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# COMMENTS

## CONSIDERATION IN SURETYSHIP CONTRACTS IN WASHINGTON

RICHARD W. BARTKE

"Suretyship is the relation which exists where one person has undertaken an obligation and another person is also under an obligation or other duty to the obligee, who is entitled to but one performance, and as between the two who are bound, one rather than the other should perform."<sup>1</sup> The suretyship relation is a specialized form of contract and in order to be enforceable must satisfy all the requirements of contract formation, one of which is consideration.<sup>2</sup> If this were always kept in mind and the cases analysed on the basis of technical contract rules, much of the difficulties and confusion found in the area would disappear. However, because of the tripartite nature of the suretyship transaction and of the circumstance that, at least historically, the surety generally did not derive any direct economic benefit from the transaction, lending his name and credit for reasons of blood ties or friendship, the basic nature of the transaction was often lost sight of by courts. This is most noticeable in the consideration area. Since people usually bargain for economic goods or services, which is almost invariably true of the principal contract in the suretyship situation, many cases tend to equate direct economic benefit with the technical concept of consideration. An example taken at random may illustrate. The court was construing the offer of a "gratuitous" surety and expressed the canon of construction, that the offers and contracts of "gratuitous" sureties will be construed strictly, in the following language: "*The appellant received no consideration for guaranteeing the payment of the indebtedness of Walder & Company. That the contract of a guarantor without compensation will be strictly construed, needs no sustaining citation of authority.*"<sup>3</sup> (emphasis supplied) Here, in two sentences, the court treated *consideration* and *compensation* as synonymous and interchangeable. Because of this recurring error in

<sup>1</sup> RESTATEMENT, SECURITY § 82 (1941); comment (g) to this section reads in part as follows: "The term 'guaranty' is used in this Restatement as a synonym for suretyship. 'Guarantor' is used as a synonym for surety. 'Guarantee' is used as a verb meaning to assume a suretyship obligation." The Restatement terminology is used throughout this article.

<sup>2</sup> *Thompson v. Moe*, 147 Wash. 133, 265 Pac. 457 (1928); *Universal C.I.T. Credit Corp. v. DeLisle*, 147 Wash. Dec. 283, 287 P.2d 302 (1955).

<sup>3</sup> *Hansen Service, Inc. v. Lunn*, 155 Wash. 182, 283 Pac. 695 (1930).

analysis the discussion will begin with a brief survey of the concept of consideration.

### CONSIDERATION

The American Law Institute defines consideration as follows:

(1) Consideration for a promise is (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification or destruction of a legal relation, or (d) a return promise, *bargained for and given in exchange* for the promise.

(2) *Consideration may be given to the promisor or to some other person.* It may be given by the promisee or by some other person.<sup>4</sup> (emphasis supplied)

This definition has been adopted by the Washington court.<sup>5</sup> This definition clearly indicates the dual nature of consideration as being either a benefit to the promisor, or a detriment to the promisee. This dual character is the result of the development of modern contract law from the common law actions of debt and assumpsit. The action of debt, which was from the beginning contractual in nature and required a *quid pro quo* as one of its elements, produced the benefit aspect of consideration. The action of assumpsit which was delictual in origin, being first a form of the action on the case for deceit, gave us the detriment aspect of consideration.<sup>6</sup> Eventually, for procedural reasons, both these grounds supported an action of assumpsit, one being the basis of *indebitatus* assumpsit and the other of special assumpsit.<sup>7</sup> The final step in the creation of modern contract law, and development of the concept of consideration, was the enforcement of mutual promises.<sup>8</sup> Relatively early in this development, the concept of suretyship was recognized, as courts began to enforce promises to pay debts of others, where in reliance on such promises, and to their

<sup>4</sup> RESTATEMENT, CONTRACTS § 75 (1932).

<sup>5</sup> *Johnson v. S. L. Savidge, Inc.*, 43 Wn.2d 273, 260 P.2d 1088 (1953); *Snyder v. Roberts*, 45 Wn.2d 865, 278 P.2d 348 (1955).

<sup>6</sup> Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1 (1888-9); Holdsworth, *Debt, Assumpsit, and Consideration*, 21 MICH. L. REV. 347 (1912-3); HOLMES, *THE COMMON LAW* c. VII and especially pp. 284-88 (1881); 1 WILLISTON, CONTRACTS § 99 (rev. ed. 1936); 1 CORBIN, CONTRACTS § 109 *et. seq.* (1950).

<sup>7</sup> Ames, *Parol Contracts Prior to Assumpsit*, 8 HARV. L. REV. 252, 264 (1894-5) "Assumpsit would lie both where the plaintiff had incurred a detriment upon the faith of the defendant's promise, and where the defendant had received a benefit. Debt would lie only in the latter class of cases..."

<sup>8</sup> Holdsworth, *Debt, Assumpsit, and Consideration*, 21 MICH. L. REV. 347, 350 (1912-3) "It was not till the middle of the sixteenth century that the judges began to incline to the belief that, if a promise were made for a promise, both promises could be enforced by action of Assumpsit; and it was not till the end of the century that the principle was accepted as settled law."

detriment, promisees parted with goods or money.<sup>9</sup> "From that day to this a detriment has always been deemed a valid consideration for a promise if incurred at the promisor's request."<sup>10</sup>

PRINCIPAL AND SURETYSHIP CONTRACTS EXECUTED  
CONTEMPORANEOUSLY

The simplest situation, analytically, is presented where the principal and the suretyship contracts are executed at the same time. This is also the most common situation. Somewhere during the bargaining process it becomes obvious that the creditor will not part with his goods or money or will not execute some other kind of agreement, e.g. a construction or employment contract, unless security, in addition to the principal's promise, is given. At such stage a surety offers to pay in case of default by the principal. If the creditor accepts and in reliance on the surety's offer parts with his goods or money, or executes the contemplated contract, the surety is bound since, "the same consideration will support an indefinite number of promises so long as they are made upon the faith thereof."<sup>11</sup> (emphasis supplied) This is simply the application of detriment consideration and has been repeatedly recognized by the Washington court. Thus in an action against the indorser of a note which, for the purposes of the decision, the court treated as non-negotiable, the defendant contended that he was not liable since no part of the consideration moved to him. The court answered that, ". . . the rule is, in case of a surety, that the consideration which moves to the principal is sufficient to sustain the obligation of the surety."<sup>12</sup>

This principle was most strikingly illustrated in *Pacific National Bank of Tacoma v. Aetna Indemnity Co.*<sup>13</sup> The plaintiff bank would not advance money without security. The defendant, a compensated, professional surety, executed a bond which was delivered to the plaintiff who advanced the money. Unknown to the plaintiff the principal never paid the premium. Upon the principal's default, the surety disclaimed liability. The court properly held that the extension of credit supported both the principal's and the surety's promises. Since the

<sup>9</sup> Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 14 (1888-9) "It was accordingly decided, in 1520, that one who sold goods to a third person on the faith of the defendant's promise that the price should be paid, might have an action on the case upon the promise. This decision introduced the whole law of parol guaranty." Citing Y. B. 12 Hen. VIII 11, pl. 3.

<sup>10</sup> *Id.* at p. 14; See also 1 CORBIN, CONTRACTS § 121 (1950).

<sup>11</sup> BRITTON, BILLS & NOTES § 93 (1943); See also RESTATEMENT, CONTRACTS § 83 (1932).

<sup>12</sup> *Farmers State Bank v. Gray*, 94 Wash. 431, 162 Pac. 531 (1917).

<sup>13</sup> 33 Wash. 428, 74 Pac. 590 (1903).

payment of the premium was not made an express condition precedent of the surety's duty, its nonpayment was not available as a defense.

The same principle was applied in a long line of cases. One of these involved a bond executed by a vendor of real property to save the vendee harmless from a judgment foreclosing a lien against the land, which the vendor was about to appeal. The vendor failed to perfect his appeal and was held liable.<sup>14</sup> Others involved an action on a bond given to secure the performance of a construction contract, where the contract itself did not call for security, but where the owner refused to sign and execute the agreement unless a bond were furnished;<sup>15</sup> the case of a butcher who supplied a logging camp on credit;<sup>16</sup> of a bank president who promised to deliver to the plaintiff collateral security in consideration of advances to the bank;<sup>17</sup> and of an indemnitor who, in consideration of the plaintiff becoming surety for a third party, promised to hold her harmless as to half the amount.<sup>18</sup> Similarly the compromise of a cause of action against a corporation was consideration for the corporation's as well as for the surety's promise.<sup>19</sup> Occasionally Statute of Frauds problems may also involve consideration questions.<sup>20</sup>

The consideration moving from the creditor to the principal will support not only the surety's promise as to future, but also as to existing indebtedness.<sup>21</sup> Since the surety's promise is aleatory, the question of the sufficiency of the consideration is not apt to arise.

The court has also held that a recital in a bond that the creditor refused to make advances unless security were given and that the

<sup>14</sup> Frank v. Jenkins, 11 Wash. 611, 40 Pac. 220 (1895).

<sup>15</sup> Sweeney v. Aetna Indemnity Co., 34 Wash. 126, 74 Pac. 1057 (1904).

<sup>16</sup> Schoening v. Maple Valley Lumber Co., 61 Wash. 332, 112 Pac. 381 (1910).

<sup>17</sup> Noyes v. Adams, 76 Wash. 412, 136 Pac. 696 (1913) (The plaintiff in this case did not recover as she failed to prove any damages.)

<sup>18</sup> Abrahamson v. Burnett, 157 Wash. 668, 290 Pac. 228 (1930).

<sup>19</sup> Hobson v. Marsh, 69 Wash. 326, 124 Pac. 912 (1912) (A corporation sold over-issued shares to a bona fide purchaser in violation of the statute, which gave rise to a cause of action against it. The purchaser surrendered the shares to the corporation and in settlement of his claim accepted the corporation's note indorsed by the defendant.)

<sup>20</sup> Backus v. Feeks, 71 Wash. 508, 129 Pac. 86 (1913) (The defendants were sureties on a bond given to secure the performance by the lessee under a five year lease; the lease was not acknowledged as required by statute and thus unenforceable otherwise than as a lease from month to month. The court held that the defense of the Statute of Frauds was not available to the sureties and said that there was consideration for their promise. The whole discussion is not very satisfactory and fails to give any workable theory for the solution of these problems.)

<sup>21</sup> W. T. Rawleigh Co. v. Langeland, 145 Wash. 525, 261 Pac. 93 (1927) (One Larsen was distributing the plaintiff's products in Washington. The plaintiff would not renew his contract unless security were given. In consideration of the execution of the renewal contract and extension of future credit, the defendants guaranteed Larsen's past and future indebtedness.)

surety was interested in the principal contract, imparted prima facie consideration and shifted the burden of proof to the surety, to prove lack of consideration.<sup>22</sup> In this case the surety failed to sustain the burden.

However, as mentioned above, in some cases the court failed to distinguish between motive which induced the surety to guarantee the principal's performance, direct economic benefit to the surety, and the technical concept of consideration. Thus in *Washington Grocery Co. v. Citizens' Bank of Anacortes*,<sup>23</sup> the defendant bank made a loan to one McLean who with the proceeds purchased a grocery business, giving the defendant a chattel mortgage. In order to enable McLean to make credit purchases from the plaintiff, the defendant executed a continuing offer of guaranty contemplating a series of contracts. The plaintiff accepted by extension of credit and upon McLean's default the court properly held the defendant liable. However, the court's reasoning is questionable; it said,

The contention that the guaranty was without consideration is fully answered by the fact that the appellant furnished all the money for the purchase of the grocery store, held a mortgage upon the same and was interested in seeing the business properly conducted.<sup>24</sup>

While the court was undoubtedly right that these were the motives which prompted the defendant to undertake its suretyship obligation, such motives are legally entirely irrelevant. The consideration was not the defendant's desire to protect its investment, but the detriment to the plaintiff which parted with its goods in reliance upon the defendant's promise. The court has in several other cases tried to find some incidental benefits to the defendant sureties and called them consideration.<sup>25</sup>

There is one more case in this group which requires analysis, not because it is important, but because it is so clearly wrong and because it so well illustrates the result of a failure to distinguish between the concept of consideration and direct economic benefit.<sup>26</sup> A street railway company applied to the plaintiff city for a franchise to construct a line. The city granted the franchise under the conditions that the construction would be completed and operation of the line started

<sup>22</sup> *German-American Mercantile Bank v. Illinois Surety Co.*, 99 Wash. 9, 168 Pac. 772 (1917).

<sup>23</sup> 132 Wash. 244, 231 Pac. 780 (1925).

<sup>24</sup> 132 Wash. at 247, 231 Pac. at 781 (1925).

<sup>25</sup> *Moore v. Kildall*, 111 Wash. 504, 191 Pac. 394 (1920); *A. M. Castle & Co. v. Public Service Underwriters*, 198 Wash. 576, 89 P.2d 506 (1939).

<sup>26</sup> *City of Aberdeen v. Honey*, 8 Wash. 251, 35 Pac. 1097 (1894).

within a stated period and that a bond with sureties would be posted. The defendants became sureties on the bond. Upon the principal's default the city sued the sureties. The court, reversing the trial court, held the defendants not liable saying,

There was no consideration running to the obligors in the bond for the reason that no franchise had been granted to them, and they, as individuals, would have had no right to construct any street railway under the franchise granted to the Pacific Wheelless Electric Railway Company, it not appearing that the franchise had been assigned to them.<sup>27</sup>

This case was never cited in any Washington case, but had it been followed, it would have meant the end of suretyship transactions in this jurisdiction. The holding of the court is not entirely clear since in the next paragraph it is said that the plaintiff city could not prevail since it failed to prove any damages; the question of damages being entirely irrelevant if there was no obligation in the first place. At any rate it would be desirable if this case were formally overruled as it may confuse a reader who happens to find it.

#### SURETYSHIP CONTRACTS EXECUTED SUBSEQUENT TO THE PRINCIPAL CONTRACT

The analytically more difficult and also more often litigated situation is that of a suretyship undertaking executed subsequent to the execution of the principal contract.<sup>28</sup> The simplest situation is presented where there is a new and independent consideration for the surety's promise; the most common being the extension of time on the principal's matured obligation,<sup>29</sup> or forbearance to enforce a claim against

<sup>27</sup> 8 Wash. at 253, 35 Pac. at 1097 (1894).

<sup>28</sup> See Annotation 167 A.L.R. 1174 (1947) and also short Annotations in 74 A.L.R. 1097 (1931) and 124 A.L.R. 717 (1940).

<sup>29</sup> *Rattelmiller v. Stone*, 28 Wash. 104, 68 Pac. 168 (1902) (The plaintiff deposited a sum of money with a savings bank and received a certificate of deposit payable one year after date. At maturity the certificate was extended for six months and on the back the defendant's intestate, an officer of the bank, signed a guaranty.) *Pitt v. Little*, 58 Wash. 355, 108 Pac. 941 (1910) (The defendant was president of a corporation indebted to the plaintiff. The debt was overdue. In consideration of the extension of the time of payment the defendant executed the note in issue.) *J. R. Watkins Co. v. Brund*, 160 Wash. 183, 294 Pac. 1024 (1931) (Brund had a sales territory for the plaintiff's products. His debts to the plaintiff were past due and one of the sureties on his bond died; the plaintiff requested a new bond. Brund induced one Buerkli to sign the bond promising not to deliver it until he obtained the signature of the surviving surety on the original bond. However, he got the signature of a financially irresponsible person and delivered the bond, the plaintiff notifying Buerkli of acceptance. The plaintiff extended Brund's time of payment and granted new credit, as well as released the sureties on the original bond. Buerkli was held liable, the court finding consideration in the extension of time, granting of credit and release of sureties. The last ground is clearly wrong, as Buerkli did not bargain for it, especially since one of the discharged sureties was to be his co-surety.)

the principal.<sup>30</sup> In the analytical process the requirements of mutual assent must be watched to make sure that the extension of time or forbearance were the bargained for equivalents. In this connection a very misleading statement by Brandt that forbearance without a promise to forbear is not enough, that there must be a promise for a promise,<sup>31</sup> must be discussed, because it was quoted with approval by the court in *Cowles Publishing Co. v. McMann*.<sup>32</sup> If the surety's offer calls for a promise and the creditor simply forbears, the surety is not liable *not* because forbearance cannot be consideration, but because there was no mutual assent and the surety's offer was never accepted. On the other hand if the surety's offer is one for a unilateral contract and calls for forbearance and the creditor in fact forbears, the offer is accepted and the surety is liable. The Washington court has so held in *F. C. Palmer & Co. v. Chaffee*<sup>33</sup> which is not mentioned in the *McMann* case. While some may feel that mere forbearance is a poor bargain, it has been often said that courts do not make new contracts for the parties, and having received what he bargained for there is no reason why the surety should not be liable according to the tenor of his undertaking.

Of course, extension of time is not the only thing sureties have bargained for. Thus there was consideration where a bond was given to secure to a partnership the exclusive possession of a stock of goods from a wrongfully appointed receiver;<sup>34</sup> where an assignor guaranteed the payment of a conditional sales contract the assignee crediting the assignor's account with the contract;<sup>35</sup> and for the release of the vendee's ship upon which the vendor had loaded machinery and which it would not let depart unless security were given.<sup>36</sup> Similarly, guaranties executed in consideration of a credit of overdue interest,<sup>37</sup> and in order

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<sup>30</sup> *Ekre v. Cain*, 66 Wash. 659, 120 Pac. 523 (1912) (The guaranty was executed to avoid the notoriety of a lawsuit.) *State Bank of Clarkston v. Morrison*, 85 Wash. 182, 147 Pac. 875 (1915) (The defendant guaranteed the note involved in consideration of the bank's forbearance to sue on the note.) *F. C. Palmer & Co. v. Chaffee*, 129 Wash. 408, 225 Pac. 65 (1924) (The defendant's tenant was indebted to the plaintiff, with part secured by a chattel mortgage upon farm machinery. The plaintiff threatened to foreclose the mortgage and the defendant wrote that if it would forbear to enforce its claim until a certain date he would guarantee the payment.) *Puget Sound National Bank of Tacoma v. Olsen*, 174 Wash. 200, 24 P.2d 613 (1933) (Guaranty executed by shareholder and officer in consideration of forbearance to sue on overdue notes of a corporation.)

<sup>31</sup> 1 BRANDT, SURETYSHIP & GUARANTY § 25 (3rd ed. 1905).

<sup>32</sup> 25 Wn.2d 736, 172 P.2d 235 (1946).

<sup>33</sup> *Supra*, note 30. See also *Essig v. Turner*, 60 Wash. 175, 110 Pac. 998 (1910).

<sup>34</sup> *Larsen v. Winder*, 20 Wash. 419, 55 Pac. 563, (1898).

<sup>35</sup> *W. W. Kimball Co. v. Cockrell*, 23 Wash. 529, 63 Pac. 228 (1900).

<sup>36</sup> *Washington Iron Works v. McNaught*, 35 Wash. 10, 76 Pac. 301 (1904).

<sup>37</sup> *Skagit State Bank v. Moody*, 86 Wash. 286, 150 Pac. 425 (1915).

to secure to the principal part of a contract price prior to the time of performance<sup>38</sup> were supported by consideration.

Of course, it is possible to have a formally executed contract, which does not become binding until the happening of some condition,<sup>39</sup> and such a condition may consist of the promise of a surety.<sup>40</sup> This has been recognized in several Washington cases.<sup>41</sup>

The two most recent Washington cases in this area deserve special attention. The first is the by now well-known case of *Cowles Publishing Co. v. McMann*.<sup>42</sup> One Baker executed a contract with the plaintiff publishing company, whereby he was to distribute the "Spokesman Review" in a certain area. The contract called for a bond with sureties. Since the regular distribution of the paper was imperative to the plaintiff, Baker at once entered upon performance. The bond was executed some time later; the exact date was in dispute. At the time of the execution of the main contract the identity of the sureties was

<sup>38</sup> *Thompson v. Moe*, 147 Wash. 133, 265 Pac. 457 (1928) (The plaintiff contracted to buy a house and lot from the defendant; the purchase price to be paid partly in cash and partly by the assumption of a mortgage. A small down payment was made, the balance to be paid on completion. The defendant requested the plaintiff to advance him some money which the plaintiff agreed to do if he were given security to hold him harmless from possible mechanics' liens. The co-defendant bonding company executed a bond. Later the defendant requested more money and delivered a second bond executed by the co-defendant. The plaintiff put the money in escrow and later used it to discharge liens. The bonding company was liable on the first, but not on the second bond, since it bargained for a cash payment to the principal, which he never received.)

<sup>39</sup> *Pym v. Campbell*, 6 El. & Bl. 379 (Q.B. 1856). However, see criticism of the rationale of this opinion in 3 CORBIN, CONTRACTS § 589 (1951).

<sup>40</sup> See Annotation 167 A.L.R. at 1185 (1947).

<sup>41</sup> *DeMattos v. Jordan*, 15 Wash. 378, 46 Pac. 402 (1896) (Action against sureties on construction bond. The bond was dated May 1, but was acknowledged on May 8 and the evidence tended to show that it was in fact executed on that date. The contractor had already started preliminary work. The court held the sureties liable on two grounds: that the giving of the bond was one of the inducements to the plaintiff, and that the executed duplicate original of the construction contract was delivered to the contractor upon the delivery of the bond indicating that the contract was not binding until that moment.) *Title Guaranty & Surety Co. v. Packard*, 75 Wash. 178, 134 Pac. 812 (1913) (The plaintiff agreed to become surety on a construction bond if the defendants would indemnify it; the defendants executed a bond which did not satisfy the plaintiff. Some three months later they executed a second bond. The defendants were held liable either because the suretyship undertaking did not become final until the indemnity bond was executed, or because the two were part of the same transaction.) *Tomanovich v. Casey*, 106 Wash. 642, 180 Pac. 919 (1919) (The plaintiff was a foreigner who could not speak or read English and the defendant was an attorney who handled a case for him and whom he implicitly trusted. The defendant's brother and another approached the plaintiff for a loan, which the plaintiff would not make unless the defendant approved. The defendant prepared a note which was subsequently extended. Later the defendant gave the plaintiff a check for a small sum and a note for the balance, which was not signed by the defendant's brother; the plaintiff believed that both instruments were checks. When he discovered his mistake he approached another attorney. Negotiations ensued and the defendant wrote a six month guaranty on the back of the note. The court held the defendant liable saying that the note did not take effect until the guaranty was executed. The case could probably have been decided on the ground that the forbearance of the plaintiff to sue at the time constituted consideration.)

<sup>42</sup> *Supra*, note 32. Noted in 22 WASH. L. REV. 142 (1947).

not ascertained. The distributorship contract gave the plaintiff the right to terminate it if Baker were in arrears; Baker in fact was never out of the "red." In the action on the bond the court affirmed a judgment for the defendants holding that there was no consideration for their undertaking and saying,

A review of the cases makes it apparent that the rule contended for by appellant has been limited in its application to situations where at the time the principal obligation is entered into: (1) the guarantor has offered or promised the debtor to guarantee the debt for him, and the debtor communicated this information to the creditor, who executed the principal contract in reliance thereon; (2) or the guarantor makes such promise direct to the creditor with the same result; (3) or the debtor gives the creditor an assurance that, if he later deems the debt insecure, he might look to a certain person, *then named by the debtor to guarantee the debt*.<sup>43</sup> (emphasis supplied)

Points 1 and 2 above are undoubtedly correct since the sureties bargained for the principal contract and although their promises were unenforceable under the Statute of Frauds, they were voidable, not void, and became binding when reduced to writing.

However, the court's third point, that the surety will be liable if named by the principal even though he was ignorant of the fact, is more than questionable. Since the gist of the concept of consideration, as shown above, is the bargained for act, forbearance or promise, it is difficult to see how somebody who was ignorant of the negotiations could have bargained for the result. The fact that his name had been given to the creditor does not change the situation; being ignorant of the transaction, he could not take part in the bargaining process. The incongruity of the court's position prompted the author of a note in the *Washington & Lee Law Review* to argue that no legal distinction should be made between a surety whose name was disclosed to the creditor, although without his knowledge or consent, and one who was not named.<sup>44</sup> While this writer agrees that it would make more sense

<sup>43</sup> 25 Wn.2d at 740, 172 P.2d at 238 (1946). This passage is quoted and adopted in SIMPSON, SURETYSHIP § 26 (1950).

<sup>44</sup> 4 WASH. & LEE L. REV. 221, 226 (1946-7) "There seems to be no logical or legal reason for the difference in holding liable one person who subsequently signs a guaranty agreement without any new consideration because he was named, albeit without authorization, by the principal debtor at the time the principal contract was executed, and in not holding liable another person similarly situated merely because he was *not named* by the debtor when the principal contract was executed. In both situations the debtor has agreed to procure a surety acceptable to the creditor. In neither situation did the person who later made the guaranty make any promise to the creditor at the time the creditor entered into the principal contract; nor can the creditor have any right against either of the third persons until he actually makes the guaranty. . . . In both cases the creditor acts in consideration of a prospective promise of a third party; and the fact

to hold the surety liable in either case, if an exception to or a deviation from the doctrine of consideration must be made, it is the opinion of this writer that the holding of the case is wrong on orthodox contract principles.

It is the opinion of this writer that the sureties in the *McMann* case should have been held liable on a constructive conditions analysis; after all, our modern doctrine of constructive conditions was first announced in a case involving the question of giving of security.<sup>45</sup> Since at the time of the execution of the suretyship undertaking the major portion of the distributorship contract was still executory, the furnishing of a satisfactory bond with sureties should have been construed as a constructive condition precedent to the continued duty of immediate performance on the part of the plaintiff publishing company. Thus construed, the happening of the condition becomes the bargained for equivalent and all the difficulties disappear, as there is ample consideration to support the suretyship undertaking.<sup>46</sup>

While it is submitted that the above analysis will work satisfactorily where the principal contract is wholly or partly executory, it will not solve the problem where the creditor has fully performed; e.g. where the creditor has parted with the goods or money, the subject matter of the exchange, in reliance on the principal's promises to pay in the future and to supply sureties as security. Under the above analysis the creditor could have refused to perform until the bargained for security was forthcoming, but of course it was competent for him to waive a condition of his own promissory duty. However, it is submitted that even in such a case the surety should be held liable. The only satisfactory approach to the problem found by this writer, is that suggested by Professor Williston, who would use the concept of novation for the purpose; it may be added parenthetically that the learned author cites no case authority for his position, primarily perhaps because courts have failed so far to develop a comprehensive theory covering this type of case. Professor Williston says,

Even in such a case [the creditor relied upon the debtor's promise to provide a surety] the surety should be held. *His promise is taken by*

that this party is named in one case and not in the other should not afford any legal distinction between the cases." (Italics are by the writer of the quoted note.)

<sup>45</sup> *Kingston v. Preston*, 2 Doug. 689 (K.B. 1773) (The defendant contracted to transfer to the plaintiff, at a certain time, his business with the entire inventory, for which the plaintiff promised to pay in agreed installments and to furnish good and sufficient security. The plaintiff failed to supply the security and the defendant refused to transfer his business. Lord Mansfield held that the giving of security was a condition precedent to the defendant's duty of immediate performance.)

<sup>46</sup> See RESTATEMENT, CONTRACTS § 266 (2) (1932).

*way of novation in satisfaction of the principal debtor's promise to provide a surety.* There is no greater difficulty in such a novation than in any case where a promisee accepts the promise of a new obligor in lieu of the promise of the previous one.<sup>47</sup> (emphasis supplied)

In this situation the consideration bargained for by the surety is the discharge of the principal from one of his promissory duties.

The fallacy of the position taken by the court in the *McMann* case, that forbearance without a promise to forbear cannot be a consideration, has been discussed above.

The most recent case involving the problems here under discussion is *Universal C.I.T. Credit Corp. v. DeLisle*.<sup>48</sup> The facts of this case are briefly these. A corporation engaged in the business of selling cars, executed on March 25, 1952 a contract with the plaintiff finance company, whereby it (the plaintiff) agreed to finance the dealer's car purchases. The dealer in turn was to assign to the finance company the conditional sales contracts whenever it sold a car. The financial condition of the dealer corporation deteriorated steadily and on June 20, 1952 the defendants, who were officers and principal shareholders of the dealer corporation, executed to the plaintiff finance company an offer of guaranty. The offer recited that the offerors requested the plaintiff to continue to extend credit to the dealer corporation and continue to accept assignments of commercial paper from it and to forbear for any period of time to strictly enforce the obligations of the dealer corporation. In consideration thereof the offerors promised to guarantee the payment of all sums due or to become due from the dealer corporation. The plaintiff continued to extend credit until February, 1954, when the dealer corporation became insolvent. The plaintiff sued the sureties, alleging the execution of the principal contract, the financial position of the principal (dealer corporation), the execution of the offer of the guaranty and its acceptance by continued extension of credit. The plaintiff was nonsuited in the trial court on the ground that there was no consideration for the defendants' undertaking and the order of dismissal was affirmed on appeal, the court saying,

Yet, beyond the bare fact of a benefit or detriment or, more specifically, the extension of further credit, it is fundamental that such must arise out of an agreement between the parties. There must be a meeting of the minds. In the instant case, the testimony is that appellant, in order to continue the account, secured the guaranty from respondent through its representative in Lewiston. There is not one word of testimony

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<sup>47</sup> 6 WILLISTON, CONTRACTS § 1874 (rev. ed. 1938).

<sup>48</sup> *Supra*, note 2.

that respondent executed the guaranty in order that further credit be extended to the motor company. *There is nothing in the written guaranty itself to indicate that it was given in consideration of the extension of further credit.* Appellant has failed to prove that the guaranty was supported by an independent consideration.<sup>49</sup> (emphasis supplied)

The above statement, especially the italicized part, is rather startling. It seems to assume that the writing was executed as an acceptance of an offer to extend further credit, when in fact it is quite clear from the writing itself that it was an offer, parts of which read as follows,

Each of us request you to extend credit to, make advances under wholesale floor plan arrangements or otherwise, purchase notes, conditional sale contracts, [etc.] . . . *and to induce you to so do and in consideration thereof* and of the benefits to accrue to each of us therefrom, each of us as a primary obligor jointly and severally and unconditionally guarantees to you . . . that Dealer will fully, promptly and faithfully perform . . .<sup>50</sup> (emphasis supplied)

This is the typical language of an offer and it is an offer for a unilateral contract, since it calls for an act (extension of credit, etc.) rather than for a promise to extend credit, etc. At the time of the execution of this offer by the defendants there was obviously no contract, as the offer had not yet been accepted. When in reliance thereon the plaintiff extended further credit, this act was both the acceptance of the offer, in the precise terms of the offer, and also the consideration for the defendants' promise. The case presents an example of faulty mutual assent analysis.

Of course, we may have an antecedent duty<sup>51</sup> problem here. There was in existence a principal contract and if the plaintiff was under an unconditional duty to continue extending credit, etc., then there was no consideration for the sureties' promise. If this were the basis of the decision the court should have said so. No part of the principal contract is set out in the opinion and we may only speculate, but it is usual for finance companies to insert in such contracts clauses whereby they may terminate their duties after a given date or when they feel insecure due to the debtor's deteriorating financial condition. If the principal contract in the *DeLisle* case had such a clause, the continued extension of credit for over a year and a half would have been ample consideration.

<sup>49</sup> 147 Wash. Dec. at 287, 287 P.2d at 304 (1955).

<sup>50</sup> 147 Wash. Dec. at 284, 287 P.2d at 303 (1955).

<sup>51</sup> See RESTATEMENT, CONTRACTS § 76 (a) (1932) adopted in *Queen City Construction Co. v. Seattle*, 3 Wn.2d 6, 99 P.2d 407 (1940); also 1 CORBIN, CONTRACTS § 171 (1950).

The case also repeats the statement of the *McMann* case discussed above, which thus acquires new dignity by repetition.

#### BILLS AND NOTES—ACCOMMODATION PARTIES

Negotiable instruments present one of the commonest areas in which suretyship transactions take place. Accommodation parties, whether they are makers, acceptors or indorsers, satisfy all the requirements of a surety as found in the Restatement of Security and thus are sureties.<sup>52</sup> Most of the rules governing negotiable paper are found in the Negotiable Instruments Law, but consideration is not defined in the statute.<sup>53</sup> Neither does section 29<sup>54</sup> help in the solution of these problems. The requirements of the enforceability of the undertaking of an accommodation party, as far as consideration is concerned, are the same as in any other kind of suretyship contract. Thus if the accommodation party becomes such prior to the delivery of the instrument, the consideration supporting the instrument will also support the promise of the surety.<sup>55</sup> Where the accommodation party becomes such subsequent to delivery, but his promise is supported by a new consideration, *e.g.* extension of the time of payment or taking of a renewal note, his obligation is binding.<sup>56</sup> Also if the accommodation party promises to become such prior to the delivery of the instrument, but signs subsequently, he is liable.<sup>57</sup>

Prior to the adoption of the Negotiable Instruments Law there was a good deal of confusion as to the nature of an accommodation party, the court purporting to make a distinction between a surety and an accommodation indorser, which, however, was never explained.<sup>58</sup> These cases seem to be of historical interest only, as the cases subsequent to

<sup>52</sup> BRITTON, BILLS & NOTES § 93 (1943); RESTATEMENT, SECURITY § 82 comment (k) (1941).

<sup>53</sup> N.I.L. § 25 (RCW 62.01.025) This section does not define consideration, but value for purposes of due course holding analysis. Since value is defined in terms of consideration, to consider this section as defining consideration would be to run in a circle. See 4 WILLISTON, CONTRACTS § 1146 (rev. ed. 1936).

<sup>54</sup> N.I.L. § 29 (RCW 62.01.029); see discussion of this section in BRITTON, BILLS & NOTES § 93 (1943); for an attempted clarification of the issues see UCC § 3-415.

<sup>55</sup> Mallette v. Pohlman Investment Co., 179 Wash. 654, 38 P.2d 357 (1934).

<sup>56</sup> Katz v. Judd, 108 Wash. 557, 185 Pac. 613 (1919) (Extension of time); Pierce v. Lowenthal, 161 Wash. 336, 295 Pac. 1021 (1931) (Renewal note).

<sup>57</sup> Dittmar v. Frye, 200 Wash. 451, 460, 93 P.2d 709, 713 (1939). The court said, "If at the time the loan was made it was the understanding—that situation not only reasonably may have existed but very probably did exist—that the additional signature of appellant would be obtained, and if it was placed on the note February 11, 1931, by appellant pursuant to the original agreement, that signing related back to the inception of the original contract of October 31, 1930, and no new consideration was necessary."

<sup>58</sup> Weeks v. Bussell, 8 Wash. 440, 36 Pac. 265 (1894); Allen v. Chambers, 13 Wash. 327, 43 Pac. 57 (1895).

the adoption of the Negotiable Instruments Law do not repeat this statement.

In those early days it was settled that an accommodation indorser, who became such prior to the delivery of the instrument, was liable, the consideration for the instrument supporting his undertaking as well.<sup>59</sup> Also it was settled, that an accommodation maker was not liable to the payee for whose accommodation the instrument was made.<sup>60</sup>

### CONCLUSION

Our law libraries are bursting with books of decided cases and our digests and other aids to research tend to subdivide fields in finer and smaller segments. While this is inevitable and a case "on all fours" is a godsend to the busy practitioner, such development presents the danger of atomization of the law. The solution of all suretyship problems on the authority of suretyship cases tends to obscure the fact that the problem is basically one of contract law. This process, if carried far enough, will result in the creation of a new branch of the law, unconnected to any other. Thus the "seamless web" of the common law is in danger of being torn to shreds. Our constitution enjoins upon us a "frequent recurrence to fundamental principles;"<sup>61</sup> this reminder is as salutary in the field of contracts as it is in constitutional law. In concrete terms of the subject under discussion this means that cases should be argued and decided more on the basis of analysis of mutual assent and consideration problems, unhampered by the fact that the contract litigated is one of suretyship, than on the authority of holdings or dicta (after all the whole celebrated passage in the *McMann* case is a dictum) in isolated suretyship cases. It is with the hope that it may in some small measure assist in an overall reappraisal of this area, that this article was written.

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<sup>59</sup> *Wilkie v. Chandon*, 1 Wash. 355, 25 Pac. 468 (1890).

<sup>60</sup> *Shuey v. Holmes*, 20 Wash. 13, 54 Pac. 540 (1898).

<sup>61</sup> WASH. CONST. art. I, § 32.