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Guaranty: Liability: Compromise and Settlement

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practices." The court therefore concluded that a suspension of the license to practice was "not necessary to give time for reformation of the defendant."⁹

Cannon, on the other hand, although criticized in *Hepp v. Petie*,¹⁰ for similar misconduct, had shown up to the time of trial no reformation of practice methods, and so was suspended from the practice of law in the state of Wisconsin for two years. The referee found that the defendant charged unconscionable and excessive fees for services performed. He thus showed that he had not recognized the fact that "the practice of law is not a trade, but a ministry."¹¹

It is as true today as it was fifty years ago, when Chief Justice Ryan said in his address before the graduates of the University Law School, that "the pursuit of the legal profession for the mere wages of life is a mistake alike of the means and the end. It is a total failure of appreciation of the character of the profession."

CARL F. ZEIDLER

Guaranty: Liability: Compromise and Settlement

When a party guarantees that an agent will perform his contract with his principal by guaranteeing to pay anything due under the terms of the contract, said party thereby makes himself primarily liable to the principal. Any settlement made by the agent with his principal will not release the guarantor from his liability because of a lack of consideration, the agent being a stranger to the contract made between the principal and the guarantor. In case the agent defaults or fails to perform his contract, and there is still money due and owing the principal, the principal can accept whatever the agent is able to advance. Such acceptance does not constitute a waiver of the principal's right to collect the deficiency from the guarantor. He has in fact contracted to answer to the principal in just such a situation as this.

The simple rule of law that a guaranty contract involves primary liability is quite fundamental and necessary knowledge for the practicing attorney to have tucked away in his mind. It concerns a situation that is common and liable to confront him any day. The recent case of the Wisconsin Supreme Court, *Swift and Co. v. Geraghty*, 226 N.W. 381, furnishes a foundation for this brief review on the nature of a guaranty contract of this kind. The main fact to bear in mind is that the guaranty contract is separate and apart from the contract entered into between principal and agent. It concerns only principal and guarantor, the

⁹ *State v. Kiefer* (Wis.) 222 N.W. 795, 797.

¹⁰ 185 Wis. 350, 200 N.W. 857.

¹¹ *Ellis v. Frawley*, 165 Wis. 381, 385, 161 N.W. 364, 366.

breach of contract between principal and agent being the spring that sets the guaranty contract in action.

Suppose A hires B to sell watches for him. B is a young man who is expected to succeed so that A thinks he will make good on the job, but A doesn't feel entirely safe in having only B to answer for the watches so he says, "B, I have faith in your ability but I can't leave this business in your hands solely on the strength of my faith. I want you to get some substantial person to back you and guarantee that should you default in the performance of your contract, this other person will be liable to me for whatever loss I incur." B gets his friend C to sign a contract guaranteeing that should B default in the performance of his contract with A, C will answer for the same. Now B does fall back on his payments, or defaults in some other manner. A takes back whatever property is on hand, B paying probably something additional but still leaving a balance due and owing to A. Does the fact that A accepts this property and money from B, release C from his contract of guaranty? The answer is self evident, if there is still money due and owing under the contract, C has guaranteed to pay this balance and is primarily liable to A.

In the Geraghty case, one Goebel entered into a contract to act as agent for Swift and Company. Geraghty was guarantor for the performance of Goebel's contract. When Goebel died, he owed the company a certain sum of money. Agents of Swift and Company accepted from the representatives of Goebel's estate the goods on hand as part payment on the amount due. Swift and Company later brought suit to collect the balance due under the contract from the guarantor, Geraghty. The defense is that there was an accord and satisfaction by acceptance of the goods on hand; secondly, that plaintiff's failure to file a claim against the agent's estate was a bar to recovery on the guaranty contract.

1. A contract guaranteeing the performance of a certain other contract by the payment of all sums due thereunder, creates a primary liability in the guarantor. *Hubbard v. Healy*, 96 Wis. 578. This rule of law was laid down in this state as early as *Malloney v. Lyman*, 3 Pin. 443, and has been followed ever since.

2. It is held in *Estate of Menzer*, 189 Wis. 340, that, under a well settled law, there must be a new consideration moving either to the guarantor or payee, in order to release the guarantor. In the instant case the court found that the evidence showed no testimony to the effect that the entire account was to be settled on return of the goods on hand. Such being the case there certainly was not an accord and satisfaction of money due under the contract by taking back the goods held by the agent. If the representative had given something over and above or

different from what was due under the contract, the guarantor might be able to show new consideration and therefore a release because of accord and satisfaction.

3. The fact that plaintiff did not file its claim against the estate of the agent, is in no way a bar to it recovering from the guarantor. By his contract, the guarantor became primarily liable for whatever money might be due and owing under the terms of the contract. The plaintiff elected to collect from the guarantor and such election was within the privilege of their contract.

In the case of *Loverin and Brown Co. v. Travis*, 135 Wis. 332, it is held that where a guaranty is one of payment and not of mere collection, no efforts to collect from the debtor are necessary before making demand on the guarantor. See also *Minter v. Branch Bank of Mobile*, 23 Ala. 762; *Bull v. Doe*, 77 Cal. 54; and *Willis v. Chowning*, 90 Tex. 617.

SYLVESTER S. SANGER

Intoxicating Liquor: Search and Seizure: Preliminary Hearing

In thumbing over recent decisions reported in the *Federal Reporter* advance sheets, we find many of the cases have come up as a result of someone violating the prohibition law. Most of us are wholly unfamiliar with the operation of the law in the prosecution and the defense of these liquor violators, so a typical case has been singled from among a number of such decisions and a report thereon is herewith given so that we may have at least a faint recollection of coming in contact with the subject. There is a marked similarity among all the cases in this field, for after all, they usually arise out of similar circumstances. The case under discussion is *Herter v. United States*, 33 Fed. 400, and 33 Fed. 402.

To make a long story short and to start at the end and work toward the starting of the action, Herter's house was raided by agents by virtue of a search warrant issued by one Jackson who was the United States Federal Prohibition Director for the district of Montana. As a result of this raid, there was delivered up to Jackson and placed in his care, 456 quarts of beer, three quarts of wine, one pint of whiskey, and various pieces of personal property, such as, copper boilers, copper buckets, steins, etc. Herter contends that the issuance of the warrant was void and that as there is to be no action taken on the seizure that he is entitled to have his property returned to him. He appears in Federal Court petitioning it to order Jackson to return his property. Here is the story that is presented to the court:

Adams, an undercover agent of the government, went to the dwelling of Herter and represented himself as being an attorney in search of the