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Accord and Satisfaction--Availability as a Defense

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form Law (§2 of the N. Y. Neg. Ins. Law) defines the first delivery of the instrument as the "issuance thereof."

The bona fide holder of the law merchant, now the holder in due course, is accorded special rights, but such parties must be transferees (indorsees). When the payee is the holder he is protected by the general principles of law applicable to all contracts.

Although the payee might recover because of an estoppel, the question is not wholly verbal, as was said in a leading case,[24] because if there is a material alteration, the payee, not being deemed a holder in due course, could not recover even on the original tenor as that was the law prior to the passage of the uniform law.[25]

It appears, then, that a payee of an instrument is not to be deemed a holder in due course, and when he comes into court he must produce evidence sufficient to show that the party sued is to be estopped from setting up personal defenses. If the payee is able to sustain his burden he recovers as a matter of substantive law.

JULIUS NOVEMBER.

ACCORD AND SATISFACTION—AVAILABILITY AS A DEFENSE.

Blackstone, in his treatise on the redress of private wrongs, enumerates two remedies which arise from the joint actions of the parties: Arbitration, and Accord and Satisfaction. He says of the latter "Accord is a satisfaction agreed upon between the party injuring and the party injured; which when performed is a bar of all actions upon this account." [1] The court has pointed out that in order to establish this defense there must be present a lawful subject matter, a sufficient consideration and *aggregatio mentis* or meeting of the minds.[2]

These elements, applicable to the determination of the validity of an accord and satisfaction, are similar to those necessary to support an ordinary contract. There exists an important distinction, however, where the accord is merely executory, for the recognition of bilateral contracts has not affected the established principle [3] that to become binding as a satisfaction the accord must be wholly executed.[4] The reason given in support of this holding was expressed

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[24] Snyder v. McEwen, 148 Tenn. 423, 256 S. W. 434 (1923).

[25] Likewise, if the maker was forced to execute the instrument by duress, he would have a good defense as there is nothing in the act of the maker to give rise to an estoppel. For an analysis of the common law rule, and the cases setting forth the rule, see 32 A. L. R. 289 (1924).

[1] 3 Bl. Comm. 15, quoted in Kromer v. Heim, 75 N. Y. 574, 576 (1879). For other definitions see 1 Cyc. 307 and cases there cited.

[2] Fuller v. Kemp, 138 N. Y. 231, 236, 33 N. E. 1034 (1893).

[3] 3 WILLISTON, CONTRACTS (1920 ed.) §1839.

[4] Reilly v. Barrett, 221 N. Y. 170, 115 N. E. 453 (1917); Moers v. Moers, 229 N. Y. 294, 128 N. E. 202 (1920); Kromer v. Heim, *supra* note 1 at 575.

in an early case "Accord executed is satisfaction, accord executory is only substituting one cause of action in the room of another which might go on to any extent." [5] The reasoning seems well founded for ordinarily a creditor will not accept the mere promise of his debtor to pay him an amount less than he feels is due when by so doing he simply reduces his claim and has secured nothing in return. This rule has been qualified, for if the agreement is to accept the new promise as a satisfaction the obligation is discharged, and the only action surviving is upon the new promise.[6] The same reason [7] might be advanced in criticism of the qualification but since the intention of the parties is the controlling factor the destruction is evident.

The accord must concern itself with an unliquidated amount for it is settled, by the weight of authority that the acceptance of a lesser amount, than is admittedly due, will not satisfy the whole though the parties agree that it is to be accepted as such.[8] The tendency of the court to uphold settlements between the parties has not been extended to encompass compromises of liquidated claims. In *Wahl* v. *Barnum* [9] it was said "The law regards with favor and seeks to uphold settlements of pending or threatened litigation but not with favor an attempt to discharge an admitted debt by payment of a part of it." [10] This principle has long been recognized [11] and though it is said to have preceded the doctrine of consideration it has come to be applied without the technicalities of refined distinctions. Although subject to much criticism [12] and expressly overruled in two

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[5] 3 WILLISTON, CONTRACTS (1920 ed.) §1840, quoting Eyre L. J. Lynn v. Bruce, 2 H. Bl. 317 ( ).

[6] Moers v. Moers, *supra* note 4; Morehouse v. Second National Bank, 98 N. Y. 503 (1885) (wherein the rule appears to have been extended to its limits); Spier v. Heide, 78 App. Div. 151, 79 N. Y. Supp. 699 (1st Dept. 1903).

[7] *Supra* note 5.

[8] United States v. Bostwick, 94 U. S. 363, 367 (1877); Fire Insurance Ass'n v. Wickham, 141 U. S. 564, 12 Sup. Ct. 84, 860 (1891); Ryan v. Ward, 48 N. Y. 204 (1872); Mance v. Hossington, 205 N. Y. 33, 93 N. E. 203 (1912); see Fuller v. Kemp, *supra* note 2 at 237, N. E. at 1033; Schnell v. Perlmon, 238 N. Y. 362, 367, 144 N. E. 641, 643 (reargument denied), 238 N. Y. 504, 144 N. E. 641 (1924).

[9] Wahl v. Barnum, 116 N. Y. 87, 22 N. E. 280 (1889).

[10] *Ibid.* at 96, N. E. at 282.

[11] Ames, *Two Theories of Consideration* (1899) 12 HARV. L. REV. 515, 521, discusses the rule in light of the early decisions and gives an interesting criticism of the cases wherein it was applied.

[12] In Kellog-Dumont v. Richards & S., 14 Wend. 116, 120 (N. Y. 1835), the Court said, "The rule that the payment of a less sum of money, though agreed by the plaintiff to be received in full satisfaction of a debt exceeding that amount, shall not be so considered in contemplation of law, is technical and not very well supported by reason. Courts therefore have departed from it upon slight distinctions"; Chicago & Milwaukee Ry. Co. v. Clark, 178 U. S. 353, 365, 20 Sup. Ct. 957 (1900); see Jaffray v. Davis, 124 N. Y. 164, 168. 26 N. E. 351-352 (1891) (wherein the note of the debtor secured by a chattel mortgage was held insufficient); Schnell v. Perlmon, *supra* note 8.

jurisdictions [13] it prevails in this and most others.[14]

A claim is said to be liquidated when what is due and how much is certain.[15] Conversely it may be said to be unliquidated when there is a *bona fide* dispute as to the amount due. The dispute need not be well founded but must be in good faith and essentially under color of right.[16] The dispute may arise over a question of law or fact.[17] The court in a very recent case [18] sets forth two forms of accord and satisfaction of unliquidated claims. "One is where there is a true assent to the acceptance of a payment in compromise of a disputed claim or in the extinguishment of a liability uncertain in amount. The other is where tender of judgment is coupled with a condition, whereby the use of the money will be wrongful if the condition is ignored." [19] Though difficulty might be encountered, in distinguishing between cases wherein assent to the condition imposed was implied, and those where the creditors protest is unavailing as a repudiation of the condition because of his conduct, in which case the assent is imputed as a matter of law, the result reached in both cases will be the same.

In the second case of *Byrne* v. *Padden* [20] the defendant, tenant, deducted certain sums from the rent due, by reason of the landlord's failure to make repairs as agreed upon, and tendered her check for

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[13] Clayton v. Clark, 74 Miss. 499, 21 So. 565 (1896); Freye v. Hubbell, 74 N. H. 358, 68 Atl. 325, 1197 (1907). In the latter case the Court discusses the rule and the early cases generally cited in support thereof, and while the conclusion arrived at has not been adopted in most jurisdictions it is neither unreasonable nor impractical. The generally prevailing rule has in some jurisdictions been abrogated or limited by statutes which are collected in 1 C. J. 542, note 99.

[14] Laroe v. Sugar Loaf Dairy Co., 180 N. Y. 367, 73 N. E. 61 (1905); Leidy v. Proctor, 226 App. Div. 322, 235 N. Y. Supp. 101 (1st Dept. 1929); Beecrof v. Casey, 180 App. Div. 104, 179 N. Y. 249 (1st Dept. 1919) and cases cited, *supra* note 8. For cases in other jurisdictions, see 1 C. J. 539, note 74; 1 Cyc. 319, note 94.

[15] Chicago & Milwaukee Ry. Co. v. Clark, *supra* note 11; Naissoy v. Tomlinson, 148 N. Y. 326, 330, 42 N. E. 715, 716 (1896) "A demand is not liquidated even if it appears how much is due, and when it is admitted that one of two specific sums is due, but there is a genuine dispute as to which is the proper amount the demand is regarded as unliquidated, within the meaning of that term as applied to the subject of accord and satisfaction."

[16] In Simon v. American L. of A., 178 N. Y. 263, 265, 70 N. E. 776, 776 (1904) after reciting the general rule that part payment of an unliquidated amount when accepted will satisfy the obligation the court said: "The test in such cases is, was the dispute honest or fraudulent? If honest, it affords the basis for an accord between the parties, * * * the execution of which is a satisfaction." See also Andrews v. Brewster, 124 N. Y. 433, 26 N. E. 1024 (1891).

[17] Seybel v. Metz, 120 App. Div. 291, 105 N. Y. Supp. 145 (1st Dept. 1907); General Electric Co. v. Nassau Electric Co., 36 App. Div. 510, 55 N. Y. Supp. 858 (2d Dept. 1899).

[18] Hudson v. Yonkers Fruit Co., 258 N. Y. 168, 179 N. E. 373 (1932).

[19] *Ibid.* at 172, N. E. at 374.

[20] 248 N. Y. 243, 162 N. E. 20 (1928).

the lesser amount, stating it was to be in full payment for the balance of the term. The plaintiff kept the check and upon an action for the balance the defense of accord and satisfaction was sustained. From the use of the check the consent to the condition imposed was implied. *Fuller* v. *Kemp*[21] is a case frequently cited and quoted as an authority upon this point. There, plaintiff sent a bill to the defendant for medical services rendered; the defendant remitted his check for a lesser amount and stated the bill was excessive and that the check was to be in full payment. Plaintiff cashed the check and applied it on account and billed defendant for the balance. The defendant notified plaintiff that he must return the money or accept it as satisfaction; this the plaintiff failed to do but brought an action for the balance. In sustaining the plea of accord and satisfaction the court held that the plaintiff had by returning and using the check assented to the condition imposed.[22]

In *Lewinson* v. *Montauk Theatre Co.*[23] under a somewhat similar statement of facts the court sustained the same defense, but it would seem that there the assent was imputed; the court recognized the unwillingness of the creditor to accept the condition but disregarded his attempt to repudiate it. In such cases as the court said in an earlier case "When he indorsed and collected the check, * * * it was the same in legal effect, as if he had signed and returned the receipt, because his acceptance of the check was a conclusive election to be bound by the condition upon which the check was offered."[24]

Whether the assent be imputed or implied the facts must clearly show that the tender with condition and the acceptance thereof was understood by the parties, as to what will be sufficient evidence thereof depends upon the facts of each case.[25] However clear the condi-

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[21] *Supra* note 2.

[22] *Supra* note 2 at 237, N. E. at 1035, wherein it was said, "The acceptance of the money involved the acceptance of the condition, and the law will not permit any other inference to be drawn from the transaction. Under such circumstances the assent of the creditor to the terms proposed by the debtor will be implied, and no words of protest can affect the legal quality of his act."

[23] Lewinson v. Montauk Theatre Co. *et al.*, 60 App. Div. 572, 69 N. Y. Supp. 1050 (2d Dept. 1901).

[24] Nassoiy v. Tomlinson, *supra* note 14.

[25] McKeen v. Morse, 49 Fed. 253 (C. C. A. 2d, 1891); Eames Vacuum Brake Co. v. Prosser, 157 N. Y. 289, 51 N. E. 986 (1898) wherein the court refused to extend the doctrine of Fuller v. Kemp and Nassoiy v. Tomlinson, stating at 299, 51 N. E. at 989, "In those cases the doctrine of accord and satisfaction was carried to the extreme limit, and it is not our purpose to further the rule"; and again at 300, 51 N. E. at 989, "there must be proof of some form of an express or implied assent to the account rendered by one party to another before the latter can be held to be so far concluded that he can impeach it only for fraud and mistake"; to like effect is the holding in Rothschild v. Mosbacher, 26 App. Div. 167, 49 N. Y. Supp. 698 (1st Dept. 1898) (motion to dismiss appeal granted) 158 N. Y. 711, 53 N. E. 1131 (1899).

tion imposed it will be ineffective unless it is lawful. In the instant [26] case plaintiff requested defendant to procure a purchaser for a quantity of apples. The purchase price therefor was paid to the defendants who deducted commissions and remitted a check for the balance then due, if the deductions proved correct. Plaintiffs retained the check but protested against the deductions as wrongful. The action was brought to recover the amount withheld, and upon a finding of the jury that no agreement had been made to pay commissions, and that the services were gratuitous judgment was rendered for the plaintiff. The Appellate Division sustained the defense of accord and satisfaction and reversed the Trial Term.[27]

The Court of Appeals reversed the Appellate Division and affirmed the judgment of Trial Term. The decision rested principally upon the ground that the condition (i.e., that the acceptance of the check would be in satisfaction of the entire amount due), was not lawfully imposed.[28] The decision follows the holding of the court in *Eames Vacuum Brake Co.* v. *Prosser* [29] and the later case of *Gen. Fireproof Const. Co.* v. *Butterfield*.[30] In the latter case the defendants, as plaintiff's attorneys, collected certain moneys and after making deductions for services rendered, sent a check for the balance stating it was in full payment. The plaintiff retained the check and in an action for the balance the court refused to sustain the defense of accord and satisfaction holding that the money belonged to the plaintiff and the attorneys' lien upon it was limited to the amount retained; he having conceded that the amount sent belonged to the plaintiff.[31] These decisions, in limiting the doctrine of accord and satisfaction, are basically sound and manifestly necessary. To hold otherwise would be to leave the principal and owner of a fund with a choice of either consenting to the demands of the agent or sending back his own money awaiting the outcome of a lawsuit with the danger of losing all and procuring a worthless judgment.

As the court in the instant case pointed out, the money remitted in such cases is not that of an ordinary debtor merely "paying its own money which it would be free to retain or disburse according to its pleasure" [32] but belonged to the plaintiff in any event. As to cases wherein the tender is coupled with a condition Cardozo, *C. J.*, says "The doctrine of accord and satisfaction by force of an assent that is merely constructive or imputed assumes as its foundation stone the existence of a condition lawfully imposed." [33]

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[26] *Supra* note 17.
[27] Hudson v. Yonkers Fruit Co., 233 App. Div. 884, 250 N. Y. Supp. 991 (3rd Dept. 1931).
[28] Hudson v. Yonkers Fruit Co., *supra* note 17.
[29] *Supra* note 25.
[30] 143 App. Div. 708, 128 N. Y. Supp. 407 (4th Dept. 1911).
[31] *Ibid.*
[32] *Supra* note 18 at 173, N. E. at 375.
[33] *Ibid.*