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RECENT DECISIONS

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CONTRACTS — CONSIDERATION — MORAL OBLIGATION AS SUFFICIENT FOR EXECUTION OF NOTE AND MORTGAGE IN PAYMENT OF DEBT BALANCE VOLUNTARILY DISCHARGED — Plaintiffs contracted to buy land from the defendant and later defaulted on the contract. After accepting the bonds of the

Home Owners Loan Corporation in full satisfaction of the amount remaining unpaid under the contract, the defendant conveyed by warranty deed to the plaintiffs. The defendants signed a release form suplied by the H. O. L. C. in which they relinquished all claims against the plaintiffs and agreed not to require of the plaintiffs any second mortgage or other instrument or payment in money to cover any portion of the original contract price. But as between the plaintiffs and defendant, before the defendant agreed to take the bonds in full satisfaction of the debt, it was understood that plaintiff would pay defendant the difference btween the proceeds of the bonds and the contract price if there should be a deficit. After the sale of the bonds there was a deficit of $450. Plaintiffs delivered a promissory note for this amount to the defendant and executed a mortgage on the property to the defendant. Plaintiffs now bring this action to cancel and set aside the note and mortgage alleging that the agreement was without consideration. *Held*, for the defendant on the ground that there was a moral obligation owing from plaintiffs to defendant sufficient to satisfy the requirement of consideration. *Krause v. Swanson*, (Neb. 1942), 3 N. W. (2d) 407.[1]

The court in the principal case relies strongly upon the decision in *Fourth National Bank of Cadiz v. Craig*,[2] and cites with approval the sweeping assertion made in that case that a moral obligation to pay a pre-existing legal debt is good consideration for the execution of a note and mortgage in payment thereof. This doctrine was long ago asserted by Lord Mansfield.[3] However, the weight of authority [4] for the last hundred and fifty years has refused to enforce subsequent promises of a debtor to pay all or part of a previously voluntarily discharged debt.[5] Thus moral obligation as a quid pro quo has practically dis-

[1] The court also considered an allegation by the plaintiff's that the note and second mortgage were void because contrary to H. O. L .C. regulations, but found no merit in the allegation. 3 N. W. (2d) 407 at 410.

[2] 1 Neb. (Unof.) 849, 96 N. W. 185 (1901). In this case the maker of a note defaulted and the surety made good, receiving back the note marked "paid." The surety assigned the note and right to collect from the maker to a bank. The maker resisted suit by the bank on the ground of no consideration at the time of transfer, for the note had been discharged. The court decided that the fact that appellant honestly owed the debt and was morally obligated to pay it was a sufficient consideration for the execution of a note and mortgage.

[3] "About the middle of the eighteenth century the term 'moral obligation' as a kind of past consideration giving validity to a subsequent promise to fulfill the obligation gained currency. This seems to have been due to the influence of Lord Mansfield. He was trained in the doctrine of the civil law and undoubtedly disliked the common-law doctrine of technical consideration." 1 WILLISTON, CONTRACTS, rev. ed., § 147 (1936).

[4] 1 WILLISTON, CONTRACTS, rev. ed., § 159 (1936); ANSON, CONTRACTS, 5th Am. ed., 136 et seq. (1930); 1 PAGE, CONTRACTS, 2d ed., § 632 (1920).

[5] Rasmussen v. State National Bank, 11 Colo. 301, 18 P. 28 (1888), found no consideration for a promise to pay the balance remaining on claims after a composition agreement. The court emphasized the point that after a voluntary accord and satisfaction had extinguished a claim, there was nothing left to form a consideration to pay any portion of the claim so extinguished. Accord: Ingersoll v. Martin, 58 Md. 67 (1882); Hale v. Rice, 124 Mass. 292 (1878); Mason v. Campbell, 27 Minn. 54,

appeared from the law save for a few well-recognized exceptions.[6] The instant case offers a fact situation not covered by any of these exceptions, for here the debt was voluntarily released and the creditor accepted a smaller sum from a third party in full extinguishment of the debtor's obligation. However, statutory enactments in a few states,[7] and a number of decided cases [8] appear to hold moral obligation in general to be sufficient. Since no legal obligation remained when the defendant accepted the H. O. L. C. bonds after previous signing of the release agreement,[9] the principal decision seems to fall in line with

6 N. W. 405 (1880); Grant v. Porter, 63 N. H. 229 (1884), distinguishing between the effect of a voluntary discharge (no consideration for new promise) and a discharge in bankruptcy (new promise thereafter is enforceable); Gross, Kelly & Co. v. Bibo, 19 N. M. 495, 145 P. 480 (1914).

[6] Among these exceptions are where a pre-existing legal debt is barred by some technical rule of law: Born v. La Fayette Auto Co., 196 Ind. 399, 145 N. E. 833 (1924), moral obligation to pay debt honestly owing, but uncollectible because of operation of rule of law taking away the remedy, held to be sufficient consideration for the execution of a note to secure it; Mutual Reserve Fund Life Assn. v. Beatty, (C. C. A. 9th, 1899) 93 F. 747, debt discharged by bankruptcy; Baker v. Gregory, 28 Ala. 544 (1856), new promise after attainment of majority; Marshall v. Holmes, 68 Wis. 555, 32 N. W. 685 (1887), bar of statute of limitations; Muir v. Kane, 55 Wash. 131, 104 P. 153 (1909), bar of statute of frauds; cases collected in 17 A. L. R. 1299 at 1328 (1922); 79 A. L. R. 1346 at 1350 (1932); 53 L. R. A. 353 at 362 (1901); 26 L. R. A. (N. S.) 520 at 522 (1910); 16 MINN. L. REV. 808 (1932); 1 WILLISTON, CONTRACTS, rev. ed., §§ 148, 150, 155, 157, 158 (1936).

[7] Ga. Code Ann. (1935), § 20-303: "A good consideration is such as is founded on . . . a strong moral obligation." Natural obligations are declared to be sufficient consideration for a new contract by La. Civ. Code (Dart, 1932), §§ 1758, 1759. In re Atkins' Estate, (C. C. A. 5th, 1929) 30 F. (2d) 761, interpreting this statute, held that a natural obligation was a purely moral obligation not based on any prior legal obligation. Cal. Civ. Code (Deering, 1939), § 1606: "a moral obligation originating in some benefit conferred upon the promisor, or prejudice suffered by the promisee . . . is . . . good consideration for a promise. . . ." See, In re McConnell's Estate, 6 Cal. (2d) 493, 58 P. (2d) 639 (1936), where the code provision was construed to be applicable only where good and valuable consideration had once existed. See also 36 MICH. L. REV. 1010 (1938).

[8] Park Falls State Bank v. Fordyce, 206 Wis. 628 at 635, 238 N. W. 516 (1931), stating, "he ought in morals to do what he knowingly and advisedly gave one acting for his own benefit and to his own hurt to understand he would do"; Estate of Smith, 226 Wis. 556, 277 N. W. 141 (1938); Estate of Schoenkerman, 236 Wis. 311, 294 N. W. 810 (1940), noted 39 MICH. L. REV. 1025 (1941); Fourth National Bank of Cadiz v. Craig, 1 Neb. (Unof.) 849, 96 N. W. 185 (1901). See also Muir v. Kane, 55 Wash. 131, 104 P. 153 (1909), holding broker's services sufficient moral obligation to constitute consideration. See also cases collected in FOURTH DECENNIAL DIGEST, "*Contracts*," § 76 (1937).

[9] Payment of a less sum by a third person's note or obligation and acceptance thereof by the creditor is an extinguishment of the entire debt. Wipperman v. Hardy, 17 Ind. App. 142, 46 N. E. 587 (1897); Brooks v. White, 2 Met. (43 Mass.) 283 (1841); Kellogg v. Richards, 14 Wend. (N. Y.) 116 (1835); Conklin v. King, 10 N. Y. 440 (1853). In Stafford v. Bacon, 1 Hill (N. Y.) 532 (1841), where a creditor accepted the commercial paper of a third person, expressly in satisfaction of the entire

these cases and statutes. Although the language of the court goes far,[10] the facts themselves do not stand for a return to the idea that a pre-existing legal debt, once discharged, is in itself sufficient consideration. They are closely analogous to those in the New York case of *Taylor v. Hotchkiss*,[11] where an accord and satisfaction was effected by substitution of securities at fixed valuation. That court limited its decision to situations where a moral obligation was recognized at the time of the compromise, and was an inducement thereto. On its facts the scope of the principal case seems to be limited to such situations.

DAMAGES — ADDITUR WITH NO OPTION OF NEW TRIAL TO DEFENDANT — Plaintiffs brought separate actions for personal injuries resulting from an automobile collision. The aggregate damages assessed by the jury amounted to $150. Upon motion, the trial court raised this sum to $992.85, granting to the plaintiffs alone the option of a new trial on the question of damages. Plaintiffs accepted the sum fixed by the court. The defendant appealed on the ground that he had been denied the right to trial by jury. *Held*, for the plaintiffs. In a very brief opinion based upon the precedent of *Risch v. Lawhead*[1] the court found that there was no denial of the right to jury trial when a court raised inadequate damages to the lowest sum which a properly instructed jury would probably render, allowing no new trial option to the defendant. *Tollander v. Bonneville*, 240 Wis. 500, 3 N. W. (2d) 679 (1942).

A grossly excessive or inadequate award of damages by the jury is traditionally a basis for a new trial. Remittitur and, to a less extent, additur have been developed as substitutes for new trials by most courts.[2] The use of either of these methods, however, has ordinarily required the giving of an option of standing new trial to the party benefited by the erroneous jury award.[3] In giving

debt, it was held to be a good accord and satisfaction. See cases cited in 41 A. L. R. 1490 at 1494 (1926); 2 CONTRACTS RESTATEMENT, § 421 (1932); 6 WILLISTON, CONTRACTS, rev. ed., §§ 1857, 1860 (1936).

[10] The court states in the principal case, 3 N. W. (2d) at 408, that a moral obligation to pay a pre-existing legal debt is good consideration for the execution of a note and mortgage in its payment.

[11] 81 App. Div. 470, 80 N. Y. S. 1042 (1903), affirmed in 179 N. Y. 546, 71 N. E. 1140 (1904). In this case, a corporation persuaded its creditors to accept certain securities in an attempt to settle their full claim, and further proposed to offer its moral obligation to take the securities back at a fixed valuation of 80 per cent. See also Park Falls State Bank v. Fordyce, 206 Wis. 628, 238 N. W. 516 (1931), where the promisee did not discharge the debtor until given assurance that the debtor would make up the deficit.

[1] 211 Wis. 270, 248 N. W. 127 (1933). There the jury had assessed the damages at $3,000 for personal injuries and the trial court increased them to $4,000, and ordered a new trial unless the plaintiff desired to take the $4,000 as the smallest judgment an "unprejudiced jury would award."

[2] For evidence of the modern trend towards a full use of both additur and remittitur, see 44 YALE L. J. 318 (1934).

[3] The courts reason that it is otherwise a denial of the right of trial by jury. Kennon v. Gilmer, 131 U. S. 22, 9 S. Ct. 696 (1889); Sigol v. Kaplan, 147 Wash. 269, 266 P. 154 (1928); Crawford v. Emerson Const. Co., 222 Iowa 378, 269 N. W.

only the plaintiffs, the parties prejudiced by the jury's award, this option, the court in the instant case has made an important modification of customary procedure. Clearly there has been a marked departure from the right to jury trial, at least in its customary form. This matter the court does not deal with, being of the opinion that it was settled by *Risch v. Lawhead*.[4] In so doing it ignores a later opinion handed down by the United States Supreme Court [5] which stated that both parties had to be given an option in additur cases, for otherwise the court would be making a "bald addition of something which in no sense can be said to be included in the verdict." It may be argued that since the judge is governed in his action by the minimum award of a properly instructed jury [6] and that since there is no radical difference between this process and the directing of verdicts upon the evidence,[7] no substantial advantage of jury trial has

334 (1936); London & Scottish Assur. Corp. of London, England v. Smith, 229 Ala. 556, 158 So. 892 (1935); S. & C. Transport Co. v. Barnes, 191 Ark. 205, 85 S. W. (2d) 721 (1935); Blackmore v. Brennan, 43 Cal. App. (2d) 280, 110 P. (2d) 723 (1941). Also, see annotations: 53 A. L. R. 779 (1928); 95 A. L. R. 1163 (1935). In Watt v. Watt, [1905] App. Cas. 115, a remittitur case, the court required both the plaintiff and defendant to consent to a reduction of verdict by the court as a substitute for jury trial. Of course, with liquidated damages the courts have had little difficulty with options, but allow the entry of an absolute decree since any correction is merely a matter of computation. A few courts on occasion have ignored the matter of options, in case of unliquidated damages, and merely entered an absolute increase or decrease of the damages. Thus, in Bass v. Peterson, 168 Va. 273, 191 S. E. 519 (1937), the court said that the trial court may enter the amount of damages for personal injuries when what the jury found is inadequate and there is no conflicting evidence as to the extent of the injuries. Also, Gable v. Bingler, 177 Va. 641, 15 S. E. (2d) 33 (1941); Dierks Lumber & Coal Co. v. Noles, 201 Ark. 1088, 148 S. W. (2d) 650 (1941); Southall v. Smith, 151 La. 967, 92 So. 402 (1922).

[4] See note 1, supra.

[5] Dimick v. Schiedt, 293 U. S. 474 at 486, 55 S. Ct. 296 (1935). The majority opinion distinguished remittur and additur. It was felt that in the former case the verdict, even though reduced by the court, still originated from the jury while in the latter case the court by itself manufactured at least a portion of the verdict. This distinction is criticized in 20 CORN. L. Q. 342 (1935). To the effect that the defendant alone should have the option in additur cases and not both parties, see 32 MICH. L. REV. 538 (1934).

The decision of the United States Supreme Court was not binding upon Wisconsin, since state courts are not controlled by the Seventh Amendment to the Federal Constitution. Walker v. Sauvinet, 92 U. S. 90 (1876); Pearson v. Yewdall, 95 U. S. 294 (1877). At the same time it might very well have had a persuasive effect on the court in the instant case in interpreting Article 1, § 5 of the Wisconsin Constitution guaranteeing the right to jury trial in cases at law unless waived by the parties.

[6] This reasoning was employed in Risch v. Lawhead.

[7] ". . . a directed verdict is proper when it is plain that a contrary verdict cannot be allowed to stand. . . ." 31 AM. JUR. 561 (1940). A directed verdict does not deny the right of trial by jury. 35 C. J. 241-242 (1924). Also, see 17 TENN. L. REV. 250 (1942).

been denied.[8] Such arguments appear somewhat strained, however.[9] In spite of its shortcomings, the decision has its practical advantages in a facilitating of the judicial process.[10] The practice of the Wisconsin court will doubtless become more common and will quite likely be further developed.[11]

[8] ". . . it should not be taken as indicating a tendency to invade or narrow the functions of the jury, but rather as indicating that our jurisprudence is still developing toward that ideal of perfection where the administration of the law is truly the administration of justice." Baxter v. Chicago & N. W. Ry., 104 Wis. 307 at 336, 80 N. W. 644 (1899), and cited in Campbell v. Sutliff, 193 Wis. 370, 214 N. W. 374 (1927).

[9] An undeniable element of discretion is left in the trial judge, for, especially in the field of torts, the standards for the measurement of damages are far from fixed. See MCCORMICK, DAMAGES, § 6 (1935).

[10] "The consequence [of awarding new trials] has been to prolong litigation, to swell bills of cost, to delay final adjudication, and, in a large number of instances, to have such excessive judgments repeated over and over, upon the new trial." Alabama Great Southern R. R. v. Roberts, 113 Tenn. 488 at 493, 82 S. W. 314 (1904).

[11] If the view of Dimick v. Schiedt, 293 U. S. 474, 55 S. Ct. 296 (1935), is not followed, and there is good authority for not following it, it might not be necessary for the Wisconsin court to give any option whatever. See Sunderland, "The Scope of Judicial Review," 27 MICH. L. REV. 416 (1929), where the author states that in the interest of decreasing cost and uncertainty, it even would be desirable to confer upon trial and appellate courts the power to revise directly the award of damages.