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COMMENTS

PAYMENT OF THE LIQUIDATED PORTION OF A DEBT AS CONSIDERATION FOR THE DISCHARGE OF THE ENTIRE CLAIM

In a recent Washington case, *Paulsen Estate, Inc. v. Naches-Selah Irrigation District*,[1] the Supreme Court was called upon to decide whether the payment of the liquidated portion of a debt was a sufficient consideration for the discharge of the remaining part which was disputed by the parties. The court's decision that the debtor was thereby discharged presents a phase of accord and satisfaction which has had a peculiar history in this state.

The doctrine that payment by a debtor of a less sum than the

[1]190 Wash. 205, 67 P. (2d) 856 (1937).

whole amount of the debt will not extinguish the debt, although the creditor expressly agrees to receive it in full payment, is well established by abundant authority.[2] The rule had its origin in the famous *dictum* by Lord Coke in Pinnel's Case,[3] and although it has been subjected to the severest criticism, the principle there expressed has become rooted in the common law. In some jurisdictions, however, the rule has been modified or abrogated by statute,[4] and in a few states the courts have expressly repudiated it.[5] Indeed, in view of the expressions of modern courts on the subject, despite their steadfast adhesion to the general rule, it may be safely conjectured that, if presented as an original proposition today, it would find little, if any, support.

The reason for the rule is said to be that where part payment of a liquidated and undisputed debt is accepted in full, no consideration exists for the express or implied promise of the creditor to release the remainder of his debt. The debtor has done nothing more than he was previously bound to do. No benefit having been derived by the creditor, or detriment suffered by the debtor in such a transaction, it is therefore a mere *nudum pactum*. But the orthodox rule became so unpopular that the courts soon began to seize upon almost any circumstance to take a case out of the operation of the rule. Thus the rule of accord and satisfaction has established that if the debt is unliquidated or disputed, part payment of the debt will extinguish the whole claim. This would seem to satisfy the requirement of consideration in contracts; for, by the payment of any sum on an unliquidated claim, the debtor is risking the payment of a greater sum than the determination of the amount of the claim in a suit brought for that purpose might show to be due. Where the parties dispute the existence or validity of the claim, the contention of the debtor may be correct, and there may be no debt whatever. This possibility of an actual detriment constitutes a sufficient consideration to sustain the agreement.

It is not necessary that the creditor expressly assent to the

[2] 1 WILLISTON, CONTRACTS (Rev. ed. 1936) § 120; RESTATEMENT, CONTRACTS (1932) § 76 (a).

[3] 5 Coke 117a, 77 Reprint 237 (1602).

[4] 1 WILLISTON, CONTRACTS (Rev. ed. 1936) 419, n. 9.

[5] *Ibid.* 419, n. 8. Washington at one time seemed about to join this minority. In Brown v. Kern, 21 Wash. 211, 57 Pac. 798 (1899), the court, after calling attention to the criticism of the rule, said: "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." This was merely *dictum* in this case because the court actually found other consideration. There is similar *dicta* also in Williams v. Blumenthal, 27 Wash. 24, 67 Pac. 393 (1901), and in Baldwin v. Daly, 41 Wash. 416, 83 Pac. 724 (1906). The court has subsequently ignored these cases without expressly overruling them and now follows the majority rule. Plymouth Rubber Co. v. West Coast Rubber Co., 131 Wash. 662, 231 Pac. 25 (1924); Graham v. New York Life Insurance Co., 182 Wash. 612, 47 P. (2d) 958 (1935). See generally, Shattuck, *Accord and Satisfaction in Washington* (1934), 8 WASH. L. REV. 112.

acceptance of the lesser amount than that claimed by him, for it is well settled that when the debt is unliquidated or in dispute and the debtor sends the creditor a check for the lesser amount accompanied by a statement that it is in full satisfaction of the debt, the acceptance and cashing of the check constitutes in law an assent that the debt is paid in full.[6] The fact that the creditor immediately notifies the debtor that he is accepting it merely as part payment has no effect, for the creditor is not permitted to appropriate the check without agreeing to the condition.[7]

However, a more difficult problem is presented where the debtor concedes that at least a certain sum is due on a claim that is otherwise unliquidated or in dispute. When the debtor pays more than he concedes he owes then clearly there is sufficient consideration to support a promise of the creditor to discharge the debt. But it has been argued that this does not follow when the debter pays only that amount which is admittedly due, since it is neither a detriment to him nor a benefit to the creditor. Some courts have been impressed with this argument and have thus held that part payment discharges the debt *pro tanto* only, even though the payment is tendered and accepted in full settlement.[8] While it must be conceded that there is respectable authority for this position, still the majority of courts have held that in such a case the entire claim is discharged.[9]

The reason for so holding is usually said to be that the whole debt becomes unliquidated by the dispute as to the remaining part and that therefore part payment will effect an accord and satisfaction. But perhaps the underlying reason is the growing dissatisfaction with the orthodox rule itself, and also the apparent disposition to grasp any fact or circumstance which will enable the court to say that a particular case is not within the rule. The spirit of the local decisions on the point reflects this attitude on the part of the courts.

The case which first announced the majority rule in this state is *Pederson v. Tacoma.*[10] There the plaintiff was claiming for extra work done under a contract with the city. The plaintiff contended that since the city had awarded him $61,342 pursuant to a resolution of the city council, it admitted that at least that much was due and thus there could be no accord and satisfaction of his claim for $108,000. The court, however, found the city was claiming that a sum much less than $61,342 was due and therefore the payment of the latter amount was an accord and satisfaction. In so holding, the court said:[11]

> "But if we may assume that the city agreed that $61,342 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

[6] 1 WILLISTON, CONTRACTS (Rev. ed. 1936) § 1854; RESTATEMENT, CONTRACTS (1932) § 420.

[7] *Ibid.* § 1856; *ibid.* § 420.

[8] See cases collected in 1 WILLISTON, CONTRACTS (Rev. ed. 1936) p. 439, n. 2.

[9] *Ibid.* § 129; RESTATEMENT, CONTRACTS (1932) § 420.

[10] 86 Wash. 164, 149 Pac. 643 (1915).

[11] *Ibid.* 167, 149 Pac. 644.

> is in dispute, the parties may agree upon an amount to be paid, which amount when paid will constitute an accord and satisfaction."

Of course what was said here was unnecessary to the decision of the case. Nevertheless, the court's position is unequivocal on whether or not part payment of the undisputed amount would be sufficient consideration. The court failed to intimate that it was departing from any earlier views that it had expressed on the subject.

The doctrine of the *Pederson* case was reaffirmed in *Clubb v. The Sentinel Life Ins. Co.*[12] There the plaintiff in his application for accident insurance stated that his occupation was that of license inspector. After he had suffered a partial paralysis, the company was informed that he had ceased to be a license inspector. The policy provided that in the event that the insured was injured, after having changed his occupation to one classified as more hazardous, the company would pay only such portion of the indemnities as the premium paid would have purchased at the rate fixed for such more hazardous occupation. After a dispute, the controversy was settled by the plaintiff agreeing to accept weekly total disability benefits of $20, instead of the $25 provided in the policy. The plaintiff thereafter brought suit upon the policy as originally written. In disposing of the contention that there was lack of consideration because of the fact that the plaintiff was compelled to accept what the company admitted and was willing to pay, the court said:[13]

> "The instant case is very like the case of *Pederson v. Tacoma* . . . Among other things, we there said, '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.' "

This case, unlike *Pederson v. Tacoma,* is squarely in point, since the $20 paid apparently was a liquidated obligation under the accepted definition of that term. It is very plain that the court thought nothing turned on the fact that the defendant admitted it was paying only what it conceded would be due under the terms of the policy. The fact that this case is not as similar to the *Pederson* case as the court thinks is evidence of its eagerness to establish the principle suggested in that case.

The court in *Cobb Healy Investment Co. v. Tall*[14] found that payment of the liquidated amount due was not an accord and satisfaction. However, this was for the reason that the parties had agreed that the check should be merely paid upon account and therefore the notation on the check that it was in full payment was ineffective. This result would seem to follow logically enough, since the parties having agreed that the payment is to be only on account, there was no dispute which could be the subject of an accord.

In *Bottoroff v. Paige Machinery Co.*,[15] the plaintiff claimed

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[12]181 Wash. 284, 42 P. (2d) 792 (1935).
[13]*Ibid.* 291, 42 P. (2d) 794.
[14]181 Wash. 300, 42 P. (2d) 1107 (1935).
[15]174 Wash. 438, 24 P. (2d) 1059 (1933).

money for additional services which the defendant denied owing. The defendant tendered the plaintiff a check in full settlement for his services, the check being in the amount which the defendant admitted to be due according to a statement furnished him. The plaintiff cashed the check and then demanded payment of certain extras not included in the statement. The court in holding that there was an accord and satisfaction said:[16]

> "The general rule is that, where a debtor sends to his creditor a check for the amount he is willing to pay, 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 agrees to the settlement and cannot thereafter seek additional compensation."

Again the case is not squarely in point because the court indicated that it was construing the whole claim to be unliquidated. It would seem, however, that the facts clearly showed that the defendant did not dispute the amount he actually paid. But, as has been pointed out by a writer in a previous issue of this Review,[17] the result is the same in each case whether a liquidated amount is paid or not, as long as the court is willing to treat the whole amount as unliquidated. This practice of finding the whole claim to be unliquidated naturally offers a very convenient "out" when the reasoning of the minority rule is vigorously pressed upon the courts.[18]

In *Hotel Randolph Co. v. Waltrous Co.*,[19] the court discussed the consideration question only incidentally to the larger problem of finding whether the facts showed mutual assent. It used language, however, unequivocally committing itself to the majority view.[20]

The latest expression of the Washington court upon the problem is *Paulsen Estate, Inc. v. Naches-Selah Irrigation District*.[21] Here the plaintiff was suing to recover interest which had accrued at the legal rate between the time of the maturity date and the actual time when the bonds were paid. The defendant conceded that the bonds and interest-bearing coupons were due, but disputed that the plaintiff was entitled to interest at the legal rate during the time that the bonds were in default. The plaintiff finally accepted a check for the amount which the defendant admitted to be due, but immediately brought suit for the interest. The plaintiff vigorously argued that the defendant had paid only that much which it conceded it owed and that hence there was no consideration for an accord and satisfaction. But the court brushed aside this argument and relied on its previous decisions holding that the payment of the undisputed amount is sufficient consideration for the extin-

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[16]*Ibid.* 442, 24 P. (2d) 1060.

[17]Shattuck, *Accord and Satisfaction in Washington* (1934) 8 WASH. L. REV. 112.

[18]See James v. Riverside Lumber Co., 121 Wash. 130, 208 Pac. 260 (1922) for a case employing the same approach.

[19]144 Wash. 215, 257 Pac. 629 (1927).

[20]*Ibid.* 218, 257 Pac. 630.

[21]190 Wash. 205, 67 P. (2d) 856 (1937).

guishment of the entire claim. Thus it would seem that the Washington court, upon a case squarely raising the issue, has deliberately adopted the majority view that it is immaterial that the debtor concedes the amount he is paying is owing to the creditor, as long as he disputes in good faith that an additional amount is due on the whole claim.

On the other hand there are at least four cases in Washington which apparently deny that there can be an accord and satisfaction of a claim when the debtor pays only that amount which is liquidated or undisputed.

In *Seattle, Renton, etc., R. Co. v. Seattle-Tacoma Power Co.*,[22] the plaintiff was suing to prevent the defendant from shutting off power for not paying the bill. A specific method of computation of the price of power was provided by the contract between the parties to determine the monthly charge for power used, but it was expressly agreed that in any event a minimum charge of $1,000 was to be paid. The plaintiff sent the defendant a check for $1,000 each month without regard to the amount of power used and accompanied the checks with a claim of payment in full, but the power company sent the plaintiff a statement that the payments were applied upon account only. The court in denying that there had been an accord and satisfaction of the entire debt, said:[23]

> "An offer to pay the confessed minimum amount due can hardly be construed into a payment of the maximum amount due, nor as a payment in settlement of the whole controversy . . . It may be safely asserted that, underlying all application 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."

This was an unliquidated claim and by the application of the majority rule the court should have found that the whole debt was extinguished. The language quoted clearly indicates that the court in this early case requires the debtor to pay something more than he concedes he owes in order that there can be an accord and satisfaction of the further amount which the debtor disputes. In *Thayer v. Harbican*,[24] a case in which the court found the whole claim to be liquidated, the court also used language approving the minority rule.[25]

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[22] 63 Wash. 639, 116 Pac. 289 (1911).

[23] *Ibid.* 646, 116 Pac. 291.

[24] 70 Wash. 278, 126 Pac. 625 (1912).

[25] *Ibid.* 284, 126 Pac. 627: "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 directly within the rule announced in Seattle, Renton, etc., R. Co. v. Seattle-Tacoma Power Co."

In *Seattle Investors, etc., v. West, etc., Stores,*[26] the defendant attempted to terminate its lease by giving notice that it would vacate on a certain date and offered to pay rent up to that date. The defendant sent a check for the amount of this rent and endorsed on the back of it that it was payment in full for all rent "until end of tenancy". The plaintiff received the check and *X*'d out the provision concerning payment in full and cashed the check. When the plaintiff sued to collect rent for the balance of the term the defendant contended that the cashing of the check operated as an accord and satisfaction of the whole debt. The court, after citing the *Seattle-Tacoma* case, *supra,* denied the contention of the defendant, saying:[27]

> "This check was in payment of two months rent, which at the time was due and payable . . . When the debtor pays what he is in law bound to pay and admits he owes, there is no consideration."

The case is not strictly in point because the future amounts payable under the lease were liquidated. Nevertheless, the court certainly approves the doctrine of the *Seattle-Tacoma* case here.

Were it not for another recent case it might be safely said that the minority rule had been entirely repudiated in this state. In *Graham v. New York Life Insurance Co.,*[28] the plaintiff was suing to recover for double indemnity on a life insurance policy, claiming that the insured's death was accidental. The defendant contended that the death was a suicide and tendered a check for only the face amount of the policy which the plaintiff was finally induced to accept. The court's previous decisions holding that payment of the liquidated portion of a debt is sufficient consideration for the release of the whole claim were strenuously urged upon it. However, the court held that the acceptance and cashing of the check did not operate as an accord and satisfaction, saying:[29]

> "Where the debtor pays what in law he is bound to pay and what he admits that he owes, such payment by the debtor and its acceptance by the creditor, even though tendered as payment in full of a larger indebtedness, do not operate as an accord and satisfaction of the entire indebtedness, because there is no consideration therefor . . . The appellant, by its check, paid only that which it was in any event bound to pay and that which it admitted to be due and owing."

The case was probably correctly decided because the facts showed that the parties had agreed that the acceptance of the check for the lesser amount would not necessarily release the whole claim. However, the language quoted is plainly inconsistent with the previous decisions following the majority rule and in fact reaffirms the doctrine of the *Seattle-Tacoma* case, which decision the court cited apparently with approval.

Where, then, are we in Washington with respect to the require-

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[26]177 Wash. 125, 30 P. (2d) 956 (1934).
[27]*Ibid.* 128, 30 P. (2d) 958.
[28]182 Wash. 612, 47 P. (2d) 1029 (1935).
[29]*Ibid* 620, 47 P. (2d) 1033.

ment of consideration in accord and satisfaction? Evidently from the *Paulsen* case we are back again to the majority rule. But the minority rule has not been repudiated. Certainly it is true that there is more justification for the majority position. It must be apparent that the strict enforcement of the doctrine of Pinnel's Case will inevitably foster bad faith. This would seem to be the reason that the history of the judicial decision since the announcement of the doctrine shows such a constant effort to escape from its absurdity and injustice. The modern courts with reluctance still adhere to it, because of the pressure of *stare decisis,* and in spite of the current of condemnation and in face of the demands and conveniences of a much greater business and more extensive mercantile dealings and operations. Nevertheless they have wisely restricted the rule to embrace only those cases within its very letter. When it is understood that the doctrine of Pinnel's Case is not to be extended beyond its precise import and is not to be employed whenever the technical reasons for its application do not exist, then the basis of the majority rule can be more easily justified.

The Washington court in its most recent decision on the subject has squarely held along with the majority and better reasoned cases. However, the history of these local decisions shows that the court has several times changed its position, and therefore it might be too optimistic to say that Washington has definitely committed itself to the majority position. The *Seattle-Tacoma Power Co.* case was not overruled in the court's latest decision and it must be conceded that that case stands for the minority view. Perhaps the court will decide to expressly repudiate it when the problem is again presented.

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