much broadened, and will enable him to join additional defendants where in the past he had been deprived of the right through inability to secure service on a non-resident party.[90]

It may be objected that this enlarged power to secure service can be entirely destroyed by the act of the plaintiff. It is true that if the original suit is instituted in a county other than where the transaction took place or the cause of action arose the right to extraterritorial service is lost. However, the basis of the right is also lost, since you are not forcing the third party to defend at the place where his liability-creating conduct took place or where the right arose as a result of such conduct, and the defendant has no ground on which to claim the extraterritorial service.

V. Conclusion

From the preceding discussion it should be clear that the new rules afford an opportunity to eliminate many of the evils existing under the old procedures. Certainly the litigation on the mechanics of the device which proved so troublesome heretofore has been largely eliminated. An exception may exist in the motion to dismiss which in practice may prove too cumbersome and all-inclusive to be satisfactory. Possibly, also, questions will arise over the grounds for joinder owing largely to the restricted interpretation placed on the joinder provision of the *Sci Fa* Acts. As was pointed out, the difficulty is to a great extent theoretical, since joinder has been permitted in violation of the express terms of the *Jones* case where the policy which necessitated that decision was not involved. Nevertheless the possible limitations inherent in the rule of that case should be removed, now that the express indemnitor can be adequately protected by the discretionary power of the trial court. This discretionary power will probably be subjected to a great deal of criticism, largely because it is a new and untried method radically modifying previous Pennsylvania procedure. It should be remembered that change was necessary and that the method has been used successfully in other jurisdictions. However, the benefit to be derived from it and from the general increase of power vested in the trial court will be directly proportioned to the care and effort expended on its exercise. That it can be rendered practically valueless by perfunctory application is well illustrated by the confusion and inconvenience permitted to continue during the past ten years while a simple remedy existed in the trial court's power to sever issues in complicated cases. On the manner of application the success of the new procedure depends; only time can show whether the remedy promised will actually materialize.

T. A. O'B.

NOTE

Oral Suretyship Contracts and the Leading Object Rule in Pennsylvania

A creditor unable to collect from his irresponsible debtor is admittedly in an unfortunate position, and desire to avoid this has led many a creditor to fabricate a claim that a third person had orally promised to pay the debt. Prior to the Statute of Frauds, the temptation was great because the possibility of success in establishing such a claim was greatly enhanced

90. See explanatory remarks to Rule 2254. See also Rule 2131 (c) (service on a partnership), and Rule 2157 (c) (service on an unincorporated association), which give the same right of service.

by the susceptibility of such an oral promise to proof contrary to fact. Thus, the obvious purpose behind the enactment of that section of the statute requiring a promise to answer for the debt, default or miscarriage of another to be in writing [1] was to remove this temptation, and to prevent the successful prosecution of claims of this nature.[2] Yet at the very outset it became equally obvious that a strict construction of the statute would be as likely to effectuate a fraud by the promisor as to prevent one by the creditor, and there has long been a tendency on the part of the courts to narrow the effect of the statute in certain instances.[3]

In attempting to define the type of case in which the application of the statute is generally denied, it is helpful to consider, from an abstract point of view, the reasons behind the legislative discrimination between a promise to pay one's own debt and a promise to pay that of another. The most apparent distinction between the two situations is that the former involves, in addition to the alleged promise, an indebtedness, which is difficult to prove contrary to fact and which of itself is indicative of a liability in the person directly benefited. Further analysis shows that the ordinary contract requirement of consideration can be easily satisfied in the latter situation without raising any suspicion as to the liability of the supposed promisor. For where the promise of *S* is allegedly given before the debt is incurred it, as well as the promise of *P*, the principal debtor, is sufficiently supported by the extension of credit to *P*, and where the alleged promise is to pay a pre-existing debt of *P's* it is supportable by any detriment to *C*, the creditor, such as forbearance to sue *P* or dismissal of suit against him. In neither case is the nature of the consideration suggestive of a promise by *S*. Thus it is logical to suppose that the legislative discrimination above-mentioned was dictated by a twofold desire: (1) to hold an honest man who has received no apparent benefit only in accordance with his exact promise; and (2) to remove the possibility of success, on the part of the creditor with a worthless claim, in fabricating a case against a third party, where the only thing indicative of liability in such party as well as the only thing necessary to be established contrary to fact is an oral promise. So the courts have reasoned that the statute was never intended as an aid to a person, upon whom valuable benefits have been directly conferred, in avoiding any inquiry into whether or not he promised to pay therefor, even though payment would result in extinguishing the debt of another, and have been in general agreement in removing this class of cases from the scope of the statute.[4] However, the

1. 29 CAR. II, c. 3, § 4 (1676). Pennsylvania did not include this section in its original statute of frauds, and it was not until 1855 that a substantially similar act was passed: "No action shall be brought whereby to charge . . . the defendant, upon any special promise, to answer for the debt or default of another, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him authorized." PA. STAT. ANN. (Purdon, 1930) tit. 33, § 3.

2. *See* ARNOLD, SURETYSHIP AND GUARANTY (1927) § 39.

3. *See* ARANT, SURETYSHIP (1931) § 31, and cases cited therein. Substantially, cases in which the statute has not been applied are merely illustrations of an evasion of the statute. Being promises to pay the debt of another, whether or not incidental to a broader purpose of the promisor, the instances referred to would seem to be clearly within the wording of the statute.

The historical reluctance of equity courts to give effect to the statute of frauds even as to its other sections should be kept in mind as a partial explanation of the judge-made exceptions to the various sections of the statute.

4. *Ibid.* Such a result might be justified by drawing an analogy to the equity doctrine of partial performance in removing oral contracts for the sale of interests in land from the statute of frauds. *See* WALSH, EQUITY (1930) § 77 *et seq.* But some states reject this doctrine completely. *Id.* at 403. Perhaps the harsh results of rigid application have been lessened therein by early education.

difficulty of phrasing any general rule to cover all the factual situations arising has led to much confusion.[5]

In their efforts to evade the statute, the courts have evolved certain general propositions. For an alleged oral promisor to invoke the protection of the statute there must be an obligation from a third person to the promisee to which the alleged promise can be collateral,[6] the promise being allegedly made to the creditor,[7] and to pay out of the promisor's own substance.[8] The confusion arises in the effort to further narrow the application of the statute, when all of the aforementioned requirements are satisfied, by removing from its reach cases in which the alleged promisor is apparently seeking to promote his own interests and has received a consideration more or less advantageous to him. Perhaps one of the most common of the several tests devised to accomplish this end is that dubbed the "main purpose" or "leading object" rule, which received its impetus in an early Massachusetts case,[9] and to which the Pennsylvania courts have given voice in the following terms:

> ". . . when the leading object of the promise or agreement is to become guarantor or surety to the promisee, for the debt for which a third party is and continues to be primarily liable, the agreement, whether made before or after, or at the time with the promise of the principal, is within the statute, and not binding unless evidenced by writing. On the other hand, when the leading object of the promisor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay or discharge the debt of another, his promise is not within the statute." [10]

From an examination of the rule as stated, certain inconsistencies appear. When it is remembered that the purpose of the statute was to remove the likelihood of imposing liability on an innocent person on the basis of a promise he did not make, it is curious to note that a rule, drawn to effectuate a more equitable application of this statute, by its very declaration, assumes in the first instance that the promise was made, and then goes ahead to inquire into the purpose of the promisor in making it. Needless to say, it was not the purpose of the statute to provide relief for one who has actually promised, and whose promise is supported by the requisite legal consideration, merely because the promise was promoted by a desire to aid another. Again it has been seen that the class of cases to which the statute should not be applicable is that in which the alleged promisor has received a consideration beneficial to himself and of such a nature as to be, of itself, indicative of a promise by the receiver. Yet the test to be applied to determine whether or not a case can be properly included in such classification emphasizes not the nature of the consideration involved but rather the state of mind of the promisor in making the promise, not the benefit actually received but the advantage sought. Such emphasis substitutes for a palpable basis on which to infer the existence of a prom-

5. *See* 2 WILLISTON, CONTRACTS (1936) §§ 462, 467 *et seq.*

6. Lieberman v. Colahan, 267 Pa. 102, 110 Atl. 246 (1920); Black v. Bernheimer, 66 Pa. Super. 41 (1917); *see* ARANT, *op. cit. supra* note 3, § 33 and cases cited therein.

7. *See* ARANT, *op. cit. supra* note 3, § 32 and cases cited therein. *But see* Fehlinger v. Wood, 134 Pa. 517, 524, 19 Atl. 746, 748 (1890).

8. Stoudt v. Hine, 45 Pa. 30 (1863); Fehlinger v. Wood, 134 Pa. 517, 19 Atl. 746 (1890); Collins v. Herwick, 109 Pa. Super. 413, 167 Atl. 474 (1933); *cf.* Seabrook v. Betz, 308 Pa. 333, 162 Atl. 260 (1932); *see* ARANT, *op. cit. supra* note 3, § 34 and cases cited therein.

9. Nelson v. Boynton, 3 Metc. 396 (Mass. 1841).

10. Nugent v. Wolfe, 111 Pa. 471, 480, 4 Atl. 15, 17 (1886).

ise a nebulosity often difficult to determine to any satisfactory degree, and equivocal in its implication.[11] In substance, at least, the leading object rule is based upon common sense. But its very vagueness, perhaps purposeful in the beginning to enable further evasions of the statute, has led to conflicting results and lack of uniformity.

I. Development of Rule in Pennsylvania

The dictum of Chancellor Kent of New York in *Leonard v. Vredenburgh,*[12] to the effect that a promise to pay the debt of another is not within the statute when it arises out of some new and original consideration of benefit or harm moving between the newly contracting parties,[13] antedated the declaration of the leading object rule by about thirty years, and after much criticism has been generally discarded as too loose.[14] The difficulty is that, under such doctrine, any consideration of detriment to the creditor or promisee is sufficient to remove the promise from the protection of the statute, and yet, as has already been seen, this situation is squarely within the evils contemplated by the statute.

The next step in formulating the rule was taken by Chief Justice Shaw of Massachusetts in *Nelson v. Boynton,*[15] a leading case on the subject:

> ". . . cases are not considered as coming within the statute, when the party promising has for his object a benefit which he did not before enjoy, accruing immediately to himself; but where the object of the promise is to obtain the release of the person or property of the debtor, or other forbearance or benefit to him, it is within the statute." [16]

The emphasis is here shifted to the beneficial nature of the consideration, yet *Arnold v. Stedman,*[17] one of the earliest Pennsylvania cases on the subject, failed to distinguish the Massachusetts rule from Kent's, citing both with approval. *C* had a mechanic's lien on *S's* land for work done thereon for *P,* prior possessor, and *S* orally promised *C* that he would pay, *C* agreeing to stop proceedings. On *C's* suit to enforce this promise the protection of the statute was denied because the consideration was beneficial to *S,* because it was a new and original one arising between *S* and *C* independently of *P's* debt, and because *S's* object was to subserve a purpose of his own. The impossibility of determining the precise ground upon which the decision was based made obvious the need for further clarification, and, at least so far as it terminated the existence of Chancellor Kent's doctrine in Pennsylvania, this need was supplied by the case of *Maule v. Bucknell,*[18] decided two years later. Here *S* orally promised *C,* director, stockholder and creditor of *P* company, that he would pay *P's* debts, including the one owed to *C,* if *C* would transfer to him certain stock and resign his office, thereby enabling *S* to become a director and gain control. On suit by *C* to enforce this promise, the court, stressing the collateral nature of the promise and the continuance of *P's* original liability, held the promise to be within the statute and hence unenforceable. The *Leonard*

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11. *See* Arant, *op. cit. supra* note 3, at 113.
12. 8 Johns. 29 (N. Y. 1811).
13. *Id.* at 39.
14. *See* Townsend v. Long, 77 Pa. 143, 146 *et seq.* (1874); 2 Williston, *op. cit. supra* note 5, at 1358.
15. 3 Metc. 396 (Mass. 1841).
16. *Id.* at 402.
17. 45 Pa. 186 (1863).
18. 50 Pa. 39 (1865).

case dictum was expressly disapproved [19] and the *Arnold* case was distinguished as coming within a recognized exception to the statute wherein the promisor's property was liable for the debt independent of his express promise, *S* undertaking to pay the debt of the property.[20] The court here indicated satisfaction in observing a recent tendency to construe the statute more strictly.[21] Yet it is probable that had the leading object rule, which, curiously enough, was not mentioned by the court in spite of discussion in briefs of counsel, been more fully developed at this time an opposite result would have been forthcoming. Basically, anyway, it seems apparent that such a factual situation does not readily lend itself to proof contrary to fact.

It remained for the leading case of *Nugent v. Wolfe*,[22] some twenty years later, to introduce the rule, as previously quoted, in its modern form, the courts in subsequent cases being content to quote the rule as stated therein rather than attempt a different phraseology.[23] In the *Nugent* case, *X* had obtained a judgment against *P*, and *S* persuaded *C* to go security for stay of execution on this judgment, orally promising to indemnify *C* for any loss he should suffer thereby.[24] *C*, being forced to pay, sued *S* on his oral promise, and the court in denying recovery applied the rule to bring the case within the statute, saying that the only consideration for his promise was a detriment to *C*, *S* having no personal interest involved. From this it seems to follow that although the declaration of the rule stresses the object of the promisor, either the nature of the consideration or the actual existence of a personal interest is the controlling factor in its application. The remainder of this note will be devoted to an effort to discover just what circumstances are stressed by the Pennsylvania courts in their application of the rule, and whether the results reached thereby approach any workable degree of consistency.

II. Application

(a) *Personal Interest of Promisor as Ultimate Test*

In very few, if any, cases has the court been disposed to remove oral promises to pay the debts of another from the statute of frauds upon the sole ground that the object of the promisor is to subserve an interest of his own. Indeed the improbability of determining the promisor's object without resort to some external standard is inherent in the test as stated. As the test seems to be applied the existence of a promise is assumed for the moment and inquiry is made into the surrounding circumstances to determine, if possible, the reasons which would be likely to generate such a promise. If, in the light of such circumstances, the probability of the existence of a promise is not too remote, the court considers itself justified in submitting to the jury the question of whether or not the promise was

19. *Id.* at 53.
20. *Ibid.*
21. *Id.* at 51.
22. 111 Pa. 471, 4 Atl. 15 (1886).
23. *But see* Klein v. Rand, 35 Pa. Super. 263, 269 (1908) wherein the court purports to follow the United States Supreme Court rule of somewhat different emphasis. Emerson v. Slater, 63 U. S. 28, 43 (1859). *See* Note (1932) 17 St. Louis L. Rev. 348, 352, 358 *et seq.*
24. There is considerable conflict between different jurisdictions as to whether contracts of indemnity are, in the first instance, covered by the statute of frauds. The *Nugent* case takes the affirmative view in a well-reasoned opinion. *See* 2 Williston, *op. cit. supra* note 5, § 482; Arant, *op. cit. supra* note 3, § 37. Pennsylvania adopts the view, apparently a minority one, that the statute is applicable to such contracts: Nugent v. Wolfe, 111 Pa. 471, 4 Atl. 15 (1886); Bayard v. Penna. Knitting Mills, 290 Pa. 79, 137 Atl. 910 (1927); *but cf.* Elkin v. Timlin, 151 Pa. 491, 25 Atl. 139 (1892).

in fact made.[25] The presence of what circumstances justifies such procedure is the subject of considerable disagreement, and the uncertainty caused thereby makes prediction hazardous, although the confusion seems for the most part to arise from the language used rather than from actual results reached.

As a general proposition it has been noted that the mere presence of consideration is insufficient to remove the promise from the statute. A contrary view would render the statute a nullity, since consideration is necessary to support the promise even in absence of the statute. On the other hand, when it appears that the original liability is released on the making of the new promise, the statute is inapplicable since there is no obligation from a third person in existence.[26] Thus the utility of the leading object rule, however applied, depends upon the continuance of the original liability and upon the presence of something more than the consideration requisite to a binding contract.[27] Perhaps one of the more obvious factual situations to which the rule has been applied is that in *Elkin v. Timlin*,[28] where *S* and *P* desired to sell their individual interests in a tract of land, *C* agreeing to buy both interests, but not either without the other. When *P's* deed was offered to *C*, he objected to taking it, fearing there might be judgments against *P*, but was induced to do so by the oral promise of *S* to stand good to him for all judgments against *P*. *C*, suffering loss, sued *S* on his promise, and recovery was allowed because *S* benefited in the disposal of his interest in the land which could not have been accomplished without inducing *C* to accept *P's* deed. Likewise in *Bailey v. Marshall*,[29] where *C*, judgment creditor of *P*, refrained from bidding on *P's* property at sheriff's sale on the strength of *S's* promise to see *C's* judgment against *P* paid, and *S*, also a judgment creditor of *P*, was thereby enabled to buy in the property at his own figure, the court enforced his promise, saying that his sole purpose was to silence *C* as an antagonistic bidder and that he reaped the full fruits thereof. In each of these cases the consideration for the alleged promise actually operated to *S's* pecuniary advantage.[30]

On the other hand, in *Bayard v. Penna. Knitting Mills*,[31] where *S*, a new corporation organized to take over the stock of *P* corporation in

25. *But see* Paul and Russell v. Levitties, 95 Pa. Super. 92, 94 (1928) where the court splits the case into two questions: (1) whether the promise was in fact made, and (2) if made, was it a promise to "answer for the debt or default of another", and therefore not actionable under the statute, or an original undertaking to subserve the defendant's own interests and purposes. That this approach is incorrect has been noted. See p. 210 *supra*.

26. Merriman v. McManus, 102 Pa. 102 (1883); *see* Burr v. Mazer, 2 Pa. Super. 436, 440 (1896); *but see* Shoemaker v. King, 40 Pa. 107, 110 (1861) where it is said that the promise cannot be removed from the statute so long as the old debt remains. However, the continuance of the original debt is no longer conclusive.

27. There is some tendency to make use of the leading object rule even though it is apparent that the new agreement was made in discharge of the original debtor, or that there never was an obligation from a third person: Burr v. Mazer, 2 Pa. Super. 436 (1896); Electro-Tint Engraving Co. v. Eckels & Co., 115 Pa. Super. 509, 175 Atl. 876 (1934).

28. 151 Pa. 491, 25 Atl. 139 (1892).

29. 174 Pa. 602, 34 Atl. 326 (1896).

30. *Accord:* Landis v. Royer, 59 Pa. 95 (1868); Pizzi v. Nardello, 209 Pa. 1, 57 Atl. 1100 (1904); Weber & Co. v. Bishop, 12 Pa. Super. 51 (1899); Baxter v. Hurlburt, 15 Pa. Super. 541 (1901); *but cf.* O'Hara's Estate, 118 Pa. Super. 558, 180 Atl. 86 (1935). Where the promisor has a real interest in property which he wishes to release from the creditor's grasp, the answer seems clear: HANNA, CASES ON SECURITY (1932) 352. But the indication is that the statute applies where the only advantage gained was compensation for becoming security. *See* RESTATEMENT, CONTRACTS (1932) § 184.

31. 290 Pa. 79, 137 Atl. 910 (1927).

reorganization proceedings, promised *C* that if he guaranteed payment of debts of *P*, he would be indemnified from loss by *S*, the court, in denying recovery on this promise for loss sustained, said that *S's* interest as prospective shareholder in promoting the financial success of the company was not sufficient, not being an individual interest but rather one shared with all other stockholders.[32] The failure of the court to inquire into the benefit actually acquired by *S* as a result of the transaction suggests that the character or sufficiency of the interest present is more important. The inference is that if *S's* interest in the corporation, whether as director, officer, creditor, or substantial stockholder, is individual and not such as is shared by every other stockholder or creditor, the promise will be enforced.[33] This principle seems to be further born out in *Kirby v. Kirby*,[34] although an opposite result was reached. *S*, widow of *P* who had died indebted to *C*, promised *C* she would pay the debt if *C* did not sue the estate. Recovery was allowed on the promise in spite of evidence that the estate was very small, the court saying that *S* had an interest of her own in the transaction and her promise was therefore to subserve a purpose of her own, namely, keeping whatever estate *P* left. It did not appear whether the estate would have been sufficient to pay the debt, but the court treated this as of no importance.[35] Thus it appears that the denial of the protection of the statute is not made to depend on the showing of a profit resulting from the transaction. The question in the background of both the *Bayard* case and the *Kirby* case seems to be whether *S's* personal interest is of such a nature that it points unequivocally to him as the promisor. This question could have been answered affirmatively in either the *Elkin* case or the *Bailey* case, but any emphasis on the advantage actually gained by *S*, as expressed in these cases, would seem to dictate opposite results in both the *Bayard* case and the *Kirby* case. This necessitates the conclusion that the nature or sufficiency of the interest rather than the benefit actually received is of more importance, since it is only on the former ground that the cases can be reconciled.[36]

(b) *Necessity of an Original Undertaking*

There has been, however, surprising consistency in requiring that the leading object rule be applied in such a way as to show an original rather than a collateral obligation on the part of the promisor, an obligation to pay his own debt even though payment results in extinguishing the debt of another, before the promise can be removed from the statute.[37] Thus in *Lewis v. Lewis Lumber Mfg. Co.*,[38] *S*, lumber company, contracted with *P*, jobber, to peel and pile bark. *P* employed *C* to work on the job,

32. *Accord:* Sharp v. Levan, 236 Pa. 374, 84 Atl. 915 (1912); *but cf.* Goodling v. Simon, 54 Pa. Super. 125 (1913). On the general situation elsewhere *cf.* Harburg India Rubber Comb Co. v. Martin, [1902] 1 K. B. 778; Hurst Hardware Co. v. Goodman, 68 W. Va. 462, 69 S. E. 898 (1910).

33. Goodling v. Simon, 54 Pa. Super. 125 (1913).

34. 248 Pa. 117, 93 Atl. 874 (1915).

35. *Id.* at 119, 93 Atl. at 874. The payment of interest on the debt by *S* for eight years must have been treated as an added factor pointing to *S's* liability, although the court did not expressly so treat it. This would seem a good case for application of the analogy suggested *supra* note 4.

36. The interest must be of a pecuniary or business nature rather than of the sort arising out of family relationship or love and affection. Kaestner v. Robling, 6 Lack. Jur. 366 (Pa. 1905).

37. Bailey v. Marshall, 174 Pa. 602, 34 Atl. 326 (1896); Kelly v. Baun, 6 Pa. Super. 327 (1898); *cf.* Stouffer v. Jackson, 42 Pa. Super. 450 (1910). *See* ARNOLD, *op. cit. supra* note 2, § 64. But the distinction between an original and a collateral undertaking seems specious and impossible of uniform application in the cases.

38. 156 Pa. 217, 27 Atl. 20 (1893).

and after some time *C* began to fear he would not get paid by *P* if he continued to work for him. *S* persuaded him to continue by promising to see him paid. The court denied recovery on this promise on the ground that it was purely a collateral undertaking to pay after *P's* default and hence squarely within the statute.[39] And in *Corcoran v. Huey*,[40] on substantially similar facts, where *S's* promise was in the terms: "we will see to it that you are paid", the court, adopting without discussion the view that an original undertaking must be made out, said it was proper for the jury to determine under all the circumstances whether the undertaking of *S* was original or collateral, the form of the promise in itself not being inconsistent with an original obligation, nor being conclusive of either type of obligation.[41] This requirement seems to have arisen out of a desire to satisfy the wording of the statute and to avoid the criticism that removal of such promises from the operation of the statute is judicial legislation. That the position thereby taken is inaccurate is apparent from a reference to the nature of promises to pay the debts of another to be incurred in the future.

It is clear that the promise to pay for goods or other consideration inuring to the benefit of a third person, without more, is not such a promise as is contemplated by the statute since there was never any liability imposed upon or credit extended to the third person, the promise being only to pay the promisor's own debt.[42] When it becomes difficult to determine to whom credit was extended, the form of the promise as well as the surrounding circumstances are taken into consideration, the question being primarily one of fact for the jury. But when it appears that the credit of the third person as well as that of the promisor was some inducement to the advancement of the consideration, and the third person receives the benefit thereof, the third person becomes the principal debtor and the promisor is merely a surety, regardless of the arrangement *inter sese*.[43] The dogma is that one *quid pro quo* cannot give rise to two original debts,[44] and since the receiver of the benefit becomes the debtor, the promisor is necessarily within the protection of the statute as one whose liability is secondary or collateral to that of the principal debtor, unless the obligation was a joint one.[45] Whether or not this view be taken as accurate for all purposes, brief reflection will show the desirability for its acceptance so far as the statute of frauds is concerned. For if the applicability of the statute is made to depend on whether or not the promise of *S* was in the same terms as that of *P* and not conditioned on *P's* default, the only effect of the statute would be to cause *C*, having failed to recover from *P*, to allege an absolute rather than a conditional promise which is perhaps just as susceptible of proof contrary to fact, and there is, again, nothing else indicative of liability in *S*.[46] Thus it would seem that removal of such a promise from the statute under the leading object rule should not be made to depend on whether a primary or original obligation on the part of the

39. *Accord:* Rancil v. Krohne, 31 Pa. Super. 130 (1906).
40. 231 Pa. 441, 80 Atl. 881 (1911).
41. *Accord:* Gable v. Graybill, 1 Pa. Super. 29 (1895); 2 WILLISTON, *op. cit. supra* note 5, § 465.
42. See note 6 *supra*.
43. *See* BROWNE, STATUTE OF FRAUDS (5th ed. 1895) § 197; 2 WILLISTON, *op. cit. supra* note 5, § 466.
44. *Ibid.*
45. *Ibid. But see* ARANT, *op. cit. supra* note 3, § 35.
46. "If joint and several liability may be orally created, it seems difficult to see why several liability may not be." 2 WILLISTON, *op. cit. supra* note 5, at 1346. *See* RESTATEMENT, CONTRACTS (1932) § 181.

promisor can be made out.[47] Indeed in *Kampman v. Pittsburgh Contracting & Engineering Co.*,[48] the most recent pronouncement by the Supreme Court on the subject, the court, although continuing to pay lip service to the requirement of an original undertaking,[49] reached a result opposite to that in the *Lewis* case on facts hardly distinguishable therefrom. *C*, materialman, had been supplying materials to *P*, subcontractor, and, becoming doubtful of *P's* ability to pay either for the materials already supplied or for those ordered, threatened to stop furnishing them. *S*, general contractor, persuaded him to continue by promising to see him paid, and *C*, in supplying further goods, continued to bill *P* therefor. In allowing recovery, the court at first professed to decide that *S's* undertaking was primary, but on being confronted with the argument that *C* continued to bill *P*,[50] was inclined to approve the position taken by the *Restatement of Contracts* which clearly allows recovery on the oral promise, although conditioned on *P's* failure to perform.[51]

As a fundamental proposition, it would seem that the requirement of an original undertaking, rather than being a part of the leading object rule, is quite distinct therefrom, and a prerequisite to removal of a promise from the statute additional to sufficiency of interest. For, as illustrated in the construction cases, where the promisors' interests are always of a similar nature, the conflicting results reached can be explained only on the ground that an original obligation was or was not made out.

III. Conclusion

That the "main purpose" or the "leading object" of the promisor does not control the operation of the statute seems apparent. In the first place necessity for resort to the surrounding circumstances in determining a state of mind is obvious and suggests that one or some of these factors aiding in the determination is of more significance than an ultimate conclusion as to purpose or object. In the second place the results of the cases cannot be reconciled by the application of such a test. Where a stockholder of a corporation promises to pay a debt owed by it, his purpose to promote his own financial interests is scarcely to be denied, yet it has been seen that this is not controlling.[52] Again, in the typical construction contract where the general contractor promises to pay the materialman both for materials already supplied and those to be supplied to the subcontractor, emphasis on his purpose in making the promise may well lead to enforcement of the promise to pay for future supplies but not for supplies furnished prior to the making of the promise.[53] But such a distinction has not been made in the cases.[54] Further, the express conditioning of the promise on the failure of the principal to pay is strong evidence that the promisor's purpose was to answer for the default of an-

47. The foregoing discussion is directed toward situations in which the extension of credit to the principal occurred subsequent to the time of *S's* promise, for it is recognized that an obligation incurred subsequent to the extension of the credit can be original or primary, although the old debt continues and is incidentally discharged by the satisfaction of such obligation. However, this discussion is persuasive for the rejection of the requirement in the latter case as well for the sake of consistency.

48. 316 Pa. 502, 175 Atl. 396 (1934).

49. *Id.* at 504.

50. *Id.* at 506.

51. Restatement, Contracts (1932) § 184, illustration 1. This appears to be a minority rule, however: Note (1935) 99 A. L. R. 96.

52. See p. 214 *supra*.

53. *See* Arant, *op. cit. supra* note 3, at 123.

54. Pizzi v. Nardello, 209 Pa. 1, 57 Atl. 1100 (1904); Kampman v. Pittsburgh Contracting Co., 316 Pa. 502, 175 Atl. 396 (1934).

other. But that the form of the promise is of no greater importance than the other surrounding circumstances has been observed.

While the actual receipt of a benefit by the promisor has generally been applied as the test,[55] it seems that the courts are limiting the scope of the statute to even a greater degree in enforcing promises regardless of the advantage gained [56] and in spite of the fact that the consideration is not inherently beneficial to the promisor, where the surrounding circumstances and application of the foresight rule show that the alleged promisor occupies a position wherein he is peculiarly susceptible to the acquisition of an advantage as a result of the creditor's course of conduct. The nature of the whole subject does not permit of a more accurate definition, and although the courts are apparently concerned with the presence of an individual pecuniary interest in the promisor, results are bound to vary with the personnel of the courts. The objective in all the cases is to discover something of substance aside from the promise itself which makes it likely that a promise was actually made, and while the actual receipt of a benefit by the promisor strengthens such an inference, the courts do not always look on this factor as an essential or as the ultimate test.

Finally, to apply the statute to a situation wherein the undertaking is found to be collateral, although a sufficient pecuniary interest in the promisor is obviously present and being served, is to attach an arbitrary and technical impediment to what originated as a rule for the more equitable application of the statute. The more desirable view, tendency toward which is manifested in the *Kampman* case, considering the presence of an original undertaking as not essential, does not increase the likelihood of the evils contemplated by the statute, and more general adoption of such view would do much to eliminate confusion and establish a reasonable uniformity in applying the so-called "leading object" rule. The only justification for the other view was to avoid the criticism of judicial legislation, the existence of which, so far as the statute of frauds is concerned, is widespread throughout the country.

S. W. F.

55. See note 30 *supra.*
56. See p. 210 *supra.*