Washington Law Review

Volume 8 | Issue 2

10-1-1933

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WASHINGTON LAW REVIEW

Published Quarterly by the Law School of the University of Washington
Founded by John T. Condon, First Dean of the Law School

SUBSCRIPTION PRICE $2.50 PER ANNUM, SINGLE COPIES $1.00

NOTES AND COMMENTS

ASSUMPTION OF LIABILITY BY IMPLICATION

In the case of the *National Credit Company v. Casco Company*,[1] the plaintiff's assignor sold to the Avalon Theatre Company, defendant's lessee, a neon electric sign under a conditional sales contract. To secure rental payments, defendant secured from the Theatre Company, its lessee, a chattel mortgage on all the furniture and fixtures owned by the lessee located upon the premises. Upon default in payment, defendant foreclosed the mortgage and purchased at the foreclosure sale, defendant receiving from the sheriff a bill of sale of all the property covered by the chattel mortgage, including the neon sign. Subsequently, defendant leased the building with the sign and other property to the Liberty Theatre Company of Olympia, giving the lessee an option to purchase after a certain date, if payments of rent were made as provided in the lease. While the theatre was in the possession of the Liberty Theatre Company, as lessee, defendant made four separate payments covering eleven installments due by the terms of the conditional sales contract under which the neon sign had been sold. Defendant thereafter refused to make any further payments. In this action the court allowed plaintiff to recover the balance of the purchase price.

The court found that defendant, as purchaser at the foreclosure sale, was legally in the same position as an assignee of the rights of the mortgagor, which is clearly in accord with the weight of authority.[2] The court also found that defendant assumed the obligations of the contract through an implied in fact promise. In arriving at this conclusion that defendant had intended to assume the obligations of the contract, chief reliance was placed upon defendant's having voluntarily paid the eleven installments on the conditional sales contract and also on its having leased the

[1] 73 Wash. Dec. 182, 22 Pac. (2d) 670 (1933).

[2] Wash. Rem. Rev. Stat. (Ann.) (1933) Sec. 1108; *First National Bank v. Woolery*, 6 Wash. 215, 33 Pac. 357 (1893) *Larson v. Anderson*, 97 Wash. 484, 166 Pac. 774 (1917) *Gross v. Thomson's Estate*, 286 Ill. 185 121 N. E. 600 (1918).

sign together with the other property under the lease with *option to purchase.* The court said

> "Everything that appellant did with regard to the subject-matter of the contract, up to the commencement of this action, was consistent only with the theory—and absolutely inconsistent with any other reasonable theory—that it had adopted the sales contract."[3]

Thus the court from this subsequent conduct finds an implied in fact promise on the defendant's part to assume the obligations of the assignor on the contract. It is a well established rule that even an implied contract requires a meeting of the minds and must grow out of the intention of the parties. In the instant case it seems questionable if the intention to assume can be found in the conduct of the defendant. There was evidence that his payments were made with an insistence that the duty was not his, a fact which scarcely indicates an intention to assume the obligation. His conduct is the normal stop-loss payment, which is not made with the intention to assume the obligation but to keep the property intact. There is probably a serious doubt if the contract, if it exists, can be supported by any consideration. If there is any, in the instant case, it might possibly be found in detriment to plaintiff in that relying on the implied in fact promise, he did not repossess the sign.

It is true that the language of the court might be interpreted as basing the decision on estoppel. Thus the court quotes from the case of *Wiggins Ferry Co. v. Ohio & Miss. R. Co.*[4]

> "It is not necessary that a party should deliberately agree to be bound by the terms of a contract to which he is a stranger, if, having knowledge of such contract, he deliberately enters into relations with one of the parties, which are only consistent with the adoption of such contract. If a person conduct himself in such manner as to lead the other party to believe that he has made a contract his own, and his acts are only explicable upon that theory, he will not be permitted afterwards to repudiate any of its obligations."

Most courts reject the estoppel theory on the ground that there has been no injury to the obligor, since the assignor is still liable on the contract, which is all that the obligor contracted for in the first place, and also since whether or not the assignee is liable to the obligor, either the assignee or the assignor must perform all conditions precedent on their side of the contract before the obligor is bound to perform.[5] In the instant case, if estoppel were

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[3] *National Credit Company v. Casco Company,* note 1, *supra,* p. 671. 142 U. S. 396, 408, 12 Sup. Ct. 188, 35 L. Ed. 1055 (1892).

[5] *Dahlhjelm Garages Inc. v. Mercantile Ins. Co.,* 149 Wash. 184, 270 Pac. 434 (1928) See 2 R. C. L. 625. The great weight of authority refuses to base an estoppel on voluntary payments made by the assignee. *Lisenby v. Newton,* 120 Cal. 571, 52 Pac. 813 (1898) *Wilson v. Beazely,* 186 Cal. 437, 199 Pac. 772 (1921) *Tarpey v. Curran,* 67 Cal. App. 575, 228 Pac. 62 (1924) *Meyer v. Droegmueller* 165 Minn. 245, 206 N. W 391 (1925) *Champion v. Brown,* 6 Johns, Ch. 398 (N. Y. 1822).

relied upon, injury to the plaintiff seems lacking, unless it could be found in his failure to repossess the sign because of his reliance on defendant's conduct.

The general view is that in the absence of an express or implied in fact promise by the assignee to assume the obligations imposed on the assignor in the contract, he is not liable for the performance thereof.[6] The American Law Institute's Restatement of Contracts attempts to go a step further and reach a more equitable view[7] It recognizes the fallacy of human nature of not being explicit, and so makes it a presumption that, in the absence of circumstances showing a contrary intention, the assignee should be regarded as promising to assume the duties as well as taking the rights. This is what in effect the Washington court is doing, both in this case and in the case of *Great Western Theatre Equipment v. M. & E. Theatres*.[8] It is a view which alleviates the hardship on the obligor of proving that the assignee had promised to perform the duties, which is often only impliedly intended by the parties, and so is hard to prove, although it is what the parties would usually naturally desire. This rule which applies to assignees can hardly be extended to purchasers at foreclosure sales. The assignee can be said to have intended to assume duties as well as rights, but the purchaser at a foreclosure sale can scarcely be said to have such intention. In the latter case the rule is well established that the purchaser doesn't take the obligation unless he assumes it. Furthermore, in the instant case, the facts surrounding the payment could be regarded as a circumstance showing an intention not to assume.

Washington is in accord with all other states in holding that the assignor remains liable on the contract even after he has assigned his rights thereunder, in the absence of a novation.[9] Washington also follows the majority view in allowing the admission of parol evidence to prove an oral agreement to assume the obligations of the assignor even when there was a written assignment made at the time.[10] For this view, the Washington court offers two

[6] *Comstock v. Hitt*, 37 Ill. 542 (1863) 1 Williston on Contracts, sec. 412; Note, 42 Harv. L. Rev. 941 (1929). See *Atlantic & N. C. R. Co. v. Atlantic & N. C. Co.*, 147 N. C. 368, 61 S. E. 185, 188, 23 L. R. A. (N. S.) 225, 125 Am. St. Rep. 550 (1908).

[7] Contracts Restatement (official draft), Sec. 164 (2).

[8] 164 Wash. 557, 3 Pac. (2d) 1003 (1931).

[9] *Wooding v. Crain*, 10 Wash. 35, 38 Pac. 756 (1894) *Johnson v. Norman*, 98 Wash. 331, 167 Pac. 923 (1917) *Medgard v. Shimogaki*, 135 Wash. 527, 238 Pac. 574 (1925), *De Lano v. Tennent*, 138 Wash. 39, 244 Pac. 273 (1926) *Auve v. Wenzleff*, 162 Wash. 368, 298 Pac. 686 (1931) *Atlantic & N. C. R. Co. v. Atlantic & N. C. Co.*, note 6, supra; Contracts Restatement (official draft), Sec. 160 (4) 1 Williston on Contracts, Sec. 411, 1 Tiffany, Landlord and Tenant, 962.

[10] *Don Yook v. Washington Mill Co.*, 16 Wash. 459, 47 Pac. 964 (1897) *Ordway v. Downey*, 18 Wash. 412, 51 Pac. 1047, 52 Pac. 228 (1898) *Gilmore v. Skookum Box Factory*, 20 Wash. 703, 56 Pac. 934 (1899) *Dimmick v. Collins*, 24 Wash. 78, 63 Pac. 1101 (1901) *Bicknell v. Henry*, 69 Wash. 408, 125 Pac. 156 (1912) *Harbican v. Skinner*, 83 Wash. 596, 145 Pac. 582 (1915) *Hart v. Bogle*, 88 Wash. 125, 152 Pac. 1010 (1915) *Union Machinery & Supply Co. v. Darnell*, 89 Wash. 227, 154 Pac. 183 (1916) *Roberts v. Stiltner* 101 Wash. 397, 172 Pac. 738 (1918) *Bollong v. Cormon*, 117 Wash. 336, 201 Pac. 297 (1921) *Hargis v. Hargis*, 160 Wash. 594, 295 Pac. 742 (1931) *Hardinger v. Fullerton*, 165 Wash. 483, 5 Pac. (2d) 987 (1931). Contra; *Osburn v. Dolan*. 7 Wash. 62, 34 Pac. 433 (1893).

rationalizations which, in effect, are the same, first, that parol evidence is always admissible to show what the true consideration is,[11] and second, that parol evidence of an oral collateral agreement is admissible.[12] In order to be a collateral agreement such that parol evidence thereof is admissible, it would seem from the cases that there need only be an additional promise given at the same time for the same consideration, so, in effect, this rationalization is the same as the first.

Will the Washington court hold the assignee liable when neither an express nor an implied promise on his part to assume the assignor's obligations can be raised? There are several statements by the Washington court to the effect that it will not hold the assignee liable unless there is an express assumption on his part.[13] However, the Washington court has never adhered very strictly to this view, but has, where it thought proper, altered its precept. It has recognized that an implied in fact promise based on the intention of the parties is just as effective to bind the assignee as an express promise.[14] But where the assignment is such that there is obviously no intention on the part of the parties that the assignee should assume the obligations under the contract, the court has refused to raise such an implied in fact promise and has held the asignee not to be liable for nonperformance of the duties.[15] It has gone so far as to raise an implied in law promise in one case, that of the *Dahlhjelm Garages Inc. v. Mercantile Ins. Co.*,[16] although it may be possible to interpret the case as being based on a theory of estoppel, but this is an exceptional case. It is submitted that the view holding the assignee liable to the obligor on the contract where the intention of the parties is that the assignee should become a party to the transaction and not merely be the holder of the assignment as security is the better and more equitable view

In the purchase at foreclosure sale situations, the same rule should apply if an intention to assume the obligation can be found. In view of the holding in the instant case, it seems advisable for the one making the payment to explicitly state that he is not, in so doing, assuming the obligation.

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[11] *Harbican v. Skinner* note 10, *supra*, *Roberts v. Stiltner* note 10, *supra*.

[12] *Bollong v. Corman*, note 10, *supra*.

[13] *Bimrose v. Matthews*, 78 Wash. 32, 138 Pac. 319 (1914) *Hardinger v. Fullerton*, 165 Wash. 483, 5 Pac. (2d) 987 (1931).

[14] *Chaffee v. Hawkins*, 89 Wash. 130, 154 Pac. 143 (1916) *McGill v. Baker*, 147 Wash. 394, 266 Pac. 138 (1928).

[15] *Prescott Co. v. Franklin Tool Works*, 117 Wash. 283, 201 Pac. 308 (1931). See *McGill v. Baker* note 14, *supra*.

[16] Note 5, *supra*. In this case *P* bought a Velie automobile from *N Co.* to be used as a taxi. *N Co.* undertook to insure the car against fire, theft, and collision in its use as a taxi, the sale being under a conditional sales contract. *N Co.* took out the proper insurance and through various mesne conveyances assigned its interest in the contract to *D*. When the insurance expired, *D* took out "pleasure car" and not taxi insurance. *D* knew that *P* required taxi insurance and was insisting upon it, but without securing it, accepted the balance of the payments due on the car. The taxi was in a wreck and the insurance company refused to pay. *P* sued *D*. Court held for *P* Its theory in this case was that the performance of all conditions precedent was necessary before the assignee could