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Accord and Satisfaction in Washington [Part 2]

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ACCORD AND SATISFACTION IN WASHINGTON*

In *Plymouth Rubber Co. v. West Coast Rubber Co.*[56] the creditor was suing for an alleged balance due. The debtor's defense was based on his check, accepted and cashed by the creditor, for part of the account, plus tender of merchandise for the balance. The check was sent with a letter stating in effect that the debtor was unable to dispose of all the goods, purchase of which gave rise to the obligation in question, because the creditor had flooded the local market with inferior goods sold at a lesser price. "We are, therefore, compelled to return these Toesans for credit and ask that you kindly render us credit for whatever we return." The court said

> "It is true neither the check nor the letter expressly stated that the tender of the money and the property was in full payment or satisfaction of the whole debt, or that both must be either accepted or rejected, but such are the necessary inferences."

The court in *Hotel Randolph Co. v. John C. Watrous Co.*[57] found a conditional tender, apparently from the fact that the creditor's attorney, after receipt by the creditor of a check for less than the alleged sum due, called on the debtor prior to cashing the check and was informed that it was to be in full settlement of the account. The check when sent evidently had no notation to the effect it was in full payment, but was accompanied by a statement showing the charges and credits which were used by the debtor in computing the sum he claimed to be due, the statement being noted. "Check to balance."[58]

Notwithstanding a notation on the check reciting that it is in full payment of the account or of the items indicated in an accompanying voucher the creditor may after cashing it show by parol that the parties did not intend the check to be a final settlement. In *Phelps Lumber Co. v. Bradford-Kennedy Co.*[59] the defendant pleaded accord and satisfaction and put in evidence various checks sent to and cashed by the plaintiff, each marked "In full settlement of account below." The defense was denied because

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[56] Note 13, *supra.*

[57] Note 40, *supra.*

[58] In *Thomas W Simmons & Co. v. Northwestern Junk Co.*, 124 Wash. 61, 213 Pac. 485 (1923) the debtor tendered a statement and check for the balance shown thereon, saying "there, take it or leave it." The creditor took it; the court concluded there was an accord and satisfaction. The statement in a letter accompanying a check that "This will settle your account with this company in full" was in *Bottorff v. A. E. Page Machinery Co.*, note 46, *supra*, deemed sufficient to make the tender conditional.

[59] 96 Wash. 503, 165 Pac. 376 (1917).

* Continued from last issue.

> "The trial judge found that, notwithstanding the form of these voucher checks, they had been received with an understanding on the part of the payee that the differences existing between the parties were to be settled later on."

The creditor in *LeDoux v. Seattle, etc., Shipbuilding Co.*[60] had accepted a check bearing this notation "In full settlement to date of all expenses and services rendered " The trial court found as a fact that the remittance was intended by the parties to be part payment only, the appellate court declined to upset that finding.

> "Where there is an agreement that a certain sum shall be paid on account and not in full settlement, the sending of a check which shows that it is in full settlement does not, as a matter of law, accomplish an accord and satisfaction.
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> We think, therefore, that the court properly received this testimony "

Objections based on the parol evidence rule are answered by analogy to the receipt cases.[61]

An interesting and somewhat similar problem was presented in *Ingram v. Sauset*.[62] Plaintiff was suing for an alleged balance due under a contract. Defendant pleaded accord and satisfaction based on a check sent to and cashed by the plaintiff. Defendant had prepared a statement of what he considered the proper account and had sent it to plaintiff with a check for the balance shown on the statement. No notation of any kind was attached to the check or indicated in the statement. The court said

> " respondent testified in effect that he received the idea from the statement and check that Sauset intended that the check should be payment in full, that he (respondent) was unwilling to so accept it, and advised his attorney to cash the check only in the event that it could be safely accepted and treated as a payment on account. From this it is argued that respondent, knowing the check was intended as payment in full, is as much bound thereby as though the statement or check, one or both, bore a

[60] Note 47, *supra*. In *Glenz v. Tacoma Ry. & Power Co.*, note 36, *supra*, voucher checks endorsed by the creditor were held not conclusive and he recovered an additional amount.

[61] In the *Phelps* case the court while not referring specifically to the parol evidence rule based its holding on *Allen v. Tacoma Mill Co.*, 18 Wash. 216, 51 Pac. 372 (1897) a decision which held parol evidence admissible to controvert a receipt. *Allen v. Tacoma Mill Co.*, was cited also in the *LeDoux* case. The propriety of an analogy between accord and satisfaction cases and receipt cases is questionable. It would seem that the contractual elements of accord and satisfaction clearly distinguish the two types of case.

[62] Note 50, *supra*.

> written notice of the maker's intention. The argument is plausible, but we think unsound the meeting of the minds so as to create an agreement of the parties is an essential feature. The fallacy of the appellant's position lies in this. first, whatever Sauset's intention, the check was not offered in full satisfaction of the demand, though respondent thought that Sauset intended or hoped it would be so accepted, no conditions accompanied it and there was nothing to indicate that it might not, in the event that the payee declined to accept it as full payment, be applied on account. Second, there is nothing in the record to indicate that respondent accepted the check as full payment."

The court's conclusion rested on an interpretation of the facts. It would seem possible to find under facts like these that a condition was imposed, imposed, not by the debtor's subjective intent, but by his conduct and the effect of such conduct on the creditor. If the creditor as a reasonable man would be bound to know when he received the statement and check under the circumstances in question that the debtor intended the check as a tender of full settlement, the creditor should be bound just as though the check stated expressly "In full settlement" The debtor has surely made known to the creditor, objectively, his intent that the creditor's right to retain the check be contingent upon his accepting it in full satisfaction of his claim. The court in *Plymouth Rubber Co. v. West Coast Rubber Co.*,[63] we think, better states the rule.

> "... payment by the debtor of an amount less than that claimed by the creditor, and the 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 "

The creditor is bound by acceptance of the check tendered conditionally irrespective of knowledge by him of the legal consequences following such acceptance.[64]

Although the general rule is that the creditor who retains for an unreasonable time the check tendered to him conditionally will be held to have accepted it[65] the Washington court in *Katich v. Evich*[66] reached a contrary result. The plaintiff sued to recover an alleged balance due as his share of the profits from a fishing

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[63] Note 13, *supra*.

[64] *First. National Bank v. White-Dulaney Co.*, note 40, *supra*: "It is not necessary that it be shown that the respondent or its officers knew the legal result of their acceptance of the check, as the mere acceptance will be regarded as assent."

[65] WILLISTON ON CONTRACTS, sec. 1854.

[66] 161 Wash. 581, 297 Pac. 762 (1931).

voyage. He was discharged early in the season, at which time defendant sent him a check for $67.20 "accompanied by a statement showing that that was the balance due the respondent up to the time he was discharged." In a letter accompanying the check it was recited that the check and statement were enclosed "for your one share of the fish caught on the boat Avalon up to August 3, 1929." Plaintiff kept the check and put it in evidence in this action. The court concluded that "at the time appellant sent the same (check) he did not inform respondent that it was intended to be considered as full payment." (Just how this conclusion was reached in view of the letter which accompanied the check is not clear.) The court continued "In this case, it should be observed that the respondent did not cash the check." The instant case was then distinguished from prior cases wherein a discharge by accord and satisfaction was found, because "In each of those cases the check sent was cashed." *Katich v. Evich* seems to be the only Washington decision discussing this particular point.

Where the conditional payment was made in money, however, it has been held that failure to return the payment promptly to the debtor binds the creditor to an acceptance of the tender and accord and satisfaction results.[67]

Effect of an Executory Accord on the Original Cause of Action

The debtor and creditor when entering into an accord may intend one of two things (1) that the accord itself shall be substituted for the original cause of action, or (2) that performance by the debtor of the accord will discharge the claim. In the absence of express language to the contrary in the accord the latter will be presumed.[68] In the first situation the original claim is immediately discharged;[69] should the debtor default on the accord the creditor's only recourse is an action on the accord. The second situation offers several possibilities. Upon the debtor's default on the accord the creditor may sue either on the accord or on the original debt.[70] Should the creditor default either by suing on

[67] *Northern Bank & Trust Co. v. Harmon*, note 26, *supra*. The court said. "The payment to the attorneys was a payment to their client, and their possession was his possession. If he or they retained the money, such retention was an acceptance of the tender, and if he was unwilling to accept the tender, the only alternative was to promptly return the money"

[68] WILLISTON ON CONTRACTS, sec. 1847 Restatement of the Law of Contracts, sec. 419.

[69] WILLISTON ON CONTRACTS, sec. 1846, Restatement of the Law of Contracts, sec. 418. The decisions of the Washington court in *Rogers v. Spokane*, note 79, *infra*, and *Joyner v. Seattle*, note 80, *infra*, indicate a recognition of this rule.

[70] WILLISTON ON CONTRACTS, sec. 1848; Restatement of the Law of Contracts, sec. 417 (c).

the original debt prior to maturity of the accord or by refusal to accept performance of the accord and discharge the debt the debtor has a cause of action for such breach, which cause of action may either be prosecuted separately or interposed as a counterclaim in the creditor's suit on the original debt.[71]

The question whether an executory accord should be available as a defense to an action on the original obligation has been the subject of some discussion. It would seem that a promise by the creditor to forbear suit on the original claim until default on the accord or until a reasonable time has elapsed where no time for performance is set by the accord, must be implied as an element of the accord. "If *anything* was intended by the arrangement by both creditor and debtor it was that the debtor should have immunity from suit on the original claim until he had defaulted on the new agreement."[72] Professor Williston has suggested that the executory accord should be a defense and advocates its specific performance in answer to a suit or threatened suit on the original obligation.[73] It is argued that the executory accord should be admitted as a plea in abatement in defense of an action on the original claim.[74] The Restatement of the Law of Contracts[75] provides that "If the creditor breaks such a contract (the contract of accord), the debtor's original duty is not discharged. The debtor acquires a right of action for damages for the breach, and if specific performance of that contract is practicable, he acquires an alternative right to the specific enforcement thereof. If the contract is enforced specifically, his original duty is discharged." It should be noted here that the equity in such specific enforcement lies in the nature of the accord. The inadequacy of the remedy at law gives equitable jurisdiction.[76] There need be no unique subject matter or other traditional basis for equitable relief.

The weight of case authority, Washington included, holds the executory accord no defense.[77] The same rule is applied even

[71] WILLISTON ON CONTRACTS, sec. 1840 and 1848; Restatement of the Law of Contracts, sec. 417 (d).

[72] Shepherd, "The Executory Accord," 26 Ill. Law Rev. 22.

[73] WILLISTON ON CONTRACTS, sec. 1845.

[74] Shepherd, "The Executory Accord," 26 Ill. Law Rev. 22.

[75] Sec. 417 (d).

[76] See the Comment on Clause (d), sec. 417, Restatement of the Law of Contracts. In *Collins v. Fidelity Trust Co.*, 33 Wash. 136, 73 Pac. 1121 (1903) specific performance of an accord was granted, but not as a defense. The accord contained several mutual promises, all of which, save a promise by the defendant to assign a lease to plaintiff, had been performed. Plaintiff was granted specific performance of the promise to assign the lease. Where specific performance of the accord is sought as a defense the debtor, facing actual or threatened suit on the original debt, brings a bill for specific performance of the accord and injunction against the creditor. Since the accord is no bar to a suit at law the debtor's legal remedy is inadequate and there is equitable jurisdiction.

[77] WILLISTON ON CONTRACTS, sec. 1842.

though the debtor has performed partly or tendered complete performance.[78]

The plaintiff in *Rogers v. Spokane*[79] sued to recover for personal injuries allegedly received through defendant's negligence. In defense defendant pleaded an agreement between the parties whereby plaintiff promised to accept $343.90 in full settlement of his claim and defendant promised to pay that sum. The defense was denied because

> " it will be observed that the allegation of the affirmative answer is not that the plaintiff agreed to accept the *agreement* of the city council to pay him the sum of $343.90 in discharge and satisfaction of his claim, but that he agreed to receive the *payment* of the said sum agreed upon in satisfaction of his claim. "

Similarly, in *Joyner v. Seattle*[80] an executory bilateral contract between the parties, the creditor promising to accept $500 and discharge his claim, and the debtor promising to pay that amount, was held no bar to an action by the creditor on the original claim.

In neither of these cases was the debtor in default on the accord. The creditor simply sued and recovered on the original claim despite the accord. In neither case did the debtor attempt to use the creditor's breach of the accord by way of counterclaim although this procedure would no doubt have been available.[81]

A year before *Rogers v. Spokane* was decided the Washington court in *Staver & Walker v. Missimer*[82] applied a rule which if urged in the *Rogers* case might have produced a different result. By the majority rule a contract to forbear suit temporarily will not bar action on the claim involved although a minority of courts hold to the contrary.[83] There developed, however, as a part of the law merchant the rule that an agreement supported by consideration to extend the due date of a negotiable instrument can be pleaded in bar to an action brought on the note prior to expiration of the agreed extension period.[84] This doctrine, it will be noted, achieves the same result as that of the minority in con-

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[78] WILLISTON ON CONTRACTS, sec. 1843.

[79] 9 Wash. 168, 37 Pac. 300 (1894).

[80] 144 Wash. 641, 258 Pac. 479 (1927). See also *Hackett v. McIntosh*, 144 Wash. 104, 256 Pac. 1028 (1927) Here the defendant attempted to use an executory accord as a defense and the court after finding there was no accord, said " it did not amount to an agreement that the appellant's present offer to perform would be accepted in satisfaction and extinguishment of the original contract, but only that the performance or doing of what he proposed would satisfy it."

[81] WILLISTON ON CONTRACTS, sec. 1840.

[82] 6 Wash. 173, 32 Pac. 995, 36 A. S. R. 142 (1893).

[83] WILLISTON ON CONTRACTS, sec. 1844.

[84] 8 Corpus Juris 441.

nection with simple contracts. *Staver & Walker v. Missimer* was an action on a note. An extension agreement was pleaded by the defendant and judgment for him might well have been put on the general rule as to negotiable instruments. The court, however, did not do so, but enunciated a rule broad enough to include any sort of temporary forbearance contract.

> "This is a new question in this state, and, being untrammeled by precedent, we feel free to adopt the rule that seems to us to be the most nearly in accord with the general principles of law applied by courts to the construction and enforcement of contracts, and we therefore decide that a promise to forbear to sue for a definite time, where the promise is based upon a sufficient consideration, can be pleaded in bar to the action."

The court in reaching this conclusion relied chiefly on *Robinson v. Godfrey*,[85] a Michigan case involving a simple contract.

It is possible that had the attention of the court deciding the *Royers* case been called to the *Missimer* decision and the point made that an accord of necessity implies an agreement by the creditor to forbear suit on the original obligation the accord in *Rogers v. Spokane* might have been recognized as at least a plea in abatement.

The language of *Staver & Walker v. Missimer* was quoted *verbatim* in *Commercial Bank v. Hart*,[86] an action on a note, and an extension agreement sustained as a plea in bar. But by 1901 the broader implications of the *Missimer* decision seem lost and the court in *Price v. Mitchell*[87] sustained an extension agreement as a plea in bar because

> "Where there is a sufficient consideration to support an agreement to extend the time for the payment of a note, such agreement may be pleaded in bar to an action on the note." (Citing *Staver & Walker v. Missimer*)

Effect of Accord and Satisfaction

It is well settled that satisfaction of the accord operates to discharge the original debt and there are several Washington decisions so holding.[88] Washington also recognizes the rule that discharge of a principal through accord and satisfaction releases

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[85] 2 Mich. 408 (1852).
[86] 10 Wash. 303, 38 Pac. 1114 (1894).
[87] 23 Wash. 742, 63 Pac. 514 (1901).
[88] *Brown v. Kern*, note 16, *supra*, *Williams v. Blumenthal*, note 19, *supra*, *Reichel v. Jeffrey*, 9 Wash. 250, 37 Pac. 296 (1894) *Maynard v. First Bank of Colton*, 56 Wash. 486, 106 Pac. 182 (1910) *Simons v. Hallidie Co.*, 73 Wash. 499, 131 Pac. 1169 (1913) *Pederson v. Tacoma*, note 26, *supra*, *Plymouth Rubber Co. v. West Coast Rubber Co.*, note 13, *supra*; *Hewitt v. Jones*, 149 Wash. 360, 271 Pac. 76 (1928) *Heiland v. Grunbaum*, note 39, supra.

his guarantor and that such discharge of a joint obligor discharges the other joint obligor.[89]

After performance of the accord the parties may not thereafter contest the validity of the accounts so discharged. The defendant in *Hotel Randolph Co. v. John C Watrous Co.*[90] interposed a defense of accord and satisfaction which the creditor contested on several grounds including the ground that a counterclaim allowed the debtor in the alleged accord and satisfaction was in fact unenforceable because of the Statute of Frauds. Said the court

> " after accord and satisfaction, one may not raise the defense of the statute of frauds or any defense on the merits to the issues which were originally in dispute. That is fundamental, otherwise accord and satisfaction would be a poor defense indeed."

The general rule in the United States holds a debtor discharged by an accord and satisfaction between the creditor and a third person and this is so even though the third person was not acting as the debtor's agent either through prior authorization or subsequent ratification.[91] The Restatement of the Law of Contracts[92] states that "A payment or other performance by a third person, accepted by a creditor as full or partial satisfaction of his claim, discharges the debtor's duty in accordance with the terms on which the third person offered it. But the debtor on learning of the payment or other performance has power by disclaimer within a reasonable time to make the payment or other performance inoperative as a discharge." There are apparently no Washington decisions on this point.

In the foregoing pages we have attempted to make a collection and some analysis of the Washington cases in so far as they relate to the substantive law and problems of accord and satisfaction. Other problems of procedure incidentally related are treated in a footnote.[93]

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[89] *Keane v. Fidelity Savings & Loan Assn.*, 173 Wash. 199, 22 Pac. (2d) 59 (1933).

[90] Note 40, *supra.*

[91] WILLISTON ON CONTRACTS, sec. 1858.

[92] Section 421.

[93] "The question whether there has been an accord and satisfaction in any given case is generally a mixed question of law and fact." *First National Bank v. White-Dulaney Co.*, note 40, *supra, Kubey v. Coast*

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