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CONTRACTS - RIGHT OF PROMISEE OF A CREDITOR-BENEFICIARY CONTRACT TO SUE IN EQUITY FOR EXONERATION

Mary Jane Morris
University of Michigan Law School

CONTRACTS — RIGHT OF PROMISEE OF A CREDITOR-BENEFICIARY CONTRACT TO SUE IN EQUITY FOR EXONERATION — The defendant purchased a barber shop and beauty parlor business from the plaintiff; and as part of the contract, the defendant assumed an indebtedness owing to a third person by the plaintiff. In an action brought by the creditor against the present plaintiff and defendant, judgment was rendered against the plaintiff herein and the action was dismissed as to the defendant. In that action, the present plaintiff filed a cross-petition against the defendant in this case, to require her to perform her alleged oral agreement to assume outstanding obligations, and moved to transfer the cross-petition to equity. Trial on the cross-petition and answer was had in equity and decree in favor of the plaintiff was entered. From this the defendant appealed. *Held*, that by assuming the indebtedness, the buyer became the principal and the seller the surety, and that the seller could sue in equity to compel the buyer to pay the debt. Judgment affirmed. *McKey Fansher Co v. Rowen*, (Iowa, 1942) 5 N. W. (2d) 911.

In jurisdictions which accept the rule of *Lawrence v. Fox*,[1] the creditor is given a direct action at law against the promisor who promised to pay to the creditor the debt owing to him from the promisee. In the absence of a nova-

[1] 20 N. Y. 268 (1859).

tion, the creditor may sue either the original debtor, the promisor, or both.[2] And it would seem that the promisee should have a right to sue the promisor. Certainly the promisee is vitally interested in securing the performance of the promise. Yet some courts have held that the creditor alone has a direct right against the promisor.[3] Perhaps this is due to the feeling that the promisor should not be subjected to suits by both parties. One reason advanced for denying the promisee an action is that a novation has been effected,[4] but this does not appear to be warranted.[5] Another reason given is that the promisee has only a right of subrogation to the rights of the creditor, requiring that the promisee himself first pay the creditor before having a right against the promisor.[6] Yet most courts allow the promisee a direct action against the promisor.[7] Considering his interest in the performance of the promise and the fact that the consideration has moved from him, this result is highly desirable. The principal case illustrates a further basis upon which the promisee may enforce the promise. The decision that a suretyship relation results when one party to a contract assumes an indebtedness owing by the other to a third is by no means novel.[8] The remedy available to the promisee as a surety is dependent upon whether or not he has first paid the debt himself. That is, a surety has no legal action until he has suffered a loss.[9] But it is well recognized that a surety, before payment, may

[2] 2 WILLISTON, CONTRACTS, rev. ed., § 388 (1936); CONTRACTS RESTATEMENT, §§ 136 (1) (a), 141, 428 (1932).

[3] 2 WILLISTON, CONTRACTS, rev. ed., § 390, (1936), and cases cited therein. In Dimmick v. Register, 92 Ala. 458 at 460, 9 So. 79 (1890), the court said, "The promise enured to the benefit of the creditors, and prima facie, they alone can claim payment, or sue for the breach of the agreement." See also Young v. Hawkins, 74 Ala. 370 (1883).

[4] 2 WILLISTON, CONTRACTS, rev. ed., § 391 (1936): "The idea behind the cases which deny the promisee a right of action is that by the assent of the third person a novation is created; but . . . a contract with a debtor to pay his debt, even though the creditor assents, does not amount to a novation."

[5] Id. Likewise in § 388 at p. 1126, "Such assent does not necessarily include an agreement to give up the claim against the original debtor. Moreover, the promisor must assent to enter into a contractual relation directly with the creditor."

[6] Ayers v. Dixon, 78 N. Y. 318 (1879).

[7] 2 WILLISTON, CONTRACTS, rev. ed., § 392 (1936): "Whatever the hardship upon the promisor may be in being liable to two persons when he promised but one, most courts have found it the simpler alternative, a recovery by either party being a bar to an action by the other." Cases cited.

[8] Calloway v. McKnight, 180 Mo. App. 621, 163 S. W. 932 (1914) (vendee of land assumed payment of note executed by vendor); Sully v. Childress, 106 Tenn. 109, 60 S. W. 499 (1900) (same situation as preceding case); Union Stove & Machine Works v. Caswell, 48 Kan. 689, 29 P. 1072 (1892); Warren v. Wilder, 114 N. Y. 209, 21 N. E. 159 (1889); Malanaphy v. Fuller & Johnson Mfg. Co., 125 Iowa 719, 101 N. W. 640 (1904); Des Moines Bridge & Iron Works v. Plane, 163 Iowa 18, 143 N. W. 866 (1913); Miller v. Kennedy, 12 S. D. 478, 81 N. W. 906 (1900).

[9] ARANT, SURETYSHIP, 319 (1931): "At law, however, it was well settled that no action could be maintained by the surety against the principal until he had paid some, though not necessarily all, of the principal's debt."

bring a suit in equity to be exonerated by a decree compelling the principal to pay the obligation.[10] The decision in the principal case, therefore, appears to be well supported. In connection with this problem it is worth noting that the suretyship relation is an implied one growing out of a contract entered into primarily for another purpose. Hence, although as a surety the promisee has no action at law before he has suffered loss, it is possible that he might have an action at law as a promisee for breach of a promise to indemnify against liability, if the promise can be so construed.[11] And even if the buyer's promise is not equivalent to an indemnity against liability, it is none the less a promise to pay the vendor's debt which the buyer assumed. The mere fact of the resulting suretyship and the consequent rule, that, as a surety, the promisee has no action at law until he has suffered a loss, should not operate to deprive him of an action as the promisee of a third party beneficiary contract. The decision in one case [12] has been criticized for failing to realize this possibility.[13] It should be kept in mind that, despite the theory utilized, the end to be achieved is the enforcement of the promise.

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[10] STORY, EQUITY JURISPRUDENCE, 11th ed., § 327 (1873); ARANT, SURETYSHIP, 318 (1931); DURFEE, CASES ON SECURITIES, 3d ed. 52, note (1942); Holcombe v. Fetter, 70 N. J. Eq. 300, 67 A. 1078 (1905); Bishop v. Day, 13 Vt. 81 (1841); Des Moines Bridge & Iron Works v. Plane, 163 Iowa 18, 143 N. W. 866 (1913).

[11] McAbee v. Cribbs, 194 Pa. 94 at 97, 44 A. 1066 (1899), was an action of assumpsit on a contract of indemnity in which recovery was allowed. The court stated, "As a contract of indemnity it was broken as soon as the plaintiff's liability became fixed, and he could then maintain an action on it without proof of payment." See 4 WILLISTON, CONTRACTS, rev. ed., § 1274, p. 3638 (1936).

[12] John Deere Plow Co. v. Tuinstra, 47 S. D. 555, 200 N. W. 61 (1924). Vendor's indebtedness was assumed by the buyer; and on his failure to discharge it, the vendor brought an action against him and garnished a note and mortgage which the buyer assigned before judgment was recovered against him. The assignee brought suit to enjoin the sheriff from the sale on execution. A decision denying the injunction was reversed, the court holding that since the vendor had become a surety for the buyer as to the indebtedness assumed, he had no action against the buyer until he himself had paid the debts.

[13] 38 HARV. L. REV. 502 (1925). In a footnote at p. 504 the writer states, "It is when the suretyship relation is over-emphasized and the positive promise to pay the debt by the principal to the surety is overlooked, that a court may fall into the error made in Deere Plow Co. v. Tuinstra."