractor (C). C was fearful that D might not pay. S assured C that if he would go on and finish work under the contract "he would see that plaintiff got his pay."⁹⁸ The court conceded that it would have been competent for C and S to have entered into a new contract by which C would be working for S. This would be completely separate and distinct from the

⁹⁴ 21 N.Y. 412 (1860).

⁹⁵ *Id.* at 413–14; *accord* *Nelson v. Boynton*, 44 Mass. (3 Met.) 396, 400 (1841). The result in *Mallory* was anticipated in *Larson v. Wyman*, 14 Wend. 246, 248 (N.Y. Sup. Ct. 1835).

⁹⁶ *Mallory*, 21 N.Y. at 423. The court's preoccupation with lack of benefit to S was in reaction to an unfortunate statement of (then) Chief Justice Kent in *Leonard v. Vredenburg*, 8 Johns. 29 (N.Y. Sup. Ct. 1811), in which he attempted a three-part classification of cases presenting the statute of frauds issue. The third class, to which the statute did not apply, was "when the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties." *Leonard*, 8 Johns. at 39. The statement was unnecessary to the decision in the case, which was that (1) where the guarantee is made in the same transaction that gives rise to the principal debt, the same consideration that supports the debt also supports the guarantee; and (2) the writing signed by the defendant satisfied the statute. Thus, not only was the quoted statement dictum, it was erroneous dictum. As frequently pointed out, "benefit or harm" covers the entire gamut of possible considerations, so the statute would only apply where the promise would be void without it. *See* *Wilson, Van Saun & Co. v. Hentges*, 12 N.W. 151, 152 (Minn. 1882); *Maule v. Bucknell*, 50 Pa. 39, 53–54 (1865).

⁹⁷ 38 N.Y. 187 (1868).

⁹⁸ *Id.* at 188.

old D/C contract, which would be practically abandoned, if not formally rescinded. But in such a new contract, one would expect to see S promise to pay C himself, without any reference to D. It would be totally inconsistent with such a new contract for S to promise to pay if D did not, or to guarantee D's payment. At least as to work done by C after S's promise, we may profitably compare the cases in Part I, where S's oral promise is made in the same transaction as that of D. If C gives any credit to D, S's promise is not original. On the facts in *Brown*, the trial referee had found that S's promise was, in intent and form, a promise to guarantee D's obligation to C and that all of C's work was done pursuant to his contract with D, to whom C looked for payment in the first instance. Thus, S's promise was held collateral and void under the statute. The court quoted from the statute and said:

The language shows that the test to be applied to every case is, whether the party sought to be charged is the principal debtor, primarily liable, or whether he is only liable in case of the default of a third person; in other words, whether he is the debtor, or whether his relation to the creditor is that of surety to him for the performance, by some other person, of the obligation of the latter to the creditor. In the former case the promise is not within the statute, because the party promising is not undertaking for the performance by another, of some duty owing by the other, but for the performance of his own obligation; but, in the latter case, it is within the statute, because the liability is contingent upon, whether another performs his obligation, for whose performance the party sought to be charged has undertaken.⁹⁹

3. *White v. Rintoul*

It is fair to say that *White v. Rintoul*¹⁰⁰ is the leading case in New York, just as *Nelson v. Boynton*¹⁰¹ is in Massachusetts. The facts in *White* were open and shut. S had no beneficial interest to

⁹⁹ *Id.* at 189–90. The position taken in *Brown* had been anticipated in *Payne v. Baldwin*, 14 Barb. 570, 571–72 (N.Y. Sup. Ct. Gen. T. N.Y. County 1853). *Accord* *Collins v. Abrams*, 176 N.E. 814 (Mass. 1931); *Gill v. Herrick*, 111 Mass. 501 (1873). It seems that the distinction drawn in the quoted passage fails to account for cases such as *Cardell v. McNiell*, *supra* note 54, where S is a debtor to C despite the conditional form of his promise.

¹⁰⁰ 108 N.Y. 222, 15 N.E. 318 (1888).

¹⁰¹ 44 Mass. (3 Met.) 396 (1841).

promote and the case could have been decided summarily with a cite to *Mallory v. Gillett*.¹⁰² Instead, Judge Finch undertook a review of a few leading cases, chiefly *Mallory* and *Brown*, and concluded with a famous synthesis:

[T]hat 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.¹⁰³

This compendious summary is ambiguous, perhaps designedly so. The word “such” dangles in the second clause of the sentence. What is its proper antecedent? Is it the consideration that founds the independent duty of payment? Or is it the promise? For example, in *Cardell v. McNiel*, the consideration (sale of a horse) was such as to establish conclusively S’s status as independently indebted to C, even though his promise was collateral.¹⁰⁴ On the other hand, in the lien cases discussed above,¹⁰⁵ the same consideration will or will not make S independently indebted to C depending on the intent and form of S’s promise. The cases thus show that, depending on the context, both the consideration and S’s promise are essential variables. The independent duty of payment arises as a result of the relation between the consideration and the promise.

4. *Witschard v. A. Brody & Sons*

In *Witschard v. A. Brody & Sons*,¹⁰⁶ an owner (S) orally promised a lumber supplier (C) to a defaulting building contractor (D) that if C would continue deliveries, he would “guarantee payment” of past due and future debts. The court

¹⁰² 21 N.Y. 412, 413 (1860). In *White*, S was the father of one partner in a firm whose notes were held by C. The firm was also indebted to S, who was secured by mortgages. S orally promised C to pay the firm’s notes in exchange for forbearance. In the court’s view, S was fully protected and had nothing to gain by C’s forbearance.

¹⁰³ *White*, 108 N.Y. at 227, 15 N.E. at 320.

¹⁰⁴ 21 N.Y. 339, 339 (1860). Perhaps it is not fair to use this case to compare with Judge Finch’s statement. The debt in *Cardell* was antecedently contracted, but not with C; it was originally owned by S. Nevertheless, the case fits the summary. How the summary applies when the consideration moves from D to S will be discussed *infra* Part IV.

¹⁰⁵ See *supra* Part III.B.

¹⁰⁶ 257 N.Y. 97, 98–99, 177 N.E. 385, 385 (1931). This case is addressed out of chronological order to better appreciate the doctrinal development.

held the promise void under the statute. As between C and S, the form of the promise was alone sufficient to show that S's responsibility was collateral to that of D.¹⁰⁷ Benefit to S will not avoid the statute if S's manifested intent is to be collaterally responsible for a debtor to whom the creditor continues to look for payment.¹⁰⁸ *Witschard* thus returned to the gospel as handed down in *Brown v. Weber*,¹⁰⁹ though without ever citing that case. In doing so, it necessarily overruled several lower court cases that had been recreant to the strict teaching of *Brown*.¹¹⁰ Where the beneficial consideration moves from C to S, the form of S's promise may or may not be conclusive on what was the shared intent of the parties.¹¹¹ In *Witschard*, the form of S's promise

¹⁰⁷ *Accord* Gill v. Herrick, 111 Mass. 501 (1873); Payne v. Baldwin, 14 Barb. 570 (N.Y. Sup. Ct. Gen. T. N.Y. County 1853).

¹⁰⁸ The court introduced a misleading complication by quoting 2 SAMUEL WILLISTON, CONTRACTS § 475 (rev. ed. 1924):

"The true test of the validity of a new oral promise should be: Is the new promisor a surety?" If, as between the promisor and the original debtor, the promisor is bound to pay, the debt is his own and not within the statute.

"Contrariwise, if as between them the original debtor still ought to pay, the debt cannot be the promisor's own and he is undertaking to answer for the debt of another."

Witschard, 257 N.Y. at 99, 177 N.E. at 385. This statement is harmless on the facts of *Witschard*, but is misleading if applied to the facts of *Fish v. Thomas*, 71 Mass. (5 Gray) 45 (1855). In that case, as between S and D, the primary duty to pay remains on D, the original debtor. Yet the dealing between C and S (release of a lien on S's boat) constituted S as a principal debtor, liable independently of D. *Fish*, 71 Mass. (5 Gray) at 48.

¹⁰⁹ 38 N.Y. 187 (1868).

¹¹⁰ Some appellate cases, mostly from the First Department, had allowed subcontractors and suppliers to recover from the benefited owner based on a collateral promise. *See, e.g.*, Voska, Foelsh & Sidlo, Inc. v. Ruland, 172 A.D. 616, 620, 158 N.Y.S. 780, 783 (1st Dep't 1916) (enforcing collateral promise as to work done thereafter); Block v. Galitzka, 114 A.D. 799, 800, 100 N.Y.S. 173, 173-74 (2d Dep't 1906); W. T. Merserau Co. v. Washburn, 6 A.D. 404, 411, 39 N.Y.S. 664, 668-69 (1st Dep't 1896); Sinkovitz v. Applebaum, 56 Misc. 527, 528, 107 N.Y.S. 122, 123 (Sup. Ct. App. T. 1907); Lachman v. Irish, 72 Hun 491, 494, 25 N.Y.S. 193, 194-95 (Sup. Ct. Gen. T. 5th Dep't 1893). Other departments of the Appellate Division had followed *Brown* in holding collateral promises by owners unenforceable. *McRoberts v. Mathews*, 18 A.D. 624, 624, 45 N.Y.S. 431, 431-32 (2d Dep't 1897); *Smith v. Burditt*, 107 A.D. 628, 629, 95 N.Y.S. 188, 190 (3d Dep't 1905); *Snyder v. Monroe Eckstein Brewing Co.*, 107 A.D. 328, 330, 95 N.Y.S. 144, 146 (2d Dep't 1905), *aff'd*, 188 N.Y. 576, 80 N.E. 1120 (1907); *Almond v. Hart*, 46 A.D. 431, 433, 61 N.Y.S. 849, 850 (4th Dep't 1899) (finding original promise on doputful evidence); *Desmond v. Schenck*, 36 A.D. 317, 318, 55 N.Y.S. 251, 252 (2d Dep't 1899) (straining to find unconditional promise);

¹¹¹ On sympathetic facts, courts occasionally tolerate jury findings of new original contracts where the language of S's promise is, at best, ambiguous. *See, e.g.*,

disclosed an undertaking collateral to that of D, an inference corroborated by C's conduct.¹¹² It is also unsafe to draw an easy conclusion where S's promise is absolute in form; the nature of the consideration¹¹³ and the conduct of the parties¹¹⁴ may show that S's undertaking does not bring him "under an independent duty of payment irrespective of the liability of the principal debtor."

5. *Richardson Press v. Albright*

*Richardson Press v. Albright*¹¹⁵ illustrates the inconclusive character of a promise absolute in form. A corporation that published a periodical was indebted to the plaintiff who printed it. Defendant, a large shareholder, promised the printer "to pay" part of the debt and advance cash to pay for future work if plaintiff would keep doing the printing work. Plaintiff continued its work and later attempted to collect from the corporation, took some security from the corporation, and "turned to defendant only when the resources of the original debtor had been completely exhausted."¹¹⁶ The court held that despite the absolute form of the promise, plaintiff's actions showed that it never entered into a new contract with defendant independent of the original debtor. It continued to perform its contract with the corporation, regarded it as a debtor, and treated defendant's promise as collateral.¹¹⁷ The court concluded:

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

Greene v. Burton, 10 A. 575, 576-77 (Vt. 1887).

¹¹² *Accord* Fitzsimmons v. Int'l Ass'n of Machinists, 7 A.2d 448, 453-54 (Conn. 1939). In *Cardell v. McNeil*, *supra* note 54, S's duty to pay the price of a horse purchased from C made him a principal debtor despite the collateral form of his oral promise to guarantee payment of D's note.

¹¹³ The most obvious case is where S says to C, "forbear from suing D for one month and I will pay the debt." If S gets no benefit, the statute applies. *See* Kahn v. Naitove, 171 Misc. 504, 508, 12 N.Y.S.2d 144, 147 (Sup. Ct. Kings County 1939); *Gibbs v. Holden*, 137 Misc. 480, 483, 244 N.Y.S. 10, 14 (Sup. Ct. Tompkins County 1930), *aff'd*, 237 A.D. 862, 261 N.Y.S. 970 (3d Dep't 1932). This point was the focus of *Mallory v. Gillet*, *supra* note 94. *See also* SIMPSON, *supra* note 34, at 124-25.

¹¹⁴ *See* Lawrence v. Anderson, 184 A. 689, 690 (Vt. 1936).

¹¹⁵ 224 N.Y. 497, 121 N.E. 362 (1918).

¹¹⁶ *Id.* at 502, 121 N.E. at 364.

¹¹⁷ *See also* Lawrence, 184 A. at 690.

debtor primarily liable.¹¹⁸

Operating under the main purpose rule, on similar facts, the Massachusetts court reached the same conclusion.¹¹⁹

On the facts of the case before it in *Richardson Press*, the court's reference to "the intention of the parties" applies to C and S. The only relevant transaction was between C and S and the consideration that allegedly benefited S moved from C.¹²⁰ D's intention would not matter. In Part IV, I will examine other cases where S took D's debt upon himself for a consideration moving from D to S. In such cases, it seems obvious that "the intention of the parties" would refer to D and S. C's intention would not matter.

D. Building Contracts

The suretyship problems presented by dealings among landowners (S), general contractors (D), and suppliers or subcontractors (C) have generated much litigation, of which *Brown*¹²¹ and *Witschard*¹²² are but two instances. In those two cases, C lost because the evidence showed that S and C intended that C should continue to work for D, that D remained liable for all of C's work, and that S was only secondarily liable, both for work done before his promise and that done afterward.¹²³ It may not be possible to address the variety of problems, but let us take as an illustration a case where D has a contract to build a house for S and C has a contract to sell lumber to D. Upon D's failure

¹¹⁸ *Richardson Press*, 224 N.Y. at 502, 121 N.E. at 364. *Bulkley v. Shaw*, 289 N.Y. 133, 44 N.E.2d 398 (1942) was similar to *Richardson Press*, except that the benefit to the promisors was greater in that they were the sole shareholders in the D corporation. The intent that D was to continue as the debtor of first resort was even clearer than in *Richardson Press* and the court held that the degree of benefit is irrelevant if S does not manifest an intent to pay without regard to D. *Bulkley*, 289 N.Y. at 139, 44 N.E.2d at 401.

¹¹⁹ *Carleton v. Floyd, Rounds & Co.*, 78 N.E. 126, 127 (Mass. 1906).

¹²⁰ See Francis X. Conway, *Subsequent Oral Promise to Perform Another's Duty and the New York Statute of Frauds*, 22 FORDHAM L. REV. 119, 138-39 (1953). This writer cannot agree with the statement that the court's reference was to the debtor and the surety. CALAMARI & PERILLO, *supra* note 28, at 753. Professor Perillo attributes to the court the view favored by 2 WILLISTON, *supra* note 108, § 475, but the *Richardson Press* court did not rely on Williston (the first edition of whose treatise was not published until 1920, two years after *Richardson Press* was decided).

¹²¹ 38 N.Y. 187 (1868).

¹²² 257 N.Y. 97, 177 N.E. 385 (1931).

¹²³ *Id.* at 99, 177 N.E. at 385-86; *Brown*, 38 N.Y. at 191-92.

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to pay for lumber delivered, C suspends performance,¹²⁴ then has a conversation with S, who is anxious to have work on his building resume. Three typical possibilities suggest themselves:

- (i) S orally promises C to guarantee D's debt to C for lumber previously delivered and for future deliveries.
- (ii) S orally promises C absolutely to pay C for future deliveries of lumber.
- (iii) S orally promises C absolutely to pay C for lumber previously delivered as well as future deliveries.

The promise described in (i) represents the exact issue presented in *Brown and Witschard*. There has been no novation, and C and S understand that C will continue to perform his contract with D, backed up by S's guarantee. S's guarantee is obnoxious to the statute.¹²⁵ In New York, it does not matter what S's "main purpose" might have been. Unless S and C intend to make a new contract by which S becomes indebted to C independently of D's debt to C, the oral promise is void.¹²⁶ This was formerly the position in Massachusetts on these facts.¹²⁷ Whatever the main purpose rule meant in general, in this context, the oral guarantee did not satisfy it: a mere guarantor

¹²⁴ It is important that C has good cause to suspend performance of his contract with D. Otherwise, a promise by S to induce C to perform a binding contract with D would lack consideration. See *Schaefer v. Brunswick Laundry, Inc.*, 183 A. 175 (N.J. 1936); *Snyder v. Monroe Eckstein Brewing Co.*, 107 A.D. 328, 95 N.Y.S. 144 (2d Dep't 1905), *aff'd*, 188 N.Y. 576, 80 N.E. 1120 (1907). *Contra* *Abbott v. Doane*, 40 N.E. 197, 198 (Mass. 1895). If the point had been raised, *Brown* might have been decided on this ground. On the other hand, if C cancels his contract with D, justifiably or otherwise, and enters a new contract directly with S, there is no problem with consideration. See *infra* note 139 and accompanying text.

¹²⁵ This will often turn on disputed issues of fact. See *Robert H. Finke & Sons v. Sears Oil Co.*, 256 A.D.2d 868, 869, 681 N.Y.S.2d 829, 830 (3d Dep't 1998).

¹²⁶ *Martin Roofing Inc. v. Goldstein*, 60 N.Y.2d 262, 267, 457 N.E.2d 700, 703, 469 N.Y.S.2d 595, 597-98 (1983); *Worlock Paving Corp. v. Camperlino*, 207 A.D.2d 975, 975-76, 617 N.Y.S.2d 87, 88-89 (4th Dep't 1994); *Capital Knitting Mills Inc. v. Duofold, Inc.*, 131 A.D.2d 87, 92-94, 519 N.Y.S.2d 968, 970-72 (1st Dep't 1987); *Bonded Forms, Inc. v. Morgan*, 42 A.D.2d 651, 652, 345 N.Y.S.2d 213, 215 (3d Dep't 1973); *McRoberts v. Mathews*, 18 A.D. 624, 625, 45 N.Y.S. 431, 432 (2d Dep't 1897) (lamenting the New York rule). In *Holtzman v. Country Wood, Inc.*, 142 N.Y.S.2d 868 (Sup. Ct. Kings County 1955), the owner orally promised the subcontractor, in exchange for reducing the debt, to "join in" the general contractor's debt as a principal. *Id.* at 869. The court held the promise valid, apparently under the "joint obligors" theory. See *supra* notes 34-35 and accompanying text. This decision allowed the statute to be circumvented by a verbal dodge.

¹²⁷ *Collins v. Abrams*, 176 N.E. 814, 814 (Mass. 1931) (promise to "see that the plaintiff was paid"); *Gill v. Herrick*, 111 Mass. 501, 503-04 (1873) (S "guaranteed" C that D would pay).

who did not make the debt his own was subject to the statute. The *Restatement* takes a contrary position. Invoking the “main purpose” rule, it validates S’s oral promise to C to pay for goods previously delivered together with goods to be delivered thereafter “if D fails to do so.”¹²⁸

Some recent Massachusetts cases have moved in the direction of the *Restatement*. In *Webster v. Kowal*, a lawyer guaranteed a physician that his patient’s past due medical bills would be paid in exchange for the physician’s services as an expert witness in a personal injury case the lawyer was prosecuting for the patient.¹²⁹ The oral agreement was that the medical bills would be paid out of any recovery in the action. Although there was a recovery, the physician was never paid. The focus of the opinion was on another issue,¹³⁰ but it stated cryptically that “[t]he judge’s instructions improperly precluded the jury from determining whether any agreement between Dr. Webster [C] and Mr. Kowal [S] was one collateral to the primary obligation and thus within the Statute of Frauds, or was one whose primary purpose was to benefit Mr. Kowal and therefore outside the statute.”¹³¹ A recent lower court case¹³² denied summary judgment to S, a president of a corporation, who orally guaranteed a lawyer that the corporation would pay for his services. Citing the “main purpose” or “leading object” rule of the *Restatement of Contracts*,¹³³ the court stated that it was a question of fact whether S’s promise was primarily to benefit the corporation or himself. Neither of these two cases involved a building construction fact pattern, but only time will tell whether

¹²⁸ RESTATEMENT (SECOND) OF CONTRACTS § 116 illus. 3 (1981); RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 11 illus. 20 (1996); see 4 CORBIN & BROWN, *supra* note 9, § 16.4.

¹²⁹ 476 N.E.2d 205, 206–07 (Mass. 1985). If the lawyer’s guarantee were limited to the fund recovered in the pending action, most jurisdictions would uphold the promise for reasons explained *infra*, Part IV. The purpose of the statute is to protect people from paying out their own money on oral testimony, not from distributing the debtor’s money. However, Massachusetts has always insisted that S’s status as a principal debtor must be based on consideration moving to S from C, not to S from D. See *infra* text accompanying notes 183–87; see also *Leon v. Martinez*, 84 N.Y.2d 83, 88–89, 638 N.E.2d 511, 513–14, 614 N.Y.S.2d 973, 974–75 (1994) (holding that a lawyer who obtained a tort recovery was held bound by client’s previous equitable assignment of a fraction of the recovery to caregiver).

¹³⁰ See *Webster*, 476 N.E.2d at 208.

¹³¹ *Id.* at 209.

¹³² *Murphy v. Morello Constr. Corp.*, 11 Mass. L. Rep. 490 (Super. Ct. 2000).

¹³³ RESTATEMENT (SECOND) OF CONTRACTS § 116.

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a strict or loose version of the main purpose rule will prevail in Massachusetts.

In the *Restatement* view, the circumstantial evidence tends to corroborate C's testimony. If C stopped deliveries and D had still not made payment, why did C resume deliveries other than because of a new promise by S? The danger of injustice is further reduced by S's indirect receipt¹³⁴ of the lumber, a benefit conferred by C. Complications arise when the benefit to S is not as direct as that in the example,¹³⁵ but this rule is flexible and responsive to the purposes underlying the statute. The New York and early Massachusetts positions have the merit of greater clarity, and in the case of New York, firmer adherence to precedent.

The promise described in (ii)¹³⁶ is not controversial in principle, though it may present a close question on the facts. If C continues to perform pursuant to his existing contract with D, and S's promise is superadded to D's obligation, then S's promise is collateral and the statute applies. It does not matter whether S's promise is to see that D pays¹³⁷ or to pay personally.¹³⁸ On the other hand, if the evidence justifies a finding that S made a new contract with C and unconditionally promised to pay for everything to be done from then on, S's oral promise is binding. C is justified in canceling his contract with D and competent to enter a new contract to sell lumber to S. Indeed, it should not matter whether or not C was justified in canceling his contract with D. Either way, D is not indebted to C for lumber delivered under C's new contract with S, and so there is no principal debt to which S's promise can be collateral.¹³⁹ However, if S's responsibility is intended to include sums owed to C by D, this can only be accomplished by a novation.¹⁴⁰ There is no difference

¹³⁴ The benefit to S is indirect in that C continues to deliver the lumber to D, who is under contract with S.

¹³⁵ An early example of loose application of the principle is *Emerson v. Slater*, 63 U.S. 28 (1859), where the promisor was a shareholder of and did business with the debtor for whom he answered.

¹³⁶ See *supra* p. 347.

¹³⁷ See cases cited *supra* note 127.

¹³⁸ See *Ribock v. Conner*, 105 N.E. 462 (Mass. 1914); *Miles v. Driscoll*, 87 N.E. 579 (Mass. 1909); *Richardson Press v. Albright*, 224 N.Y. 497, 121 N.E. 362 (1918).

¹³⁹ See *Walker v. Hill*, 119 Mass. 249, 250 (1876); *Payne v. Baldwin*, 14 Barb. 570, 572 (N.Y. Sup. Ct. Gen. T. N.Y. County 1853) (dictum); RESTATEMENT OF CONTRACTS § 180 illus. 8 (1932).

¹⁴⁰ *Am. Fireworks Co. of Mass. v. Morrison*, 18 N.E.2d 160 (Mass. 1938);

between the New York and Massachusetts positions.¹⁴¹ Even if D remains on the job site in a new capacity and C's contract with S calls for work to be done or deliveries physically made to D, as long as D is not indebted for such work or goods and the only responsible party is S, S is the sole debtor and the statute is not violated.¹⁴²

The promise described in (iii)¹⁴³ is more complicated, and less well settled in both New York and Massachusetts. If C's contract with D is cancelled, and S makes a new contract with C that only obliges S to pay for goods or work provided under the new contract, it would be valid for the reasons stated above. But if S's promise also embraces what D owes for C's past performance, it looks like a promise to answer for D's debt.

Technically, it is perfectly possible for S to agree to pay any dollar amount for goods or services to be furnished by C, without regard for their market value. S may agree to pay \$500 each for goods only worth \$250. Or S may agree to pay a fixed lump sum for an indeterminate quantity of goods to be delivered by C. Or S may agree to pay for each item \$2 multiplied by the number of home runs Bobby Bonds hits during the season. Assuming that freedom of contract is still permitted in New York and Massachusetts, any of these agreements is binding. But if D already owes C \$250 for goods previously delivered and S orally agrees to pay \$750 for future goods worth \$500 in the market, it looks suspiciously as if S is promising to pay D's debt. Naturally, C will argue that the new promise is independent of D's liability and that D's indebtedness was only the measure of S's undertaking. In order for S's promise to skate around the statute, the evidence would have to show that C and S understood that S's payment would not satisfy D's debt, that

Fitzgerald v. Tiffany, 9 Misc. 408, 30 N.Y.S. 195 (N.Y. Buffalo Super. Ct. Gen. T. 1894). Massachusetts has allowed juries to find novations on scant evidence. See cases cited *supra* note 51.

¹⁴¹ Compare *Brown v. Weber*, 38 N.Y. 187 (1868) (dictum); *Krider Bldg. Material Co. v. Consol. Indem. & Ins. Co.*, 241 A.D. 768, 270 N.Y.S. 554 (2d Dep't 1934); *Bayles v. Wallace*, 56 Hun 428, 10 N.Y.S. 191 (Sup. Ct. Gen. T. 2d Dep't 1890); *Devlin v. Woodgate*, 34 Barb. 252 (N.Y. Sup. Ct. Gen. T. N.Y. County 1861), with *Seder v. Kozlowski*, 23 N.E.2d 880 (Mass. 1939); *Walker*, 119 Mass. at 251; *Allen v. Leonard*, 82 Mass. (16 Gray) 202, 203-04 (1860).

¹⁴² See, e.g., *Seder*, 23 N.E.2d at 881; *Merrill v. Kirkland Const. Co.*, 310 N.E.2d 106, 109 (Mass. 1974); *Hammond Coal Co. v. Lewis*, 143 N.E. 309, 309 (Mass. 1924); *Bayles*, 56 Hun at 429, 10 N.Y.S. at 192.

¹⁴³ See *supra* p. 347.

payment by D would not discharge S, and that C would be free to collect the \$750 from S and the \$250 from D.¹⁴⁴ One would think that the evidence would have to be very strong to establish such a shared intent.¹⁴⁵

Assuming that the evidence shows that S's unconditional promise embraced D's debt for C's past performance, there are three possible ways a court might respond. First, it might hold that if any part of a promise violates the statute, the promise is void in *toto*. Second, it might hold the promise enforceable as to the part that would be valid if made separately, and void as to the part that represents a promise to pay for what D owes C. Third, it might make the promise valid in *toto*.¹⁴⁶

No New York case took the severe position that S's promise was void in *toto*, but most earlier cases assumed that it could be enforced as to work performed in response to the promise, but not for work previously performed for D and for which D remained indebted to C.¹⁴⁷ This position had the strong support of

¹⁴⁴ See *Fullam v. Adams*, 37 Vt. 391 (1863). Under RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 1 (1996), S would not have suretyship status.

¹⁴⁵ Such a case may be *Tallman v. Bresler*, 65 Barb. 369 (N.Y. Sup. Ct. Gen. T. 1st Dep't 1873), *aff'd on op. below*, 56 N.Y. 635 (1874), *op. on rearg.*, 58 N.Y. 123 (1874). C had done work for a tenant, D. Upon D's default, the owner, S, told C to finish the work and S would pay \$2,000. This was neither the amount D owed C, nor what S owed D. The promise was held original. *Id.* at 378.

¹⁴⁶ See, e.g., *McLaughlin v. Austin*, 62 N.W. 719 (Mich. 1895).

¹⁴⁷ See, e.g., *Newman v. Rhebem Theatres Corp.*, 224 A.D. 845, 231 N.Y.S. 829 (2d Dep't 1928); *Windsor Constr. Co. v. Ruland*, 173 A.D. 94, 159 N.Y.S. 446 (1st Dep't 1916) (dictum); *Voska, Foelsch & Sidlo, Inc. v. Ruland*, 172 A.D. 616, 158 N.Y.S. 780 (1st Dep't 1916); *Winne v. Mehrbach*, 130 A.D. 329, 114 N.Y.S. 618 (3d Dep't 1909) (straining to find unconditional promise); *A. Schwoerer & Sons v. Stone*, 130 A.D. 796, 115 N.Y.S. 440 (1st Dep't 1909); *Desmond v. Schenck*, 36 A.D. 317, 55 N.Y.S. 251 (2d Dep't 1899); *Lachman v. Irish*, 72 Hun 491, 25 N.Y.S. 193 (Sup. Ct. Gen. T. 5th Dep't 1893); *Snell v. Rogers*, 70 Hun 462, 24 N.Y.S. 379 (Sup. Ct. Gen. T. 3d Dep't 1893). Other cases appear to have allowed S's absolute promise to embrace amounts owed by D to C. See, e.g., *Reisler v. Silbermintz*, 99 A.D. 131, 90 N.Y.S. 967 (1st Dep't 1904); *Mannetti v. Doege*, 48 A.D. 567, 62 N.Y.S. 918 (2d Dep't 1900); *Sinkovitz v. Applebaum*, 56 Misc. 527, 107 N.Y.S. 122 (Sup. Ct. App. T. 1907); *Breen v. Isaacs*, 49 Misc. 127, 96 N.Y.S. 741 (Sup. Ct. App. T. 1905). Some of the cited cases that held the statute applicable to money owed by D, allowed a promise to "guarantee payment" to apply to work done thereafter. After the decisions in *Witschard v. A. Brody & Sons*, 257 N.Y. 97, 177 N.E. 385 (1931) and *Richardson Press v. Albright*, 224 N.Y. 497, 121 N.E. 362 (1918), the New York courts would not enforce promises collateral in form, even as to C's future work, but the cited cases seem sound on the issue of divisibility of the promise. A dictum in *Belknap v. Bender*, 75 N.Y. 446, 452 (1878) also suggests that partial enforcement is acceptable.

King v. Despard, 5 Wend. 277 (N.Y. Sup. Ct. 1830) enforced S's oral promise to C that included amounts for work C had previously done for D. But the facts reveal

Professor Williston, who criticized decisions that allowed the new promise to include past due debts of D:

Such decisions, however, appear to contravene the purpose of the Statute of Frauds since they clearly allow the enforcement of a promise to answer for the debt of another, and the consideration received is the equivalent only for part of the agreed price. As to the goods or services previously furnished, the promisor is merely a surety.¹⁴⁸

An early New York case, not involving a building contract, vindicates Williston's view. In *Pfeiffer v. Adler*,¹⁴⁹ S's husband was indebted to C for goods sold. Upon his death, S sought to carry on his business and orally promised C to pay not only for goods to be sold to her on credit, but also the balance of her husband's debt. The court held her promise to pay her husband's debt void, and stated, "A verbal promise to sell goods to a responsible party, for their full value and on the usual terms, forms no consideration for an independent engagement to pay the antecedent debt of a third person."¹⁵⁰

After first holding S's oral promise void in *toto*,¹⁵¹ Massachusetts later enforced S's promise as to work performed in response to the promise, but not for past work for which D remained indebted.¹⁵² At this point, the two jurisdictions were in

that S had taken an assignment of D's rights and assumed his duties. Thus, S had made D's debt his own through prior dealing with D under the principles stated *infra* Part IV. *Accord* Block v. Greenfield, 137 Misc. 573, 243 N.Y.S. 117 (City Ct. N.Y. County 1930).

¹⁴⁸ 3 WILLISTON & JAEGER, *supra* note 46, § 483, at 494; *accord* Fitzgerald Spear Co. v. Kelly, 83 A. 491 (N.J. 1911). To be distinguished are cases in which S promises to pay C out of sums held back from D. *See infra* text accompanying notes 176–82. These promises clearly embrace past due debts of D to C.

¹⁴⁹ 37 N.Y. 164 (1867).

¹⁵⁰ *Id.* at 165. Of course, the court's statement is not literally true as a matter of the substantive law of contracts. A single consideration may support more than one promise. *Heyman Cohen & Sons v. M. Lurie Woolen Co.*, 232 N.Y. 112, 133 N.E. 370 (1921); *CALAMARI & PERILLO*, *supra* note 28, § 4.15, at 218. As applied to the issue in the case, it is clear that the court means that the consideration equal in value only to future sales, was not such as to take S's promise to pay her husband's debt out of the statute of frauds. *See also Belknap*, 75 N.Y. at 450.

¹⁵¹ *See Loomis v. Newhall*, 32 Mass. (15 Pick.) 159, 169 (1833).

¹⁵² *See Miles v. Driscoll*, 87 N.E. 579 (Mass. 1909); *Haynes v. Nice*, 100 Mass. 327 (1868); *Allen v. Leonard*, 82 Mass. (16 Gray) 202 (1860); *Rand v. Mather*, 65 Mass. (11 Cush.) 1 (1853). These cases were later undermined by cases in which a landlord accepted a new tenant upon his oral promise to pay back rent owed by his predecessor in which such promises were enforced. *See, e.g., Rainault v. Evarts*, 7 N.E.2d 145 (Mass. 1937); *Washington & Devonshire Realty Co. v. Lewis Diamond*

accord. With the 1965 decision in *Hayes v. Guy*,¹⁵³ however, Massachusetts liberalized its interpretation and allowed C to enforce S's promise to pay for work previously done by C for D for which D remained indebted to C, as well as work done thereafter directly for S. The court emphasized that C had made a new contract with S and the benefit derived by S in having C's work completed early. The court distinguished one earlier case in which C had continued to work for D with S's assurance that he "would see that the plaintiff was paid."¹⁵⁴ The court failed to mention two early cases where C made a new contract with S which included an unconditional promise to pay for past debts of D. In those cases, the Supreme Judicial Court affirmed plaintiffs' judgments that excluded recovery for such past debts.¹⁵⁵

In New York, the previous course of decision appears to have been quietly liberalized by *Brown Bros. Electrical Contractors, Inc. v. Beam Construction Corp.*¹⁵⁶ The court's opinion is preoccupied with whether there was legally sufficient evidence for the trial court's finding that C and S entered a new contract independent of the old C/D contract. Having found sufficient evidence to make the issue one of fact for the trial judge, the court affirmed the judgment that Cale [S] would be bound to pay Brown [C] all sums still unpaid when the work was completed.¹⁵⁷ The opinions at the Appellate Division indicate that the judgment included amounts owing to C from D.¹⁵⁸ If this silent

Co., 161 N.E. 883 (Mass. 1928). A resourceful lawyer in Massachusetts had a good chance of proving a novation. *See supra* note 51.

¹⁵³ 205 N.E.2d 699 (Mass. 1965). Following the *Hayes* case, *M.J. Pirolli & Sons v. Mass. Equip. & Supply Corp.*, 401 N.E.2d 146, 147 (Mass. App. Ct. 1980) refused to apply the main purpose exception where S's oral promise ("I'll see that you get paid") was clearly one to guarantee D's debt to C. Again following *Hayes*, *Barboza v. Liberty Contractors Co.*, 469 N.E.2d 1303, 1304 (Mass. App. Ct. 1984) enforced S's absolute promise to pay for arrears owed to C by D as well as all further goods delivered under the new contract with S.

¹⁵⁴ *Collins v. Abrams*, 176 N.E. 814 (Mass. 1931).

¹⁵⁵ *Haynes*, 100 Mass. at 329; *Allen*, 82 Mass. (16 Gray) at 204; *see supra* note 145. Nor did the Court rely on the landlord-tenant cases cited *supra* note 152.

¹⁵⁶ 41 N.Y.2d 397, 361 N.E.2d 999 (1977).

¹⁵⁷ *Id.* at 399, 361 N.E.2d at 1001; *see also* *Pyramid Champlain Co. v. R.P. Brosseau & Co.*, 267 A.D.2d 539, 543, 699 N.Y.S.2d 516, 521 (3d Dep't 1999).

¹⁵⁸ S orally promised to pay C the unpaid part of the contract price provided in the original contract between C and D. The opinion in the Court of Appeals notes that S objected to paying for an "extra" item performed by C for D. The dissent in the Appellate Division, objecting to the finding of a new contract between S and C,

departure from prior law now represents the considered position of the Court of Appeals, New York and Massachusetts appear once again to be together on this issue. On the other hand, if that aspect of the judgment was not considered by the court, its value as a precedent is slight.

One final thought: at the beginning of this Part, the example chosen to facilitate analysis of the cases was the sale of lumber by C to D, and a subsequent promise by S. A sale of goods contract is nearly always divisible, so C's claim against D would be for the price of lumber delivered.¹⁵⁹ S's promise, therefore, would be coextensive with D's duty to pay.¹⁶⁰ But if S is a subcontractor providing a service for D, such a contract is nearly always entire.¹⁶¹ If C is justified in canceling his contract with D, his remedy is not the agreed price but unliquidated damages, measured by the unpaid contract price minus cost of completion.¹⁶² Assuming C cancels, and his right to damages has accrued, if S then promises to pay the unpaid price that C was to get from D, it could be argued that S's promise is not for the same duty as that for which D is responsible, hence not the promise of a surety. As this thought has not been expressed in the cases, and as I am unsure of its merit, I will pursue it no further.¹⁶³

IV. CONSIDERATION MOVING FROM DEBTOR TO SURETY

In the all of the cases discussed previously, the beneficial consideration moved from C to S. And if in light of the consideration and S's promise, S makes the debt his own and

observed:

[The trial court] states that as a result of that meeting a new contract arose between plaintiff [C] and Cale [S] whereby plaintiff would continue and perform whatever remained undone for which it would receive not merely the value of its services, as one might ordinarily expect with a "new" contract, but whatever it had not been paid by Beam [D] before July 26, 1967.

Brown Bros. Elec. Contractors, Inc. v. Beam Constr. Corp., 51 A.D.2d 815, 816, 379 N.Y.S.2d 187, 190 (3d Dep't 1976) (Kane, J., dissenting).

¹⁵⁹ See, e.g., U.C.C. § 2-607(1) (2002); *Tipton v. Feitner*, 20 N.Y. 423 (1859).

¹⁶⁰ Assuming that C was justified in canceling his contract with D, he is undoubtedly entitled to damages in addition to the price of goods delivered, but S's promise may in terms cover only part of D's debt.

¹⁶¹ See *New Era Homes Corp. v. Forster*, 299 N.Y. 303, 306, 86 N.E.2d 757, 758 (1949). C usually has an alternative remedy of restitution for the value of work done, but that also is not identical with the unpaid contract price.

¹⁶² See *id.* at 307, 86 N.E.2d at 759.

¹⁶³ But see *infra* note 265.

comes under a duty to pay independently of D's liability, then S's promise is original, even though performance by D will discharge S's duty to C and performance by S will discharge D's duty to C.¹⁶⁴

In the cases to be examined in this Part, beneficial consideration moves from D to S. If D places money or property in S's hands for the purpose of paying D's creditors, including C, then by accepting the fund for the specific purpose of paying D's creditor, S is viewed as a trustee and C a beneficiary.¹⁶⁵ S's duty to C became enforceable at law in *indebitatus assumpsit* as money had been received.¹⁶⁶ *Indebitatus assumpsit* was a magnet for absorbing such equitable principles into the law courts, but the character of the remedy should not obscure the point that the obligation was not what we today would call contractual; it was an equitable property right to a specific asset.¹⁶⁷ On this basic point, there is no difference between New York and Massachusetts law.¹⁶⁸ There developed in New York a corollary that appears to have had no counterpart in

¹⁶⁴ Although D's duty to C is discharged by S's payment, he does not thereby escape responsibility for the debt. He now owes the debt to S, who is subrogated to the position formerly held by C. *Westinghouse Elec. & Mfg. Co. v. Fidelity & Deposit Co. of Md.*, 146 N.E. 711 (Mass. 1925); *Fairchild v. Lynch*, 99 N.Y. 359, 365, 2 N.E. 20, 21 (1885); *Mathews v. Aikin*, 1 N.Y. 595, 599 (1848); *Marsh v. Pike*, 10 Paige Ch. 595, 597 (N.Y. Ch. 1844); see SIMPSON, *supra* note 34, § 47.

¹⁶⁵ See *Lucas, Turner & Co. v. Payne & Dewey*, 7 Cal. 92, 96 (1857); *Bennett v. Merchantsville Bldg. & Loan Ass'n*, 13 A. 852, 853 (N.J. 1888); *Rogers Locomotive & Mach. Works v. Kelly*, 88 N.Y. 234, 238 (1882); *Blackmar v. McLoughlin*, 44 A. 804, 804 (R.I. 1899).

¹⁶⁶ See *Prather v. George Vineyard*, 9 Ill. (4 Gilm.) 40 (1847); *Hilton v. Dinsmore*, 21 Me. 410 (1842).

Whenever one person has in his possession money which he cannot conscientiously retain from another, the latter may recover it in this form of action, subject to the restriction that the mode of trial and the relief which can be given in a legal action are adapted to the exigencies of the particular case, and that the transaction is capable of adjustment by that procedure, without prejudice to the interests of third persons. No privity of contract between the parties is required, except that which results from the circumstances.

Roberts v. Ely, 113 N.Y. 128, 131, 20 N.E. 606, 607-08 (1889); see also *Neilson v. Blight*, 1 Johns. Cas. 205, 208 (N.Y. Sup. Ct. 1799); *Justice v. Tallman*, 86 Pa. 147, 149 (1878) (per curiam).

¹⁶⁷ 2 WILLISTON & JAEGER, *supra* note 46, § 348.

¹⁶⁸ Compare *Fitch v. Chandler*, 58 Mass. (4 Cush.) 254, 256 (1849); *Hall v. Marston*, 17 Mass. (1 Tyng) 575, 579 (1822); *Arnold v. Lyman*, 17 Mass. (1 Tyng) 400, 404-05 (1821), with *Sayer v. Wynkoop*, 248 N.Y. 54, 57-58, 161 N.E. 417, 418 (1928); *Clark v. Howard*, 150 N.Y. 232, 238, 44 N.E. 695 (1896).

Massachusetts. A genuine contractual duty arose where, having incurred the duty of a trustee, S made a subsequent oral promise to C to pay C from the fund or its proceeds,¹⁶⁹ often coupled with a request that C forbear from suing D.¹⁷⁰ Even without a request to forbear, an exception to the bargain theory of consideration lay in the rule that a subsequent promise to discharge a previous duty was valid at law.¹⁷¹ The statute of frauds was avoided on the theory that by accepting the fund from D, S had made the debt his own.¹⁷² The "statute applies to promises to pay the promisor's own money, not the money of another in his hands."¹⁷³ Certainly as between D and S, S ought to pay; if C recovered from D, S would be liable to reimburse D, regarded as a quasi surety.¹⁷⁴ There are no Massachusetts cases addressing the enforceability at law of a new promise by S to C based upon a trust fund placed in S's hands by D.¹⁷⁵ That indebitatus

¹⁶⁹ See *Hilton*, 21 Me. at 414; *Ellwood v. Monk*, 5 Wend. 235 (N.Y. Sup. Ct. 1830). Some early New York cases applied the statute to invalidate the promise in this situation. See, e.g., *Jackson v. Rayner*, 12 Johns. 291, 291 (N.Y. Sup. Ct. 1815); *Simpson v. Patten*, 4 Johns. 422, 423 (N.Y. Sup. Ct. 1809). Other cases held the promise valid. See, e.g., *Olmstead v. Greenly*, 18 Johns. 12, 13 (N.Y. Sup. Ct. 1820); *Gold & Sill v. Phillips*, 10 Johns. 412, 414 (N.Y. Sup. Ct. 1813). The validity of such a promise was regarded as established in *Farley v. Cleveland*, 4 Cow. 432 (N.Y. Sup. Ct. 1825). In *Lamkin v. Palmer*, 164 N.Y. 201, 58 N.E. 123 (1900), C consented to a sale of D's assets by S, who was taking over D's business, in consideration of S's oral promise to pay D's debt to C out of the proceeds. *Id.* at 203, 58 N.E. at 123.

¹⁷⁰ See *Barker v. Bucklin*, 2 Denio 45, 47 (N.Y. Sup. Ct. 1846); *Ellwood*, 5 Wend. at 236.

¹⁷¹ See *Earl v. Peck*, 64 N.Y. 596, 599 (1876). In *Fullam v. Adams*, 37 Vt. 391 (1864), Chief Justice Poland wrote:

[T]he party making the promise, holds the funds of the debtor for the purpose of paying his debt, and as between him and the debtor, it is his duty to pay the debt, so that when he promises the creditor to pay it, in substance he promises to pay his own debt, and not that of another.

Id. at 396; accord *Mallory v. Gillett*, 21 N.Y. 412, 419–20 (1860) (dictum); 2 CORBIN & BROWN, *supra* note 9, § 363, at 262–63.

¹⁷² *Clark v. Howard*, 150 N.Y. 232, 238, 44 N.E. 695, 697 (1896) ("When the promise in such cases is the consideration or condition upon which the third party has received the debtor's property, he thereby makes the debt his own and assumes an independent duty of payment irrespective of the liability of the principal or original debtor.") (dictum); *Skelton v. Brewster*, 8 Johns. 376 (N.Y. Sup. Ct. 1811); accord *Lyon v. Clochessy*, 43 Misc. 67, 69, 86 N.Y.S. 245, 246 (Sup. Ct. App. T. 1904).

¹⁷³ *Tuttle v. Armstead*, 22 A. 677, 678 (Conn. 1885).

¹⁷⁴ See *Comstock v. Drohan*, 71 N.Y. 9, 13 (1877); *Rogers v. Kneeland*, 13 Wend. 114, 122 (N.Y. 1834).

¹⁷⁵ A promise by S to C appears in *Peterson v. Meekins, Packard & Wheat, Inc.*, 158 N.E. 768, 769 (Mass. 1927), but the court downplayed its significance and grounded C's recovery on money paid by D to S for C's use. *Id.* See also *Webster v.*

assumpsit would lie based on the trust fund itself appears to have been a sufficient remedy in the commonwealth.

However, a variation on the familiar fact pattern generated controversy and placed New York and Massachusetts on opposite sides of a dispute. The variation arose where the consideration given by D to S was understood to belong to S for his own benefit, not to hold in trust, and S's promise to D was to pay C out of his own substance. Here, there is no trust *res* and any duty of S to C must be strictly contractual. In New York, the famous case of *Lawrence v. Fox*¹⁷⁶ made this promise enforceable by C, dubbed a "creditor beneficiary." There was no problem with the statute which only applied to promises made to the creditor, not the debtor.¹⁷⁷ If S made a separate oral promise to C, it was binding under the rules stated above.¹⁷⁸ Thus, in *Farley v. Cleveland*,¹⁷⁹ D owed a debt to C. D then sold a quantity of hay to S in consideration of S's oral promise to pay D's debt to C, which promise S repeated to C. The latter promise was enforced as

Kowal, *supra* note 129.

¹⁷⁶ 20 N.Y. 268 (1859). *Indebitatus assumpsit* would not lie unless S held a specific fund to C's use. *Thorne v. Dillingham*, 1 Denio 254, 257 (N.Y. Sup. Ct. 1845); *Mason v. Munger*, 5 Hill 613, 615 (N.Y. Sup. Ct. 1843).

¹⁷⁷ See *Aldrich v. Ames*, 75 Mass. (9 Gray) 76 (1857); *Chapin v. Merrill*, 4 Wend. 657, 658 (N.Y. Sup. Ct. 1830); *Eastwood v. Kenyon*, 113 Eng. Rep. 482, 485 (K.B. 1840). A common application of this interpretation of the statute was where a grantee of mortgaged property assumed the mortgage; no writing was necessary at common law. See *Pike v. Brown*, 61 Mass. (7 Cush.) 133, 136 (1851); *Bowen v. Buck*, 94 N.Y. 86, 89 (1883). *But cf.* N.Y. GEN. OBLIG. § 5-705 (McKinney 2001). However, some early courts perceived the mischief that the statute was intended to suppress, and held the oral promise void. See, e.g., *Clapp v. Lawton*, 31 Conn. 95, 101-03 (1862); *Shoemaker v. King*, 40 Pa. 107, 110 (1861). Others upheld C's right to sue on S's promise to D because of the equivalent consideration given to S by D. See, e.g., *Wilson v. Bevans*, 58 Ill. 232, 234-35 (1871); *Clark v. Howard*, 150 N.Y. 232, 238, 44 N.E. 695, 697 (1896); *Barker v. Bucklin*, 2 Denio 45, 60 (N.Y. Sup. Ct. 1846). The best reason for excluding promises to a debtor from the statute's reach was that the promisor in such cases nearly always received a quid pro quo that made the debt his own. See *Fullam v. Adams*, 37 Vt. 391, 392 (1863); RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 11(3)(c) (1996).

¹⁷⁸ *Rounsevel v. Osgood*, 44 A. 535, 535-36 (1896); *First Nat'l Bank of Sing Sing v. Chalmers*, 144 N.Y. 432, 439, 39 N.E. 331, 333 (1895); *Ackley v. Parmenter*, 98 N.Y. 425, 431 (1885) (dictum); *Metzger v. Edson*, 25 Misc. 236, 237, 55 N.Y.S. 61, 61 (Sup. Ct. N.Y. County 1898); see also 2 CORBIN, *supra* note 67, § 349, at 219.

¹⁷⁹ 4 Cow. 432 (N.Y. Sup. Ct. 1825), *aff'd*, 9 Cow. 639 (N.Y. 1827). This case was on all fours with *Lawrence*, except for the fact that S made a promise directly to C, thus raising the statutory issue. The court in *Lawrence* granted C a legal right to enforce S's original promise to D, thus rendering superfluous his direct promise to C, and skirting the statutory issue. *Lawrence*, 20 N.Y. at 274.

original, being founded on an assumption of the debt by S. This extension of the traditional fact pattern is seen in several cases where D was employed by S who held back an amount earned by D for the purpose of paying D's debt to C. Money owed by S to D constitutes a purely contractual debtor-creditor relation; the amount owed is not the *res* of a trust.¹⁸⁰ Nevertheless, S's oral promise to C to pay him out of the holdbacks has been held valid.¹⁸¹ To the extent that S's promise to C is to pay out of what S owes D, he is paying his own debt.¹⁸²

Massachusetts has always upheld C's right to bring *indebitatus assumpsit* where S held an identifiable fund provided by D to pay his debt.¹⁸³ However, in *Mellen v. Whipple*,¹⁸⁴ the Supreme Judicial Court reached a result contrary to *Lawrence v. Fox*, where there was no specific asset held upon a trust, and

¹⁸⁰ *McKee v. Paradise*, 299 U.S. 119, 121–22 (1936); *Solomon v. Boschulte*, 200 F.2d 482, 483 (3d Cir. 1952).

¹⁸¹ *See, e.g., Cincinnati Traction Co. v. Cole*, 258 F. 169 (6th Cir. 1919); *Woodruff v. Scaife*, 83 Ala. 152 (1887); *Calkins v. Chandler*, 36 Mich. 320 (1877); *Raabe v. Squier*, 148 N.Y. 81, 42 N.E. 516 (1895); *Gallagher v. Nichols*, 60 N.Y. 438 (1875) (S accepted order from D to pay C out of funds to come due to D from S); *King v. Despard*, 5 Wend. 277 (N.Y. Sup. Ct. 1830); *Schild v. Monroe Eckstein Brewing Co.*, 108 A.D. 50, 95 N.Y.S. 493 (2d Dep't 1905); *Reisler v. Silbermintz*, 99 A.D. 131, 90 N.Y.S. 967 (1st Dep't 1904); *Roussel v. Mathews*, 62 A.D. 1, 70 N.Y.S. 886 (1st Dep't 1901), *aff'd*, 171 N.Y. 634, 63 N.E. 1122 (1902); *May v. Nat'l Bank of Malone*, 9 Hun 108 (Sup. Ct. Gen. T. 3d Dep't 1876), *aff'd*, 73 N.Y. 599 (1878); *Tallman v. Bresler*, 65 Barb. 369 (N.Y. Sup. Ct. Gen. T. N.Y. County 1873), *aff'd*, 56 N.Y. 635 (1874); *accord* 3 WILLISTON & JAEGER, *supra* note 46, § 481; 4 CORBIN & BROWN, *supra* note 9, § 15.18.

¹⁸² As between D and S, the duty is primarily that of S. After S pays, C he has no right to seek reimbursement from D. 3 WILLISTON & JAEGER, *supra* note 46, § 481.

¹⁸³ *See Fitch v. Chandler*, 58 Mass. (4 Cush.) 254 (1849); *Hall v. Marston*, 17 Mass. (1 Tyng) 575 (1822); *Arnold v. Lyman*, 17 Mass. (1 Tyng) 400 (1821). *Mellen v. Whipple*, 67 Mass. (1 Gray) 317 (1854) recognized the force of the *indebitatus assumpsit* cases, and cases subsequent to *Mellen* have reaffirmed them. *See Bianconi v. Crowley*, 152 N.E. 305 (Mass. 1926); *Putman v. Field*, 103 Mass. 556 (1870); *Frost v. Gage*, 83 Mass. (1 Allen) 262 (1861). The same distinction was obtained in Michigan. *See Fay v. Sanderson*, 12 N.W. 161 (Mich. 1882) (affirming third party's right to sue for money paid into defendant's hands for plaintiff's use); *Halsted v. Francis*, 31 Mich. 113 (1875) (rejecting claim by creditor beneficiary). The distinction between the two grounds of liability was recognized in *Clapp v. Lawton*, 31 Conn. 95 (1862).

¹⁸⁴ 67 Mass. (1 Gray) 317 (denying a mortgagee recourse against an assuming grantee). *Contra Burr v. Beers*, 24 N.Y. 178 (1861). Of course, in Massachusetts, the grantor, as promisee, had recourse against the grantee if the grantee broke his oral promise to pay the mortgagee. *See Alger v. Scoville*, 67 Mass. (1 Gray) 391 (1854). Subsequently, bills in equity by creditors were entertained. *See Forbes v. Thorpe*, 95 N.E. 955 (Mass. 1911).

where S's undertaking to pay the promisee's creditor was based only upon a consideration provided by the promisee. The court insisted that a binding promise could only be based on a consideration given by the one seeking enforcement. Note that *Mellen* did not involve the statute of frauds;¹⁸⁵ it was based on a point of substantive contract law: that the consideration must move from the plaintiff. At about the same time, the Supreme Judicial Court announced a corollary rule based on the statute of frauds. In *Curtis v. Brown*,¹⁸⁶ a general contractor signed over all his material to the owner and released the owner from all obligation under the contract in exchange for the owner's oral promise to pay workers and suppliers. The owner directed this promise to be communicated to the builder's creditors. The court held that the exception to the statute carved out by *Nelson v. Boynton*¹⁸⁷ only applied where the creditor provides the beneficial consideration. In the case before it, the consideration moved from the debtor.¹⁸⁸ The effect of this decision is seen in several later cases involving an owner's promise to pay the builder's creditors out of sums held back for that purpose. In New York, this is held to be a promise to pay the owner's own debt in a particular way.¹⁸⁹ In Massachusetts, because S's promise to D to hold back money for the benefit of C did not create rights in C, his later promise to C was not to pay his own debt, but a collateral promise to answer for D's debt.¹⁹⁰ As Justice Gray said

¹⁸⁵ It is true that the defendant grantee in *Mellen* did not sign the deed containing the assumption clause. As a promise to the debtor, it was not necessary to have written evidence. *Mellen*, 67 Mass. (1 Gray) at 391. The holding of *Mellen* was routinely applied to cases where the defendant's promise to D was written. See *Larson v. Jeffrey-Nichols Motor Co.*, 181 N.E. 213 (Mass. 1932); *New England Structural Co. v. James Russell Boiler Works Co.*, 120 N.E. 852 (Mass. 1918); *Aigen v. Boston & Maine R.R.*, 132 Mass. 423 (1882); see also 2 WILLISTON & JAEGER, *supra* note 46, § 381.

¹⁸⁶ 59 Mass. (5 Cush.) 488 (1850).

¹⁸⁷ 44 Mass. (3 Met.) 396 (1841).

¹⁸⁸ *Furbish v. Goodnow*, 98 Mass. 296 (1867); *Curtis*, 59 Mass. (5 Cush.) at 488. The early cases did not address a situation where the consideration moved from D to S and S made a written promise to pay C. Such a promise was enforced in *Marine Contractors Co. v. Hurley*, 310 N.E.2d 915 (Mass. 1974).

¹⁸⁹ See *supra* notes 179–80 and accompanying text.

¹⁹⁰ See *Ribock v. Canner*, 105 N.E. 462 (Mass. 1914) (semble); *Miles v. Driscoll*, 87 N.E. 579 (Mass. 1909); *O'Connell v. Mt. Holyoke Coll.*, 55 N.E. 460 (Mass. 1899); *Borden v. Boardman*, 32 N.E. 469 (Mass. 1892); see also *Halsted v. Francis*, 9 Mich. 113 (1875). If C released D and agreed to look solely to S in consideration of S's oral promise to pay C directly out of sums due to D, an enforceable novation resulted. See *McNulty v. Cruff*, 98 N.E. 512 (Mass. 1912); cf. *Langdon v. Hughes*, 107 Mass. 272

in a later case:

[B]y the later decisions in New York, Maine and Vermont, the application of the statute has been so far relaxed in those states as to treat a transfer of property from the original debtor to the new promisor as taking the promise of the latter to the original creditor out of the statute.¹⁹¹

There have been cases where S's promise to pay C was based on receipt of an indirect benefit from C, coupled with a direct benefit from D. The Supreme Judicial Court insisted that whether S became a principal debtor could be based only on the benefit conferred by C, and if that benefit was itself insufficient for that purpose, it could not be established by S's dealing with D. For example, in *Colpitts v. L.C. Fisher Co.*,¹⁹² a leading case featured in contracts casebooks,¹⁹³ some employees of a corporation held its notes for money lent, and outside creditors also had claims. The shareholders of the corporation wanted to liquidate it and begin business afresh with a new corporation. Speaking for the new corporation, they orally promised the employees that if they would forbear pressing their claims against the old corporation and allow its assets to be used to pay the outside creditors, the new corporation would continue to employ them and would pay the notes of the old corporation. The employees agreed, the outside creditors were paid and the other tangible assets passed to the new corporation. The employees were later discharged and their notes were never paid. In their action against the new corporation, the court held the promise void under the statute. It observed that the employees did not release any lien or surrender their claims against the old corporation. Their forbearance directly benefited the old corporation and its creditors. "Only indirectly was the new corporation aided."¹⁹⁴ If the case had arisen in New York, it could

(1871) (holding that a novation occurred where father agreed with sons to pay their debt to C for a consideration, and C agreed to release sons and accept father as debtor).

¹⁹¹ *Furbish v. Goodnow*, 98 Mass. 296, 302 (1867). Although no cases were cited, Justice Gray may have had in mind *Barker v. Bucklin*, 2 Denio 45 (N.Y. Sup. Ct. 1846), *Maxwell v. Haynes*, 41 Me. 559 (1856), and *Wait v. Wait*, 28 Vt. 350 (1856).

¹⁹² 193 N.E. 833 (1935).

¹⁹³ FRIEDRICH KESSLER, ET. AL, *CONTRACTS: CASES & MATERIALS* 765 (3d ed. 1986); SAMUEL WILLISTON, *CASES ON THE LAW OF CONTRACTS* § 383 (Laube ed., 6th ed. 1954).

¹⁹⁴ *Colpitts*, 193 N.E. at 836.

have been argued that the new corporation took the debt upon itself in its dealing with the old corporation, to whose business it succeeded.¹⁹⁵ Under the rule in Massachusetts, this element of the case was immaterial.

On the third-party creditor beneficiary point, Massachusetts has abandoned *Mellon v. Whipple* and adopted the majority rule represented by *Lawrence v. Fox*.¹⁹⁶ It remains to be seen whether this shift will have its logical impact on the statute of frauds issue.¹⁹⁷ Meanwhile, it is pleasantly ironic to contemplate a judge of the court credited with originating the “main purpose” rule chide New York for relaxing the scope of the statute.¹⁹⁸

To summarize the New York position, where beneficial consideration moves from D to S, the validity of S’s subsequent promise to C depends altogether upon whether, in his dealing with D, S made the debt his own and converted D into a quasi surety. It is useful to note that if S simply acquires the assets of D, without any promise to D with respect to D’s debt to C, a subsequent oral promise to C violates the statute. For example, in *Noce v. Kaufman*,¹⁹⁹ an owner was indebted to a contractor for work done on his building. The owner deeded the building to a grantee, who allegedly made an oral promise to the contractor to pay the former owner’s debt. There was no evidence that the grantee promised the grantor to pay the debt. The court held the grantee’s promise void under the statute. Similarly, if S accepts assets from D merely as indemnity for possible future liability, he thereby incurs no duty to D, has not made the debt his own, and his subsequent promise to C violates the statute.²⁰⁰ And if S’s

¹⁹⁵ See, e.g., *Lamkin v. Palmer*, 164 N.Y. 201, 58 N.E. 123 (1900); *Kramer v. Harrington Wells & Rhodes Ltd.*, 275 A.D.2d 302, 711 N.Y.S.2d 507 (2d Dep’t 2000); *Biener Contracting Corp. v. Elberon Rest. Corp.*, 7 A.D.2d 391, 183 N.Y.S.2d 756 (1st Dep’t 1959); *Mann v. Ewing*, 156 Misc. 216, 281 N.Y.S. 515 (Sup. Ct. App. T. 1st Dep’t 1935).

¹⁹⁶ *Choate, Hall & Stewart v. SCA Servs., Inc.*, 392 N.E.2d 1045 (Mass. 1979).

¹⁹⁷ *Webster v. Kowal*, 476 N.E.2d 205 (Mass. 1985) may be a harbinger of change.

¹⁹⁸ See *supra* note 189 and accompanying text.

¹⁹⁹ 2 N.Y.2d 347, 141 N.E.2d 529, 161 N.Y.S.2d 1 (1957) (holding that the contractor had no mechanic’s lien; it is unclear when the grantee made his promise to the contractor); *accord Chandler v. Davidson*, 6 Blackf. 367 (Ind. 1843); *Cardeza v. Bishop*, 54 A.D. 116, 66 N.Y.S. 408 (2d Dep’t 1900); *Healy v. Brotman*, 96 Misc. 2d 386, 409 N.Y.S.2d 72 (Sup. Ct. Suffolk County 1978).

²⁰⁰ *Ackley v. Parmenter*, 98 N.Y. 425 (1885); *Becker v. Krank*, 75 A.D. 191, 77 N.Y.S. 665 (3d Dep’t 1902), *aff’d*, 176 N.Y. 535, 68 N.E. 1114 (1903); *accord 2 WILLISTON & JAEGER, supra* note 46, § 459.

promise to D is only to pay C out of the proceeds of property transferred by D to S, his obligation to D and C is subject to the condition that the proceeds be realized. If S makes an unconditional oral promise to C to pay D's debt before the condition is satisfied, it is not congruent with his preexisting duty to D and is barred by the statute as a promise to pay the debt of another, not his own debt.²⁰¹ If S has not previously assumed the debt in his dealing with D, his subsequent promise to C "would be void at common law as without any consideration, and void also under the statute of frauds as not in writing."²⁰² On the other hand, as stated above, if S receives assets from D for his own use and, in exchange, makes an unconditional promise to D to pay C, as in *Lawrence*, then S's subsequent promise to C is congruent with his duty to D and is held to be a valid promise to pay a debt he has made his own.²⁰³

Recall the summary of the law made in *Richardson Press v. Albright*,²⁰⁴ discussed previously in Part III.C, that S's promise 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."²⁰⁵ In the analysis of that case, it was observed that where the position of S depends on consideration moving from C to S the relevant parties whose intention counts are C and S.²⁰⁶ The previous paragraph shows that where the position of S derives from consideration moving from D to S, those are the relevant parties whose intention may make S a principal debtor primarily liable.

The Form of the Promise Revisited. Where consideration passes from D to S, it is certain that the way those two parties regard the consideration determines whether S becomes the principal debtor and D a quasi surety. If, by that transaction, D

²⁰¹ See *Belknap v. Bender*, 75 N.Y. 446 (1878); SIMPSON, *supra* note 34, at 131. Although the facts are unclear, it is possible that *Jackson v. Rayner*, 12 Johns. 291 (N.Y. Sup. Ct. 1815) may be defended on this ground.

²⁰² *Belknap*, 75 N.Y. at 452.

²⁰³ See *First Nat'l Bank of Sing Sing v. Chalmers*, 144 N.Y. 432, 39 N.E. 331 (1895). If a jurisdiction followed *Mellen* in denying standing to a creditor beneficiary, then S's subsequent promise to C, oral or written, would lack consideration. *Halsted v. Francis*, 31 Mich. 113 (1875).

²⁰⁴ 224 N.Y. 497, 121 N.E. 362 (1918).

²⁰⁵ *Id.* at 502, 121 N.E. at 364.

²⁰⁶ See *supra* note 120 and accompanying text. Williston's test for satisfying the statute only fits the cases where the key transaction is between D and S. See *supra* note 108 and accompanying text.

has bargained to have S assume the debt, S becomes primarily responsible vis-à-vis D, and the form of S's subsequent promise to C is not relevant for the purpose of the statute of frauds. Even if S presents himself to C in the aspect of a surety ("forbear from suing D and I'll guarantee you will get paid"), he is nevertheless promising to pay his own debt.²⁰⁷ That the form of S's promise to C is unimportant is underlined by a reference to *Lawrence v. Fox*,²⁰⁸ according to which no further promise to C is necessary. Thus, if D turns over money or other assets to S and the parties intend the beneficial interest to vest in S in exchange for S's promise to pay D's creditor, then as between S and D, S ought to pay.²⁰⁹ If an owner (S) tells a subcontractor (C) that he will hold back enough money otherwise payable to the general contractor (D) to "guarantee" that C will be paid, the promise has been held original despite its form.²¹⁰

The importance of the transaction between D and S has a corollary in third-party beneficiary law. If D conveys mortgaged land to S with a deed containing a clause by which the grantee assumes payment of the mortgage debt, the promise will be given its natural meaning as a promise enforceable by the mortgagee as creditor beneficiary.²¹¹ But this is only allowed where S acquires the beneficial as well as the legal ownership. If the deed from D to S is intended by the parties only as security for a debt owed by D to S, it is regarded as a mortgage, and the assumption clause, despite its form, is interpreted as merely a promise to advance money to D to pay his debt on the security of the land, not as a promise to pay the mortgage debt itself enforceable by the mortgagee.²¹² As Judge Andrews summed up the law in

²⁰⁷ See *Raabe v. Squier*, 148 N.Y. 81, 42 N.E. 516 (1895). This remains true even if C is unaware of the previous dealing between D and S, and perceives S as only a surety. 11 WILLISTON & JAEGER, *supra* note 46, § 1371.

²⁰⁸ 20 N.Y. 268 (1859).

²⁰⁹ See *Clark v. Howard*, 150 N.Y. 232, 238, 44 N.E. 695, 697 (1896); see also *supra* notes 176–78 and accompanying text.

²¹⁰ *Cincinnati Traction Co. v. Cole*, 258 F. 169 (6th Cir. 1919); *Raabe*, 148 N.Y. at 87, 42 N.E. at 518; *Threadgill v. McLendon*, 76 N.C. 24, 26 (1877); accord 1 WILLISTON & JAEGER, *supra* note 86, § 481 (noting that for what S pays to C, he has no right to indemnity from D). It is unclear whether D must consent to the holdback. See 2 CORBIN, *supra* note 67, § 363, at 266.

²¹¹ See *Burr v. Beers*, 24 N.Y. 178, 179 (1861).

²¹² See *Cole v. Cole*, 110 N.Y. 630, 632, 17 N.E. 682, 683 (1888); *Root v. Wright*, 84 N.Y. 72 (1881); *Pardee v. Treat*, 82 N.Y. 385, 387 (1880); *Garnsey v. Rogers*, 47 N.Y. 233, 237–38 (1872). A further example of how courts rewrite promises to

Pardee v. Treat.²¹³

We think the true result of the decisions upon the effect of an assumption clause in a deed is, that it can only be enforced by a lienor, where in equity the debt of the grantor secured by the lien becomes, by the agreement between him and his grantee, who assumes the payment, the debt of the latter. On the other hand, if the assumption is in aid of the grantor,...or, in other words, if, in equity as at law, the grantor remains the principal debtor, then the assumption clause is a contract between the parties to the deed alone, and the liability of the grantee, for any breach of his obligation, is to the grantor only.²¹⁴

The issue in *Pardee* was not framed in terms of the statute of frauds; the statute only applies to a promise by S to C; a promise by S to D lies outside the statute. Yet, whereas between S and D, S had not made the debt his own, C was denied the right to enforce it as a third-party beneficiary despite the form of S's promise. And a subsequent promise by S to C would be subject to the statute.²¹⁵ Were the rule in *Pardee* otherwise, the corollary rule that promises to D lie outside the statute might have to be modified.

The freedom with which the New York courts enforce promises collateral in form when based on consideration moving from D to S stands in contrast to the rigorous scrutiny of the form of S's promise when the consideration moves from C to S.²¹⁶ It has been observed that when beneficial consideration is provided to S by D, it is intrinsically more likely to be the

conform to an intent ascribed by the court is where D owns land subject to a mortgage but is not personally liable for the debt. If he sells and conveys the land to S with a deed containing a clause by which S agrees to pay the debt, the assumption clause is not given its usual meaning. Because D had no apparent interest in having the debt paid once he no longer owns the land, S's promise will be interpreted as intended only as an indemnity to D, by which C derives no rights. *Vrooman v. Turner*, 69 N.Y. 280 (1877); see also *infra* notes 237–38 and accompanying text. It had previously been held that even with beneficial consideration, a promise by S to D to indemnify D against his obligation to C was not enforceable by C. See *Turk v. Ridge*, 41 N.Y. 201, 207 (1869).

²¹³ 82 N.Y. 385 (1880).

²¹⁴ *Id.* at 388–91.

²¹⁵ See *Ackley v. Parmenter*, 98 N.Y. 425 (1885). This relation between third-party beneficiary law and how the statute is interpreted when S's promise is made to C has its reverse mirror image in the Massachusetts cases of *Mellen v. Whipple* and *Curtis v. Brown*. See *supra* text accompanying notes 183–90.

²¹⁶ See *Witschard v. A Brody & Sons*, 257 N.Y. 97, 99, 177 N.E. 385, 385 (1931); *Richardson Press v. Albright*, 224 N.Y. 497, 502, 121 N.E. 362, 364 (1918).

equivalent of S's undertaking than when it moves from C to S.²¹⁷ It is striking that the exception in which the court tolerated a collateral promise in the latter type of case in *Brown v. Curtiss*,²¹⁸ in which S owed C a debt and C accepted a third-party note at face value in payment. The underlying constant is that the purpose of the statute is not implicated if S receives an equivalent quid pro quo by which he becomes a principal debtor, independently of D's liability.

V. TWO LOOSE ENDS

I have attempted to analyze some typical suretyship situations in light of precedent and policy. There is one further situation that seems correct but is hard to classify with other precedents; and one that is not only hard to classify, but of doubtful soundness.

A. *The Del Credere Agent*

A seller may be unfamiliar with a distant market and the reliability of numerous traders there. The seller contracts with a local agent and empowers him to sell goods on credit to persons selected by the agent, and the agent orally guarantees payment for goods sold. In consideration of his added responsibility, the agent receives an enhanced commission. In conformity with the common law consensus,²¹⁹ New York²²⁰ and Massachusetts²²¹ hold the agent's oral promise binding. Various reasons have been assigned for this result, but the *Restatement* view is that "an important inducement for the promise is his desire to advance his own interest."²²² This is an acceptable explanation in

²¹⁷ See 1 WILLISTON, *supra* note 86, § 476. The manifest equivalence in values in *Cardell v. McNiel*, 21 N.Y. 336 (1860) undoubtedly clinched the conclusion that S was promising to pay his own debt to C.

²¹⁸ 2 N.Y. 225 (1849). One would also include *Cardell*, in which C accepted a third-party note at face value from S in payment for a horse. *Cardell*, 21 N.Y. at 337. The extension of these cases to the sale of a third-party note in *Milks v. Rich*, 80 N.Y. 269 (1880) is less persuasive.

²¹⁹ See 2 FARNSWORTH, *supra* note 14, § 6.3.

²²⁰ See *Sherwood v. Stone*, 14 N.Y. 267, 269 (1856); *Wolff & Henricks v. Koppel*, 5 Hill 458 (N.Y. Sup. Ct. 1843), *aff'd*, 2 Denio 368 (N.Y. 1845).

²²¹ See *Swan v. Nesmith*, 24 Mass. (7 Pick.) 220, 223–24 (1828).

²²² RESTATEMENT (SECOND) OF CONTRACTS § 121(2) cmt. a (1981); *accord* RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 11(3)(g) cmt. q (1996); 1 WILLISTON, *supra* note 86, § 484 (opining that the promise is withdrawn from the statute "only because the transaction on both sides is concerned with a matter to

jurisdictions comfortable with a loose version of the main purpose rule. But it is hardly satisfactory in New York. If the result is to be reconciled with the overall case law in New York, one would hope to find an explanation that constitutes the agent as a principal debtor, independent of the customers' indebtedness. In *Sherwood v. Stone*,²²³ the court attempted to constitute the agent as a purchaser of the debt from the principal independent of the customer. This suffered from the slight difficulty that it was not in accord with the facts. Earlier, Justice Cowen recognized that the agent's promise was collateral to that of the customer, but put forward an ingenious analogy: "Suppose a factor agrees by parol to sell for cash, but gives a credit. His promise is virtually that he will pay the amount of the debt he thus makes. Yet who would say his promise is within the statute?"²²⁴ The Justice appears to say that a business objective that could be accomplished by one lawful means justifies any other means, even if the latter means as such is barred by statute. Thus, the agent becomes an original promisor by analogy.²²⁵

Professor Simpson, a good legal realist, cut through the evasions and slight-of-hand characterizations:

The fact that the guarantor has a purpose of his own to promote scarcely of itself justifies calling him a debtor, or denying that he promises to answer for the debt of another. Nevertheless, the well established view that the promise of a *del credere* agent is not within the statute, though it appears to be within its letter, is sound, because such a situation presents practically none of the danger that spurious claims might be established by perjured testimony that led to the passage of the statute.

Professor Simpson goes on to describe the circumstances of a typical *del credere* agency and concludes, convincingly, that there is less danger of fraud than in an ordinary action of debt where

which the guaranty is a mere incident"). The same might be said of many cases where the courts have applied the statute. See 2 CORBIN, *supra* note 67, § 389 (stressing that the leading object of the agent is to make larger commissions from sales to strangers, so that "he is an insurer and not a surety"). This description fits many professional compensated sureties as to whom the statute applies. *Id.* § 371.

²²³ *Sherwood*, 14 N.Y. at 267.

²²⁴ *Wolff & Henricks*, 5 Hill at 460.

²²⁵ In addressing a similar argument, Chief Judge Cardozo observed: "The form of the transaction was not thoughtless or accidental. . . . The quality impressed at the beginning persists until the end." *Wayne County Produce Co. v. Duffy-Mott Co.*, 244 N.Y. 351, 353, 155 N.E. 669, 669 (1927).

the goods are delivered to a designee of the buyer.²²⁶ Professor Simpson's explanation accords with the testimony of experience. Such an arrangement has proven over many years to be a useful way of doing business.²²⁷ If this explanation lacks logical symmetry with other legal principles of suretyship law in New York, it may be that the main purpose rule has a tiny part of its nose in the tent. Chief Judge Cardozo reminded us in another context: "As in the case of other concepts,...the pressure of exceptions has led to irregularities of form."²²⁸

B. Rosenkranz v. Schreiber Brewing Co.

There is one New York Court of Appeals case that eludes my ability to place it in some satisfactory category. In *Rosenkranz v. Schreiber Brewing Co.*,²²⁹ C, a builder, contracted with D to renovate D's property. This was done at the urging of S, who orally assured C not to worry about payment because he was advancing money to D to take care of paying C. Apparently attempting to come within the line of cases described in Part I, the plaintiff's agent testified that based on what the defendant's agent said, he "inferred" that plaintiff could look solely to defendant for payment. C won in the trial court. The judgment was reversed in the Appellate Division, whose opinion refers to the lack of legally sufficient evidence to justify defendant's "inference" that he looked solely to S for payment. The Court of Appeals in turn reversed the Appellate Division and held the statute inapplicable. If the Court of Appeals had simply based its reversal on the ground that there was enough evidence to make plaintiff's "inference" a jury question, the decision would be unexceptionable in principle, if dubious on the facts. The Court of Appeals did indeed reverse because it found a jury question, but not the one referred to. The critical factual issue, in the view of that court, was whether the evidence supported a finding that the defendant promised "to indemnify the plaintiff against a

²²⁶ See SIMPSON, *supra* note 34, at 163–64.

²²⁷ Most recently, the *del credere* technique has been used by commodities brokerage firms in relation to their account representatives; customer deficits are deducted from commissions payable. See *Conticommodity Servs., Inc. v. Haltmier*, 67 A.D.2d 480, 481, 416 N.Y.S.2d 298, 299 (2d Dep't 1979).

²²⁸ *Allegheny Coll. v. Nat'l Chautauqua County Bank*, 246 N.Y. 369, 375, 159 N.E. 173, 175 (1927).

²²⁹ 287 N.Y. 322, 39 N.E.2d 257 (1942).

default of Edgewater Island Park, Inc. [D], or was a special promise to answer for such a default and hence was within the statute of frauds."²³⁰ That was held to be a question of fact for the jury, whose verdict was reinstated.

It is respectfully submitted that the court's distinction is without substance. A promise to "indemnify" against a debtor's default and a "promise to answer for such a default" are substantially identical. There is no magic in the word "indemnify." It all depends on what risk of loss the promise addresses.²³¹ Many types of loss occur without anyone being legally responsible. Fire and collision insurance are illustrations. Yes, some fires and some damages are caused by careless tortfeasors, but many are not; and the indemnitor promises to make good the loss regardless of the liability of any third person. The indemnitor's right to subrogate to the victim's tort claim in a particular case²³² does not retroactively convert the absolute promise of indemnity to the collateral one of suretyship.²³³ But

²³⁰ *Id.* at 325, 39 N.E.2d at 257.

²³¹ See *Perkins v. Littlefield*, 87 Mass. (5 Allen) 370 (1862); *Gen. Phoenix Corp. v. Cabot*, 300 N.Y. 87, 93, 89 N.E.2d 238, 241 (1949). A surety was long ago defined as one who promises "to indemnify against a future default or liability of such principal debtor." *Rogers v. Kneeland*, 13 Wend. 114, 121 (N.Y. 1834). One controversial issue is whether S's oral promise to indemnify C for becoming surety for D's obligation to a fourth party violates the statute. Most cases enforce the promise on the ground that the promisee is an obligor, not an obligee. See *Aldrich v. Ames*, 75 Mass. (9 Gray) 76, 77 (1857); *Chapin v. Lapham*, 37 Mass. (20 Pick.) 467, 470 (1838); *Tighe v. Morrison*, 116 N.Y. 263, 269, 22 N.E. 164, 166 (1889); *Chapin v. Merrill*, 4 Wend. 657 (N.Y. Sup. Ct. 1830); RESTATEMENT (SECOND) OF CONTRACTS § 118 (1981); *cf. Sanders v. Gillespie*, 59 N.Y. 250 (1874). It may be objected that if D is under a duty to exonerate or reimburse C, then S's oral promise is collateral to that duty. Some authorities would apply the statute. See 1 WILLISTON, *supra* note 86, § 482. However, if D did not request C to be his surety, and C signed at the urging of S (and the fourth-party creditor) only, D has no implied duty to save C harmless. SIMPSON, *supra* note 34, at 201. In this situation, C's only right is to be subrogated to the creditor's right against D. *Id.* at 209. The cases holding the statute applicable do not seem to notice this distinction. See Arthur L. Corbin, *Contracts of Indemnity and the Statute of Frauds*, 41 HARV. L. REV. 689, 705-06 (1928).

²³² The insurer's right arises from the equities of the situation and requires no contract. *Hall & Long v. R.R. Cos.*, 80 U.S. 367 (1872); *Hart v. W. R.R.*, 54 Mass. (13 Met.) 99 (1847); *Conn. Fire Ins. Co. v. Erie Ry. Co.*, 73 N.Y. 399 (1878); *Aetna Fire Ins. Co. v. Tyler*, 16 Wend. 385 (N.Y. 1836).

²³³ New York and Massachusetts enforce oral insurance contracts. See *Sanborn v. Firemen's Ins. Co.*, 82 Mass. (16 Gray) 448, 452-53 (1860); *Ellis v. Albany City Fire Ins. Co.*, 50 N.Y. 402, 405 (1872); *First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N.Y. 305, 307 (1859); see also *Ocean Accident & Guar. Corp. v. Hooker Electrochemical Co.*, 240 N.Y. 37, 147 N.E. 351 (1925); WILLIAM R. VANCE, INSURANCE § 36 (3d ed. 1951).

where the only loss indemnified against is a specific debtor's default, as in *Rosenkranz*, indemnity and suretyship become one.²³⁴

A comment on *Rosenkranz* by the Court of Appeals in a later case suggests that a distinction between suretyship and indemnity lies in the lack of a principal debtor at the time the defendant's promise is made.²³⁵ This is no more persuasive than what was said in *Rosenkranz*. While the delayed appearance of a principal debtor may occur in legitimate indemnity cases, such as fire insurance, it is also true in routine suretyship cases as well.²³⁶ If S says to C, "sell goods on credit to D and I guarantee you will be paid," the promise is bad without a writing even though the principal debt is not incurred until after the surety's promise.²³⁷ It cannot be the law that if S says to C, "sell goods on credit to D and I will indemnify you against possible default," the court would hold D's oral promise binding.²³⁸ As Judge Pound said of the statute in *Richardson Press*, "its efficacy should not be wasted by unsubstantial verbal distinctions."²³⁹

The late Professor John D. Calamari understood *Rosenkranz* to mean that where S's promise is contemporaneous with D's indebtedness to C, the out-of-state main purpose rule applies and New York law does not require that S come "under an independent duty of payment irrespective of the liability of the

²³⁴ *Accord* Conway, *supra* note 120, at 144. According to Professor Conway, the record in *Rosenkranz* disclosed that S was a brewer, and its promise to pay for the installation of a bar for D was to provide an outlet for sales of S's beer. Corbin sets forth a "main purpose" notion of indemnity that would include credit insurance. Because the insurer is a total stranger to the potential obligors, and the undertaking is not for their benefit, the promisor is not a surety. 2 CORBIN, *supra* note 67, § 388. *Contra* 3 WILLISTON & JAEGER, *supra* note 46, § 482. Even under the Corbin view, *Rosenkranz* was a suretyship contract.

²³⁵ *Bulkley v. Shaw*, 289 N.Y. 133, 140, 44 N.E.2d 398, 402 (1942).

²³⁶ 4 CORBIN & BROWN, *supra* note 9, §§ 15.4–5. In New York, the Appellate Division held that a father's oral promise to pay for his daughter's hospital care had to be original because it was made before the daughter had incurred any debt to the hospital. *Four Winds Hosp. v. Keasbey*, 92 A.D.2d 478, 479–80, 459 N.Y.S.2d 68, 69–70 (1st Dep't 1983), *modified*, 59 N.Y.2d 943, 453 N.E.2d 529, 466 N.Y.S.2d 300 (1983). The Court of Appeals reversed, holding that a question of fact was presented whether the father was a surety.

²³⁷ *See, e.g., Carville v. Crane*, 5 Hill 483 (N.Y. Sup. Ct. 1843); *Jones v. Cooper*, 98 Eng. Rep. 1058 (K.B. 1774). *See generally* 4 CORBIN & BROWN, *supra* note 9, § 15.5.

²³⁸ *See Alber-Wickes Platform Serv. v. Freiburg Passion Play in English, Inc.*, 141 Misc. 480, 483, 252 N.Y.S. 209, 212 (Sup. Ct. Onondaga County 1931).

²³⁹ *Richardson Press v. Albright*, 224 N.Y. 497, 502, 121 N.E.2d 362, 364 (1918).

principal debtor,"²⁴⁰ as required by *White v. Rintoul*.²⁴¹ It is quite true that Judge Finch's synthesis in that case was expressly applied to cases where the primary debt "was antecedently contracted."²⁴² But that was simply because the facts of the case before him, as well as the cases he reviewed, all involved debts antecedently contracted. That does not entail the conclusion that the out-of-state main purpose rule applies where D's debt to C is incurred at the same time as S's promise to C. Neither the New York nor the Massachusetts cases support that interpretation. The cases, addressed in Part I of this Article, did not look to the reason for S's promise or what self-interest he was promoting. The rule of those cases was that S's promise was outside the statute only if he was the sole obligor and no credit whatsoever was given to D.²⁴³ It would have been superfluous for Judge Finch to have incorporated this class of cases in his synthesis. There is no one whose liability is more clearly independent of anyone else than a person who is the sole obligor. Indeed, Judge Finch's formula, as applied where D's debt was contracted prior to S's promise, brings those cases into perfect harmony with the rule applied to the cases where there is a single transaction.²⁴⁴ The latter class of cases would have to be overruled to let the main purpose rule creep in that door, and if so, there would be no point in not applying it as well to cases where D's debt was antecedently contracted. Whatever the merits of *Rosenkranz*, it

²⁴⁰ John D. Calamari, *The Suretyship Statute of Frauds*, 27 FORDHAM L. REV. 332, 343 (1958).

²⁴¹ 108 N.Y. 222, 15 N.E. 318 (1888).

²⁴² *Id.* at 227, 15 N.E. at 320.

²⁴³ See *supra* note 24 and accompanying text. The recent case of *Capital Knitting Mills, Inc. v. Duofold, Inc.*, 131 A.D.2d 87, 519 N.Y.S.2d 968 (1st Dep't 1987) would have been decided differently under Professor Calamari's rule. C supplied specialty cloth under contract with D, which in turn manufactured it into garments for S. D's credit was questionable and C refused to sign with D until S orally guaranteed payment. S's self-interest is manifest, yet the court held that the promise violated the statute: C gave credit to D and S's promise was collateral. The court applied the New York rule but was not happy with it and invited the Court of Appeals to revisit the issue.

²⁴⁴ As long ago as *Mallory v. Gillett*, 21 N.Y. 412 (1860), the court insisted that: [T]he statute [makes] no distinction between a debt created at the time when the collateral engagement is made, and one having a previous existence. . . . [I]n either case, and equally in both, the inquiry under that statute is, whether there be a debtor and a surety, and not when the relation was created.

Id. at 415; accord *Rogers v. Kneeland*, 13 Wend. 114, 121 (N.Y. 1834).

did not overthrow prior precedents and has been little noticed in subsequent cases.

One possible rationale for *Rosenkranz* is that S's promise was not directly to answer for the debt of D. S promised to advance funds to D to enable D to pay its debt to C. In the relationship between principal and surety, the performance by either will discharge both duties. As Corbin stated, "If the performance promised by the two persons are different and full performance by either of them would not discharge the other, neither one is a surety and the statute does not apply."²⁴⁵ In *Rosenkranz*, if S kept his promise to advance funds to D, that would not satisfy D's duty to pay C. True, it would facilitate performance of that duty, but that is a different thing.²⁴⁶ It may be that the court's reference to the possibility that S promised to "indemnify the plaintiff against a default" of D was an obscure way of expressing this idea. However, in *Bulkley v. Shaw*,²⁴⁷ decided the same year as *Rosenkranz*, a promise to put the debtor in funds was regarded as coming within the statute, without discussion. There the matter must rest.

CONCLUSION

The heading of a capstone section of Williston's treatise reads: "True Test Should Be: Is the New Promisor a Surety?"²⁴⁸ In the explanation that follows, Williston makes it clear what he means by a surety: "If, as between himself and the original

²⁴⁵ 2 CORBIN, *supra* note 67, § 349; *see also* 4 CORBIN & BROWN, *supra* note 9, § 15.19.

²⁴⁶ *But see, e.g.*, *D'Wolf v. Rabaud*, 26 U.S. 476, 500 (1828); *Towne v. Grover*, 26 Mass. (9 Pick.) 306, 307 (1830); RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 1 illus. 14 (1996) (suggesting that S was not a surety).

²⁴⁷ 289 N.Y. 133, 138, 44 N.E.2d 398, 401 (1942). Defendants, controlling shareholders of a publishing corporation, promised a vendor, Bulkley, that they would fund the corporation if he would continue to sell paper on credit to it. Interestingly, the court recognized the difference between the promises of D and S: "The italicized portions of the contract . . . show quite clearly that the defendants never promised to pay Bulkley any sum. Their promise was to put Review in funds to meet its obligations." *Id.* at 136, 44 N.E.2d at 400. The court did not pursue the implications of this sentence and held the promise void under the statute. If S promises D to advance funds to enable it to pay C for some work, the promise is not within the statute, but catch 22, C is not an intended beneficiary. *Tomaso, Feitner & Land, Inc. v. Brown*, 4 N.Y.2d 391, 393, 151 N.E.2d 221, 222, 175 N.Y.S.2d 73, 74 (1958). Because *Bulkley* involved a promise directly to the creditor, there was no problem with third-party beneficiaries.

²⁴⁸ 3 WILLISTON & JAEGER, *supra* note 46, § 475, at 447.

promisor, the debt really ought to be paid by the latter, whatever may be the other elements of the transaction, the new promisor is on principle and in fact promising to answer for the debt or default of another.²⁴⁹

Williston admits that his theory leaves out cases where the defendant promisor received a quid pro quo from the creditor and thus became a principal debtor.²⁵⁰ As seen in *Cardell v. McNiel*, if S pays his debt to C with D's note, S's oral guarantee is enforced, yet as between S and D the latter ought to pay.²⁵¹ In *Fish v. Thomas*, the boat owner's promise is enforced, yet as between the owner of the boat and the builder who incurred the debt, the builder ought to pay.²⁵² A rationale that fails to account for these cases is not satisfactory.

If we can admit that indebtedness and suretyship can coexist, that a person can wear two hats—as a principal debtor to C and, at the same time, a surety for D—then we can see our way clear to a comprehensive interpretation of the statute: it applies only to promisors who occupy suretyship status as to both C and D. Such would be the case in *Fish v. Thomas*, if S, the owner of the encumbered property, had promised C to “guarantee” D's debt.²⁵³ On the other hand, if S's dealings with either D or C make him primarily liable to the party dealt with, then the statute does not apply. The line of cases typified by *First National Bank of Sing Sing v. Chalmers* show S taking D's debt upon himself by a transaction with D; thus S's subsequent promise to C to pay D's debt is at the same time a promise to pay his own debt.²⁵⁴ *Fish*,²⁵⁵ *Cardell*²⁵⁶ and kindred cases show S taking an original debt upon himself in a transaction with C. Perhaps we can say that in these cases, S's status as a debtor to C trumps his status as a surety for D.

²⁴⁹ *Id.* § 475.

²⁵⁰ *Id.* at § 475.

²⁵¹ 21 N.Y. 336, 337–39 (1860).

²⁵² 71 Mass. (5 Gray) 45, 48 (1855).

²⁵³ Such a promise would make S a surety as to both C and D, and the statute would apply. See *supra* notes 86–93 and accompanying text.

²⁵⁴ 144 N.Y. 432, 434, 39 N.E. 331, 331 (1895); see also RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 11(3)(b) cmt. h (1996) (acknowledging that in the situation described in the text, S has suretyship status and is also answering for his own debt).

²⁵⁵ 71 Mass. (5 Gray.) at 48.

²⁵⁶ 21 N.Y. at 337–39.

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This explanation fits comfortably within the famous summary statement in *White v. Rintoul*:

[W]here 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.²⁵⁷

This summary is quite open textured, but it clearly does not focus on whether S is a surety; it focuses on whether S is a debtor to C independently of D's liability. Where D has given consideration to S in exchange for S's promise to pay the debt, then as between S and D, S has made himself primarily responsible and his subsequent promise to C fits the *Rintoul* test. Where the seller of a horse accepts an orally guaranteed note from S in payment, the form of the promise may be collateral, but it is for a debt independent of the liability of the maker of the note. If the facts of any case show that S has "made the debt his own" vis-à-vis either C or D, the *Rintoul* test is satisfied.²⁵⁸

One of Williston's most insightful observations concerned a basic distinction not always observed by courts: "That distinction is between a consideration which is given and received as the equivalent of the debt, payment of which is promised; and, on the other hand, a consideration which is given merely as the equivalent for the risk which the promisor may run in being compelled to pay."²⁵⁹ Somewhere in the middle of Williston's dichotomy lie cases where the consideration for S's promise is discounted by the risk of D's nonpayment. A particularly difficult issue is presented by cases in which the consideration moves from C to S, but does not fully match the scope of S's undertaking. Assume C has delivered lumber worth \$100 under a contract with D, who is building a house for S. D has not paid for the lumber and C justifiably refuses to deliver more. S says to C, "Forget about D. You and I can make a new contract. You

²⁵⁷ 108 N.Y. 222, 227, 15 N.E. 318, 320 (1888).

²⁵⁸ *Cardell* did not involve a debt "antecedently contracted," at least not between C and D. Prior to S's promise, the debt was owed by D to S. S assigned it to C with a guarantee as payment for a horse purchased from C. Nevertheless, the result is in harmony with the *Rintoul* dictum. See *Cardell*, 21 N.Y. at 337-39.

²⁵⁹ 1 WILLISTON & JAEGER, *supra* note 46, § 473. This point is noticed in *Rolfsmeyster v. Rau*, 269 N.W. 411, 413 (Minn. 1936).

continue to deliver lumber to the site and I'll pay you for all lumber delivered." C accepts this offer and delivers an additional \$100 worth of lumber. May C recover \$200 from S? Cases from Massachusetts and New York formerly said no, but recent cases have said yes.²⁶⁰ This result is not directly inconsistent with *Brown v. Weber*²⁶¹ and *Witschard v. A. Brody & Sons*.²⁶² In those cases, S's promise was to "guarantee" D's debt for past and future work done by C for D. C continued to perform the contract with D. There was no new contract between C and S, bypassing D. Here, there is such a new contract. C is no longer dealing with D; he is dealing with S. However, it is most unlikely that C and S intended that C could collect \$200 from S and \$100 from D. Therefore, if S pays C \$200 he subrogates to C's claim against D for \$100.²⁶³ This indicates that S is a surety for D to the extent of \$100. Thus, as to past indebtedness of D to C, the form of S's promise does not escape the strictures of *Brown* and *Witschard*. This is apparent from *Pfeiffer v. Adler*,²⁶⁴ in which S's promise to pay for goods to be sold to her by C included an absolute promise to pay a debt for goods previously sold to her late husband. The only consideration was C's continued sale of goods on credit to S at market price. The promise to pay the past debt was held void. A dishonest creditor can just as easily testify to the conversation quoted above as to a promise by S to "guarantee" that D will pay. The facts may be cloudy as to D's role thereafter. Is it a wise interpretation of the statute to allow the result to depend so heavily on the words testified to? If C's recovery were limited to the price of goods delivered or work done in response to S's absolute promise, the danger of fraud is minimized in that S has received an equivalent quid pro quo. But if S's promise can incorporate past due debts of D to C, S is exposed to liability for which he has not received equivalent consideration.

I have said above that S can wear two hats: he may be a

²⁶⁰ *Hayes v. Guy*, 205 N.E.2d 699, 700 (Mass. 1965); *Brown Bros. Elec. Contractors, Inc. v. Beam Constr. Corp.*, 41 N.Y.2d 397, 399, 361 N.E.2d 999, 1001, 393 N.Y.S.2d 350, 351 (1977). The *Hayes* case faced the issue squarely and gave brief reasons for its conclusion based on the main purpose rule. Whether those brief reasons are satisfactory is a different question. The *Brown Bros.* decision was far less explicit and did not betray awareness that it was departing from prior law.

²⁶¹ 38 N.Y. 187, 191-92 (1868).

²⁶² 257 N.Y. 97, 177 N.E. 385 (1931).

²⁶³ See 2 CORBIN, *supra* note 67, § 366, at 277; SIMPSON, *supra* note 34, at 206.

²⁶⁴ 37 N.Y. 164 (1867).

debtor to C and at the same time a surety for D. But the indebtedness must exist independently of S's promise to C.²⁶⁵ To say this requirement is met here would require a court to believe that the parties agreed that the consideration provided by C—the lumber delivered after the promise—made S a debtor to the tune of \$200, so S was really promising to pay his own debt to C. This strains credulity to the breaking point.²⁶⁶ S promised C to pay \$200, not because that was the agreed price of lumber thereafter delivered, but because the consequential damages that would be caused by C's withholding delivery outweighed in S's mind the burden of paying D's debt, which might be small in comparison. S's promise cannot be forced into the mold of *Rintoul*;²⁶⁷ S is not promising to pay a debt of his own that exists independently of his promise to C, as would be required under the traditional New York rule.²⁶⁸ If the promise is to be enforced, it can only be because it was S's leading object to benefit himself, not to accommodate D. If this is now the law in New York, the main purpose rule has more than its nose in the tent; the rest of the animal has crept in unnoticed.

Of course, the doctrine developed in New York is different in form from the main purpose rule found in Massachusetts law. But where the benefit flows from C to S, many cases similar on their facts have been decided the same way in both jurisdictions; at least until recently, there have been few differences in actual

²⁶⁵ RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 11(3)(b)(ii) cmt. h (1996).

²⁶⁶ 2 WILLISTON, *supra* note 86, § 684, at 1321.

²⁶⁷ 108 N.Y. 222, 15 N.E. 318 (1888).

²⁶⁸ *Pfeiffer*, 37 N.Y. at 164; *accord* *Winne v. Mehrbach*, 130 A.D. 329, 114 N.Y.S. 618 (3d Dep't 1909); *Cardeza v. Bishop*, 54 A.D. 116, 117, 66 N.Y.S. 408, 408 (2d Dep't 1900). Paradoxically, in New York, C's case against S might be stronger if C was not justified in canceling the prior contract with D. If C was a subcontractor providing services, such a contract is always held to be entire. *New Era Homes Corp. v. Forster*, 299 N.Y. 303, 306–07, 86 N.E.2d 757, 758–59 (1949). In New York, that means that if C quit without good cause, he has no claim against D. *Steel Storage & Elevator Constr. Co. v. Stock*, 225 N.Y. 173, 176, 121 N.E. 786, 786–87 (1919); *Triple M. Roofing Corp. v. Greater Jericho Corp.*, 43 A.D.2d 594, 594, 349 N.Y.S.2d 771, 773 (2d Dep't 1973). If D owes nothing to C, S's new promise cannot be collateral. *See* *Manetti v. Doege*, 48 A.D. 567, 568–69, 62 N.Y.S. 918, 919 (2d Dep't 1900); *Devlin v. Woodgate*, 34 Barb. 252, 253 (N.Y. Sup. Ct. Gen. T. N.Y. County 1861); *accord* *Buchanan v. Moran*, 25 A. 396, 397–98 (Conn. 1892). However, if C was delivering goods to D, the contract of sale is undoubtedly divisible. C has a vested right to payment for goods delivered despite his later breach. *See* U.C.C. § 2-607(1) (2002); *Tipton v. Feitner*, 20 N.Y. 423, 427 (1859); *see also supra* notes 159–60 and accompanying text.

results. Seventy years ago, the Supreme Judicial Court undertook a major review of the case law and limited some prior loose statements of the rule, confining it to S's acquisition of such a direct and substantial benefit from C that the debt may fairly be said to be his own.²⁶⁹ This strict version of the rule brought it into close proximity to the New York position. The Massachusetts cases since that time have chipped away at the statute piecemeal and enlarged the exception, not always with attention to precedent. There is now a large area of uncertainty. A new synthesis would be welcome.

In contrast, where the benefit flows from D to S, who in exchange agrees to pay D's debt, the Court of Appeals has enforced S's oral promise to C, while the Supreme Judicial Court has, thus far, refused to do so, although the demise of *Mellen v. Whipple*²⁷⁰ may one day bring about a change. Until such a change comes, it appears that New York is more generous to creditors seeking to deny promisors the protection of the statute. This may come as a surprise to those who assume that the Massachusetts rule is always more permissive than the rule in New York.

By and large, New York has been faithful to the standards laid down in the earlier cases, but recently has shown signs of straying from the well-trodden path.²⁷¹ The way the statute is interpreted may be at a crossroads. The Court of Appeals will have to decide whether to strike out in a new untried direction,²⁷² perhaps toward a more perfect justice, or not, or else return to the strait and narrow way laid down in the cases summarized in Part III.C.

²⁶⁹ *Colpitts v. L.C. Fisher Co.*, 193 N.E. 833, 834 (Mass. 1935), *see also supra* notes 192–94 and accompanying text (examining the nature of the benefit and the promisor's relation to it). In referring to the building construction cases, the court cited with approval not only *Gill v. Herrick*, 111 Mass. 501 (1873) and *Collins v. Abrams*, 176 N.E. 814 (Mass. 1931), but also *Witschard v. A. Brody & Sons*, 257 N.Y. 97, 177 N.E. 385 (1931). However, the court also apparently approved the landlord-tenant case of *Washington & Devonshire Realty Co. v. Lewis Diamond Co.*, 161 N.E. 883 (Mass. 1928).

²⁷⁰ 67 Mass. (1 Gray) 317 (1854).

²⁷¹ *See Brown Bros. Elec. Contractors, Inc. v. Beam Constr. Corp.*, 41 N.Y.2d 397, 361 N.E.2d 999, 393 N.Y.S.2d 350 (1977); *see also* *Pyramid Champlain Co. v. R.P. Brosseau & Co.*, 267 A.D.2d 539, 543–44, 699 N.Y.S.2d 516, 521 (3d Dep't 1999).

²⁷² Such a change was suggested in *Capital Knitting Mills, Inc. v. Duofold, Inc.*, 131 A.D.2d 87, 95, 519 N.Y.S.2d 968, 972–73 (1st Dep't 1987).