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## TENDER OF LESS SUM IN FULL PAYMENT OF LIQUIDATED OR UNDISPUTED CLAIMS

C. SEVERIN BUSCHMANN\*

Frequently a less sum is offered in payment of an obligation upon condition that it is taken in full payment thereof. The creditor thus confronted with the temptation of immediate payment or secured payment, later on often regrets his earlier action and seeks to hold his debtor for the balance of the claim.

All questions of accord and satisfaction necessitate consideration of whether or not the claim is liquidated or unliquidated. An unliquidated claim is 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.<sup>1</sup> Where the debt or demand is liquidated and is due, payment by the debtor and receipt by the creditor of a less sum is not a satisfaction thereof, although the creditor agrees to accept it as such, if there be no release under seal or no new consideration given.<sup>2</sup> The above statement represents the rule in all but two states except where abrogated by statute.

The reason for the rule that receipt of a less sum is no satisfaction of an undisputed or liquidated debt is that there is no consideration therefor. Accordingly the giving of a receipt in full does not in any way affect the rule that payment of a less sum in discharge of a greater sum presently due is not a consideration thereof, although accepted as such, as the element of consideration is lacking.<sup>3</sup>

However, any new consideration moving from the debtor toward the creditor will take the case out of the operation of this rule. Thus if in addition to making a part payment, the debtor gives something which the law may consider a benefit to the creditor, the transaction will constitute a valid accord and satisfaction.<sup>4</sup> For example, payment before the debt is due is sufficient additional consideration to make the receipt of a sum less than the whole debt a valid accord and satisfaction.<sup>5</sup> Moreover, payment at a different place is enough of an additional

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\*See biographical note, p. 397.

<sup>1</sup> Williston on Contracts, Sec. 128.

<sup>2</sup> 1 C. J. 538. Anson on Contracts (Corbin Ed.), No. 140. *Miller v. Eldridge*, 126 Ind. 461.

<sup>3</sup> 1 C. J. 543; 21 A. L. R. 292.

<sup>4</sup> Anson on Contracts (Corbin Ed.), No. 140, 1 C. J. 544, *Fletcher v. Wurgler*, 97 Ind. 223.

<sup>5</sup> *Hutton v. Stoddart*, 83 Ind. 539; *Princeton Coal Co. v. Dorth*, 191 Ind. 615, 24 A. L. R. 1471.

consideration<sup>6</sup> as is the case of payment by a third person, provided the money is not furnished by the debtor, or the note or indorsement of a third person.<sup>7</sup>

So also the abandonment of a defense<sup>8</sup> or waiver of right of appeal is sufficient.<sup>9</sup> An agreement not to go into bankruptcy had been held a sufficient consideration.<sup>10</sup> An agreement to secure new business, composition agreements with several creditors.<sup>11</sup>

The decisions are conflicting as to whether acceptance by the creditor of the debtor's unsecured negotiable note or check for a less sum than due will operate as an accord and satisfaction. In England even the debtor's own note or check for part of the debt has been held sufficient consideration for a promise to discharge the remainder.<sup>12</sup> However, the general rule in the United States in case of a debtor's own note is that it does not operate as a satisfaction of the debt, although some jurisdictions hold to the contrary.<sup>13</sup> There is likewise a conflict in the case of checks. Upon principal, if the payment of a certain amount of money would be insufficient consideration to support an accord and satisfaction, the debtor's check for the same would be no better,<sup>14</sup> and this is the general rule. However, the authorities in Indiana are in conflict.

One of the earliest cases in Indiana was that of *Fensler v. Prather*<sup>15</sup> in which the court said, by way of dictum,

"A negotiable security for a smaller amount given and accepted in satisfaction of a larger debt will operate effectually in discharge of it."<sup>16</sup>

The court thus announced the English rule as applicable to negotiable instruments, although the statement was not necessary in deciding the case.

In the case of *Wells v. Morrison*,<sup>17</sup> the court reversed the lower court because in enumerating the exceptions to the rule that a part payment by a debtor of a less sum than is due, can not

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<sup>6</sup> 1 C. J. 545.

<sup>7</sup> 1 Williston on Contracts, Sec. 125.

<sup>8</sup> *Fensler v. Prather*, 43 Ind. 119.

<sup>9</sup> 1 C. J. 546.

<sup>10</sup> 11 L. R. A. (N. S.) 1018, L. R. A. 1917 A 722.

<sup>11</sup> *Devou v. Ham*, 17 Ind. 472; *Wipperman v. Hardy*, 17 Ind. App. 142, 150, and various other things, 1 C. J. 551, 11 L. R. A. (N. S.) 1027.

<sup>12</sup> 1 Williston on Contracts, Sec. 124; Anson on Contracts (Corbin Ed.), No. 140, 431.

<sup>13</sup> 1 C. J. 549. 1 Williston on Contracts, Sec. 124.

<sup>14</sup> 1 Williston on Contracts, Sec. 124, note 84.

<sup>15</sup> (1873), 43 Ind. 119.

<sup>16</sup> Leake Law of Con. 474, 475.

<sup>17</sup> (1883), 91 Ind. 51.

operate as a satisfaction of the debt, the lower court neglected to instruct that "where the less sum is paid by a check or other instrument negotiable by the law merchant, it may operate as a discharge of the entire indebtedness." In support of the decision the court cited several English cases and the dictum contained in *Fensler v. Prather*.

In case of *Pottlitzer v. Wesson*<sup>18</sup> involved a suit by a seller to recover the balance due on a car load of fruit which the buyer claimed failed to comply with the contract and had sold, remitting a check for \$550.70 and refusing to pay the balance of \$825. In considering the possibility of an accord and satisfaction the court pointed out that the buyer did not sufficiently indicate when he remitted the check that he meant for the seller to return the check if unwilling to accept it in full payment, nor did he do anything else to indicate anything other than that the amount of the check was the sum in which he considered himself indebted to the seller, and decided the case on this ground. The court, however, said:

"If \* \* \* the appellants \* \* \* became bound to pay the full contract price therefor, as liquidated damages an agreement \* \* \* by the acceptance of the check for \$550.70 to take that amount in satisfaction of the \$825 debt is without consideration."<sup>19</sup>

The case cited, however, did not involve a negotiable instrument. The dictum is thus contrary to the cases of *Fensler v. Prather* and *Wells v. Morrison* and in line with the prevailing rule in this country.

In *Hodges v. Truax*<sup>20</sup> defendant sent a check for \$150 containing the words "in full of all notes and obligations to date," accompanied by a letter stating the reasons for the tender. The lower court held there was no accord and satisfaction and the same was affirmed but apparently on the ground that the debtor had not made it sufficiently clear that the check which he sent was offered only on condition that it be taken in full payment, relying on *Pottlitzer v. Wesson*. The court left undecided the question of whether the debtor's own check for a less amount could constitute a valid accord and satisfaction, although this was squarely raised by the ruling of the lower court on the demurrer to the third paragraph of answer.

The case of *Meyer v. Green*<sup>21</sup> presented the question on demurrer to the third paragraph of answer of whether a check

<sup>18</sup> (1893), 8 Ind. App. 472.

<sup>19</sup> *Stone v. Lewman*, 28 Ind. 97.

<sup>20</sup> (1897), 19 Ind. App. 651.

<sup>21</sup> (1898), 21 Ind. App. 138.

sent in payment of a larger liquidated amount constituted a valid accord and satisfaction. The court in holding it did not, cited *Hodges v. Truax* and *Pottlitzer v. Wesson* for the proposition that acceptance of a check for part of a liquidated sum does not discharge the entire debt, stating that the lower court properly sustained the demurrer. The opinion fails to refer to the earlier cases of *Fensler v. Prather* and *Wells v. Morrison* to the contrary.

In *Jennings v. Durflinger*<sup>22</sup> the court again held that acceptance of a check in full settlement of a larger liquidated claim was not sufficient to constitute an accord and satisfaction, citing *Meyer v. Green*, *Pottlitzer v. Wesson* and *Hodges v. Truax*.

The question next came before the Appellate Court in the case of *Little v. Koerner*<sup>23</sup> where the court says by way of dictum:

"A negotiable security for a smaller amount given and accepted in satisfaction of a larger debt will operate effectually in discharge of it."<sup>24</sup>

The situation again confronted the Appellate Court twelve years later in *American Seeding Machine Co. v. Baker*<sup>25</sup> in which case a suit was brought to enjoin the levying of execution of a default judgment on the ground that the judgment had been discharged by the payment of check of a less amount and costs in full satisfaction thereof, the creditor executing a receipt in full satisfaction and payment. The lower court overruled a demurrer to the action and defendants failing and refusing to plead further were enjoined from collecting or attempting to collect said judgment. In holding there was no error in overruling the demurrer to the complaint, the court said that a negotiable security for a smaller amount given and accepted in satisfaction of a larger liquidated debt will operate effectually in discharge of it, citing among other cases in support thereof *Pottlitzer v. Wesson* and *Hodges v. Truax*. In speaking of these cases the court says:

"The last two cases cited are among those relied upon by appellants. On the facts of those cases, they seem to have been correctly decided, but some expressions therein made, seem to support appellant's contention. This is especially true of *Hodges v. Truax*. In that case the ruling on the demurrer to the third paragraph is considered and determined under the general rule above stated, but it does not appear from the opinion that the court in doing so considered the effect of the giving and acceptance of a regular bank check in payment of the amount alleged to have been

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<sup>22</sup> (1899), 23 Ind. App. 673.

<sup>23</sup> (1901), 28 Ind. 625.

<sup>24</sup> *Fensler v. Prather*, 43 Ind. 119, 122.

<sup>25</sup> (1913), 55 Ind. App. 625.

agreed upon and paid in satisfaction of a note for a larger amount. The court said: 'Appellant did not say to appellee when he sent the check, to return if not accepted in full \* \* \*. It is plain from the findings that appellee did not accept the amount of the check in full payment, for it sent appellant a receipt for the amount without showing upon what account, or under what conditions it was paid.' What the court decides is that the facts of that case bring it within the general rule. The court, however, recognizes the fact that under different circumstances, showing an accord and satisfaction, an agreement to accept a negotiable instrument in payment, though for a sum less than the full amount, would be binding upon the parties after the acceptance of such instrument."

The court ignores the dictum in the *Pottlitzer* case and misinterprets *Hodges v. Truax*, especially in view of the interpretation given by the Appellate Court in the later case of *Meyer v. Green* and *Jennings v. Durflinger*.

The following year in the case of *Neubacher v. Perry*<sup>26</sup> the court says:

"Even if appellees were correct in their contention that the entire claim was liquidated, and undisputed, there is another well-settled rule of law applicable to the facts found which would prevent their recovery. Where a check for a less amount than the claim is given and accepted as payment of a liquidated claim, there is an accord and satisfaction of the whole claim.

"The court erred in its conclusion of law upon the facts found, and the judgment is reversed, with directions to re-state the conclusions of law to the effect that plaintiffs take nothing by their action, and render judgment accordingly."

The last case on the subject is *Neher v. Kerr*<sup>27</sup> and was an action to recover the balance due on some lumber, the defense being that the claim was liquidated and payment had been made by check which was tendered and accepted in full settlement, citing *Jennings v. Durflinger* and *Meyer v. Green*. The court disposes of the question, however, by deciding that the claim was not liquidated, being in *quantum meruit*.

The Indiana authorities are therefore in some conflict. The cases of *Pottlitzer v. Wesson*, *Hodges v. Truax*, *Meyer v. Green* and *Jennings v. Durflinger*, contrary to the *Wells v. Morrison* and the *Baker* case, support the view that a check is no better than the money it represents, and that if payment of the same amount of money would not be sufficient as an accord and satisfaction, the payment by check should likewise be insufficient.<sup>28</sup> The *Neher v. Kerr* case by citing the case of *American Seeding Mach. Co. v. Baker* in support of the proposition that a check

<sup>26</sup> (1914), 57 Ind. App. 362.

<sup>27</sup> (1919), 70 Ind. App. 363.

<sup>28</sup> 1 Williston on Contracts, Sec. 124.

for less can operate as an accord and satisfaction of an unliquidated or disputed claim and mentioning the *Meyer v. Green* and *Jennings v. Durflinger* cases without comment, leaves the law in an unsatisfactory state.<sup>29</sup>

By the great weight of authority, however, the acceptance and use of a remittance by check purporting to be in full or accompanied by a letter to that effect, amount to an accord and satisfaction of the larger claim where the same is unliquidated or disputed.<sup>30</sup>

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<sup>29</sup> See 1 Ind. Law Journal 192.

<sup>30</sup> Williston on Contracts, Sec. 1854, 34 A. L. R. 1035; *Neubacher v. Perry, supra*; *Neher v. Kerr, supra*.

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