1946

Suretyship and the Statutue of Frauds: A Survery of the Minnesota Law

Stefan A. Riesenfeld

William E. Mussman

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation

https://scholarship.law.umn.edu/mlr/2336

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
SURETYSHIP AND THE STATUTE OF FRAUDS: A SURVEY OF THE MINNESOTA LAW

By Stefan A. Riesenfeld* and William E. Mussman**

I. SCOPE AND PURPOSE OF THE INQUIRY

TTHE YEAR 1677 marks a very important although probably not altogether propitious event in the history of Anglo-American law. In that year the celebrated Statute of Frauds was enacted, mainly through the joint efforts of Lord Nottingham and Chief Justice North together with other famous contemporary jurists including, in all likelihood, Sir Matthew Hale. Hardly any lawyer will disagree that this act and its American counterparts have been among the most controversial and most frequently litigated pieces of legislation in English speaking countries.

The first treatise on the Statute known to the writers appeared a little more than 125 years after its enactment, and in the preface the author informs us that from the days of Lord Mansfield "... a diversity of sentiment has prevailed with respect to the utility of the great Statute of Frauds and Perjuries." Surveying the pronouncements for and against the act he concluded that they were

*Professor of Law, University of Minnesota.
**Instructor of Law, University of Minnesota.

129 Car. II., chp. 3. An Act for the Prevention of Frauds and Perjuries.
2Date and authorship of the statute were for a long time uncertain and in dispute. The results of the most modern and convincing research can be found in Costigan, The Date and Authorship of the Statute of Frauds, (1913) 26 Harv. L. Rev. 329; Flemming, The Original Drafts of the Statute of Frauds (29 Car. II c. 3) and Their Authors, (1913) 61 U. Pa. L. Rev. 283; and 6 Holdsworth, A History of English Law (2nd ed. 1924) p. 379. Wrong and misleading is Hawkins, Where, Why and When Was the Statute of Frauds Enacted, (1920) 54 Am. L. Rev. 867.

fairly balanced. But in recent days the current of opinion seems to have swung to a condemnation of both the wisdom and beneficial effect of the statute, although voices of praise have not been silenced entirely.

While in fact most of the provisions of this once very comprehensive act have been either repealed or incorporated into other statutes by the British Parliament in the course of time, the famous section 4 requiring a writing for certain types of agreements, among them contracts of guarantee, and section 23 are still in force in the original version. And it is the very section 4, which was inserted in the original draft only at a later stage, that has come to be regarded as the very heart of the statute of frauds.

It is certainly significant that in the country of its origin the English Law Revision Committee recommended in 1937 the repeal of section 4 which contains, in addition to provisions relating to other types of contracts, the famous reference to "any special promise to answer for the debt, default or miscarriage of another person." With negligible differences in phraseology, it is reiterated in all American statutes of frauds. The most interesting point for our purpose is the fact that while the Law Revision Committee in general was in agreement upon the advisability of the repeal of the section there was a split with reference to contracts of guarantee. The majority stated explicitly that they had considered the question "... whether we ought to recommend that the contract of

---

4Roberts, Statute of Frauds (Phil. 1807) p. XX. 3 Blackstone, Commentaries (6th ed. 1774) p. 159 stated the provisions of the statute without special comment.

5See the literature listed by Ireton, Should we Abolish the Statute of Frauds?, (1938) 72 U. S. L. Rev. 195. The learned writer calls the statute "ambiguous, archaic, arbitrary, uneven, unwieldy, unnecessary and unjust."

6Hawkins, loc. cit. supra note 2, concludes that the statute stands as a "lofty and endurable monument to the genius, logic and equitable abilities of a class of law makers, whose facilities, education, environment and experience fitted them for just such a task."

7In its present form the section reads: "No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the Defendant upon any special promise to answer for the debt, default or miscarriages of another person; or to charge any person upon any agreement made upon consideration; or upon any agreement that is not to be performed within the space of one year from the making thereof; 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 thereunto by him lawfully authorized."

8Williams, The Statute of Frauds (1932) sec. 4.

9See Flemming, loc. cit. supra note 2.


11The committee follows the conclusions previously reached by the scholarly treatise of Williams, op. cit. supra note 8, p. 280.
SURETYSHIP—STATUTE OF FRAUDS

guarantee should be treated separately . . . by providing that a signed writing should be made essential for this type of promise,” but that they had reached a negative conclusion. The minority conversely requested “. . . that it should be provided that a guarantee is to be invalid unless the terms thereof (other than consideration, if any) have been embodied in a written instrument and signed by the guarantor.”

The majority of the committee based its position on the ground that first and foremost the Act was a product of conditions in the law of evidence which have long since passed away, that it promoted frauds rather than prevented them, that the selection of promises to be in writing was arbitrary and haphazard, that it was out of step with normal business practice, that it was partial and lopsided in its operation and ambiguous and ill drawn. The minority took its stand with respect to guarantees not because the writing would prevent “frauds and perjuries” but for the reason that it would give “. . . the proposed surety an opportunity of pausing and considering, not only the nature of the obligation he is undertaking but also its terms.”

In the United States as in England the courts have struggled with the provisions of the statutes of frauds of the various states and a formidable body of case law has developed. And just as in the country of its origin, so the American courts have whittled away much of the literal meaning of the provisions of the statute. While the basic purpose of the act—to secure defendants against unfounded and fraudulent claims—has never been obscure, the courts have had almost insurmountable difficulties in devising a simple and workable scheme of promises without and within the statute.

Although American commentators, as strongly as their English colleagues, have emphasized the technicalities, incongruities and conflicts in the decisions and the amount of useless labor spent, a great deal of effort on this side of the Atlantic has been expended in reducing the unwieldly body of law to a number of

---

12Law Revision Committee, Sixth Interim Report, Statute of Frauds and Doctrine of Consideration (1937) p. 11.
13Ibid. p. 33.
14Ibid. p. 7.
15Ibid. p. 33.
16See 2 Williston, Contracts (rev. ed. 1936) sec. 448, p. 1308.
17See particularly Willis, The Statute of Frauds—A Legal Anachronism, (1928) 3 Ind. L. J. 427, 528. Professor Willis notes that the Century Digest, the First Decennial, and the Second Decennial list under the heading of “Statute of Frauds” approximately 10,800 cases of which less than one-third held the statute applicable.
rational propositions in accord with the "better views." Naturally, the most important attempt of this kind are the propositions laid down in the Restatement of Contracts by the American Law Institute.

It can hardly be denied that the contracts to answer for the "debts, defaults and miscarriages of another" are among the most important promises involving the American statutes of frauds. In this field, in addition to Professor Williston's endeavors, a lucid essay from the pen of the late Judge Arant helps to facilitate a rational approach to the problems presented. It should also be noted that the American Law Institute has dealt with the statute of frauds in connection with contracts of guarantee not only in the Restatement of Contracts but also in the Restatement of Security. While absolute and complete consistency has been attempted, nevertheless a few slight divergences exist between them. The most noteworthy discrepancy is occasioned by the fact that section 180 of the Restatement of Contracts is not reproduced in the Restatement of Security.

The purpose of the following inquiry is, in the first place to attempt a comprehensive and critical presentation of the Minnesota rules governing the application of the statute of frauds to contracts of suretyship as elaborated by the decisions of our Supreme Court; and in the second place to ascertain how far they are in harmony with the propositions laid down by the American Law Institute in the Restatement of Security.

18 Outstanding, of course, is the work of Professor Williston.
19 Restatement, Contracts, secs. 178-225.
20 Williston, op. cit. supra note 16, sec. 452.
21 Arant, A Rationale for the Interpretation of the Statute of Frauds in Suretyship Cases, (1927) 12 Minn. L. Rev. 716. The author points out that "... the special danger in the type of situation contemplated by the statute was due to the fact that the consideration usually alleged in support of a false promise has always occurred and, whether induced by a promise of a defendant or not, it was always consistent with the plaintiff's claim that it was." (p. 718).
22 Restatement, Security, secs. 89-100.
23 Except as stated in secs. 182-184 and 187-189 a promise to perform or otherwise satisfy all or part of a duty of any kind by which another person is then bound or thereafter becomes bound to the promisee, is within Class II of sec. 178 if the promisor by virtue of his contract or relation with such other person is a surety for him, and the promisee knows or has reason to know of the suretyship relation." This incorporates substantially Professor Williston's famous "surety test" (Williston, op. cit. supra note 16, sec. 462) which was recently adopted by the New York Court of Appeals. Witschard Bros. v. Brody & Sons, (1931) 257 N. Y. 97, 177 N. E. 385; Bulkley v. Shaw, (1942) 289 N. Y. 133, 48 N. E. (2d) 398. However, all illustrations given by the Restatement of Contracts to sec. 180 are incorporated into the Restatement of Security as illustrations to sec. 89, a reproduction of the usual wording of the statute itself.
SURETYSHIP—STATUTE OF FRAUDS

II.

"COLLATERAL" AND "ORIGINAL" PROMISES AND THE PROBLEM OF CLASSIFICATION OF PROMISES WITHIN AND WITHOUT THE STATUTE

The Evolution of Particular Criteria for the Application of the Statute to This Class of Cases.

The pertinent section of the Minnesota statute reads as follows:24

"No action shall be maintained in either of the following cases upon any agreement, unless such agreement, or some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party charged therewith: ...

(2) Every special promise to answer for the debt, default or doings of another."

There has been no change in the wording of this section since its adoption in the Revised Statutes of 1866.25 Previously the Minnesota statute read slightly differently:26

"In the following cases, every agreement shall be void unless such agreement, or some note or memorandum thereof expressing the consideration, be in writing and subscribed by the party charged therewith: ...

(2) Every special promise to answer for the debt, default, or miscarriage of another person."

This version was an unaltered copy of the corresponding New York statute, which had been formulated in the Revision of 1829,27 while prior thereto New York had verbatim adopted section 4 of the English statute.28

Not only was the New York statute the model for the Minnesota act, but the construction which the New York court had originally placed upon its statute has had a deep influence on the formation of Minnesota law. However, it should be emphasized at the outset that the later far reaching changes of New York law29 have had practically no repercussions in our state.

The New York law itself, of course, had not had an original

24 Minn. Stat. 1945, sec. 513.01.
25 Minnesota General Statutes (1886), chp. 41, sec. 6.
26 Revised Statutes of the Territory of Minnesota (1851), chp. 63, sec. 2.
28 Laws of New York, Revised Laws of 1802, chp. 44, sec. 11; Laws of New York, Revised Laws of 1813, chp. 44, sec. 11.
29 See text and notes 41-43 infra.
growth under the statute but was molded in agreement with English precedent. In particular it was in accord with the early English practice of distinguishing "original" from "collateral" promises in determining whether they were within or without the statute of frauds. Yet the term "collateral" is not employed by the statute and in fact was developed long before its enactment. The distinction was drawn by the courts originally for the purpose of differentiating between cases where debt (or later indebitatus assumpsit) and where an "action on the case sur assumpsit" would lie. Of particular importance in this respect were the suretyship situations where only a principal was liable in debt or general assumpsit while the surety had to be sued in special assumpsit. Thus, it was only natural to continue the traditional terminology and even to consider these cases turning on the proper form of action as precedents for the application of the statute of frauds. But it should be added that it was early recognized "... that although 'collateral promise' has become the technical phrase, whereby the promise within the statute has generally been distinguished [it] cannot be taken as a certain criterion in deciding whether a promise for another is, or is not within the meaning of this law."  

---

30See, for instance, Roberts, Statute of Frauds (Phil. 1807) p. 207, who calls his whole chapter "On Collateral Promises." This was in accord with the usage by the courts. See Read v. Nash, (1751) 1 Wils. 305, 95 E. R. 632 where it is stated that "The true difference is between an original promise and a collateral promise; the first is out of the statute, the latter is not when it is to pay the debt of another which is already contracted." The first case on this point is apparently the extremely important case of Birkmyr v. Darnell, (1704) 1 Salk. 27, 91 E. R. 663, 6 Mod. 50, 87 E. R. 996, Holt. K. B. 606, 90 E. R. 1235. 


33Ames, Lectures on Legal History (1913) p. 95. It may be added that Justice Holt himself reported the case of Birkmyr v. Darnell, loc. cit. supra note 30, which involved the Statute of Frauds, together with Butcher v. Andrews, loc. cit. supra note 32, which turned on the form of action point, under the common heading of "promises collateral," and that Salkeld, in his report on the former case cited (1595) 1 Roll. Abr. 14 which reads in translation: "If A buys goods from B and because B distrusts A's payment J. S. promises, that if A does not pay on such day he himself will pay, and if J. S. dies and the vendors are not paid on the day, the executors of J. S. can be charged in an action on the promise as it is collateral, 38 Eliz. B. R." 

34Roberts, Statute of Frauds (Phil. 1807) p. 223.
The truth of the matter is that the distinction between original and collateral promises refers to a result rather than to a reason.

The leading American case on the application of the statute of frauds to cases of guarantees is the decision of Chancellor (then C. J.) Kent in *Leonard v. Vredenburg*.

It involved the validity of a guarantee on a promissory note without explicit statement of the consideration. The guarantor was held to be liable. In the course of his opinion, the learned judge stated: "There are, then, three distinct classes of cases on this subject which require to be discriminated;

1) Cases in which the guaranty or promise is collateral to the principal contract but is made at the same time, and becomes as essential ground of the credit given to the principal or direct debtor. There, as we have already seen, is not nor need be, any other consideration than that moving between the creditor and original debtor.

2) Cases in which the collateral undertaking is subsequent to the creation of the debt, and was not the inducement to it, though the subsisting liability is the ground of the promise, without any distinct and unconnected inducement. There must be some further consideration shown.

3) A third class of cases . . . is when the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties.

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

This classification was by no means a radical departure from the English law as of that date, but a concise summary of the contemporary cases. The statement has been cited with approval in many subsequent cases. And it is significant for this paper that in the second case on the application of the statute of frauds to contracts of guarantee that came before the Supreme Court of Minnesota, Justice Flandrau repeated verbatim the statement from *Leonard v. Vredenburg* quoted above and observed: "I find no case that states the law upon this subject with more clearness."

It is true that in the course of time courts and text writers have

---


36 The English law of that date is thoroughly treated in Roberts, Statute of Frauds (Phil. 1807).

37 Walker v. McDonald, (1861) 5 Minn. 455, 461.
found fault with Kent's propositions. His third category, and particularly the words "new and original consideration of benefit or harm moving between the newly contracting parties," has been the target of the most bitter and somewhat unfounded attacks. Yet in analyzing Kent's classes in their context and interrelation, it appears that many of the objections are the result of a misconstruction placed on his real meaning rather than a basic difference in views.\textsuperscript{38} The New York court nearly a half a century later in a case making Kent's language more precise stated that the historical classification and the connecting remarks respecting each class were strictly correct and had been a landmark of the law for forty years.\textsuperscript{39} And thirty years after the \textit{Vredenburg Case} Chief Justice Shaw of Massachusetts, while observing that Kent's classes were well stated, announced a somewhat more specific criterion than the one based on the parties to the consideration which became later known as the leading purpose test: "The terms original and collateral promise, though not used in the statute are convenient enough to distinguish between the cases, where the direct and leading object of the promise is to become the surety or guarantor of another's debt, and those where, although the effect of the promise is to pay the debt of another, yet the leading object of the undertaker is to subserve or promote some interest or purpose of his own."\textsuperscript{40}

However, in New York the aspect of the law has ultimately undergone a fairly radical change since Kent's propositions.\textsuperscript{41} In 1888 Justice Finch, reviewing the \textit{Vredenburg Case} and three subsequent decisions summed the situation up as follows:

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

\textsuperscript{38}A typical example is Arant, Law of Suretyship and Guarantee (1931) p. 107. Yet Arant, like other critics, overlooks the fact that Kent expressly excluded the mere forebearance cases where no legal benefit results to the promisor from that group. To Kent "consideration moving between the parties" was not the equivalent of any "sufficient consideration," and he specifically pointed this out. In the subsequent New York case which slightly modified Kent's test by substituting "moving to the party making the promise" for "moving between the newly contracting parties" it was pointed out that the "difference is not one of principle." Mallory v. Gillet, (1860) 21 N. Y. 412.

\textsuperscript{39}Mallory v. Gillet, (1860) 21 N. Y. 412.

\textsuperscript{40}Nelson v. Boynton, (1841) 3 Met. (Mass.) 396.

\textsuperscript{41}(1941) 10 Ford. L. Rev. 439.
SURETYSHIP—STATUTE OF FRAUDS

of payment irrespective of the liability of the principal debtor."42
And in more recent days the court has moved even still further.
away, considering the valid criterion now to be that proposed by
Professor Williston: "If as between them [the parties] the origi-
nal debtor still ought to pay, the debt cannot be the promisor's
own and he is undertaking to answer for the debt of another."43

Although the final status of the law in a particular state can only be ascertained upon a close analysis of the course which the
stream of judicial decision has taken, it still seems permissible for
the purpose of a preliminary inquiry to start from Kent's classifica-
tion and look at the time of the making of the promise whose
original or collateral nature is to be determined. Consequently the
Minnesota cases will be grouped under two main headings; 1) cases
where the promise in issue was made at the time the whole transac-
tion was concluded, and 2) cases where the promise was made in reference to a pre-existing debt of another person.

III.

CLASS I: PROMISES MADE CONCURRENTLY WITH OR PRIOR TO THE CREATION OF THE DEBT

1.

Applicability of the Statute to This Class of Cases in General

The first group of cases to be discussed deals with the situations
where no debt exists at the time of the making of the promise. In
the usual circumstances of this type of transaction, a creditor
furnishes goods or services pursuant to negotiations with two or
more parties, one of whom obtains the delivery while the other
makes certain commitments as to payment. The problem naturally
is to decide under what conditions these undertakings have to
comply with the statute of frauds.

Since the statute by its very terms requires the obligation of
another, it is logical that it does not apply if the recipient of the
commodities is not liable but only the other party. The difficulty
is rather in determining whether the recipient did or did not incur

42White v. Rintoul, (1888) 108 N. Y. 222, 227, 15 N. E. 318. The four
cases which Justice Finch summarizes were Leonard v. Vredenburg, (1811)
412; Brown v. Weber, (1868) 38 N. Y. 187; and Ackley v. Farmenter, (1885)
385; Bulley v. Shaw, (1942) 289 N. Y. 133, 138, 48 N. E. (2d) 398. The
quotation is verbatim from 2 Williston, Contracts (rev. ed. 1936) sec. 475,
p. 1370.
any liability. However, if the recipient is liable, it by no means follows that the promise must be in writing. Then theoretically three possibilities are open: 1) that both parties are joint or joint and several obligors, 2) that the recipient is the principal and the other party a mere guarantor, or 3) the rare occurrence where the recipient is the guarantor and the other party the principal.44

1) It is now recognized that the statute does not require that there be a pre-existing debt, but that it may apply equally in cases where one party guarantees a debt which the promisee contracts on the very strength of the guarantee. In the middle of the eighteenth century there was a period in English law where this proposition was questioned. Lord Mansfield in Mawbrey v. Cunningham46 ruled that because the promise was made before the debt itself was created it was not within the statute.46 However, a year later in Jones v. Cooper47 Lord Mansfield himself, on the strength of a ruling by Judge Nares, departed from his original view and recognized that the statute might apply “... where the undertaking is before delivery and yet conditional.” The court in fact held that the promise in issue was of this type and required compliance with the statute. This result was actually no innovation, but only a reassertion of the traditional views previously established. Thus, as early as 1698 and again in 1704 it had been decided that an oral promise of guarantee given prior to the creation of the principal debt was within the statute.48 The rule of Jones v. Cooper was subsequently reaffirmed by Lord Mansfield himself in Peckham v. Faria49 and then established beyond question.

44For an example, suppose that A goes with his fiancee B to a jewelry store to buy an engagement ring. The young lady is known to the jeweler. The ring being more expensive than A had anticipated, he finds himself considerably short. B states that C should not worry, that she would see that he gets paid. In this case B would seem to be both the recipient and the surety. Minnesota has by dictum referred to this situation. See Cole v. Hutchinson, (1886) 34 Minn. 410, 413, 26 N. W. 319.
45The decision is not separately reported, but the case was referred to by Justice Buller in Matson v. Wharam, (1787) 2 T. R. 80, 100 E. R. 44, and by counsel in Jones v. Cooper, (1774) 1 Cowp. 227, 98 E. R. 1058, Lofft, 769, 98 E. R. 910. According to the information in these two cases, it was decided by Lord Mansfield in nisi prius at Guildhall in 1773.
46This idea might have originated from a lonely dictum in Read v. Nash, (1751) 1 Wils. 305, 95 E. R. 632.
47(1774) 1 Cowp. 227, 98 E. R. 1058, Lofft, 769, 98 E. R. 910.
49(1781) 3 Doug. K. B. 13, 99 E. R. 514. Lord Mansfield stated: “Before the case of Jones v. Cooper I thought there was a distinction between an undertaking after credit given and an original undertaking to pay, and that in the latter case the surety, being the object of confidence, was not within the statute, but in Jones v. Cooper the court was of the opinion that whenever a man is called upon only in second instance, he is within the statute.”
2) However, having settled that the statute was applicable to concurrent promises, if collateral, the courts were confronted with the more difficult task of distinguishing between original and collateral promises in the various cases. Since the question is essentially one of attributing legal significance to negotiations, a twofold method of approach is possible: either the rather formalistic one of classifying the terms used in the promise, or the more rational one of determining the intentions of the parties in the light of the surrounding circumstances—of which the form of the promise is at best only one.

A.

The English Origin and Early American Adoption of the “Entire Credit” Test

The English courts, never adhering exclusively to a purely literal approach, have from a very early date attempted to elaborate certain practical standards, particularly the “entire credit” test. The first case on this point decided under the statute (by Chief Justice Holt in nisi prius) is apparently representative of the emphasis put on the words of the promise. “If A promise B being a surgeon, that if B cure D of a wound he will see him paid; this is only a promise to pay if D does not it ought to be in writing; but if A promise, in such case, that he will be B’s paymaster . . . he is liable without writing.” However, one year later the same judge in Austen v. Baker, a case involving the proper form of action, stated that “. . . at Guildhall he always required the tradesman to produce his books to see whom credit was given to.”

51(1698) 12 Mod. 250, 88 E. R. 1299.
52See text and notes 32 and 33 supra.
53It is significant to note that the practice of ascertaining to whom credit was given was originated by Chief Justice Holt when he sat at Guildhall. This celebrated building was not only the seat of the Lord Mayor and the city government of London but, what is more important, was also the place where the merchants customarily settled their affairs and disputes. See Thomas, Calendar of Select Pleas and Memoranda of the City of London (1932) Introduction. The Chief Justices of the King’s Bench and Common Pleas sat at Guildhall in nisi prius hearings whereas the courts in banco held their sessions at Westminster. The close contact thus resulting between the merchants and the Chief Justices would quite naturally affect the decisions of the latter. We know that Lord Mansfield “. . . often declared that he never passed his time more satisfactorily nor agreeably than in trying mercantile causes by a special jury of merchants at Guildhall.” 3 Campbell, Lives of the Chief Justices (1874) p. 319. And Hale, as Chief Baron of the Exchequer, ordered a search for precedents at Guildhall to determine whether debt lay on the acceptance of a bill of exchange. Anonymous, (1668) Hard. 485, 145 E. R. 560. That the law merchant was quite advanced in comparison with the common law even before that period had
The next and leading case in point was *Birkmyr v. Darnell*. Here the court announced the rule that "... if the whole credit be not entirely given to the undertaker, so as no remedy lies against the party upon the contract, but that the undertaker comes in aid of the credit given by the contract to the party, the undertaking will

been emphasized by Malynes in his famous book, *Lex Mercatoria*, written in 1636. However, since at that time the law merchant was troubled neither by the requirement of writing nor the form of action, Malynes only distinguished cases of absolute or conditional suretyship for the purpose of determining whether a previous demand on the principal is required. Malynes, *Lex Mercatoria*, (1636) pp. 68-69.

It is probably more than a mere historical coincidence that trials at nisi prius were transferred to *Guildhall* on the eve of England's birth as a great commercial power. This change was accomplished by the charter of June 16, 1518 granted by Henry VIII to the City of London upon petition of the Mayor and the citizenry. Birch, Historical Charters and Documents of the City of London (1887) p. 97. Previous to that date the City had jealously guarded its freedom from the presence of royal justices within its limits and their interference in City matters. The itinerant judges sitting at the Tower had run into severe troubles at the sessions in 1321 (1 Sharpe, London and the Kingdom (1894) pp. 143 ff.), and as a consequence the new king, Edward III, granted the City a charter on March 6, 1327 in which it was provided that all inquisitions regarding citizens of London by justices and other officials of the King should be taken at St. Martin-le-Grande except inquisitions by the itinerant justices at the Tower and sittings for gaol delivery at Newgate. 1 Munimenta Guildhallae Londoniensis (ed. Riley 1859) p. 147, no. 205. St. Martin-le-Grande was technically not under the jurisdiction of London, but a liberty of its own. In 1341 troubles broke out again, when the itinerant justices attempted to hold court at the Tower and Edward III was compelled to grant another charter on May 26, 1341. 1 Sharpe, op. cit. supra, pp. 187 ff. This charter reconfirmed that no justices should be assigned to the City, except the itinerant justices at the Tower, courts for gaol delivery at Newgate and the judges in error at St. Martin-le-Grande. 1 Munimenta Guildhallae Londoniensis, op. cit. supra, p. 151, no. 247. The jurisdiction exercised at St. Martin-le-Grande was moved to *Guildhall* by the above mentioned charter of Henry VIII which explicitly left undisturbed the courts for gaol delivery and the sittings of itinerant justices at the Tower. The latter exception was, however, practically without significance because the riots of 1341 marked the beginning of the end for the jurisdiction in eyre. Cam, Studies in the Hundred Rolls, 6 Oxford Studies in Social and Legal History (1921) p. 79. Further, there was no longer need for them because their functions had been taken over by the justices of assize which since 1285 had exercised the jurisdiction in nisi prius. 1 Holdsworth, History of English Law (5th ed. 1931) p. 272; Cam, op. cit. supra, p. 82. Thus, the justices of the King's Bench and Common Pleas from 1518 on held their sessions at *Guildhall* and no longer at St. Martin-le-Grande, a conclusion borne out by numerous entries in the Patent Rolls before and after 1518, and these sessions included the nisi prius sittings which gained steadily in importance while the jurisdiction in error from the various London courts declined. After the great fire of 1666 the Chief Justice of the King's Bench sat in the Mayor's court room, while the Chief Justice of the Common Pleas sat in the Court of Orphans. 3 London and its Environ Described (1761) p. 104. In the light of these recorded facts the statement in (1814) 3 Campbell's Reports 42 that trials at nisi prius had been held in *Guildhall* "by immemorial custom" seems exaggerated.

54Loc. cit. supra note 30. The defendant had promised to plaintiff who was about to rent a horse to one J. S. that he would undertake that J. S. should redeliver it safely.
be within the statute.” But it had trouble in determining whether the whole credit was actually given to defendant. After a conference with other judges, it was held *per curiam* that the promise was invalid inasmuch as under the facts detinue would lie against the recipient. According to the court’s view, the promise by the defendant that the other would redeliver a rented horse in connection with a contract for hire was analogous to an undertaking that the recipient shall pay in the case of a sale. And such a promise would create a collateral duty whereas “I will see you paid” would give rise to an original duty.55

With the exception of one case which involved the construction of a written promise, no decisions discussing the application of the entire credit test in guarantee situations could be found for the next sixty-nine years. A possible explanation for this hiatus might lie in the fact that “… mercantile questions were so ignorantly treated when they came into Westminster Hall, that they were usually settled by private arbitration among the merchants themselves.”56

The reappearance of this doctrine was somewhat hampered by Lord Mansfield’s vagaries referred to previously. Had *Mawbrey v. Cunningham*57 settled the law, no place would have remained for the “entire credit” test. The decisions in *Jones v. Cooper*58 and *Peckham v. Faria*,59 while restoring the law in respect to a possible application of the statute of frauds to promises concomitant to the main transaction, still avoided any specific foundation upon the credit criterion. It should be observed, however, that the promises in both cases were *in terms* clearly conditional. Apparently the court felt that in such circumstances the problem to whom credit was actually extended was of no or subordinate significance. Particularly *Peckham v. Faria* seems to be an extremely formalistic ruling.60

---

55In regard to this latter statement, it should be observed that it is in conflict with the holding in Watkins v. Perkins, op. cit. supra note 48, where the same words were adjudicated to be indicative of a collateral promise.
56Campbell, Lives of the Chief Justices (1874) p. 275. The author refers to the period before Lord Mansfield’s ascension to the bench in 1756.
57Loc. cit. supra note 45.
58Loc. cit. supra note 45.
59Loc. cit. supra note 49.
60In the Jones Case it was at least expressly stated in the findings that the recipient was entered as debtor in plaintiff’s books. For that reason, counsel in Peckham v. Faria tried to distinguish his case on that point, claiming that his client had given credit to defendant, that this was an issue for the jury, and that the jury had found it to be so. But the court nevertheless held against the plaintiff, one of the judges (who had been of counsel in the older case) pointing out that even in the Jones Case the recipient was known to be insolvent.
The credit test came back into its own in the cases of Matson v. Wharam and particularly in Anderson v. Hayman, decided after Lord Mansfield's resignation. The court very clearly considered that the issue of to whom credit was given was decisive and set aside a finding by the jury that credit was not partially given to the recipient of the goods, since it resulted clearly from the evidence that the opposite was true. Thus it became settled at that period of English Law that the paramount issue in these cases was whether the promise of the other merely aided the credit of the recipient or whether it was the entire ground for the credit extended, that it was a question of fact for the jury, and that the entry in the books of the plaintiff was an important factor to consider.

This state of English Law undoubtedly exerted a decisive influence upon the formation of the early American precedents. Thus, the abovementioned leading opinion of Chief Justice Kent in Leonard v. Vredenburg, after stating that "If the whole credit is not given to the person who comes in to answer for another, his undertaking is collateral," relies on Matson v. Wharam and Birkmyr v. Darnell. Similarly, in Cahill v. Bigelow, another American landmark, Chief Justice Shaw stated: "The test is this when the promise is made before the credit is given, to decide whether one promising is an original debtor or a guarantor, namely, whether credit was given to the person receiving the goods. If it was then such promisor is a guarantor only." His authorities are again exclusively the discussed English cases.

B. Minnesota Law; First Stage

These two cases together with the English precedents themselves determined the evolution of the Minnesota doctrine as can be ascertained from the decisions in Walker v. McDonald, Rogers v. Stevenson, Wilson Sewing Machine Co. v. Schnell, and par-

---

61 (1787) 2 T. R. 80, 100 E. R. 44.  
62 (1789) 1 H. Bl. 120, 126 E. R. 73. See also Keate v. Temple, (1797) 1 Bos. & P. 158, 126 E. R. 834, discussed at length in Roberts, Statute of Frauds (Phil. 1807) p. 211.  
63 (1811) 8 Johns. (N.Y.) 29, 5 Am. Dec. 317. Kent was obviously also influenced by the comments in Saund's Reports following Forth v. Stanton, (1669) 1 Saund. 210, 85 E. R. 217, 2 Keb. 465, 84 E. R. 292, 1 Lev. 262, 83 E. R. 398, which he cited in his opinion and which set the law forth very succinctly.  
64 (1836) 18 Pick. (Mass.) 369.  
65 (1861) 5 Minn. 455.  
66 (1870) 16 Minn. 68.  
67 (1873) 20 Minn. 40.
SURETYSHIP—STATUTE OF FRAUDS

particularly *Cole v. Hutchinson* which must be regarded as the cornerstone of the law on that point in our jurisdiction.

In the *Cole Case* the defendant was sued on a promise to pay for such goods as one J. D., who was not then present, would take. The lower court instructed the jury "... that to bring a promise within the statute of frauds ... there must be in existence at the time when the promise is made an original liability upon which the collateral promise is founded." The supreme court reversed the order refusing a new trial and pointed out that such a statement of the law was a basic misconception of the true rule and apt to mislead the jury. It avoided thus the error into which Lord Mansfield and at least one early American case had fallen, but which the Minnesota Supreme Court had clearly recognized from the beginning.

In addition to settling the point beyond doubt that a pre-existing obligation by another was not required for the application of the statute, Chief Justice Gilfillan's opinion constitutes an important step in the development of the "entire credit" test in Minnesota. This criterion had been invoked by our court from the beginning in that type of case. *Walker v. McDonald* started us out in complete harmony with the principles laid down in the previous section. It dealt with the liability for rent of the tenant's son who had declared in connection with a lease renewal by his mother "If you will let mother stay, I'll be responsible for the rent and see that it is all right." The judge, quoting extensively from *Leonard v. Vredenburg*, concluded that "... there could be no pretense that the house was leased defendant." The mother continued to be liable for rent under the new lease, making defendant's promise necessarily a collateral one. Under the circumstances of the case, dealing with the renewal of an existing relation, the soundness of the holding appears to be unquestionable.

In the next case the credit test likewise was applied without

---

68 (1886) 34 Minn. 410, 26 N. W. 319.
69 Supra notes 45-49 and text. See Perley v. Spring, (1815) 12 Mass. 297; overruled *semble* by Tileston v. Nettleton, (1828) 6 Pick. (Mass.) 509; and Cahill v. Bigelow, (1836) 18 Pick. (Mass.) 369. In De Wolf v. Rabaud, (1828) 1 Pet. (U.S.) 475, 499, Justice Story, speaking for the court, intimated that, were it not so well established in English law, a holding to the effect that by the true intent of the statute it was to extend to cases where the so-called collateral promise was part of an original agreement would deserve "grave deliberations."
70 *Walker v. McDonald*, (1861) 5 Minn. 455.
71 Ibid.
72 *Rogers v. Stevenson*, (1870) 16 Minn. 68. It is, however, interesting to note that the jury had found that the original credit had been given to Stevenson. The supreme court, taking the opposite view, nevertheless upheld the lower court because an unenforceable promise was still sufficient consideration to sustain a valid endorsement.
trouble. The plaintiff had sold goods to one Stone on the faith of defendant's oral promise that if S did not pay for them he would. In consequence of his promise he had subsequently indorsed Stone's note. The court held him liable on the note although it recognized that the underlying obligation was unenforceable under the statute, since there was no doubt that the credit was given to Stone on the faith of defendant's guarantee.

In *Winslow v. Dakota Lumber Co.* the court was for the first time confronted with the issue of how in a doubtful situation the question as to whom credit was given could be resolved. While the statute of frauds is not explicitly mentioned in the opinion, it can be inferred that it was invoked, and the headnote to the case, prepared by the judge writing the opinion, so states. In his well reasoned treatment of the sufficiency and competency of the evidence, Justice Berry commented on the fact that the business involved in the action had been very loosely conducted and that therefore the evidence admissible to prove a valid agreement between the parties by necessity would encompass a large number of facts.

"When the informal character of the contract between the parties . . . is considered, it is clear that much more latitude was permissible for the purpose of showing historically and otherwise the relations of the contracting parties, and the circumstances in which they acted, than if the contract had been entered into with the formality with which business of the kind ordinarily is and always ought to be transacted."
The defendant had assigned as error particularly that plaintiff's books of account had been admitted, although they showed that the price of the goods sued for were charged to the recipient instead of defendant, and that plaintiff consequently had adduced evidence to show that this method of keeping account did not signify that credit had been given to the recipient. The court decided that the fact that the books did not charge the goods to defendant did not make them inadmissible and that plaintiff had the right to introduce evidence " . . . to remove the presumption that the credit was given to [the recipient] because the account was kept in his name."
The weight of such evidence upon the question of to whom credit was given had to be determined by the jury.

---

73 (1884) 32 Minn. 237, 20 N. W. 145. The court apparently did not deem it necessary to look for support in precedents.

74 This is required by virtue of Minnesota General Statutes (1878), chp. 63, sec. 4.

75 No authorities were cited in support of these views. But the decision in the instant case has become a recognized precedent for the proposition that a charge in the books to the recipient is only prima facie evidence that credit has been extended to him. See, for example, Kamm v. Rees, (1910) 177 Fed. 14, 23; Note (1900) 53 L. R. A. 510, 538.
Grant v. Wolf, decided in the next year by the same judge, occasioned a further elaboration of the principles pertaining to the construction of such dubious undertakings. Defendants had promised to plaintiffs "to see them paid" for boarding hands in the employ of defendant's subcontractor. There was no evidence of an agreement between the subcontractor or laborers and plaintiffs, and the jury had found for plaintiffs. On appeal this finding was held sustained by the evidence. The supreme court pointed out that the promise was clearly original despite the form. "For, although ordinarily and standing alone, these words import a collateral agreement, yet like other words, they are to be construed with reference to the connection in which they occur, and the facts accompanying or surrounding their utterance."

However, the court further indicated that the result might be based also upon a second ground. The contractor had retained from the estimates earned by the subcontractor the price for the board furnished to the laborers. Thus, intimated the court, this fact alone might suffice to warrant a recovery, even though it were assumed that the contract was with the laborers in the first instance, because these amounts were held by defendant pursuant to an implied trust. This theory, which is no further discussed, is adopted by the Restatements as a reason for withdrawing a promise from the purview of the statute.

Against these four Minnesota cases as background we can now appreciate Chief Justice Gilfillan's exposition in the aforementioned case of Cole v. Hutchinson. The judge not only decided that the instruction given to the jury was erroneous, but took occasion to comment on the scope and the evidence necessary for the application of the entire credit test. Curiously enough he refrained from citing the precedents of his own court but quoted extensively from Cahill v. Bigelow to establish the rule that to be an original promise the entire credit must be given to the promisor. The justice added, however, two important qualifications, one relating to the type of credit, the other to its proof. The first is so important that we quote in full:

"The credit mentioned in stating the rule must be understood as purchaser of the goods, for the receiver of the goods might by ex-

---

76(1885) 34 Minn. 32, 24 N. W. 289.
77Restatement, Contracts, sec. 182 (a); Restatement, Security, sec. 91 (a). Apparently this is the only case in Minnesota in support of this proposition.
78(1886) 34 Minn. 410, 26 N. W. 319.
79(1836) 18 Pick. (Mass.) 369.
80(1886) 34 Minn. 410, 412, 26 N. W. 319.
press terms assume the liability of a guarantor. He might undertake to pay in case the other did not. But where both are liable, whichever is original, primary debtor, the promise of the other must of necessity be collateral. If the debt be a debt of the receiver of the goods, then the promise of the other is to answer for his debt, and is within the statute."

In regard to the proof of the credit, he pointed out that it was controlled by what takes place between the parties when the goods are called for or delivered. "... not by any mental reservation nor secret motive on the part of either." Thus, in the instant case the giving of notes for the price of the goods by the receiver would apparently be conclusive on his liability as purchaser unless adequately explained: But the court cautioned that such circumstances were different in evidentiary value from charging the price against the receiver in the seller's books, or demanding payment from him or bringing suit, which were only akin to an admission and therefore explainable as owing to mistake.

It can be seen that Cole v. Hutchinson and its predecessors settled the principal rules governing the application of the statute in the absence of a pre-existing main obligation. We shall set them out in order that the further modifications to be noted may be more easily followed:

1) The statute is applicable unless the recipient of the goods or services receives no credit whatsoever, except possibly as a mere guarantor;

2) The question as to whom and what kind of credit is given is to be determined by the jury in the light of all circumstances surrounding the transaction, up to the reception of the goods and services;

3) Acts by the parties subsequent to the transaction, such as charging the price to a certain person, or demanding payment, are competent evidence but should be treated in the nature of an admission;

4) The form of the promise should be considered in the determination but is by no means controlling, although certain terms, unless explained, might warrant a finding one way or the other;

5) The statute might not apply despite the fact that the recipient is liable, if the promisor had received funds owed or owing to the recipient, for the purpose of paying the obligation;

The Restatement has not specifically taken care of any of these points, except the one under 5). On the other hand, it has given certain criteria of its own for the application of the statute, which
SURETYSHIP—STATUTE OF FRAUDS

we will discuss in connection with later cases involving these principles.

C.

**Minnesota Law: The Present State; Deviations From and Modifications of the Entire Credit Test**

Although the law in its present state is somewhat more complex, it may be helpful to arrange the discussion in the order of the five propositions stated above insofar as possible.

1. **The statute is applicable unless the recipient of the goods or services receives no credit whatsoever, except possibly as a mere guarantor.**

   The last six qualifying words of this first proposition, injected into Minnesota law by Chief Justice Gilfillan,\(^6^{09}\) appear at first blush both reasonable and innocuous. But after close analysis they are apt to cause considerable difficulty and might even have, at that juncture, changed the direction of the path of the law.

   a) The qualification constitutes a serious erosion into the “entire credit” test because it recognizes that credit might have extended to both parties, the recipient and the promisor, and yet the statute of frauds would not be applicable. It would be easy to say that all that Justice Gilfillan actually did was to say that the non-recipient promisor must have received the “principal credit” or perhaps “credit as principal” instead of “entire credit”; yet in fact the implications might go to the very root of the credit test. The reason is that the actual or intended relations between recipient and the other promisor might thus become a significant if not decisive factor in the application of the statute.\(^8^{1}\) In addition, if carelessly applied they might give the seller an easy way to explain any credit to the recipient and thus emasculate the whole statute.

   On the other hand, the “entire credit” test in its traditional absolute scope probably overshoots the target and Chief Justice Gilfillan’s statement, if properly read and understood, may well be regarded as a sound interpretation of the statute. The point has never come up again before the Minnesota Supreme Court, yet in the light of the quoted dictum it might well be accepted that Minnesota will not carry the entire credit test to its extreme.

   b) In addition to the particular contingency referred to by Justice Gilfillan in his limitation on the “entire credit” test, our

---

\(^{609}\)See quotation in text to note 80, supra.

\(^{81}\)It may also lead to the converse proposition, which is in effect closely allied to Professor Williston’s test, that the statute is not applicable unless credit was given to the promisor (be he the recipient or other party) as guarantor only.
discussion must necessarily turn to another situation in which the promisor does not receive the entire credit and yet the statute is not applied. This is the case of joint promises. Since the problem presents a great number of difficulties, a somewhat more general discussion cannot be avoided.

Section 90 of the Restatement of Security recognizes that joint promises are not within the statute. It provides:

Where promises of the same performance are made by two persons for a consideration which inures to the benefit of only one of them, the promise of the other is within the Statute of Frauds, even if the promise is not in terms conditional on default by the one to whose benefit the consideration inures unless

a) The promises are in terms joint and not joint and several or several; or

b) the promisee neither knows nor has reason to know that the consideration does not inure to the benefit of both promisors."

This provision was, with a slight change,\textsuperscript{82} incorporated directly from section 181 of the Restatement of Contracts;\textsuperscript{83} consequently, the reporter felt that no further explanatory notes were required. The reporter for the Restatement of Contracts offered a brief historical reason for the rule.\textsuperscript{84} “Though two obligations may arise on the transfer of a single quid pro quo but one of them at common law could be a debt.” The other was therefore necessarily collateral. The logical inconclusiveness of such analysis was properly realized by the reporter, but the adopted rule was justified on the ground that to hold otherwise “... would violate a rule dating back to the early law of debt.” The official comment by the American Law Institute consequently states: “The debt being joint the debtors stand for the purpose of the statute as a unit.”\textsuperscript{85}

While the rule a) of the Restatement seems to be largely in accord with the available authority on the point the reason given for the rule by the cases is apparently quite different from the historical rationalization of Professor Williston\textsuperscript{86} and the Restatements. It must be conceded that there has been little litigation on the question, as evidently the attorneys did not press the point very often. Thus the justice who wrote what is probably the leading

\textsuperscript{82} The Restatement of Contracts, sec. 181, reads that the consideration does not inure to the benefit of "such other promisor" instead of "both promisors."

\textsuperscript{83} Cf. Restatement, Security, sec. 90, comment a.

\textsuperscript{84} Restatement, Contracts, Reporter's Commentaries No. 4, sec. 178.

\textsuperscript{85} Restatement, Contracts, sec. 181, comment a; Restatement, Security, sec. 90, comment a.

\textsuperscript{86} Williston, Contracts (rev. ed. 1936) sec. 466, p. 1342.
opinion on the application of the statute to joint promises re-
marked:87 "The question of a joint promise appears to have been
seldom raised for adjudication in connection with the statute of
frauds."

The earliest instance in which the problem was posed is the
English case of Peckham v. Faria.88 There counsel argued in sup-
port of a favorable verdict that the jury also may have thought
"... that the goods were delivered on the joint credit of defendant
and Sylva," Sylva having been the recipient of the goods. No
precedent was cited in support nor was the argument noted in the
opinion of the court. Roberts in his famous treatise of the statute
of frauds likewise did not refer to the subject.89 However, a book
on the subject by Walter W. Fell appearing in its second edition
in 188090 propounded the rule that a promise is not within the
statute where a party buys goods jointly with another though for
the sole use of such other.91 The author assumed that this was
clearly so if the vendor did not know that the bargain was entirely
for the use of one person only,92 but he questioned whether the
statute should also be inapplicable where the vendor knew that
neither a partnership nor a community of interest in the particular
transaction subsisted between the joint promisors. Nevertheless
he cited Scholes et al v. Hampson and Merriot, an unreported nisi
prius case, for the proposition that even such a transaction did not
come within the scope of the statute of frauds.94 It can readily be
seen that this result was reached rather by a modification of the
credit test than by historical reminiscences on the action of debt.

While the earliest American case took an opposite view,95 the

88(1781) 3 Doug. 13, 99 E. R. 514.
89Roberts, Statute of Frauds (Phil. 1807).
92Fell refers to Waugh v. Carver, (1793) 2 H. Bl. 235, 126 E. R. 525
and the cases there cited as authority, but on examination it cannot be
said that they bear the author out. Waugh v. Carver deals only with the
liability of an apparent partnership without reference to the statute of frauds.
93Op. cit. supra note 90, p. 27.
94Hampson wanted to buy cotton from Scholes, but the latter requested
that someone else be answerable for payment. Merriot, a relative of Hampson
not otherwise interested in the business, then agreed that the invoices should
be made out in their joint names. Chambre, J., permitted in a joint suit
judgment against Merriot, although he pleaded the statute, holding his
promise not to be within its scope. See Fell, op. cit. supra note 90, pp. 27-28.
95Matthews and Alderson v. Milton, (1833) 4 Yerg. (Tenn.) 576. In
this case goods were advanced on the joint credit of one W. Milton and one
C. Milton, W. Milton being the recipient. The court held that W. and C.
could not be jointly charged because C. was not responsible without a
writing if W. was under any liability. This is, of course, the logical con-
sequence of the entire credit test.
trend of judicial authority shifted soon to a more restricted construction of the statute. A joint promise was first held to be outside of the scope of the statute of frauds in *Wainwright v. Straw.* In that case a store was sold to the defendants upon their joint responsibility on a cattle note. Upon the pleading of the statute the court ruled:

"To bring a case within the statute of frauds it is necessary that the undertaking should be collateral to, and in the aid of another. But in the present instance the promise of the defendant is joint. They both made the purchase, and upon their joint responsibility. . . . The fact that it might have been for the individual use of Straw is not sufficient to create the relation of principal and surety."

In the leading case of *Hetfield v. Dow* the point was again discussed. Counsel had charged as error that the instructions had not informed the jury that both might be original debtors, each promising severally, for himself, to pay the debt. The court conceded that "If A and B jointly promise to pay for goods delivered to B, A and B are joint original debtors: it is a joint promise to pay the indebtedness of A and B and not a promise by A to pay the debt of B. Such a promise is not within the statute." But the court refused to extend the exemption from the statute to promises severally made by A and B to pay for goods delivered to B because such a construction of the statute was precluded by precedent. In a concurring opinion it was pointed out that no evidence of a joint contract was submitted, and that the statute always operated on one of two several promises for the same consideration. It is perhaps particularly noteworthy that the judge emphasized in this connection (contra to Professor Williston's celebrated surety-test) that "it by no means follows that he who, by the arrangement between the promisors, ultimately may be bound to pay the debt is, as to the promisee, the principal debtor; that does not concern him."

In the same year Chief Justice Shaw seems to have recognized at least by implication that a joint promise need not comply with the form required by the statute.

The Michigan Supreme Court gave the matter extensive consideration in 1867. The court relied heavily on *Hetfield v. Dow*
SURETYSHIP—STATUTE OF FRAUDS

and held that "... the statute only applies to such promises made in behalf or for the benefit of another as would, if valid create a distinct and several liability of the party thus promising and not a joint liability with the party in whose behalf it is made."102 "In all such cases where the sale is upon the joint credit and promise of the defendant, though the property is purchased for and delivered to but one of them, I think the legal effect of the transaction constitutes as between them and the vendor, a sale to the two jointly."103 From the reasoning it seems to follow that the jointness of the credit rather than the technicality of the doctrine of the quid pro quo was the ratio decidendi.104

The few scattered cases later decided followed the course initiated by the decisions discussed in the text,105 some among them relying in addition thereto on the certainly faulty ground, repudiated

102Ibid., p. 301.
103Ibid., p. 305.
104However, in a concurring opinion, Justice Campbell at page 305 states: "I have had some doubt whether some of the rulings were not open to the objection that they rest too much on the question of a joint obligation." This argument was answered by the majority's reasoning that "... to say that they cannot both become jointly liable upon their joint promise, not in writing, to pay such debt or the price of such goods, if the party originally owing the debt or receiving the goods be at all liable, is but another form of declaring that it is not competent for both to become original promisors, as between them and the promisee, unless both are under an equal obligation as between themselves for the ultimate payment of the debt. Such a proposition, it seems to me, can not be maintained either upon principle or authority." For later expressions to the same effect see Bryant v. Panter, (1919) 91 Ore. 686, 691, 178 Pac. 989; and White v. Carter Dry Goods Co., (1927) 221 Ky. 845, 851, 299 S. W. 1079.
since Lord Mansfield's days, that a promise to be collateral must be auxiliary to a pre-existing liability.

Thus, it seems to be well settled by authority that the statute does not operate on joint promises even though the consideration is received only by one of the promisors; the cases apparently neither require, as the Restatements do, that the promises are in terms joint nor give importance to the nature of the relations inter se between the promisors or to the knowledge of the promisee as to whom the benefits inure. The criterion is rather: was credit extended to both of them in fact jointly.

However, the majority of the cases mentioned seem to rely decisively on the nature of the liability created as joint in the technical common law sense. This leads to the problem of what the law is in those jurisdictions where joint liabilities are by statute transformed in joint and several ones. Minnesota is one of them. Professor Williston expresses uncertainty on the point and reasons "If joint and several liability may be orally created, it would be difficult to see why several liability may not." There is practically no authority in this respect. The only court ever to explicitly comment on the question is North Dakota. It was argued that the promisee who asserted his rights against one of the promisors could not claim exemption from the statute and "in one breath to call the liability joint and joint and several." The court disposed of this contention by saying "We do not deem this to be material. The question is not so much as to whether the liability was a joint and several liability, but whether it was an original one." As a matter of principle it can perhaps be said that the answer depends upon a choice between two alternatives. Either the promisee will be deprived of an advantage resulting from a common law technicality because his state has abolished a purely joint obligation, or the statute will be cut down even further, by construing

108 See supra note 49 and text.
1092 Williston, Contracts (rev. ed. 1936) sec. 466, p. 1346.
110 Apart from the North Dakota case cited supra, the only case which refused the application of the statute to a joint and several liability is Bryant v. Panter, loc. cit. supra note 104, but in the opinion the court emphasized only the joint nature of the promise. All that can be cited on the point in addition is the headnote to Horne v. People's Bank, loc. cit. supra note 105, and an instruction, which was uncalled for by the facts and for that reason held erroneous, in Waldock v. First Nat'l Bank, loc. cit. supra note 105.
111 Olson v. McQueen, (1912) 14 N. Dak. 212, 217, 139 N. W. 522.
the exemption in case of "joint credit" to mean "credit as principals." The latter alternative would practically eliminate the statute and certainly give the credit test a whimsical nature, except where it is evident that the promisee had reason to believe that both promisors received the economic benefits of the contract—a qualification which is substantially that of section 90 b) of the Restatement of Security.

In only one instance, apparently, has the question of the exemption of joint promises from the operative scope of the statute of frauds been presented to the Minnesota Supreme Court. Counsel for plaintiff in Schmitt v. Murray attacked on appeal an instruction of the trial judge applying the "entire credit" test for the reason that "These charges absolutely prevented the jury from finding and determining in the case that the contract sued upon was a joint contract between all of the defendants and the plaintiff; for if it was a joint contract then plaintiff was entitled to recover." Inasmuch as the Minnesota statute converting all joint obligations into joint and several obligations had been enacted five years previously, the court might well have decided the issue of whether a joint promisor could assert that his liability was now joint and several and therefore invoke the protection of the statute of frauds. However, with no discussion of the merits of counsel's argument and without reference to the joint obligation statute, it ruled that the objection should have been raised when the instructions were given the jury.

It is therefore difficult to surmise which way the Supreme Court of Minnesota would rule if the problem were ever to be presented again. Certainly if the promisee did not know that the consideration inured to one of the promisors only, the Restatement of Security should have persuasive authority. Although there is little precedent in support of the rule stated, it seems to be sound. But where the promisee had notice that only one of the joint promisors receives the contractual benefits, the existence of the joint and several obligation statute produces a dilemma. On the one hand, there are cases in other jurisdictions which have admitted the exception to the statute of frauds in case of joint obligations even

112(1902) 87 Minn. 250, 252, 91 N. W. 1116.
113Loc. cit. supra note 108. The statute in part provides that "... all parties to a joint obligation, including ... all contracts upon which they are jointly liable, shall be severally liable also for the full amount thereof."
though there were in force at that time provisions similar to our joint obligation statute. But in none was the point called to the attention of the court. Probably more effective would be an argument based on Justice Gilfillan’s express admission by way of dictum that if the promise of the recipient was only a guarantee the undertaking of the other promisor was an original one. It could be reasoned from this that it should, as to the form of his promise, make no difference whether the recipient promised as guarantor or co-principal. However, on the other hand, it cannot be overlooked that the cases involving joint promises were decided on their peculiar common law character which in Minnesota no longer exists in its technical form and that the policy of the statute includes a several obligation of the non-recipient if there is another several principal who receives the actual benefits.

2) The question as to whom and what kind of credit is given is to be determined by the jury in the light of all circumstances surrounding the transaction up to the reception of the goods or services. Very little change is noticed in the repetition of this principle down the line of later cases. And as long as a jurisdiction maintains the “entire credit” test there is no possible way to circumvent this fact-finding procedure. It is imperative to find out everything said or written between the parties, who was present, why they were present, financial condition and credit standing of the parties, amount, kind, and price of the goods or services bargained for, etc. Only in the light of these and many more facts can a jury or judge correctly determine who was given the credit.

It is to be noted that the words and acts important in this inquiry are those which precede or concur with the consummation of the transaction. The vendor’s intent at this time is legally determinative as to whether the recipient or third party promisor is the purchaser. And it is the objective manifestations of such intent, not any “mental reservations or secret motive,” which are controlling.

One act on the part of the plaintiff which has caused some comment in suits against the third party promisor is the taking of promissory notes from the recipient at the time of the sale. In Cole v. Hutchinson, we have seen, it was said that such an act,

116 Text to note 78 supra.
118 Text to note 78 supra.
in the absence of adequate explanation, would be conclusive against the defendant's liability. It seems difficult to imagine a situation in which a vendor would take the recipient's note and still be giving him no credit. Yet in Armort v. Christofferson110 it was held that upon the vendor plaintiff's testimony that he took the recipient's notes at the express direction of the defendant promisor, and in reliance on his promise that he would also sign, the jury could properly find for the plaintiff. "The explanation offered by the plaintiff as to the taking of the note is such that it cannot be said to have been conclusively shown that any credit was given to Kieley [recipient]." It is obvious that while all acts are important, some are weighted heavier than others. In the more recent cases, there is little discussion of the test, the evidence, or the foregoing precedent120 indicating that the rules of law applied are correct and the verdict is justifiable.

3) Acts by the parties subsequent to the transaction are competent evidence but should be treated in the nature of an admission. One of such acts which has received emphasis by both counsel and court is the charging of the goods on plaintiff's books. It is reasonable to assume that the vendor will charge whomever he considers liable, and the importance of the plaintiff's act as evidence of his intent was early recognized in the application of the "entire credit" test.121 In Winslow v. Dakota Lumber Co.122 the Minnesota court, as we have already noted,123 adopted a liberal view as to the admissibility of such records by either party.

The problem which has been most troublesome in this connection arose when the vendor charged the recipient. The Winslow Case indicates that under these circumstances a presumption arises that the recipient was given some credit and it is incumbent on the vendor to explain his actions. With a somewhat different approach, Justice Gilfillan in Cole v. Hutchinson124 took the view that such entry is evidence like an admission against the vendor and consequently can be refuted as due to a misapprehension. Whatever theory is adopted, it is clear from these and the later cases that the book entry charging the recipient is not conclusive against the plaintiff vendor. Thus in Maurin v. Fogelberg125 the court

110(1894) 57 Minn. 234, 59 N. W. 304.
120See North Central Publishing Co. v. Speranza, (1934) 193 Minn. 120, 258 N. W. 22; Wolfson v. Kohn, (1941) 210 Minn. 12, 297 N. W. 109.
121See text to and notes 51-53 supra.
122(1884) 32 Minn. 237, 20 N. W. 145.
123See text to note 75 supra.
124(1886) 34 Minn. 410, 26 N. W. 319.
125(1887) 37 Minn. 23, 32 N. W. 858.
through Mr. Justice Mitchell held that evidence tending to show that the recipient was charged at the express request of the promisor was correctly admitted and properly submitted to the jury in connection with the determination of who received the credit. The opinion further elaborated the point and found a probable reason for the promisor’s request, that it would help the promisor keep his accounts straight with the recipient. Again, in *Culver v. Scott and Wolston Lumber Co.*\(^\text{126}\) the same justice held to be a correct statement of law an instruction to the effect that “The fact that on plaintiff’s books the articles are charged to Campbell [the recipient] is a circumstance in the case that should be considered by the jury in determining to whom credit was given.” The last statement of our court on the matter\(^\text{127}\) merely reiterates the rule that plaintiff’s act of charging the recipient is not conclusive on the issue of whether the recipient was in fact given any credit. In the *Winslow, Fogelberg, Culver, and Conrad cases* the Supreme Court refused to disturb a verdict in favor of plaintiff where he had in fact made book entries charging the recipient. It is clear, of course, that a charge to the defendant promisor,\(^\text{128}\) as well as direct evidence by the plaintiff to the effect that he gave full credit to the defendant\(^\text{129}\) is admissible to establish that the “entire credit” was given to him.

Another act in the nature of an admission which Justice Gilfillan mentioned in the *Cole Case* was a demand by the plaintiff for the recipient to pay for the goods or services before suit was brought against the defendant promisor. The absence of proof of such a demand was noted by Justice Mitchell in *Maurin v. Fogelberg*\(^\text{130}\) where a verdict for plaintiff was held sustained by the evidence.

\(^{126}\)(1893) 53 Minn. 360, 55 N. W. 550.

\(^{127}\)Conrad v. Clarke, (1909) 106 Minn. 430, 433, 119 N. W. 214, 482.

\(^{128}\)In the later case of Askier v. Donnelly, (1923) 157 Minn. 502, 195 N. W. 494, the charge had been made to the recipient qualified by the words “Job Donnelly [defendant promisor].” A per curiam opinion affirming a judgment for defendant did not mention the effect given or to be given such words. The respondent’s appellate brief contains argument on these words in support of affirmance. For an interesting disposal of a requested instruction covering a similar issue by a lower court judge, see the Record, p. 1003 to Kenny Co. v. Horne, (1935) 194 Minn. 357, 260 N. W. 358. The requested instruction was: “The fact that on the plaintiff’s books the insurance is charged to [recipient] is evidence in the nature of admission by plaintiff that credit was extended to [recipient] and not [defendant promisor].” The judge’s note says that such is proper for argument but he refused to give the instruction because it would have unduly emphasized one specific item of evidence.


\(^{130}\)Collins v. Joyce & Rasmussen, (1920) 146 Minn. 233, 235, 178 N. W. 503.

\(^{130}\)(1887) 37 Minn. 23, 32 N. W. 858.
Obviously it is an important factor or circumstance in determining who got the credit. However, in Conrad v. Clarke\footnote{131} it was emphasized that “... the mere fact that she [plaintiff] ... made efforts to collect from the corporation [recipient] is not conclusive that she gave it credit in whole or in part.”

In a relatively recent case\footnote{132} the action was commenced against both the recipient Combs and a third party promisor, alleging a sale to both. At the end of the plaintiff’s case the action was dismissed as to Combs, the plaintiff claiming the goods were sold to the defendant promisor upon his credit and delivered to Combs at defendant’s direction. The plaintiff’s explanation was that Combs had been joined through error on the part of her first attorney, that she neither authorized the action nor intended to sue Combs. The lower court found this statement to be true in fact, and the supreme court, after holding that the evidence supported the finding, concluded that “... the fact that Combs was originally joined as a defendant in the action would have no effect on the issues as estoppel or otherwise.”

Without exception, then, acts on the part of the plaintiff subsequent to the transaction which, standing alone, clearly indicate an intent to hold the recipient in some measure liable have been dealt with by our court as admissions or “prima facie” presumptions. At the same time, evidence in explanation or refutation has been freely allowed and fairly weighed.\footnote{133} This approach would seem necessary for consistency with the idea that the controlling issue of to whom credit was given is a question of fact to be determined objectively from all the circumstances.

4) The form of the promise should be considered in the determination but is by no means controlling, although certain terms, unless explained, might warrant a finding one way or the other. The case of Grant v. Wolf\footnote{134} discussed above, held that a promise in form collateral—“I will see you paid”—can be proven original by appropriate evidence showing “... the facts accompanying or surrounding its utterance.” In Armort v. Christoffers\footnote{135} the promise was again “I will see you paid” and again it was held that the words, “... construed with reference to the connection in which

\footnote{131}(1909) 106 Minn. 430, 119 N. W. 214, 482.
\footnote{132}Kutina v. Combs, (1930) 180 Minn. 467, 231 N. W. 194.
\footnote{133}In one case, a second promise by the defendant to pay after the services had been given to the third party recipient was held to be admissible, not as an actionable promise, but as an admission of the contract previously made. Collins v. Joyce & Rasmussen, (1920) 146 Minn. 233, 178 N. W. 503.
\footnote{134}See note 76 supra and text.
\footnote{135}(1894) 57 Minn. 234, 59 N. W. 304.
they were used, and the facts surrounding their utterance," im-
ported an original and not a collateral undertaking. The negative
implication of the Grant and Armort Cases was that in the absence
of such proof the collateral form would have been conclusive
against the plaintiff's case.

Such reasoning might have been in fact applied in Askier v.
Donnelly, a per curiam memorandum opinion, where the alleged
promise "I will see that you get your pay" was declared to be
collateral. We are not told what, if any, evidence the plaintiff
introduced to explain the transaction in whole since the defendant
denied such promise and the trial court found that plaintiff had
failed to establish a contract. The court affirmed the order denying
a new trial and gave as an alternative reason that inasmuch as "The
language which plaintiff says was used did not recognize the debt
as defendant's own debt but as the debt of another," the promise
was therefore "within the provision of the statute of frauds." Be-
cause this technique indicates that the plaintiff in no way attempted
an explanation, the case fits nicely within the negative proposition
of the Grant and Armort Cases.

Only one case—Maurin v. Fogelberg—has specifically dealt
with promises which are in form original. There, the defendant
had directed plaintiff to give two subcontractors all the goods they
wanted and promised "every first of the month you bring in the
bill, and I will pay it." The expression, said Mr. Justice Mitchell,
"... uncontroled and unqualified by circumstances, imports on its
face an original, and not a collateral promise, and implies that credit
was to be given exclusively to the promisor as purchaser." The
affirmance of the judgment for plaintiff indicates that defendant
had failed to explain away the form of promise which he had used.

Thus, in Minnesota the form of the promise, whether it be
original or collateral, has always been no more than a prima facie
presumption as to the intent of the promisor. Clearly no one can
contest the fairness nor logic of this approach when the words
used in the promise are provincial, vague or ambiguous. But what
of the case where the promise is so worded that there can be no
possible doubt as to the meaning? The Fogelberg Case indicates
that it makes no difference. However, in Cole v. Hutchinson the
court assumed the commitment "You sell to James D. whatever
goods he wants; and if he does not pay for them. I will" and ob-

136(1923) 157 Minn. 502, 195 N. W. 494.
137(1887) 37 Minn. 23, 32 N. W. 858.
138(1886) 34 Minn. 410, 411, 26 N. W. 319.
served that "The terms of such a promise would not contemplate a sale to defendant, nor upon his credit as purchaser and principal debtor... None could doubt that such a promise would be collateral and within the statute of frauds." From this language it might be thought that in some instances the Minnesota court will hold a promise so certain in meaning that extrinsic evidence of an intent contrary to the expression is inadmissible or to no avail. It can not be overlooked that such explanation could as easily support the reasoning in Askier v. Donnelly as the theory advanced by the writers above.

5) The statute might not apply despite the fact that the recipient is liable if the promisor had retained funds owed or owing to the recipient for the purpose of paying the obligation. This particular basis for holding a promisor liable regardless of who received the credit has never been resorted to after its original pronouncement in Grant v. Wolf. It can be assumed that this rule is still good law and that Minnesota is in accord with the Restatement of Security.

In addition to the above discussed decisions which constitute fundamentally an application and elaboration of the entire credit test, attention must be called to a few cases in which the court apparently proceeded along a different line of reasoning even though the situation belonged to our class of "promises made concurrently with or prior to the creation of the debt." Here the court considered as the decisive criterion for the original or collateral nature of the promise whether or not the promisor's primary object or main purpose was to subserve some interest of his own. This is the familiar "main purpose" rule.

In the case of promises to pay a pre-existing debt, a more detailed discussion of which will be attempted in the next section, this rule after a long history is fairly well crystalized. But where the promise of the defendant has been prior to the creation of the debt little authority can be found. The Restatements of Security and Contracts provided for the "main purpose" rule only where the promise is to pay a pre-existing debt. A probable explanation is

139See note 76 supra and text.
140See note 77 supra.
141(1924) 8 Minn. L. Rev. 629.
142Restatement, Security, sec. 92 a). "... where the consideration for a promise that all or part of a previously existing duty of a third person to the promisee shall be satisfied is in fact or apparently desired by the promisor for his own pecuniary or business advantage, rather than in order to benefit the third person, the promise is not within the Statute of Frauds." To the same effect see Restatement, Contracts, sec. 184.
that in the application of the "entire credit" test evidence showing that the promise was made primarily for the promisor's advantage is used to determine the intent of the parties. It is another of the "surrounding circumstances" which finally determines who was given credit as purchaser. A further important inquiry is, would it be practical to have the "main purpose" rule and the "entire credit" test existing side by side in the law? If both were to be recognized a rather complicated procedure in each case would be necessary—assuming appropriate evidence. First the question would be, did the promisor mainly subserve his own interest? If yes, then the statute doesn't apply. If no, then the question as to who was the purchaser in the light of all surrounding circumstances would have to be answered. Instructions to the jury would be, to say the least, a bit complicated.

There are indications, however, that the Minnesota Supreme Court will apply the "main purpose" rule in cases where there is no pre-existing debt. In King v. Franklin Lumber Co. one K was in contract with defendant to furnish him logs. K, unable to obtain credit in order to supply the men working for him, was told by defendant to get what supplies he needed and that defendant would stand behind him. K went to the plaintiff and sought board for his men which plaintiff agreed to furnish, relying solely on defendant's promise. In holding defendant's promise original, the court talked only in terms of the interest which defendant had in seeing the contract with K carried out and the improbability of its being carried out in the absence of defendant's promise.

The next hint at the "main purpose" rule is found in Conrad v. Clarke where the court, in affirming a judgment for plaintiff, noted that "Defendant had interests to protect by a continuance of the business of the corporation, and to further his interests and protect them he urged plaintiff to continue in the work, with which she was fully familiar." Plaintiff had stayed on with the corporation in reliance on defendant's promise to see her salary paid.

143See note 146 infra and text.
144(1900) 80 Minn. 274, 83 N. W. 170. The earlier case of Grant v. Wolf, (1885) 34 Minn. 32, 24 N. W. 289, is cited for the "main purpose" rule in an annotation in Note (1908) 15 L. N. S. 214, 223. Nothing in the case can justify any conclusion other than that only the "entire credit" test was applied.
145A simpler solution, perhaps, would have been to hold K an agent for defendant. In such a case the only question would be as to K's authority, real or apparent, to bind defendant to this agreement.
146(1909) 106 Minn. 430, 433, 119 N. W. 214, 482, discussed in text to note 131 supra.
Standing alone the above quotation is an unadulterated application of the "main purpose" rule. However, the statement was made by the court in connection with a recounting of the various factors which indicated the "entire credit" had been given defendant. It is difficult to determine whether the defendant's interest is thus made one of the important "surrounding circumstances" in applying the "entire credit" test or whether the court is merely saying that because of defendant's interest his liability as sole purchaser of plaintiff's services is certainly not unjust.

The most recent and also strongest case on the point is *Kenney Co., Inc. v. Horne.*\(^{147}\) In this case appellant finance company held chattel mortgages and conditional sales contracts on some taxi cabs. Because the cabs could not be operated without liability insurance, appellant took out covering policies from plaintiff. Suit was brought for a balance of premiums due. The policies were made out to the owners of the cabs who were joined in this suit. Plaintiff recovered judgment against one of the owners and the finance company, but only the latter appealed. One of the plaintiff's theories, according to an instruction by the trial judge,\(^{148}\) was that he would not have issued the policies if appellant had not promised to pay the premiums. The Supreme Court's reasoning in affirming the lower court was that inasmuch as the statute of frauds has no application to "direct and primary obligations" it has no application to appellant's promise because "It was for its [appellant's] benefit that insurance be obtained upon the cabs so that they could be operated and appellant receive their earnings to reduce the indebtedness secured by its chattel mortgage and conditional sales contracts." The court declared it to be immaterial whether appellant had an insurable interest. Because of the joinder of both appellant-promisor and the owner named in the policy in a single suit and because plaintiff obtained a judgment against both it is obvious that the "entire credit" test was not and could have been applied consistently with the result. And it is worth emphasizing that the court apparently felt no difficulty in slipping over to the "main purpose" rule.

From this discussion it seems to follow that quite probably both the "main purpose" rule and the "entire credit" test are a part of the law of Minnesota excluding promises made prior to the creation of the debt from the purview of the statute of frauds. To

---

\(^{147}\)(1935) 194 Minn. 357, 260 N. W. 358.

\(^{148}\)See the paper briefs to the case, Record, p. 329, folio 985.
date there has been no conflict in their application. And it must be conceded that the "main purpose" rule will cover many situations to which the "entire credit" test is not applicable and which result in injustice and hardship to a deserving plaintiff.149

(To Be Continued)

149 At least one case has arisen where the only basis for allowing recovery was on the "joint promises" exception. See Bennington Lumber Co. v. Attaway, (1916) 58 Okla. 229, 158 Pac. 566. In Minnesota, where, as we have seen, this basis is probably non-existent, the "main purpose" rule could adequately handle the situation.