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Accord and Satisfaction in Washington

Harold Shepherd
University of Washington School of Law

Warren Shattuck

ACCORD AND SATISFACTION IN WASHINGTON

General Principles

Although the terms *accord* and *satisfaction* are generally used in the conjunctive, they constitute distinct stages in the process of discharging a cause of action. The accord, in its technical sense, is a bilateral contract by the terms of which a creditor having a cause of action against a debtor promises to accept and the debtor promises to give something other than was originally due in discharge of the claim.[1] Performance of the accord and its acceptance by the creditor constitute satisfaction.[2] Generally the cause of action is not discharged until satisfaction, although there may be cases where discharge is complete with the formation of the contract of accord.[3] A cause of action may also be discharged without the necessity of an accord where the creditor accepts some tendered performance but not in pursuance of his promise to do so. Such unilateral contracts of discharge are closely related to accords, and as Professor Williston has pointed out,[4] antedate the recognition of bilateral contracts. Since as a practical matter the two are closely related and often not differentiated by the courts, both are considered in this article.

Although accord and satisfaction are generally thought of in connection with the discharge of money debts and causes of action arising from breach of contract, they are by no means so limited. The discharge of judgments and claims arising from the commission of torts are equally within their scope.[5]

Since the accord involves an exchange of mutual promises and must satisfy the ordinary rules of mutual assent in bilateral contracts and since a unilateral contract of discharge must satisfy the rules for formation of unilateral contracts generally, it seems clear that an offer for discharge unsupported by consideration is revocable at the will of the offeror. These principles are recognized by the Washington decisions.[6] The failure of some courts to recog-

[1] Williston on Contracts, sec. 1838; Shepherd, "The Executory Accord," 26 Ill. Law Rev. 22, at page 22.

[2] Williston on Contracts, sec. 1838; Restatement of the Law of Contracts, sec. 417 and Comment (a).

[3] Williston on Contracts, sec. 1846, Shepherd, "The Executory Accord," 26 Ill. Law Rev. 22, at page 24, Restatement of the Law of Contracts, sec. 418.

[4] Williston on Contracts, sec. 1838.

[5] See 1 Corpus Juris, pages 524-526 inclusive.

[6] *Harding Hotel Co. v. United States Fidelity & Guaranty Co.*, 133 Wash. 272, 233 Pac. 276 (1925) *Kahl v. Ablan*, 160 Wash. 201, 294 Pac. 1010 (1931). The Washington court seems to have avoided the error pointed out by Dean Shepherd in his article, "The Executory Accord," 26 Ill. Law Rev. 22, viz., that of refusing relief in such cases on the ground that an accord executory is no defense.

nize the distinction between a mere offer for a contract of discharge and the completed but executory accord has led to much confusion.[7]

CONSIDERATION

The accord, being a bilateral contract, must satisfy the usual contract requirement of consideration. This will be found in the mutual promises, of the debtor to render some performance, as to pay a sum of money, deliver a chattel, or perform services, and of the creditor to accept this performance and discharge the cause of action. Examples of true accords are few in the Washington decisions.[8] The great majority of the cases involve offers for unilateral contracts of discharge.[9] In such cases, as in the formation of all unilateral contracts, the doing of the act completes the contract and in the act done must be found the consideration to support the promise to discharge. Since the rule that a cause of action might be discharged by the actual acceptance of satisfaction antedated the recognition of simple contracts[10] and the formulation of the doctrine of consideration,[11] the requisites of satisfaction and consideration might well have varied.[12] The courts, however, Washington included, have chosen to require that the act of satisfaction be such as would be sufficient from the consideration standpoint to support any counter-promise.[13]

The consideration problem largely centers around the orthodox rule that a smaller payment in money will support neither a promise to discharge nor a discharge of a liquidated debt.[14] The rule is not popular and a minority of states have broken away from it.[15] For a time it appeared that Washington might join this minority,

[7] See SHEPHERD, "The Executory Accord," 26 Ill. Law Rev. 22, pages 23-24.

[8] *Rogers v. Spokane*, 9 Wash 168, 37 Pac. 300 (1894) and *Joyner v. Seattle*, 144 Wash. 641, 258 Pac. 479 (1927) clearly involve bilateral contracts of accord. *Brown v. Kern*, 21 Wash. 211, 57 Pac. 798 (1899), and *Pederson v. Tacoma*, 86 Wash. 164, 149 Pac. 643 (1915) are cases which may apparently be so classed. It is difficult or impossible to ascertain from the facts given in many cases whether the court is dealing with a bilateral contract of accord or an offer for a unilateral contract of discharge accepted by performance.

[9] The check cases considered later are illustrative, the type situation being this: D, owing C an unliquidated obligation, sends a check to C noted "In full payment of all claims," or a check with accompanying letter reading "I tender you my check in full settlement of your claim. If unsatisfactory, return it to me at once."

[10] WILLISTON ON CONTRACTS, sec. 1838.

[11] WILLISTON ON CONTRACTS, sec. 1851.

[12] WILLISTON ON CONTRACTS, sec. 1851.

[13] "Accord and satisfaction is founded on contract, and a consideration therefor is as necessary as for any other contract." *Plymouth Rubber Co. v. West Coast Rubber Co.*, 131 Wash. 662, 666, 231 Pac. 25 (1924).

[14] WILLISTON ON CONTRACTS, sec. 120.

[15] See the cases cited in notes, 10 Minn. Law Rev. 248, and 24 Mich. Law Rev. 412.

three early decisions paving the way for complete abandonment of the orthodox rule. In the first of these cases, *Brown v. Kern*,[16] appeal was taken from denial by the trial court of a motion by a joint judgment debtor for an order cancelling as to him the judgment. The creditor having secured a judgment against both joint debtors agreed with each separately to accept from him one half thereof in full satisfaction of his obligation. One paid, the other did not, and both were here sued for the balance due. The relief sought by the debtor who had paid was denied below on the ground of insufficient consideration to support the agreed discharge. The Supreme Court reversed the decision and on the matter of consideration said

> "The general principle that the acceptance of a less sum of money than is actually due cannot be a satisfaction and will not operate to extinguish the whole debt, although agreed by the creditor to be received upon such condition, seems to be well established by almost uniform authority For many years, however, courts have been dissatisfied with this rule and have refused to extend the doctrine, but have sought to restrict the operation of the rule whenever it was possible. It is certainly not in accordance with ethics and ought not to be in accord with the rules of law, to allow a creditor to enter into a contract to compromise his debt or judgment, and by reason of that compromise receive an amount of money which he could not have received except through the medium of a compromise, and then allow him to violate his contract on the plea of want of consideration and still retain the fruits of the agreement which he made to compromise."
>
> "However," said the court, "it is not necessary to go so far as to overturn the established doctrine, for the reason that, under the findings of fact, it appears that the defendant Ridpath was unable to pay this judgment. The creditor then had a judgment which was worthless in the eyes of the law, and it was certainly a consideration to him to obtain a portion of that judgment."[17]

It would seem but a step from the decision in *Brown v. Kern* to an outright admission that partial payment of a debt will

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[16] 21 Wash. 211, 57 Pac. 798 (1899).

[17] See *Hidden v. German Savings and Loan Society*, 48 Wash. 384, 93 Pac. 688 (1908), where the court enforced a promise by a mortgagee to remit overdue interest on a note secured by mortgage, finding consideration in the fact the creditor deemed itself insecure at the time the promise was made. "The respondents were then at liberty to suffer the mortgage to go to a foreclosure and permit the appellant to recover its indebtedness as it then stood as best it could. But in reliance on the promise made (to remit some $1,500 of delinquent interest) the respondents continued in possession of the property and paid not only the overdue interest which they were already obligated to pay but additional interest under the modified agreement to the amount of more than $3,000."

furnish consideration for the discharge of the entire claim.[18]

The doctrine of the *Brown* case was continued in *Williams v. Blumenthal*.[19] In this case a creditor, in consideration of a payment of $100.00 and the relinquishment by the debtor of his right of appeal, had agreed to release a judgment for a larger amount secured against the debtor. In enjoining the enforcement of the judgment,[20] the court said.

> "Appellant contends that the judgment referred to constitutes and is a fixed, certain, and liquidated indebtedness, and that the rule is that, when such a debt is due and payable, an agreement to accept a part of the debt in payment of the entire debt is void. The authorities cited support this contention. This rule, however, has been severely criticised in many of the states, and in other states statutes have been passed entirely abrogating or materially modifying it. This state belongs to the former class."

Even though the force of the decision on this point is weakened by the presence of other consideration in the relinquishment by the debtor of his right of appeal, the court's conclusion that the $100.00 was sufficient consideration was unequivocal.[21]

Baldwin v. Daly[22] is the third of this group of cases. Again the decision is not squarely in point, because at the time part payment was made and accepted by the creditor the obligation (a note) was not matured. However, the court did not find the consideration in that fact, but said.

> "And while it is true that courts have disagreed on the question whether the payment of a part of a debt is a sufficient consideration to support an agreement for the release of the whole, this court has taken part with the courts holding such contracts to be founded on a sufficient consideration " (Citing *Brown v. Kern*).

Apparently these cases, while never expressly overruled, have

[18] There was in *Brown v. Kern* no indication that Ridpath was insolvent, hence the decision cannot be explained by reference to the doctrine, followed in some jurisdictions, that any sum paid by an insolvent debtor is sufficient consideration for a discharge of his entire obligation. (See cases cited in note, 24 Mich. Law Rev. 412.) Professor Williston says of this doctrine, "There seems no proper ground for making such a distinction." (WILLISTON ON CONTRACTS, sec. 120, at pages 261-262.)

[19] 27 Wash. 24, 67 Pac. 393 (1901).

[20] The decision here and in *Brown v. Kern, supra*, must be taken to indicate that in Washington judgments may be made the subject matter of accord and satisfaction. There was a time when debts of record could not be so discharged. (See WILLISTON ON CONTRACTS, sec. 1850.)

[21] After the statement quoted and after citation of authorities, the court went on to say, regarding the creditor's position after acceptance of the $100, "the respondent (creditor) was bound by his contract to satisfy the judgment when he entered into the agreement and received the money, and no good reason can be urged why he should not be bound thereby."

[22] 41 Wash. 416, 83 Pac. 724 (1906) See also *Russell & Co. v. Stevenson*, 34 Wash. 166, 75 Pac. 627 (1904).

been ignored[23] and the later decisions indicate an adherence to the orthodox rule.[24]

Liquidated Claims

Washington also follows the general rules[25] that payment by means of something other than money will satisfy a liquidated obligation regardless of the value of the performance rendered, and that payment of any sum will discharge an unliquidated claim.[26]

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[23] The last case approving the doctrine of *Brown v. Kern* is *Conlan v. Spokane Hardware Co.*, 117 Wash. 378, 201 Pac. 26 (1921), a case which does not involve accord and satisfaction. An agreement to modify a lease, reducing the rent, was held sustained by consideration because the tenant was at the time unable to pay the amount stipulated in the lease and threatened to abandon the property. The court construes *Brown v. Kern* and the cases following it to hold: " that an obligee who agrees to accept and accepts something less from an obligor than full satisfaction of an obligation, rather than take a doubtful chance of enforcing full performance, is bound by his agreement." However, in view of the decisions reviewed in note 24 *infra* we cannot accept this case as a reversion to the doctrine of *Brown v. Kern*, particularly so because the court in the *Conlan* decision relies not only on *Brown v. Kern*, but on other cases wherein there was consideration under the orthodox rule. Also, the courts generally appear willing to go a long way in an effort to uphold rent-reducing modifications of leases. See note, 43 A. L. R. 1451.

[24] The court concludes, in *Anderson v. Sanitary Dairy*, 160 Wash. 647, 295 Pac. 925 (1931) without discussion, that "The payment of a less amount than the liquidated demand was not a discharge of the whole." Similarly, in *Champagne v. McDonald*, 141 Wash. 617, 251 Pac. 874 (1927), an action to recover the agreed discount after payment of the entire debt, recovery was denied, the court saying: "From the evidence, we are unable to find any consideration for the ten per cent reduction agreement. The five thousand five hundred dollars was due and payable at the time it was made. By making this agreement, no benefit moved to McDonald. No detriment operated against the Terhunes, as they were only doing what they were already under obligation to do."

[25] WILLISTON ON CONTRACTS, secs. 121 and 128. For a compilation of all the Washington decisions involving consideration in contracts, see Restatement of the Law of Contracts with Annotations to the Washington Decisions, 7 Wash. Law Rev. 391, and 8 Wash. Law Rev. 20.

[26] The present position of the Washington court on the matter of consideration in accord and satisfaction is well set forth in *Plymouth Rubber Co. v. West Coast Rubber Co.*, note 13 *supra*. Starting on page 666, the court says: "One rule of law with reference to accord and satisfaction, which has been adopted by this court, is that, if a claim or indebtedness is liquidated and undisputed, and is due and owing, payment by the debtor and receipt by the creditor of any amount of money less than the whole amount of the indebtedness will not discharge the balance if the indebtedness is unliquidated and is disputed, payment by the debtor of an amount less than that claimed by the creditor, and receipt by the latter of such amount under such circumstances as that he is bound to know that the intention was to make the payment in full of all demands, will discharge the whole claim. if the indebtedness is liquidated and undisputed, and the debtor tenders something other than money, or both money and other property, and the tender is made under such circumstances as that the creditor is bound to know that it is made in full payment acceptance by the creditor of the tender will discharge the indebtedness." See also *Northern Bank & Trust Co. v. Harmon*, 126 Wash. 25, 217 Pac. 8 (1923) and *Pederson v. Tacoma*, 86 Wash. 164, 149 Pac. 643 (1915). It will be noted that the question of whether an obligation is or is not liquidated may become very important. This point is discussed later in connection with check cases.

While it is held generally that liquidated debts may as well be discharged by accord and satisfaction[27] as unliquidated claims, and while there are Washington cases so holding,[28] there is language in two of our decisions which might be construed as denying this proposition. In *Farley v. Letterman*[29] the defendant offered in evidence a letter from the plaintiff at variance with the terms of a lease executed between the parties. In ruling on the admissibility of this letter the court said.

> "The court (below) admitted this evidence on the theory of an accord and satisfaction. This was a mistaken conception for the reason that an accord and satisfaction cannot arise until there exists some difference or controversy between the parties thereto."

There is similar language in *London Guaranty & Accident Co. v. Western Smelting & Power Co.*,[30] where a defense of accord and satisfaction was predicated on the sending of a check by the debtor and its acceptance by the creditor. The defendant, owing several years' back premium on a compensation insurance account, as well as advance premium on a renewal policy, sent the plaintiff a check in the amount of the advance premium together with a letter reading: "I take pleasure in enclosing herewith cheque in full payment of our account." The defense was denied, the court saying:

> "It is difficult to perceive there has been any accord and satisfaction whatever. There was no dispute between the parties nor controversy of any kind shown by the record."

While the result was proper in each case, the reason assigned that there was no controversy or dispute between the parties cannot be supported.[31] Dispute or controversy as to the obligation or the amount of it may be of importance in determining whether there is consideration, but should not, it is submitted, determine whether the claim may be discharged by accord and satisfaction.

Claims Not Subject to Discharge by Accord and Satisfaction

Where public policy dictates the enforcement of a statutory minimum sum to be exacted by the creditor in certain situations, the parties cannot by accord and satisfaction discharge the obliga-

[27] See Restatement of the Law of Contracts, sec. 417, Comment (a).

[28] *Brown v. Kern*, note 8 *supra*, *Williams v. Blumenthal* (judgment), note 8 *supra*; *Baldwin v. Daly* (note), note 22 *supra*.

[29] 87 Wash. 641, 152 Pac. 515 (1915).

[30] 117 Wash. 568, 201 Pac. 914 (1921).

[31] It is doubtful if the court here really intended to announce a rule that only unliquidated or disputed claims could be the subject of accord and satisfaction. If so, it has been overruled by *Plymouth Rubber Co. v. West Coast Rubber Co.*, note 13 *supra*, where a defense of accord and satisfaction was sustained in an action on a liquidated debt.

tion for a lesser sum. In *Larsen v. Rice*[32] plaintiff sued to recover the difference between a contract salary of $3.00 per week and the amount she conceived to have been due her because of Rem. Comp. Stat. sec. 6571-1 *et seq.* (Now Rem. Rev. Stat. sec. 7639 *et seq*), providing for minimum salaries for women. Defendant as an affirmative defense alleged that before suit was filed plaintiff demanded of him the amount here claimed (the difference between $3.00 per week and the statutory minimum, totaling several hundred dollars) and that in consideration of $40.00 then paid by him, she discharged her claim. This defense was denied on the ground that public policy requires payment of a living wage to wage-earners, and although compromises are favored, a compromise executed after accrual of a substantial sum due the employee because of wage payments much less than the required minimum, which compromise did not secure to the employee the full amount of such accrued wages, could not be supported. Similarly, in *Robinson v. Wolverton Auto Bus Company*[33] the plaintiff, receiver for a ferry company, recovered the difference between tariff rates as filed by the ferry company with the state, and the sum actually paid by the defendant. A defense of accord and satisfaction was denied on the ground that the tariff rates, once fixed, could not, by statute, be varied by agreement between the parties.

Check Cases

(A) *Consideration*

The defense of accord and satisfaction seems to be raised most frequently in Washington in cases where the debtor claims a discharge of his obligation as a result of his creditor's cashing a check sent as payment in full. The creditor claims a balance due and that the check was a payment on account only Such cases raise problems of both mutual assent and consideration. Whether there is consideration depends upon whether the obligation was unliquidated. If liquidated, the check for less than the full amount due cannot be made a basis for accord and satisfaction, the usual rule of consideration applying.[34] Where the obligation is liquidated, notations on a check for part of the sum due, or in an accompanying letter, stating that the check is tendered as payment in full of all claims, are ineffective. The creditor does not prejudice himself by cashing the check, with or without notification to the debtor that he accepts the payment as on account only In *Rhodes v. Tacoma*[35] plaintiff had for months received pay checks upon which was printed "All endorsements on this check are an ac-

[32] 100 Wash. 642, 171 Pac. 1037 (1918).
[33] 163 Wash. 160, 300 Pac. 533 (1931).
[34] See note 24 *supra.*
[35] 97 Wash. 341, 166 Pac. 647 (1917).

knowledgement of payment in full for services rendered to the city of Tacoma as per roll, line and month on the reverse side hereof." A city ordinance fixed plaintiff's salary at $200 per month and he had been paid only $150 per month. Referring to a defense of accord and satisfaction pleaded by the defendant in answer to plaintiff's action to collect $50.00 per month additional salary for the period of his completed employment, the court said

> " the salary of his office is fixed and certain in amount, there being no dispute as to the time he was an incumbent of the office, it would seem that any such alleged accord and satisfaction would be without consideration. True, the city paid him $150.00 monthly, but its obligation so to do was absolute. It thereby paid him no more than it was at all events bound in law to pay him. So it is easy to see that it gave him nothing in consideration of any accord and satisfaction."[36]

There is, however, consideration for the discharge of a liquidated obligation where property is given the creditor in addition to the check for part of the sum due.[37]

The Washington court apparently has not attempted to define "unliquidated obligation," and examination of the decisions does not reveal any type situation which can be relied on as definitive of the term. Professor Williston defines it as "one the amount of which has not been fixed by agreement or cannot be exactly determined by the application of rules of arithmetic or of law."[38] Tort claims are clearly unliquidated. A *bona fide* dispute as to the amount owed on a contract makes the obligation thereon unliquidated.[39] Where the amount of the obligation is fixed and undis-

[36] The court in *Glenz v. Tacoma Ry. & Power Co.*, 125 Wash. 650, 216 Pac. 842 (1923) had before it facts analogous to those in the *Rhodes case*. After agreement by defendant with its employees for payment of time and a half for overtime, the plaintiff worked for months, regularly putting in overtime, and was paid at regular rates only. Each check bore this notation: "In full for wages to and including ——" (period of time covered by the check being inserted). A defense of accord and satisfaction was entered against the employee's action to recover the excess due for the overtime. Defendant appealed from motions for directed verdict denied below. The court refused to upset the verdict for plaintiff below and dwelt at some length on the fact that intent of the parties is in such cases a matter for the jury, but said nothing whatever about consideration.

[37] *Plymouth Rubber Co. v. West Coast Rubber Co.*, note 13 *supra*, *Northern Bank & Trust Co. v. Harmon*, note 26 *supra*.

[38] WILLISTON ON CONTRACTS, sec. 128. Professor Williston also distinguishes "disputed" from "unliquidated" claims. The former term evidently applies to situations where the existence of any obligation at all is disputed; the obligation if existing may be either liquidated or unliquidated. The distinction is not material here, it being conceded that for the purposes of consideration there is no difference.

[39] *Pederson v. Tacoma*, note 26 *supra* (claim for extras under a construction contract) *James v. Riverside Lumber Co.*, 121 Wash. 130, 208 Pac. 260 (1922) (claim for services by an architect) *Heiland v. Grunbaum*, 171 Wash. 148, 17 Pac. (2d) 864 (1933) (dispute over the provisions of a stock purchasing agreement).

puted but a counter-claim is demanded by the debtor and disputed by the creditor, the entire obligation is unliquidated. In *Hotel Randolph Co. v. John C Watrous Co.*[40] plaintiff sued for $500.00 allegedly owed by defendant on account of collections made by him for plaintiff. The defense of accord and satisfaction was based on the plaintiff's acceptance of a check tendered as full settlement of his claim. It appeared that defendant collected for plaintiff's account some $975.00, and claiming that plaintiff owed it $500.00 in connection with another transaction, sent along a check for the difference, together with an itemized statement showing their computations and the charge of $500.00, the statement being noted "Check to balance." Plaintiff cashed the check. Said the court.

> "We think this case is governed by the rule laid down in *First National Bank of Ritzville v. White-Dulaney Company* In that case, on facts very similar to those in this case, the court, after recognizing the general rule applicable to debts which are liquidated and due, deliber ately adopted the majority rule to the effect that a claimed offset in dispute will render the whole debt unliquidated. So here, appellant was well advised, before it cashed the check, of the claimed offset, and being a party to the dispute, well knew it existed, and, we think, to hold that there was no accord and satisfaction here would be to, in effect, overrule the *White-Dulaney* case, which we are unwilling to do."

Although it is the general rule that where part of an obligation is disputed and part admitted, payment by the debtor of the part admitted is sufficient consideration for the creditor's discharge of his entire claim,[41] there are two early Washington decisions *contra.* The court in *Seattle, Renton, etc., R. Co. v. Seattle-Tacoma Power Co.*[42] had for consideration an alleged accord and satisfaction founded on payment each month by the plaintiff of an amount provided in the contract as the minimum monthly charge for electric power. Plaintiff sought an injunction against a threatened shut-off of power by the defendant, who claimed failure by plaintiff to pay power bills in excess of the minimum amount. The court said

> "It may be safely asserted that, underlying all appli-

[40] 144 Wash. 215, 257 Pac. 629, 53 A. L. R. 766 (1927) In *First National Bank v. White-Dulaney Co.*, 123 Wash. 220, 212 Pac. 262 (1923), the counter-claim was based on sacks sold the plaintiff's assignor, the original creditor. The court cited 1 C. J. 556 and 1 R. C. L, 198 and concluded that the obligation was unliquidated. Professor Williston says: " if there are cross claims between the parties, if either claim is unliquidated, or the subject of *bona fide* and reasonable dispute, since the balance due on adjustment of the claims is uncertain, any payment will support an agreement to cancel both claims." (WILLISTON ON CONTRACTS, sec. 129.)

[41] WILLISTON ON CONTRACTS, sec. 129.

[42] 63 Wash. 639, 116 Pac. 289 (1911).

> cation of the rule of accord and satisfaction, in cases of both liquidated and unliquidated accounts, where the creditor is absolutely and in any event entitled to receive a definite and fixed sum, but claims an additional sum to be his due, which additional sum only is disputed by the debtor, the payment by the debtor of the definite and fixed debt and its acceptance by the creditor, though tendered as payment in full, will not constitute an accord and satisfaction.[43]

The rule here announced was approved in *Thayer v. Harbican.*[44]

There is, however, in a later case a dictum which seems to follow the general rule.[45] Just what the Washington court would now

[43] Professor Williston, after indicating the general rule on this point, goes on to say: "Though the courts seem to have failed to observe the distinction between a wholly unliquidated claim of at least a specified value and a claim where there is a distinct obligation to pay a liquidated amount as part of an entire contract, the distinction is clearly recognized between either of such cases on the one hand, and a case where a debtor is liable under two distinct contracts, on the other hand. If the debtor owes a liquidated amount, the fact that he owes on another contract an unliquidated or disputed amount, will not make payment of the former sufficient consideration for an agreement to discharge the latter, or indeed for any other promise." (WILLISTON ON CONTRACTS, sec. 129.)

[44] 70 Wash. 278, 126 Pac. 625 (1912). Here plaintiff sued to recover attorney fees alleged to have totalled $1,023.89. Defendant had sent plaintiff a check for $50.00 upon which was the notation, "This is payment in full for your services. " Plaintiff drew a line through this notation and wrote in "Accepted as part payment of attorney fees " and cashed the check. The services had been rendered in connection with a mortgage foreclosure; the defendant in settling with the mortgagor exacted $300.00 as attorney fees. Proceeding from the rule that in such mortgage cases the entire fee collected from the mortgagor must go to the attorney, the court stated: "There could, hence, be no *bona fide* dispute that that sum ($300.00) at least was due to the appellant. The rule that where a claim is in dispute and the debtor sends a check to the creditor for a less sum, indorsed as payment in full of the claim, the retention of the check by the creditor constitutes an accord and satisfaction, has no application to the case here presented. That rule only applies where the claim is disputed in good faith, and only as to the part of the claim so disputed. This case falls within the rule announced in *Seattle, Renton, etc., R. Co. v. Seattle-Tacoma Power Co.* The respondent having collected from the mortgagor $300.00 as an attorney's fee, could not dispute the attorney's right to that amount. Up to that amount, the claim was thenceforth liquidated and indisputable. The acceptance thereafter of a less sum by the attorney could not form the basis of or operate as a consideration for an accord and satisfaction." Granted that the case is distinguishable on its facts from the *Seattle-Tacoma Power Co.* case and might well have been decided solely on the ground that a lesser payment in cash will not discharge a liquidated debt, the earlier case is certainly relied on here.

[45] *Pederson v. Tacoma*, note 26 *supra*. The court having found as a fact in that case that the parties agreed on the sum of $61,342.79 as settlement for extras under a construction contract, plaintiff having claimed more and the city having claimed less was due, answered plaintiff's contention that defendant had admitted $61,342.79 was due and hence such sum could not support accord and satisfaction by saying: "But if we may assume that the city agreed that $61,342.79 was due and that the appellant was claiming $108,000, the parties might agree upon either sum, and that would be an accord and satisfaction. Where a claim is in dispute, the parties may agree upon an amount to be paid, which amount when paid will constitute an accord and satisfaction."

hold in a case raising squarely the issue of whether payment of the liquidated portion of a claim which is disputed in part, is consideration for discharge of all of it, is problematical. There appears to be a tendency away from the technical rules of consideration and the dictum indicated above at least offers a starting point for abandonment of the rule announced in the earlier decisions.[46]

(B) *Mutual Assent*

The element of mutual assent requisite to the formation of the contract of discharge in check cases is sometimes difficult to determine and set out clearly Assuming a proper condition has been appended to the check or made known to the creditor in some other way, the debtor in effect has said, "Here is my check for so much. I tender it in full satisfaction of your claim. If you are unwilling to accept it on that condition and to discharge your claim, return the check to me." The creditor may then follow one of several courses. He may acknowledge acceptance of the remittance as satisfaction, he may cash the check, saying nothing; he may cash the check but advise the debtor that the proceeds are being applied on account only, or he may simply retain the check uncashed.

Express acceptance of the check as satisfaction clearly supplies the promise necessary to complete the unilateral contract of discharge. Where the check is cashed and nothing said, such promise may be implied. So also where the check is retained an unreasonable time. Where the check is cashed but the condition is expressly denied, the element of mutual assent would seem to be entirely lacking. However, for reasons of policy, by the general

[46] Movement toward a change may be indicated by *James v. Riverside Lumber Co.*, note 39 *supra*. Plaintiff, an architect, had prepared two sets of plans in connection with construction of a building for the defendant and submitted a bill, itemized and with separate amounts charged for each set. Defendant sent a check for the amount charged for one plan and denied liability for the other. Plaintiff cashed the check and lost this action to recover for the other plans, defendant's defense of accord and satisfaction being sustained. The court concludes that "the various claims were so interwoven as to constitute an unliquidated demand and when coupled with the contentions made by appellants, and which they introduced testimony to support, show that none of this claim was in fact liquidated, " It would seem from the facts the court might readily have found the claim liquidated in so far as the amount due for the set of plans paid for was concerned. In a later case, *Bottorff v. A. E. Page Machinery Co.*, 74 Wash. Dec. 401, 24 Pac. (2d) 1059 (1933), the court seems to follow the same general approach as was used in *James v. Riverside Lumber Co.*, and reaches the same conclusion, viz., that the entire claim was unliquidated, hence there was consideration to support accord and satisfaction. Again, from the facts the court would have been justified in finding part of the claim liquidated and part unliquidated. It will be noted that by construing the facts so as to find the entire claim unliquidated, the ultimate result achieved is the same as would be reached in a jurisdiction adhering to the general rule on consideration. It may be that the court, loath to overrule the earlier Washington decisions, has adopted this method of bringing Washington into line with the weight of authority on the point.

rule the creditor who has cashed the check tendered him conditionally may not thereafter deny discharge of the obligation.[47]

(C) *Conditional Tender*

Just what language is necessary to create a condition which will bind the creditor upon his cashing or retaining the check is not indicated by the Washington decisions. It is clear that a condition must be attached to the tender; otherwise the creditor may regard the payment as on account only In *O'Connell v. Arai*[48] an action for unlawful detainer, a defense of accord and satisfaction was interposed. Six hundred dollars rent had accrued and defendant, the tenant, claiming $140.00 deduction on account of sidewalk repairs which had disturbed his occupancy, sent plaintiff a check for $460.00 with a letter setting forth his claim and stating, "You will find enclosed check for $460.00 rent for month of June, 1910, the balance of $140.00 being retained in satisfaction of the above claim." Plaintiff cashed the check and denied the deduction. Said the court.

> "This check was not tendered to the plaintiff conditionally The plaintiff denied the right of defendant to make the reduction The acceptance of the check under these conditions did not constitute an accord and satisfaction."

So also, in *Three Rivers Growers' Association v. Pacific Fruit & Produce Company*[49] where the debtor, having purchased several cars of berries and having been unable to dispose of all of them at a profit, sent the creditor a check for less than the total debt, noted "Inclosed herewith is our check number 17587 for $3,675.00, representing the net returns on A. R. C. 597. We were able to sell 770 at f. o. b. price of $4.00; 270 we sold at $2.50 f. o. b. We have deducted from this our ten-cent brokerage, out of which we have paid our broker in Calgary $25.00." After finding as a fact that defendant was a purchaser and not an agent of plaintiff, the court concludes

> "It (defendant) did not then inform the respondent that it intended the check to be a payment in full, nor was the remittance accompanied by any act or declaration which would amount to a condition that the money tendered, if accepted, would be accepted as a satisfaction in full."

Plaintiff recovered the difference between the contract price and the amount remitted, over a defense of accord and satisfaction based on the check.

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[47] WILLISTON ON CONTRACTS, secs. 1854, 1855 and 1856, Restatement of the Law of Contracts, sec. 420; *LeDoux v. Seattle, etc., Shipbuilding Co.*, 114 Wash. 632, 195 Pac. 1006 (1921) *James v. Riverside Lumber Co.*, note 39 *supra*. But notice the language in *Ingram v. Sauset*, note 51, *infra*.

[48] 63 Wash. 280, 115 Pac. 95 (1911).

[49] 159 Wash. 572, 294 Pac. 233 (1930).

A defense of accord and satisfaction was denied in *Ingram v. Sauset*[50] on the ground that the debtor's remittance was not tendered conditionally Here the creditor had a claim for services rendered, the amount due being in dispute. The debtor prepared a statement of what he considered to be the true account and sent it to the creditor with a check for the balance shown on the statement. The check was cashed and this action started to recover an additional amount. During the trial the creditor testified he received the idea from the statement and check that the remittance was intended by the debtor to be payment in full, but being unwilling to so accept it, he left the check with his attorney with instructions to cash it only if upon investigation he found it could be accepted as payment on account only The court refused to find in the debtor's subjective intent any condition, despite the fact the creditor was aware of that intent. " no conditions accompanied it (the check) and there was nothing to indicate that it might not, in the event the payee declined to accept it as full payment be applied on account. "[51]

As indicative of what will constitute a condition, there is the statement in *Le Doux v. Seattle, etc., Shipbuilding Company*[52] that.

> " where a debtor sends to his creditor a check and at that time informs the creditor that he intends the check to be considered as full payment, then, by the acceptance and cashing of the check, the creditor agreed to settlement. "

What language or conduct of the debtor will satisfy this requirement that he *"inform the creditor that he intends the check as full settlement?"* The following situations have been held to involve a conditional tender. In *James v. Riverside Lumber Company*[53] the defendant had before it plaintiff's statement for services rendered in preparing two sets of building plans and sent a check for the amount which, according to the statement, was due for one of the plans, with this letter

> "It is our understanding that the duties of an architect include the getting up of plans which are satisfactory to their customer. It is necessary often times to submit sev-

[50] 121 Wash. 444, 209 Pac. 699 (1922)

[51] The court went on, after the sentence quoted, "Second, there is nothing in the record to indicate that respondent accepted the check as full payment. He testified that he would not, and did not, so consider it, and his acts in taking it to his attorney with directions to cash it only if it could be applied on account bear out his testimony. Hence there was no meeting of the minds, no agreement to compromise, and no accord and satisfaction." What would the result have been had the court found as a fact the debtor had conditioned his payment? See also in this connection *Peterson v. Jahn Contracting Co.*, 96 Wash. 210, 164 Pac. 937 (1917) and *Inman v. W E. Roche Fruit Co.*, 162 Wash. 235, 298 Pac. 342 (1931).

[52] Note 47, *supra.*

[53] Note 39, *supra.*

eral different plans, the one most suitable being carried out, and this being the one upon which any compensation would be based. We are therefore eliminating from your statement the item of $225.00 for plan No. 1, which was never executed. (we) decline to consider the first item of this charge."

Said the court. " when respondent accepted the check with the conditions under which it was tendered, he must be deemed to be bound by those conditions."

Although the facts in the case of *First National Bank v. White-Dulaney Company*[54] are not entirely clear on the point, the condition there was apparently in the form of an oral statement, by the debtor as the check was handed to the creditor's representative, that the check was in full settlement of the account. And in *Northern Bank & Trust Company v. Harmon*[55] a condition was found in the fact that the debtor's remittance "was paid to the (creditor's) then attorneys as a tender of full payment and satisfaction."*

HAROLD SHEPHERD.**
WARREN SHATTUCK.***

[54] Note 40, *supra*.
[55] Note 26, *supra*.
*To be continued.
**Dean of the Law School, University of Washington.
***Member of the senior class in the Law School, University of Washington and President of the Student Editorial Board of the WASHINGTON LAW REVIEW. This article was written by Mr. Shattuck in the course of a research study under the direction and supervision of Dean Harold Shepherd.

The American Law Institute's Restatement of the Law of Contracts with Annotations to the Washington Decisions* Chapter 5

DUTIES AND RIGHTS WHERE MORE PERSONS THAN ONE ARE PROMISORS OR PROMISEES OF THE SAME PERFORMANCE**

Section 117. DUTY OF A JOINT PROMISOR, JOINDER OF CO-PROMISORS.

Each person bound by a joint promise is bound for the whole performance thereof, but by making appropriate objection can prevent recovery of judgment against him unless there are joined as defendants all promisors who were originally jointly bound with him, except such of them as are at the time of suit dead or beyond the jurisdiction of the court.

*The absence of annotations to particular sections of the Restatement indicates that no Washington decisions have been found on the principle therein stated.
**Continued from last issue.