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Subsequent Oral Promise to Perform Another's Duty and the New York Statute of Frauds

Cover Page Footnote

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SUBSEQUENT ORAL PROMISE TO PERFORM ANOTHER'S DUTY AND THE NEW YORK STATUTE OF FRAUDS

FRANCIS X. CONWAY†

THE New York Court of Appeals is one of limited jurisdiction,¹ its principal function being not so much to decide individual controversies as to establish the law of the state for the guidance of the lower courts and the legal profession.² In the limited field of the law with which this paper deals the efforts of the court to perform its principal function, while frequent and strenuous, do not appear to have met with outstanding success.

Thirty-three years ago Professor Burdick³ pointed to the confusion and uncertainty in the opinions of the New York Court of Appeals dealing with the applicability of the New York Statute of Frauds to oral promises to perform the pre-existing duty of another. Despite the fact that the intervening years since Professor Burdick wrote on the subject have furnished the Court of Appeals with several opportunities⁴ to clarify the law on the subject, one finds it difficult, if not impossible, on the basis of the opinions of the court, to state precisely what the law is today on the enforceability of such oral promises to perform another's antecedent duty. Not that the court has not tried. The court has certainly striven to announce a definite principle for future guidance⁵ and has succeeded in deciding, with fairly constant unanimity among the members of the court, the individual controversies presented to it with a very definite consistency in result.⁶

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1. N. Y. CONST. Art. VI, § 7; *Ocean Accident and Guarantee Corporation, Ltd. v. Otis Elevator Company*, 291 N.Y. 254, 52 N.E. 2d 421 (1943); *Charles W. Sommer & Bros. Inc. v. Albert Lorsch & Co.*, 254 N.Y. 146, 172 N.E. 271 (1930).

2. Cohen and Karger, *THE POWERS OF THE NEW YORK COURT OF APPEALS* § 3, p. 16 (1952).

3. Burdick, *Suretyship and The Statute of Frauds*, 20 COL. L. REV. 153 (1920).

4. Such opportunities were presented in *Witschard et al. v. Brody & Sons, Inc. et al.*, 257 N.Y. 97, 177 N.E. 385 (1931) and *Bulkley et al. v. Shaw et al.*, 289 N.Y. 133, 44 N.E. 2d 398 (1942).

5. *White v. Rintoul*, 108 N.Y. 222, 15 N.E. 318 (1888); see text accompanying note 42 *infra*.

6. The Court of Appeals has almost invariably held the oral promises to be unenforceable. See note 43 *infra*.

Nevertheless, the law on the subject remains confused. Indeed it may be said that whatever confusion existed thirty-three years ago has in the intervening years become to some extent more confounded.

That, over the years, the Court of Appeals has been conscious of the uncertain state of the law on the enforceability of the oral promises involved and of the lack of success of its own previous attempts to announce a fairly definite principle of law, which might be understood and applied with some degree of certitude, is readily apparent from the court's own repeated attempts to restate, clarify and to sum up its previous pronouncements, to explain and modify the language of its prior opinions and to lay down, at least in *dicta*, rules for future application.

These strivings appear not to have borne fruit. So far as mere language goes, it is true we are left with an oft-quoted statement of the applicable rule of law. Unfortunately the true meaning and application of that rule appear to be incapable of satisfactory understanding and definition. In fact the most recent decisions of the court make it uncertain whether the announced rule now really means what it appears to say.

THE PROBLEM

The problem which we will consider involves essentially the question whether a person may by oral promise become originally liable for the same antecedent debt for which another person continues also to remain liable to the same creditor. A negative answer to that question presents an easy and complete solution to the problem. An affirmative answer raises the difficulty which has plagued the Court of Appeals and which the court has recognized may never be satisfactorily resolved. This is the conclusion of the court itself.

"When, by some authorities, it was said that a verbal promise to pay the debt of another was always collateral and invalid if the primary debt continued to exist concurrently with the promise, a simple and easy test was furnished to determine whether the statute did or did not apply. But when that test was discarded, and it became the law that a promise to pay another's debt might be original, although that debt subsisted, and was in no manner extinguished, the presence of such continued liability raised a cloud of doubt and ambiguity which, perhaps, will never be entirely dissipated."⁷

The pertinent provision of the New York Statute of Frauds is simple enough:

"Every agreement, promise or undertaking is void,⁸ unless it or some note or

7. *White v. Rintoul*, 108 N. Y. 222, 224, 15 N. E. 318, 319 (1888).

8. Although the New York statute uses the word "void" the view of the New York courts is that the oral agreement is valid and only becomes unenforceable when the de-

memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or understanding; . . . 2. Is a special promise to answer for the debt, default or miscarriage of another person; . . ."⁹

However, this simple provision has, perhaps by reason of its very simplicity, been the source both in New York and in other jurisdictions of many and varied interpretations.

There are a number of "exceptions" to the quoted provisions of the Statute of Frauds, some merely apparent¹⁰ and others apparently real.¹¹ One exception to the literal language of the Statute, generally recognized outside of New York, is the so-called "main purpose rule."¹² That rule applies under certain circumstances where a promisor (S) orally promises the promisee (C) to perform the antecedent duty of another person (P), such as to pay P's pre-existing debt to C.

If New York applied the main purpose rule or an equivalent rule, as such rules are generally although not uniformly applied in other jurisdictions, there would be less reason for the discussions we are now embarked upon. New York, without explicitly referring to the main purpose rule as such, has in effect applied its underlying principle in a few limited instances.¹³ However, the New York Court of Appeals

pendant raises the point that it is oral. *Crane v. Powell*, 139 N.Y. 379, 34 N.E. 911 (1893); *Sanger v. French*, 157 N.Y. 213, 51 N.E. 979 (1898). See *Beau v. Flint*, 204 N.Y. 153, 161, 97 N.E. 490 (1912).

9. N.Y. PERS. PROP. LAW § 31. The New York statute, like those of the other states, is derived from the original English statute, 29 Car. II, § 4.

10. The Statute of Frauds, by its literal language, applies only to the promise of a surety, *i.e.*, one who is promising to perform *another's* duty. Where actually the promisor is not a surety but an original promisor promising to perform his own duty, the Statute does not apply; for example, where no credit has been extended to the other person to whom the promisee has delivered goods or rendered services (*Drummond v. Pillsbury*, 130 Me. 406, 156 Atl. 806 (1931)), or where for some other reason that other person is not liable (*Mease v. Wagner*, 1 McCord 395 (S.C. 1821)).

11. Within this category may be included decisions holding the Statute inapplicable where the oral promise is made to a person other than the creditor such as *Eastwood v. Kenyon*, 113 Eng. Rep. 482 (1840).

12. Arnold, *The Main Purpose Rule and The Statute of Frauds*, 10 CORNELL L. Q. 28 (1924); Simpson, *HORNBOOK ON THE LAW OF SURETYSHIP* 135-53 (1950).

13. The Statute of Frauds has been held to be inapplicable in New York where the oral promise to pay is in reality a mere incidental part of a larger transaction, such as the oral promise made by a seller of a note or by the assignor of a *chose in action* that the note or claim is good (*Milks v. Rich*, 80 N.Y. 269 (1880); *State Bank of Pike v. People's National Bank et al.*, 118 N.Y. Supp. 641 (1909), note 121 *infra*), or the oral promise of a *del credere* factor guaranteeing that those to whom he sells will pay (*Wolff & Hendricks v. Koppel*, 5 Hill 458 (N.Y. 1843); *Sherwood v. Stone*, 14 N.Y. 458 (1843)). Williston treats these two types of promises as involving the same ground for rendering the Statute inapplicable. 2 WILLISTON, *CONTRACTS* § 484 (Rev. ed. 1936).

does not appear to have given the main purpose rule or any analogous rule the general acceptance accorded to such rules by the courts of other states and it is the apparent attempt of our highest court to devise a substitute and more limited rule for application to the particular case of the subsequent oral promise to perform another's pre-existing duty, which has given rise to uncertainty in the law and to the discussion which follows.

We will assume for the purpose of giving concrete expression to that discussion the following typical set of facts, particularly since such facts present a situation which is not uncommon today. S, an owner of unimproved land, employs P, a building contractor, to build a house for S on the latter's land. C, who may be either a subcontractor of P or his material supplier, to whom P is already indebted in the sum of \$1,000 for work performed or materials supplied in building the house, refuses to continue work for P or to supply him with materials, unless S, the owner, agrees to pay both the \$1,000 already due and also for all subsequent work or materials furnished. S, in order to obtain completion of the house, orally gives the requested promise. Thereafter C as subcontractor completes the work, or as materialman furnishes the materials, and P refuses to pay for the work furnished or materials supplied. In an action by C against S is the Statute of Frauds a defense? In jurisdictions which recognize the main purpose rule or related rules, there would appear to be a basis for holding S's oral promise to be enforceable.¹⁴

One of the most frequently quoted statements of the main purpose rule is that of Chief Justice Shaw in *Nelson v. Boynton*:

"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. The former whether made before, or after, or at the same time with the promise of the principal is not valid, unless manifested by evidence in writing; the latter, if made on good consideration, is unaffected by the statute, because although the effect of it is to release or suspend the debt of another, yet there is not the leading object on the part of the promisor."¹⁵

Another statement of the rule often quoted or referred to is that of Mr. Justice Clifford in *Emerson v. Slater*:

14. See *Kampman v. Pittsburg Contracting & Engineering Co.*, 316 Pa. 502, 175 Atl. 396 (1934); 2 WILLISTON, CONTRACTS § 481 (Rev. ed. 1936). The Restatement is in accord with the majority view. RESTATEMENT, SECURITY § 92. But see, SIMPSON, HORNBOOK ON THE LAW OF SURETYSHIP, 144-6 (1950). Many of the decisions are collected in 99 A.L.R. 76 (1935).

15. 3 Metc. 396, 402 (Mass. 1841).

"But whenever the main purpose and object of the promisor is not to answer for another, but to subserve 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."¹⁶

While at one time New York apparently flirted with the idea of adopting the main purpose rule,¹⁷ our Court of Appeals cannot be said to have adopted that rule in the form in which it is generally recognized.¹⁸ Instead, so far as applicable to subsequent oral promises to perform another's antecedent duty, the Court of Appeals has announced its own rule. The expression of this rule has changed but in its most definite and articulate form it appears to be the rule finally evolved in *White v. Rintoul*, as follows:

"... 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."¹⁹

It will be the objective of this article to analyze and consider this rule, particularly in so far as it has been applied in subsequent decisions of the Court of Appeals,²⁰ and to attempt to reach some understanding of its true meaning.

16. 22 How. 28, 43 (U.S. 1859). Also see the leading case of *Davis v. Patrick*, 141 U.S. 479 (1891). In the opinion in a leading English case, *Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K.B. 778, the court assimilates instances such as that of the *del credere* factor with other instances where the oral promise is merely an incidental feature of a larger object.

17. *Mallory v. Gillett*, 21 N.Y. 412 (1860) discussed *infra* note 28 and accompanying text.

18. In the comparatively recent case of *Bulkley et al. v. Shaw et al.*, 289 N.Y. 133, 44 N.E.2d 398 (1942), the attorneys for the plaintiff in attempting to hold the oral promisor liable cited decisions of the federal courts applying the main purpose rule, headed by *Davis v. Patrick*, 141 U.S. 479 (1891), *supra* note 16, but the Court of Appeals refused to follow these decisions. *Id.* at 140, 44 N.E.2d at 401.

19. 108 N.Y. 222, 227, 15 N.E. 318, 320 (1888).

20. No attempt will be made in this paper to consider the decisions of the Appellate Division or lower New York courts, decided either before or after *White v. Rintoul*, except incidentally, even where such decisions have been affirmed by the Court of Appeals without opinion. The principal opinions of the Court of Appeals, both before and after *White v. Rintoul*, have for the most part limited themselves to a discussion of the court's own decisions. The opinions of the lower New York courts consist generally of an attempt to apply the decisions of the highest court in the state. Accordingly, even if space permitted it, a discussion of decisions other than those of the highest court would not appear to be profitable.

EVOLUTION OF THE NEW YORK RULE

Chancellor Kent first attempted in *Leonard v. Vredenburg*²¹ to state a simple test to apply to determine the enforceability of a subsequent oral promise to pay another's antecedent debt. He said that the oral promise is not within the Statute

" . . . 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."²²

The basic error in this assumption was effectively demonstrated by Chief Justice Comstock in *Mallory v. Gillett*²³ when he adverted to the simple proposition that in the case of a subsequent promise to answer for an already existing debt of a third person new consideration is necessary to support the promise as a valid agreement without regard to the question of the Statute of Frauds and that, therefore, such new consideration must be shown before any question of the enforceability of the promise under the Statute is reached. "It is nothing to say that here was a new consideration. If such were not the fact, there would be no question in the case."²⁴

Nevertheless, apparently in deference to the great jurist who had suggested the new and original consideration test, Judge Comstock, while remarking that Chancellor Kent's test was "open to some misapprehension," interpreted the suggested test as referring to a new and beneficial consideration moving to the promisor. In an exhaustive opinion, which reviewed the authorities and commented favorably upon the language of Chief Justice Shaw in *Nelson v. Boynton*,²⁵ Judge Comstock remarked regarding the decisions permitting enforceability:

"With great variety in the circumstances one controlling characteristic pervades them all. In every instance, the consideration of the promise was beneficial to the person promising. This was the feature which imparted to the promise the character of originality, as that term is used with reference to the Statute of Frauds."²⁷

In *Mallory v. Gillett*, C had repaired P's boat to the extent of \$125 and had possession of it under a lien. S orally promised to pay the repair bill if C would deliver the boat to P free of the lien. Five members of the court held that the release of the lien did not benefit S, the

21. 8 Johns 29 (N.Y. 1811).

22. *Id.* at 39.

23. 21 N.Y. 412 (1860).

24. *Id.* at 414.

25. *Id.* at 418.

26. 3 Metc. 396 (Mass. 1841); see text accompanying note 15 *supra*.

27. 21 N.Y. 412, 423 (1860).

promisor, and accordingly held S's oral promise to be unenforceable within the Statute. Three judges who dissented were of the opinion that the relinquishment of the lien was sufficient to take the case out of the Statute.

The test governing the enforceability of subsequent oral promises approved in *Mallory v. Gillett* is, therefore, that of beneficial consideration moving to the promisor. While actually such a test may be different, not only in wording but somewhat in content, from the main purpose rule as announced in *Nelson v. Boynton* and other cases, it has been accepted by respected authority as being substantially the same rule.²³

Eight years after *Mallory v. Gillett* the case of *Brown v. Weber*²⁹ was decided by the Court of Appeals. The facts were substantially the hypothetical facts assumed above as a typical case. S, an owner, orally promised to pay P's subcontractor, C, the amount due from P in order to induce C to complete the work for S. Here indeed appeared to be a case of beneficial consideration moving from C to S. However, the court held that C had failed to perform his contract and hence the court was not required to reach the question of Statute of Frauds. Nevertheless, since the case had been decided below upon the basis of the Statute of Frauds, the court considered an examination of the law on that question to be proper.

The court said of the Statute:

"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. There has never been any dispute as to the above principles, but the difficulty has been in determining to which class the cases that have been adjudged belonged. The principal cases were very elaborately reviewed

28. Burdick, *Suretyship and the Statute of Frauds*, 20 COL. L. REV. 153 (1920), in which the author thus describes the doctrine of *Mallory v. Gillett* at page 182: "It looks to the purpose of the promise rather than its form. It holds that the statute was aimed at promises directly for the benefit of the debtor, and that the proof of direct benefits to the promisor in exchange for the promise, or proof of benefit antecedently received from the debtor which induced the promise, is sufficient corroboration to put the promise outside the danger of fraudulent proof of parol promises aimed at by the statute. This doctrine is that which has been arrived at in England and is that which is most generally accepted in the United States."

29. 38 N. Y. 187 (1868).

and classified in *Mallory v. Gillett* (21 N.Y. 412). From these cases it appears that the courts have endeavored to establish certain rules by the application of which the case in judgment could be determined; but this has been attended with much embarrassment arising from the almost infinite variety of cases that have arisen; one test was the inquiry, whether the promise was original or collateral. This would be perfect if the term 'original' is understood in all cases as applicable only to an absolute undertaking by the party promising to discharge an obligation of his own, not at all dependent upon performance or non-performance of any thing by another. The party is then himself the debtor, and must discharge the obligation, and it matters not whether some other is liable for the same thing or not. The party promising is not discharged, although another may pay or perform, unless the other does it as his surety or by his procurement. But this test is liable to mislead, as is shown in the case of *Mallory v. Gillett, supra*, if the term 'original' is understood in the sense of new.

"Another test relied upon in many cases is, whether the consideration was new, not arising out of the existing obligation, and received by the party making the promise. Where this was the case, it was held, that the case was not within the statute, and these facts are cited as the reasons why it is not. In most cases these facts will show whether the party promising contracted an independent obligation of his own, or whether his position to the creditor was that of a surety. The former case is not within the statute; the latter is. As an illustration, suppose A delivers property to B, in consideration of his promise to become surety to him for the payment of a debt owing to him by C: the case is within the statute, because B's obligation, although upon a consideration received by him, is that of surety only that C shall perform. Again, suppose that B, in consideration that A will discharge C of a debt owing to A, promises A that he will thereafter pay the whole or any part of such debt, the case is not within the statute, for the reason that B has contracted an independent debt of his own, and is in no sense surety to A for the performance of any thing by C, although he personally received no consideration for his promise. It will thus be seen that the receipt or non-receipt of the consideration by the party promising, does not determine in every case whether it is within the statute or not, but that the inquiry still remains whether he entered into an independent obligation of his own, or whether his responsibility was contingent upon the act of another."³⁰

The above language has been quoted at length because it is noteworthy for two reasons: (1) the opinion very clearly repudiates the test suggested in *Mallory v. Gillett*; beneficial consideration moving to the promisor is not *alone* sufficient to take the oral promise out of the protection of the Statute; (2) the court suggests for the first time that an additional element is required, *i.e.*, that the promisor (S) must also become independently liable to the promisee (C) before the promise falls without the purview of the Statute.

The court observed that, despite P's contract with the plaintiff, C, to complete the work, it was nevertheless competent for the defendant, S, "to make an independent contract with the plaintiff for doing the

30. *Id.* at 189-91.

same job, and to pay him therefor, and such contract would not come within the Statute; . . ."³¹

In other words the court appears to have said that whenever P remains liable to C and S later becomes obligated to C for the same debt, the liability of S must be that of a surety to whom the statutory provision by its literal terms applies; but that if upon a good consideration S later becomes liable to C in such a manner that C will be entitled to performance separately from both P and S (*i.e.*, double performance) the Statute of Frauds does not apply. In such latter case it just happens that the performance promised by S is the same as the performance owed by P but the former is in no way dependent upon or related to the latter.

The rule suggested in *Brown v. Weber* appears to be that found in the very language of the Statute: the oral promise of a surety, *i.e.*, one who becomes obligated in any form to perform another's duty, must be in writing to be enforceable. If the matter ended there, there would be no further doubt about the meaning of the New York Statute.

Six years later the court decided *Sanders v. Gillespie*.³² There the plaintiff, apparently at the defendant's request, had become first indorser, with the defendant second indorser, of a note representing an indebtedness upon which the plaintiff already was liable. Defendant orally promised that if the plaintiff would pay the note at maturity, the defendant would reimburse the plaintiff by the delivery of merchandise. Plaintiff paid the note and defendant defaulted. The court citing *Brown v. Weber*, held that the defendant's liability was independent of that of the maker of the note. The court also cited *Leonard v. Vredenburg* in connection with its statement that there was "a new and original consideration of benefit or harm moving between newly contracting parties,"³³ but the real and ultimate ground of decision, in connection with which the court cited *Mallory v. Gillett*, appears to have been that "it was an agreement to indemnify one who was a guarantor for a third person to some one else."³⁴ Considered as involving a promise by an indemnitor given in order to induce a person to assume another's debt, the result reached in *Sanders v. Gillespie* appears to be unexceptional, for the New York courts have consistently held the Statute of Frauds to be inapplicable to such a promise.³⁵

31. *Id.* at 191.

32. 59 N. Y. 250 (1874).

33. *Id.* at 252.

34. *Ibid.*

35. See note 96 *infra* and accompanying text.

*Ackley v. Parmenter*³⁶ would not warrant discussion here were it not for the fact that it is later cited by the Court of Appeals as bearing upon the problem. The case may be simply classified with the so-called "property cases" in which P delivers property to S and the latter orally promises C to apply the property to pay P's debt. In such a case most jurisdictions hold that S's promise is enforceable to the extent of the value of the property received by S since the duty to pay P's debt is imposed by law upon S as a trustee and exists apart from his promise to C.³⁷ New York, by virtue of a seemingly technical distinction based upon the precise time when the promise is made, appears to hold that if S's promise is to pay C out of the proceeds of the property, the duty to make such payment does not arise until such proceeds have been realized and that if S's promise to pay C is made before that time, it is within the Statute of Frauds.³⁸ The court held the oral promise made in *Ackley v. Parmenter* to be of the latter kind and, accordingly, found for the defendant.

*White v. Rintoul*³⁹ has without doubt become an outstanding case

36. 98 N. Y. 425 (1885).

37. 2 WILLISTON, CONTRACTS § 459 (Rev. ed. 1936). RESTATEMENT, SECURITY § 91. To the extent that the property is insufficient to pay P's debt the Statute is a defense (*Belknap v. Bender*, 75 N. Y. 446, 452 (1878)) and where S has promised to pay P's debt and the property has been received by him from P merely as security to indemnify him, the Statute should also be a defense. See *Becker et al. v. Krank et al.*, 75 App. Div. 191, 194, 77 N. Y. Supp. 665, 667 (3d Dep't 1902). The above instances must be distinguished from the case where the promisor has purchased property from a debtor and as part of the consideration has assumed payment of the seller's debt. In *First National Bank v. Chalmers*, 144 N. Y. 432, 434, 39 N. E. 311 (1895), the court said: "What constitutes an original promise, upon which the Statute of Frauds does not operate, and which, therefore, may be valid and effectual without a writing, is fairly settled in one direction at least. Wherever the facts show that the debtor had transferred or delivered to the promisor, for his own use and benefit, money or property in consideration of the latter's agreement to assume and pay the outstanding debt, and he, thereupon, has promised the creditor to pay, that promise is original, upon the ground that by the acceptance of the fund or property under an agreement to assume and pay the debt the promisor had made that debt his own, has become primarily liable for its discharge, and has assumed an independent duty of payment irrespective of the liability of the principal debtor. (*Ackley v. Parmenter*, 98 N. Y. 425; *White v. Rintoul*, 108 *id.* 223.) In such a case the debt has become that of the new party promising; his promise is not to pay the debt of another, but his own; as between him and the primary debtor the latter has become practically a surety entitled to require the payment to be made by his transferee."

38. *Belknap v. Bender*, 75 N. Y. 446 (1878). The decision is sound in so far as it holds that C may not enforce S's promise until the property has been liquidated, since, until that time no duty exists. Where, however, the property is later liquidated, the duty to apply the proceeds comes into existence and should be enforceable by the creditor regardless of the promise.

39. 108 N. Y. 222, 15 N. E. 318 (1888).

on the subject under discussion. In that case the unanimous Court of Appeals, speaking through Judge Finch, laid down what was clearly intended to be a forthright and definitive statement of the court's position on the problem. Simply stated the facts were that the firm of P was indebted to C who was pressing for payment. S, the father of one of the members of the firm of P and who held a chattel mortgage on fixtures and machinery of the firm to secure an indebtedness of the firm to him, orally promised C that if C forbore, he (S) would pay the firm's debt to C. The court might readily have disposed of the case in the defendant's favor by finding, as it did, that since S was adequately secured, C's promise of forbearance in no wise benefited S. Nevertheless the court, undoubtedly conscious of the uncertainty existing as a result of its own former opinions, reviewed the court's prior pronouncements.

The court referred to *Leonard v. Vredenburg*, *Mallory v. Gillett*, *Brown v. Weber* and *Ackley v. Parmenter* as representing three stages in the development of the doctrine prevailing in New York which distinguishes between promises within and without the Statute of Frauds. The court said:

"Each was a definite and deliberate advance toward a more faithful observance of the statute, and an abandonment of efforts to narrow the just and natural range of its application."⁴⁰

The court then discussed each case separately. The "new consideration" test of *Leonard v. Vredenburg* is characterized as "dangerously broad and capable of grave misapprehension."⁴¹ The "beneficial consideration" test of *Mallory v. Gillett*, which the court practically identifies with the *Nelson v. Boynton* main purpose rule, is accepted but the court points to the language in *Brown v. Weber* as adding to the generality of that test the limitation that, in addition to beneficial consideration moving to the promisor, the promisor must come under an independent duty of payment. *Ackley v. Parmenter* is then referred to by the court as giving authoritative support to what the court recognizes was merely a dictum in *Brown v. Weber*. The court then announces the rule:

"These four cases, advancing by three distinct stages in a common direction, have ended in establishing a doctrine in the courts of this state which may be stated with approximate accuracy thus, that *where the primary debt subsists and was antecedently contracted, the promise to pay it is original when it is founded on a new consideration moving to the promisor and beneficial to him, and such*

40. *Id.* at 224, 15 N.E. at 319.

41. *Id.* at 225, 15 N.E. at 319.

that the promisor thereby comes under an independent duty of payment irrespective of the liability of the principal debtor."⁴²

The above quoted statement represents the rule which after its pronouncement the New York Court of Appeals has consistently relied upon in determining the enforceability—in most cases the non-enforceability—of oral promises to pay debts antecedently contracted by persons other than the promisor.

We will now consider the subsequent applications of the rule by the court to cases in which the problem of the enforceability of such oral promises has been squarely presented.

DECISIONS SUBSEQUENT TO *White v. Rintoul*

The most significant thing about the decisions of the Court of Appeals rendered both before and after *White v. Rintoul* is that almost invariably the court has ruled the oral, subsequent promise to be unenforceable under the Statute of Frauds.⁴³ The actual adjudications, therefore, leave us with a negative, rather than a positive norm. The "advances" referred to by Judge Finch were, as he observed, toward a tightening of the statutory provisions, but even under the more liberal approaches of *Leonard v. Vredenburg* and *Mallory v. Gillett*, the plaintiff was always unsuccessful in holding the promisor liable.

42. *Id.* at 227, 15 N.E. at 320. (Italics added). Professor Williston seems to be of the opinion that such a promise is within the protection of the Statute of Frauds if it be assumed that payment by the new promisor will discharge any existing liability. 2 WILLISTON, CONTRACTS § 456 (Rev. ed. 1936). He says: "If it were held that a promise was on that account withdrawn from the Statute, many transactions understood by the parties to be guaranties, and treated by the courts as such, would be withdrawn from the Statute. Behind any question of the necessity of a writing is the principle of contracts that a promisor if held at all must be held according to the terms of his promise, and it is certainly true in a large number of cases where a guaranty is intended that the guarantor defines his undertaking, not by any reference to the legal liability of the principal, but by reference to matter *in pais*. He guaranties 'the price' of goods furnished the principal, 'the rent' of a house leased to him, the payment of a fixed sum of money; and whether the parties contemplate that there is a great chance, a small chance or no chance that the person named as principal debtor is under no legal obligation seems immaterial. The sole question should be whether the person so named in fact is under a legal obligation."

43. In the relatively few cases such as *Sanders v. Gillespie*, 59 N. Y. 250 (1874); *Raabe et al. v. Squier et al.*, 148 N. Y. 81, 42 N. E. 516 (1895); *Lamkin v. Palmer*, 164 N. Y. 201, 58 N. E. 123 (1900),—also see *Rosenkranz v. Schreiber Brewing Co. et al.*, 287 N. Y. 322, 39 N. E. 257 (1942)—in which the Court of Appeals has permitted enforcement of the oral promise to pay the indebtedness for which another person has continued to be liable there have been circumstances which may have justified the result, as the text of this article will attempt to indicate. While not saying that each of these cases may be *sui generis*, the fact remains that we do not appear to have any case decided by the Court of Appeals in which the oral promise of one who is actually a surety (with the exceptions noted in notes 11, 13 *supra* and 67 *infra*) has been held to be enforceable.

By a strict application of the doctrine of *stare decisis* we are able to state rather definitely what subsequent oral promises are not enforceable. However, the nearest approach to an affirmative rule of guidance is the above quoted and italicized language from the opinion in *White v. Rintoul*. The language in subsequent opinions of the court to some extent consists of discussions, analyses and explanations of the rule as laid down in *White v. Rintoul*. It will be the object of this paper, after considering the decisions of the Court of Appeals handed down since *White v. Rintoul*, to explore the possible situations where the court may enforce an oral promise even though it may in some way relate to the antecedently contracted debt of another person.

One decision, which has been pointed to⁴⁴ as having in effect overruled the dictum in *Brown v. Weber* requiring that the promisor come "under an independent duty of payment irrespective of liability of the principal debtor," to have reinstated the beneficial consideration rule of *Mallory v. Gillett* or the substantially equivalent main purpose rule of *Nelson v. Boynton* and to have rendered these rules and Judge Finch's statement of the law in *White v. Rintoul* as synonymous, is *Raabe et al. v. Squier et al.*⁴⁵ It is also a case where the Court of Appeals held the oral promise to be enforceable.

However, the distinguishing and important feature in *Raabe et al. v. Squier et al.* is that the promise was not to pay an antecedent debt but rather a debt created after and in consideration of the promise. This is the court's own appraisal of the facts.

"As to the Statute of Frauds it appears to us that its provisions have no application to the case under consideration. In the first place the indebtedness at the time the promise was made has been paid. The promise, in so far as it is here sought to be enforced, related to the indebtedness thereafter to be created."⁴⁶

The facts were substantially identical with our assumed typical state of facts except that the promise of S (the owner) to pay C, the supplier, applied solely to future deliveries by C.

44. Burdick, *Suretyship and The Statute of Frauds*, 20 COL. L. REV. 153, 174-5 (1920).

45. 148 N. Y. 81, 42 N. E. 516 (1895).

46. *Id.* at 87, 42 N. E. at 518. Where the promise of the owner to pay applies solely to the services to be performed or materials to be delivered in the future it appears to be universally acknowledged that the Statute does not apply, since, in such a case the consideration is being furnished directly to the promisor who is the principal debtor. *Parisi v. Hubbard*, 226 App. Div. 280, 235 N. Y. Supp. 220 (4th Dep't 1929); *Shisler v. Moore*, 19 F.2d 991 (3d Cir. 1927). In fact some courts declare as severable a promise to pay for both materials to be delivered in the future as well as for materials already delivered and uphold the Statute as a defense only in respect to the goods already delivered. *Peterson v. Paxton-Pavey Lumber Co.*, 102 Fla. 89, 135 So. 501 (1931); *Board of Commissioners v. Cincinnati Steam Heating Co.*, 128 Ind. 240, 27 N. E. 612 (1891).

The court found that beneficial consideration in the form of the future deliveries moved to S and then, in what might easily mislead one, stated that this brought the case within the rule stated by Judge Finch in *White v. Rintoul*, i.e., "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." Here the only "primary debt" which "was antecedently contracted" and which continued to subsist at the time the promise of S was made was P's obligation under his contract with C to purchase and pay for all materials called for by the supply contract. C was calling upon S not to perform that contractual obligation but rather to pay the purchase price of the materials delivered after and on the strength of S's promise. While the payment by S for such materials would to that extent discharge P's contractual obligation to C, the payment would be made "irrespective of the liability of the principal debtor," even assuming that P, in respect to the materials delivered after S's promise, continued to be the principal debtor.

But in respect to the future materials involved it would appear that P was in no real sense the principal debtor. The defendant's promise in *Raabe et al. v. Squier et al.* was that, if P did not pay, S "would take it out of the amount going to them [P] and would pay the plaintiffs."⁴⁷ In such a case, as Professor Williston points out,⁴⁸ even where P still remains liable on his contract to C, S is in reality the principal debtor. He is not promising as a surety because, upon payment to C, S would have no right of reimbursement against P. As between P and S, the debt is principally S's. The consideration, that is, the future deliveries of materials, was furnished directly for the benefit of S, who, if he had not paid P therefor, remained principally and ultimately liable.⁴⁹

The later decision in *Lamkin v. Palmer*⁵⁰ is more difficult to reconcile with the court's abandonment of *Mallory v. Gillett* and its apparent tendency not to enforce oral promises to pay another's debt. There

47. 148 N. Y. 81, 86, 42 N. E. 516, 518 (1895).

48. 2 WILLISTON, CONTRACTS 1379, § 481 (Rev. ed. 1936); see *Block v. Galitzka*, 114 App. Div. 799, 100 N. Y. Supp. 173 (2d Dep't 1906).

49. There does not appear to be any indication in the facts of the case, as stated by the court, that the moneys due to P (the building contractor) on the contract were insufficient to pay C for the materials. S may have had the right to retain sufficient moneys due to P to satisfy his suppliers of material.

50. 164 N. Y. 201, 58 N. E. 123 (1900).

C, the plaintiff, an employee and stockholder of the P corporation, in order to enable it to carry on its business, had loaned money to the corporation, part of whose debts the defendant S had become obligated to pay. S had obtained an offer for the purchase of part of the P corporation's assets and in order to induce C as a stockholder of P to consent to the sale, S orally promised C to pay his claim out of the proceeds of the sale. The court held the promise to be enforceable, saying:

"If there was a new and distinct consideration moving to the defendant and beneficial to him, the promise to pay was not within the statute." (Citing *Leonard v. Vredenburg* and *Raabe et al. v. Squier et al.*)

It is not quite understandable how the court, after Judge Finch's careful exposition of its prior positions ("advances") in *White v. Rintoul*, could have relied upon the "new and distinct consideration" doctrine of Chancellor Kent in *Leonard v. Vredenburg* as a justification for its holding. The reference to mere beneficial consideration as the norm might certainly lead one to believe that the court had backtracked and was repudiating the "independent duty of payment" element, the latest advance clearly specified in *White v. Rintoul*.⁵¹

Nevertheless, the facts in *Lamkin v. Palmer*, although not so clearly as those in *Raabe et al. v. Squier et al.*, appear to be distinguishable from the usual case of an oral promise to pay another's antecedent debt. The promise was to pay C from the proceeds of the sale of part of P corporation's assets. If we look to the substance of the transaction, and disregard the distinction made in *Belknap v. Bender*⁵² in reference to the time when the promise was made, we have what is tantamount to the not uncommon case of S, to whom P has turned over property, promising to pay P's debts from the proceeds of the sale of such property. The fact was that the contemplated purchaser refused to complete the purchase unless C's claim was settled or his consent to the sale was obtained. Nearly all courts in such a case would enforce S's promise, at least to the extent of the proceeds of the sale, since in such a case S is in reality merely promising to perform a duty which he has already assumed.⁵³ Moreover, S was already obligated to pay some of the P corporation's debts and by paying C would to that extent be reducing the obligations of P corporation and thus freeing its remaining assets for payment of its debts.

51. This appears to be Professor Burdick's belief: Burdick, *Suretyship and the Statute of Frauds*, 20 Col. L. Rev. 153, 182 (1920).

52. 75 N. Y. 446 (1878); see note 38 *supra*.

53. See note 37 *supra* and *Mann v. Ewing*, 156 Misc. 216, 281 N. Y. Supp. 515 (Sup. Ct. 1935).

Without expatiating further upon *Lamkin v. Palmer*, it should suffice to say that, in view of the unusual facts in the case, particularly the fact that S was not promising to pay P's debt from his own substance, the actual decision of the court, disregarding the court's very brief discussion of the legal principles involved, cannot be considered to have the effect of being a clear departure from the definite position taken by the court in *White v. Rintoul*.

*Richardson Press v. Albright*⁵⁴ marks the beginning of the court's more recent attempt to explain and apply the rule announced in *White v. Rintoul*. At the outset it should be observed that, just as in *White v. Rintoul*, the court could apparently have disposed of the case against the plaintiff upon the narrow ground that there was lacking the first and essential element of the rule announced in *White v. Rintoul*, namely, beneficial consideration moving to the promisor, S. The court observed that S's beneficial interest in making the promise "was at best remote."⁵⁵ However, as observed by the court in a later case,⁵⁶ the decision was not put upon that ground but upon the broader one that the promisor, S, did not come under an independent duty of payment, irrespective of the liability of the principal debtor.

In *Richardson Press v. Albright*, S, a large stockholder of P, a publisher, orally promised to pay C, a printer, for about half of the past due account owed by P to C for printing the magazine published by P and at the same time agreed to pay in cash for the printing of each subsequent issue of the magazine. The Court of Appeals made an obvious effort to elucidate the meaning of the "independent duty of payment, irrespective of the liability of the principal debtor" element suggested in *White v. Rintoul*. After pointing out that C, after S's promise, continued to look to and pursued P and not S for payment and only turned to S when P's resources were completely exhausted, the court stated 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*."⁵⁷

Aside from the quoted language, the disposition of the case by the Court of Appeals would not appear to be particularly noteworthy. Even assuming that the additional printing benefited S, P's large stockholder, the circumstances indicated that S's promise was intended and accepted by C, to be purely collateral to P's liability; in other words, that S promised as a surety or guarantor. Credit for the new

54. 224 N. Y. 497, 121 N. E. 362 (1918).

55. *Id.* at 501, 121 N. E. at 363.

56. *Bulkley et al. v. Shaw et al.*, 289 N. Y. 133, 137-8, 44 N. E. 2d 398, 400 (1942).

57. 224 N. Y. 497, 502, 121 N. E. 362, 364 (1918).

printing was extended by C, the court found, "primarily" to P and this fact was emphasized by C's subsequent efforts to collect from P before C made any claim against S. However, the use by the court of two concepts: (1) intention of the parties, and (2) primary liability, as an apparent explanation of what is meant by the "independent duty, irrespective of the liability of the principal debtor" language of *White v. Rintoul* would seem to be worthy of analysis, even though involving a digression, to ascertain whether possibly the court was offering some new explanation of its former language. First, what significance may be attached to the adverb "primarily"?

A surety is one who becomes liable *in any form* to discharge another's duty.⁵⁸ That other person who, as between himself and the surety, has the ultimate duty of performance is generally called the principal. His liability is "original" in the sense in which that word was used in the old action of debt.⁵⁹ His, as a matter of agreement, justice or right, is the ultimate duty of performance. It is a mere matter of nomenclature whether we designate his liability as "primary" or "principal" and that of the surety as "secondary" or "collateral," so long as it is understood that either word "primary" or "principal" is intended to designate the obligation of that one of two obligors who, as between him and the other obligor, owes the duty of performance. It is in that sense that Professor Williston sometimes refers to the principal's liability as "primary."⁶⁰ Similarly the words "secondary" and "collateral" are often used interchangeably to refer to the obligation of a surety, namely, one who is entitled to indemnity or reimbursement from another (the primary or principal obligor) if he is compelled to perform that other's duty.

However, in another, and semantically perhaps a more correct sense, the obligation of obligors may be designated as being either "primary" or "secondary" to indicate the conditional form of the obligation with

58. 4 WILLISTON, CONTRACTS § 1211 (Rev. ed. 1936). The word "surety" is used here in its broader sense as including a guarantor. The distinction made in some American cases between a surety, as one who makes a direct and unconditional promise to the creditor, and a guarantor who makes a conditional promise, ARNOLD, OUTLINES OF SURETYSHIP AND GUARANTY § 7 (1927), merely emphasizes the form of the undertaking which cannot affect the basic relationship between P and S. SIMPSON, HORNBOOK ON THE LAW OF SURETYSHIP § 7 (1950). The distinction has rightfully been criticized as of little or no value (Radin, *Guaranty and Suretyship*, 17 CALIF. L. REV. 605 (1929)) and many courts have ignored it. *Davis v. Wells*, 104 U.S. 159 (1881); *Read et al. v. Cutts*, 7 Me. 186 (1831); *People v. Backus et al.*, 117 N.Y. 196, 22 N.E. 759 (1889).

59. Ames, *Parol Contracts Prior to Assumpsit*, 8 HARV. L. REV. 252, 263-4 (1894). Also see Hening, *A New and Old Reading of the Statute of Frauds*, 57 U. OF PA. L. REV. 611 (1909).

60. 2 WILLISTON, CONTRACTS §§ 448-84, *seriatim* (Rev. ed. 1936).

its consequent effect upon the procedural rights of the obligee.⁶¹ In this sense the obligation of a surety—giving that word its more restricted meaning⁶²—was said to be primary, his obligation being absolute, while by way of contrast that of a guarantor was said to be secondary, his obligation being conditional.⁶³ In this sense also the obligation of a maker of a note is primary while that of an indorser is secondary.⁶⁴ And yet while in form a person's obligation may be primary, in substance it may be secondary, or vice-versa. For example, an accommodation maker is in the formal sense primarily liable on the instrument and yet in reality he is a surety and thus in another and more substantive sense his liability is secondary. Or a person who formally guarantees the debt of another and thus appears to be secondarily liable may in fact be the real debtor since the person whose debt he guarantees may be merely his agent⁶⁵ and thus in fact a surety entitled to reimbursement from his so-called "guarantor" if compelled to pay the debt.

In *Richardson Press v. Albright* the form of the oral promise testified to could not have been controlling because the plaintiff's testimony was that the promise was absolute in form⁶⁶ and yet the court held the promise to be unenforceable. The fact, therefore, that C, the plaintiff, first pursued P rather than the promisor S appears to have been significant in showing, not that C considered P to be primarily liable procedurally, but in demonstrating that credit had been extended principally to P and that P was accordingly the principal and, in that sense, the primary obligor "within the intention of the parties."

In a Statute of Frauds case the form which the oral promise is alleged

61. The liability of a surety is primary in the sense that immediately upon the principal's default, the surety may be proceeded against without any effort by the creditor (C) to pursue the principal (P). *General Phoenix Corp. v. Cabot*, 300 N.Y. 87, 89 N.E.2d 238 (1949); *First National Bank v. Jones et al.*, 219 N.Y. 312, 114 N.E. 349 (1916). Of course, the liability of the surety (guarantor) may by the terms of the agreement be made secondary as in the case of a so-called guarantor of collectibility. *RESTATEMENT, SECURITY* § 130; *Northern Insurance Co. v. Wright*, 76 N.Y. 445 (1879); *Dillman v. Nadelhoffer*, 160 Ill. 121, 43 N.E. 378 (1895). *Cf. Loos v. McCormack*, 107 App. Div. 8, 95 N.Y. Supp. 1141 (1st Dep't 1905). See *ARNOLD, OUTLINES OF SURETYSHIP AND GUARANTY* § 7, pp. 9-13 (1927).

62. See note 58 *supra*.

63. See note 61 *supra*.

64. N.Y. *NEGOTIABLE INSTRUMENTS LAW* § 3.

65. *Lesser-Goldman Cotton Co. v. Merchants' & Plaster's Bank*, 182 Ark. 150, 30 S.W.2d 215 (1930). *Cf. Bartolotta v. Calvo*, 112 Conn. 385, 152 Atl. 306 (1930).

66. The promise testified to and accepted by the trier of the facts was: "I will agree to pay you \$1,500 in three payments, \$500 weekly. I will further agree to pay each issue hereafter in cash, before you send it out." 224 N.Y. 497, 500, 121 N.E. 362, 363 (1918).

to have taken can usually be of only minor value in solving the problem.⁶⁷ One commentator has expressed the opinion that the rule set forth in *White v. Rintoul* means that to be without the protection of the Statute, S's promise "must be such that it can clearly be interpreted as 'I will pay you' and does not amount to 'I will pay you if he does not.'"⁶⁸ Would that it were that simple and easy. If the substance of what was agreed upon can be "intepreted" to mean that S will pay if P does not, then unquestionably in most situations S's promise would be held to be collateral, since it would indicate that both C and S considered P's liability to be "primary" in the sense of "principal."⁶⁹ But, as pointed out above, even one actually a principal debtor may sometimes promise to pay what is in fact his own debt only upon condition that his surety does not pay it. Therefore, an oral promise absolute in form such as "I will pay you" cannot merely by reason of its unconditional form be held to be original, as the very holding in *Richardson Press v. Albright* shows. The relationship between P and S, known to C, may still be availed of to show that, although S has orally promised in the most absolute form—"honor bound," "my word is as good as my bond"—to pay the debt, the debt is in reality P's and not S's and that, therefore, S's promise is unenforceable since it is collateral.

There are also substantial reasons why the *form* of the oral promise cannot be determinative in resolving questions involving the Statute of Frauds. The policy of the Statute of Frauds is to prevent recoveries based upon perjured testimony of witnesses. This policy could be easily evaded if the form of the promise controlled because a false witness could readily be coached to testify to the unconditional form of S's alleged oral promise. But in addition it would appear that the form of S's promise really becomes important only when that promise has become formal to the extent of having been reduced to a writing.

67. "The real character of a promise does not depend altogether upon the form of expression, but largely upon the situation of the parties: and the question always is, what the parties mutually understood by the language, whether they understood it to be a collateral or direct promise." *Davis v. Patrick*, 141 U.S. 479, 489 (1891). See *Carville v. Crane*, 5 Hill 483, 485 (N. Y. 1843), 2 WILLISTON, CONTRACTS § 465 (Rev. ed. 1936). In one case it may be said that the form of the promise is determinative. It is well settled that where the form of the undertaking is joint, rather than joint and several, the promises are without the protection of the Statute even though in reality as between the two promisors the relationship of principal and surety exists, this because the joint promise is considered to create a single debt. *Gibbs et al. v. Blanchard*, 15 Mich. 292 (1867); *Boyce v. Murphy*, 91 Ind. 1 (1883).

68. 4 CORNELL L. Q. 60, 61 (1918).

69. SIMPSON, HORNBOOK ON THE LAW OF SURETYSHIP, 124-5 (1950).

At that point questions, such as questions of procedure other than those involving the Statute of Frauds, may arise.

It would seem, therefore, that the court in *Richardson Press v. Albright* was not concerned with the mere form of S's oral promise and that when it used the expression "a principal debtor primarily liable" the adjective and the adverb were being used with synonymous meaning.⁷⁰

What significance has the expression "within the intention of the parties"? We must first consider to which of the parties the court was referring. In every case under the provision of the Statute of Frauds with which we are concerned there are three parties: C, S and P. It is unlikely that the court meant all three parties since actually the publishing company, P, except to the extent it was represented by S, was not a party to the conversations which gave rise to the alleged promise. The same is true in many other Statute of Frauds cases. The parties, therefore, to whose intention the court referred were either P and S or C and S. They could not be P and C because their intention could hardly determine the nature of S's liability. The same is true of P and S. The literal language of the Statute of Frauds makes unenforceable the oral promise of a surety. Whether a promisor is a surety depends essentially upon the dealing between P and S.⁷¹ If, as between P and S the debt ought to be paid by P, S is a surety. Dealings between P and S may shift from P to S the ultimate responsibility for the debt in which event S would become the principal debtor and P the surety.⁷² But the mere intention of P and S cannot accomplish this result. Rather it is the consideration passing between them that brings about the change. The court must have been referring to the intention of C and S.

The Statute of Frauds only becomes involved in a contest between C and S, not in one between P and S. As Williston⁷³ and the Restatement⁷⁴

70. It is significant that the Court of Appeals in *Brown v. Weber*, 38 N.Y. 187, 189 (1868), used similar language in describing a principal obligor: "The language [of the Statute] 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." (Italics added).

71. 2 WILLISTON, CONTRACTS § 475 (Rev. ed. 1936).

72. *First National Bank v. Chalmers et al.*, 144 N.Y. 432, 434, 39 N.E. 331 (1895) quoted in note 37 *supra*.

73. 2 WILLISTON, CONTRACTS, § 475 (Rev. ed. 1936). Williston points out also, however, that belief by C that S is promising as a surety does not render the Statute of Frauds available to S as a defense, if actually S is not a surety. See note 65 *supra* and accompanying text for an illustration. Another illustration would be the case where the supposed

point out, even where S is in fact a surety, the applicability of the Statute may depend upon the knowledge which C has of that fact.⁷⁵ Moreover, so far as the Statute is concerned, S may become the principal debtor as to C even without knowledge or consent of P, as where C releases P upon S's assumption of P's indebtedness to C. In such a case, absent P's consent to the substitution of obligors, there is lacking a technical legal novation,⁷⁶ but, nevertheless, S's promise will be enforceable under the Statute as that of one who has become an original obligor.⁷⁷

From all of the above, and the context in which the language was used, it seems clear that the parties, to whose intentions the court referred in *Richardson Press v. Albright*, were C and S.

What part does the intention of C and S play in the solution of the problem? The suretyship relation is a contractual one and it is axiomatic that a contractual intent is necessary to the existence of a contract. The important question remains, however, as to what kind of contractual relationship C and S intended. The court in *Richardson Press v. Albright* states that S's promise "is regarded as original only when" S "clearly becomes within the intention of" presumably C and S "a principal debtor." Can the mere intention of C and S, contractual or otherwise, make the new promisor, S, a principal debtor?

Certainly the mere intention of C and S cannot alter the basic relationship between S and P.⁷⁸ As we have already seen, whether P or S

obligation of P to C is void as in the case where P is an insane person or a married woman at common law. SIMPSON, *HORNBOOK ON THE LAW OF SURETYSHIP*, 126-7 (1950).

74. RESTATEMENT, SECURITY § 90.

75. Knowledge by C of the true relation between P and S is important in other fields of the law of suretyship, e.g., an alteration without S's consent of the obligation owed by P to C will be a defense to S only if C knew of the surety relationship between P and S, as in the case where S retires from the partnership of P and S and P, as partial consideration for the purchase of S's interest in the firm, assumes the obligation to pay the firm creditors, and thereafter C, a firm creditor, without S's consent, extends the maturity of the firm debt. The retired partner S is a surety but he will not be discharged of the debt to S unless C knew of the agreement and dissolution. N. Y. PARTNERSHIP LAW, § 67(2). *Strike-man v. Whitman, Requardt and Smith*, 272 App. Div. 627, 75 N. Y. S. 2d 73 (3d Dep't 1947); *Advance Rubber Co. v. Bershad*, 125 Misc. 826, 211 N. Y. Supp. 574 (App. Term, 2d Dep't 1925).

76. 2 WILLISTON, CONTRACTS, § 477 (Rev. ed. 1936).

77. *Meriden Britannia Co. v. Zingsen*, 48 N. Y. 247 (1872); *Booth v. Eighmie*, 60 N. Y. 238 (1875); *Claggett v. Donaldson*, 238 App. Div. 831, 263 N. Y. Supp. 17 (1st Dep't), *appeal dismissed*, 262 N. Y. 697, 188 N. E. 113 (1933); *Blek v. Wilson et al.*, 241 App. Div. 98, 271 N. Y. Supp. 553 (1st Dep't 1934); *Slotnick v. Smith et al.*, 252 Mass. 303, 147 N. E. 737 (1925).

78. Consideration must pass to convert the principal obligor into a surety and vice-versa. See note 72 *supra*.

is the principal debtor depends upon which one of them, as between themselves without regard to C, should pay the debt. However, we have also seen that the applicability of the Statute of Frauds does not always depend upon the relationship between P and S.⁷⁹ It would appear, as pointed out above, that where S is actually a surety, he may be deprived of the defense of the Statute if C is ignorant of that fact, even though C's belief that S is a surety will not make the Statute available to him as a defense where actually S is not a surety.⁸⁰ Therefore, while, for purposes other than the Statute of Frauds, the relationship between P and S determines whether one or the other is a surety, it would seem that the court in *Richardson Press v. Albright* may have been stating that *for the purpose of the Statute of Frauds* the agreement between C and S may at times be determinative of whether, *as between C and S*, S becomes a principal debtor, even though actually, as between P and S, S is a surety.⁸¹

We must recognize that once again the court in referring to the intention of the parties was expressing itself in a dictum. In *Richardson Press v. Albright* the promise of S was patently collateral and, therefore, protected by the Statute as the court held. However, we have been forced to search the language of the court's opinion for a possible "lead" or hint as to when the court will eventually, if ever, hold S liable upon his oral promise, even though P continues to remain liable to C as a principal obligor.

The court's reference in *Richardson Press v. Albright* to S becoming within the "intention of the parties, a principal obligor primarily liable" might possibly mean either one of three things. (1) The rule of *Brown v. Weber* is the law of this state; if actually S is P's surety, the oral promise of S is unenforceable, since the liability resulting therefrom being collateral, S's duty of payment is dependent upon, and therefore cannot be irrespective of, the liability of P, the principal debtor. The intention of C and S cannot change this fact. (2) The intention of C and S, supported by a new and beneficial consideration moving from C to S, may make S principally liable to C, irrespective of the liability of P to C. (3) The same result as in (2) even though, as between P and S, S is surety for P. Under this last view C would appear to be the fortunate possessor of two several original obligations, that of P and that of S. This would be the very result seemingly attained by application of the main purpose rule, the difference being that it is

79. For example, where the promise of P and S is joint, note 67 *supra*, or where C lacks knowledge of the relationship between P and S, notes 73 and 74 *supra*.

80. See note 73 *supra*.

81. See note 79 *supra* and accompanying text.

the intention of C and S, supported by beneficial consideration moving from C to S, rather than the main purpose, object or motive of S in making the promise, which brings about the result. Before concluding which, if any, of the three views the court was perhaps expressing, we will review the remaining cases decided by the court.

The facts which earlier in this article were assumed as typical of the problem we have been considering were presented to the court in *Witschard et al. v. Brody & Sons, Inc. et al.*⁸² P contracted to perform certain work for S on the premises owned by the latter. P became indebted to C for lumber supplied to the job and C refused further deliveries until he was paid. Thereupon S promised that if deliveries were continued "he would guarantee payment of what had already been delivered, and what was to be delivered in the future." C resumed making deliveries to P who failed to make any payments.

Here again the decision, so far as the opinion of the court discloses, was unexceptional. The actual adjudication does not merit discussion, but here again what was said by the court by way of exposition of its former opinions does serve to interest anyone anxious to ascertain the situation in which the Court of Appeals will, if ever, enforce the oral promise of S to pay C the debt for which P is already indebted to C.

In *Witschard et al. v. Brody & Sons, Inc. et al.*, the court observed that "the language of the promisor unmistakably indicates its intention to become a surety, for the very promise relied upon is that it 'would guarantee payment.'"⁸³ As pointed out earlier, the form of such a promise, while not always conclusive upon the application of the Statute of Frauds, may clearly show that the promisor and promisee understood that the promisor was merely agreeing to pay the debt of another.

The court quotes with approval the simple and clear rule of Professor Williston⁸⁴ that the Statute of Frauds applies to one who is a surety and then adopts the following test from that eminent authority:

"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.'"⁸⁵

Without question this is the simple rule derived from the literal language of the Statute itself, the rule announced in *Brown v. Weber*: the oral promise of a surety is unenforceable. Such a rule is equally

82. 257 N. Y. 97, 177 N. E. 385 (1931).

83. *Id.* at 99, 177 N. E. at 385.

84. 2 WILLISTON, CONTRACTS § 475 (Rev. ed. 1936).

85. 257 N. Y. 97, 99, 177 N. E. 385 (1931).

applicable whether the promise of S is made before, concurrently with, or subsequently to the creation of P's obligation.⁸⁶

All jurisdictions recognize the above simple rule. Many jurisdictions, however, recognize that in addition under certain circumstances a person, actually a surety, may be held liable upon his oral promise under the main purpose or beneficial consideration exceptions to the general rule. Professor Williston, although somewhat disapprovingly, also takes cognizance of these exceptions to the general rule.⁸⁷ New York, as we have seen, has never recognized as generally applicable the main purpose or beneficial consideration rules as such. The nearest approach to a general application in New York of these exceptional rules is the test suggested in *White v. Rintoul*, by way of dictum as a culmination of the previous "advances" made in New York, also made by way of dicta.

The surprising thing about the brief opinion in *Witschard et al. v. Brody & Sons, Inc.* et al. is what the court had to say in attempting to reconcile the simple and clear position which the court was now apparently taking (by way of dictum, it is true), with what the court had said in its previous opinions. The court said concerning its quotation from Williston:

"We find the same view expressed in *Mallory v. Gillett* (21 N.Y. 412, 415) and *Richardson Press v. Albright* (224 N.Y. 497, 502). In the former, Comstock, Ch. J., said that 'the inquiry under that statute is, whether there be a debtor and a surety'; in the latter, Pound, J., said that the promise is original 'only when the party sought to be charged clearly becomes, within the intention of the parties, a principal debtor primarily liable.'⁸⁸

Of course, Comstock, Ch. J., said much more in *Mallory v. Gillett* than quoted above. It is true that the promise in that case was held to be unenforceable, but the majority opinion in that case clearly suggested that the receipt by C of beneficial consideration would render the promise enforceable even though the principal debtor remained liable to C. And in *Richardson Press v. Albright*, Judge Pound (who con-

86. Although in discussing this test as the "true test" Professor Williston speaks at times of the "original debtor" and the "new promisor," it is clear that he is suggesting a test applicable generally to promises made before, after or concurrently with the creation of the other person's obligation. This "true test" is the last of seven considered by the author in the chapter dealing with the Statute of Frauds. 2 WILLISTON, CONTRACTS, c. XVI, pp. 1307-92, particularly § 462 (Rev. ed. 1936).

87. 2 WILLISTON, CONTRACTS §§ 470 and 475 (Rev. ed. 1936). The Restatement of Contracts, of which Williston was the reporter, also recognizes the main purpose rule as an exception to the general rule (RESTATEMENT, CONTRACTS § 184) and the Restatement of Security follows suit. RESTATEMENT, SECURITY § 93.

88. 257 N.Y. 97, 99, 177 N.E. 385 (1931).

curred in the court's unanimous opinion in *Witschard et al. v. Brody & Sons, Inc. et al.*) used the above quoted language in a context which, as we have pointed out at some length, rendered that language susceptible of an interpretation quite different from the simple one now ascribed to it by the court.

If there were any doubt, as has been suggested,⁸⁹ whether the language of the court in *Richardson Press v. Albright* is to be interpreted as restoring the unequivocal test suggested *obiter dicta* in *Brown v. Weber*, the brief opinion of the court in *Witschard et al. v. Brody & Sons, Inc. et al.*, if it can be accepted at face value for what it says, would seem to dispel that doubt. The court appears to have gone far out of its way to ascribe to its opinions in one of the earliest cases (*Brown v. Weber*) and in one of its more recent cases (*Richardson Press v. Albright*) a view which was, at best, very much hidden in the earlier decision and equivocally stated in the more recent decision.

The very brevity of the opinion in *Witschard et al. v. Brody & Sons, Inc. et al.*, would lead one to believe that the Court of Appeals had finally determined to set at rest the uncertainty which had resulted from its former dicta. The apparently definitive and oft-quoted rule of *White v. Rintoul* was not referred to nor was that case even cited. In effect the court said: "Forget our former dicta. The Statute means what it says. The oral promise of a surety is unenforceable. There are no exceptions, even where the surety receives beneficial consideration and thereby in some way comes under an independent duty of payment irrespective of the obligation of the principal debtor."

Consideration of two more decisions will complete a review of the more recent decisions of the Court of Appeals. The first case which we will consider does not involve a promise to pay an antecedent debt but the court's holding in the case strongly bears upon the problem under consideration.

In *Rosenkranz v. Schreiber Brewing Co. et al.*,⁹⁰ the complaint alleged that S urged the plaintiff, C, a building contractor, to enter into a contract with the P corporation for the improvement of certain premises owned by P and promised to be answerable for payments to be made by P to C, S representing that he was advancing the moneys necessary to pay C, that C entered into the contract with P, completed the work and was not paid. A jury returned a verdict for the plaintiff C. The Appellate Division reversed⁹¹ and upheld a defense of the Statute of Frauds,

89. Burdick, *Suretyship and The Statute of Frauds*, 20 COL. L. REV. 153, 178-82 (1920).

90. 287 N. Y. 322, 39 N. E.2d 257 (1942).

91. 257 App. Div. 1040 (4th Dep't 1939).

citing *Brown v. Weber*. The Court of Appeals in turn reversed the Appellate Division in a brief *per curiam* opinion saying:

" . . . whether this was an original undertaking to indemnify the plaintiff against a default of Edgewater Island Park, Inc., or was a special promise to answer for such a default and hence was within the Statute of Frauds . . . were questions of fact and were properly left to the jury," (citing *Brown v. Weber* and *Tighe v. Morrison*).⁹²

An examination of the record on appeal discloses that the trial court in effect charged that to be within the Statute of Frauds the promise of S "must have been made before the contract [between C and P] was entered into."⁹³ The fact was well established that the contract was entered into after the promise of S was made and by returning a verdict for the plaintiff under the trial court's charge the jury apparently so found. While the above-quoted language of the Court of Appeals does not unequivocally affirm the trial court's charge on the law, a later description of the Court of Appeals' holding in the case by the Court of Appeals itself makes it evident that the court did base its reversal squarely upon the position taken by the trial court in its charge to the jury. In *Bulkley et al. v. Shaw et al.*,⁹⁴ the next and final case which we will consider, the court thus refers to *Rosenkranz v. Schreiber Brewing Co. et al.*:

"There, on the plaintiff's proof, there was no liability to him of any other person at the time defendant Schreiber Brewing Co. undertook to be his paymaster. In that view, there was no principal obligation to which the promise could have been collateral with the result that the promise was original, or so the jury could have found under the charge."

Thus established by the court's own statement, the holding in *Rosenkranz v. Schreiber Brewing Co. et al.*, or at least the reasons advanced for the holding, appear, it is respectfully suggested, to be clearly erroneous. In principle the fact that a surety's oral promise is made, as it frequently is in the case of most guaranties, before the principal becomes obligated cannot remove the surety's promise from the protection of the Statute.

This apparently fundamental error in the court's reasoning is emphasized by its citation of *Tighe v. Morrison*,⁹⁵ which dealt with the much disputed and discussed⁹⁶ question whether the oral promise of an in-

92. 287 N. Y. 322, 325, 39 N. E. 2d 257 (1942).

93. Folio 609 of the Record on Appeal.

94. 289 N. Y. 133, 140, 44 N. E. 2d 398, 402 (1942).

95. 116 N. Y. 263, 22 N. E. 164 (1889); also see *Jones v. Bacon*, 145 N. Y. 446, 40 N. E. 216 (1895).

96. See Arnold, *Indemnity Contracts and the Statute of Frauds: Thomas v. Cook*

demnitor to save harmless from loss one who is about to become a surety is within the Statute of Frauds. New York, along with the great majority of jurisdictions, holds such an oral promise is not within the Statute of Frauds and *Tighe v. Morrison* is a leading authority in this state for such holding. For purposes of the present discussion we may prescind from a consideration as to whether that holding is correct as a universal proposition, a question which, as we have mentioned, has occasioned much debate. It will suffice for our present purpose to say that a true indemnitor, unlike a surety, is one who comes under an independent duty of payment irrespective of the liability of the principal debtor.⁹⁷ The basic question which has occasioned the greatest dispute is whether in a particular case the promisor is a surety or a true indemnitor as just defined.

One of the reasons⁹⁸ advanced in *Tighe v. Morrison* for the court's holding was that the oral promise was made before the existence of any obligation or duty of another person.⁹⁹ This reasoning may have some merit as applied to the oral promise of an indemnitor to save a prospective surety harmless. There the only possible third-party obligation involved in such a promise is the implied obligation of the principal to indemnify or reimburse the prospective surety should the surety be compelled to perform the principal's duty and apparently the courts hesitate to apply the Statute where the only obligation, other than the promisor's, is that of a third person which shall exist only impliedly and solely as a legal incident to the surety relationship.¹⁰⁰

versus Green v. Cressell, 9 MINN. L. REV. 401 (1925); Carey, *Guaranties and the Statute of Frauds in Wisconsin*, 2 WISC. L. REV. 193, 221 (1923); Corbin, *Contracts of Indemnity and the Statute of Frauds*, 41 HARV. L. REV. 689 (1928); Arant, *A Rationale for the Interpretation of the Statute of Frauds in Suretyship Cases*, 12 MINN. L. REV. 716, 738 (1928); 2 WILLISTON, CONTRACTS § 482 (Rev. ed. 1936).

97. See note 114 *infra*.

98. "But this promise was not made to the creditor, and at the time it was made there was no liability of the third person in existence to which it could be collateral." 116 N. Y. 263, 270, 22 N. E. 164, 167 (1889).

99. The other ground advanced by the court was that the promise was not made to the creditor. It is generally accepted that in such a case the Statute is not a defense, note 11 *supra*. The court said: "Moreover, the rule seems to be well settled that a promise not made to the person entitled to enforce the liability assumed by the promisor is not within the statute." 116 N. Y. 263, 270, 22 N. E. 164, 167 (1889). Of course such a conclusion begs the question. It presumes that the liability assumed by the indemnitor is the obligation of the principal (P) upon which the indemnified surety (S) is becoming liable to the creditor (C), whereas, the obligation the performance of which the indemnitor may really be guaranteeing is P's duty to reimburse or indemnify S, should the latter be compelled to perform P's duty to C. See RESTATEMENT, SECURITY § 96.

100. "It is asserted that in these cases of indemnity the debt which the defendant engages to discharge is that implied obligation of the third party to the promisee which

However, as applied to the facts of a case such as *Rosenkranz v. Schreiber Brewing Co. et al.*, the reasoning that no third party obligation existed at the time the oral promise was made appears to be an unsound premise upon which to hold the Statute inapplicable. This was recognized very early in the history of the litigation involving the Statute of Frauds by no less a personage than Lord Mansfield. In one of the first cases under the Statute Lord Mansfield took the view that the Statute was inapplicable where the oral promise was made before the obligation of P to C came into existence.¹⁰¹ However, a year later the great innovator repudiated this view,¹⁰² and it seems now to be fairly well established that where S induces C to extend credit to P by orally promising C that he will be paid, such a promise falls exactly within the language and spirit of the Statute. As mentioned already, this is the fairly typical situation where a guaranty is given. In such a case the guarantor's promise is a continuing offer for a unilateral contract or a series of such contracts, a promise for an act. The extension by C of credit to P constitutes the act which gives rise to the contractual liability of S as well as that of P.¹⁰³

This would appear to have been the situation in *Rosenkranz v.*

arises on the making of the oral promise, but it may well be doubted whether the statute was intended to include in its operation an obligation of a third person which exists or is to exist solely by virtue of and as incidental to the special contract which the plaintiff seeks to enforce. *Browne, St. Fr. (5th ed.) Section 162.* Note, 2 *COL. L. REV.* 105 (1902). As against this view Williston points out that the Statute was intended to apply to promises to answer for all types of obligations. 2 *WILLISTON, CONTRACTS* § 452 (Rev. ed. 1936).

101. *Mawbrey v. Cunningham*, Hilary Term (1773), cited in *Jones v. Cooper*, 98 Eng. Rep. 1058 (1774).

102. *Jones v. Cooper*, 98 Eng. Rep. 1058 (1774). At an early date the New York Court for the Correction of Errors repudiated the contention that the Statute applied solely to the contemporaneous or prior obligations of P. *Rogers et al. v. Kneeland*, 13 Wend. 114, 122 (N.Y. 1834). In an earlier case, *De Wolf v. Rabaud et al.*, 1 Pet. 476, 499 (U.S. 1828), involving the New York Statute of Frauds, Mr. Justice Story stated that the question whether the Statute was intended to be confined in its application to a subsequent promise to pay a pre-existing debt deserved "very grave consideration" but concluded that the question was no longer an open one. See *Cowdin et al. v. Gottgetreau*, 55 N.Y. 650 (1873).

103. *RESTATEMENT, SECURITY* §§ 86 and 87; *Smith v. Dann*, 6 Hill 543 (N.Y. 1844); *Jordan v. Dobbins*, 122 Mass. 168 (1877); *Midland National Bank v. Security Elevator Co. et al.*, 161 Minn. 30, 200 N.W. 851 (1924); *Aitken et al. v. Lang's Adm'r et al.*, 106 Ky. 652, 51 S.W. 154 (1899). Cf. *United States ex rel. Wilhelm et al. v. Chain*, 300 U.S. 31 (1937). The fact that a guaranty, no matter how worded, unless supported by a consideration, is a mere continuing offer seems to have been overlooked in *Newburger et al. v. Lubell*, 266 N.Y. 4, 193 N.E. 440 (1934). Cf. *Stone-Ordean Wells Co. v. Taylor*, 139 Minn. 432, 166 N.W. 1069 (1918).

Schreiber Brewing Co. et al. A reading of the record on appeal in that case indicates that the interest of the brewing company (S) in promising to pay C for the installation of a bar for P was to assure itself an outlet for its beer and there is an intimation that S refused to pay C when P started to sell the beer of a competitor. Even on the assumption that the installation of the bar constituted beneficial consideration to the brewing company,¹⁰⁴ the principal debt appeared to be that of the P corporation, the owner of the bar, with which C had contracted to do the work. The brewing company (S) did not appear to come under any independent duty of payment irrespective of the liability of P.¹⁰⁵ The Appellate Division appears to have been justified in relying upon *Brown v. Weber*, whose dictum appears to have been reaffirmed in *Witschard et al. v. Brody & Sons, Inc. et al.*

*Bulkley et al. v. Shaw et al.*¹⁰⁶ is the last case for our review. The facts in that case were practically the same as those in *Richardson Press v. Albright*, with the exception that S owned or controlled substantially all of the stock of P while in *Richardson Press v. Albright* S was characterized as merely a substantial stockholder. The Appellate Division¹⁰⁷ divided three to two, the majority opinion distinguishing *Richardson Press v. Albright* on the basis that there S's beneficial interest was found to be "at best remote," while in the case at hand S practically owned the P corporation. The majority in effect applied the main purpose rule¹⁰⁸ citing *Davis v. Patrick*¹⁰⁹ a leading authority for that rule, even though the majority also quoted the oft-quoted language of *White v. Rintoul*.

The Court of Appeals agreed with the view of the minority of the Appellate Division that *Richardson Press v. Albright* was "squarely in point"¹¹⁰ and observed that the decision in that case was not put upon

104. Similar guaranties of brewing companies have been upheld as *intra vires* since the guaranty is for the benefit of the corporation. *Holm v. Claus Lipsius Brewing Co.*, 21 App. Div. 204, 47 N.Y. Supp 518 (2d Dep't 1897); Comment, 13 *FORD. L. REV.* 234, 236 (1944); N.Y. STOCK CORP. LAW § 19.

105. This conclusion might be altered by the fact that, as the record of appeal discloses, the plaintiff had previously done similar work for the brewing company on property owned by the brewing company and on property owned by others, always at the brewing company's request, and that the brewing company had paid the plaintiff for all of this work. Under such circumstances it might well be inferred that, despite his contract with P, C considered that he was doing the work for S and that so far as he was concerned S was his real debtor. If, in addition, the installation was to become S's property, then, of course, *Raabe et al. v. Squier, et al.*, 148 N.Y. 81, 42 N.E. 516 (1895), note 45 *supra*, would apply.

106. 289 N.Y. 133, 44 N.E. 2d 398 (1942).

107. 262 App. Div. 196, 28 N.Y.S. 2d 616 (1st Dep't 1941).

108. *Id.* at 197, 28 N.Y.S. 2d at 617, 618.

109. 141 U.S. 479 (1891), note 16 *supra*.

110. 289 N.Y. 133, 136, 44 N.E. 2d 398, 400 (1942).

the ground that the promisor's beneficial interest was at best remote but upon the broader ground that the promisor did not come "under an independent duty of payment, irrespective of the liability of the principal debtor."

Finally in answer to the argument of the majority of the Appellate Division that the facts of *Witschard et al. v. Brody & Sons, Inc. et al.* were distinguishable because in that case there was no identity of interest between P and S, the court said:

"Assuming that to be true, although it is difficult to find a greater interest in the subject matter of a promise than one between a promisor and a debtor using materials to build upon property owned by the promisor for whom the debtor was working (an interest greater than in the instant case), the case still falls within the doctrine of Prof. Williston, quoted with approval (*supra*) that '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.'"¹¹¹

THE PRESENT NEW YORK RULE?

Upon the basis of the actual adjudications and even the language of the most recent opinions of the Court of Appeals, commencing with that in *Richardson Press v. Albright*, the conclusion seems to be inescapable that the dictum in *Brown v. Weber* represents the law of New York generally on the enforceability of the oral promise of S to pay a debt or perform some other duty upon which P continues to be liable to C. It is the simple rule set forth in the literal language of the Statute itself: the oral promise of every surety is unenforceable. It is the rule applied in two of the last cases decided by the Court of Appeals, *Witschard et al. v. Brody & Sons, Inc. et al.* and *Bulkley et al. v. Shaw et al.*

Nevertheless the court went to great lengths to formulate the statement of a definitive rule in *White v. Rintoul* and that pronouncement cannot readily be considered, despite the court's intimation to the contrary in *Witschard et al. v. Brody & Sons, Inc. et al.*, to be a mere repetition of the simple test announced in *Brown v. Weber*. While the court failed to cite *White v. Rintoul* in *Witschard et al. v. Brody & Sons, Inc. et al.* and *Bulkley et al. v. Shaw et al.*, it is difficult to conclude that today the language of the opinion in that case will be considered by the court to be either disowned or entirely meaningless.

It would be reasonable to infer that if the promisor referred to in *White v. Rintoul*, who by virtue of the receipt of a new and beneficial consideration "comes under an independent duty of payment irrespective of the liability of the principal debtor," is truly a surety as to that principal debtor, the dictum in *White v. Rintoul* must have been in-

111. *Id.* at 139, 44 N. E. 2d at 401.

tended to state an exception to the general rule of *Brown v. Weber*, something in the nature of a substitute in New York for the main purpose rule. However, there is little in the actual language or decisions of the court to support such a conclusion. Though the dictum in *White v. Rintoul* does refer to the "principal debtor" in discussing the obligation of the promisor, it would not appear that the court was thus referring by contrast to a promisor who was something other than a "principal debtor," *i.e.*, a surety. The expression "principal debtor" was apparently used simply to refer to another person who was also liable to the promisee.

Who then can such a promisor be? In this writer's opinion such a promisor can only be an indemnitor, if we use that word in its broad sense of an insurer against loss.¹¹² The generally accepted definition of such an indemnitor or insurer seems to fit the description which the court in *White v. Rintoul* gave to the promisor whose oral promise might be enforceable.¹¹³ Such an indemnitor may be defined as one who agrees to save another person harmless from some loss, irrespective of the liability of a third person.¹¹⁴

112. As used in the text the word "indemnitor" is not intended to describe a promisor who agrees to indemnify another who is about to become a surety as in the case of *Tighe v. Morrison*, note 95 *supra* and accompanying text, but to describe one who agrees to compensate another person for a loss. The word "indemnify" has two meanings, one to secure a person against loss occasioned by liability to another, and the other to make compensation for a loss. *Weller v. Eames*, 15 Minn. 461 (1870); WEBSTER, NEW INTERNATIONAL DICTIONARY 1093; FUNK & WAGNALLS, NEW STANDARD DICTIONARY 1248. The indemnitor referred to in the text is of the latter kind.

In the suretyship relation the principal by implication of law or of fact is deemed to have indemnified the surety against two possibilities: (1) liability and (2) loss. See *Roberts et al. v. Keene et al.*, 74 Misc. 238, 133 N. Y. Supp. 1091 (Sup. Ct. 1911).

113. Support for this conclusion may also be found in the Court's brief reference in *Rosenkrantz v. Schreiber Brewing Co. et al.*, to *Brown v. Weber* and *Tighe v. Morrison*, quoted at page — *supra*. The court cited these two cases in juxtaposition to each other apparently as representing respectively two contrasting promisors: (1) a surety whose oral promise is collateral and hence unenforceable and (2) an indemnitor—a "paymaster," *Bulkley et al. v. Shaw et al.*, 289 N. Y. 133, 140, 44 N. E. 2d 398, 402 (1942)—whose oral promise is original and, therefore, enforceable.

114. RESTATEMENT, SECURITY § 82, comment 1, defines indemnity as follows: "A contract of indemnity is one where the promisor agrees to save a promisee harmless from some loss, irrespective of the liability of a third person. In this sense, indemnity is synonymous with insurance." It must be pointed out that at least one of the illustrations given in the Restatement designated as involving a surety relationship would undoubtedly be treated by the courts as involving credit insurance. See note 117 *infra*. For example, the Restatement states at page 238 that where a corporation contracts with a merchant to save him from loss due to the inability of customers to pay their accounts, there is a contract of suretyship rather than one of indemnity. This would appear to be the very situation contemplated by the dictum in *White v. Rintoul* where an oral agreement would be enforceable.

If this conclusion as to the Court's possible meaning is correct, then the dictum of *White v. Rintoul* would appear to have a limited and exceptional application. It would refer solely to the case where it is the intention of C and S that S will compensate C for a loss which may arise upon the happening of an event, namely the non-payment of P's debt to C, regardless of P's liability to C.¹¹⁵ In other words, the agreement must contemplate that S by fulfilling his agreement will not so much be satisfying P's debt to C as compensating C for a loss which C has suffered as a result of P's non-payment of his debt to C. Under such circumstances, S may not be entitled to the usual right of reimbursement against P, which P's surety would have, since S would be merely insuring C against loss without regard to P's liability. In fact S, in the case assumed may be reimbursing C without P's knowledge or consent.¹¹⁶ In this sense the agreement may be considered a form of credit insurance.¹¹⁷ The fact that S may eventually be subrogated to C's claim against P should not change the agreement into one of suretyship.¹¹⁸ The Restate-

115. The distinction between such an agreement and one of suretyship is noted in *Howell v. Commissioner of Internal Revenue*, 69 F.2d 447, 450 (8th Cir.), *cert. den.*, 292 U.S. 694 (1934): "A contract of indemnity is an original undertaking independent of any collateral contract. It creates a primary liability. The promise of the indemnitor is not to answer for the debt, default, or miscarriage of another, but may be to make good the loss resulting from such debt, default, or miscarriage. 28 C.J. 892; *Eckhart v. Heier*, 37 S.D. 382, 158 N.W. 403; *Assets Realization Co. v. Roth*, 226 N.Y. 370, 123 N.E. 743; *National Bank of Tifton v. Smith*, 142 Ga. 663, 83 S.E. 526, L.R.A. 1915 B, 1116, 1117; 14 R.C.L. 43. While the object of a guaranty and an indemnity agreement may be the same—to save the promisee from loss—the legal effect is different. One guarantees the performance of an obligation according to its terms. A nonperformance of the obligation constitutes a breach of the guaranty agreement giving rise to the liability of the guarantor. The other indemnifies against loss in case of nonperformance, the failure to perform does not create the liability until the ascertainment of a loss therefrom." Also see *Pan-American Bank & Trust Co. et al. v. National City Bank*, 6 F.2d 762, 766 (2d Cir.), *cert. den.*, 269 U.S. 554 (1925).

A promisor, S, may be legally bound to perform what another, P, has in fact promised to do, even though P is not legally bound to perform. *McLaughlin v. McGovern*, 34 Barb. 208 (N.Y. 1861); *Backus v. Feeks et al.*, 71 Wash. 508, 129 Pac. 86 (1913); *SIMPSON, HORNBOOK ON THE LAW OF SURETYSHIP* § 55 (1950).

116. In such a situation even if S were a surety he would not be entitled to reimbursement from P. *Wright v. Garlinghouse*, 26 N.Y. 539 (1863); *Matter of City Bank Farmer's Trust Co.*, 149 Misc. 498, 509, 268 N.Y. Supp. 554, 565 (Sup. Ct. 1923).

117. *Tebbetts et al. v. Mercantile Credit Guarantee Co.*, 73 Fed. 95, 97 (2d Cir. 1896); *American Credit Indemnity Co. v. Athens Woolen Mills*, 92 Fed. 581 (6th Cir. 1899); *National Surety Co. v. Mutual Veneer Co.*, 66 F.2d 88 (6th Cir. 1933); *Gordon v. Home Indemnity Co.*, 121 Pa. Sup. Ct. 241, 183 Atl. 427 (1936); *Shakman v. United States Credit System Co.*, 92 Wis. 366, 66 N.W. 528 (1896); see *First National Bank v. National Surety Co.*, 228 N.Y. 469, 127 N.E. 479 (1920).

118. *Reid et al. v. Pauly et al.*, 121 Fed. 652 (9th Cir. 1903); *Traveler's Insurance Co.*

ment recognizes that the rules pertaining to suretyship—and this should include the Statute of Frauds—would not apply to the origin of the indemnitor-indemnitee relationship, even though subsequent events may bring the debtor into the picture.¹¹⁹

While the suggested distinction between the oral promise of an indemnitor (compensator for a loss) which the courts will enforce and that of a surety to which the Statute applies, may appear to be one mostly of emphasis and intent, the distinction is one which has been recognized by the courts. This does not mean that a promise by S to answer for P's debt to C becomes an indemnity agreement merely because S in making his promise may have used the word "indemnify." A promise by S to "indemnify" C against P's default may be merely another form of guaranteeing P's debt.¹²⁰ Whether the agreement is one of suretyship or indemnity must depend upon the substance of the agreement between C and S which in turn must be inferred not only from the language used but also from all of the facts and circumstances, including their intention. One fact which would appear to be important is the relationship—factual, not legal—between P and S when the prom-

v. Great Lakes Engineering Works Co., 184 Fed. 426 (6th Cir. 1911); BRANDT, *THE LAW OF SURETYSHIP* § 348 (3d ed. 1905); Campbell, *Non-Consensual Suretyship*, 45 *YALE L. J.* 69, 75-6 (1935).

119. RESTATEMENT, SECURITY 237 contains the following statement: "Much of the confusion which exists in connection with the administration of the rules relating to indemnity and suretyship can be avoided by recognizing that a contract of indemnity may also involve suretyship as a result of subsequent events. In other words, a relationship which involves two persons at the outset may ultimately involve three. This means that where a contract may fairly be called one of indemnity or insurance, the rules pertaining to suretyship do not apply to its execution, even if upon the introduction of a third party the rules of suretyship become applicable. It should be noted, however, that where the indemnitor becomes a surety, the indemnitee becomes the creditor and not the principal." An excellent comment on *Credit Transactions and Legal Categories*, 44 *YALE L. J.* 1053, 1066 (1935) dealing with the distinctions which the courts have made between contracts of suretyship and of indemnity contains this pertinent observation: "In other words, the distinction between suretyship and indemnity in cases of this nature is of significance only when some question is presented for litigation, and the court feels that the decision of that question will be aided by a resort to the distinction, in order to attain the result desired. Hence, it is conceivable that an oral contract to answer for the debt of another person would be treated as, and called, a contract of indemnity for the purpose of enforcing the promisor's duty despite the statute of frauds. And yet the same contract might be treated as one of suretyship for purposes of granting a right of reimbursement to the third party promisor against the principal debtor."

120. *Dolgoff v. Schnitzer*, 209 App. Div. 511, 205 N.Y. Supp. 11 (1st Dep't 1924); *Whitney v. Groot*, 24 Wend. 82 (N. Y. 1850); also see *Maine Lumber Co., Ltd. v. Maryland Casualty Co. et al.*, 216 App. Div. 35, 214 N.Y. Supp. 621 (1st Dep't), *aff'd without opinion*, 244 N.Y. 537, 155 N.E. 887 (1926). SIMPSON, *HORNEOOK ON THE LAW OF SURETYSHIP* 154 (1950).

ise is made. In all of the cases where the promise was not enforced, such as *Richardson Press v. Albright* and *Witschard et al. v. Brody & Sons, Inc. et al.*, the factual relationship between the promisors and the one already indebted to C was such as practically to preclude any inference that S was doing anything other than making a suretyship agreement. The relationship was such as to show a purpose or object to guarantee P's debt rather than to compensate C against loss irrespective of P's liability. The assurance that P would pay his debt rather than the indemnification of C appeared to be the "main purpose" or "leading object" of the promise by S.

A factual relationship which might give rise to a different inference would be one where S had no connection with P and no apparent reason to guarantee the latter's debt, but rather to assure C of payment.¹²¹ In *Rosenkranz v. Schreiber Brewing Co. et al.*, there may possibly have been a basis for furnishing some plausibility to a finding that S intended to indemnify C (as the jury apparently found) rather than to guarantee payment of P's debt.¹²² Unfortunately, as pointed out above, the court in that case appears to have posited its decision upon a seemingly irrele-

121. Such a situation would exist where S's promise to pay P's debt is made in connection with the assignment by S to C of P's indebtedness to S. See note 13 *supra*. In such a case the debt from P to S, whether represented by a note or some other form of contract, is being sold by S to C, and in effect S, by guaranteeing that P will pay, is warranting the worth of the thing sold as would any vendor of a chattel. In this respect S is promising to indemnify—in the sense of compensating—C for any loss which C may suffer as a result of the non-payment of the debt by P. That such is the case is apparent from the following observations made by the Court of Appeals. In *Brown v. Curtiss*, 2 N.Y. 225 (1849), the court said: "Although in form this is a promise to answer for the debt of another, in substance it is an agreement to pay the *guarantor's* debt in a particular way. He does not undertake as a mere surety for the maker, but on his own account, and for a consideration which has its root in a transaction entirely distinct from the liability of the maker. The defendant was a debtor of the plaintiff, and gave the note with the guaranty to satisfy that debt." (Italics added). In *Cardell v. McNeil*, 21 N.Y. 336 (1860), S, in payment for goods purchased from C, transferred to C the note of P in which S was named as payee. The court said: "It is claimed that the guaranty is void by the Statute of Frauds. In mere form it was certainly a collateral undertaking, because it was a promise that another person should perform his obligation, but looking to the substance of the transaction, we see that the defendant [S] paid, in this manner, a part of the price of a horse sold to himself. In a sense merely formal, he agreed to answer for the debt of Cornell [P]. In reality he undertook to pay his own vendor so much of the price of the chattel, unless a third person should make the payment for him." *Id.* at 339.

In both of the above cases S was not actually interested in P's payment of the debt assigned by S to P except to the extent that such payment would relieve S of his independent duty to C, irrespective of P's liability to C, to see that C was paid.

122. See note 105 *supra*.

vant fact, namely, that the promise of S was made before the indebtedness of P to C arose.

It must be acknowledged that the suggested explanation—in an effort to find one—of who is the promisor referred to in *White v. Rintoul*, who “comes under an independent duty of payment irrespective of the liability of the principal debtor” would not satisfy those who would, for all purposes, place the surety and the indemnitor in exact categories to be determined solely by the objective facts and who would hold that the suretyship relation exists, regardless of the intention of the parties, whenever performance by S would be the performance of P’s duty.¹²³ Nevertheless, other courts have not hesitated to depart from an observance of such strict and inflexible categories in order to enforce oral promises where justice and the spirit of the Statute would seem to require it.¹²⁴ There is no reason to assume that our Court of Appeals, in a proper case, will be any more hesitant and will not some day give a concrete meaning to the language of *White v. Rintoul*.

CONCLUSION

We can only speculate as to the true meaning of the test laid down in *White v. Rintoul* until such time as the Court of Appeals is called upon to hold enforceable the oral promise of one, who, in the court’s opinion, has come “under an independent duty of payment irrespective of the liability of the principal debtor.” It is questionable whether any future expression *obiter dicta* of the court’s understanding of the language of *White v. Rintoul* will clarify the law any better in the future than it has in the past. One other possible source of clarification would be legislation, but it does not appear that a subject involving such nice and subtle

123. See Williston’s statement quoted in note 42 *supra*.

124. “Ignoring, however, the vagueness of the tests as to whether or not a contract is ‘independent,’ and its subordinate tests of whether the promisor received a ‘new consideration’ or had a ‘leading object,’ it is apparent that in many of the cases where the promisor’s promise is called independent, and his promise held enforceable, a tripartite relationship exists, factually speaking. This is because the nature of the condition precedent to the third party’s liability is the default of another person, the principal debtor, and this liability is discharged if the principal pays. It appears, therefore, that there is no real distinction in these cases, in the sense that the courts talk of the distinction, which can ever be used as a means of understanding the cases. The explanation for these cases, and hence the explanation of what the distinction is between suretyship and indemnity, is based on a recognition of the reason why the distinction is made, rather than on how it is made. The real identifying earmarks of the cases placed in the ‘indemnity’ category may often be found in the fact that the evidence showing the existence of the alleged oral contract is so clear that justice requires its enforcement.” Comment, 44 *YALE L. J.* 1053, 1058-9 (1935).

distinctions can be properly and appropriately dealt with by the enactment of clarifying legislation, unless it were to take the form of the outright adoption for New York State of the main purpose rule. If the more recent decisions of the Court of Appeals disclose any one thing with certainty, it is that the public policy of our state, as interpreted by the Court of Appeals, is against adoption of that broad rule.