have decreased in those states or increased in those states favoring strict immunity.

In addition, charities now are more like business enterprises than in the past —they have a capacity for bearing loss undreamed of at the time when the doctrine of immunity was first formulated. Then, a single negligence action might have wiped out a small charity with meager funds. Now, however, charities are in a position to protect their funds. It is an odd rule that would place the whole of the loss upon a single injured individual if, fortuitously, the negligence of a charity causes that loss. The decision in the instant case, although unfortunately limited, points the way for the Illinois Supreme Court or for the legislature to join those states which have abandoned the unfair and outmoded doctrine of immunity.

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## FIDUCIARY DUTY OF INSURER IN SETTLEMENT OF CLAIMS

In *Kellogg v. Iowa State Traveling Men's Ass'n*[1] the Supreme Court of Iowa struck down a purported accord and satisfaction, seemingly relying on the rule in *Pinnel's Case*, but also asserting the unique notion that an insurance company is under a fiduciary duty to its policyholders.[2] The plaintiff, administrator of the estate of the deceased beneficiary, brought an action at law on a $5,000 membership certificate of the defendant association to recover for the accidental death of the insured. The certificate provided for an indemnity of $5,000 in the case of death resulting exclusively from bodily injuries accidentally received but disclaimed liability in excess of 1/10 of that amount if death or disability should be caused by, or be effected or aggravated by, "heart" disease.

The insured, who was sixty-eight years old, was severely shaken up and bruised in a highway collision on June 25, 1945. He complained of pains in his abdomen, and onlookers brought him to his home, where he died within an hour.

A doctor examined him about ten minutes after his death. In the proofs of loss the doctors stated that the insured died of coronary thrombosis, initiated by the accident and subsequent nervous shock. No X-rays were made and no autopsy was performed.

The proofs of loss were delivered to the defendant, and no other correspondence took place. The defendant mailed to the insured's wife a check for $500, which stated on its face that its indorsement by her as payee would be settlement in full for all claims for indemnity arising under the membership. There was evidence that she knew that the insured had suffered from previous attacks

[1] 29 N.W. 2d 559 (Iowa, 1947).

[2] The notion should be contrasted with the well established doctrine that in cases of suretyship and marine insurance there is a strict duty of full disclosure, amounting to a fiduciary duty owed by the insured to the insurer. Richards, Insurance §§ 79, 80 (4th ed., 1932); Arant, Suretyship § 28 (1931).

of angina. She indorsed the check and received payment thereon. The accompanying letter requested her to sign and remit an inclosed release, but she did neither. Shortly thereafter she died.

The plaintiff admitted the payment of $500 and prayed judgment for $4,500, alleging that the insured's death was exclusively the result of bodily injuries accidentally sustained and that the $500 was received not in compromise and settlement of the claim of $5,000 but as a credit thereon.

An expert medical witness testified at the trial that there was insufficient evidence to determine with certainty what the insured died of, but that in his opinion death was most likely caused by injuries to internal organs in the abdomen. At the close of the evidence the jury returned a verdict of $4,500 for the plaintiff, but the trial judge held that there was an accord and satisfaction and entered judgment for the defendant notwithstanding the verdict. On appeal, the Iowa Supreme Court ruled that there was no accord and satisfaction and ordered the trial court to reinstate the judgment for the plaintiff on the verdict, one judge specially concurring and three judges dissenting.

American courts have generally followed the rule in *Pinnel's Case*,[3] affirmed in *Foakes v. Beer*,[4] that payment of a lesser sum in full satisfaction of a larger sum then owing is not consideration to support a discharge of the residue. The rationale of the rule is usually said to be that there is no detriment to the debtor other than the obligation which he is already under and no benefit to the creditor other than that which was already due him.[5] This doctrine, however, has been adversely criticized and subjected to frontal attacks for many generations[6] as a "relic of antique law which [makes] the requirement of consideration an overworked shibboleth rather than a logical and just standard of actionability."[7]

Claims for money may consist of liquidated or unliquidated amounts, either indisputably due or in dispute. The possible combinations of these factors give rise to various correlative rules based on the requirement of consideration for the enforcement of contracts. The rule in *Pinnel's Case* applies only where the claim is liquidated and undisputed—where a sum certain is admittedly due.[8]

[3] 3 Co. 117 a (1602).

[4] L.R. 9 App. Cas. 605 (1884).

[5] Foakes v. Beer, L.R. 9 App. Cas. 605 (1884); 1 Williston, Contracts § 120 (rev. ed., 1936); Ames, Two Theories of Consideration, 12 Harv. L. Rev. 515, 526 (1899); Gold, The Present Status of the Rule in Pinnel's Case, 30 Ky. L. J. 72, 73 (1941).

[6] See for example, Ames, op. cit. supra note 5; Gold, op. cit. supra note 5; Sharp, Promissory Liability II, 7 Univ. Chi. L. Rev. 250, 253 (1940); Street, Foundations of Legal Liability 89 (1936); Allen, Law in the Making 289 (1946).

[7] Rye v. Phillips, 203 Minn. 567, 569, 282 N.W. 459, 460 (1938). A list of more than twenty common-law jurisdictions in which the rule has been eliminated by statute or by judicial construction is available in Gold, op. cit. supra note 5, at 203. Even where the rule has been retained the applications of its exceptions have been more numerous than the applications of the rule itself. Frye v. Hubbell, 74 N.H. 358, 68 Atl. 325 (1907); Brooks v. White, 2 Metc. (Mass.) 283 (1841); 119 A.L.R. 1123, 1125 (1939).

[8] Foakes v. Beer, L.R. 9. App. Cas. 605 (1884); Chicago, M. & St. P. R. Co. v. Clark, 178 U.S. 353 (1900); 1 Am. Jur., Accord and Satisfaction § 39 (Supp., 1947).

Where a claim is unliquidated and disputed—where the amount due, if anything, is unascertained and is the subject of a dispute conducted in good faith and with some color of reason—it is well settled that the surrender of the claim for a lesser sum is good consideration to support an accord and satisfaction.[9] It is equally well settled that a liquidated and disputed claim, or an unliquidated and undisputed claim, may be compromised by payment of less than the amount claimed.[10] There is a conflict, however, as to whether payment of the conceded part of a single claim is consideration for the discharge of the disputed balance of the claim.[11] Those courts which hold that such payment is consideration base their decisions on the theory that a dispute as to a part makes the entire claim uncertain in amount so as to bring the case within the rule that part payment of an unliquidated and disputed debt in full satisfaction thereof discharges the entire debt.[12] Execution of a receipt in full is generally considered not to take the case out of the operation of the rule in *Pinnel's Case*,[13] although one court has suggested that under such circumstances a defendant debtor may plead estoppel.[14]

In the typical situation requiring the application of the rule a creditor releases a claim for a specific and conceded amount due in consideration of part payment of the amount. Insurance cases, however, are not like those arising in the ordinary debtor-creditor relationship. The instant case involved payment of an amount concededly and indisputably due in an attempt to satisfy an additional and distinct liability which arose under the contract. Only the question of liability for the claim, not the amount of the claim, was in dispute. The majority took the position that there were two claims, one for $500, which was liquidated and owing in any event, and one for $5,000 minus the amount paid on it, which was due in the event that the insured's accidental death was not in any way a result of heart disease. Their decision proceeded, however, on the

[9] San Juan v. St John's Gas Co., 195 U.S. 510 (1904); 1 Am. Jur., Accord and Satisfaction § 60 (Supp., 1947).

[10] Simms Oil Co. v. American Refining Co., 288 S.W. 163 (Tex. Comm'n App., 1926); see 1 Williston, Contracts §§ 128, 129 (rev. ed., 1936).

[11] Ferryboatmen's Union v. Northwestern Pacific R. Co., 84 F. 2d 773 (C.C.A. 9th, 1936); Schuttinger v. Woodruff, 259 N.Y. 212, 181 N.E. 361 (1932); 1 Williston, Contracts § 129 (rev. ed., 1936); 112 A.L.R. 1219, 1221–22 (1938).

[12] Tanner v. Merrill, 108 Mich. 58, 65 N.W. 664 (1895); Schultz v. Farmer's Elevator Co., 174 Iowa 667, 156 N.W. 716 (1916); Snow v. Griesheimer, 220 Ill. 106, 77 N.E. 110 (1906); 1 Williston, Contracts § 420 (rev. ed., 1936).

[13] Fire Ins. Ass'n Ltd. v. Wickham, 141 U.S. 564 (1891); Buel v. Kansas City Life Ins. Co., 32 N.M. 34, 250 Pac. 635 (1926); Pennsylvania R. Co. v. Cameron, 280 Pa. 458, 124 Atl. 638 (1924). A release under seal, however, takes the case out of the operation of the rule. See Foakes v. Beer, L.R. 9 App. Cas. 605 (1884). But in many jurisdictions the common-law effect of the seal has been abrogated by statute or decision, thus greatly limiting the effect of instruments under seal on the rule in Pinnel's Case. Gold, op. cit. supra note 5; see Woodbury v. United States Casualty Co., 284 Ill. 227, 120 N.E. 8 (1918).

[14] See Meyers v. Acme Homestead Ass'n, 18 La. App. 697, 138 So. 443 (1931); cf. Rest., Contracts § 90 (1932).

erroneous theory that the larger amount was an undisputed and liquidated sum, for the release of which, under the rule in *Pinnel's Case*, payment of the lesser sum could be no consideration. Whether the claim was liquidated or unliquidated was actually immaterial, since the applicability of the rule in *Pinnel's Case* depends also on the claim's being undisputed. The majority seemed to think that the dispute as to liability for the claim and the disputed amount of the claim were one and the same question and that since the amount was ascertained it was not disputed.[15] This confusion obscured additional grounds upon which the court placed its decision,[16] and upon which decisions in this type of case are usually placed: Payment of an undisputed claim does not constitute consideration for the release of an additional, disputed claim, whether liquidated or unliquidated.[17] The specially concurring judge, who was joined by three members of the majority, based his opinion on the applicability of this rule to accident insurance policies. The dissenting judges argued, however, that the entire claim was an indivisible and unliquidated sum—that either $500 or $5,000 was due—so that satisfaction of the lesser claim would necessarily extinguish the greater.

But even the construction placed on the nature of the claim by the dissenting judges should have resulted in the conclusion, entirely independent of the rule in *Pinnel's Case*, that there was no consideration for the purported accord and satisfaction. They should have concluded that the case was within the general rule that payment of a liquidated and undisputed claim is not consideration for the release of a larger, inconsistent claim.[18]

More significant than the legal mechanics of accord and satisfaction, and apparently of greater weight in inducing the court's decision, was its theory that in such a situation "the relationship between the parties is closely akin to a fiduciary one, and . . . the insurer should be most meticulous and conscientiously scrupulous to protect the rights of the beneficiary and to give every opportunity to fully establish her rights."[19] Moreover, the court imputed lack of good faith to the defendant.[20] The minority vigorously dissented from this

[15] Kellogg v. Iowa State Traveling Men's Ass'n, 29 N.W. 2d 559, 570 (Iowa, 1947).

[16] Ibid., at 573.

[17] De Soto Life Ins. Co. v. Jeffett, 196 S.W. 2d 243 (Ark., 1946); Woodmen of the World Life Ins. Society v. Smauley, 153 S.W. 2d 608 (Tex. Civ. App., 1941); American Life Ins. Co. v. Williams, 234 Ala. 469, 175 So. 554 (1937); Buel v. Kansas City Life Ins. Co., 32 N.M. 34, 250 Pac. 635 (1927); Knights Templar Mason's Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N.E. 1066 (1904).

[18] American Life Ins. Co. v. Williams, 234 Ala. 469, 175 So. 554 (1937); Dodt v. Prudential Ins. Co., 186 Mo. App. 168, 171 S.W. 655 (1914); Weidner v. Standard Life and Accident Ins. Co., 130 Wis. 10, 110 N.W. 246 (1906); Barr v. Clinton Bridge Works, 179 Iowa 702, 161 N.W. 695 (1917); 112 A.L.R. 1219, 1241 (1938).

[19] Kellogg v. Iowa State Traveling Men's Ass'n, 29 N.W. 2d 559, 568 (Iowa, 1947).

[20] Ibid. The court added: "While it is and should always be the policy of the courts to encourage the amicable settlement of all controversies, it is even more a matter of good policy and good morals to stamp the law's disapproval upon settlements which bear the taint of fraud and undue advantage." Ibid., at 574.

view on the traditional theory that under such circumstances the parties deal at arm's length and that the company's only duty is to deal uprightly.[21] The minority inferred from the evidence, based upon the proofs of loss, that the defendant had every reason to believe that the insured died of heart disease and that the beneficiary had made an informed, well-considered bargain in view of the insured's previous medical history.

It is apparent that the reason why the court raised a fiduciary obligation, against the great weight of authority, was that general policy notions of fairness and the unequal position of the parties influenced its consideration of the case. The court said:

> This was not a simple dispute between two persons on even terms over the amount of an account for wages or merchandise. The insurer is always the dominant party in a transaction of this kind. It is always far better informed respecting the facts and the law than the beneficiary, particularly the widow who has just lost her husband. His income has stopped and there is always the burial expenses. Money is needed and an offer of $500 is a temptation that is often irresistible. The fact that the insurer seeks to force a settlement is a most significant item of evidence as to its good faith.[22]

The court thus articulated a concept which, if legally sufficient and if supported by the facts, should have governed the case whether or not there was consideration for the release of the claim. Even where contracts are supported by consideration they are not enforced in cases of duress, fraud, misrepresentation, nondisclosure in some relationships, mistake, impossibility, forfeiture, and similar circumstances. Of course, if the imputation of bad faith and of inequality of information and bargaining position was not justified, the case was unfairly decided. But an assumption that the evidence warranted the court's position leads to the inference that the decision was placed on narrow and much criticized technical grounds because the court had no confidence in the legal sufficiency of its real major premise—that the unequal bargaining position of beneficiaries under insurance contracts should be compensated by imposing a fiduciary obligation on insurers.

Contemporary writers on contract theory agree that regardless of the consideration doctrine the enforcement of promises should be governed by intelligible and useful social policies.[23] However, the courts have been very reluctant, as was the court in the instant case, to impose new fiduciary duties as the basis of decisions or to set aside agreements squarely on such explosive policy grounds as inequality of bargaining power.

The basic problem of economic inequality which underlies the problem of unequal bargaining power is so complex and goes so deeply into the roots of our social order that the traditional logic of the judicial function precludes its consideration in the decision-making process. Lawyers generally feel that the

[21] Ibid., at 578. [22] Ibid., at 568.

[23] Sharp, Pacta Sunt Servanda, 41 Col. L. Rev. 783, 785 (1941); Hays, Formal Contracts and Consideration: A Legislative Program, 41 Col. L. Rev. 849, 853 (1941); Llewellyn, Common Law Reform of Consideration: Are There Measures?, 41 Col. L. Rev. 863, 871 (1941).

courts must accept the basic postulates of our society, which include economic inequality and consequent inequality of bargaining power. It is true that there are certain established exceptions,[24] but most lawyers believe that unless the courts accept the basic facts of inequality, the unity of the law will be destroyed, and with it will be destroyed the logical basis of socially reasonable expectations.

Such considerations as these impel the courts occasionally to utilize available mechanical doctrines to obscure the real kernel of decisions. If inequality of bargaining power were to be given substantial consideration by courts in determining the enforceability of contracts, the classical notion of freedom of contract would have to be revised. One writer, with particular regard to insurance contracts and standardized contracts generally, has proposed as much, maintaining that freedom of contract must mean different things for different types of contracts.[25] In the instant case such a proposition was obviously the inarticulate premise of the court when it spoke of the existence of a fiduciary relationship between the parties. Articulation of the premise, and its utilization as a basis of decision, would require a frank admission that the ordinary consideration doctrine is not suited to insurance contracts or contracts settling insurance claims, in view of the peculiar inequality that often exists between the parties: In making insurance contracts there is little or no bargaining over the terms of the contract—the insured must take it or leave it; in making settlements the insured is often hard pressed for cash and cannot tolerate the same cost, delay, vexation, and hazards of litigation that mean little to the corporate insurer; and in both cases there may be a profound inequality of information and of competent advice.

Courts have already created a bulge in the classical notion of freedom of contract in cases of this type by broad application of well established doctrines such as fraud, mistake, and duress.[26] Decisions in this field should be based directly on the acceptance of a quasi-fiduciary of fiduciary relation between the parties rather than upon mechanical doctrines into which the facts must frequently be tortured in order to avoid patent injustice. In another recent insurance case, Judge Clark, concurring, wrote: "[A] result placed not squarely upon inequity, but upon interpretation, seems sure to produce continuing uncertainty in the law of insurance contracts."[27] If the Iowa Supreme Court in the instant case

[24] Hale, Bargaining, Duress, and Economic Liberty, 43 Col. L. Rev. 603 (1943); see the dissenting opinion of Justice Frankfurter in United States v. Bethlehem Steel Corp., 315 U.S. 289, 326 (1942).

[25] Kessler, Contracts of Adhesion—Some Thoughts about Freedom of Contract, 43 Col. L. Rev. 629, 642 (1943).

[26] The Illinois Supreme Court, for example, has been particularly liberal in invalidating, unconscionably obtained releases. See Woodbury v. United States Casualty Co., 284 Ill. 227, 120 N.E. 8 (1918); Some Aspects of the Law of Release of Claims in Illinois, 5 Univ. Chi. L. Rev. 455 (1938).

[27] Gaunt v. John Hancock Mutual Life Ins. Co., 160 F. 2d 599, 603 (C.C.A. 2d, 1947) noted in 15 Univ. Chi. L. Rev. 379 (1947).

really believed that the defendant had exceeded the permissible limits of bargaining zeal, or had taken advantage of the beneficiary's ignorance, it might have brought the case within the boundaries of fraud, mistake, or duress, or it might have gone one step further to make use of the fiduciary concept which it set forth. Instead, it took elaborate pains to fit the facts into the rigid mold of the rule in *Pinnel's Case*. The slight additional bulge that extensive use of the fiduciary concept might make in technical contract doctrines would be justified by the resulting clarity, flexibility, and fairness in the law.

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## LIMITATION ON MINORS' COMMON LAW POWER TO DISAFFIRM CONTRACT

In response to a problem presented by the motion picture industry, the California legislature provided in 1927 that "[a] minor cannot disaffirm a contract otherwise valid to perform or render services as actor, actress, or other dramatic services where such contract has been approved by the superior court of the county where such minor resides or is employed. . . ."[1] In 1941 the section was amended to include within its provisions contracts for the services of professional athletes.[2] Twenty years after its enactment, the constitutionality and application of the statute were challenged in *Warner Bros. Pictures, Inc. v. Brodel.*[3]

In 1942, when 17 years of age, Miss Brodel, known professionally as Joan Leslie, entered into a contract with Warner Brothers Studios which was subsequently approved by the Superior Court of Los Angeles under the statute. The contract provided that Miss Brodel should perform as a motion picture actress for one year and that Warner Brothers should have six successive options, exercisable over a six-year period, permitting the employer at the end of each year to extend the time of employment for an additional period of 52 weeks. On February 20, 1946, within a month after reaching her majority, Miss Brodel attempted to disaffirm the contract. In a subsequent suit to enjoin this alleged breach of contract, the California Supreme Court upheld the validity of the contract and the option to extend, and Miss Brodel was enjoined from her attempted disaffirmance.

In defending against the suit for injunction, Miss Brodel contended that the Superior Court had approved only the first year's contract, and, under the statute, lacked jurisdiction to approve any options for its extension. Although the trial court, the District Court of Appeals, and two members of the Supreme Court agreed with this position, the majority decision in the instant case rejected such a construction as contrary to the legislative intent.[4] The defendant also

[1] Cal. Stat. 1927, c. 876, p. 1917.

[2] Cal. Civ. Code Ann. (Deering, 1941) § 36.

[3] 192 P. 2d 949 (Cal., 1948).

[4] The California legislature indicated its disapproval of the decision by the District Court of Appeals, Warner Bros. Pictures v. Brodel, 179 P. 2d 57 (Cal. App., 1947), by amending