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Recent Decisions

RECENT DECISIONS

BILLS AND NOTES—SUM CERTAIN IN MONEY—EFFECT OF BLANK AS TO AMOUNT.—Defendant gave plaintiff a promissory note, regular in form, except that in the body of the instrument the amount was left blank. In the upper left hand margin of the instrument the sum $1,900 appeared in figures. Plaintiff brought suit on the instrument. On appeal from a judgment rendered in favor of the defendant, *held,* there can be no recovery on a note where there is no promise to pay a sum certain. *Hogan v. Brogdan,* 14 S. E. (2d) 575 (Ga. Ct. App. 1941).

The instant case brings into relief a problem of importance in negotiable instruments. One of the requirements of negotiability is that the instrument be payable in a sum certain in money.[1] Assuming all other requirements to have been met, is an instrument negotiable in that it promises to pay a sum certain when the amount to be paid is left blank in the body of the instrument but an amount is superscribed in the margin?[2]

There are two classes of cases possible when the amount in an instrument is omitted. First is the situation where the amount is inserted but the unit of currency, i.e., dollars, pounds, etc., is omitted;[3] and second, where the unit of currency is inserted but the amount is omitted.[4]

The courts, with one exception,[5] seem to be agreed that the figures in the margin of an instrument are not a part of the instrument itself.[6] However, in those cases, where the amounts were inserted but the unit of currency omitted, the approach of the courts was to consider the instrument ambiguous, and the figures in the margin were referred to for the purpose of clarification.[7] Thus, where an instru-

1. UNIFORM NEGOTIABLE INSTRUMENTS ACT § 1, N. Y. NEGOTIABLE INSTRUMENTS LAW § 20.

2. The same question is posed in BRANNAN'S NEGOTIABLE INSTRUMENTS LAW (6th ed. 1932) § 17; see also (1911) 24 HARV. L. REV. 400.

3. Corgan v. Frew, 39 Ill. 31 (1865); Sweetser v. French, 13 Metc. 262 (Mass. 1847); Petty v. Fleishel, 31 Tex. 170 (1868). These cases were wholly relied on by Citizens Bank of Georgetown v. Jones, 127 Wash. 294, 220 Pac. 737 (1923), as authority for a recovery where the amount is left blank. See also, Missouri State Life Insurance Co. v. Allen, 251 S. W. 751 (St. Louis Ct. App. 1923).

4. Chestnut v. Chestnut, 104 Va. 539, 52 S. E. 348 (1905); Kimball v. Costa, 76 Vt. 289, 56 Atl. 1009 (1904); Hollen v. Davis, 59 Iowa 444, 13 N. W. 413 (1882).

5. "The check mark being placed in the margin by the parties themselves, the time the instrument is made, becomes a part of it. . . ." Corgan v. Frew, 39 Ill. 31 (1865).

6. Where words in the body of the instrument are ambiguous or uncertain reference may be had to the figures to fix the amount. UNIFORM NEGOTIABLE INSTRUMENTS ACT § 17, N. Y. NEGOTIABLE INSTRUMENTS LAW § 36. Parol evidence was not admitted to show that the figures in the margin of the note were correct and that those in the instrument incorrect. Bell v. Birmingham, 9 Ala. App. 212, 62 So. 971 (1913). *Cf.* Dunn v. Utah Serum Co., 65 Utah 527, 238 Pac. 245 (1925), where in a suit on a mortgage it was allowed to be proved that the amount in the body of the mortgage was incorrect and that the figures placed in the margin of the instrument were correct. See also, Kasnowitz v. Manufacturers Trust Company, 171 Misc. 545, 13 N. Y. S. (2d) 211 (1939); Citizens' Bank v. White, 133 S. C. 285, 128 S. E. 27 (1925); Fales v. Wilson, 121 Me. 207, 116 Atl. 268 (1922).

7. See note 6, *supra.*

ment merely specified "five hundred" but omitted to state *dollars* and the margin of the instrument contained the notation "$500" the court allowed a recovery on the note holding that the marginal notation clarified the ambiguity.[8]

The situation in the principal case involves the second of the classifications above mentioned, namely; where the amount was omitted and only the marginal notation gives a clue to what that amount should be.

The holder of a promissory note, which is lacking in some material particular, has *prima facie* authority to complete the instrument by filling in the blanks, provided that he does so within a reasonable time and in strict accordance with the authority given him to do so.[9] If the blank to be supplied is the amount of the note and there are marginal figures, the holder may fill in the blank but only up to the limit of the marginal figures.[10] In *Prim v. Hammel*[11] the maker left the amount in the body of the note blank, gave the payee authority to fill in that blank, but placed the figures "$1,500" in the margin. The payee filled in the blank, but only for one thousand dollars. A subsequent holder brought suit for one thousand five hundred dollars alleging that to be the amount of the note. The court held, that as between the writing in the body of the note and the margin, the body must prevail, going on to say that since the payee had the authority to fill in the blank up to a certain amount he most certainly could fill it in an amount less than that contemplated.

Norwich Bank v. Hyde, decided in 1839, the leading case against recovery on an instrument where the amount is left blank was relied on as authority for the holding in the principal case. In that case suit was brought on the instrument. The complaint alleged a valid note. The court in its opinion agreed that the plaintiff had the right to fill the blank space in the instrument up to the amount in the marginal notation. However, the court continued, the note alleged upon in the complaint did not correspond to the note produced at the trial. The court went on to say that the plaintiff had the power to correct the situation and ordered a new trial.[12]

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8. ". . . it (referring to the marginal notation) may be resorted to as a means of explaining anything (sic) doubtful in reference to the sum named in the body of the note." Corgan v. Frew, 39 Ill. 31 (1865).

9. UNIFORM NEGOTIABLE INSTRUMENTS ACT § 14, N. Y. NEGOTIABLE INSTRUMENTS LAW § 33. The power to fill in is said to extend to every incomplete feature of the instrument. Linthicum v. Bagby, 131 Md. 644 102 Atl. 997 (1917). The authority to fill in may be an implied authority. Linthicum v. Bagby, *id.* As to what constitutes a reasonable time, see Greenblatt v. Miller, 255 App. Div. 18, 5 N. Y. S. (2d) 388 (1st Dep't 1938) (*held,* 9 years to be an unreasonable length of time); Madden v. Gaston, 137 App. Div. 294, 121 N. Y. Supp. 951 (1st Dep't 1910) (holding 8 months to be unreasonable).

To be a holder in due course it is necessary that the instrument be complete at the time it is negotiated to such holder. UNIFORM NEGOTIABLE INSTRUMENTS ACT § 52, N. Y. NEGOTIABLE INSTRUMENTS LAW 91, Nicholaras v. Stewart, 25 N. Y. S. (2d) 157 (1941).

10. 1 DANIEL, NEGOTIABLE INSTRUMENTS (7th ed. 1933) § 99 at p. 134.

11. Prim & Kimball v. Hammel, 134 Ala. 652, 32 So. 1006 (1902).

12. Norwich Bank v. Hyde, 13 Conn. 279 (1839). In the light of UNIFORM NEGOTIABLE INSTRUMENTS ACT § 14, N. Y. NEGOTIABLE INSTRUMENTS LAW § 33, with its requirement of filling in within a reasonable time it is doubtful whether Connecticut would hold the same way if the same case arose today.

Opposed to the rule that no recovery may be had where the amount, at the time of the trial has not been filled, is the case of *Citizens Bank of Georgetown v. Jones.*[13] In this case the amount in the body of the note was left blank but the upper left hand margin contained the notation $5,000. The court held that a recovery may be had on the instrument, without going through the formality of filling in the blank, and that the holder of such an instrument was a holder in due course. The court held that the superscription represents the amount usually found in the body of the instrument. Inasmuch as the body of the instrument contains a promise to pay dollars, why, the court queried, if the number of dollars is blank shouldn't the superscription in the margin be relied on to supply the missing detail in the body?

The cases relied on by the *Citizens Bank of Georgetown* case as authority for its position, with the exception of *Witty v. The Michigan Mutual Life Insurance Company,*[14] cannot be considered as such. They involve not the absence of an amount but an ambiguity in the body of the instrument. This, however, should not be construed as a detraction from the inherent soundness of the decision.[15]

The situation as it exists today is rather anomalous, with the emphasis being placed on form rather than substance. Prevailing opinion will not permit the holder to recover if the amount is not filled within a reasonable time, still at no time can there be said to be a doubt as to the amount of such an instrument. The rule of common sense seems to be in favor of the *Citizens Bank of Georgetown v. Jones.*

MASTER AND SERVANT—UNEMPLOYMENT INSURANCE—INTEREST OF EMPLOYEES IN LABOR DISPUTE.—The Chrysler Corporation manufactures automobiles and to that end maintains nine essential, co-ordinated plants, all of which are within eleven miles of the main plant. A labor dispute actively in progress at the main plant and three of the other plants resulted in work being suspended at each of the nine plants. The employees of the plants not actively engaged in the dispute sought unemployment insurance benefits. On appeal from a judgment of the Circuit Court, *held,* that none of the employees was entitled to benefits under the statute which disqualifies an applicant for unemployment insurance benefits for any week with respect to which his unemployment is due to a labor dispute in the establishment in which he is or was last employed unless it is shown that the applicant was not "participating in or financing or directly interested in the labor dispute".[1] *Chrysler Corporation v. Smith,* 297 Mich. 438, 298 N. W. 87 (1941).

One important point involved in this case is as follows: Were the claimants directly interested in the labor dispute?[2] The finding of the court is to the effect

13. Citizens Bank of Georgetown v. Jones, 127 Wash. 294, 220 Pac. 787 (1923).

14. Witty v. The Michigan Mutual Life Ins. Co., 123 Ind. 411, 24 N. E. 141 (1890).

15. See (1924) 22 MICH. L. REV. 607, approving the *Citizens Bank v. Jones* decision.

1. MICH. UNEMPLOYMENT COMPENSATION LAW, § 29 (c) [formerly § 29 (d)]. Each of the forty-eight states has some provision disqualifying an applicant if his unemployment is due to a labor dispute.

2. The case also stands for the proposition that all nine plants constituted a single establishment within the meaning of the statute. This is in accord with Spielmann v.

that the employees of all nine plants were directly interested in the dispute, even though the employees of the six plants not involved in the controversy had no voice therein. The court was influenced in its decision by the fact that the dispute involved new contract provisions affecting wages, hours of work and other conditions of employment of all employees of the Chrysler Corporation. No American cases are cited in the opinion to support the decision of the court. The court, however, was not without precedent for its decision. It is in accord with the cases decided by the British Umpire,[3] the highest administrative tribunal[4] provided for in the English Act.[5] No doubt the court was motivated in its decision by the fact that the English Act is the prototype for most of the American legislation on this subject. The general rules may be enunciated, that where a statute is fashioned after a similar statute of another state or country, the construction of the courts of that state or country placed upon the model statute, will have persuasive force in determining legislative intent and appropriate construction with regard to the new statute.[6] In other words there is no mandate imposing an obligation upon a court to observe the foreign construction of a statute which serves as the prototype for the one under consideration.[7]

The meaning to be attached to the phrase, "directly interested in the labor dispute" found in similar statutes has also been considered recently by the courts of last resort in New Jersey and Georgia.[8] In New Jersey, the decision in the case of *Kieckhefer Container Co. v. Unemployment Compensation Commission*,[9] is *contra* to the decision in the principal case. In refusing to adopt a rule similar in all respects to that adopted by the court in the principal case, the court in a clear,

Industrial Commission, 236 Wis. 240, 295 N. W. 1 (1940) in which the court decided that the two plants of the Nash-Kelvinator Corp. comprised a single establishment, even though they were forty miles apart.

3. Umpire's Decisions 177/1926, 1317/1926 interpreting clause identical to § 29 (c) of the MICH. UNEMPLOYMENT COMPENSATION LAW.

4. The decision of the Umpire is final; no further appeal is permitted, 10-11 GEORGE V 1920, c. 30, § 11 (6).

5. 10-11 GEORGE V 1920, c. 30.

6. Cunningham v. Commission of Banks, 249 Mass. 401, 144 N. E. 447 (1924); Chesapeake & Ohio Ry. Co. v. Mizelle, 136 Va. 237, 118 S. E. 241 (1923); Lasier v. Wright, 304 Ill. 130, 136 N. E. 545 (1922); Lavender v. Rosenheim, 110 Md. 150, 72 Atl. 669 (1909); Williams v. Tompkins, Inc., 208 App. Div. 574, 204 N. Y. Supp. 168 (1st Dep't 1924).

7. State v. Nelson, 58 S. D. 562, 237 N. W. 766 (1931); *In re* Miller's Trust, 313 Pa. 18, 169 Atl. 362 (1933); Phoenix Title & Trust Co. v. Old Dominion Co., 31 Ariz. 324, 253 Pac. 435 (1927).

8. The statutes concerned in these cases are substantially identical with the Michigan statute. See N. J. REV. STAT. 1937, c. 43 § 21-5 (d) subsection 2; GA. UNEMPLOYMENT COMPENSATION LAW 1937, § 5 (d), subsection 1.

9. 125 N. J. L. 52, 13 A. (2d) 646 (1940). In accord with the New Jersey ruling see also Hormidas Ringuette v. Unemployment Compensation Board, P. A. No. 1762 (R. I. Super. Ct.), (5 CCH Unemployment Insurance Service, R. I. § 1980.01 at p. 42,037); N. C. Commission Dec. No. 5, 7-26-38 (5 CCH Unemployment Insurance Service N. C. § 1980.07 at p. 36,057); W. Va. Board of Review Dec., Appeal No. 187 (6 CCH Unemployment Insurance Service, W. Va. § 1980.05 at p. 51,042).

concise opinion decided that the use of the words "directly interested in the dispute" clearly limits their application to those employees directly interested in its furtherance by participation and activity therein. In Georgia, *Huiet v. Boyd*,[10] citing the decision in the principal case, disagrees with the *Kieckhefer Container Co.* case. In this case the claimant had been prevented from entering the factory, where he was employed, by the threats of the picket line in front of the factory. He in no way participated in or had anything to do with the dispute, yet was denied unemployment insurance benefits on the ground that he was "directly interested in the labor dispute". There is no doubt that the claimant was unemployed through no fault of his own.

The New Jersey case presents the better view as it is apparent that the New Jersey court did not lose sight of the purpose for which this legislation was enacted, *viz.*, to provide a fund to be used "for the benefit of persons unemployed through no fault of their own".[11] A recent case before the Massachusetts Appeals Board gives us another instance of the manner in which this purpose is defeated in the principal case and *Huiet v. Boyd.* A foreman, who was ineligible for union membership because he had the right to hire and fire, sought unemployment insurance benefits when he was thrown out of work by a strike on the part of his subordinates. The strikers sought a raise in pay for all workers paid on an hourly basis. As the foreman was paid on an hourly basis, he was held to be directly interested in the strike.[12] It is manifest that such an interpretation of the phrase "directly interested in the labor dispute" goes far towards defeating the purpose with which this legislation was enacted.[13]

SALES TAX—PERSONAL PROPERTY DISTINGUISHED FROM WORK LABOR AND SERVICES. —Plaintiff, a professional photographer who made photographic portraits of private clients, brought an action against a tax commissioner, challenging the validity of an assessment, made under authority of a statute, taxing the gross receipts from retail sales of "tangible personal property consisting of goods, wares, and merchandise."[1] Two per cent of the price charged by plaintiff represented the cost

10. 64 Ga. App. 564, 13 S. E. (2d) 863 (1941). For similar holdings see Conn. Commission Dec. No. 134-D-39 (2 CCH Unemployment Insurance Service Conn. § 8063 at p. 10,506); Ind. App. Tribunal Dec. No. 39-LD-16 (3 CCH Unemployment Insurance Service Ind. § 8071.06 at p. 17,513); Maryland Unemployment Compensation Board Decision No. 17, 1939 (3 CCH Unemployment Insurance Service Md. § 1980.01 at p. 23,034).

11. MICH. UNEMPLOYMENT COMPENSATION LAW, § 2. Similar declarations of policy are found in the statutes of most of the states.

12. Mass. Appeals Dec. No. 39-A-127, 7-19-39 (3 CCH Unemployment Insurance Service Mass. § 1980.04 at p. 24,039).

13. See Fierst and Spector, *Unemployment Compensations in Labor Disputes* (1940) 49 YALE L. J. 461 in which the authors advance the argument that the purpose of the legislation would be served by the repeal of the clause disqualifying an employee engaged in a labor dispute.

1. Sales Tax Act, N. Dakota Sess. Laws 1937, c. 249, § 2. The sales tax enactments of the various jurisdictions, the decisions of which are hereinafter cited, contain the term "tangible personal property" or similar phrase.

of materials used, the remainder being a charge for the skilled service of plaintiff in etching and retouching. A separate charge was made for the sitting and the presentation of proofs whether the customer ordered finished portraits or not. *Held,* one judge dissenting, on appeal by the tax commissioner from a judgment setting the assessment aside, (1) the charge for the sitting was not taxable but (2) the assessment based on the price of the finished portrait was valid under the act. Judgment reversed. *Voss v. Gray, Tax Com'r,* 298 N. W. 1 (N. Dakota 1941). Primarily the question in this case was one of statutory interpretation requiring a determination of the intent of the legislature. The court implicitly admitted that a contract for services alone would not be within the statute, when it exempted the charge made for the sitting and presentation of proofs.[2] Plaintiff contended that the contract to deliver the photographs was also one of service and not a sale. Upon first impression the contention of the plaintiff would appear sound. In cases not involving sales tax enactments it has been frequently stated that the photographer's contract is one of *employment.*[3] But a similar holding where taxing statutes are involved would eventually frustrate them. An example of this may be found in Illinois. The courts of that state have adopted the rule that if a transfer of property is merely incidental to a contract of services, the transaction is not taxable,[4] but if the services are incidental to a transfer of property the tax may be levied.[5] As a result of this rule the following sales have been held not taxable as "sales of tangible personal property at retail"; photostats,[6] printed letterheads,[7] matrices, stereotypes, electrotypes,[8] eyeglass lenses and frames when supplied by a licensed optometrist.[9] The revenue ordinarily expected was entirely lost. In cases

2. Voss v. Gray, 291 N. W. 1 (N. Dakota 1941).

3. White v. Dreyfoos, 156 App. Div. 762, 142 N. Y. Supp. 37 (1st Dep't 1913); Homes v. Underwood and Underwood, Inc., 225 App. Div. 260, 233 N. Y. Supp. 153 (1st Dep't 1929); 4 WILLISTON, CONTRACTS (rev. ed. 1936) § 1025.

4. "The paper is a mere incident—the skilled service is that which is required." J. A. Burgess Co. v. Ames, 359 Ill. 427, 194 N. E. 565 (1935), holding that a photostater's contract is one of service.

5. The court invoked this rule in holding that food charges in a restaurant constituted a sale. Brevoort Hotel v. Ames, 360 Ill. 485, 196 N. E. 461 (1935). See also (1935) 1 JOHN MARSHALL L. Q. 61 for a detailed discussion on this point.

6. See note 4, *supra.*

7. H. G. Adair Printing Co. v. Ames, 364 Ill. 342, 4 N. E. (2d) 481 (1936), decision based on fact that paper is of no commercial value to anyone but vendee. *Contra:* See Long v. Roberts and Son, 234 Ala. 570, 176 So. 213 (1937); also, Bigsby v. Johnson, 99 P. (2d) 268 (Cal. 1940) transfer of printed mats and letterheads is a sale *even if the customer furnishes the material.*

8. A. B. C. Electrotype Co. v. Ames, 364 Ill. 360, 4 N. E. (2d) 476 (1936).

9. Babcock v. Nudelman, 367 Ill. 626, 12 N. E. (2d) 635 (1935); the majority is *contra;* State Tax Commission v. Hopkins, 234 Ala. 556, 176 So. 210 (1937); Commonwealth v. Miller, 337 Pa. 246, 11 A. (2d) 141 (1940); Kamp v. Johnson, 15 Cal. (2d) 187, 99 P. (2d) 274 (1940). The court subsequently held that the manufacturer who supplied the optometrist was not liable for the tax either, *since the sale to the latter was not at retail but for resale.* American Optical Co. v. Nudelman, 370 Ill. 627, 19 N. E. (2d) 582 (1939).

similar to the principal case involving the furnishing of photo-engravings[10] and made-to-order designs,[11] New York has held such a transaction to be a sale.

The intention of a legislature in passing a tax enactment is obviously to produce a substantial revenue. Any other decision than that made in the principal case would not appear to effect this purpose as may be seen from the Illinois cases herein cited. It is therefore submitted that the principal case illustrates the better rule.[12]

STATUTE OF FRAUDS—PROMISE TO PAY DEBT OF ANOTHER—ORAL PROMISE OF STOCKHOLDER TO ADVANCE MONEY TO CORPORATION.—The defendants, owning substantially all of the stock in a corporation orally agreed with the plaintiffs, who had been supplying large quantities of paper to the corporation, that if the plaintiffs would continue to extend a ninety-day credit to the corporation the defendants would advance to the corporation sufficient moneys for it to pay for said paper and to meet any deficit in its operations. The defendants failed to advance the sums of money as agreed. The defendants pleaded that section of the Statute of Frauds,[1] which bars recovery on a promise to answer for the debt of another unless there be a writing signed by the party to be charged. On appeal from an order dismissing the complaint, two judges dissenting, the defendant's promise was not within the Statute of Frauds. The agreement to advance the money to the corporation was a promise independent of any debt of the company. The promisors made it in order to serve a primary, proximate interest of their own. Judgment reversed. *Bulkley v. Shaw,* 28 N. Y. S. (2d) 616 (1941).†

Historically, the first attempt to formulate the rule that under certain circumstances, a promise to answer for the debt of another is not within the Statute

10. People *ex rel.* Walker Engraving Co. v. Graves, 243 App. Div. 652, 276 N. Y. Supp. 674 (3rd Dep't 1935) *aff'd* 268 N. Y. 648, 198 N. E. 539 (1935).

11. People *ex rel.* Foremost Studios Inc. v. Graves, 246 App. Div. 130, 284 N. Y. Supp. 906 (3rd Dep't 1936). The furnishing of periodic, confidential financial reports is not taxable as a sale, Dun & Bradstreet v. City of New York, 276 N. Y. 198, 11 N. E. (2d) 728 (1937). It should be noted that the New York City Statute forestalls exemption by creating a presumption that all receipts are taxable until proven otherwise, N. Y. CITY LOCAL LAWS 1934, § 2, n. 24, as extended by N. Y. CITY LOCAL LAWS 1939, n. 101, N. Y. CITY LOCAL LAWS 1940, n. 79. It is generally held that a funeral director is liable under a sales tax act insofar as his business directly involves the transfer of property such as caskets, vaults, and flowers. Ahern v. Nudelman, 374 Ill. 237, 29 N. E. (2d) 268 (1940); Kistner v. Iowa St. Board of Assessment, 225 Iowa 404, 280 N. W. 587 (1938); and Commonwealth v. Dinnien, 320 Pa. 257, 182 Atl. 542 (1933).

12. See also (1938) SO. CALIF. L. REV. 532; (1938) 51 HARV. L. REV. 753 and cases therein cited.

†Motion for leave to appeal to the Court of Appeals granted; questions certified. N. Y. L. J., October 4, 1941, p. 896, column 6.

1. N. Y. PERS. PROP. LAW NO. 31, which in substance is the same as 3 HALSBURY'S STATUTES OF ENGLAND 583. The other states of the union have generally adopted the statute. See STEARNS, SURETYSHIP (2d ed.) § 25.

of Frauds, was made in *Leonard v. Vredenburgh.*[2] Chancellor Kent, by way of *dictum,* said that where "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, it is not within the Statute."[3] This doctrine, while followed in some jurisdictions,[4] is unsound in principle.[5] Impotent, indeed, would be the Statute so far as new promises to pay an already existing debt are concerned, if recovery were allowed on any promise for which there was sufficient consideration by way of detriment to the promisee.

This earlier rule has been explained away, and is now generally discredited. In a very careful consideration of the subject, Comstock Ch. J., in *Mallory v. Gillett*[6] states the rule to be that a promise to pay the debt of another is not within the statute if made to obtain a direct beneficial consideration from the creditor. It takes out of the class of original promises, all those in which the consideration of the promise was harm to the promisee, and the resultant benefit moved to the debtor instead of the promisor.

In 1868, *Brown v. Weber*[7] added the requirement that the new promisor should come under an independent duty of payment. Twenty years passed, and Judge Finch again reviewed the subject in *White v. Rintoul.*[8] He declared that the law was that "where the primary debt subsists and was antecedently contracted, the promise to pay it, is original, when it is founded on a new consideration moving to the promisor and beneficial to him, and such that the promisor thereby comes under an independent duty of payment irrespective of the liability of the principal debtor." The conjunction is significant. It would seem from the above that the elements of (1) beneficial interest and (2) new consideration together with (3) the independent duty of payment must be present to take the case out of the statute.

Yet, in *Raabe v. Squier,*[9] the Court of Appeals, after applying the test laid

2. 8 Johns. 29 (N. Y. 1811). This appears to have been the first American case in which the doctrine was announced that a new consideration moving between the parties to the guaranty prevents the promise from falling within the statute. See BROWNE, STATUTE OF FRAUDS (5th ed. 1895) § 171.

3. Wright v. Smith, 81 Va. 777 (1886); Chapline v. Atkinson & Co., 45 Ark. 67 (1885); Lookout Mountain R. R. Co. v. Houston, 85 Tenn. 224, 226, 2 S. W. 26 (1886); Templeton v. Bascom, 33 Vt. 132 (1860).

4. In Arkansas and North and South Carolina it is still accepted and applied. Marrow v. White, 151 N. C. 96, 65 S. E. 746 (1909); Ellis v. Carroll, 68 S. C. 376, 47 S. E. 679 (1904). *Contra:* Turner v. Lykes, 68 S. C. 392, 48 S. E. 301 (1904). Becker Provision Co. v. Parker Hardware Co., 146 Ark. 539, 226 S. W. 177 (1920).

5. BRANDT, SURETYSHIP (3rd ed. 1905) § 80.

6. 21 N. Y. 412 (1860).

7. 38 N. Y. 187 (1868). The court indicated that even though the new consideration moved to the promisor, and was beneficial to him and although, manifestly, the "leading object of the undertaker" was "to subserve or promote some interest or purpose of his own", those facts would not in every case, stamp the promise as one sufficient to withdraw it from the operation of the statute. The inquiry would remain whether such promise was independent of the original debt or contingent upon it.

8. 108 N. Y. 222, 227, 15 N. E. 318, 320 (1888).

9. 148 N. Y. 81, 42 N. E. 516 (1895); Parisi v. Hubbard, 226 App. Div. 280, 235 N. Y. Supp. 220 (1929); Voska v. Ruland, 172 App. Div. 616, 158 N. Y. Supp. 780

down in *Mallory v. Gillett*,[10] namely, that the promise is not within the Statute, "where, although, the debt remains, the promise is founded on a new consideration which moves to the promisor", quoted the test of Finch, J., in *White v. Rintoul*[11] as really identical with that in *Mallory v. Gillett*. It would seem the "main purpose rule", of which *Mallory v. Gillett* was our leading exponent, was in vogue once more. The most recent pronouncements of the Court of Appeals upon the subject in *Richardson Press v. Albright*[12] and *Witschard v. Brody & Sons, Inc.*,[13] however, seemed to add again the requirement of independent liability.

In the first case, defendant was a large stockholder in the corporation which was publishing a magazine, printed by plaintiffs. In answer to plaintiffs' demand for some assurance of payment, defendant orally promised to pay a portion of the prior indebtedness, and also the cost of printing subsequent issues. Payment was to be forwarded by defendant to the treasurer of the publishing company. On this evidence, the promise was held to be within the Statute of Frauds. Weighing the element of beneficial interest, the promisor's interest was considered to be, "at best remote". The benefit moving directly to him under the contract, was not such as to properly take the promise out of the Statute under the rule laid down in *Mallory v. Gillett*. However, decision did not rest upon this test alone. Judge Pound said, "the inquiry remains whether the consideration is such that the promisor thereby comes under an independent duty to pay, irrespective of the liability of the principal debtor."[14] He indicated that the promisor must clearly become, "within the intention of the parties, a principal debtor primarily liable." In *Witschard v. Brody & Sons* the court had an opportunity to re-establish the law of *Mallory v. Gillett* as applied in *Raabe v. Squier*, but adopted a formula suggested by Professor Williston[15] holding the promise to be within the Statute, if as between the promisor and the original debtor the latter "ought to pay". It was also held in the case that "beneficial consideration" received by the promisor did not shift the actual indebtedness to the new promisor, nor remove the "ought" from the principal debtor's obligation to pay. These cases seem to insist on both direct benefit to the promisor and the assumption by him of an independent liability.

It is submitted that the distinctions which the Court professes to see between *Richardson v. Albright* and the case under discussion are not substantial. Here as in the *Richardson* case, the plaintiffs were furnishing materials to the corporation

(1916); noted in (1917) 2 CORN. L. Q.; RESTATEMENT, CONTRACTS § 184; Howell v. Harvey, 65 W. Va. 310, 64 S. E. 249 (1909).

10. See note 6, *supra*.

11. See note 8, *supra*.

12. 224 N. Y. 497, 121 N. E. 362 (1918). See Watson v. Quilter, 220 App. Div. 663, 222 N. Y. Supp. 386 (1927) *aff'd* 249 N. Y. 562, 164 N. E. 584 (1928), citing *Richardson v. Albright* as conclusive—"It is futile to endeavor to reconcile the lines of conflicting authorities dealing with the subject of primary and collateral obligations. The discussion of this subject in 2 WILLISTON, CONTRACTS §§ 462-475 sufficiently discloses the unsettled condition in which the law has heretofore been. We regard these conflicts as settled, however, by *Richardson Press v. Albright* which is conclusive upon this appeal."

13. 257 N. Y. 97, 177 N. E. 385 (1931).

14. Richardson Press v. Albright, note 12, *supra* at p. 502. Here apparently is a trend, if not a return, to the ruling of Brown v. Weber, 38 N. Y. 187 (1868).

15. 2 WILLISTON, CONTRACTS (2d ed. 1920) § 475.

and refused to continue to do so unless the defendants agreed to put up sufficient cash to take care of its bills. Here as there, the defendants were large stockholders of the corporation and controlled it. In both cases the defendants had interests of their own to subserve. But they had nothing in the nature of a charge on the corporation's property;[16] they were at the utmost general creditors, and if they profited, it would only be in consequence of the credit given to the company. Here, as there, the defendants agreed to advance funds to the corporation. Here as there the plaintiff continued to furnish materials to the corporation. The defendants looked to the corporation as the primary debtor, by charging the goods to it and demanding payment, as evidenced in the case at bar, by the pursuit of the claim in bankruptcy. It was expected that the corporation would be able to pay. The parties here did not contemplate that the defendants should become the "principal debtor primarily liable".

Perhaps the New York cases might be divided into two groups: (1) those where the promisor agreed to pay a debt of another, created before his promise was given, (2) those where the promise did not cover any antecedent debt but a new debt, created after the promise was given. It might be argued that past decisions in the first class of cases, require that some benefit move to the promisor and that he assume an independent liability to take the promise out of the statute. In the second class, it is necessary to establish only a benefit to the promisor. Still, the case at bar does not seem sound even if it is taken as a case of the second class. Any "benefit" moving to the stockholders is too remote on the facts given.

16. In Harburg Comb Co. v. Martin, 1 K. B. 778 (1902), a promise to pay a debt of a corporation made by a stockholder in the corporation, because of his financial interest therein, in consideration of the creditor's refraining from seizing its property was held within the statute. In Davys v. Buswell, 2 K. B. 47 (1913), this case was followed though the promisor was not only a stockholder but the holder of debentures which gave him a direct interest in the property of the corporation, since the assets of the corporation were mortgaged to secure the debentures. To the same effect, Hurst Hardware Co. v. Goodman, 69 S. E. 898 (W. Va. 1910).