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CONTRACTS - DISCHARGE - ACCORD AND SATISFACTION WITH A THIRD PERSON

W. Wallace Kent
University of Michigan Law School

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CONTRACTS — DISCHARGE — ACCORD AND SATISFACTION WITH A THIRD PERSON — Action by *P* against *D* on an alleged oral promise to pay a debt owed to *P* by *D*'s mother. *P* had agreed to discharge the mother from liability. There was no direct evidence that the mother was a party to the transaction. Apparently the defense was that *D*'s promise was within the statute of frauds if the agreement to discharge was executory, or, if it was executed, that there was no consideration for *D*'s promise because the discharge of *D*'s mother was not legally binding since it was an accord and satisfaction with a third person. The trial court directed a verdict for *D*. *Held*, that the promise was not within the statute of frauds and that such a promise could be binding. The court said that, although a discharge by the creditor is not effective unless assented to by the debtor, the jury would have been warranted in inferring such assent from the circumstances here. *F. I. Somers & Sons, Inc. v. LeClerc*, (Vt. 1939) 8 A. (2d) 663.

If the original debtor is not discharged at the time the oral promise to pay

the debt is made by the third person, such a promise is within the statute of frauds because collateral to the original promise.¹ But if there is a present discharge of the original debtor the new promise is not within the statute.² The court in the principal case apparently assumed that there was a present discharge.³ Consideration is based on the exchange of values.⁴ Unless the purported discharge was effective, *P* suffered no legal detriment and there was not sufficient consideration for *D*'s promise.⁵ If the creditor was bound by the purported discharge, then clearly there was consideration for the promise to pay.⁶ Whether a creditor, accepting satisfaction from a stranger to the contract, can effectively discharge a debtor without getting the latter's consent is a question that has vexed the common-law courts because of lack of privity between the debtor and the stranger.⁷ The English rule, despite an early case to the contrary,⁸ requires agency or ratification by the debtor,⁹ which may be made at the trial,¹⁰ but there is a recent case which, in its language, deviates from this rule.¹¹ The present general rule in the United States sustains the validity of satisfaction of a debt by a third party,¹² apparently on the ground that ratification will be presumed.¹³ However, the debtor has the right to disclaim the payment.¹⁴ Such a holding seems to be approached by the spirit of the principal case¹⁵ and the

¹ 2 WILLISTON, CONTRACTS, rev. ed., § 476 (1936).

² 2 WILLISTON, CONTRACTS, rev. ed., § 477, at note 3 (1936).

³ 8 A. (2d) 663 at 665.

⁴ 1 WILLISTON, CONTRACTS, rev. ed., §§ 103, 103G (1936).

⁵ 17 C. J. S. 425 (1939); 13 C. J. 315 (1917).

⁶ 1 WILLISTON, CONTRACTS, rev. ed., § 102, at note 2 (1936); 17 C. J. S. 439 (1939); 13 C. J. 326 (1917).

⁷ *Grymes v. Blofield*, Cro. Eliz. 541, 78 Eng. Rep. 788 (1596); *Jones v. Broadhurst*, 9 C. B. 173, 137 Eng. Rep. 858 (1850); 1 C. J. 535 at note 30 (1914).

⁸ 36 Hen. 6, 1 FITZHERBERT, LA GRAUNDE ABRIDGEMENT, "Barre," pl. 166 (1577).

⁹ *Simpson v. Eggington*, 10 Ex. 845, 156 Eng. Rep. 683 (1855).

¹⁰ *Smader v. Columbia Wisconsin Co.*, 188 Wis. 530, 205 N. W. 816 (1925); *Simpson v. Eggington*, 10 Ex. 845, 156 Eng. Rep. 683 (1855).

¹¹ ". . . my view [is] that either the debt is extinguished or that the Court will not allow the creditor to assert his claim. . ." *Moulton*, L. J., in *Hirachand Punamchand v. Temple*, [1911] 2 K. B. 330 at 340.

¹² 2 CONTRACTS RESTATEMENT, § 421 (1932); *Snyder v. Pharo*, (C. C. Del. 1885) 25 F. 398; *Jackson v. Pennsylvania Ry.*, 66 N. J. L. 319, 49 A. 730 (1901); *Crumlish's Admr. v. Central Improvement Co.*, 38 W. Va. 390, 18 S. E. 456 (1893); *Grouf v. State Nat. Bank of St. Louis*, (C. C. A. 8th, 1935) 76 F. (2d) 726; 1 C. J. S. 482 at note 3 (1936).

¹³ ". . . in the absence of all circumstances tending to show the contrary, the rational inference would be, that the act done, being for the debtor's benefit, was done *with his consent*, or, if without his knowledge at the time, that it would, as a matter of course, *be ratified* by him afterward." *Leavitt v. Morrow*, 6 Ohio St. 71 at 76-77 (1856).

¹⁴ 2 CONTRACTS RESTATEMENT, § 421 (1932). As to rescission by the third person before ratification by the debtor, see *Walter v. James*, L. R. 6 Ex. 124 (1871).

¹⁵ "We concur in the validity of such a defense [payment by a third person]." Principal case, 8 A. (2d) 663 at 665.

same is true of other jurisdictions following the common-law rule.¹⁶ It is submitted that the creditor should be confined to the satisfaction to which he agreed and that the third person, who has persuaded the creditor to forego the enforcement of his rights against the third person, should be bound by his promise to pay, because few debtors will refuse to accept payment of their debts by a third person.¹⁷

W. Wallace Kent

¹⁶ 6 WILLISTON, *CONTRACTS*, rev. ed., § 1859 (1938).

¹⁷ It has been suggested that payment by a third person might be available as an equitable defense where it would not be available as a legal defense. 6 WILLISTON, *CONTRACTS*, rev. ed., 1860 (1938).