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**The American Law Institute's Restatement of the
Laws of Contracts with Annotations to
the Washington Decisions***
Chapter 5

**DUTIES AND RIGHTS WHERE MORE PERSONS THAN
ONE ARE PROMISORS OR PROMISEES OF THE
SAME PERFORMANCE****

Section 124. EFFECT ON OBLIGEE'S RIGHTS OF A CONTRACT NOT TO SUE A CO-PROMISOR.

A contract by the person entitled to receive performance not to sue one or more joint, or joint and several promisors is not violated by making such promisors defendants in a suit on the joint promise and obtaining judgment against them, if none of their assets are seized by the plaintiff in entire or partial satisfaction of the judgment. But a contract that one or more of such promisors shall not be sued or made answerable by anyone upon the joint promise is violated if any of their assets are seized or they are in any way made answerable either by the person entitled to receive performance or by a co-promisor.

Comment

a. One of a number of co-promisors may suffer loss on breach of his promise in either of two ways firstly, by having his property directly levied upon by the creditors, or, secondly, by being compelled to give contribution or indemnity after the creditor has levied on the assets of the other promisors. The Section distinguishes contracts with the creditor which will protect a promisor from loss of the first kind from those which will protect him from both kinds.

Section 125. SURVIVORSHIP OF JOINT DUTIES.

On the death of a joint promisor in a contract when one or more of the joint promisors are still surviving, the estate of the deceased promisor is not bound by the joint promise unless all of the surviving joint promisors are insolvent; nor in that event if the deceased promisor was a surety

*The absence of annotations to particular sections of the Restatement indicates that no Washington decisions have been found on the principle therein stated.

**Continued from last issue.

Athletic Club, 172 Wash. 305, 20 Pac. (2d) 21 (1933). Accord and satisfaction is an affirmative defense and the burden of proving it rests on the party who pleads it. *Hargrave v. Colfax*, 89 Wash. 467, 154 Pac. 824 (1916) *Glenz v. Tacoma Ry. & Power Co.*, note 36, *supra*, *Hackett v. McIntosh*, note 80, *supra*, *Anderson v. Sanitary Davy Inc.*, note 24, *supra*. However, the defense need not be averred in technical language. *Hargrave v. Colfax*, note 93, *supra*, *First National Bank v. White-Dulaney Co.*, note 40, *supra*. A receipt in full given by the creditor to the debtor is evidence of accord and satisfaction, *Pederson v. Tacoma*, note 26, *supra*, and where uncontradicted will of itself support the defense. *Green v. Fuller*, 159 Wash. 691, 294 Pac. 1037 (1930) It is not, however, conclusive and may be contradicted by parol. *Simons v. Hallidie Co.*, note 88, *supra*.

Comment

a. Where joint promisors are also severally bound, the principle of survivorship is not applicable to the several duties.

This Section and Section 128 relate merely to the duties of the promisors because of their joint promise. What rights a surviving promisor who has been compelled to pay may have against the estate of a deceased joint promisor is not under consideration in this Chapter.

ANNOTATION

Washington cases are *contra* to this Section.

Brownfield v. Holland, 63 W 86, 114 P 890 (1911) held that under Rem. & Bal. Code, Sections 1344, 179, 189, 153, 1535, 406, 407, and 236, the common law rule that the death of a joint debtor terminates his liability at law is abolished and an action may be maintained against the executors of a deceased joint tenant and the surviving joint tenant for rent accruing before or after the death of the joint tenant; *id.*, *Megrath v. Gilmore*, 15 W 558, 46 P 1032 (1896) and the estate of a deceased joint contractor is liable even though deceased was only a surety, *Donnerberg v. Oppenheimer* 15 W 290, 46 P. 254 (1896) *Olson v. Seldovia Salmon Co.*, 89 W 547, 154 P 1107 (1916) the administrator of a deceased principal and the latter's surety upon a joint and several bond, upon rejection by the probate court of a claim by the obligee against the administrator, may be joined as defendants in a suit upon the bond, *Spokane v. Costello*, 57 W 183, 106 P. 764 (1910)

Section 126. EFFECT OF DEATH OF ALL JOINT PROMISORS.

On the death of the last survivor of two or more joint promisors in a contract his estate is bound by the contract.

Section 127 APPLICABILITY OF SECTIONS 85-93 TO SEVERAL, TO JOINT, AND TO JOINT AND SEVERAL CONTRACTS.

The principles of Sections 85-93 are applicable to several and to joint and to joint and several contracts, so far as concerns the power of a promisor to create a new contract binding himself, or to vary his own previous duty, but one promisor has no power to affect other promisors unless they have actually or apparently authorized him to do so.

Section 128. WHEN PROMISES TO SEVERAL PERSONS CREATE SEVERAL, JOINT, OR JOINT AND SEVERAL RIGHTS.

(1) If a promise in a contract is made to several persons, the intention of the promisor as expressed in the contract determines whether the right thereby created is joint or whether rights are created which are several or are joint and several.

(2) If no intention is expressed in such a promise, the rights are several if the interests of the obligees in the performance of the promise are distinct; but if their interests in its performance are joint, or if any one of the obligees has neither a separate nor a joint interest in the performance, the right is joint.

Comment

a. The interest of a promisor or promisee in the performance of a promise, or in the consideration received for it, does not mean sentimental interest or desire but a material or pecuniary interest. Thus partners have a common interest in the performance of a promise to or by them with reference to partnership matters, and in the consideration given or received for such a promise. They

are jointly concerned with the welfare of the partnership, and are co-owners of the partnership property. On the other hand where a principal and surety promise that a certain performance shall take place, the performance of the promise affects their interests differently. Moreover the fact that they are principal and surety probably indicates that the principal received the consideration for the promises and that the surety derived no material or pecuniary advantage from it. There is no common interest between the principal and surety either with reference to the performance of the promise or the consideration for it.

ANNOTATION

Subsection (2). If only one of two obligees of a garnishment bond has sustained damage he may maintain action therein without joining the other obligee as plaintiff, and if in such action a demurrer is sustained for non-joinder of the other obligee, and an amended complaint is filed in which both obligees are joined as plaintiffs, defendants are estopped from contending that recovery cannot be had on the amended complaint by either party because of lack of interest of one of the plaintiffs, *Harrington v. Gordon*, 42 W 692, 80 P. 187 (1905).

Section 129. PARTIES TO ACTIONS BY JOINT OBLIGEEES.

An action to enforce a joint right under a contract must be brought by or in the name of all surviving obligees.

Comment

a. The persons having a joint right will generally be promisees, but where third party beneficiaries are allowed to enforce a promise, the joint right may be that of such beneficiaries.

Section 130. POWER OF A JOINT OBLIGEE TO SUE, DISCHARGE OR RECEIVE TENDER ON BEHALF OF CO-OBLIGEEES.

Except as the rules of this Section are qualified by Section 131,

- (a) any joint obligee may sue for the enforcement of the promise in the name of all the joint obligees; he also has the power to discharge the promisor by collection and receipt of the performance promised or by release or otherwise;
- (b) a discharge by a joint obligee of his individual right operates as a discharge of the joint right of all,
- (c) a tender to one of several persons jointly entitled is equivalent to a tender to all of them.

Section 131. EFFECT OF FRAUDULENT EXERCISE OF THE POWERS OF A JOINT OBLIGEE.

(1) If an obligee attempts or threatens to discharge the promisor in fraud of a co-obligee, whether joint, several, or joint and several, the co-obligee may obtain an injunction forbidding such discharge.

(2) A discharge of the promisor by an obligee in fraud of a co-obligee is inoperative to discharge the promisor's duty to the extent of the co-obligee's interest in the performance, if the promisor gives no value or knows, or has reason to know of the fraud.

Section 132. SURVIVORSHIP OF JOINT RIGHTS.

On the death of a joint obligee, the surviving obligees, if more than one, become the only joint obligees. If but one obligee survives he becomes the sole obligee; and on the

death of the last surviving obligee, his estate becomes solely entitled to performance by the obligor.

Comment

a. The duty of the surviving obligee to account to the estate of a deceased obligee is not here under consideration.

CHAPTER 6

CONTRACTUAL RIGHTS OF PERSONS NOT PARTIES TO THE CONTRACT

Section 133. DEFINITION OF DONEE BENEFICIARY, CREDITOR BENEFICIARY, INCIDENTAL BENEFICIARY.

(1) Where performance of a promise in a contract will benefit a person other than the promisee, that person is, except as stated in Subsection (3)

- (a) a donee beneficiary if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary;
- (b) a creditor beneficiary if no purpose to make a gift appears from the terms of the promise in view of the accompanying circumstances and performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary, or a right of the beneficiary against the promisee which has been barred by the Statute of Limitations or by a discharge in bankruptcy, or which is unenforceable because of the Statute of Frauds;
- (c) an incidental beneficiary if neither the facts stated in Clause (a) nor those stated in Clause (b) exist.

(2) Such a promise as is described in Subsection (1a) is a gift promise. Such a promise as is described in Subsection (1b) is a promise to discharge the promisee's duty

(3) Where it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee is to benefit a beneficiary under a trust and the promise is to render performance to the trustee, the trustee, and not the beneficiary under the trust, is a beneficiary within the meaning of this Section.

Comment

a. A single contract may consist of a number of promises. One or more of them may require performance to the promisee, others may require performance to persons not parties to the contract. Of these latter promises, some may be of the type stated in Subsection (1a.), others of the type stated in Subsection (1b) In other promises any benefit derived by a third person from their performance may be merely incidental.

b By performance of a promise is to be understood doing the acts or forbearances undertaken by the promisor—not the discharge of a legal duty though such a discharge may be one of the

consequences of doing what the promisor undertakes, whether that is positive action or negative refraining from action.

c. By gift is meant primarily some performance or right which is not paid for by the recipient and which is apparently designed to benefit him. There are also covered by Subsection (1a) cases where, though the promisee receives consideration from the beneficiary, there is manifested an intent that the beneficiary shall acquire a right against the promisor to some performance never due or supposed or asserted to be done to the beneficiary from the promisee (see Illustration 3)

d. A contract for the benefit of a third person usually provides that performance shall be rendered directly to the beneficiary, but this is not necessarily the case. A promise to discharge an indebtedness of one whom the contract is made to benefit, will provide for payment to the creditor of the beneficiary, not to the beneficiary himself who owes the money

e. Contractual rights of a beneficiary must be distinguished from interests in chattels created by the delivery of the chattels to one person with the expressed intent that another shall have an interest in them. The rights thus acquired are independent of the law of contracts. On the other hand, delivery of chattels to one person with the expressed intent that he shall be merely an agent in their delivery to another creates no right in the latter either under the law of property or of contracts.

ANNOTATION

The Washington cases, although recognizing generally the third party beneficiary doctrine, do not make distinctions between the three types of beneficiaries recognized by the Restatement. Clarity would result from recognizing these distinctions and adopting the terminology of the Restatement.

Subsection (1) (a). No Washington case (insurance cases excepted) has been found squarely involving a donee beneficiary. The language in some cases is, however, broad enough to cover the situation. In *Gilmore v. Skookum Box Factory*, 20 W 703, 56 P. 934 (1899), a creditor beneficiary case, the court said: "The rule (third party beneficiary) has for its basis a new consideration, moving from the promisor to the promisee, creating a liability on the part of the promisor to pay the beneficiary of the promise in any event, and irrespective of any debt due from the promisee to such beneficiary." This language was approved in *Corkrell v. Poe*, 100 W 625, 630, 171 P. 522 (1918). *Corkrell v. Poe* (supra) may be a true donee beneficiary case since it permitted recovery by a mortgagee against a grantee who assumed the mortgage debt even though defendant's immediate grantor was not obligated on the debt. See *Williston*, Contracts, Section 386.

The right of the beneficiary (donee) of a life insurance policy to maintain an action on the policy is provided for by statute. R. C. S. Sections 7230-1.

Subsection (1) (b) The creditor beneficiary situation, although not so designated, has been recognized in a number of cases. Creditor of vendor when vendee agrees, as part of purchase price, to pay the debt; *Silsby v. Frost*, 3 W Terr. 388, 17 P. 887 (1888) *Don Yook v. Washington Mill Co.*, 16 W 459, 47 P. 964 (1897) *Gilmore v. Skookum Box Factory*, 20 W 703, 56 P. 934 (1899) *Reiley v. Spokane Sanitary Laundry Co.*, 71 W 516, 128 P. 1075 (1913).

Mortgagee wherein purchaser of the mortgaged premises assumes the mortgage debt; *Solicitors' Loan and Trust Co. v. Robins*, 14 W 507, 45 P. 39 (1896) equitable subrogation theory of *Keller v. Ashford*, 133 U. S. 610 followed; *Ordway v. Downey*, 18 W 412, 51 P. 1047 (1898) *Harbican v. Chamberlin*, 82 W 556, 144 P. 717 (1914) *Corkrell v. Poe*, 100 W 625, 171 P. 522 (1918) *First State Bank of Arneson*, 109 W 346, 186 P. 889

(1920) *Bollong v. Corman*, 117 W 336, 201 P 297 (1921) *Insley v. Webb*, 122 W 98, 209 P 1093 (1922) *Hargis v. Hargis*, 160 W 594, 295 P 742 (1931) *Frazey v. Casey*, 96 W 422, 165 P 104 (1917).

Persons injured by negligence of insured under liability policy: *Finkelberg v. Continental Casualty Co.*, 126 W 543, 219 P 12 (1923) *Stusser v. Mutual Union Insurance Co.*, 127 W 449, 221 P 331 (1923).

Laborers and materialmen on contractor's bond: See Annotations to Section 136 (1) a.

Other creditor beneficiary cases are: *Dimmick v. Collins*, 24 W 78, 63 P 1101 (1901) *Luan v. Huglen*, 141 W 369, 251 P 585 (1926) *Zioncheck v. Hepden*, 144 W 272, 257 P 835 (1927) *Moore v. Baasch*, 109 W 568, 187 P 388 (1920).

Subsection (1) (c) *Horstmann Co. v. Waterman*, 103 W 18, 173 P. 733 (1918) (semble) *Hanson v. Blackwell Motor Co.*, 143 W 547, 255 P 939 (1927)

Section 134. CONTRACTS TO WHICH STATEMENTS IN THIS CHAPTER ARE APPLICABLE.

The statements in Sections 135-147 are applicable both to absolute and conditional promises in either formal or informal contracts.

Comment

a. By the definition of creditor beneficiary a person falls within this designation if performance of the promise will operate to discharge a real or supposed or alleged duty and is not intended in whole or in part as a gift. It is enough that performance, if performance ever becomes due, will have this effect. It may not be known to the parties whether there is such a duty, and the promise may be conditional on its existence (see Illustration 2)

ANNOTATION

Finkelberg v. Continental Casualty Co., 126 W 543, 219 P 12 (1923), and *Stusser v. Mutual Union Insurance Co.*, 127 W 449, 221 P. 331 (1923) seem to illustrate conditional promises within the meaning of the Section.

Section 135. DUTIES CREATED BY A GIFT PROMISE.

Except as stated in Section 140,

- (a) a gift promise in a contract creates a duty of the promisor to the donee beneficiary to perform the promise; and the duty can be enforced by the donee beneficiary for his own benefit;
- (b) a gift promise also creates a duty of the promisor to the promisee to render the promised performance to the donee beneficiary

Comment

a. No assent by a donee beneficiary to the contract or knowledge on his part of its existence is necessary to give him a right of action on it.

b The damages recoverable in an action at law by the promisee of a gift promise will generally be nominal, but in Illustration 1 under Section 133, A's damages would be \$100. (A owes C \$100 for money lent. For sufficient consideration B promises A to pay C \$200, both as a discharge of the debt and as an indication of A's gratitude to C for making the loan. C is a donee beneficiary) As to the right of specific performance, see Section 138.

ANNOTATION

See Annotation to Section 133 (1) (a).*

The annotations to Chapter 5 were prepared in memorandum form by the late Professor Harvey Lantz of the University of Washington Law School. Those to Chapter 6 were prepared by Dean Harold Shepherd.