

so that there was actually contribution to the losses by each of the associates, ergo, also an intention to contribute, although the contribution was to be made in a specified way and manner. There was here a community of interest in the business as such, a sharing in the profits, and a measure of control in each party to the contract. To this extent they were all principals who shared in the profits, and they should have been held to be partners. The net result of this case is a recognition of an anomalous type of enterprise, not quite a principal-agent relationship, not quite a partnership, but a principal-associate status hitherto unknown, with no reason to recommend its adoption as another means of attaining limited liability without complying with prescribed statutory regulation.

In cases of this type, it would seem to be the policy of the Missouri courts to recognize and favor a liability limited to particular property. There is no objection to allowing a limited liability where there is such a provision contained in the independent contracts with third parties, but there is some question as to the wisdom of a policy which in effect allows parties contracting *inter sese*, by such contracts to limit liability as to third persons, not the contracting parties. And although some argument might be made in its favor in large group action, there are statutory means of protection against full liability which should be employed for that purpose.

If the intention doctrine which Missouri has articulated since 1922 is an unconscious divergence from the prevailing view, then it is submitted that a conscious revision by the courts, or at least a disclosure of the policy intended to be served would be fitting. If, however, the adoption of the expressed intention and loss-sharing criteria as determinative in the formation of a partnership status is conscious and purposive, it is clear that the Missouri courts are clinging to a doctrine foreign to the prevailing view of Anglo-American partnership law.

STANLEY MORTON RICHMAN, '33.

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#### THE MAIN PURPOSE RULE AND THE STATUTE OF FRAUDS AS APPLIED TO PROMISES TO ANSWER FOR THE PRE-EXISTING DEBT OF ANOTHER

Where a statute passed to prevent frauds and perjuries is actually used to enable a person to acquire a benefit and then prevent any inquiry as to whether he promised to pay for this benefit, there is an inevitable tendency of the courts to try to discover some way by which such a person can be forced to perform

his promise.<sup>1</sup> The terms of the Statute of Frauds are all-inclusive: ". . . no action shall be brought whereby to charge . . . the defendant upon any special promise to answer for the debt, default, or miscarriage of another person . . . unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."<sup>2</sup> Under these circumstances the courts have adopted various theoretical tests by which they have endeavored to satisfy themselves that the promise to pay the debt already owed to the promisee by a third person is under varying circumstances not within the statute and hence need not be in writing. It is necessary to examine these divergent fundamental principles in some detail as they serve to explain why the courts of the various states have sometimes reached absolutely contradictory results in dealing with the same concrete situations.

Historically the first attempt to formulate the doctrine that under certain circumstances a promise to answer for the debt of another was not within the Statute, was made by Chancellor

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<sup>1</sup> It is not the purpose of the present note to consider the merits or lack of merit of the Statute of Frauds. It is sufficient to say it exists in every state. Only cases in which the debt of a third person existed before the new promise was made and is not extinguished by way of novation by that promise will be considered.

<sup>2</sup> (1677) 29 Car. II c. 3 sec. 4. The equivalent Missouri provision is R. S. Mo. (1929) sec. 2967. California, Idaho, and Montana have adopted an identical statute covering the whole subject of this note and removing all doubt upon the matter. It is made an express exception to the local Statute of Frauds. It reads: "A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor and need not be in writing: (1) Where the promise is made by one who has received property of another upon an undertaking to apply it pursuant to such promise. . . (2) Where the creditor parts with value or enters into an obligation, in consideration of the obligation in respect to which the promise is made, in terms or under circumstances such as to render the party making the promise the principal debtor, and the person in whose behalf it is made, his surety; (3) Where the promise being for the antecedent obligation of another is made . . . upon the consideration that the party receiving it will release the property of another from a levy or his person from imprisonment upon a judgment obtained upon the antecedent obligation; or upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation or from another person; . . . (5) Where the holder of an instrument for the payment of money on which a third person is or may become liable to him transfers it in payment of a precedent debt of his own or for a new consideration and in connection with such transfer enters into a promise respecting such instrument." Cal. Civ. Code (Deering 1923) sec. 2794; Idaho Comp. Stat. sec. 7977; Mont. Rev. Civ. Code (Choate 1921) sec. 8175.

Kent by way of dictum in *Leonard v. Vredenburg*,<sup>3</sup> decided in 1811. The learned chancellor divided promises made after the creation of the original debt into two classes: (1) where the subsisting liability is the ground for the promise, although "here there must be some further (or new) consideration shown, having an immediate respect to such liability; for the consideration of the original debt will not attach to this subsequent promise"; and (2) where the "promise to pay the debt of another is founded upon a new and distinct consideration, independent of the debt, and one moving between the parties to the new promise." Elsewhere the chancellor speaks of the second class as embracing those cases where there is a "new and original consideration." This consideration may be one either of benefit to the promisor or of harm to the promisee. This rule is largely based upon the English case of *William v. Leper*,<sup>4</sup> but the views of the majority of the judges in that case do not actually support this rule. Indeed there was no real attempt by the English Courts to lay down a general rule on this subject, as distinguished from a decision upon the facts of a particular case, until 1902.<sup>5</sup> Backed by the prestige of Chancellor Kent, this rule spread rapidly over the country,<sup>6</sup> but it has now been almost completely dis-

<sup>3</sup> (N. Y. 1811) 8 Johns. 29. However, three previous cases had upheld promises made in consideration of the release of liens upon authority of the English cases, but without any attempt to lay down any general guiding principle. *Kershaw v. Whitaker* (S. C. 1794) 1 Brev. 9; *Siav v. Pigott* (S. C. 1804) 1 Nott. & McC. 124; *Slingerland v. Morse* (N. Y. 1811) 7 Johns. 463.

<sup>4</sup> (1766) 3 Burr. 1886, 97 Eng. Repr. 1152. Lord Mansfield and Justice Ashton hold it to be a promise to pay out of a fund belonging to the original debtor but temporarily in the promisor's hands. Justice Wilmot upholds it on the basis that it created the new promisor an agent of the creditor and liable to account as such, while Justice Yates alone puts his opinion upon the ground that it is a new and original promise. It is well settled that a promise to pay out of funds of the debtor is not within the Statute. *Armstrong v. First National Bank of Bolivar* (Mo. App. 1917) 195 S. W. 562; *Gutknecht v. Sorge* (1923) 195 Wis. 468, 218 N. W. 716. Better precedents would have been: *Tomlinson v. Gill* (1756) Ambler 330, 27 Eng. Repr. 221; *Croft v. Smallwood* (1793) 1 Esp. N. P. R. 121, 170 Eng. Repr. 299; *Houlditch v. Milne* (1800) 3 Esp. N. P. R. 86, 170 Eng. Repr. 547; *Castling v. Aubert* (1802) 2 East 325, 102 Eng. Repr. 393.

<sup>5</sup> By Lord Justice Vaughan-Williams in *Harburg India Rubber Comb Co. v. Martin* (1902) 1 K. B. 778, limiting it to cases in which the creditor waives a lien upon property or documents belonging to the promisor. A similar view is followed in Vermont and Connecticut. *Fullam v. Adams* (1864) 37 Vt. 391; *Dillaby v. Wilcox* (1891) 60 Conn. 71, 22 Atl. 491.

<sup>6</sup> Aided by the elaborate review of authorities by Chief Justice Savage in *Farley v. Cleveland* (N. Y. 1825) 4 Cowen 432, affirmed without opinions by the Court of Errors (1827) 9 Cowen 639. Cf. for examples *Creel v. Bell & Co.* (1829) 25 Ky. 309; *Travis v. Allen* (Ala. 1831) 1 Stew. & P. 192; *Allen v. Thompson* (1838) 10 N. H. 32.

carded, still prevailing only in Arkansas<sup>7</sup> and South Carolina,<sup>8</sup> as an actual rule of decision, although it is frequently cited as the law in cases which are decided under other rules, which the courts do not always seem to realize are conflicting.

The courts have proved unwilling to continue so sweeping an exception to the Statute as this, for it would take most cases of promises to pay prior debts of another out of the Statute even though the benefit or harm passing between the parties to the new promise was comparatively very slight. In such cases the inherent equities of the situation which tended to create the exception would not be present. The limitation most commonly adopted is that announced by Chief Justice Shaw in *Nelson v. Boynton*<sup>9</sup> in 1841:

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

Elsewhere in the opinion the chief justice uses a shorter and more commonly quoted, but less exact, phrase to define the test, "where, although the effect of the promise is to pay the debt of another, the leading object of the undertaker is to subserve or promote some interest of his own." This language has been widely adopted as the proper rule, particularly in its shorter form.<sup>10</sup> The difficulty is that the two forms of the test are widely different in their emphasis. The first passage is primarily concerned with the directness of the benefit to the new promisor, while the second is apparently more concerned with his motive. Massachusetts has been rigid in maintaining the requirement of a direct benefit to the new promisor and a mere incidental although certain benefit to him is not enough to take the case out of the Statute.<sup>11</sup> In Missouri it was settled in the leading case

<sup>7</sup> *Becker Provision Co. v. Parker Hardware Co.* (1920) 146 Ark. 539, 226 S. W. 177.

<sup>8</sup> *Ellis & Co. v. Carroll* (1904) 68 S. C. 376, 47 S. E. 679; but see *Turner v. Lykes* (1904) 68 S. C. 392, 48 S. E. 301, which completely ignores all prior precedents in South Carolina, while the first case is based upon a review of these.

<sup>9</sup> (Mass. 1841) 3 Metc. 396.

<sup>10</sup> It would serve no useful purpose to attempt to enumerate even a fair selection of the cases adopting this test. It may safely be said to prevail in all states in which a different rule is not specifically mentioned as being applied.

<sup>11</sup> *Ames v. Foster* (1870) 106 Mass. 400 (giving up a lien on the share of a part owner of a vessel which would prevent the vessel being taken to New

of *Walther v. Merrell*,<sup>12</sup> that a similar strict test should be applied. Other states while nominally applying the same rule have stressed the intent of the promisor and have been content with a far less direct benefit to him than would be deemed sufficient in Massachusetts.<sup>13</sup>

This vagueness of the Massachusetts rule led to the creation of still a third major doctrine by the Supreme Court of the United States in *Emerson v. Slater*<sup>14</sup> while apparently trying to apply the *Nelson v. Boynton* rule, as it should since the contract was made in Massachusetts and Federal jurisdiction depended solely on diversity of citizenship. There it was declared:

Whenever the main purpose and object of the promisor is not to answer for the debt of another but to observe [sic. subserve meant] some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the Statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability.

This test is really a compromise between the views of Chancellor Kent and Chief Justice Shaw, for if the leading object of the contract is of the right kind, a mere detriment to the promisee is enough. It must be noted that the object is limited to serving a pecuniary or business purpose, while under Chancellor Kent's rule the object might be of any nature, provided there was a new consideration passing between the parties. This rule is apparently in force in West Virginia<sup>15</sup> and Ohio,<sup>16</sup> and in the latter state has resulted in upholding contracts where there was a detriment to the creditor,<sup>17</sup> but the benefit to the new promisor

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York to be sold at a very advantageous price is not enough when the promise is made by the owner of the rest of the vessel).

<sup>12</sup> (1878) 6 Mo. App. 370.

<sup>13</sup> *Prout v. Webb* (1889) 87 Ala. 593, 6 So. 190 (profits of agency as buyer for debtor); *Garvey v. Crouch* (Ky. 1896) 35 S. W. 273 (influence others to consign goods to promisor's warehouse). Texas has recently adopted a variant of this rule by which the motive of the promisor is immaterial and the test depends upon the subject matter of the contract. *Housley v. Strawn Merchandise Co.* (Tex. 1927) 291 S. W. 864.

<sup>14</sup> (1859) 22 How. 28. Explicitly followed in *Davis v. Patrick* (1891) 141 U. S. 479. Approved by Arnold, *SURETYSHIP AND GUARANTY* (1927) sec. 60.

<sup>15</sup> *Howell v. Harvey* (1909) 65 W. Va. 310, 64 S. E. 249. However, in *Hurst Hardware Co. v. Goodman* (1910) 68 W. Va. 462, 69 S. E. 898, the same court considered the facts of *Emerson v. Slater* and *Davis v. Patrick* at length, but ended by applying the tests of *Nelson v. Boynton* without realizing that there was any difference between them.

<sup>16</sup> *Grant v. Kinney* (1927) 117 Ohio St. 362, 159 N. E. 346.

<sup>17</sup> *Texas Co. v. Seaboard National Bank* (Ohio App. 1926) 159 N. E. 842.

was not direct enough to meet the test of *Nelson v. Boynton*. It is not clear whether the words "object or purpose of the contract" mean the subjective intent of the new promisor or refer to the material thing effected by the contract. From the use of the word "purpose" it would seem that they have reference to the intent of the parties. In a few instances the intent of the parties has been deemed controlling even where the intent was not to obtain a pecuniary or business purpose, but rather to obtain a result desired for reasons of family love and affection.<sup>18</sup> Were this latter test to be applied it would virtually remove all cases from the Statute as there would be such a motive for nearly every promise which might be claimed to have been made to answer for the debt of another.

The situation in New York up to recently was chaotic.<sup>19</sup> Under the influence of Chief Justice Comstock the earlier rule of *Leonard v. Vredenburg* was modified in *Mallory v. Gillett*,<sup>20</sup> so as to be practically equivalent to that of *Nelson v. Boynton*, saying that a third class of cases where the Statute did not apply was "where, although the debt remains, the promise is founded upon a new consideration which moves to the promisor." Unfortunately, the decision says that the Statute covers all promises to answer for the debt of another. This language has caused great confusion in the subsequent cases in the Court of Appeals. In *Brown v. Weber*<sup>21</sup> and more strongly in *Rintoul v. White*<sup>22</sup> it was declared that the new promise must put the new promisor under an "independent duty of payment irrespective of the liability of the principal debtor." Although there is some conflict and in the majority of cases the point is not considered, this is probably true if it is limited to mean only that the new promise must not be upon a condition precedent that the principal debtor does not pay.<sup>23</sup> Such was the situation in *Brown v.*

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<sup>18</sup> *Koban v. Gordon Supply Co.* (1929) 253 Ill. App. 569; *Evans v. Shaw* (Tex. Civ. App. 1925) 268 S. W. 1037; *Gleason v. Thaw* (C. C. A. 2, 1913) 205 F. 505.

<sup>19</sup> The authorities in New York up to 1920 are excellently reviewed in *Burdick, Suretyship and the Statute of Frauds* (1920) 20 COL. L. R. 153, 160-182.

<sup>20</sup> (1860) 21 N. Y. 412. In the important case of *Kingsley v. Balcome* (1848) 4 Barb. 131, Judge Sill, while sitting on a lower court bench, announced that the true rule was that the promise is valid only if, as between the debtor and the new promisor, the duty of payment is upon the new promisor.

<sup>21</sup> (1868) 38 N. Y. 187.

<sup>22</sup> (1888) 108 N. Y. 222, 15 N. E. 318.

<sup>23</sup> *Yeomans v. Miller* (1889) 33 Mo. App. 343; *Rancil v. Krohne* (1906) 31 Pa. Super. Ct. 130; *Edwards v. Bryan* (1926) 214 Ala. 441, 108 So. 9. *Contra*: *Heggie v. Smith* (1899) 87 Ill. App. 141; *Keyser v. Hopkins* (Ky. 1931) 34 S. W. (2d) 968. In *Davis v. Patrick* (1891) 141 U. S. 479, it was

*Weber*, but in *Rintoul v. White* the promise was absolute in form; however, in the latter case there was no benefit whatsoever to the new promisor and the promise was within the Statute for this reason, although the court did not stress this point.

In *Raabe v. Squier*<sup>24</sup> the same court held that the tests of *Malloy v. Gillett* and *Rintoul v. White* were really identical and upheld a promise although it was clearly upon the condition precedent of non-payment by the principal debtor. The New York lower courts almost universally disregarded *Rintoul v. White* and decided the cases upon a consideration of the directness of the benefit to the new promisor.<sup>25</sup> In *Richardson Press v. Albright*,<sup>26</sup> Justice Pound added to the obscurity of the subject by the following reason for holding within the statute a promise absolute in form:

But a promise may still be collateral even though the new consideration moves to the promisor and is beneficial to him . . . the inquiry remains whether the promisor thereby comes under an independent duty of payment, irrespective of the liability of the principal debtor . . . it is regarded as original only when the party sought to be charged clearly becomes, within the intention of the parties, a principal debtor primarily liable.

This was again largely disregarded by the lower courts.<sup>27</sup> Finally in the case of *Witschard v. Brody and Sons Inc.*,<sup>28</sup> the Court of Appeals laid down still another rule, which if followed will revolutionize the jurisprudence of New York on this subject. However, the rule was announced in a very short opinion of less than a thousand words. It cites and primarily relies upon Professor Williston,<sup>29</sup> saying:

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considered that the conditional form would have been fatal, but the words used were interpreted in the light of the circumstances to create an absolute duty of payment. The majority view seems the better one as the new benefit could hardly raise the promise higher than one made at the time the debt was originally incurred and here the promise would obviously have to be absolute in form.

<sup>24</sup> (1895) 148 N. Y. 81, 42 N. E. 516.

<sup>25</sup> The multitudinous cases are collected by Professor Burdick in the article cited in footnote 19.

<sup>26</sup> (1918) 224 N. Y. 497, 121 N. E. 362.

<sup>27</sup> *Block v. Greenfield* (1930) 137 Misc. Rep. 573, 243 N. Y. S. 177; *May v. Schneider* (1920) 184 N. Y. S. 705. *Contra*: *Gibbs v. Holden* (1930) 137 Misc. Rep. 480, 244 N. Y. S. 10.

<sup>28</sup> (1931) 257 N. Y. 97, 177 N. E. 97.

<sup>29</sup> The first sentence of this is a direct quotation from 1 Williston, *CONTRACTS* (1927) sec. 475. In the original the author continues: "If as between himself (the new promisor) and the original debtor, the debt real-

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.

The court cites isolated passages from *Mallory v. Gillett* and *Richardson Press v. Albright* as justifying this view, but aside from these Justice Thompson does not bother to consider either the law of the subject or the practical application of the new rule. Under this theory the creditor would be utterly unable to tell whether a promise would or would not be within the Statute as it would depend upon the relations between the new promisor and the old debtor, which the creditor has no way of knowing. This test probably is theoretically desirable if our attempt is to reach a merely formal or strict interpretation of the wording of the Statute, but this whole doctrine has grown up to reach practical justice.<sup>30</sup> It is fashionable to deride judge-made law but it is surely even a greater evil for judges to repeal exceptions which have been sanctioned by generations of their fellows when the sole reason for this radical change is to obtain theoretical consistency.

In the present state of the case law upon this subject, the courts, particularly the lower and intermediate tribunals, are more apt to decide a given case by the narrow precedents which are applicable to the concrete situation presented by it rather than by a reconsideration of the fundamental principles. It may be helpful to consider these situations in some detail.

Although mere forbearance to sue the principal debtor or to foreclose a lien against his property would be sufficient consideration for a written promise to pay, it is almost universally treated as not being enough to take the promise out of the Statute, no matter what test is applied, unless there is some special

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ly 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. The fact that he is led to do this by consideration of his own ultimate advantage, do not make the ultimate fact that the debt is another's any the less true."

<sup>30</sup> Dean Arant would avoid this theoretical difficulty by invoking the maxim that when the reason for a rule ceases, the rule should cease also and limit the doctrine under discussion so as to be the following: ". . . a promise is not within the statute when the consideration alleged to support it is indicative of an undertaking by the defendant and of such a character that there is no particular danger that the plaintiff may establish it contrary to fact by the use of perjured testimony." He admits that the courts do not follow this rule with the exception of dicta in cases announcing one of the other principles. ARANT ON SURETYSHIP (1931) 114.



relationship between the new promisor and the original debtor.<sup>31</sup> It cannot subserve any business or pecuniary purpose of the promisor or result in any direct benefit to him. Indeed, it should not ordinarily be a new and distinct consideration, although most courts following *Leonard v. Vredenburg* have held it to be such.<sup>32</sup>

A very common type of these promises is where the creditor gives up a lien against property owned by the promisor in return for a promise to pay a debt originally incurred by a third person. Such a promise may be made either by the grantee of mortgaged lands or by the owner of a building under construction where the principal contractor leaves unpaid workmen and materialmen who could file mechanics' liens, which are in most states charges against the property and not merely against the balance as yet unpaid to principal contractor.<sup>33</sup> Such a promise has been almost universally held not to be within the Statute,<sup>34</sup> although the continuance of such decisions in New York would seem doubtful under the *Witschard* doctrine. In this class of cases it would seem especially harsh to allow the use of the Statute as a bar. Although there is conflict, it would seem that the better and majority rule is to reach the same decision when the lien is not actually binding upon the property, if the promisee at the time asserts it in good faith (obviously the promisor must have believed in its probable validity, or he would not have

<sup>31</sup> *Waggoner v. Davidson* (1915) 189 Mo. App. 345, 175 S. W. 232; *Thomas v. Delphy* (1870) 32 Md. 373; *Duffy v. Wunsch* (1870) 42 N. Y. 243; *Dexter v. Blanchard* (Mass. 1865) 11 Allen 365. Under the California type statute it would be sufficient if the lien of a judgment for the debt was waived or the debtor was released from imprisonment for debt in any state in which this is still possible.

<sup>32</sup> *Becker Provision Co. v. Parker Hardware Co.*, above; *Ellis & Co. v. Carrol*, above. *Contra*: *McKinney v. Quilter* (S. C. 1823) 4 McC. 409.

<sup>33</sup> R. S. Mo. (1929) sec. 3156. A statute making it a lien only on the amount then unpaid to the principal contractor led to refusal to enforce a promise to pay made by the owner in Alabama. *Clark v. Jones* (1888) 85 Ala. 127, 4 So. 771.

<sup>34</sup> *Missouri State Life Ins. Co. v. Early* (1929) 222 Mo. App. 1118, 13 S. W. (2d) 1097; *Hoag v. Boyle* (1928) 125 Kan. 436, 265 Pac. 61; *Monroe Lumber Co. v. Bezeau* (1916) 192 Mich. 307, 158 N. W. 880; *Fish v. Thomas* (Mass. 1855) 5 Gray 45 (advancing in justification that it is in a way a debt of the promisor's as it is a debt for which his property is bound); *Prime v. Koehler* (1879) 77 N. Y. 91. *Contra*: *Mathews v. Libbey Brothers* (1914) 42 App. D. C. 272; *Hutton Brothers v. Gordon* (1893) 2 Misc. Rep. 267, 23 N. Y. S. 770; *Warner v. Willoughby* (1891) 60 Conn. 468, 22 Atl. 468; *Vaughn v. Smith* (1885) 66 Iowa 579, 22 N. W. 684 (all of which were cases of mechanics' liens under statutes which apparently made them a charge on the property). Cases involving promises by mortgagees and others than the owner are considered below.

made the promise).<sup>35</sup> The same considerations obviously apply to a promise by the assignee of the vendee to prevent a conditional vendor retaking the chattel because of defaults in payments.<sup>36</sup>

Another frequent occurrence caused by "shoe-string" financing, particularly in the building industry, is that the original contractor is not able to meet payments due his subcontractors who consequently refuse to continue work. The owner frequently will promise to pay them the sums due and unpaid if they will complete their contracts. Such promises are almost invariably held not to be within the Statute,<sup>37</sup> although, of course, the subcontractors must be justified in refusing to continue work, or their promise to do so would merely be a promise to do what they were already bound by contract to do and no consideration for any contract.<sup>38</sup> In such cases it is said that the shorter interruption in the progress of the work is a sufficient benefit to the new promisor.<sup>39</sup> This is probably generally true, but almost none of the cases undertake to determine whether or whether it was true in the particular case. Another benefit of more limited application is the advantage of retaining skilled workmen.<sup>40</sup> The same rule is applied when the promise is made by a mortgagee,<sup>41</sup> although here it would seem that the benefit was very indirect, unless the mortgage was actually in default. Cases in which the promisor has acquired an interest as partner

<sup>35</sup> *Dybdahl v. Continental Lumber Co.* (1925) 133 Wash. 81, 233 Pac. 10; *Cornell v. Central Electric Co.* (1895) 61 Ill. App. 325; *Joseph v. Smith* (1894) 39 Neb. 259, 57 N. W. 1012; *Burrus v. Smith* (1885) 75 Ga. 710; *Gardiner v. Hokins* (N. Y. 1830) 5 Wend. 23. *Contra*: *Rintoul v. White*, above; *Tolhurst v. Powers* (1891) 61 Hun 105, 15 N. Y. S. 420.

<sup>36</sup> *Frame v. Whittam* (1930) 181 Ark. 768, 27 S. W. (2d) 990; *Barth v. Sanders* (N. Y. Sup. Ct., appellate term, 1908) 113 N. Y. S. 651.

<sup>37</sup> *Winn v. Hillyer* (1891) 43 Mo. App. 139; *Garrison v. Lane* (N. J. L. 1925) 129 Atl. 233; *Roy v. Flin* (1906) 10 Ariz. 80, 85 Pac. 725; *Long v. McDaniel* (1905) 76 Ark. 292, 88 S. W. 964; *Manetti v. Doege* (1900) 48 App. Div. 567, 62 N. Y. S. 918; *Wills v. Cutler* (1881) 61 N. H. 405. *Contra*: *Belknap v. Bender* (1878) 75 N. Y. 446; *Lachman v. Irish* (1893) 72 Hun 491, 25 N. Y. S. 193; and *cf.* *Slotnick v. Smith* (1925) 252 Mass. 303, 147 N. E. 737 (dicta).

<sup>38</sup> *Snyder v. Monroe Eckstein Brewing Co.* (1905) 107 App. Div. 323, 95 N. Y. S. 144.

<sup>39</sup> *Manetti v. Doege*, above.

<sup>40</sup> *Wills v. Cutler*, above.

<sup>41</sup> *Higgin Mfg. Co. v. Bankers Mortgage Co.* (1929) 128 Kan. 267, 277 Pac. 44; *Mersereau Co. v. Wasburn* (1896) 6 App. Div. 404, 39 N. Y. S. 664; *Kleinman v. Auerbach* (1913) 82 Misc. Rep. 436, 143 N. Y. S. 1033. *Contra*: *Ellison v. Jackson Water Co.* (1859) 12 Cal. 542; *Puckett v. Bates* (1842) 4 Ala. 390; *Cavanato v. Piccirilli* (1918) 184 App. Div. 640, 172 N. Y. S. 421.

in the firm<sup>42</sup> or by assignment of all the profits are obviously governed by the same principles.<sup>43</sup> The benefits to the new promisor are most apparent when he is a contractor, bound to finish within a certain time, and the promise is made so that one of his subcontractors can obtain the necessary material or labor to finish his part.<sup>44</sup>

A more difficult problem is presented when the promise is made upon the consideration that the creditor will sell further goods to the new promisor upon the usual credit terms. The intent to subserve a business purpose is clearly present and thus the detriment in the extension of credit would be sufficient to satisfy the test of *Emerson v. Slater*, but it is doubtful whether there is ordinarily a sufficiently direct benefit to satisfy the more widely adopted requirements of *Nelson v. Boynton*. To determine whether this is present it would be necessary in each case to find out whether the creditor would have extended these credit terms to the promisor without this extra promise.<sup>45</sup> However, the courts decide the question ordinarily upon their general concepts of business practice without such an inquiry. The majority of the cases hold that such a promise is within the Statute,<sup>46</sup> but the more recent tendency seems to be towards upholding such a promise, a reversal which has perhaps been caused by a realization of the tendency towards stricter control of credit extension.<sup>47</sup>

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<sup>42</sup> *McPike v. Kardell Motor Car Co.* (Mo. App. 1919) 213 S. W. 904; *Cuthill v. Harrington* (1919) 185 Iowa 537, 170 N. W. 788.

<sup>43</sup> *West v. Grainger* (1903) 46 Fla. 257, 35 So. 91; *Rhodes v. Matthews*, (1879) 67 Ind. 131.

<sup>44</sup> *Newell Contracting Co. v. Glenn* (1926) 214 Ala. 282, 107 So. 801; *Kelly Handle Co. v. Crawford Supply Co.* (1916) 171 N. C. 495, 88 S. E. 514; *Cooper v. Kelley & Kelley, Inc.* (N. Y. Sup. Ct., appellate term 1917) 164 N. Y. S. 828. A similar rule was applied to a promise to prevent the attachment and removal of property which the subcontractor needed to comply with his contract. *Moore v. McHaney* (1915) 191 Mo. App. 686, 178 S. W. 259. The principle also applies to promises made to prevent filing of liens when the promisor has contracted to pay all claims of others. *McDonald v. General Construction Co.* (1911) 152 Iowa 273, 132 N. W. 369; *Stephen v. Yeomans* (1897) 112 Mich. 624, 71 N. W. 159.

<sup>45</sup> As was done in *First National Bank of Dexter v. Crutcher* (Mo. App. 1929) 15 S. W. (2d) 888.

<sup>46</sup> *Ruppe v. Peterson* (1887) 67 Mich. 437, 35 N. W. 82; *Pfeiffer v. Adler* (1867) 37 N. Y. 164; *Martin v. Black's Executors* (1852) 21 Ala. 721; *Winne v. Mehrbach* (1909) 130 App. Div. 320, 114 N. Y. S. 329; *Cardeza v. Bishop* (1900) 54 App. Div. 116, 66 N. Y. S. 408.

<sup>47</sup> *Maine Candy Co. v. Turgeon* (Me. 1925) 130 Atl. 242; *Davies v. Carey* (1913) 72 Wash. 537, 130 Pac. 1137; and *cf.* *Hill Bros. v. Bank of Seneca* (1903) 100 Mo. App. 230, 73 S. W. 307 (continued sale of services upon credit).

Where both parties to the new contract are creditors of the principal debtor, but one personally promises to pay the other, the correct answer to the problem depends upon their preferential rights between themselves. If the promisee has a prior lien on the goods in question, then under any rule, the promise is not within the Statute.<sup>48</sup> If both parties have similar rights and the promise is made merely to prevent a race to see who could attach sufficient property first,<sup>49</sup> the situation would seem doubtful in theory if the rule of *Nelson v. Boynton* prevails, as the benefit to the new promisor would seem quite indirect. Where the promisor has the superior lien and the promise is made solely to prevent interference with his plans to sell the property,<sup>50</sup> the benefit is still more remote. Since the intent is to foster the promisor's business purposes, both these promises would clearly be valid under *Emerson v. Slater*.<sup>51</sup>

When the holder of a promissory note sells it to another without indorsement but with an oral promise guaranteeing payment, such a promise has almost always been held to be not within the Statute.<sup>52</sup> Here there is clearly the necessary intent and benefit under any rule, but the promise is conditional in form and if made at the time the debt was created it would obviously have had to be in writing to be binding. Since the mere promise is all that a dishonest buyer would have to prove (the sale occurred at any rate and does not indicate whether or not a promise was made), it would seem that these cases are squarely

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<sup>48</sup> *Simpson v. Carr* (Ky. 1903) 76 S. W. 346; *Rodgers v. Empire Hardware Co.* (1888) 24 Neb. 653, 39 N. W. 844; *Weisel v. Spence* (1884) 59 Wis. 301, 18 N. W. 165; *Conrad v. Sullivan* (1873) 45 Ind. 181; *Hodgins v. Heaney* (1870) 15 Minn. 185; *Arnold v. Stedman* (1863) 45 Pa. St. 186. *Contra*: *Campbell v. Weston Basket and Barrel Co.* (1915) 87 Wash. 73, 151 Pac. 103 (the court seems never to have heard of the main purpose doctrine in any form).

<sup>49</sup> Such promisees were upheld in *Wallenburg v. Kerry* (La. App. 1931) 133 So. 823; *Sullivan v. Idaho Wholesale Co.* (1926) 43 Idaho 149, 249 Pac. 895; *Patton v. Mills* (1878) 21 Kan. 163.

<sup>50</sup> Such promises were upheld in *Bailey v. Marshall* (1896) 174 Pa. St. 602, 34 Atl. 326; *Helt v. Smith* (1888) 74 Iowa 667, 39 N. W. 81.

<sup>51</sup> A problem analogous to that discussed in this paragraph is where an heir to an estate promises to pay the debt if the creditor will not file a claim against the estate (in situations where the failure to file has not yet resulted in a discharge of the estate). These promises have been generally upheld. *Kirby v. Kirby* (1915) 248 Pa. 117, 93 Atl. 874; *Day v. Morgan* (1924) 184 Wis. 595, 200 N. W. 382; *Withers' Adm'r v. Withers' Heirs* (Ky. 1907) 100 S. W. 253. *Contra*: *Durant v. Allen* (1874) 48 Vt. 58.

<sup>52</sup> *Barker v. Scudder* (1874) 56 Mo. 272; *First State Bank of Windom v. McElwrath* (Tex. Civ. App. 1927) 266 S. W. 837; *Swenson v. Stoltz* (1904) 36 Wash. 318, 78 Pac. 999. *Contra*: *Dows v. Swett* (1883) 134 Mass. 140. Such promises are expressly allowed by the California type statute.

within the class of cases to which the Statute was meant to apply.

Where the new promisor is to obtain any benefit solely because he is a stockholder of the debtor corporation which is to be directly benefited by the actions of the promisee, it is generally held that the promise is within the Statute as the benefit is too indirect and uncertain.<sup>53</sup> It would seem that here again the rule of *Emerson v. Slater* would prove more liberal than that of *Nelson v. Boynton*, but the split of the cases does not seem to be determined by that or any other logical basis. It seems to make no difference whether or not the promisor holds virtually all the stock of the company,<sup>54</sup> although it should in determining the directness of the benefit in actuality. If, however, the promisor also has some other relation to the debtor company, besides being a stockholder, this other relation may take the promise out of the Statute, as when the promisor holds an assignment of all the profits of the debtor.<sup>55</sup> Realistically this latter situation is no different from that in which the promisor is the sole stockholder.

Under the rule in most states it makes no difference whether or not the creditor or the original debtor furnish the consideration.<sup>56</sup> However, in Massachusetts and a few other states the consideration must be furnished by the promisee.<sup>57</sup> Where the consideration is furnished by the original debtor, there is doubtless also a promise between them by which the receiver of the property is to pay the creditor. In states which allow suits by a

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<sup>53</sup> Bayard v. Pennsylvania Knitting Mills Corp. (Pa. 1927) 137 Atl. 910; Freidlin v. Crocain (1918) 122 Va. 521, 95 S. E. 432; Sherwood v. Lowell (1917) 34 Cal. App. 365, 167 Pac. 554; Roscoe Lumber Co. v. Reynolds (1908) 124 App. Div. 539, 108 N. Y. S. 1018; Carleton v. Floyd, Rounds & Co. (1906) 192 Mass. 204, 78 N. E. 126. *Contra*: Great Southern Oil Ass'n v. Cooper (Tex. Civ. App. 1921) 231 S. W. 157; Moon v. Greenlee (1920) 69 Colo. 482, 195 Pac. 1100; Washington Printing Co. v. Osner (1918) 99 Wash. 537, 169 Pac. 988; Goodling v. Simon (1913) 54 Pa. Super. Ct. 125.

<sup>54</sup> Miller v. Denny (1921) 115 Wash. 635, 197 Pac. 936; City of Elkins v. Elkins El. Ry. Co. (1920) 87 W. Va. 350, 105 S. E. 233.

<sup>55</sup> Emerson v. Slater and Davis v. Patrick, above; Lindley v. Kelly (1914) 47 Okla. 328, 147 Pac. 1015; Schaefer v. Strieder (1909) 203 Mass. 467, 89 N. E. 618.

<sup>56</sup> Harvey v. Bank of Center Hill (1922) 83 Fla. 55, 90 So. 699; Tasin v. Bastres (1920) 268 Pa. 85, 110 Atl. 744; Rothermell v. Bell and Zoller Coal Co. (1898) 79 Ill. App. 667; First National Bank v. Chalmers (1895) 144 N. Y. 432, 39 N. E. 331. A variant of this in which the consideration really comes from the creditor is where the creditor consents to this transfer. Stone v. Kellet Motor Co. (Ala. 1929) 124 So. 412; Washington and Devonshire Realty Corp. v. Lewis Diamond Co. (1928) 263 Mass. 554, 161 N. E. 883.

<sup>57</sup> Stowell v. Gram (1904) 184 Mass. 562, 69 N. E. 342; McIntire v. Schiffer (1903) 31 Colo. 246, 72 Pac. 1056.

third party beneficiary, the creditor could sue on this promise and avoid all trouble concerning the Statute.<sup>58</sup> If the New York courts continue to follow the doctrine laid down in the *Witschard* case this will be the only situation of those which have been discussed in detail which will not fall within the ban of the Statute, unless the creditor is allowed to show in addition to the contract upon which he is suing some outside agreement as between the new promisor and the original debtor.

From this examination of the practical application of the various theories, it is obvious that the rule of the *Witschard* case would lead to very unjust results in many instances, unless we assume that the alleged promise was never made in each case, an assumption which would make the creditor's conduct very difficult to explain upon any rational ground. It is probably hopeless to urge that the states should adopt the more flexible rule of *Emerson v. Slater* instead of the well entrenched doctrine of *Nelson v. Boynton*. But it would seem desirable that the courts be less rigid and formalistic in determining what is a direct benefit and should pay more attention to the facts of each particular case rather than feel bound by precedents in generally, but not exactly, similar situations. Under this rule a person would not be allowed to obtain a benefit and then avoid fulfilling the arrangement by which he obtained it, while greater solemnity would be required in those cases where it is particularly needed—where the promise is supported by a legal but not a beneficial consideration. The reduction of such promises to writing impresses upon the promisor a clearer conception of what he is doing and may lead him to reconsider an ill-advised decision.

GEORGE W. SIMPKINS, '33.

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<sup>58</sup> *Davis v. Faulkner* (1923) 186 N. C. 439, 119 S. E. 819; *Wolf v. Koppel* (N. Y. 1843) 5 Hill 458.