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Principal and Surety: Application of Payments: Liability of Surety

Kearney W. Hemp

Standard Pecan Co., 309 Ill. 226, 140 N.E. 834 (1923), the court, reversing a judgment for the plaintiff purchaser, founded its reasoning upon the argument that the agent, making the repurchase agreement, was only a special agent having power to sell the stock, but was unauthorized to do more, and so far as the principal was concerned the sale was not conditional, and the court felt that retaining the purchase money was not a ratification of the agent's unauthorized agreement.

In comparing these three cases with the instant case it becomes evident that each case is characterized not only by its facts but by the reasoning used by the courts in each to reach what they feel is the equitable decision. The courts which found for the plaintiff purchaser seemingly were influenced by facts which were not "legally" important to the problem at hand. In the instant case the advanced age of the plaintiff's was a motivating factor in the court's decision, and in the two cases in which the repurchase agreement was made with the plaintiff by important officers of the defendant corporation the court took this point into consideration and decided that the plaintiff was entitled to recover what he had paid for stock in the defendant corporation. The "argumentative tools" used by the courts in all of the cases are varied, and this variance in the use of these tools, such as "special agent," "unjust enrichment," and "ratification," brings forth the point that the courts will decide where the equities lie and will then bolster the decision through the use of the "standardized" legal terminology. It should be noted that in the case where the court reached its decision through the strictest adherence to the usual legal arguments the resulting decision is in the minority.

JOSEPH GOLDBERG AND JOHN H. RUSSELL.

PRINCIPAL AND SURETY—APPLICATION OF PAYMENTS—LIABILITY OF SURETY.—This action is by a subcontractor upon a statutory bond intended to afford protection to materialmen and laborers who furnished materials or performed labor in the construction of a public building. The plaintiff sued the surety on the bond, the contractor, and its receiver to recover for services performed on school "No. 69." He had also done work for the same contractor on school "No. 49." The bond for that job was underwritten by another surety. It was contended by the defendant that the plaintiff had received money in payment for the work done on school "No. 69," and had wrongfully applied the money so received upon the payment of the prior account. The trial court entered a judgment on the verdict in the amount of $1,692.33 which was the amount determined to be still due and owing upon job "No. 69." On appeal, *held*, judgment affirmed. In the event of failure by debtor to designate, the creditor has the right to apply payments received to whatever debt he may choose. The finding of the jury that no direction was made by the debtor, is binding in absence of evidence grossly to the contrary. *Western & Southern Indemnity Co.* v. *Cramer*, (Ind. 1937) 10 N.E. (2d) 440.

The general rule is that where a debtor owes distinct accounts or debts and makes a voluntary payment of money, he may direct its application. Upon his failure to so designate the creditor may, and in the absence of either party to so designate, the law will apply it justly, usually in extinguishment of the first debt. *Born* v. *Union Elevator Co.*, 67 Ind. App. 97, 118 N.E. 973 (1918); *Stone* v. *Talbot*, 4 Wis. 422 (1855); *Milwaukee Boston Store* v. *Katz*, 153 Wis. 492, 140 N.W. 1038 (1913). Unless an agreement exists to the contrary payments in absence of designation must be applied to extinguishment of the indebtedness

first accrued. *Yellow River Improvement Co.* v. *Arnold,* 46 Wis. 214, 4 N.W. 971 (1879); *Hannar* v. *Engelmann,* 49 Wis. 278, 5 N.W. 791 (1880). A mortgagor paying interest has the right to indicate on which of several mortgages payment should be applied. *Johnson* v. *Bank of New Richmond,* 188 Wis. 620, 206 N.W. 871 (1926). The law governing the application of payments is the same whether the payments are made on an ordinary running mercantile account, or on an account made up of as many independent causes of action as there are bills of goods sold. *American Wollen Co.* v. *Maaget,* 86 Conn. 234, 85 Atl. 583 (1912). Application to one of two accounts is determined by the intention of the parties. *Paragould & M. R. Co.* v. *Smith,* 193 Ark. 224, 124 S.W. 776 (1910). But neither debtor nor creditor can claim the right to appropriate a payment to a particular item of an account after a controversy has arisen. *Lehigh Coal & Navigation Co.* v. *McLeod,* 114 Me. 427, 96 Atl. 736 (1916). Under all ordinary circumstances the debtor and creditor may control the application of payments between themselves as between secured and unsecured indebtedness. *F. A. Patrick & Co.* v. *Deschamp,* 145 Wis. 224, 129 N.W. 1096 (1911).

The courts are fairly consistent in their application of the broad and general doctrine where there is no accommodating party in the case who would be prejudiced by the application to one account or to another. Where an accommodating party is involved the courts hold diverse views. Some courts are of the opinion that it is necessary for the materialman-creditor to determine the source of the money which he receives from the contractor and in the event of his failure to do so, and if by reason of misapplication he fails to file a lien, he is precluded from recovery. *Sipes* v. *Ardman Book & News Co.,* 138 Okla. 180, 280 Pac. 805 (1929); *The United States, for Crane Co.* v. *Johnson, Smathers & Rallins,* 67 F. (2d) 121 (C.C.A. 4th, 1933). It has been held that a materialman who receives from the contractor with full knowledge that it was turned over for purpose of payment of a specific debt cannot apply it to the payment of another debt. *Farr* v. *Weaver,* 84 W.Va. 182, 99 S.E. 395 (1919); *Orwell Banking Co.* v. *Pelton,* 34 Ohio Cir. Ct. R. 172, 106 N.E. 1071 (1911). The surety is entitled to benefit of a payment made by the principal with money furnished for that purpose by the builder where the creditor knows the circumstances and the source of the payment, although the principal assented to its application to another debt. *Bayer* v. *Leyor,* 186 N.Y. 569, 79 N.E. 1100 (1906). The opposite view is taken in the case of *Standard Oil Co.* v. *Day,* 161 Minn. 281, 201 N.W. 410 (1924), where it was held that the payment of money to the contractor by the principal imposed upon the contractor no obligations as regards the surety; payment and application in any manner whatsoever could not be controlled or regulated by the surety. In *Salt Lake City* v. *O'Conner,* 68 Utah 238, 249 Pac. 810, 49 A.L.R. 941 (1926), the court said that it was for the public interest that commercial transactions should not be fettered, that complications should not be increased, and that money once released should circulate freely unbranded by any hidden equities of the law. The Wisconsin court has held that where a debtor makes a voluntary payment to a creditor who has several claims against him and fails to direct where such payment shall be applied, the creditor has a right to apply the same on any of the claims, which rule governs a payment made by a contractor to a materialman who had furnished materials to him on several different jobs as against a property owner from whom the contractor had received the money so paid. *W. H. Pipkorn Co.* v. *Evangelical Lutheran St. Jacobi Society of the City of Milwaukee,* 144 Wis. 501, 129 N.W. 516 (1911). It is submitted that the idea of commercial necessity is plausible. The usual dealings between materialmen and contractor involve the handling of various

commodities for more than one job on which the contractor is working at the same time. For reasons of convenience the contractor does not have several bank accounts, but rather one running account and the burden which some courts would put on the materialman to determine the source of the payment and apply it to its separate account would affect adversely the course of modern business transactions. The courts suggest that surety companies should insist that contractors get waivers of liens from materialmen and that the contractors should have to turn these over to the builder, the city or private company, to qualify for the progress payments.

KEARNEY W. HEMP.

WORKMEN'S COMPENSATION—DEPENDENTS—ADULT WHO HAD BEEN SUPPORTED BY DECEASED STEPFATHER ENTITLED TO COMPENSATION.—This is a proceeding brough by one Frances Lindsay, under the Workmen's Compensation Act, for the death of her stepfather. The applicant, Frances Lindsay, resided with the deceased pursuant to an agreement whereby the applicant provided a home and paid the taxes thereon out of her own funds, while her deceased stepfather paid the current household expenses. The Industrial Commission, later affirmed by the circuit court, ordered the payment of compensation to the applicant as a dependent of the deceased employee. On appeal, *held,* judgment reversed on the grounds that the computation of the amount of compensation was imperfect, though the applicant, as a dependent of the deceased, was eligible for some compensation. *Duluth-Superior Milling Co.* v. *The Industrial Commission,* (Wis. 1937) 275 N.W. 515.

A dependent is one who is sustained by, or relies for support on, the aid of another, or who looks in some way to another for some of the reasonable necessities of life consistent with his or her social position, and who does so with some reasonable expectation of future support. *Koeppel* v. *E. I. Du Pont de Nemours Co.,* (Del. 1936) 183 Atl. 516. The issue of dependency, unless the Workman's Compensation Act specifically sets forth who shall be presumed to be a dependent, is a question of fact to be determined in accordance with the facts as they existed at the time of the accident. *Morrison Co.* v. *Industrial Commission,* 212 Wis. 507, 250 N.W. 396 (1933). Section 102.51 of the Wisconsin Statutes provides that there shall be a conclusive presumption that a wife is dependent upon her husband with whom she was living at the time of his death, that a husband is dependent upon a wife with whom he was living at the time of her death, a child under 18 dependent upon the parent with whom it was living, and a child over such age, but mentally or physically incapacitated, upon the parent with whom such child was living at the time of the parent's death. In the absence of such a statute there are no presumptions of dependency regardless of the relations of the parties. *Utah Fuel Co.* v. *Industrial Commission,* 67 Utah 25, 245 Pac. 381, 45 A.L.R. 882 (1926). The courts will not, on their own initiative, infer any presumption that aged parents are dependent upon their adult child with whom they reside. *Wisconsin Mutual Liability Co.* v. *Industrial Commission,* 184 Wis. 203, 199 N.W. 221 (1924); *Wisconsin Drainage Co.* v. *Industrial Commission,* 161 Wis. 42, 152 N.W. 460 (1915). Nor will the courts raise any presumption that grandchildren are dependent upon the grandparents with whom they reside, where the statute provides only for the dependence of a minor child upon its parents. *Universal Foundry Co.* v. *Industrial Commission,* (Wis. 1937) 272 N.W. 23. That case, however, held that an adopted child taken in and supported by the