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Henry M. Grether
University of Nebraska College of Law

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CAVEAT PROMISSEE: NEBRASKA'S "NEW CONSIDERATION" TEST AND THE ANACHRONISTIC STATUTE OF FRAUDS.

Henry M. Grether*

A. Introduction

Nearly a quarter of a century ago Professor Maurice H. Merrill made an exhaustive and analytical study of the Nebraska cases regarding suretyship.¹ Reading his work on this subject leads to the conclusion that in most instances the rules of suretyship in Nebraska followed the views expressed by a majority of the other states and text writers. One of the areas in which Professor Merrill discovered confusion and need for greater clarity concerned the so-called "leading object" or "main purpose" rule, a doctrine which will take out of the Statute of Frauds a promise to answer for another's debt. Professor Merrill wrote, "The variety of the views presented and the irreconcilability of the cases suggest that it may be profitable to review all the Nebraska cases dealing with new promises in the light of the various theories. Such a survey might enable us to determine which view most adequately reflects the law of Nebraska . . . ."² Further, he concluded, "... a definite selection by the court of some one view as a basis for its new promise decisions seems highly desirable."³

The purpose of this article, written nearly a quarter of a century after Professor Merrill's suggestion that our court select some definite view, is to determine whether it is now possible to state the Nebraska rule regarding the status and future of oral guarantees of another's pre-existing duty. Incentive for this quest is furnished not only by lapse of time since the aforementioned research, but also by the recent decision of the Supreme Court of Nebraska in King v. Schmall.⁴

Evolution of the Statute of Frauds—1677-1954

To eliminate confusion between the "main purpose" doctrine and other doctrines involved in the surety section of the Statute of Frauds, particularly the confusion between the "main purpose" doctrine and the "entire credit" test,⁵ the history of the statute and the evolution of the cases construing it should be considered.

* Assistant Professor of Law University of Nebraska; assisted by Lawrence L. Wilson, member of the junior class.

² 8 Id. at 429.
³ 8 Id. at 434.
⁴ King v. Schmall, 156 Neb. 635, 57 N.W.2d 287 (1953).
⁵ This test ascertains whether credit was actually given to the surety or the principal debtor. For a scholarly discussion of this test see Riesenfeld and Mussman, Suretyship and the Statute of Frauds: A Survey of the Minnesota Law, 31 Minn. L. Rev. 1, 11 (1946).
The original enactment of the Statute of Frauds was in the year 1677. It was a very comprehensive act containing twenty-five sections dealing with a great variety of subject matters but having a single purpose of preventing fraud and perjury. Of the original twenty-five sections, only two, sections four and twenty-three, are still in force in the original version, although parliament later incorporated some of the repealed sections into other statutes. It is also interesting that section four, which includes the promise to answer for another's debt, was not inserted until a later stage of the draft. More significant, however, is the fact that the English Law Revision Committee recommended in 1937 that section four be repealed. The report of this committee contained both a majority and minority report as to the advisability of repealing the portion of section four that applies to contracts of guaranty. The majority recommended that contracts of guaranty should not be treated separately, while the minority report recommended that contracts of guaranty were of such a nature that a signed writing should be made essential for this type of promise.

In the United States the controversy over the wisdom of requiring a writing for contracts of guaranty has by no means been dormant.

An Act For the Prevention of Frauds and Perjuries, 29 Car. II, c. 3. Section 17 of the Statute of Frauds now repealed and (with certain changes) re-enacted by the Sale of Goods Act, 1893, was as follows:

And be it further enacted by the authority aforesaid that from and after the 24th day of June no contract for the sale of goods, wares or merchandizes for the price of £1 sterling or upwards, shall be allowed to be good except the buyer shall accept part of the goods so sold and actually receive the same or give something in earnest to bind the bargain or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

Section 7 of the Statute of Frauds Amendment Act, 1828, now repealed and re-enacted by the Sale of Goods Act, 1893, was as follows:

Be it enacted that the said enactments shall extend to all contracts for the sale of goods of the value of ten pounds sterling and upwards notwithstanding the goods may be intended to be delivered at some future time or may not at the time of such contract be actually made, procured or provided or fit or ready for delivery or some act may be requisite for the making or completing thereof or rendering the same fit for delivery.


Report of the English Law Revision Committee, Sixth Interim Report (1937), The Statute of Frauds and the Doctrine of Consideration. Reprinted in 15 Can. B. Rev. 585 (1937). Id. at 594. In June 1952 a Law Reform Committee was constituted by the present Lord Chancellor. This Committee also studied the merits of the Statute of Frauds. In April 1953 this Committee recommended that section 4 of the Statute, except insofar as it relates to "any special promise to answer for the debt, default or miscarriage of another person," should be repealed. In effect this proposal differs from the majority view of the Law Revision Committee only in that the latter recommended a total abolition while the Reform Committee would retain contracts of guarantee. 1 Business Law Review (English) 6 (Jan. 1954). Id. at 617-618.
In fact, the United States courts have been grinding out case after case in a seemingly never ending struggle to bring out of chaos rational propositions to be applied to Statute of Frauds cases. Contemporary cases obviously have a root base going back many years. These cases are better explained by a full understanding of this historic background rather than by attempting to accept them at face value.

The pertinent part of the English Statute of Frauds for suretyship reads:

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

The test of whether the statute renders a particular oral promise unenforceable is whether the agreement of the promisor is an original and independent undertaking and not accessory or collateral to another main contract, or whether it is collateral. Original promises are not within the statute but collateral promises are. Difficulty arises, however, when this test is applied to a specific fact situation. In attempting to distinguish independent from collateral promises, the courts have laid down a great many tests, none of which are entirely satisfactory.

A number of outstanding writers have made noteworthy contributions to legal learning on this subject by classifying different types of agreements which most courts have decided are not within the meaning and spirit of the statute. After reading these texts, one learns

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12 For an idea of the enormity of litigation and legal labor that has been expended to reach the present indecisive status of the law on this subject with all its subtleties, technicalities, and conflicts, see Willis, The Statute of Frauds—A Legal Anachronism, 3 Ind. L. J. 427, 528 (1928).

13 See note 6 supra. The Nebraska Statute of Frauds provides: “In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith: ... (2) every special promise to answer for the debt, default or misdoings of another person....” Neb. Rev. Stat. § 36-202 (Re-issue 1952).

14 See 2 Williston, Contracts § 463 (Rev. ed. 1936).

15 “The fact that the promisor’s undertaking is entered into subsequent to the creation of the main obligation does not make it necessarily independent of the main obligation. Again the fact that some benefit may accrue to the promisor, or that he receives some consideration for his promise, does not necessarily make his promise an independent one. The fact that the promisee incurs some detriment or disadvantage as a result of the new promise is not conclusive. On the other hand, the promise may be independent, even though someone else’s debt will be paid in consequence of performance of the contract and even though the original debtor remains liable after making the promise.” Stearns, The Law of Suretyship, (5th ed. 1951).

16 Merrill, 6 Neb. L. Bull., op. cit. supra note 1, at 413-434; Simpson, Suretyship, 113-164 (1950); Riesendfeld and Mussman. op. cit. supra note 5. at 1-34, 633-679; Restatement, Security §§ 89-100; Stearns, op. cit. supra note 15, 3.06-3.21.
that there are more rules and subtleties providing for exceptions to the statute than there are rules concerning when a certain fact situation is within the statute. Thus, a short summary of the Statute of Frauds is that all oral suretyship agreements are unenforceable except, except, etc. However, most of these exceptions are well established and easily found by reference to the standard texts and articles on the subject. For example, the usually recognized exceptions are promises made to the debtor;\(^{17}\) where a legal duty of identical performance exists apart from the oral promise;\(^ {18}\) joint promises;\(^ {19}\) promises to indemnify;\(^ {20}\) the del credere agent's promise;\(^ {21}\) promises in satisfaction of the duty of another;\(^ {22}\) promises not originally subject to the statute where a third person later assumes the duty, as in the case where a partner retires from a partnership and the remaining partner agrees to assume all of the partnership obligations;\(^ {23}\) promises made where no obligation exists between the principal and creditor;\(^ {24}\) and promises where the entire credit is given the promisor.\(^ {25}\)

**B. The Problem**

Another well established exception, sometimes called the “new consideration theory,” or the “leading object” or “main purpose” rule, is recognized in one of these forms by all the authorities.\(^ {26}\) The true mean-

\(^{17}\) Restatement, Security § 100 (1941); Simpson, Suretyship § 34 (1950); 2 Williston, Contracts §§ 460, 478 (Rev. ed. 1936); Merrill, 8 Neb. L. Bull., op. cit. supra note 1, at 420; Stearns, op. cit. supra note 15, § 3.6.

\(^{18}\) Restatement, Security, op. cit. supra note 17, § 91(c); Simpson, op. cit. supra note 16, § 36; 2 Williston, op. cit. supra note 17, at § 459; Stearns, op. cit. supra note 15 at § 3.16.

\(^{19}\) Restatement, Security, op. cit. supra note 17, § 90(a); Simpson, op. cit. supra note 16, § 37; 2 Williston, op. cit. supra note 17, § 466; Stearns, op. cit. supra note 15, § 3.14.

\(^{20}\) Restatement, Security, op. cit. supra note 17, § 96; Simpson, op. cit. supra note 16, § 39; 2 Williston, op. cit. supra note 17, § 482; Merrill, 8 Neb. L. Bull., op. cit. supra note 1 at 421-422; Stearns, op. cit. supra note 15, § 3.10.

\(^{21}\) Restatement, Security, op. cit. supra note 17, § 98; Simpson, supra note 16, § 40; 2 Williston, op. cit. supra note 17, § 484; Stearns, op. cit. supra note 15, § 3.21.

\(^{22}\) Restatement, Security, op. cit. supra note 17, § 92; 2 Williston, op. cit. supra note 17, at § 477; Merrill, op. cit. supra note 1, at 422-423; Stearns, op. cit. supra note 15, § 3.18.

\(^{23}\) Restatement, Security, op. cit. supra note 17, § 95; Stearns, op. cit. supra note 15, § 3.16.

\(^{24}\) Restatement, Security, op. cit. supra note 17, § 89, illust. 3 and 5; Simpson, op. cit. supra note 16, § 35, 2 Williston, op. cit. supra note 17, § 454; Merrill, 8 Neb. L. Bull., op. cit. supra note 1, at 414; Stearns, op. cit. supra note 15, § 3.12.

\(^{25}\) Restatement, Security, op. cit. supra note 17, § 89, illust. 4, 7 and 10; 2 Williston, op. cit. supra note 17, § 465; Merrill, 8 Neb. L. Bull., op. cit. supra note 1, at 415; Stearns, op. cit. supra note 15, § 3.13.

\(^{26}\) To illustrate an application and statement of the “new consideration” test, see White v. Rintoul, note 86 infra. For an application and statement of the “main purpose” or “leading object” rule, see Rose v. O'Linn, 10 Neb. 364, 6 N.W. 430 (1880).
ing and application of this rule appears to be incapable of satisfactory understanding and definition. This is the exception that Professor Merrill referred to nearly twenty-five years ago when he admonished the Supreme Court of Nebraska to make a selection of some one definite rule regarding this exception. Applying this exception was the problem recently confronting the Supreme Court of Nebraska in deciding *King v. Schmall*.

Clearly a promisor cannot be made to answer for the debt of another unless someone else is primarily liable to the creditor. A promise is not within the statute unless there is an obligation of another to which it relates. Part of the problem we are considering is whether a person may by oral promise become originally liable for the same antecedent debt for which another person continues to remain liable to the same creditor.

C. The Origin of the "Main Purpose Rule" and the "New Consideration Test"

In 1756 Chancellor Hardwicke seems to have initiated these doctrines in *Thomlinson v. Gill*. Ten years later another landmark case, *Williams v. Leper*, which was to greatly influence cases in both England and the United States, was decided. In the next forty-five years two more English cases were decided that tended to develop the "main purpose" doctrine before its adoption in America. After the rule was transplanted to America it developed in the main along two different trends. The most famous American cases developing these trends are *Leonard v. Vredenburgh*, decided in New York in 1811 and *Nelson v. Boynton*, decided in Massachusetts in 1841. The first Nebraska case, *Rose v. O'Linn*, was not decided until a generation later and at that time the dictum of a great judge in the early New York case above was made the basis for deciding the Nebraska decision. Since the de-

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27 See Note 3 supra.
28 See note 4 supra.
29 "It is very clear that a promisor cannot be made to answer for the debt of another unless someone else is primarily liable to the creditor." Simpson, Suretyship, 122-123 (1950). See also 2 Williston, Contracts § 454 (Rev. ed. 1936).
30 For an exhaustive and detailed analysis of the New York cases involving this same problem, see Conway, Subsequent Oral Promise to Perform Another's Duty and the New York Statute of Frauds, 22 Ford L. Rev. 119-154 (1953).
35 3 Metc. (Mass.) 396, 37 Am. Dec. 148 (1841).
36 Rose v. O'Linn, see note 26 supra.
37 James Kent, at the time of his opinion in *Leonard v. Vredenburgh*, was Chief Justice of the Supreme Court of Judicature of New York and later became Chancellor.
cision in the first Nebraska case there has been doubt whether Ne-
braska has been following the New York or the Massachusetts ap-
proach.38 In the meantime the doctrine enunciated in Massachusetts by
another great judge39 was adopted by the American Law Institute as
the “majority rule” to be set out in the Restatements,40 and the New
York doctrine grew from what was confusing dictum to its con-
temporary status that now is even more confounded.41 During the
years since 1880, Nebraska has had numerous opportunities to apply
its doctrine.42 Is Nebraska continuing to follow the blind groping of
the New York judges, is it tending toward the Massachusetts and Re-
statement doctrine, or is it developing some independent view of its
own?

The Four Basic English Cases

Thomlinson v. Gill appears to be the English case originating these
doctrines.43 The defendant made an oral promise that if the widow of
the intestate would permit him to be joined with her in the letters of
administration, he would make good any deficiency of assets to dis-
charge the intestate’s debts. The creditors of the intestate filed a bill
and defendant’s oral promise was held to be enforceable on the ground
that the Statute of Frauds did not apply where the promise to pay the
debt of another was supported on a “new distinct consideration.” 44

Williams v. Leper appears as a landmark case in the English law
and represents a basis for the development of this doctrine. An oral
promise by an assignee for benefit of creditors was held to not be within
the Statute of Frauds. The debtor had assigned his effects to the
defendant in trust for his creditors; the defendant advertised a sale
and on the morning advertised for the sale, the landlord came to dis-

38 See note 3 supra. See also Grether, Nebraska Annotations to the Restate-
ment of Security § 93 (1950).
39 Referring to Chief Justice Shaw who wrote the opinion in Nelson v. Boy-
ton, see note 35 supra.
40 Restatement, Security § 93 (1941); Restatement, Contracts § 184 (1932).
41 See note 30 supra at 119, 120. Professor Conway states that it is difficult,
if not impossible, on the basis of the opinions of the New York Court of Ap-
peals, to state precisely what the law is today regarding the enforceability of
such oral promises. He further states that recent decisions of the courts make
it uncertain whether the announced rule now really means what it appears to
say. He concludes that we can only speculate as to the true meaning of the
New York test.
42 For a list of Nebraska cases see Table Showing Nebraska Cases Correctly
or Incorrectly Decided According to Six Theories of Enforceability of Oral
Promises to Answer for Debt of Another, set out in this article, infra.
43 Riesenfeld and Mussman, op. cit. supra note 5 at 659.
44 Lord Hardwicke decided that the oral promise was not within the first
branch of Section 4 of the Statute of Frauds—a promise by an administrator
to answer damages out of his own estate—because the defendant was not an
administrator at the time he made the promise. The chancellor regarded the
promise to the widow as being made in trust to her for the benefit of the
creditors.
train the goods in the house. The defendant, having notice of plaintiff's intention to distrain, promised to pay the rent owing if plaintiff would desist from distraining; and thereupon plaintiff did desist. The court must be understood as having considered the power of immediate distress and the intention to enforce it as equivalent to an actual distress.\(^4\) Mr. Justice Aston thought that the defendant would not be liable for any more than the amount received for the goods sold; Mr. Justice Yates held that the defendant's promise was an admission that the goods were sufficient to satisfy the plaintiff's demand and that defendant's promise created a new contract upon a good consideration; Lord Mansfield's position was that the statute was not applicable because the plaintiff had released an existing lien, and payment was to be made out of the fund; and Justice Wilmot decided that the defendant was bailiff for the landlord with respect to that portion of the proceeds of the goods as was covered by rent due. The court distinguished a line of cases regarding oral promises in consideration of forbearance to sue and did not cite the earlier case of \textit{Thomlinson v. Gill} nor seem to consider its rationale. In both cases, however, the promisor's motive was to secure a benefit for himself rather than a desire to pay some other person's debt. Although the judges agreed on the result in \textit{Williams v. Leper}, their reasons for the result were widely divergent. Consequently, one can only speculate as to their result had they considered the \textit{Thomlinson} case.

In the next case, decided thirty-four years later, Lord Eldon is reported to have held in \textit{Houlditch v. Milne}\(^4\) that if a tradesman, having goods in his possession upon which he has a lien, parts with those goods on the promise of a third person to pay the demand, such promise is not within the Statute of Frauds. In that case the defendant sent the carriages of a third person to the plaintiff for repair. Thereafter, upon orders from the defendant, the carriages were placed on board a ship, but only after the defendant had promised to pay for the repairs. At most it can only be implied from the facts that the defendant received an economic gain from the release of the lien and that implication only from Lord Eldon's statement, "If a person \textit{got goods into his possession}, on which the landlord had a right to distrain for rent, and he promised to pay the rent, though it was clearly the debt of another, yet a note in writing was not necessary."\(^4\) Lord Eldon relied on the \textit{Leper} case in making his decision.

\(^{45}\) See note by Serjeant John Williams, 1 Wms. Saund. 210 at 211, 85 Eng. Rep. 217 at 224. The extensive note follows a Saund's report of Forth v. Stanton and is a useful summary of these early precedents. The note was written during the early 1800's.

\(^{46}\) See note 33 supra.

but in a note summarizing these early English precedents, Serjeant Williams disagreed with Lord Eldon’s rationale and reconciled the case with the statement that the circumstances of the case showed the credit to have been given to the defendant and that the real owner of the carriages was not liable.48

The latest English case decided on this doctrine before the rule was transplanted to the United States was Castling v. Aubert.49 In that case, C, who was D’s broker, had policies of insurance in his hands belonging to D. These policies were security on which C had a lien for the balance of his account; on the faith of this security C agreed to accept commercial paper for the accommodation of D. An action was brought against C, as acceptor, and D as drawer, of a bill. The promisor agreed to settle the acceptances due and to pay money to a banker for the satisfaction of the remainder of the acceptances as they became due if C would turn over the policies to the promisor so he could collect from the underwriters money due from the policies for losses incurred. All of the judges agreed that the Statute of Frauds was no defense to the promisor where the promisee had released his lien on the insurance policies in order for the promisor to collect on the policies. Lord Ellenborough stated that the amount collected on the policies was a much larger amount than that for which the promisor agreed to indemnify the broker and that the promise was not induced by a desire to attain the discharge of D, but rather the discharge of himself. In the note written by Serjeant Williams, this case is explained on the ground that it involved the purchase of an interest rather than a mere undertaking to pay the debt of another.50 This was the first case emphasizing the factor of benefit to the promisor as well as detriment to or reliance of the promisee. The motive of gaining some independent economic interest for the promisor is thus suggested as a basis for exempting oral guaranties from the Statute of Frauds.

The American Doctrine

The English law had developed the “main purpose” or “leading object” rule to this point before any American precedent was developed. The important and influential American cases transplanting the English doctrine into our law are those from the states of New York and Massachusetts.

The most famous of these cases is Leonard v. Vredenburgh. James Kent, then Chief Justice of the Supreme Court of Judicature of New York, wrote the opinion containing dictum that since has been widely

49 See note 33 supra.
CAVEAT PROMISSEE

quoted and furnished the basis for decisions in many cases. Kent's dictum classified oral guaranty cases into three groups, and it is the third group with which we are here concerned. In order to keep this famous dictum in context, it is well to quote it as to all three classes:

There are, then, three distinct classes of cases on this subject, which require to be discriminated: 1. Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal or direct debtor. Here, as we have already seen, is not, nor need be, any other consideration, than that moving between the creditor and original debtor; 2. Cases in which the collateral undertaking is subsequent to the debt, and was not the inducement of it, though the subsisting liability is the ground of the promise, without any distinct and unconnected inducement. Here some further consideration must be shown having an immediate respect to such liability, for the consideration for the original debt will not attach to this subsequent promise. . . . 3. A third class of cases, and to which I have already alluded, is 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.

The first two classes of cases are within the statute of frauds, but the last is not . . . .

In spite of later misconstruction of his words, it does not appear that Kent meant any consideration sufficient to support a contract would render the statute inapplicable. He cited the cases of Tomlinson v. Gill and Williams v. Leper, and the whole tenor of the opinion indicates that the test is not absence of consideration, but that only an independent economic advantage of the promisor will render the statute inapplicable. Kent's emphasis was that the new consideration had to be moving between the newly contracting parties. Subsequent New York cases have explained, modified and restated this famous dictum but to date have failed to evolve a workable rule therefrom. The

51 According to Shepard's New York Court of Appeals Citations, Leonard v. Vredenburgh has been cited by the United States Supreme Court and the states of Arkansas, California, Delaware, Georgia, Illinois, Iowa, Michigan, Minnesota, Missouri, North Carolina, North Dakota, Nebraska, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Virginia, Washington, Wisconsin and West Virginia.

52 Leonard v. Vredenburgh was in this first category and decided on this rule, so that the next two classifications are only dictum.

53 The fact that the Chief Justice spoke at another place in the opinion, "Of some new and original consideration of benefit or harm moving between the newly contracting parties" explains why there was some confusion as to the true meaning of the dictum. But the whole opinion taken in context clearly shows that Kent did not mean to include the mere forbearance cases, and it is not conceivable that he was thinking of a harm moving between the parties, whatever that could mean. Thus, the words "or harm" should be ignored. Cf. Burdick, Suretyship and the Statute of Frauds, 20 Col. L. Rev. 153, 164 (1920).

54 Mallory v. Gillett, 21 N.Y. 412 (1860), the test requires a beneficial consideration moving to the promisor. Brown v. Weber, 38 N.Y. 187 (1868), as-
failure of the New York bench is an interesting result and is considered later in this article.

The Massachusetts development of the rule under consideration has been second only to New York in influencing the American position. Chief Justice Shaw wrote the opinion in Nelson v. Boynton which has been credited as being the origin of the modern doctrine. The classic expression of the "leading object" or "main purpose" test from the pen of Chief Justice Shaw is that "... When the party promising has for his object a benefit which he did not before enjoy, accruing immediately to himself," the promise is not within the Statute; but where "the object of the promise is to obtain the release of the person or property of the debtor, or other forbearance or benefit to him, it is within the statute."

D. The Nebraska Cases

Professor Merrill has already analyzed, discussed and summarized the facts of the early Nebraska cases. No useful purpose would be served by a reiteration of this scholarly work, although this writer is not in complete accord with the characterization of Nebraska cases made in that article. The accompanying table (page 588), however, will provide a brief of these cases as classified by Professor Merrill. The table also shows that there is no pattern to these cases insofar as deciding whether the case is or is not within the Statute. Both the New York and the Massachusetts developments have shown a marked influence in the Nebraska cases. The present writer thoroughly agrees with Professor Merrill, however, that no definite statement of the Nebraska law can be gleaned from those cases. Furthermore this writer believes that if it is not impossible, it is at least difficult, to state precisely what the law is today on the enforceability of these oral promises. Nevertheless four cases subsequent to Merrill's article will be discussed for an analysis of the cases to date, so that one may better guess what the Nebraska test is and more intelligently ponder the problem of where to go from there.

Chronologically speaking, the first of these cases is Elson v. Nelson. Plaintiff threshed grain on which the defendant bank held a chattel mortgage. Plaintiff sued the bank on its oral promise to pay for the threshing, but the bank denied the direct promise and alleged that
CAVEAT PROMISSEE

after part of the grain had been threshed, it promised the plaintiff to
allow the owner of the wheat to retain enough proceeds from the sale
of grain already threshed and to be threshed to pay the plaintiff for
his work. The bank alleged that it permitted the owner to retain
such proceeds, denied that it made any agreement to pay the thresher
and claimed that any such agreement would be void under the Statute.
The Supreme Court affirmed the decision in favor of the plaintiff rely-
ing on Peyson v. Conniff,60 which is an “entire credit test” case61 and
thus is not in point so far as the rule discussed in this article is concern-
ed. Aside from a procedural question, the Court stated that the case
was not within the statute because “the promise of the bank to pay
for the threshing was a direct promise to pay. It was based upon a
good consideration . . . .”62 Whether the court was referring to the
“new consideration” theory is problematical, although there was refer-
ence to some earlier Nebraska cases. The court cited cases supporting
various theories without appearing to be conscious that there was any
difference in them.63 Consequently, the decision in Elson v. Nelson
makes practically no legal contribution beyond determining the rights
of the parties litigant.

Four years later the Supreme Court had its next chance to un-
scramble the existing confusion and make a definite selection of some
one view with reference to these situations. In Johnson v. Anderson64
an attorney sued the promisor for his oral promise to pay the at-
torney’s fee for defending another in a criminal case. The attorney
got an acquittal in the criminal case and then brought action on the
oral promise for his fee, the promise to pay the fee being made after
completion of the trial. In the law action to recover the fee the lower
court held for the plaintiff, but the Supreme Court reversed the judg-
ment on the ground that the oral promise was within the statute of
frauds. No indication was given in the opinion that earlier cases were
being overturned or reconciled. The court based its decision on a
statement from Ruling Case Law,65 but also cited three Nebraska cases.
While the statement from Ruling Case Law is more like the New York

60 32 Neb. 269, 49 N.W. 340 (1937).
61 See note 5 supra.
63 An illustration of indiscriminate citation of cases by the early Nebraska
Supreme Court is the citing of Romberg v. Hughes, 18 Neb. 579, 26 N.W. 351
(1888) in Clay v. Tyson, 19 Neb. 530, 56 N.W. 240, 241 (1886). (Interestingly
enough, the report of this case in the Northwestern Reporter omitted the cita-
tion of Romberg v. Hughes.) The proposition for which the case was cited
was that a direct promise to pay is not within the Statute of Frauds and need
not be in writing. However, a reading of the case discloses that it has nothing
to do with the Statute of Frauds or any other relevant matter either expressly
or by implication.
64 140 Neb. 78, 299 N.W. 340 (1941).
65 See note 88 infra.
Table Showing Nebraska Cases Correctly or Incorrectly Decided According to Six Theories of Enforceability of Oral Promises to Answer for Debt of Another.

<table>
<thead>
<tr>
<th>Case</th>
<th>Kent</th>
<th>Shaw</th>
<th>Clifford</th>
<th>Maxwell</th>
<th>Williston</th>
<th>Annt</th>
<th>Decision</th>
<th>Nebraska Within Statute</th>
<th>Within Statute</th>
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<td>Rose v. O'Linn 10 Neb. 364</td>
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<tr>
<td>Clopper v. Poland 12 Neb. 69</td>
<td>Quoted Shaw's test—analytically the case falls in a different category—promise made to debtor. See Merrill, op. cit. supra Note 1, at 420, Restatement of Security Sec. 160.</td>
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<td>Fitzgerald v. Morrissey 14 Neb. 188</td>
<td>U</td>
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<td>Morrissey v. Kinsey 16 Neb. 17</td>
<td>U</td>
<td>X</td>
<td>NO</td>
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<tr>
<td>Clay v. Tyson 19 Neb. 530</td>
<td>Court held there was a new and independent contract, based upon a valuable consideration, creating new debt. Analytically case is in same category as Clopper v. Poland, supra, or is under application of funds test. See Merrill, op. cit. supra Note 1, at 419, Restatement of Security, Sec. 91(a).</td>
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<tr>
<td>Rogers v. Empkie Hdw. Co. 24 Neb. 653</td>
<td>Basis of opinion is form of promise and benefit to promisor but analytically the case is within application of funds test as Clay v. Tyson supra.</td>
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<td>Mathews v. Seaver 34 Neb. 592</td>
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<td>Joseph v. Smith 39 Neb. 255</td>
<td>U</td>
<td>NO</td>
<td>X</td>
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<td>Swayne v. Hill 59 Neb. 562</td>
<td>U</td>
<td>X</td>
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<td>Oleson v. Oleson 50 Neb. 738</td>
<td>U</td>
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<td>NO</td>
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<tr>
<td>Elson v. Nelson 132 Neb. 532</td>
<td>On disputed facts the court's opinion had some &quot;leading object&quot; test language but pegged the case on Peysen v. Conniff, 32 Neb. 269, which is an entire credit test case. See Merrill, op. cit. supra Note 1, at 415.</td>
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<td>Johnson v. Anderson 140 Neb. 78</td>
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<td>Estate of Allen 147 Neb. 909</td>
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<td>King v. Schmall 156 Neb. 633</td>
<td></td>
<td>NO</td>
<td>NO</td>
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Legend:
- X—Case decided correctly according to the particular theory (Merrill's Classification).
- ?—Case decided correctly according to the particular theory (Author's Classification).
- U—Unclassified by Merrill.
- NO—Decision of case contrary to theory.

Kent's test: In Leonard v. Vredenburgh, 8 Johns. (N.Y.) 29 (1811) Chief Justice Kent by way of dictum said that 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 the case is not within the Statute of Frauds. See footnote 87 as to subsequent requirements of this rule in New York.
Shaw’s test: In Nelson v. Boynton, 3 Met. (Mass.) 396, 402 (1841) Chief Justice Shaw wrote: “that cases are not considered as coming within the statute, when the party promising has for his object a benefit which he did not before enjoy, accruing immediately to himself; but where the object of the promise is to obtain the release of the person or property of the debtor, or other forbearance or benefit to him, it is within the statute.” This test is basically section 93 of the Restatement of Security.

Clifford's test: In Emerson v. Slater, 22 How. 28, 43 (1859), Mr. Justice Clifford phrased the leading object rule in the following manner: “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.”

Maxwell’s test: Mr. Justice Maxwell in Fitzgerald v. Morrissey, 14 Neb. 198, 15 N.W. 233 (1883), described the rule as follows: “where the leading purpose of a person who agrees to pay the debt of another is to gain some advantage, or promote some interest or purpose of his own, and not to become a mere guarantor or surety of another’s debt, and the promise is made on a sufficient consideration, it will be valid although not in writing ... In such a case the promisor assumes the debt and makes it his own. The promise is a direct undertaking on the part of the person promising to pay the debt—not to pay if the debtor fails to pay.” This view apparently does not restrict the motive which forms the leading object to the promotion of a business or pecuniary advantage so long as it is something desired by the promisor it is enough.

Williston’s test: Williston, Contracts § 475 (Rev. ed. 1936) states that the “true test is whether or not the new promisor is a surety.” Therefore, “if, as between himself (the new promisor, words supplied) and the original promisor, the debt really ought to be paid by the latter, whatever may be the other elements of the transaction, the new promisor is on principle and in fact promising to answer for the debt or default of another. Though he is led to do this by consideration of his own advantage, the ultimate fact that the debt is another’s is none the less true.

Arant’s test: Dean Arant expressed the view that since the policy of the Statute of Frauds is to protect defendants from being held liable through fabricated oral testimony upon promises which they never made, the promises should be held to lie outside the statute, if, in the main purpose cases, circumstances are present which remove the danger of perjury and corroborate the plaintiff’s case. See Arant, A. Rationale for the Statute of Frauds in Suretyship Cases, 12 Minn. L.R. 716 (1928), particularly at 727-738.
development, two of the cited Nebraska cases adhere to the Massachusetts development of the rule. The third Nebraska case cited is more of an unclassifiable hybrid.

A few years later the Supreme Court of Nebraska had another opportunity to reconcile or overturn these earlier Nebraska cases when In re Estate of Allen was decided. This is the only Nebraska case in which the individual Justices of the Supreme Court appear to have been unable to reach unanimity of opinion regarding application of this section of the Statute of Frauds.

In the Allen case, Jane Allen was divorced from her husband and had a decree for 25 dollars per month support money for her three children. The decree for the small sum of 25 dollars per month resulted from a stipulation between the parties to the divorce suit. This stipulation was induced by an oral promise from the children's paternal grandfather to pay the 25 dollars per month to Jane Allen if she would forego her demand for the higher sum of 75 dollars per month, which sum she was intending to ask the court to decree. The grandfather's promise was made because he felt that he wanted to do something for his grandchildren and help provide for them. He could not afford more than 25 dollars per month, but felt that his daughter-in-law would be better off to accept his offer thereby being assured of receiving a certain amount each month. After the grandfather died, this action was brought against his estate for judgment on his oral promise.

The trial court found for the plaintiff, but the Supreme Court reversed with directions to the lower court to dismiss the action. The majority opinion held that the promise came within the Statute, and that in fact there was no consideration at all flowing to the promisor, thereby leaving nothing but a nudum pactum agreement. The appellee had argued that there was consideration in that the grandfather's promise to pay was in lieu of an obligation imposed upon him by statute to support pauper grandchildren. The court held, however, that the statute did not fix liability, and, that before such liability could be established under the statute, it must first be proved that the mother

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66 See note 54 supra.
67 Morrissey v. Kinsey, 16 Neb. 17, 19 N.W. 454 (1884); Rose v. O'Linn, 10 Neb. 364, 6 N.W. 430 (1880).
68 Union Loan & Savings Ass'n v. Johnson, 118 Neb. 17, 223 N.W. 467 (1929). For an analysis of this case see Merrill, 8 Neb. L. Bull., op. cit. supra note 1, at 418 ff.
69 147 Neb. 909, 25 N.W.2d 757 (1947).
70 The case was heard by Justices Simmons C. J., Paine, Carter, Messmore, Yeager, Chappell and Wenke. Justice Yeager wrote the opinion for the Court. Chief Justice Simmons and Justice Wenke concurred in the result. Justice Paine wrote a dissenting opinion.
was a poor person and unable to earn a livelihood in consequence of some bodily infirmity, idiocy, lunacy or other unavoidable cause.\textsuperscript{71}

Justice Paine in his dissent stated: "This dissent is based upon the approved rule that 'The applicability of the statute to an oral promise does not depend upon the question as to whether there is a consideration for the promise which would be sufficient to support it if it were not for the Statute of Frauds. The real question is whether or not the consideration is of a character which stamps the promise as an original one. . . . If the benefit accruing is direct and personal, then the promise is original within the rule, and the validity thereof is not affected by the Statute of Frauds.' Annotation, 8 A.L.R. 1199.\textsuperscript{72}"

Other language in the dissent indicates a belief that the court should not strictly adhere to the letter of the statute and goes so far as to state the following: "... even though the effect of the promise is to pay off the debt of another, yet if the evidence discloses that the prime purpose and object of the agreement are to carry out some design and interest of his own, it is unaffected by the statute, because it is an original promise, made on a good consideration, of benefit or harm, moving between the newly contracting parties."\textsuperscript{73}

Such statement of the rule goes even farther in relaxing strict application of the statute than does the "main purpose" rule.\textsuperscript{74} Nevertheless, it seems generally to embody the philosophy of the "main purpose" rule and appears to be related to the Massachusetts development. On the other hand, it also suggests that the dissenting Justice was in opposition to other members of the court who were inclined to follow the New York development adopting the "new consideration" theory. However, the majority of the court may have felt that the case did not turn on a question of the Statute of Frauds so much as on the question of whether there was consideration to support a simple contract. In the most recent case, decided last year, the Court apparently applied the Statute strictly and followed the "new consideration" doctrine. In \textit{King v. Schmall}\textsuperscript{75} the subcontractor refused to continue the performance of his furnace and heating equipment and installation contract because of the prospective failure of the general contractor

\textsuperscript{71} "Every poor person, who shall be unable to earn a livelihood in consequence of an unavoidable cause, shall be supported by the father, grandfather, mother, grandmother, children, grandchildren, brothers, or sisters of such poor person if they or either of them be of sufficient ability . . ." Neb. Rev. Stat. § 68-101 (Reissue 1950).

\textsuperscript{72} See note 69 supra, 147 Neb. at 929, 930, 25 N.W.2d at 768.

\textsuperscript{73} See note 69 supra, 147 Neb at 925, 25 N.W.2d at 765.

\textsuperscript{74} Contrast Justice Paine's statement of the approved rule, note 72 supra, as conditioned by his latter statement, note 73 supra, with that of the main purpose rule found in § 93 of the Restatement of Security which requires a prime motive of serving some" . . . pecuniary or business advantage . . . ."

\textsuperscript{75} See note 4 supra.
to make agreed payments. To induce further performance by the subcontractor the owner of the building promised to pay the subcontractor. The subcontractor thereupon completed his contract. Afterwards, the general contractor became bankrupt. The subcontractor first attempted to foreclose his mechanic's lien but failed because it had been filed too late. Next, he sued the owner on her promise to pay. In the lower court the jury returned a verdict for the plaintiff. However, the Supreme Court reversed the lower court and decided as a matter of law that the owner's promise was within the Statute and unenforceable.

In order to harmonize *King v. Schmall* with the earlier Nebraska precedents, the court had only two Nebraska cases to compare, assuming building contract cases are regarded separately. These two earlier cases, *Fitzgerald v. Morrissey* and *Morrissey v. Kinsey*, involved promises to pay laborers' wages if they would continue their work. The former case held the oral promise not to be within the statute, and the latter case held just the opposite. Those two cases are not necessarily contrary because they may be distinguishable by the form of the promise made. In the *Fitzgerald* case there was a direct promise to pay, and in the *Kinsey* case the promise was "would see it [the debt] paid for, providing Schindler did not pay for it." Applying the test to the language in which the promise is phrased, the result in *King v. Schmall* is in harmony with the two earlier contractor cases because the form of the promise made by Mrs. Schmall was "You don't have to worry. I have Mr. Messerschmidt bonded. I'll see you get your money." If the case is to be explained solely on the ground that the form of the promise is conditional, Nebraska is adopting a rule contrary to the general view and deciding the rights of parties on the superficial basis of laymen's accidental choice of words rather than on their substantive intent and true nature of their agreement. This technique has little relevance to the supposed policy of preventing frauds and perjuries. However, it may be a better explanation of the case than the "new consideration" test.

The court's opinion in *King v. Schmall* also takes the position that there was no new consideration to the owner because the plaintiff was under contract to the general contractor to furnish and install the furnaces and the general contractor had promised to build the duplexes for a contract price which the owner paid to the general contractor. This conclusion was reached despite testimony that the subcontractor would not have performed his contract had it not been for the owner's promise to see him paid, that the owner had told him she had to have

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70 14 Neb. 198, 15 N.W. 233 (1883).
72 For the Nebraska view as to the effect of a promise "to see a debt paid," see Merrill, 8 Neb. L. Bull., op. cit. supra note 1, at 416-418, 431.
73 See Stearns, op. cit. supra note 15, § 3.7.
heat in the duplexes because the plasterers and painters needed it and that she had to get the work finished so the renters could move in. Inasmuch as the appellate court decided the issues as a matter of law, it remains uncertain what kind of benefit will be deemed sufficient consideration moving to the promisor to remove a promise from the statute. Obviously, it is something more than the necessary consideration to make a valid contract; but how much more? The court's reasoning as to consideration leads to the possibility that in all subcontractor cases owner promises are unenforceable, if oral, because the owner never receives anything to which he was not entitled under his contract with the general contractor.80

A curious point about the case is that the appellee's brief states that the owner settled with the bonding company for a "sum of money."81 Why did the subcontractor fail to get satisfaction from the bond, which was stated to be a "general performance obligation"?82 Nebraska cases hold that a laborer or materialman is a third-party beneficiary of a general obligation bond, and any settlement between surety and owner should not bar the third party's rights.83 Furthermore, if the owner's settlement with the surety could have included a sum for the subcontractor's non-performance, had he not relied on the owner's promise, there might be some consideration to the owner in that she bargAINED with the subcontractor for a completion of his performance without delay, time being essential for the purpose of getting the premises rented.

Nevertheless, if we classify this case on the basis of the Supreme Court's reasoning as expressed by the language and mode of expression


81 785 Nebraska Supreme Court Briefs, Docket No. 33249, Brief of Appellees 46.

82 Id. at 18.

83 For a collection of cases, see Grether, Nebraska Annotations to the Restatement of Security § 165 (1950).
the Court used in the opinion, the case is a strong precedent for the proposition that Nebraska has now decided to follow the "new consideration" test. On the other hand, one should not completely ignore the fact that from the testimony regarding whether the promise was in fact made, there was strong conflict which, justifiably or not, raises doubt as to the validity of the jury's finding of fact.  

E. Conclusion

Judging from the decisions of the four Nebraska cases, the writer is of the opinion that the Nebraska Supreme Court is now adhering to the "new consideration" test in determining which oral promises shall fall outside the Statute of Frauds.

New Consideration Test—Gloomy Prediction

Whether the test now propounded will have an enlightening effect upon a heretofore unclarified and irreconcilable phase of case law is highly doubtful.

There is no historical justification for choosing the "new consideration" test rather than the "main purpose" rule. One would suppose that the New York courts who formulated and projected the "new consideration" test would have the problem resolved, after a century of judicial thought, into a well-settled principle of law. Strange as it may seem the courts of this great state with all their great jurists of the past and present have not been able to unscramble their conflicting cases and to state a rule which has a substantial degree of predictability when applied to a particular set of facts.

In a recent article Professor Francis Conway made an exhaustive analysis of the New York decisions regarding subsequent oral promises to perform another's duty.\(^5\) His conclusion was that the rule in New York today is completely unclarified, and any attempt to reconcile the cases would bring only speculation as to the true meaning of *White v. Rintoul*,\(^6\) a leading New York case expounding the "new consideration" test. The expression of this rule is as follows:

\[\ldots\] 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.\(^7\)

\(^{5}\)"Two conflicting tendencies have been evident for the whole two hundred and seventy years. One of these is to regard the statute as a great and noble preventative of fraud and apply it against the plaintiff with a good conscience even in cases where no doubt exists that the defendant made the promise with which he is charged. The other and much more frequent one is to enforce promises that a jury would find to have been in fact made, and if necessary to this end to narrow the operation of the statute." 2 Corbin, Contracts § 275 (1950).

\(^{6}\)Conway, op. cit. supra note 30.

The Nebraska Supreme Court has chosen the following quotation from Ruling Case Law as the rule to be applied within its jurisdiction:

... it is said that a consideration to support a promise, not in writing, to pay the debt of another must be of a peculiar character, and must operate to the advantage of the promisor, and place him under a pecuniary obligation to the promisee independent of the original debt, which obligation is to be discharged by the payment of that debt.88

Comparing the two above statements of the "new consideration" rule, it would appear that Nebraska has extended its rule even farther than New York. Under the New York doctrine the consideration required need only be "new consideration moving to the promisor," while the Nebraska statement of the rule is that "a consideration to support a promise must be of a peculiar character..." Further, it would appear that the New York doctrine only requires consideration to support an ordinary contract, while Nebraska would require more. However, such is not the case. Even New York, like Nebraska, requires that the consideration must not only be sufficient to support the promise, but also of such a nature as to take the promise out of the statute.89

The difficulty in applying this test is obvious. Whether the promise will fall within or without the statute will depend entirely upon each

88 Id, 108 N.Y. at 227, 15 N.E. at 320. Though Professor Conway in his article, supra note 30, concluded that although the New York decisions regarding the enforceability of these oral promises were in utter confusion, he also stated that, generally, the courts were relying upon the dictum of Brown v. Weber, 38 N.Y. 187, 191 (1868): "... 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." Evidence of his cautious statement is found in the more recent decisions of Witschard v. Brody & Sons, Inc., 257 N.Y. 97, 117 N.E. 385 (1931) and Bulky v. Shaw, 289 N.Y. 133, 44 N.E.2d 398 (1942). Both of these cases approve Professor Williston's view which is that the true test of the validity of a new oral promise is to determine whether the new promisor is a surety, and, 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. This same view was also expressed in Mallory v. Gillett, supra note 54 and Richardson Press v. Albright, 224 N.Y. 497, 121 N.E. 362 (1918). Under this view an oral promise to answer for another's debt would never be enforceable if the original debtor remained liable since it adheres strictly to the letter of the statute. For the meaning and application of the test in White v. Rintoul, see Burdick, op. cit. supra note 54 at 178.


90 "There must be a consideration in every case even if the promise is in writing. But a consideration is not of itself sufficient to supply the place of a writing where one is necessary. To take the case out of the statute there must be a consideration moving to the promisor, either from the creditor or the debtor. It must be beneficial to the promisor. That is the feature which imparts to the promise the character of an original undertaking." Ackley v. Parmenter, 98 N.Y. 425, 433 (1885).
factual situation, and very few, if any, case precedents will guide the court in its decision.

After the decision of *King v. Schmall* any laborers or materialmen who supply services or materials to a contractor, and who continue performance because of oral promises of reimbursement by the owner, will be unable to enforce the oral promise unless it be shown that the owner received more of a benefit than did Mrs. Schmall. Would this decision be of any value as a guide in deciding a case in which the promisor's benefit was forbearance of suit? Continued occupancy of premises? Release of lien? It would seem that in each case the sufficiency of consideration and resulting benefit to the promisor would have to be compared with the relative total value of the contracted debt, e.g., forbearance to sue the promisor in a large damage action might be sufficient consideration to take the promise out of the statute where the anticipated amount of damages is more than the assumed debt, whereas, forbearance to sue upon a minor trespass might not. In each case different amounts of debts to be assumed would require different comparison standards as to the benefit derived.

**Main Purpose Doctrine—A Better Test?**

After so many years of judicial debate on this test resulting in no present satisfactory method of application, it should be clear that instead of continually trying to reconcile decisions and further confuse what is already confusing, some type of constructive effort should be made to clarify the issue and even change the law if need be. 00 Professor Williston suggests eight tests which might distinguish promises and take out of the Statute of Frauds the oral promise to answer for the debt of another. 2 Williston, Contracts §§ 467-475 (1936). § 467: "... a promise to pay a debt or perform a duty if another person fails to do so, is within the Statute, but that a promise may be made orally if it is absolute in terms to pay the debt of a person primarily liable irrespective of any prior default by the latter." § 468: "... that the applicability of the Statute depends upon whether the promise in question is in terms to pay the debt of another, so that the contract by its very language makes the measure of the promisor's liability identical with that of another, who as between the two is the one who should discharge the obligation." § 469: "... a new promise is presumptively within the Statute of Frauds unless the original debt is discharged." § 470: This section talks of the main purpose or object of the promisor as a test. § 471: "... where the new promisor makes the debt his own, the promise is not within the Statute." § 472: "... that the surrender to the new promisor of property which was held by the creditor as security for his claim prevents the promise from falling within the Statute." § 473: "Whether the consideration for a new promise is received as the equivalent of a debt." § 474: the Modern English test that "application of the Statute [depends] not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise." Professor Williston states what he believes to be the true test of validity in § 475: "Unless ... a complete novation with the creditor as security for his claim prevents the promise from falling within the Statute."
The "main purpose" rule has gained favor with the courts throughout most of the jurisdictions and has as its test the purpose or object of the promisor in making the promise, rather than focusing the entire attention upon sufficiency of consideration.

It was stated earlier that under the "new consideration" test the consideration must support the promise to pay the debt and also take the promise out of the statute. The thing to be looked at in the "main purpose" or "leading object" rule is not whether the consideration is enough to cover the debt itself plus something more, but rather whether it provides evidence of the promisor's real purpose to subserve some pecuniary or business advantage of his own which he previously did not have. The fact that the benefit moving to the promisor is not, moneywise at least, the equivalent of or more than the assumed debt is immaterial since the rule is based on the theory that the parties bargained for their position, and it represents the equivalent of the obligation undertaken.

Hence, in order to take the promise out of the statute under the "main purpose" rule, the requirement would be that the pecuniary or business advantage gained by the promisor is so much a benefit to him as to justify the promise. As a practical matter, no great degree of difficulty would be anticipated in determining the purpose behind the promise in most cases since it would follow from the bargaining of the parties. Further, it is hard to conceive of many cases in which one would be desirous of paying another's debt without some form of remuneration or other benefit. If such cases arise the promise would be unenforceable under either test, being nudum pactum.

No doubt one of the purposes behind the statute is to prevent persons from enforcing promises which either do not exist or have been misinterpreted. The statute worked a real hardship on the innocent promisee while at the same time serving the public good in deterring by the latter... the new promisor is on principle and in fact promising to answer for the debt or default of another... On the other hand if, as between the original debtor and the new promisor, the latter ought to pay the debt, he is promising to answer for his own debt, not that of another, the true test, then, is the existence of the relation of principal and surety between the new promisor and the other party also bound for the same obligation..."

"Nelson v. Boynton, 3 Metc. (Mass.) 396 (1841); Emerson v. Slater, 22 How. 28 (1859); Simpson, Suretyship § 38 (1950); Arant, Suretyship, § 36 (1931); Stearns, Law of Suretyship, § 39 (1934); Restatement, Contracts § 184; the rule is discussed in 2 Williston, Contracts § 472 (1936), but see § 475 wherein he expresses his view that the validity of the oral promise depends upon whether the new promisor is a surety. For a view similar to that of Professor Williston, see I Brandt, Suretyship, Guaranty § 81 (3d ed. 1905).

"If the beneficial consideration received, whether moving from the debtor or from the creditor, is equivalent or is bargained for as the equivalent of the obligation undertaken, then even though the debt of another continues to exist the oral promise is outside the statute as a promise to answer for the debt which is the promisor's own." Simpson, Suretyship § 38 at 147-148 (1950).
those with fraudulent designs. Because of this, the English courts
saw fit to make exceptions to it, and the "new consideration" and "main
purpose" tests grew out of such judicial attitude. Thus, the statute has
lost some of the vitality it once possessed.

However, the present application of the "new consideration" test
still seems to cling to the letter of the statute while the "main purpose"
test adheres more to its spirit by giving more weight and credence to
the bargain made by the parties.

The "main purpose" test as contended for here is set out in section
93 of the Restatement of Security. It is interesting to note that the
Supreme Court of Nebraska has cited as authoritative some sections of
all the Restatements of the Law except the Restatement of Security,
even though it is one of the few which has never been amended.\textsuperscript{33}
Though never having been cited, of the one-hundred and thirty sections
dealing with suretyship,\textsuperscript{34} the Nebraska cases show sixty-six sections in
accord, fifty sections with no cases found to be in point, nine sections
contra, and five sections in confusion.\textsuperscript{35} In other words Nebraska law
coincides with over four-fifths of the sections in the Restatement re-
lating to suretyship on which cases have been found to be in point and
is contrary to less than one-eighth of these sections.

In 1935 the Nebraska State Bar Association, after several years of
studying the merits of the work of the American Law Institute, adopted
the following report of the Committee on Cooperation with the Ameri-
can Law Institute:

\begin{quote}
3... Whereas, the American Law Institute Restatements of the Law
for the respective subjects covered thereby afford the most accurate and
the most authoritative systematic expression of what that general law is,
\end{quote}

\textsuperscript{33} Restatement, Security (1941); Restatement, Restitution (1938); Restate-
ment, Agency (1933).

\textsuperscript{34} Restatement, Security §§ 82-211 (1941).

\textsuperscript{35} Any brief count of the Restatement sections pertaining to suretyship, as to
whether they are in accord or contra to established Nebraska law is necessarily
inaccurate so far as details are concerned. Without unduly extending this
footnote, it is impossible to designate certain sections as either being in accord,
contra, or uncertain for the reason that some sections contain a number of
different and distinct rules, and Nebraska law is in accord with some of these
rules but contra or uncertain as to the other rules under the same restatement
section. However, the following classification is substantially correct: Accord:
§§ 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105,
123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141,
142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159,
160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177,
178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194,
195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208 and 209.
No cases found to be in point: §§ 85, 87, 89, 94, 95, 96, 99, 106, 110, 111, 112, 113, 114, 115, 116, 118,
121, 123, 124, 127, 128, 129, 130, 131, 132, 133, 134, 137, 138, 143, 144, 145, 151, 153, 154, 155,
156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 170, 172, 174, 175, 176, 178, 180, 182, 183, 184,
185, 186, 187, 188, 190, 191, 192, 193, 194, 195, 196, 197, 198, 200, 202, 210, and 211.
Contra: §§ 82, 93, 96, 102, 108, 116, 142, 166 and 188. Found to be in confusion: §§ 86, 88,
101, 125 and 156.
whose application often must be held to be justly controlling in the disposing of legal controversies, and

Whereas, the most important, if not the only effective way to secure for the profession and for the public the greatest benefits of the Restatement is to achieve its widest use by the profession in the adjustment and adjudication of controversies, therefore, be it

Resolved, that the Nebraska State Bar Association approves and respectfully urges upon all judges in trial and reviewing court the already growing practice of asking from the bench, during argument of pending cases, the substance of the following two questions:

a. In addition to possibly applicable statutes, decisions thereunder, and available decisions of the Supreme Court of Nebraska, what does the American Law Institute say, if anything, on the question of law in controversy?

b. If so, how does the principle or rule of law set forth in the Restatement apply to the facts found in the pending case?

It seems strange that in the face of such a strong recommendation no reference has been made to the Restatement of Security, notwithstanding that this work was not completed until 1941.

It is therefore submitted that a change from the "new consideration" test to the "main purpose" test would inject more certainty into this confused phase of the law and would do much to resolve a great deal of the difficulty. The rule contended for is in accord with that in most jurisdictions, and, as set out in section 93 of the Restatement of Security, represents the recommendation of many of this country's most prominent writers, judges and attorneys.

A return to the application of this test would not be representative of a drastic change, rather it would but re-align the previous Nebraska decisions which followed the rule.

The Future of the Statute of Frauds

So much of Section 4 of the original enactment of the Statute of Frauds of 1677 as is applicable to this problem is as follows:

No action shall be brought whereby to charge... the Defendant upon any special promise to answer for the debt, default or miscarriage of another person... unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith...

Although stated a little differently, the Nebraska statute is substantially the same.

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96 Proceedings of the Thirty-Sixth Annual Meeting of the Nebraska Bar Association, 15 Neb. L. Bull. 22, 23 (1936).

97 For example, see Swayne v. Hill, 59 Neb. 652, 81 N.W. 855 (1900); Fitzgerald v. Morrissey, 14 Neb. 198, 15 N.W. 233 (1883); Clopper v. Poland, 12 Neb. 69, 10 N.W. 538 (1881).

98 See note 6 supra.

99 See note 13 supra.
Looking at the statute today as contrasted with conditions existing at its inception leads to the conclusion that much of its utility has been lost.

After more than two-hundred and seventy-five years of its operation, eminent authorities have versed various opinions regarding its merit. Lord Kenyon called it "one of the wisest laws on our Statute Book," and added "I lament extremely that exceptions were ever introduced in construing the Statute." Of the opposite view was Wilmot, J., who concurred with Lord Mansfield, said, "Had the Statute of Frauds been always carried into execution according to the letter, it would have done ten times more mischief than it has done good, by protecting, rather than preventing frauds." Lord Nottingham used to say of the Statute "that every line was worth a subsidy," and nearly two centuries later, a learned lawyer replied "That every line has cost a subsidy, for it is universally admitted that no enactment of any legislature ever became the subject of so much litigation." Professor Holdsworth's comments were, "We no longer find them [the courts] bestowing upon the statute the hearty praises bestowed by Kenyon and Ellenborough. On the contrary, the prevailing feeling both in the legal and the commercial world is, and has for a long time been, that these clauses have outlived their usefulness, and are quite out of place amid the changed legal and commercial conditions of today."

In 1934 the English Law Revision Committee was appointed to study certain enactments to determine whether they should be amended or repealed. Section 4 of the Statute of Frauds was one of those enactments studied. In their Sixth Interim Report it was concluded that contemporary opinion was almost unanimous in condemning the Statute and favoring its amendment or repeal, and, after careful study its repeal was recommended.

The criticisms of the Statute may be summed up as follows:

(1) The conditions of today no longer warrant its usage because at the time of enactment, essential kinds of evidence were excluded.

The opinions of the Chancellors for more than one hundred years after the enactment of the statute are reviewed by Stevens, Ethics and the Statute of Frauds, 37 Cornell L. Q. 355 (1952).

Chaplin v. Rogers, 1 East 182, 194 (1800).

Chater v. Beckett, 7 T.R. 201, 204 (1797).

Simon v. Metivier, 1 Bl. W. 599, 601 (1766).

Smith, Contracts 74 (7th ed. 1885) (English).

Holdsworth, History of English Law 396 (1924).

See note 9 supra.

This recommendation may become law in the near future. See note 10 supra, note 120 infra.

"It was a full half-century after the adoption of the Statute before an English lawyer ever read or saw a treatise on the law of evidence. Not until 1726, when Chief Baron Gilbert's little book [The Law of Evidence, 1726] on that subject made its bow, did the profession learn the rudiments of that great branch of remedial law. And it took almost another century to develop the
e.g., the litigating parties could not personally give evidence since juries were entitled to act on their own knowledge of the facts. Today the law allows the parties to freely testify. 109

(2) The Statute promotes rather than prevents fraud. 110 It prevents perjury in some instances, but more frequently strikes at the honest man who omitted a precaution, thereby allowing another to break the promise with impunity. Though a hardship may result, a party who relies on the promise to the extent of having completely complied with the terms of the agreement is without remedy for its enforcement unless by action other than upon the agreement. 111 Such an inequity strikes at both promisor and promisee. Owners may part forever with outstanding equities by their hasty but honest actions. 112

(3) The classes of contracts to which the statute is directed are arbitrarily selected (a promise to answer for another’s debt, default or miscarriage is but one of the classes). There is no reason why these contracts should be reduced to writing and not others. 113 Would not consideration be required to bind the parties on these contracts just as in any other contracts? And would not the consideration result from the bargaining of the parties as in any other type of contract?

(4) Under the statute, if A and B contract and A signed a writing or memorandum which B did not, B could enforce the contract against A, but A could not enforce it against B.

(5) Contracts not in compliance with the statute are merely unenforceable yet not nullified. Therefore, in a situation where a contract which complied with the statute was replaced by agreement with

rules into a real science and make them an indispensible factor in the adjustment of disputes and the orderly trial of causes.” Ireton, Should We Abolish The Statute of Frauds, 72 U.S.L. Rev. 195, 197 (1939).

109 “We must also take into consideration a second contributory factor to the passage of the Statute—the disability under which parties to a suit lay at that time for almost two centuries thereafter, by which, on the ground of interest, they were prevented from testifying in their own cause.” Ibid.

110 For an excellent exposition of the anomalous results created by the Statute of Frauds see Willis, op. cit. supra note 12.

111 Refusal to perform an oral agreement, within the Statute of Frauds, is not such a fraud as will justify a court in disregarding the statute, even though it results in hardship to the plaintiff. Bulkey v. Shaw, 289 N.Y. 133, 44 N.E.2d 398 (1942).

112 “Such gain in the prevention of fraud as is attained by the statute is attained at the expense of permitting persons who have in fact made oral promises to break those promises with impunity and to cause disappointment and loss to honest men. It is this fact that has caused the courts to interpret the statute so narrowly as to exclude many promises from its operation on what may seem to be flimsey grounds. The courts cannot bear to permit the dishonest breaking of a promise when they are convinced that the promise was in fact made. The statute of frauds is regarded as a technical defense that often goes counter to the merits.” 2 Corbin, op. cit. supra note 84, § 275.

113 Willis, op. cit. supra note 12.
one not so complying, neither contract would be enforceable because the second validly replaced the first.

(6) The statute is out of accord with the way business is normally done. The convenient use of the telephone as a medium for conducting business brings many transactions within the purview of the statute, which, if conducted entirely by written agreement, would seriously handicap the intricate mechanism of the present commercial world. Where out of necessity large scale business demands of its participants rapidness in business judgment to maintain a competitive status, e.g., stock and commodity exchange buyers, it often gives rise to "gentlemens' agreements" which virtually ignore the statute.

(7) The statute creates needless litigation. Up to 1928, the Century, First Decennial and Second Decennial Digests list, under the heading of "Statute of Frauds," approximately 10,800 cases of which it is estimated that less than one-third fall within the statute. Although only a part of these cases involve oral promises to answer for another's debt, they are certainly indicative of a fruitless effort of a statute to achieve the purposes for which it was originally intended.

This article does not intend to analyze in detail the pro and con arguments of the statute in its entirety, although all the reasons set forth would be applicable to it. An oral promise to "answer for the debt, default or misdoings of another" is but one facet of the statute which is considered here. It is the opinion of the author that this portion of the statute should be either amended or repealed.

The statute, having its roots so firmly planted within the law, is not one which will be done away with overnight. The author urges that legislative research be instituted to make a further study of the merits of this statute. Continued use of such outmoded legislation merely because it represents a part of our legal heritage affords no sound or rational basis for its use today. Already a re-examination of the Statute of Frauds is being undertaken by the New York Law Revision Committee.

An alternative to repealing the statute and thereby causing all oral contracts to be equally enforceable is to amend the statute so as to provide an equitable means of protecting against fraud and perjury in the types of contracts thought to require such protection. This could be accomplished by using new procedural devices, new rules of evidence and scientific means of proof.

If certain classes of contracts are thought to require safeguards against perjury, the desired end might be achieved by requiring a

114 Willis, op. cit. supra note 12 at 537.
115 Already a re-examination of the Statute of Frauds is being undertaken by the New York Law Revision Commission. 2 Williston, Contracts § 448 (Rev. ed. 1936, 1953 Cum. Supp.).
higher degree of proof to establish the existence of the alleged oral contract than usually is necessary in the ordinary civil action. Such a suggestion gains merit if we keep in mind that the primary function of a jury is fact finding. To ask or instruct a jury to decide if the fact that a promise was actually made is established by clear and convincing evidence is not different from requesting the same jury to decide the guilt or innocence of an accused, or to decide if one person's negligence is such as to bar a recovery from another who was also negligent.

Another method of preventing fraudulently alleged contracts is to enforce only those contracts which are substantiated by some form of corroboration. Under the present statute, a written agreement is the only kind of corroboration sanctioned. However, corroboration of a promise is possible by means other than a writing. There must be corroborative evidence of the grounds alleged for a divorce, but the acceptable corroboration is not limited to written documents. In fact this writer doubts that a writing is the usual kind of corroboration furnished by most of the parties successfully alleging grounds for divorce.

It is very possible that modern inventiveness already has at hand a scientific method for determining the truth of whether a promise was actually made. Corroboration of the alleged promise by successfully convincing the "eagle eye" of a mechanical lie detector that the person alleging the promise is telling the truth and the person denying the promise is falsifying may well be a greater safeguard against proving contracts by perjured testimony than is the judgment of twelve good jurors, tried and true.

"No decree of divorce and of the nullity of a marriage shall be made solely on the declaration, confessions or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose." Neb. Rev. Stat. § 42-335 (Reissue 1952). See Haines v. Haines, 79 Neb. 684, 113 N.W. 125 (1907).

"Perhaps divorce is a peculiar situation involving different policy considerations and one where written evidence would be too difficult to obtain. Nevertheless, the situation does provide an illustration that there are various kinds of corroborative evidence.

"Mechanical lie detectors have been developed which have proved to be accurate in over seventy-five per cent of the cases, but no proof is available for the accuracy of verdicts of juries in judging the veracity of witnesses. . . . As things stand, the lie detector is rapidly becoming one of the most important means of crime detection; but it is not yet tolerated in the courts even to be introduced as evidence to a jury to say nothing of standing on its own merits to replace the jury as a fact finding device, and there seems to be little research in progress to develop it further as an evidentiary device." Beutel, The Lag Between Scientific Discoveries and Legal Procedures, 33 Neb. L. Rev. 1, 29, 30 (1953). Former director Fred Inbau and present director John E. Reid of the Chicago Police Scientific Crime Detection Laboratory argue that exact figures are unavailable to measure the accuracy of lie detector tests. However, they present a sound basis for making an estimate. From five years experience of examiners on the staff of John E. Reid and Associates, they conclude that when
We have no reliable empirical data for determining whether the statute prevents more frauds than it creates. We do know, however, that in nearly three-hundred years the courts have failed to frame a satisfactory statement of the rule discussed in this article. Already we have lost much time in gathering the factual data regarding the value of the Statute under modern conditions or concerning the possibility of using scientific methods to prevent perjury. Immediate research and study relating to the advisability of repeal or amendment of the Statute of Frauds should be commenced by responsible law-revision commissions, scientific foundations and educational institutions. The New York Law Revision Commission is now studying the statute, and their research will undoubtedly prove valuable for other contemporary research groups. In addition we may soon have an opportunity to observe the actual effect of a repeal of the statute since proposed legislation which would repeal the Statute of Frauds is now pending in the British Parliament.

tests are applied under the most favorable conditions an accuracy of 95 per cent, with a 4 per cent margin of indefinite determinations and a 1 per cent margin of possible error will result. Inbau and Reid, Lie Detection and Criminal Interrogation 110, 111 (3d ed. 1953).

119 "When one approaches what is generally regarded as the heart of the law making and enforcement machinery, the legislatures and the courts, the absence of scientific progress, machinery to support it or institutions devoted to research is shocking." Beutel, op. cit. supra note 117 at 27.

120 The Law Reform Committee referred to in note 10 supra, was appointed in June 1952 and recommended that section 4 be repealed except the law pertaining to contracts of guaranty. On November 24, 1953 the Law Reform (Miscellaneous Provisions) Bill was presented to Parliament. This bill contained provisions for the implementation of the suggestions made by the Law Reform Committee. 1 Business Law Review (English) 6 (Jan. 1954).