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Associate Professor of Law, Fordham University, School of Law.

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THE SURETYSHIP STATUTE OF FRAUDS

JOHN D. CALAMARI*

THE purpose of this article is twofold. The first is to set forth primarily for student use a clear and concise statement of the way in which any problem in this area should be attacked. The second is to question some of the statements made by Professor Conway in his article Subsequent Oral Promise to Perform Another's Duty and the New York Statute of Frauds1 and to advance a different hypothesis.

The suretyship Statute of Frauds in New York2 provides in substance that a special promise to answer for the debt, default, or miscarriage of another person is void4 unless it is evidenced by a sufficient memorandum.5

The task then is to determine which promises contravene the statute if not in writing and which promises are not condemned by the statute even though they are oral. When a promise contravenes the statute if not in writing, it is said to be collateral; when it does not, it is called original. These are words which are generally used to express a result and do not help in ascertaining which promises are enforceable.6

It is apparent from the wording of the statute that almost all of the cases will be tripartite. One party is the one who made the promise and who now pleads the statute as a defense. We will refer to him as the promisor, and since he is invariably the defendant in these cases, by the letter D. The person to whom the promise is made we will refer to as the creditor (C). Invariably he will be the plaintiff in the action. The person for whom the promisor promises we shall refer to as the third party (TP).7

At the outset a distinction must be drawn between cases where there is

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* Associate Professor of Law, Fordham University, School of Law.
3. “The only significance of the adjective 'special' in this phrase is to restrict the statutory provision to promises in fact made.” 2 Corbin, Contracts § 347 (1950).
4. Though the statute says void, the courts have interpreted void as voidable. In other words the statute must be pleaded as an affirmative defense. Sanger v. French, 157 N.Y. 213, 51 N.E. 979 (1898); Crane v. Powell, 139 N.Y. 379, 34 N.E. 911 (1893).
5. The question of the sufficiency of the memorandum will not be discussed here since this is properly a contract question.
6. 2 Williston, Contracts § 463 (rev. ed. 1936). "If the terms are of any service, they can be so only as terms descriptive of a result arrived at on grounds quite independent of the terms themselves." 2 Corbin, Contracts § 348 (1950).
7. This terminology is used rather than P (principal) and S (surety) to minimize the possibility of begging the question by assuming that one of the parties is the principal and another the surety. Compare 2 Corbin, Contracts § 353 (1950).
no prior obligation on the part of the third party (TP) to the creditor (C) at the time that the promisor (D) makes his promise and cases where there is such an obligation. This distinction is of extreme importance, since, as we shall see, there are different rules governing the two situations. We shall discuss first the cases where there is no prior obligation.

**Cases Where There Is No Prior Obligation Owing From TP to C at the Time D Makes His Promise**

An illustration will serve to bring this category of cases into focus. D says to C, “Deliver these goods to TP and I will see that you are paid.” C delivers the goods. Is D’s promise enforceable? This depends upon a number of questions, some contract, some suretyship.

It is frequently said and apparently is the law, that D’s promise can be collateral only where TP eventually comes under an obligation to C. If TP does not come under an obligation to C, it is reasoned that the promise must be original because in that case D is not promising to pay the debt of another, there being no other debt. It would appear, then, that the first inquiry which must be made is whether TP eventually came under an obligation at least voidable to C.1

In the illustration given, did TP come under any such obligation to C? This is purely a question of contract law and contract principles must govern the determination. The first requisite for any contract is that the offeror manifest a contractual state of mind, and this is true in determining whether TP came under obligation to C in the illustration given. This explains why the courts place so much emphasis on the question of whether C extended credit to TP, for this is merely another way of inquiring whether C manifested an intention to contract with TP. Charging TP as a debtor upon C’s books is strong evidence that credit was

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8. 2 Williston, Contracts § 462 (rev. ed. 1936); 2 Corbin, Contracts § 350 (1950).
10. Of course it is arguable that D’s promise has to be original since at the time he makes his promise there is no obligation owing from TP to C. This contention was rejected in the early case of Jones v. Cooper, 1 Cowp. 228, 98 Eng. Rep. 1058 (K.B. 1774). See 2 Williston, Contracts § 461 (rev. ed. 1936); 2 Corbin, Contracts § 350 (1950).
11. This means that for the purposes of this rule a voidable obligation is an obligation but that a void obligation is not. 2 Williston, Contracts § 454 (rev. ed. 1936); Simpson, Suretyship 127 (1950); 2 Corbin, Contracts § 356 (1950).
13. In the illustration given, although D is the offeror in relation to C, C may be and usually is an offeror in relation to TP.
14. For example, this is true of all of the cases in Simpson, Cases on Suretyship (1942) which deal with this phase of the problem.
extended to TP\textsuperscript{15} but is not conclusive.\textsuperscript{16} The question is ordinarily one of fact.\textsuperscript{17}

If $C$ has extended credit to $TP$, obviously the only remaining question to determine whether $TP$ came under an obligation to $C$ is to ascertain whether $TP$ accepted $C$'s offer.\textsuperscript{18} In many of the reported cases\textsuperscript{19} there is no evidence of what transpired after $D$ made his promise to $C$. In such a case, whether $TP$ accepted $C$'s offer, it is submitted, must be determined under the principles of contract law relating to acceptance by silence or exercise of dominion.\textsuperscript{20}

An instructive case on the question of acceptance is \textit{Mease v. Wagner}.\textsuperscript{21} The defendant ($D$), a friend of the deceased, Mrs. Bradley, told the plaintiff ($C$), an undertaker, to bury Mrs. Bradley in a certain manner and to charge the estate of Dr. Bradley ($TP$) (the husband of Mrs. Bradley who had predeceased her) or a certain nephew (also $TP$) of Mrs. Bradley. It may be assumed that the plaintiff extended credit to the estate of Dr. Bradley and to the nephew. However the estate of Dr. Bradley never became liable because it did nothing to manifest an acceptance and would not otherwise be liable.\textsuperscript{22} Although the nephew promised to pay after the services were rendered, he never became liable because of the familiar doctrine that past consideration is not consideration.\textsuperscript{23}

The court concluded that since neither the estate of Dr. Bradley nor the nephew came under an obligation to the plaintiff the promise of the defendant had to be original. The court did not consider whether Mrs. Bradley's estate came under the obligation.\textsuperscript{24} The theory was that it is

\begin{itemize}
\item\textsuperscript{15} Wood v. Dodge, 23 S.D. 95, 120 N.W. 774 (1909); Simpson, Suretyship 124 (1950).
\item\textsuperscript{16} Hammond Coal Co. v. Lewis, 248 Mass. 499, 143 N.E. 309 (1924); Annot., 99 A.L.R. 79, 82 (1935).
\item\textsuperscript{17} Burdick, Suretyship and the Statute of Frauds, 20 Colum. L. Rev. 153, 155 (1920).
\item\textsuperscript{18} "The existence or non-existence of a duty in the third person to pay for the goods or service is a mixed question of law and fact; but in most cases the facts that determine that duty are sufficiently in doubt to make this mixed issue a question for the jury." 2 Corbin, Contracts § 352 (1950).
\item\textsuperscript{19} Of course $TP$ might have some defense which would make the agreement void or voidable but this has already been considered. See note 11 supra.
\item\textsuperscript{20} For example, this is true of all of the cases in Simpson, Cases on Suretyship 1-10 (1942) which deal with this problem.
\item\textsuperscript{21} Restatement, Contracts §§ 72-73 (1932).
\item\textsuperscript{22} 1 McCor (S.C.) 395 (1821).
\item\textsuperscript{23} The estate of a deceased husband is not ordinarily liable even for the necessaries of a wife. His death, generally speaking, terminates his duty to support. Wilson v. Hinman, 182 N.Y. 408, 75 N.E. 236 (1905).
\item\textsuperscript{24} See N.Y. Surr. Ct. Act § 216. Would the estate of the deceased be liable if the plaintiff extended no credit to the estate? See Matter of Wingersky, 75 Misc. 79, 134 N.Y. Supp. 877 (Surr. Ct. 1911).
\end{itemize}
settled doctrine ... that when no action will lie against the party undertaken for, it is an original (sic) promise. Here the third parties were the estate of Dr. Bradley and the nephew. Since they did not come under an obligation the promise is original irrespective of whether the estate of Mrs. Bradley became liable. In a word, for the purposes of the Statute of Frauds, TP is the person for whom the defendant undertakes.

To summarize: In the category of cases under discussion the courts reason that if TP does not come under an obligation (at least voidable) to C the promise is original. If TP does come under obligation, so far as we know now, the promise is collateral. Whether TP comes under an obligation is not a question of suretyship law but must be decided, broadly speaking, under contract principles.

There is another contract question which must be considered. It can perhaps best be introduced by a simple illustration. D says to C, "Deliver these goods to TP and, provided you extend credit to TP, I will pay if he does not." Assume that the goods are delivered to TP but that C extends no credit to TP. Is D liable to C?

It is clear that under the rules previously considered D's promise is original because TP never came under an obligation to C. Yet this question can only be of academic interest. D should not be liable to C since, in failing to extend credit to TP, C has not accepted D's offer. In the logical order, of course, this question should be considered before advertising to whether the promise is original or collateral for if there is no contract between C and D the question of whether the promise is original or collateral under the Statute of Frauds can only be of academic interest.

This simple illustration makes it clear that in every case it is important to determine whether C has accepted D's offer and performed. Some authorities do not emphasize this in the least and seem to imply that C in every case is free to extend or not extend credit as he sees fit. The

27. On the assumptions made, would the defendant be a non-consensual surety in relation to the estate of Mrs. Bradley? Matthews v. Alkin, 1 N.Y. 595 (1848); Campbell, Non-Consensual Suretyship, 45 Yale L.J. 69 (1936).
28. The emphasized words are meant to indicate that although TP comes under an obligation to C, the promise, due to factors discussed below, may still be original.
30. 2 Williston, Contracts § 454 (rev. ed. 1936).
31. Simpson, Suretyship 125 (1990) seems to imply this:

"Nevertheless, the form of the promise has its bearing on presumptions which obtain where there is lack of evidence to refute them. If C sues S (D in this discussion) on an oral promise, 'Deliver the goods to P (TP) and I will pay for them,' proof of the promise and the delivery of the goods will entitle C to a judgment in absence of evidence that P (TP) also was obligated to C. On the other hand, if C sues S (D) on a promise alleged to be in form 'Deliver goods to P (TP) and if he does not pay for them, I will,' S's
better view, however, is that in the ordinary case whether \(D\) has insisted as a condition precedent to his liability that credit be extended to \(TP\) or that \(TP\) come under an obligation to \(C\) is a question of interpretation\(^{32}\) and very often a jury question.\(^{33}\) Since this is a contract question it will not be pursued further.

In summary, the first inquiry to be made in this type of case\(^{34}\) is whether \(TP\) eventually comes under an obligation to \(C\). If he does not, the promise is original. If he does, the promise is collateral unless it is rendered original for one of the reasons now to be discussed.

Even though \(TP\) comes under an obligation to \(C\), \(D\)'s promise will be original if there is not a principal-surety relationship\(^{35}\) between \(TP\) and \(D\).\(^{36}\) To illustrate, assume that \(TP\) makes a purchase from \(C\) and at the same time\(^{37}\) \(D\) guarantees payment and credit is extended to \(TP\) who becomes obligated. Under the rules thus far considered \(D\)'s promise would be collateral. But if it were established that \(TP\) was acting as \(D\)'s agent in this transaction, would \(D\)'s promise be collateral? The answer is in the negative.\(^{38}\) As pointed out above, for \(D\)'s promise to be collateral

\[(D\)'s\) promise is in form collateral to an apparent obligation on the part of \(P\) (TP). The burden will then be upon the plaintiff (C), where faced with the defense of the statute of frauds, to rebut the presumption of a collateral promise by showing affirmatively that \(S\)'s (\(D\)'s) promise was in substance original because no obligation was ever assumed by \(P\) (TP) nor was any credit extended to him." \(Cf.\) 2 Corbin, Contracts § 353, at 236 (1950).

34. One where \(TP\) is not under an obligation to \(C\) at the time \(D\) makes his promise to \(C\).
35. Restatement, Security § 82 (1941) defines suretyship as follows: "Suretyship is the relation which exists where one person has undertaken an obligation and another person is also under an obligation or other duty to the obligee, who is entitled to but one performance, and as between the two who are bound, one rather than the other should perform." This is a good working definition since it points out that the essence of suretyship is that, even though the plaintiff (C) may recover from \(D\), \(D\) may in turn recover from \(TP\). Whether this definition includes an indemnitor shall be discussed infra at notes 95-105 and accompanying text. See 2 Corbin, Contracts § 378 (1950).
36. "The promisor and the third person must both be under obligation to the promisee, either for the very same performance or for different performances either one of which will discharge both duties, in order to be a case within the statute. If the performances promised by the two persons are different and full performance by either of them would not discharge the other, neither one is a surety and the statute does not apply." 2 Corbin, Contracts § 349 (1950). "But a promise the performance of which will not operate as a discharge of the debt either in whole or in part is not within the statute." Id. § 364.
37. This case is still within the first category, for if \(TP\) and \(D\) became bound at the same time, there was no prior obligation on the part of \(TP\) to \(C\) at the time that \(D\) made his promise.
there must not only be an obligation on the part of TP but there must also be a principal-surety relationship between TP and D. Here that relationship does not exist.40

Even if TP comes under an obligation to C and there is in fact a principal-surety relationship between TP and D, D's promise will still be original if C does not know or have reason to know of the relationship.41 One illustration will suffice.42 When goods are being purchased from C, D promises to pay and TP states he will guarantee D's payment. C is informed that the goods are to be delivered to D. As a matter of fact the arrangement between TP and D is that D shall turn the goods over to TP and this is done. Credit is extended to both. Though TP came under an obligation to C and there is a principal-surety relationship between TP and D,44 D's promise is still original because C did not know or have reason to know of the principal-surety relationship between TP and D.45

In the illustration, TP would also be liable to C.46

39. Here, under the assumption made, TP would be liable to C as an agent who has not disclosed his principal. Ferson, Principles of Agency § 170 (1954).
40. TP is the agent and D is the principal. Though it is probably true that as between the two, D should ultimately pay, (Nolan v. Martin & Smith, Inc., 193 Misc. 877, 85 N.Y.S.2d 380 (Mun. Ct.), aff'd, 195 Misc. 50, 85 N.Y.S.2d 387 (Sup. Ct., App. T. 1949)), so that there may be additionally a principal and surety relationship under the Restatement definition, still the relationship between TP and D is not principal and surety but surety and principal. When the rule states that there must be a principal-surety relation between TP and D it means that TP must be the principal and D the surety and not vice versa.
41. 2 Williston, Contracts § 475 (rev. ed. 1936); 2 Corbin, Contracts § 362 (1950).
42. Restatement, Contracts § 180, illustration 11 (1932); compare with the cases discussed in 2 Corbin, Contracts § 355 (1950), particularly Colbath v. Clark Seed Co., 112 Me. 277, 91 Atl. 1007 (1914).
43. Even if it be assumed, which is not the case (see note 46 infra), that TP has the defense of Statute of Frauds, still he has come under a voidable obligation to C. See note 11 supra.
44. TP is the principal debtor because the goods came to him and as between him and D he should ultimately pay.
45. C knows that there is a principal-surety relationship but he thinks TP is the surety and that the defendant (D) is the principal. The rule means that before the promise of the defendant (D) can be collateral, the creditor must know, or have reason to know, that the defendant (D) is the surety. This is only fair, otherwise the creditor, even if he knew of the Statute of Frauds, might not require a writing. This result is at times explained by saying that the sale to D makes him the principal, "and ordinarily it makes no difference what he did with the goods after conveyance to him; he may have destroyed, sold, or given them away, yet he remains a debtor notwithstanding." 2 Corbin, Contracts § 355 (1950). This is undoubtedly what the author of the Restatement of Contracts means when, after giving the illustration he states that D's promise is not subject to the Statute of Frauds, "since the duty to pay is in truth his." Restatement, Contracts § 180, illustration 11 (1932); see also id., illustration 10.
46. He is in fact the principal debtor and so is promising only to pay his own debt.
By the great weight of authority, even though TP comes under an obligation to C and there is a principal-surety relationship between TP and D and C knows of this relationship, D's promise is still original if his promise and TP's promise are joint. The theory of these cases is that since the promise is joint there is only one obligation (a joint one) and that, therefore, the obligation in toto must be original. The rule does not apply where the obligation is joint and several because in such a case more than one obligation results.

From what has been said it is concluded that where there is no prior obligation on the part of TP to C at the time that D's promise is made, the promise will be original unless all of the following conditions concur:

1. TP comes under an obligation at least voidable to C.
2. There is a principal-surety relationship between TP and D.
3. C knows or has reason to know of the principal-surety relationship between TP and D.
4. The promise is not joint (in jurisdictions which posit this requirement).
5. The main purpose rule is not satisfied.

If all of these conditions concur the promise is collateral; otherwise it is original.

The main purpose rule will not be discussed here because it is in relation to that rule that the author intends to advance a different hypothesis from that advanced by Professor Conway.

CASES WHERE THERE IS A PRIOR OBLIGATION OWING FROM TP TO C AT THE TIME D MAKES HIS PROMISE

In the previous section consideration was directed to the cases where there is no obligation owing from TP to C at the time that D makes his promise. Here the rules covering the situation where TP is obligated to C at that time shall be discussed.

It is readily apparent that the words of the statute clearly apply to such a situation. It is not surprising, therefore, to find that where TP is

47. Boyce v. Murphy, 91 Ind. 1 (1883); 2 Corbin, Contracts § 361 (1950); 2 Williston, Contracts § 466 (rev. ed. 1936); Restatement, Contracts § 181 (1932).
48. The rules which establish when a promise is joint, joint and several, or several, are studied in the course in contracts and will not be considered here.
49. "If they say 'we promise' or 'we jointly promise,' they are said to be joint promisors and the technical rules of joint contracts are applicable. In such a case there is a fiction that there is only one promise made, even though there are several persons who at different times go through the factual process of promising. This one promise is supposed to create an indivisible 'obligation'..." 2 Corbin, Contracts § 361 (1950). The joint nature of the promise does not prevent a surety relationship from arising. Simpson, Contracts §§ 98-105 (1954).
obligated to C at the time of D's promise, the promise will be held to be collateral unless it falls within one of a number of recognized exceptions to the statute which will now be discussed.

The first exception which is universally recognized arises where there is a novation. This is so whether the novation be denominated legal or equitable. A practical reason for the exception is that if the promise of D causes TP's obligation to be discharged and if D's promise were held to be collateral, C would be in the unfortunate position of being unable to collect the obligation from either TP or D. The legal reason usually given is that advanced by Lord Mansfield in Anstey v. Marden, wherein he states, "I did not see how one person could undertake for the debt of another, when the debt, for which he was supposed to undertake, was discharged by the very bargain."

The second exception arises where D makes his promise to TP rather than to C. A typical illustration is the situation studied in mortgages where the assuming grantee (D) promises the grantor (TP) that he will pay the mortgage debt according to its terms to the mortgagee (C). In that case C may enforce D's promise made to TP under the theory of third party beneficiary or, in some jurisdictions, under the theory of equitable subrogation. As pointed out, the Statute of Frauds under discussion is not a defense to D. The best reason given as to why this should be is that as a result of the promise D becomes the principal debtor and is, therefore, merely promising to pay his own debt.

The question then arises as to what extent a promise made by D to C, after D's promise to TP, is enforceable. Assume a situation in which C is an employee of TP under a hiring at will. TP owes C $1000. TP enters into an agreement with D whereby TP agrees to turn the business over to D in consideration inter alia of D's promise to pay TP's obliga-

52. Hill v. Grat, 247 Mass. 25, 141 N.E. 593 (1923); Annot., 74 A.L.R. 1021, 1025 (1931); 2 Corbin, Contracts § 365 (1950).
53. 2 Williston, Contracts § 477 (rev. ed. 1936).
55. Id. at 131, 127 Eng. Rep. at 409.
56. People's State Sav. Bank v. Cross, 197 Iowa 750, 198 N.W. 70 (1924); 2 Williston, Contracts § 460 (rev. ed. 1936); 2 Corbin, Contracts § 357 (1950).
57. Osborne, Mortgages § 261 (1951).
58. Id. § 262.
59. In New York the promise under consideration would, of course, require a writing to be enforceable but this is because § 1083-c of the Civil Practice Act so requires, and not because § 31 (2) of the Personal Property Law requires. In other words, § 1083-c applies only to the assumption of a mortgage.
60. Aldrich v. Ames, 75 Mass. (9 Gray) 76 (1857); Restatement, Security § 100, comment a (1941).
tion to C. As we have seen, D's promise made to TP to pay C is enforceable by C.

But suppose that one week later D personally promises C to pay him. Is this promise enforceable? So far as the Statute of Frauds is concerned the promise is original. Since D is already the principal debtor he is merely promising to pay his own debt. The courts do not usually consider whether there is consideration for D's promise, but apparently conclude that this is a situation where his promise is enforceable without consideration.

Suppose in the illustration given that D's promise to TP was that he would pay TP's debt to C out of profits and that D makes the same promise to C later. Though in theory both of these promises should be enforceable, New York holds that if no proceeds are in being at the time D makes his promise to C the promise is not enforceable. This is clearly erroneous. However, this is of small practical importance because when proceeds do come into being C may recover on the promise D made to TP.

Suppose further in the illustration given that when D makes his promise to TP, he promises to pay C out of proceeds. Subsequently, D says to C, "If you agree to continue the work that you were doing for TP for six months, I promise to pay you $100 per week and to pay TP's debt to you after one month." There is consideration for D's promises. Is the promise to pay TP's debt after one month original? If not, is the other promise enforceable or must both promises stand or fall together? The answers to these questions depend to a great extent upon the so-called main purpose rule.

61. This is a result of his promise made to TP. See note 60 supra. For the same reason, where one of several co-partners promises personally to pay the whole debt of the partnership, the promise is not within the Statute of Frauds. For this and other cases where this principle applies, see 2 Corbin, Contracts § 391 (1950).

62. 1 Williston, Contracts §§ 143-44 (rev ed. 1936). "[A]nd since it is based upon, and coextensive with, an already existing, legally enforceable duty, it would be held to have a sufficient consideration and to be enforceable as a contract." 2 Corbin, Contracts § 363 (1950).

63. As pointed out above, when D makes his promise to TP he becomes the principal, and so when he makes the same promise to C he is merely promising to pay his own debt.

64. Ackley v. Parmenter, 98 N.Y. 425 (1885).

65. The fact that a promise is conditional should not make the promise unenforceable. It merely means that the promise cannot be enforced until the condition is fulfilled.

66. See notes 57-60 supra and accompanying text.

67. These facts are suggested by the facts in the case of Belknap v. Bender, 75 N.Y. 446 (1878).

68. Though there may be other reasons why there is consideration, it is clear that C, in promising to work six months when the original hiring by TP was at will, is suffering detriment.
The Main Purpose Rule

The main purpose rule is generally stated to have had its origin in the case of Williams v. Leper.69 Outside New York it is all but unanimously agreed that the main purpose rule may be stated in substance as follows: Where the party promising (D) has for his object a benefit which he did not enjoy before his promise, which benefit accrues immediately to himself, his promise is original, whether made before, after, or at the time of the promise of the third party, not withstanding that the effect is to promise to pay or discharge the debt of another.70

It is clear, therefore, that the main purpose rule ordinarily applies, provided (a) there is consideration for D's promise and (b) the consideration is beneficial to him.71 It is also clear that ordinarily the main purpose rule has the same content regardless of when D makes his promise in relation to the time that TP becomes obligated.72

It is generally agreed that the New York main purpose rule is different from the main purpose rule as it generally exists elsewhere.73 A discussion of this difference and its extent may begin with a brief review of the landmark cases74 which culminated in the decision of White v. Rintoul.75

Leonard v. Vredenburgh76 held that so long as the promisor (D) received new consideration for his promise the promise was original. The

71. "It is obvious that any such rule must involve fine distinctions in degree of benefit and difficult questions as to purpose and motive. . . . "Among the questions that may arise are the following: . . . Must the purpose of the promisor be a 'business purpose' as opposed to a social or philanthropic one? Must his interest be a 'pecuniary interest' rather than a sentimental one? . . . How substantial and immediate must be the benefit to the promisor?"- 2 Corbin, Contracts § 366 (1950).
72. At the beginning of the article a distinction was made between cases where there was a prior obligation on the part of TP to C at the time D made his promise to C and those where there was no such prior obligation. The main purpose rule may make the promise original in either contingency. See note 70 supra and accompanying text.
74. Id. at 124-30 has an extended discussion of these cases.
75. 108 N.Y. 222, 15 N.E. 318 (1888).
76. 8 Johns. R. 29 (N.Y. 1811).
fallacy of this position was demonstrated in *Mallory v. Gillett*.

In that case, the plaintiff (C) had made repairs upon the boat of TP and therefore had a lien. D went to C and promised that if C would surrender possession of the boat, he (D) would pay for the repairs. C surrendered possession and when he was not paid brought his action against D. It is clear that under the test of *Leonard v. Vredenburgh* the promise would be original because D's promise to pay is supported by consideration.

The court pointed out that to say that new consideration makes the promise original effectively eliminates the Statute of Frauds since consideration is necessary to support the new promise in any event. The court added that for the main purpose rule to apply not only is consideration for D's promise necessary but in addition the consideration must be directly beneficial to the promisor. At this point New York had adopted the main purpose rule in its generally accepted form.

In *Brown v. Weber* the court of appeals introduced a third element to the content of the New York law when it stated as dictum:

The language shows that the test to be applied to every case is, whether the party sought to be charged is the principal debtor, primarily liable, or whether he is only liable in case of the default of a third person; in other words, whether he is the debtor, or whether his relation to the creditor is that of surety to him for the performance, by some other person, of the obligation of the latter to the creditor.

The court of appeals explained, or attempted to explain, the meaning of this language in the leading case of *White v. Rintoul*. In that case, Wheatcroft and Rintoul (TP) made two notes in favor of the plaintiff (C). Before the maturity date of the notes, D, who was the father of one of the members of the firm, requested that C forbear collection and stated that if C would do so he would see that C was paid. D was a secured creditor of the firm. C complied with D's request and sought to recover from D on his promise. It is apparent that the court might simply have stated that the promise was collateral because the consideration for the promise of D was not sufficiently beneficial to him. However, the court reviewed the earlier cases and concluded as follows:

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

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77. 21 N.Y. 412 (1860).
78. N.Y. Lien Law § 80.
79. The surrender of the boat and the lien is consideration.
80. Conway, supra note 73, at 125.
81. 38 N.Y. 187 (1868).
82. Id. at 189. Before talking about the Statute of Frauds the court had held that C had not performed his contract with D.
83. The benefit, in the sense in which the word is being used, was to TP and not D.
A reading of this language compels the conclusion that three elements must be satisfied before the main purpose rule will apply:

(a) there must be consideration,
(b) it must be beneficial to the promisor, and
(c) the situation must be such that "the promisor thereby comes under an independent duty of payment irrespective of the liability of the principal debtor." 85

A literal reading of the italicized language, however, indicates that these three elements are required for the main purpose rule to apply where "the primary debt subsists and was antecedently contracted." It is submitted that not only this language but the result in at least one court of appeals case can best be explained on the theory that there are two main purpose rules existing in New York: "where the primary debt subsists and was antecedently contracted," then all three elements of White v. Rintoul must be satisfied; but where there was no obligation from TP to C at the time D made his promise to C, then only the first two elements of White v. Rintoul need be satisfied for the main purpose rule to operate. In a word, in the latter situation the New York main purpose rule is the same as the main purpose rule outside New York.

The case of Rosenkranz v. Schreiber Brewing Co.88 exemplifies this

84. 108 N.Y. 222, 227, 15 N.E. 318, 320 (emphasis added).
85. It was to explain the meaning of this requirement that Professor Conway wrote his article. In this connection he also explored the meaning of the language used in Richardson Press v. Albright, 224 N.Y. 497, 502, 121 N.E. 362, 364 (1918), that D's promise "is regarded as original only when the party sought to be charged clearly becomes, within the intention of the parties, a principal debtor primarily liable." The writer agrees with Professor Conway that White v. Rintoul cannot mean that where the D says, "I will pay," his promise is original and that where he says, "I will pay if TP does not," his promise is collateral. Accord, 2 Corbin, Contracts § 358 (1950). As a matter of fact, in Richardson Press v. Albright the promise was "I will pay" and the promise was held to be collateral. See Conway, supra note 73, at 137. The writer also agrees that the words in Richardson Press v. Albright, "within the intention of the parties a principal debtor primarily liable," are not very helpful, for what determines whether D is the principal or surety is not the form of the promise made to C but the situation between TP and D. Conway, supra note 73, at 134. The writer also agrees that until the court of appeals tells us when this third element of White v. Rintoul is satisfied, its meaning will remain to a degree a mystery. The writer disagrees with certain conclusions of Professor Conway but these will be discussed in the body of the article.
86. It is admitted that no New York case has in language adopted the hypothesis to be advanced, but it is submitted that some of the decisions indicate that this has been done.
87. The writer agrees with Professor Conway, supra note 73, at 123 n.20, that a discussion of decisions other than those of the highest court would not appear to be profitable.
The defendant (D) urged the plaintiff (C) to enter into a contract with TP corporation for the improvement of certain premises owned by TP, and promised to be answerable for TP's debt in case of default. D was a brewing company and made the promise because it wished to assure itself of an outlet for its beer to TP. The court of appeals held that the promise was original. Clearly this is a case where there was no prior obligation on the part of TP to C at the time D made his promise. TP undoubtedly came under an obligation to C; there was a principal-surety relationship between TP and D; C knew of this relationship; and the liability of TP and D was not joint. Under the rules explored above the promise should be held collateral unless the main purpose rule applies. Clearly the first two elements of White v. Rintoul are satisfied but the third is not. If this is so, it is reasonable to assert that the third element of White v. Rintoul applies only where there is a pre-existing obligation on the part of TP to C at the time D makes his promise.

This hypothesis would be strengthened if the case mentioned could not reasonably be explained in any other way. Professor Conway, apparently following the lead of the court, suggests that the case can be explained on the theory that D was not a surety but an indemnitee. The court reversed the appellate division. 257 App. Div. 1040, 13 N.Y.S.2d 851 (4th Dep't 1939). The opinion is a per curiam opinion with no reasons given. The lack of understanding of the problem by the trial court and even by the court of appeals is well developed in Conway, supra note 73, at 144.

The court uses the word indemnify and cites Tighe v. Morrison, 116 N.Y. 263, 22 N.E. 164 (1889). That case involved the familiar fact pattern of Newbern v. Fisher, 198 N.C. 385, 151 S.E. 875 (1930). There, a father (I, indemnitee) requested the plaintiff to become a surety for I's son upon a loan which the son was seeking from the bank (C). The defendant (I) orally promised the plaintiff that if the plaintiff became a surety he would protect him from loss. Plaintiff became a surety and was eventually compelled to pay. He sued the defendant upon his oral promise. Is the promise original? Some courts, including the two mentioned above, have held "yes" because the promise was made to a debtor, the surety. As we have seen, a promise to a debtor is original. It is of course true that the surety is a debtor in relation to the creditor. However, as other courts have pointed out, the surety is also a creditor, for he has a right to reimbursement from the principal. These courts have held the promise collateral. See cases cited in 2 Williston, Contracts § 482 n.21 (rev. ed. 1936). For a learned discussion of these four party cases, see 2 Corbin, Contracts §§ 385-87 (1950). The case under discussion, however, is not a four party but a three party case involving D, TP and C. The promise was made by D to C.

"The greatest confusion exists in regard to the question whether promises to indem-
Professor Conway,\(^9\) as does the *Restatement of Security*,\(^8\) defines an indemnitor (insurer) as one who agrees to save a promisee harmless from some loss irrespective of the liability of a third person. In this sense it seems to be generally agreed that the promise of an indemnitor is not within the statute.\(^9\) But the question remains, when in the concrete is there a promise to save harmless irrespective of the liability of a third person, and when is there a promise to answer for the debt, default, or miscarriage of another? This is admittedly a difficult question to answer as evidenced by the difference of opinion between Professors Williston and Corbin on the test to be used in making this determination.

Professor Williston\(^10\) and the *Restatement of Security*\(^11\) state that there is suretyship and not indemnity where the parties (the plaintiff \((C)\) and defendant \((D)\)) expect that a third party \((TP)\) will come under an obligation to \(C\). Professor Corbin\(^12\) states that there is a promise of indemnity where the contract is made solely for the benefit of the promisor \((D)\) and not for the accommodation or benefit of some third person \((TP)\). Professor Corbin, in answering the question of whether a third party was being accommodated, places great weight on whether the third party is an indeterminate third person or a specific third person.\(^10\)

It is clear that under Professor Williston's view the contract in the Rosenkranz case was one of suretyship because the parties contemplated

\(^9\) Conway, supra note 73, at 149.  
\(^8\) Restatement, Security § 82, comment 1 (1941).  
\(^9\) Conway, supra note 73, at 149; Restatement, Security § 82 (1941).  
\(^10\) 2 Williston, Contracts § 482 (rev. ed. 1936). This is due to the fact that the word indemnity has more than one meaning. 2 Corbin, Contracts § 384 (1950). Professor Conway uses the word synonymously with insurer against loss. Conway, supra note 73, at 149. For the distinction between an insurer against loss and liability, see Sorenson v. Overland Corp., 142 F. Supp. 354 (D. Del. 1956); Restatement, Security § 82, comment 1 (1941).

\(^11\) Ibid. Under Corbin's definition a contract of credit insurance would be a contract of indemnity. Professor Conway in his article followed this view. However Professor Corbin concedes that a contract of fidelity insurance is within the statute. 2 Corbin, Contracts § 371 (1950). It might appear that this entire discussion is academic since under either view all contracts of indemnity would in any event be original under the main purpose rule. This is because of the premium received by the insurance company. This argument is rejected by both Professor Corbin, supra, and Professor Williston, 2 Williston, Contracts § 472 (rev. ed. 1936).
an obligation on the part of a third party. Under Professor Corbin's view it is equally clear that the promise in the Rosenkranz case was not one of indemnity. The promise was not solely for the benefit of the promisor, but since TP was a specific designated person the promise was made at least partially for the benefit of TP.

It follows that the result in the Rosenkranz case cannot be explained upon an indemnity theory, and therefore can best be explained upon the theory that the main purpose rule as it exists outside New York is satisfied.

Professor Conway further suggests that the third element of White v. Rintoul is satisfied in the case of an indemnity agreement. This is undoubtedly true, but it does not in any way help to answer when the main purpose rule will be satisfied in New York. As previously pointed out, it is all but unanimously conceded that a promise of indemnity in the sense used is not within the statute. To explain the third element of White v. Rintoul upon the indemnity theory is to say that the New York main purpose rule is not satisfied unless there is a promise of indemnity. Since the fact that there is a promise of indemnity of itself makes the promise original, it is clear that this "explanation" makes the main purpose rule in New York surplusage.

It has been pointed out that the Rosenkranz case cannot properly be explained on an indemnity theory, and that, therefore, it can best be explained upon the theory that the main purpose rule as it exists outside New York was satisfied. It is now suggested that there is a case in New York where all three elements of the White v. Rintoul main purpose rule were satisfied. The case is Raabe v. Squier. But before discussing this case it is necessary to consider a situation which arises quite frequently.

D, an owner of unimproved realty, employs TP, a building contractor, to build a house for D on the latter's land. TP orders material from C who makes deliveries for which TP fails to pay. C tells TP that he will not fill further orders but subsequently agrees to fill further orders of TP

104. Conway, supra note 73, at 150. The word indemnity is used in the sense previously explained.
105. In other words, in the logical order the first question to be asked is: Was this a contract of indemnity? If it is that ends it. It is only where the promise is not one of indemnity that the rules explained above, including the main purpose rule, have to be pursued.
106. Under the theory advanced it was not necessary that the third element of White v. Rintoul be satisfied because there was no prior obligation on the part of TP to C at the time that D made his promise.
107. 148 N.Y. 81, 42 N.E. 516 (1895).
108. The word "orders" is used to convey the idea that there is no contract between C and TP except the unilateral contract which arises on each delivery.
when $D$ agrees to pay the overdue debt of $TP$ and to pay for subsequent deliveries. $C$ fills all orders; $TP$ does not pay. $C$ sues $D$ who sets up the defense of Statute of Frauds. Is the statute in whole or in part a defense?

There are three views. One view is that the promise to pay for past deliveries is unenforceable but the promise to pay for future deliveries is enforceable.\textsuperscript{109} Under this view the promises are said to be severable.\textsuperscript{110} This position does not seem to be supported by logic. If the second promise is enforceable it must be because of the main purpose rule,\textsuperscript{111} that is, there is an immediate, direct benefit to the promisor in the continued erection of his house. If this is a benefit to support the second promise why should it not be a sufficient benefit to support the first promise?

The \textit{Restatement of Security},\textsuperscript{112} for the reason suggested, rejects the doctrine of severability and carries the main purpose rule to its logical conclusion when it holds both promises enforceable.

New York, in the similar case of \textit{Witschard v. Brody \& Sons, Inc.},\textsuperscript{113} held that neither portion of the promise could be enforced. Thus New York agrees with the \textit{Restatement} that the promises are not severable but holds the promises unenforceable because the third element of \textit{White v. Rintoul} is not satisfied.\textsuperscript{114}

In \textit{Raabe v. Squier}, as in \textit{Witschard v. Brody \& Sons, Inc.}, $D$ was the owner of an unimproved piece of realty and entered into a contract with $TP$ under which $TP$ was to construct a building for $D$. $TP$ in turn entered into a contract\textsuperscript{115} with $C$ whereby $C$ agreed to make installment deliveries of woodwork in exchange for $TP$'s promise to pay for each installment delivered. $C$, the plaintiff, delivered the first installment, but $TP$ did not pay until three months later.\textsuperscript{116} The same thing happened when the second delivery was made, and though $TP$ eventually\textsuperscript{117} paid, $C$ refused to make further deliveries under the contract. At this juncture

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\textsuperscript{109.} Peterson v. Paxton-Pavey Lumber Co., 102 Fla. 89, 135 So. 501 (1931).
\textsuperscript{110.} This view appears to contradict the view taken by the courts in relation to the statute that where one promise is within the statute and the other is not, neither is enforceable. Simpson, Contracts 221 (1954).
\textsuperscript{111.} Of course this assumes that $TP$ came under an obligation to $C$ as to future deliveries, for if he did not, there would be no need to consider the main purpose doctrine.
\textsuperscript{112.} Restatement, Security § 93, illustration 1 (1941).
\textsuperscript{113.} 257 N.Y. 97, 177 N.E. 385 (1931).
\textsuperscript{114.} Conway, supra note 73, at 142. It should be noted that here there was a pre-existing duty from $TP$ to $C$ at the time that $D$ made his promise.
\textsuperscript{115.} The existence of a bilateral contract between $TP$ and $C$ was not present in any of the other cases discussed except Brown v. Weber, supra note 81.
\textsuperscript{116.} Since this was an installment contract for the sale of goods, payment and delivery were constructive concurrent conditions. N.Y. Pers. Prop. Law § 126.
\textsuperscript{117.} $TP$ paid before $D$ made the promise referred to later.
D went to C and told him that if he would make further deliveries under the contract D would see him paid, and that if TP did not pay, D "would take it out of the amount [due] . . . and would pay the plaintiffs." C performed and sued for the material delivered subsequent to D's promise.

The court held that the promise was original. Since the language is significant a portion of the court's decision is quoted:

As to the Statute of Frauds it appears to us that its provisions have no application to the case under consideration. In the first place the indebtedness at the time the promise was made has been paid. The promise, in so far as it is here sought to be enforced, related to the indebtedness thereafter to be created. The promisors were the owners of the buildings in process of construction. The woodwork furnished by the plaintiffs was for their benefit. The contractors had neglected to pay the plaintiffs for the material furnished and they refused to deliver more, as they had the right to do. Under such circumstances the promise was made, and it was in reliance upon the promise that the plaintiffs delivered the rest of the woodwork. The promise thus made was original and founded upon a new consideration, that of the goods. It was beneficial, as we have seen, to the promisors, thus bringing the case within the rule stated by Finch, J., in White v. Rintoul in which he says: "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."

118. 148 N.Y. 81, 86, 42 N.E. 516, 518 (1895). The court, in reaching its decision, treats the case as if D had simply said that he would see C paid. However, it is interesting to note that there are conflicting cases on whether the promise to pay out of the amount due, standing alone, is enforceable. There are cases which indicate that such a promise is enforceable, even though TP has not expressly authorized D to pay C out of moneys which D owes to TP, provided that TP is in default or is certain to become so and the promise of D to C is necessary in order to enable TP to perform. This is so only because D's payment to C will extinguish his own debt to TP. Tevis v. Savage, 130 Cal. 411, 62 Pac. 611 (1900); 2 Corbin, Contracts § 363 (1950). But there are cases which indicate that the consent of TP is necessary. Beltman v. Birmingham Paint & Glass Co., 185 Ala. 313, 64 So. 600 (1914). However, as pointed out above, the language under discussion was not the basis for the court's decision.

119. Note that the court is stressing the importance of whether there was an obligation owing from TP to C at the time D made his promise.

120. This is a clear indication that the court is going to rely on the main purpose rule.

121. It would appear that TP had committed a breach which went to the root and essence of the contract which not only justified the plaintiff in refusing to make future deliveries (Restatement, Contracts § 276, illustration 5 (1932)), but also permitted the plaintiff to sue for a total breach of the contract. Harton v. Hildebrand, 230 Pa. 335, 79 Atl. 571 (1911).

122. Prior to this language it would appear that the judge was about to say that White v. Rintoul had no application because there was no prior debt owing from TP to C at the time and that, therefore, the third element of White v. Rintoul need not be satisfied.

123. 148 N.Y. 81, 87-88, 42 N.E. 516, 518 (1895).
Clearly the judge appears to be saying that all three elements of *White v. Rintoul* are satisfied. But how can this be if *White v. Rintoul* applies only where there is a pre-existing debt on the part of TP to C at the time D makes his promise? It is submitted that the judge is saying that the word "debt" appearing in the quotation in *White v. Rintoul* should not be taken in its strict sense\(^{124}\) but that the word is used therein synonymously with the broader word *obligation*.\(^{125}\)

Where was the prior obligation from TP to C at the time that D made his promise to C? Was it in the contract which TP had breached? This breach, as has been pointed out, went to the root and essence of the contract and would have justified C in suing for a total breach. When D made his promise, this obligation of TP, the court appears to reason, continued to exist since there is nothing to show that there was a novation.\(^{126}\) Yet the promise was original, despite the existence of this pre-existing obligation on the part of TP to C, because under the circumstances D came "under an independent duty of payment irrespective of the liability of the principal debtor."\(^{127}\)

For the sake of completeness it must be pointed out that there are other rules which apply in determining whether a promise is original.

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124. That is to say where the writ of debt would lie. 2 Corbin, Contracts § 383 (1950).

125. "At times the word 'debt' has been used restrictively as applying only to an obligation to pay a definite sum of money. Generally its use is much wider, so as to be practically synonymous with such terms as legal duty and legal obligation. . . . The wider usage is the one adopted in applying the statute of frauds." 2 Corbin, Contracts § 347 (1950). This has been anticipated because distinctions have been stated in terms of whether there was a prior obligation on the part of TP to C and not in terms of the existence of a pre-existing debt from TP to C.

126. See note 127 infra.

127. Other explanations of the case of Raabe v. Squier might be offered. For example, it might be argued that there was a novation whereby C discharged TP from his separate obligation under the contract and accepted in return a joint obligation of the two. 2 Corbin, Contracts § 361 (1950). One trouble with this explanation is that the facts do not tend to show a joint undertaking.

It might also be argued that there was not a principal-surety relationship between TP and D because performance by D will not discharge TP "in whole or in part." 2 Corbin, Contracts § 364 (1950). But this is not so. Certainly, any payments by D when future deliveries were made would relieve TP of his duty to pay for them. Furthermore, when C delivered the goods to TP after D's promise, he "waived" the total breach and so D and TP were bound by the same obligation except that TP remained liable to C for the partial breach which had been committed. Canadian Steel Foundries, Ltd. v. Thomas Furnace Co., 186 Wis. 557, 203 N.W. 355 (1925); Restatement, Contracts § 411, comment a (1932).

It might also be argued that this is a promise of indemnity but this does not appear to be true either under Professor Williston's test or Professor Corbin's test. See notes 95-105 supra and accompanying text. In any event, the preferred explanation squares with the language of the opinion.
However, for the sake of brevity, there will be no extended discussion of these rules for they are well known and universally accepted.

The first of these rules is that the Statute of Frauds is not applicable to formal contracts. The second is that the promise of a del credere agent is not within the Statute of Frauds. The third is that the promise of an assignor to his assignee guaranteeing performance by the obligor is not within the Statute of Frauds. It is also the law that a promise to buy a claim is not within the statute.

**SUMMARY**

The author's rules concerning the statute might be summarized as follows:

The promise of a del credere agent to his principal, the promise of an assignor to his assignee guaranteeing performance by the obligor, and

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128. 2 Corbin, Contracts § 360 (1950).
129. Id. § 389. “A del credere agent is one who guarantees to his own principal the performance due him from third persons.” His leading object in so doing is to make a larger commission. The agent is D, his principal is the creditor, and the third parties are the unknown persons to whom the agent surety sells. Since the third parties are indefinite, Professor Corbin explains the result on the ground that the promise of the del credere agent is one of indemnity. Professor Williston, on the other hand, explains the case, as does Professor Conway, by saying that the transaction is incidental to a larger contract. 2 Williston, Contracts § 484 (rev. ed. 1936). If Professor Williston's definition of indemnity is accepted, little reason is perceived why the case would not be explained under the main purpose rule as it exists outside New York. Since New York recognizes this exception (Sherwood v. Stone, 14 N.Y. 267 (1836)), and since in almost all of these cases there is no prior obligation owing from TP to C at the time D makes his promise to C, it could be argued that this is another case where New York had adopted the ordinary main purpose rule in a case where there is no prior obligation on the part of TP.

130. 2 Corbin, Contracts § 390 (1950). Here the obligor is TP, the assignee is C, and the assignor is D. Professor Corbin again explains the case upon an indemnity theory because the promise was made solely for the benefit of the promisor. Professor Williston explains this case upon the theory that the promise is incidental to a larger contract. 2 Williston, Contracts § 484 (rev. ed. 1936). It is again submitted that, if Professor Williston's position on indemnity is accurate, the case can be explained by the main purpose rule as expounded herein. It should be noted that there is no pre-existing obligation from TP (obligor) to C (assignee) at the time D makes his promise. The pre-existing obligation is from TP to D at the time that D makes his promise to C.

131. “The purchaser does not promise to pay the debt; he promises to pay a price for it; and it is contemplated that the claim shall continue in existence.” 2 Williston, Contracts § 480 (rev. ed. 1936). The same result can be reached by saying that there is not a principal-surety relationship between the obligor and the purchaser. “Such a buyer is not a surety in any sense; the debtor owes him no duty of exoneration or any other duty except the one that is purchased; and the buyer’s payment to the creditor will in no wise discharge the debtor except by way of substituting a new obligee.” 2 Corbin, Contracts § 392 (1950). In fact, Professor Corbin seems to apply this rule even to a case where this is not the intention of the parties and appears to swallow up the main purpose rule therein. 2 Corbin, Contracts §§ 366, 395 (1950).
all promises of indemnity as herein discussed are original. Further if the contract is formal the statute does not apply.

In most cases whether a promise is original or collateral can be determined according to the following rules:

Where there is no prior obligation on the part of TP to C at the time D makes his promise, the promise is original unless*

1. TP comes under an obligation at least voidable to C, and*

2. there is a principal-surety relationship between TP and D, and*

3. C knows or has reason to know of the principal-surety relationship, and*

4. the promise is not joint, and*

5. the main purpose rule does not apply (a) consideration, (b) beneficial.

Where there is a prior obligation on the part of TP to C at the time D makes his promise, the promise is collateral unless**

1. there is a novation, or**

2. the promise is made to TP or if made to C is co-extensive with a pre-existing obligation on the part of D, or**

3. the main purpose rule applies (a) consideration, (b) beneficial, (c) the promisor thereby comes under an independent duty of payment irrespective of the liability of the principal debtor,† or **

4. D is a purchaser and not a surety.

* If all of these conditions concur the promise is collateral; if one is missing the promise is original.

** If any of these exceptions are present the promise is original rather than collateral.

† The subdivisions under the main purpose rule are set forth to show the author's opinion that in New York there are two main purpose rules. Where no prior obligation exists the main purpose rule is satisfied where there is beneficial consideration. Where there is a prior obligation, then beneficial consideration is not enough but the third element of White v. Rintoul must be satisfied.

132. See note 133 infra.
It is submitted that the rules as stated present a workable approach to any problem in this area.\textsuperscript{133}

\textsuperscript{133} It might profitably be asked whether some of the considerations on one side of the chart are not relevant on the other. Attention may be directed first to whether any factors listed on the left hand side of the chart could have any relevance to a case where there was a prior obligation on the part of TP to C at the time D made his promise. Clearly, (1.) has no application, because by hypothesis TP is already obligated at the time D makes his promise; (2.) on the left and (4.) on the right are roughly equivalent. The question of whether C knew or had reason to know of the suretyship relation in a case where TP was already obligated to C would seem academic because if the promise is made to TP, the promise is original anyway; if the promise is made to C, almost invariably C will know or have reason to know of the principal-surety relationship.

The fact that the promise is joint could appear to be relevant in a case where there was a pre-existing obligation but only in connection with a novation. This has previously been discussed in connection with note 127 supra. The main purpose rule applies in either case.

Do the considerations on the right hand side of the chart have any relevance to a case where there is no prior obligation on the part of TP to C at the time D made his promise? Obviously not, except for the main purpose rule, because the other three presuppose the existence of an obligation from TP to C. The only question which could arise is what would happen if the parties supposed there was an obligation and in fact there was none. These are contract questions. The answer in the case of a novation is contained in 6 Williston, Contracts § 1872 (rev. ed. 1936). In the case of the promise by D to assume a debt supposedly owed to C, there is a split of authority as to whether C can enforce the promise as a third party beneficiary or an equitable subrogee. 2 Williston, Contracts § 386A (rev. ed. 1936); 4 Corbin, Contracts § 796 (1950).