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CONTRACTS--CONSIDERATION-PERFORMANCE OF ONE ALTERNATIVE WHEN THERE IS DISPUTE AS TO WHICH IS OWED

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CONTRACTS—CONSIDERATION—PERFORMANCE OF ONE ALTERNATIVE WHEN THERE IS DISPUTE AS TO WHICH IS OWED—Defendant issued a membership certificate to one Flowers providing for payment of $5000 in case of accidental death or $500 in case of death due to heart disease. Later Flowers was injured in an automobile accident and died an hour afterward. The beneficiary submitted proofs of loss, including a statement of a physician that death was caused by "coronary thrombosis. Shock from auto accident about one hour before death." Defendant sent to the beneficiary a draft for $500 clearly stating on its face that the endorsement of the check would be a settlement in full. After cashing the check, the beneficiary sued for an additional $4500; on appeal from judgment for defendant notwithstanding the verdict, *held*, reversed. Since defendant paid no more than it admitted was due to plaintiff, there was no consideration to support the attempted accord and satisfaction. One justice dissented. *Kellogg v. Iowa State Traveling Men's Assn.*, (Iowa 1947) 29 N.W. (2d) 559.

Although the law might well have developed otherwise, it is now generally established that consideration is required in discharging a contract by accord and satisfaction.[1] On the general question whether payment of an amount conceded to be due can be consideration for the release of some other amount which is either unliquidated or disputed the courts are irreconcilably in conflict.[2] After going to great lengths to show that defendant is under two distinct and separate obligations, the court here decided that since one of these was admitted to be due, its payment could not be consideration for a release of the other.[3]

[1] 6 WILLISTON, CONTRACTS, rev. ed., § 1851 (1938).

[2] 112 A.L.R. 1219 (1938).

[3] Weidner v. Standard Life and Accident Co., 130 Wis. 10, 110 N.W. 246 (1906); American Life Ins. Co. v. Williams, 234 Ala. 469, 175 S. 554 (1937); Knights Templars' and Masons' Life Indem. Co. v. Crayton, 209 Ill. 550, 70 N.E.

This conclusion would be sound only if the payment of one obligation is consistent with the additional duty of performing the other obligation.[4] Here, however, the obligations were mutually exclusive—only one could be enforced. Certainly the performance of an alternative might well be consideration on the theory that each party surrendered the right of having a court decide that the contract could be discharged by performance of the other alternative.[5] The fact that each alternative involves merely the payment of money does not change the legal principle, but it may have the effect of concealing it. The dissenting opinion treats this as a single-claim type of contract and says that the rules that apply to double indemnity policies, which "are held to be in effect two contracts,"[6] are inapplicable to the single-claim situation. Although this would seem to be merely a distinction in words, by stressing the idea that defendant's obligation must be considered as a unit, the minority is able to conclude that if any part of a debt is disputed the whole debt must be deemed disputed or unliquidated.[7] Thus the case is brought within the well-recognized principle that payment of a sum less than that claimed, in full discharge of a single unliquidated or disputed obligation, is supported by consideration.[8] An orthodox application of the principles of contract law would seem to indicate that there was consideration here regardless of which route the court might choose to take in reaching that result. Perhaps the case is simply another manifestation of an attitude often assumed toward suits by beneficiaries against insurance companies.[9] The courts have been astute in preventing what they consider to be legal technicalities from obstructing recovery.[10]

L. B. Lea

1066 (1904); cf. Schultz v. Farmers Elevators Co., 174 Iowa 667 at 675, 156 N.W. 716 (1916), where the court says, "If it is admitted that one of two sums is due, but there is a dispute as to which is the proper amount, the demand is unliquidated within the meaning of accord and satisfaction." In deciding the principal case the court passed this off as dictum.

[4] Keene v. Gauen, (C.C.A. 5th, 1927) 22 F. (2d) 723; Ivy Court Realty Co. v. Knapp, 79 Misc. 260, 139 N.Y.S. 918 (1913).

[5] GRISMORE, CONTRACTS, § 66 (1947); North American Union v. Montenie, 68 Colo. 220, 189 P. 16 (1920); Long v. Aetna Life Ins. Co., 259 Mich. 206, 242 N.W. 889 (1932); Perryman Burns Coal Co., Inc. v. Seaboard Coal Co., 128 Conn. 70, 20 A. (2d) 404 (1941).

[6] Principal case at 578.

[7] 2 CONTRACTS RESTATEMENT, § 420(2) (1932); Tanner v. Merrill, 108 Mich. 58, 65 N.W. 664 (1895); Matlack Coal and Iron Corp. v. New York Quebracho Extract Co., (C.C.A. 2d, 1929) 30 F. (2d) 275; Ashland Coal and Coke Co. v. Old Ben Coal Corp., 37 Del. 571, 187 A. 596 (1934); Meyers v. Acme Homestead Assn., 18 La. App. 697, 138 S. 443 (1931); Schultz v. Farmers Elevators Co., 174 Iowa 667, 156 N.W. 716 (1916).

[8] 1 WILLISTON, CONTRACTS, rev. ed., § 128 (1938); GRISMORE, CONTRACTS, § 66 (1947).

[9] "The insurer is always the dominant party in a transaction of this kind"; its obligation is "closely akin to a fiduciary one." Principal case at 568. *Contra:* Long v. Aetna Life Ins. Co., 259 Mich. 206, 242 N.W. 889 (1932).

[10] To the extent that the majority considers defendant guilty of bad faith its decision as regards consideration is rendered less authoritative. Where, as here, the consideration rests upon settlement of a dispute, all courts require that the dispute