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I. Revival of a Debt Barred by Statute of Limitations—An Acknowledgment by Debtor That He Owes the Debt as a Revival of the Cause of Action

Coley v. Coley[1] raised the question whether an acknowledgment of a debt barred by the statute of limitations would remove the defense of the statute and revive the cause of action on the debt. In that case the debtor, a druggist who sold materials to the creditor, also owed the creditor a large sum in the amount of $13,300.00 After the statute of limitations had run on the debt, the debtor prepared in his own handwriting a statement of his claim which he had against the creditor. As part of the same handwritten statement the debtor itemized the claim which he owed the creditor, noting in the statement that he "owes" this amount to the creditor. Creditor died and the debtor inherited a share of the creditor's estate. Counsel for the deceased creditor's estate contended that the debtor's conduct constituted a promise to pay the debt from his share of the creditor's estate, thereby reviving his debt which had been barred by the statute of limitations.

The court of appeals, affirming the lower court, held that the conduct of the debtor constituted only an acknowledgment of his indebtedness, was not a promise to pay it, and consequently did not revive the debt barred by the statute of limitations. Judge Carney, speaking for the court, felt bound by prior Tennessee Supreme Court decisions to the effect that such an acknowledgment does not revive

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1. 48 Tenn. App. 628, 349 S.W.2d 183 (W.S. 1960).

the debt, but he expressed his personal view that the conduct of the debtor did show an expression of willingness to pay the debt which he thought sufficient to remove the defense of the statute of limitations.

Tennessee seems committed to the proposition that an acknowledgment of a debt barred by the statute of limitations does not imply a promise to pay; consequently, such an acknowledgment does not lift the bar of the statute.[2] In taking this position, Tennessee appears to be in a distinct minority of jurisdictions. As the late Professor Williston, that eminent authority in the field of Contracts, put it: "[I]t is well settled in most jurisdictions that an 'unqualified acknowledgment of present indebtedness . . . unaccompanied with any evidence showing a determination not to pay' is equivalent to a new promise."[3] Again, Professor Williston stated the same proposition in this fashion: "If the admission is unequivocal and unconditional, 'the law will imply a promise to pay from a bare acknowledgment.' "[4] The *Restatement of Contracts* takes the same position.[5] Professor Corbin, the greatest living authority on the law of contracts, likewise takes the position that an acknowledgment of the debt is sufficient to remove the bar of the statue of limitations. He summarizes the rule succinctly in these words: "It is very generally held that an acknowledgment that a sum of money is actually due, if made without any accompanying denial of willingness, justifies the inference of a promise to pay."[6]

In the *Coley* case the debtor's statement that he "owes" the creditor surely is a clear, unequivocal and unconditional acknowledgment that he owes the debt, and from that acknowledgment it is reasonable to imply a promise by the debtor to pay the debt. Moreover, as Judge Carney carefully points out in his opinion, this statement by the debtor that he "owes" the creditor was submitted to the creditor together with the debtor's statement of the amount which the creditor owed him. That, Judge Carney astutely concludes, is not only an acknowledgment of his debt due to the estate of the deceased creditor, but also reasonably manifests his willingness that the debt be paid from the debtor's share of the deceased creditor's estate.

The writer ventures to suggest that it is time for the Supreme Court of Tennessee to reexamine its position that an unqualified acknowledgment of the existence of a debt barred by the statute of limitations

2. Hall v. Skidmore, 180 Tenn. 23, 171 S.W.2d 274 (1943) (payment of interest, while constituting an acknowledgment of the barred debt, is not an expression of a willingness to pay; and hence, did not remove the bar of the statute of limitations).

3. 1 WILLISTON, CONTRACTS § 166, at 670 (Jaeger ed. 1957). Many cases are cited from a great number of jurisdictions.

4. *Id.* at § 669.

5. RESTATEMENT, CONTRACTS § 86(2)(a) (1932).

6. 1 CORBIN, CONTRACTS § 216, at 713 (1950). Many cases are cited from numerous jurisdictions.

does not remove the bar. There appears to be no good reason why Tennessee should not align itself with the overwhelming weight of authority on this point, especially since this majority is supported by Professors Williston and Corbin, who are undoubtedly the leading authorities in the field of contract law. After all, the defense of the statute of limitations is regarded as of such technical nature that a promise to pay a debt barred by the statute is enforceable even though it is purely gratuitous and not supported by any consideration.

II. RULES FOR DETERMINING PRIORITY OF RIGHT WHERE SUCCESSIVE ASSIGNEES COMPETING FOR SAME ASSIGNED CLAIM—APPLICABILITY OF THOSE RULES IN CONTEST BETWEEN AN ASSIGNEE AND DEBTOR WHOSE OBLIGATION HAS BEEN ASSIGNED

The court of appeals in *Kivett v. Mayes*[7] placed in proper perspective some unfortunate language regarding assignments of a chose in action that appeared in an earlier Tennessee Supreme Court case. In *Kivett*, the question was whether the failure of an assignee to give notice to the debtor that his debt had been assigned would prevent recovery by the assignee against the debtor. The trial court had dismissed plaintiff's suit against the debtor on the ground that such notification was required. The court of appeals quite properly took the position that the failure to notify the defendant debtor of the assignment did not prevent plaintiff from recovering.[8]

An earlier Tennessee Supreme Court case of *DeSoto Hardwood Flooring Co. v. Old Dominion Table & Cabinet Works*[9] had, unfortunately, declared that it had long been the law of Tennessee "that the assignment of a chose in action is not complete, so as to vest absolute title in the assignee, *either as against the debtor* or third persons requiring rights, until notice of the assignment has been given to the debtor. . . ."[10]

The court of appeals speaking through Judge McAmis, pointed out that the *DeSoto Hardwood* case, as well as others using the same unfortunate and incorrect language, involved a contest between successive assignees of the same chose in action; thus the contest was between two assignees of the same right. It was not a contest between an assignee and the debtor whose debt had been assigned.

An assignment of a contract right extinguishes the right of the

7. 354 S.W.2d 492 (Tenn. App. E.S. 1961).

8. In Kivett v. Mayes, *supra* note 1, the court held, however, that the plaintiff assignee had failed to carry the burden of proof showing the existence of the alleged debt that was assigned; the plaintiff lost the case on that ground.

9. 163 Tenn. 532, 43 S.W.2d 1069 (1931).

10. *Id.* at 534, 43 S.W.2d at 1070. (Emphasis added.)

assignor and creates a similar right in the assignee.[11] To produce this effect it is not necessary that notice be given to the debtor, although until such notice is given the debtor can defeat the assignee's rights by good faith payments to the assignor.[12] When successive assignees are competing for the same chose in action, there are two main rules for determining priority of claim. The so-called majority American view is that, subject to certain exceptions, the first assignee for value in time prevails over prior subsequent assignees of the same claim, irrespective of notice to the debtor.[13] The rationale of this rule is that where a chose in action has once been assigned for value, then there is nothing left which the assignor can assign. Consequently, a subsequent assignee takes nothing by way of assignment. The second main rule for determining priority as between successive assignees of the same claim, known as the rule of *Dearle v. Hall*,[14] is that priority is determined by which assignee first gives notice to the debtor whose debt has been assigned.[15] For many years Tennessee has followed the rule of *Dearle v. Hall*.[16]

When an assignee and a garnisheeing creditor are competing for the same claim, priority is determined by essentially the same rules as those used to determine priority between competing successive assignees. Thus, one view says that priority in right is determined by priority in time; if the assignment takes place before the claim is garnished, the assignee takes priority irrespective of notice to the debtor.[17] On the other hand, those states applying the *Dearle v. Hall* rule for determining priority among competing successive assignees also determine in the same manner priority between a garnisheeing creditor and an assignee of the same claim. Under this rule, a garnisheeing creditor has priority over an earlier assignee where the as-

11. 4 CORBIN, CONTRACTS § 902 (1951).
12. *Ibid.*
13. For a discussion of the view preferring the assignee first in time, as well as the exceptions to the rule, see 4 CORBIN, CONTRACTS § 902 (1951); 3 WILLISTON, CONTRACTS §§ 434-35 (Jaeger ed. 1960); RESTATEMENT, CONTRACTS § 173 (1932). Under the Restatement view, a prior assignee prevails over a subsequent assignee of the same contract right unless the subsequent assignee purchases his assignment for value in good faith without notice of a prior assignment, and obtains either: "(i) payment or satisfaction of the obligor's duty, or (ii) judgment against the obligor, or (iii) a new contract with the obligor by means of a novation, or (iv) delivery of a tangible token or writing, surrender of which is required by the obligor's contract for its enforcement. . . ." *Id.* at 221-22. New York apparently does not recognize all the four exceptions contained in the Restatement. Consequently New York will let the first assignee prevail, even to the extent of recovering from the second assignee who, in good faith, has collected the assignment from the debtor. Superior Brassiere Co. v. Zimetbaum, 214 App. Div. 525, 212 N.Y. Supp. 473 (1925).
14. 3 Russ. 1, 38 Eng. Rep. 475 (ch. 1823).
15. Graham Paper Co. v. Pembroke, 124 Cal. 117, 56 Pac. 627 (1899).
16. Naill & Naill v. Blackwell, 164 Tenn. 615, 51 S.W.2d 835 (1932).
17. McDowell, Pyle & Co. v. Hopfield, 148 Md. 84, 128 Atl. 742 (1925).

signee has not, before garnishment, given notice of the assignment to the debtor whose obligation has been assigned.[18] Under this rule an assignee will prevail over a creditor who subsequently garnishes the same obligation, if the assignee has notified the debtor of the assignment before the garnishment.[19] But, as the *Kivett* court makes clear, the rule of *Dearle v. Hall* which determines priority in right by the test of priority in notice to the obligor has no application where the contest is solely between the assignee and the debtor whose debt has been assigned.[20]

Tennessee has modified the *Dearle v. Hall* rule by statute with respect to determining priority among successive assignees of the same accounts receivable. A Tennessee statute now provides that an assignee, without giving notice to the debtor whose debt has been assigned, can make his claim safe as against a subsequent assignee or attaching creditor by filing notice of his assignment with the secretary of state.[21]

III. BREACH OF CONTRACT—NECESSITY FOR TENDER OF PERFORMANCE BY PROMISEE WHERE PROMISOR CANNOT PERFORM—RIGHTS OF PROMISEE AGAINST THIRD PARTY INDUCING BREACH OF CONTRACT

Howard v. Houck[22] presented two questions: (1) must a plaintiff, suing for breach of contract to repurchase from the defendants an interest in a business, make a tender in order to hold defendant-sellers liable when defendants have sold the property to a third party before performance date; and (2) is a third-party defendant who, knowing of the repurchase agreement, bought the property from the sellers liable in damages for procuring the breach?

In November, 1958, plaintiff (Howard) and defendants (Houcks) owned a business known as "Abbe's Telephone Answering Service." At that time plaintiff sold his one-half interest in this service to the Houcks; in the contract of sale the parties agreed that plaintiff should have an option to repurchase a one-half interest in the business from

18. DeSoto Hardwood Flooring Co. v. Old Dominion Table & Cabinet Works, 163 Tenn. 532, 43 S.W.2d 1069 (1931).

19. Moran v. Adkerson, 168 Tenn. 372, 79 S.W.2d 44 (1935).

20. See Naill & Naill v. Blackwell, 164 Tenn. 615, 618, 51 S.W.2d 835 (1932); 4 CORBIN, CONTRACTS § 902 (1951); 3 WILLISTON, CONTRACTS §§ 433-34 (Jaeger ed. 1960).

21. TENN. CODE ANN. §§ 47-1801 to -1803 (Supp. 1962). Corn Exchange Nat'l Bank & Trust Co. v. Klauder, 318 U.S. 434 (1943), made financing through the use of the assignment of accounts receivable vulnerable to the assignor's possible future bankruptcy. For a discussion of state legislation subsequently enacted to protect the assignment as a security device, see 3 WILLISTON, CONTRACTS § 435A (Jaeger ed. 1960).

22. 360 S.W.2d 55 (Tenn. 1962).

October 1, 1961, to January 1, 1962. On or before October 1, 1961, plaintiff notified the Houcks of his acceptance of the option. Plaintiff also notified the defendant Judkin that he was repurchasing an interest in the business, and Judkin was warned against interfering with plaintiff's repurchase. Nevertheless, knowing of the contract between plaintiff and the Houcks, Judkin purchased the business from the Houcks. Plaintiff sued the Houcks for breach of contract and Judkin for inducing the breach of contract. All defendants demurred to plaintiff's complaint on the ground that plaintiff had failed to comply with his part of the contract by making a tender of performance. The facts as above set forth were alleged in the bill of complaint.

In reversing the lower court, the Supreme Court of Tennessee overruled the demurrer and held that plaintiff did state a cause of action against both defendants. The court was of the opinion that it was not necessary for plaintiff to make a formal tender as a prerequisite to his suit, the sale of the business by the Houcks having rendered such tender unnecessary.

In overruling the demurrer, the court is on sound ground. It is an old maxim of the law that it compels no man to do a useless act, and this principle has been applied to the case of conditional promises. Admittedly this option contract for the sale of the business by the Houcks does not become a contract for the sale of the business until the plaintiff had exercised the option in conformity with the conditions therein prescribed. However, the option in this case differs from the usual type in which a contract is made by an owner of property giving an option to purchase upon stated terms and conditions. Here, an option to repurchase was reserved by the grantor in a deed of conveyance; when the option was exercised a binding enforceable contract of sale came into existence.[23] Since the promisors (Houcks) could not keep their promise in any event it was useless for plaintiff to perform the condition of making a tender; the defendant Houcks became liable without such performance by plaintiff.[24] A seller (Houcks) cannot defeat recovery for breaeh of his contract to sell by reason of his own default; the law does not require the doing of a useless act by the plaintiff promisee. When the Houcks sold the subject matter of the contract to Judkin, disabling themselves so that they could not perform, they breached the contract.[25]

With regard to the defendant Judkin, the Tennessee statute provides that a right of action arises against a party procuring a breach

23. Moehling v. Pierce, 3 Ill. 2d 418, 121 N.E.2d 735 (1954).
24. Sisco v. Rotenberg, 104 So. 2d 365 (Fla. 1958); 5 WILLISTON, CONTRACTS § 699, at 344 (Jaeger ed. 1961).
25. Lazarov v. Nunnally, 188 Tenn. 145, 217 S.W.2d 11 (1949).

of contract.[26] In such situations the party is liable in treble the amount of damages resulting from or incident to the breach of the contract. Since the matter was decided upon demurrer to the complaint, the court thought that sufficient facts were alleged to state a cause of action against Judkin.

Since plaintiff could not accept the option to repurchase the business from the Houcks before October 1, 1961, and since the Houcks sold the property to defendant Judkin on or about September 18, 1961, there arises the question of what was the contract of plaintiff which Judkin induced the Houcks to breach? The actual contract of repurchase of the business could not be consummated by plaintiff before October 1st, and the Houcks had sold the property before that time.

The answer is clear. Plaintiff's option to repurchase the property from the Houcks was itself the contract in question. An option has been succinctly defined as "a contract to keep an offer open."[27] When plaintiff sold his business to the Houcks, retaining in the contract of sale an option to repurchase a one-half interest in the business, the option constituted a contract to keep the offer open. The consideration received by the Houcks which made the option irrevocable was the same consideration they received from the plaintiff in the sale of the business in November, 1958. In short, plaintiff reserved an irrevocable option to repurchase the business in September, 1961, as part of the price which the Houcks paid for the business. The cases make it clear that such an option to repurchase contained in a contract of sale is irrevocable and enforceable.[28] Thus, defendant Judkin allegedly procured the breach of the option contract which plaintiff had with the Houcks.

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26. TENN. CODE ANN. § 47-1706 (1956).

27. Warner Bros. Theatres, Inc. v. Proffitt, 329 Pa. 316, 319, 198 Atl. 56, 57 (1938); see 1 WILLISTON, CONTRACTS §§ 61-61D (Jaeger ed. 1957) for a discussion of the nature of an option and the circumstances making it irrevocable.

28. Moehling v. Pierce, 3 Ill. 2d 418, 121 N.E.2d 735 (1954) (option to repurchase real estate enforced, although seller repudiated before option accepted); Standard Reliance Ins. Co. v. Schoenthal, 171 Neb. 490, 106 N.W.2d 704 (1960) (option to repurchase real estate enforced, although owners giving option died before option could be accepted); Allen v. Biltmore Tissue Corp., 2 N.Y.2d 534, 141 N.E.2d 812 (1957) (option of issuing corporation to repurchase shares of stock held by stockholder, enforced against heirs of deceased stockholder).