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THE LEADING PURPOSE DOCTRINE
AS APPLIED TO THE STATUTE OF FRAUDS

WILLIAM O. MORRIS

During the Seventeenth Century in England, the jury was undergoing a rapid transition. It changed from a group of witnesses to a group of nonwitnesses. With this transition, the courts encountered many problems, not the least of which was the development of a satisfactory method of controlling jury verdicts. To eliminate some of this difficulty, Parliament enacted the statute of frauds, which was denominated "An Act for the Prevention of Frauds and Perjuries." That portion of the act applicable to the problem under consideration provides as follows:

"That from and after four and twenty day of June, which shall be in the year of our Lord one thousand six hundred seventy and seven... no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person... unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."2

While the act was passed in 1676, it did not become effective until 1677.

The English statute of frauds has been generally recognized as not being a part of the common law of the United States, and it is in force here only by virtue of legislation. Variations on the English statute together with some enlargements and additions have been enacted by the various states. The comparable provision of the West Virginia Code4 provides:

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1 The opening words of the statute tell much about problems that existed in England at the time of the adoption of the statute. "For prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury, be it enacted..."
2 The Statute of Frauds, 1676, 29 Car. 2, ch. 3. Justice Bliss stated in Fairall v. Arnold, 226 Iowa 977, 234 N.W. 664 (1939); "It was, in fact, a statute aimed at juries, because, it was the character and function of a jury, at that time, that it might decide on its own knowledge alone, and, if it heard evidence might reject it all." Justice Bliss further stated: "It was drawn with the aid of some of the ablest judges, chancellors and civilians of that time."
3 McKennon v. Winn, 1 Okla. 327, 33 Pac. 582 (1893); "At the time of the settlement and discovery of America the statute of frauds had not been adopted, and has only become the law of the United States or of our several states and territories, by legislative enactment."
4 W. VA. CODE ch. 55, art. 1 §1 (Michie 1955).
"No action shall be brought in any of the following cases: . . .

"(d) To charge any person upon a promise to answer for the debt, default, or misdoing of another; . . . Unless, the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing, and signed by the party to be charged thereby or his agent. But the consideration need not be set forth or expressed in the writing; and it may be proved by other evidence."

The English statute, the West Virginia statute, and the statutes of other states appear to have been drafted in clear and unambiguous language, but in spite of this precision, the courts have by judicial legislation held it not applicable to certain oral promises to answer for the debts of another. It might be equally correct to say that the courts have made judicial exceptions to the statute. It is the purpose of the brief discussion to examine one of the recognized exceptions, a situation in which the statute of frauds has been held not to apply.

We should not be too critical of the courts for the judicial legislation in this area, for in some cases the end justifies the means. Clearly it is above argument that the statute was enacted in wisdom and sound policy to prevent the successful use of pretended agreements to force the payment of another's obligation by the use of perjured testimony.5 The statute of frauds was intended as a shield for the innocent, not as a sword for the unconscionable. Whenever invocation of the statute of frauds in any instance ceases to be a shield and becomes an instrument whereby one seeks to escape the responsibilities of his word, and the evidence thereon is clear, the courts have acted wisely and courageously in stating that the act was not intended to cover such situations and have determined that in this instance a man's word should be held to be equal to his bond.

Whether a promise to answer for a debt, for which the promissor was not otherwise liable, is or is not within the statute depends largely upon the intention of the parties. If it is intended that the promise is to be collateral, it is within the statute and must be in writing; if it is an original one, then it is not a promise to answer for another's debt, but to answer for the promissor's own debt and need not be in writing.

5 McKennon v. Winn, supra note 3: "The prevention of perjury and subornation of perjury in connection with the group of matters legislated about constitute the main purpose of the statute, and all its provisions are but the legislative means toward such prevention."
No better introduction to the main or leading purpose doctrine can be given than to quote from *Howell v. Harvey* where Judge Williams speaking for the court said:

"The statute of frauds is one noted for its brevity and the terseness of its language, yet it has claimed the attention of the courts of last resort, both in this Country and in England, more often perhaps than any other law. It is practically the same in all the states. It was enacted to relieve persons and their estates against false and fictitious claims, by requiring the highest order of proof to establish liability in cases where it is sought to recover against a person as a mere voluntary surety or guaranty of another. But it has been perhaps as frequently invoked to avoid liability as it has been relied upon to protect against injustice. The courts have said that it shall not be perverted and made the instrument of accomplishing a wrong, and have, therefore, in the vast majority of cases construed to have no application to those cases where there is a consideration supporting the oral promise to answer for the debt or obligation of another, other than the release of the original obligor, or the extinguishment of the old debt, or promise. If the promisor derives a benefit from his oral promise which he did not otherwise have, his promise becomes a new and original one, and falls not within the purview of the statute."

From this language it is clear that situations exist wherein an oral promise to answer for the debts of another is enforceable. The exception to, or nonapplicability of, the statute of frauds as mentioned in the above quoted statement is referred to as the main or leading purpose doctrine where applied to the statute of frauds. The cases involving the main or leading purpose doctrine roughly fall into two groups. Consideration will be given first to the group of cases wherein a shareholder has orally agreed to become responsible for the purchases of the corporation in which he is a shareholder; and secondly, an examination will be undertaken of the cases involving the contractor-builder relation, where the one having the building constructed orally undertakes to be responsible for the debts of the builder for materials and labor employed in the construction.

**Stockholder's Obligation**

The question presented is simply: Is the statute of frauds applicable to an oral promise made by a shareholder, officer or director

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6 65 W. Va. 310, 64 S.E. 249 (1909).
7 Id. at 314, 64 S.E. at 251.
of a corporation to be responsible for the debts of the corporation? The courts have stated that original promises are not to be held within the statute of frauds and therefore need not be written, but that collateral ones are within the statute and must be in writing to be enforceable as against the assertion of the statute. 8 This statement would appear to answer the question raised, but it is difficult, if not impossible, to find a satisfactory yardstick for measuring and determining the meaning of the words "original" and "collateral" as applied to such promises. 9 The application of this test does not always give a satisfactory answer.

In the Howell case, supra, the court said:

"The rule by which to determine whether a promise is original, or collateral and without consideration, is thus stated in 29 A. & E. E. L. (2nd Ed.) 929: 'An absolute promise to pay the debt of another is not within the statute though the liability of the original subsists where the leading object of the promisor is to subserve some pecuniary interest or business purpose of his own, and he receives a benefit which he did not before enjoy, and would not have possessed but for the promise'." 10

It is clear that, if the promisor-shareholder is only to receive a benefit which likewise accrues to other shareholders to the same extent, the benefit from the performance by the promisor of his obligation to the corporation is not direct but collateral and his promise would not be legally enforceable as against the assertion of the statute of frauds. Where the promisor is to receive some benefit directly to himself, as distinguished from a benefit to the corporation, then his promise is considered a primary one and not within the statute, for then he is promising to answer for his own debt and only incidentally for the debt of another.

Two cases decided by the West Virginia Supreme Court of Appeals may be used as typical illustrations of the use of the main or leading purpose doctrine to that portion of the statute of frauds dealing with a promise to pay the debt of a corporation. First,

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8 The fact that the promisor receives the benefit of the transaction should be considered as strong evidence that his promise was primary as distinguished from collateral. Schoengeld v. Brown, 71 Ill. 487 (1875).
9 Whether the promise is original or collateral should be determined by all the circumstances relating to the transaction. Bonner & M. Co. v. Hansell, 189 Ill. App. 474 (1914). For an interesting article on the problem of distinguishing collateral from primary promises, see, Simpson, A Suggested Test for Application of the Main Purpose Rule Under the Statute of Frauds, 36 CALIF. L. REV. 405 (1948).
10 65 W. Va. at 314, 64 S.E. at 251.
consideration will be given to one of the leading cases in the United States on this point, *Hurst Hardware Co. v. Goodman.* In that case defendant took a lease on some coal land. Subsequently the defendant organized the Goodman Coal and Coke Company to develop the leased land and assigned the lease to the company. The defendant was a heavy stockholder in that corporation and served as its president and treasurer. The company encountered financial difficulties and the defendant orally agreed to become responsible for the purchases of the company. This promise was made to those from whom the company was seeking credit. In reliance upon this oral undertaking credit was extended to the now bankrupt company. The present plaintiff as well as other creditors of the company filed their claims against the company in the bankruptcy proceedings and received their share of the company's assets upon distribution of the bankrupt's estate. The facts clearly evidenced that the sellers in charging the goods to and having demanded payment from the company indicated that they had treated the company as the debtor. The fact that the plaintiff proved his claim in the bankruptcy proceedings strengthened the view of the defendant that the plaintiff had relied upon and dealt with the company as the principal debtor.

The facts of the *Hurst* case do not show that the defendant Goodman had any interest in the transaction other than as officer and shareholder of the debtor company. The issue simply is: Does the mere interest that one has as a stockholder and officer in a corporation take his oral promise to answer for the debts of the corporation from operation of the statute of frauds? The question was answered in the negative by the court when it stated the applicable law as follows:

"Here the charging of the goods to the corporation, rendition of statements to it and assertion of claims therefor against it in the bankruptcy proceedings, all admitted by the plaintiff, effectually precluded a finding in its favor. . . ."

"In almost every instance of assumption of one man's debt by another, there is some reason for the promise, some benefit accruing to the promisor as well as the debtor. The acknowledg-

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11 68 W. Va. 463, 102 S.E. 216 (1910).
12 In Shepherd v. Butcher Tool & Hardware Co., 198 Ala. 275, 73 So. 498 (1916) the court held that where the goods were delivered to the contractor and credit was given to the contractor any promise made by one having the building built would be collateral and within the statute of frauds. The court considered it important to whom credit was given in determining whether the promise was primary or collateral.
edged and expressly declared purpose of the statute is to preclude the establishment of rights by oral testimony, when the situation of the parties is such as to constitute a strong motive for perjury and fraud in establishing a liability, or the false extension or amplification of conversations and transactions so as to make them impose obligations lying beyond their real scope and effect. To this end, it ordains and declares that no action shall lie to charge any person upon a promise to answer for the debt, default or misdoings of another, unless the promise or some memorandum or note thereof be in writing signed by the party to be charged thereby or his agent. Tested by its letter, the statute inhibits proof of an oral promise to pay the debt of a third person. That some benefit accrues to the promisor for the services rendered or the property sold and delivered, to such third person does not necessarily make the debt that of the promisor or prevent it from being that of such third person. If the debt is that of another and not of the promisor the terms of the statute include it, and incidental benefit, accruing to the promisor cannot exclude it. If, on the other hand, the debt is that of the promisor, the promise is not within the statute though a third person may be incidentally relieved of an obligation in subsequence of payment.”

The facts of the Hurst case further indicate that Goodman had no lien upon the property of the company nor held any other right by which the benefits accruing to the company could be said to benefit him directly. Here Goodman’s only benefit was as any other shareholder, which was incidental and indirect. The defendant may have benefited incidentally and remotely by the extension of credit to the corporation, but so did all other shareholders and possibly other creditors of the firm. The court quite correctly held the promise within the evils at which the statute of frauds was directed and that the oral promise of Goodman was not enforceable.

Twenty-six years after the decision of the Hurst case the court was called upon to consider a similar situation in the case of Tynes v. Shore. At the outset of the discussion of this case it must be said that the language in the opinion is not altogether clear. In the Tynes case a company known as the Motor Company purchased a leasehold interest from the plaintiff and had given its notes to evidence the amount due thereunder. Later the defendant, Shore, acquired all but two shares of the stock of the Motor Company. The facts do not indicate how many other shares were outstanding or what portion of the shares were owned by Shore. The defendant

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14 117 W. Va. 355, 185 S.E. 845 (1936.)
had assumed absolute control of the company. The court said "Witnesses for plaintiff testified that defendant had frequently said he owned and was the Motor Company; that at the first conference with Tynes (1932) defendant stated that the notes of the Motor Company held by Tynes had become his (defendant's) obligation and Tynes was to look to him for payment. . . ." 15

The court recognized that whether the promise of a person to pay the debt of another for which he was not previously liable would fall within the language of the statute of frauds depended upon whether the promisor intended to create a primary obligation on his part. That is, if he intended the promise to be collateral, it is within the statute and must be in writing to be enforceable; if the promise is intended as an original one, it is not within the statute and need not be in writing. The court said:

"Here the undisputed evidence shows that defendant meant for his promise to be taken as original. Furthermore, the evidence—his own evidence—justifies the finding that the Motor Company is merely a corporate simulacrum appropriated to his personal business; and that the notes in question, though nominally those of the Motor Company, are in fact his personal obligations." 16

Further, the court stated that "Courts will not permit a person, acting under guise of corporation to evade individual responsibility." 17 It might be asked whether the promise of the defendant, being an original promise as distinguished from a collateral one, is not within the statute because the promise was made to obtain a direct benefit to himself and only incidentally for the other person's benefit. The fact that the defendant owned all but two nominal shares of the stock in the Motor Co. certainly made it easier for the court to reach its result. The court stated that "when it appears that a corporation is merely a simulacrum appropriated to the personal business of an individual, the corporate entity may be disregarded." 18 But certainly the court does not by this statement mean to infer that it is holding the defendant liable for the corporate debts merely because he owns all but two nominal shares of the corporation. The court is basing its final decision on the finding that the promise of the defendant is direct and the benefits to be received in consideration of his promise moves directly to him.

15 Id. at 357, 185 S.E. at 846.
16 Id. at 358, 185 S.E. at 846.
17 Id. at 359, 185 S.E. at 847.
18 Id. syllabus 3, 185 S.E. at 845.
The courts in several jurisdictions have held that where the shareholder makes the promise to answer for the debts of the corporation at the time the credit is extended so as to acquire a direct benefit to himself, separate and apart from that moving to the other shareholders, and the fact that the promise was primary in form, makes it his debt and therefore not within the statute. The courts have been more willing to find the promise not to be within the statute where the promisor owns all or substantially all of the stock of the corporation than where he is only an incidental shareholder. The corporate veil should never be permitted, nor was it so intended, to be used as a shield to escape one's truly personal obligations, but on the other hand the shareholder should not be indiscriminately held for the debts of the corporation.

While the two principal West Virginia cases on the point have been discussed, some mention should be made of two other cases here relevant—City of Elkins v. Elkins Elec. Ry. Co. and Security Bank Note Co. v. Shrader. The first case appears to be more important because of dicta therein than because of the ultimate holding. McSpadden was president of the Railway Company and owned ninety-five percent of its stock. The Railway Company and McSpadden made an application to a surety company requesting it to become surety on an undertaking of the company to the City of Elkins, both agreeing to indemnify the surety against loss which it might sustain. The bond (surety) was executed by the Railway Company as principal, but McFadden did not execute it himself as a principal. The Railway Co. defaulted in the obligation for which the bond was given and damages are now sought.

The opinion the court proposed this question: “Does the fact that McSpadden would be benefited by having the debts of the railway company paid for which he was liable as endorser or surety make him in fact the principal in the transaction, or, if not, is this a sufficient consideration for his oral promise to be liable to perform the obligation, conceding that he made such a promise?” The court answered its question as follows: “The fact that the principal stock-

19 87 W. Va. 350, 105 S.E. 233 (1920). For cases which dealt with promises made before anything was due under the contract, and held the promise to be within the statute see Hatfield v. Dow, 27 N.J.L. 440 (1859); Billow v. Miller, 211 Ill. App. 214 (1918). For cases which held the promise not to be within the statute see Cranit City Lime & Cement Co. v. Board of Education, 203 Ill. App. 134, (1916); Benbow v. Soothsmith, 76 Iowa 151, 40 N.W. 693 (1888); Oldenburg & Kelly v. Dorsey, 102 Md. 172, 62 Atl. 576 (1905); Way v. Baydush, 133 Va. 400, 112 S.E. 611 (1922).
20 70 W. Va. 475, 74 S.E. 416 (1912).
holder and president was the efficient agent on its behalf does not of itself impose any liability upon him to perform the obligation which he undertook on behalf of the company, nor is it a sufficient consideration for a verbal promise made by him to become liable. . . .”

It is clear that the promise made by McSpadden to the surety company to indemnify it would not be a promise to answer for the debt of another and would not need to be in writing, as the promise was made for the purpose of saving the debtor, not the creditor, harmless. But the fact that McSpadden would be liable on his indemnity contract, even though oral, would be of little or no importance in determining whether the creditor might hold him liable. Here it is clear that the contract was made between the City of Elkins and the company and not by McSpadden. The court held that the fact that the principal shareholder, owner of ninety-five per cent of the stock, who promises to indemnify a surety company for any loss suffered by the surety company as a result of being a surety for the company will not make the shareholder liable to the creditor (City of Elkins). Since no promise of the shareholder was made to save the creditor harmless, none will be inferred merely because of his substantial ownership in the corporation. The court has properly refused to pierce the corporate veil in order to reach the shareholder for the obligation of the corporation.

In the Security Bank Note case, defendant Shrader, whose interest in the West Virginia Consolidated Coal Company was not shown, ordered certain engraved certificates. (Shrader appeared to occupy some position of importance either in organizing or operating the coal company.) Shrader told the plaintiff, “Make out your bill to me for the West Virginia Consolidated Coal Company.” From this statement it was uncertain to whom credit was actually extended. The court stated:

“The vital and controlling inquiry upon this evidence was, to whom did the plaintiff extend credit or upon whom did it rely, as the real debtor for payment? That the supplies furnished were intended for use by the coal company is not conclusive upon this inquiry. All the facts and circumstances must be considered. The question is one of intent.”

The court felt that it was a jury question as to whom the credit had been extended.

23 Id. at 477, 74 S.E. at 417.
Contractor-Builder Relation

The contractor-builder relation, being within the main or leading purpose doctrine, is best illustrated by the case of Howell v. Harvey. The facts in this case are: Peyton contracted to build a building for Harvey. Payton sublet part of the work to Howell, the defendant, who proceeded with his work until his employees quit because Peyton had not paid Howell. Peyton then failed. Howell claimed Harvey told him "for God's sake go on with this work; finish this post office building if you don't do it, it will ruin us." Witnesses testified that Harvey told Howell he would pay him. Howell finished the work and the defendant Harvey refused to pay the plaintiff.

The defendant relied upon the statute of frauds, although he had not specially pleaded it. The court noted that in some jurisdictions the statute must be specially pleaded, but in West Virginia and Virginia such special plea is not necessary where the defendant by either plea or answer denies the contract declared upon. The court stated: "The plea of non-assumpsit is broader in its scope than most other pleas, and under it defendant may invoke the statute of frauds." The defendant, Harvey, claimed that since the plaintiff, Howell, was surety on Peyton's bond to the defendant, Harvey, it was material to show that the plaintiff was not induced to complete the work because of the promise made by the defendant, but that he did it to relieve himself from a liability greater than his loss of pay for services. The court justified its holding for plaintiff by stating: "Here, then, was a benefit moving directly from the promisee to the promisor by virtue of his promise, which he did not have without such promise, and the new consideration was sufficient to support the promise to pay what was then due, as well as to pay for services to be thereafter rendered."

This last statement by the court is most interesting in that the court appears to have failed to distinguish between the promisor's obligation to pay the promisee sum or sums already due at the time of the oral promise, and the sum or sums to become due subsequent to the oral promise. No quarrel is to be made with the holding that the benefit moving to the promisor from the performance of the obligation by the promisee is sufficient to take the case from the operation of the statute of frauds by application of the main or

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24 65 W. Va. 310, 64 S.E. 249 (1909).
25 Id. at 312, 64 S.E. at 250.
26 Id. at 321, 64 S.E. at 254.
leading purpose doctrine, but as to the sum already owing at the time of the promise it is most difficult to treat this promise as being outside the statute. For this question may then be asked: Where is the promisor to receive any benefit from his promise to pay for the materials and services which have already been delivered or performed? It is clear that the reason for making the promise to pay for the goods and services already furnished and those to be furnished was to enable the promisor to get his building completed and is supported by consideration. But consideration alone is not sufficient to make the statute inapplicable. At this junction the problem becomes two-fold. If the oral promise to pay is conditional upon default by the principal obligor to pay that for which the principal obligor is already liable to the promisee, such promise is collateral and within the statute of frauds against the collateral promisor unless in writing. The second situation which is even more troublesome is where the promise is absolute in form and encompasses materials and labor for which the contractor is already liable to the promisee as well as for labor and materials to be subsequently furnished. Some courts have treated such a promise as divisible and the promisee may only recover against the promisor for the goods and labor performed after the promise, and have denied recovery, as against the defense of the statute of frauds, for the sum due as represented by the materials and labor furnished before the making of the oral promise. This distinction seems to be imperative.  

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27 Where the goods were delivered to the contractor and credit was given to the contractor, any promise made by the one having the building built would be collateral and within the statute of frauds. Shepherd v. Butcher Tool & Hardware Co., 198 Ala. 275, 73 So. 498 (1916).

28 Promise made to seller to pay for goods to be delivered and for materials which had been previously delivered. Court held such a promise on part of the promisor to be divisible and held that the statute of frauds was applicable to the promise to pay for the goods which had already been delivered at the time of the promise. Gibson County v. Cincinnati Steam Heating Co., 128 Ind. 240, 27 N.E. 612 (1891).

29 Where the promise was not confined to the part of the debt to become due, but included also the part already due, it was held to be simply a verbal promise to pay the whole debt. Where such a promise is entire, as it was in this case, and it relates in part to matters which render it necessary, under the statute of frauds, to be in writing, the whole promise is void. Engleby v. Harvey, 93 Va. 440, 25 S.E. 225 (1896).

Defendant had contracted to have a vault excavated by C. C in turn hired plaintiff to do the job. Plaintiff after having worked one day went to the defendant and stated he would not complete the job unless the defendant promised to pay him. The defendant told the plaintiff to finish the job and "he would be paid." Held: Promise original and not void under the statute of frauds. It was not a promise to answer for the debt or default of C. Court allowed recovery for work completed before promise was made as well as for that portion of the work done after the promise. Devlin v. Woodgate, 34 Barb. (N.Y.) 252 (1861).
An exception should never be extended beyond the point necessary to make the operation of the rule just and workable. The main or leading purpose doctrine may be considered an exception to the clear language of the statute of frauds and should be enlarged no further than to correct and avoid the evils which might be magnified by the strict application of the statute. However, when the court applies the main or leading purpose doctrine to cover promises to pay for labor or materials which have already been furnished at the time of the promise the court is losing sight of both the statute and the doctrine and is invading the province of the legislature, and may be creating a greater evil than the one sought to be avoided. The main or leading purpose doctrine should never be applied to situations wherein the credit, materials or labor have already been furnished at the time of the promise, but should only apply to promises made to gain present or future materials and services.

Where the contractor has perfected a mechanic's lien against the property for goods and labor already delivered, the release of such a lien by the promisee to the promisor would clearly be for the benefit of the promisor and would come within the main or leading purpose doctrine and would be enforceable although oral. Of course here we would have a present release of consideration from the promisee to the benefit of the promisor and would in one sense of the word be a promise for goods which have already been delivered, but the surrender of the lien should suffice as sufficient consideration to bring the promise within the doctrine.

The Custard case decided after the Howell case further clarifies the contract-builder situation. The court found that where one acting on behalf of the creditor "verbally notified defendants to proceed with the plumbing and assured then that if they did the Board would pay them out of the balance due the Construction Co.," such promise was not within the statute of frauds. The court further stated: "[T]he Board derived some benefit to itself thereby, which it otherwise would not have had, and for that reason it is an original promise and not within the statute of frauds." While the court seemed to decide the present case on the basis of the main or leading purpose doctrine it seems that the court could just as well have

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32 Id. at 518, 102 S.E. at 218.
said that it was a promise to pay from the principal debtors funds in its hands and not within the statute for that reason. While the desired result was reached the court did not give as thorough coverage to the problem as it might have given thereto.

SUMMARY

From the previously considered cases it seems clear that the West Virginia Supreme Court of Appeals has recognized the main or leading purpose doctrine and is in general accord with the laws of the sister states in applying the statute of frauds in both the stockholder-corporation and the contractor-builder situations. If the court finds that the promise was made for the purpose of obtaining a present benefit to the promisor which moves directly to him, then such oral promise is deemed a primary one and not within the evils at which the statute of frauds was aimed. The court should be extremely careful in any enlargement of this doctrine, for each additional situation, wherein the doctrine is held to apply, weakens the statute of frauds to that extent. A rule with many exceptions ceases to be a rule and only confusion and uncertainty can result.