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CONTRACTS - SPECIFIC ENFORCEMENT OF AN EXECUTORY ACCORD

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CONTRACTS — SPECIFIC ENFORCEMENT OF AN EXECUTORY ACCORD — Sometime previous to the suit in question, defendant had executed a mortgage to the plaintiff, the loan secured by such mortgage to be repaid in installments. After having paid some but not all of the installments, defendant defaulted. As a result of negotiations between the parties and the Federal Land Bank of Omaha, it was agreed that the defendant should pay a lump sum in full satisfaction of the balance of the installments due under the mortgage. Performance was later tendered under this agreement, but the plaintiff refused to accept same, and subsequently brought suit in equity to foreclose the mortgage. Defendant set up the accord as an affirmative defense, asking its specific enforcement, and received a decree in his favor. The plaintiff took an appeal. *Held*, that the decree ordering plaintiff to accept the terms of the accord should be affirmed. *Union Central Life Ins. Co. of Cincinnati v. Imsland*, (C. C. A. 8th, 1937) 91 F. (2d) 365.

It is generally held at law that a bilateral executory accord, without satisfaction, will not be even a temporary bar to an action on the original debt or claim.[1] The rule at law denying efficacy to an executory accord of this kind grew up very early, when informal contracts were not enforceable.[2] Since accords were usually unwritten, this fact, coupled with the fact that it was thought that if a cause of action was once suspended it must necessarily be gone forever,[3] led naturally enough to the result stated; for, if the executory accord were to be allowed to act as a bar until the time set by the parties for the payment of the "something other," the original obligee would have neither the original claim to enforce, it having been destroyed by the temporary suspension, nor could the unwritten accord be enforced.[4] Thus the courts required that the accord be satisfied or executed before it could be pleaded as a defense.[5] Informal contracts being now enforceable, and the theory that if a cause of

[1] Wyatt v. New York, O. & W. R. R., (C. C. A. 2d, 1930) 45 F. (2d) 705, certiorari denied 283 U. S. 829, 52 S. Ct. 353 (1931); 10 A. L. R. 222 (1921).

[2] Peytoe's Case, 5 Co. Rep. 77b, 77 Eng. Rep. 847 (1611); 3 WILLISTON, CONTRACTS, 1st ed., § 1837 (1931); Shepherd, "The Executory Accord," 26 ILL. L. REV. 22 at 28 (1931).

[3] Ford v. Beech, 11 Q. B. 852, 116 Eng. Rep. 693 (1848).

[4] 3 WILLISTON, CONTRACTS, 1st ed., § 1837 (1931); Shepherd, "The Executory Accord," 26 ILL. L. REV. 22 at 28 (1931).

[5] Peytoe's Case, 5 Co. Rep. 77b, 77 Eng. Rep. 847 (1611).

action is once suspended it is gone forever being purely arbitrary,[6] there would seem to be no reason for the rule today.[7] Moreover, if, today, the original contract is sued upon despite the accord, some courts have allowed the debtor to sue for breach of the accord.[8] This multiplicity of suits would seem to be undesirable. Yet the cases still categorically state, seemingly without re-examination of the reasons behind the rule, that an executory accord has no effect.[9] However, if, as in the instant case, the suit is in equity, or can be transferred to equity, the executory accord will be specifically enforced.[10] This result seems to be highly desirable, since it is consonant with the intent of the parties, in that it only requires them to do the very thing for which the accord was entered into.[11] Moreover, the decree itself will be security for the discharge of the original debt or claim, so that the original obligee will not suffer hardship through the loss of both the original and substituted claims, as was true at the early common law.[12]

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[6] 3 WILLISTON, CONTRACTS, 1st ed., § 1844 (1931); Shepherd, "The Executory Accord," 26 ILL. L. REV. 22 at 41 (1931).

[7] This is the position taken by the American Law Institute. 2 CONTRACTS RESTATEMENT, § 417 (1932); Shepherd, "The Executory Accord," 26 ILL. L. REV. 22 (1931).

[8] Mattocks v. Young, 66 Me. 459 (1876); Hunt v. Brown, 146 Mass. 253, 15 N. E. 587 (1888); Schweider v. Lang, 29 Minn. 254, 13 N. W. 33 (1882); Marsh v. Fricke, 1 Ala. App. 649, 56 So. 110 (1911); Billings v. Vanderbeck, 23 Barb. (N. Y.) 546 (1857). See 3 UNIV. CIN. L. REV. 58 (1929).

[9] 10 A. L. R. 222 (1921).

[10] See also Very v. Levy, 13 How. (54 U. S.) 345, 14 L. Ed. 173 (1851), where the accord was also set up by the defendant against plaintiff's suit on the original claim. Equity has also taken jurisdiction to specifically enforce the executory accord per se. Baker v. Hawkins, 14 R. I. 359 (1884); Palmer v. Bosley, (Tenn. 1900) 62 S. W. 195; Chicora Fertilizer Co. v. Duncan, 91 Md. 144, 46 A. 357 (1900); Fred v. Fred, (N. J. Eq. 1901) 50 A. 776. Relief to the debtor who is sued on the original claim has also been given by enjoining such suit on the original claim. Cook v. Richardson, 178 Mass. 125, 59 N. E. 675 (1901); Trenton St. R. R. v. Lawlor, (N. J. Eq. 1908) 71 A. 234; Boston & M. R. R. v. Union Mutual Fire Ins. Co., 92 Vt. 137, 101 A. 1012 (1917).

[11] Very v. Levy, 13 How. (54 U. S.) 345, 14 L. Ed. 173 (1851).

[12] The manner in which the decree was framed does not affimatively appear in the instant case. From the facts given, it may be supposed that defendant was ordered to pay the plaintiff in accordance with the accord. In Very v. Levy, 13 How. (54 U. S.) 345, 14 L. Ed. 173 (1851), the court appointed a receiver to select the goods which plaintiff agreed to accept in lieu of the original debt, and ordered the receiver to deliver the requisite value of goods to the plaintiff on demand. Where specific performance is sought de novo, and not pleaded as a defense, as here, the decree has been awarded on the condition that the plaintiff perform the accord. See Fred v. Fred, (N. J. Eq. 1901) 50 A. 776.