

Executory Accord

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Unfortunately, the Supreme Court of the United States has not yet been given an opportunity to pass on the constitutionality of this portion of the Social Security Act,¹² for no test case has been presented to it. Taken on the basis of its action on the Sheppard-Towner Act,¹³ however, it is fairly safe to say that, should the court take jurisdiction if and when a test case is presented to it, it will follow the principles laid down in the *Massachusetts* case.¹⁴ Certainly the problem presented to the court would, in the main, be similar to the problem presented in the former case and on the basis of this previous action it would seem that the Act will be upheld.

EDYTHE R. DUCKER.

EXECUTORY ACCORD.—The legislature has enacted an amendment to the Personal Property Law and the Real Property Law in relation to the effect of an agreement to accept a stipulated performance in satisfaction at some future time of a presently existing right of action or claim held by a creditor.¹

“Section 33-a — Personal Property Law. — *Executory Accord.*

1. * * *.

2. An executory accord hereafter made shall not be denied effect as a defense or as the basis of an action or counterclaim by reason of the fact that the satisfaction or discharge of the claim, cause of action, contract obligation, lease, mortgage or other security interest which is the subject of the accord, was to occur at a time after the making of the accord provided the promise of the party against whom it is sought to enforce the accord is in writing and signed by such party.²

Section 33-b. An offer in writing, hereafter made, signed by the offeror, to accept a performance therein designated in

¹² 49 STAT. 631, 5 U. S. C. §§ 501-505 (1935).

¹³ 42 STAT. 224, 42 U. S. C. §§ 161-174 (1921).

¹⁴ 262 U. S. 447, 43 Sup. Ct. 597 (1923).

¹ N. Y. Laws 1937, c. 77 (§ 1, Chapter forty-five of the laws of nineteen hundred and nine, entitled “An act relating to personal property, constituting chapter forty-one of the consolidated laws” is hereby amended by inserting therein two new sections, to be sections thirty-three a and thirty-three b. § 2—Re-enacts the provisions of § 1 into §§ 280, 281 R. P. L.).

² 3. If an executory accord is not performed according to its terms by one party, the other party shall be entitled either to assert his rights under the claim, cause of action, contract obligation, lease, mortgage or other security interest which is the subject of the accord, or to assert his rights under the accord.

satisfaction or discharge in whole or in part of any claim, cause of action, contract obligation, or lease, or any mortgage or other security interest in personal or real property, followed by tender of such performance by the offeree before revocation of the offer, shall not be denied effect as a defense or as the basis of an action or counter-claim by reason of the fact that such tender was not accepted by the offeror."

An accord is an agreement whereby one party undertakes to give or perform, and the other to accept in settlement of an existing or matured claim something other than what he believes himself entitled to.³ The satisfaction is the performance or carrying out of the agreement. The accord and satisfaction is a contract between creditor and debtor for the settlement of a claim by some performance other than that which is due.⁴

An *accord executory*, it had been held, without performance thereof accepted by the creditor was no bar to an action on the original claim.⁵ Until fully performed it had no effect. The original claim was not barred until the satisfaction was given.⁶ Neither part performance of the accord, nor tender of performance created any superior rights in the debtor.⁷ Why the payment was not actually made or the accord executed was apparently immaterial. The promise was to satisfy, and until the promise was fulfilled, the agreement was unenforceable and no bar to an action on the original claim, whether the failure to perform was attributable to the fault of either or neither party.⁸

Though an executory promise to give something in satisfaction of a cause of action could not be while unperformed a legal bar to an action upon the original cause,⁹ the parties could agree that an executory promise shall itself be the satisfaction for the old right; and if

³ *Kromer v. Heim*, 75 N. Y. 574 (1879); *Brooklyn Bank v. De Grauw*, 23 Wend. 342 (N. Y. 1840).

⁴ RESTATEMENT, CONTRACTS (1932) § 417.

⁵ *Kromer v. Heim*, 75 N. Y. 574 (1879); *Campbell v. Hurd*, 74 Hun 235, 26 N. Y. Supp. 458 (1893); *Wertz v. Meyersohn*, 59 App. Div. 130, 68 N. Y. Supp. 1091 (2d Dept. 1901); *Reilly v. Barrett*, 220 N. Y. 170, 115 N. E. 453 (1917).

⁶ *Brooklyn Bank v. De Grauw*, 23 Wend. 342 (N. Y. 1840); *Noe v. Christie*, 51 N. Y. 270 (1873); *Mance v. Hossington*, 205 N. Y. 33, 98 N. E. 203 (1912); *Wahl v. Barnum*, 116 N. Y. 87, 22 N. E. 280 (1889); *Reilly v. Barrett*, 220 N. Y. 170, 115 N. E. 453 (1917).

⁷ *Kromer v. Heim*, 75 N. Y. 574, 31 Am. Rep. 491 (1879); *Campbell v. Hurd*, 74 Hun 235, 26 N. Y. Supp. 458 (1893); *Reilly v. Barrett*, 220 N. Y. 170, 115 N. E. 453 (1917); *Wertz v. Meyersohn*, 59 App. Div. 130, 68 N. Y. Supp. 1091 (2d Dept. 1901).

⁸ *Noe v. Christie*, 51 N. Y. 270 (1873); *Simmons v. Hamilton*, 56 Cal. 493 (1880); *Simmons v. Clark*, 56 Ill. 96 (1870); *Makepeace v. Harvard College*, 10 Pick. 298 (Mass. 1830); *Lynn v. Bruce*, 2 H. Bl. 317, 126 Eng. Reprint 571, 3 Revised Rep. 381 (1794).

⁹ See note 8, *supra*.

the claimant accepted a promise with that agreement, his original claim was at once and finally extinguished. Thereafter he must find his only remedy upon the new promise.¹⁰

In the unexecuted accord, whether there had been part performance or not, and whether there had been tender of performance, and even though the breach had been his, the creditor was not barred from instituting action on his original cause or debt.¹¹ Where the breach was the fault of the creditor the original cause was not suspended, and the debtor had no defense to an action thereon.¹² In order to sustain a defense to an action, or to entitle a debtor to maintain an equitable action to specifically enforce the breached promise, the accord had to be fully executed.¹³ Thus, where it had been held in *Kromer v. Heim*,¹⁴ a leading case, that notwithstanding plaintiff had executed and delivered a stipulation agreeing to accept \$3,000.00 in cash and the assignment of certain patent rights in settlement of a judgment for \$4,338.08, and that plaintiff had accepted tender of the money and merchandise offered, but later refused tender of the patent interests, he could nevertheless bring action to enforce the original judgment; and, where in *Rubin v. Siegel*,¹⁵ it was decided that a partly executed settlement of a cause of action was not available as a defense to the action, and, hence, was not sufficient to entitle the defendant to maintain an equity action to enforce such settlement; now, by legislative fiat, where an *executory accord* is agreed upon, the *accord* suspends the original cause of action until performance becomes a duty, if the accord was in writing signed by the party to be charged.

Again, if the accord is breached by a party to it, the other party, whether debtor or creditor, may now assert his rights under the original claim, or may assert his rights under the accord. The rights and obligations of either and both parties to the unexecuted agreement now embrace similar remedies. The aid of the courts is available to the creditor to enforce his original cause of action, or to seek redress

¹⁰ *Morehouse v. Second Nat. Bank*, 98 N. Y. 503 (1885); *Nassoiv v. Tomlinson*, 148 N. Y. 326, 42 N. E. 715 (1896); *Spier v. Hyde*, 78 App. Div. 151, 79 N. Y. Supp. 699 (1st Dept. 1903); *Whitney v. Cook*, 53 Miss. 551 (1876); *Yazoo, etc., R. R. v. Fulton*, 71 Miss. 385, 14 So. 271 (1893); *Perdew v. Tilma*, 62 Neb. 865, 88 N. W. 123 (1901).

¹¹ *Wertz v. Meyersohn*, 59 App. Div. 130, 68 N. Y. Supp. 1091 (2d Dept. 1901); *Goffe v. Jones*, 132 App. Div. 864, 117 N. Y. Supp. 407 (1st Dept. 1909); *Rubin v. Siegel*, 181 App. Div. 181, 168 N. Y. Supp. 744 (1st Dept. 1918); *Melzer v. Karanas*, 220 App. Div. 240, 221 N. Y. Supp. 71 (4th Dept. 1927); *Canfield v. Pulsifer*, 226 App. Div. 445, 236 N. Y. Supp. 32 (3d Dept. 1929).

¹² See note 11, *supra*.

¹³ *Billings v. Vanderbeck*, 23 Barb. 546 (N. Y. 1857); *Day v. Roth*, 18 N. Y. 448 (1858); *Smith v. Cranford*, 155 N. Y. 640, 49 N. E. 1104 (1898); *Van Winkle v. Reynolds*, 157 App. Div. 901 (4th Dept. 1913); *Rubin v. Siegel*, 181 App. Div. 181, 168 N. Y. Supp. 744 (1st Dept. 1918).

¹⁴ 75 N. Y. 574 (1879).

¹⁵ 181 App. Div. 181, 168 N. Y. Supp. 744 (1st Dept. 1918).

upon the breached accord. The debtor may compel the creditor to acknowledge the promise of suspension of the original claim contained in the written accord, so that he may have the time allotted to him to perform his promises.¹⁶ If the creditor breaches his promise to abstain from prosecuting his original action the debtor may defend the action by pleading the executory accord, or may counterclaim for damages for the breach, or may institute an original action founded on the written unperformed agreement.¹⁷

The change decreed by the legislative act brings the doctrine of *unexecuted accord* into the rule of "Mutuality of Obligation". No longer is the promise of the creditor *illusory*. Mutual rights and duties have been settled upon the parties to the executory accord, which the law can enforce by appropriate action.

ARTHUR GREENSPAN.

THE WOMAN JUROR LAW.—The Legislature of the State of New York has recently enacted the so-called Woman Juror Law.¹ By this enactment several sections of the Judiciary Law² are amended, in relation to the qualifications and exemption of women as jurors. Whereas, in relation to the qualifications of trial jurors, Section 502 of the Judiciary Law formerly read:

"1. A male citizen, and a resident of the county",

it is now provided:

"1. A citizen of the United States, and a resident of the county."

And so by the deletion of the one word "male" a vast change in the administration of justice has been effected, and the possible number

¹⁶ RESTATEMENT, CONTRACTS (1932) § 417: "If the creditor breaks such a contract, the debtor's original duty is not discharged. The debtor acquires a right of action for damages for the breach, and if specific enforcement of that contract is practicable, he acquires an alternative right to the specific performance thereof. If the contract is enforced specifically, his original duty is discharged."

¹⁷ *Chandler v. Pomeroy*, 143 U. S. 318 (1891); *Matter of Freeman*, 117 Fed. 680 (N. D. N. Y. 1902); *Deen v. Milne*, 113 N. Y. 303 (1889); *Bandmann v. Finn*, 185 N. Y. 508 (1906); *Cook v. Richardson*, 178 Mass. 125, 59 N. E. 675 (1901).

¹ Laws of 1937, c. 513. The bill was introduced by Mr. Kleinfeld of Brooklyn on Jan. 11, 1937, was sent to the Governor on May 7, was signed by him on May 24, and went into effect on Sept. 1. Several bills relating to the same subject had recently been introduced, both by Miss Byrne of the Bronx and Miss Todd of Westchester, but all were defeated.

² N. Y. CONSOL. LAWS, c. 30.