

1961

Ray Tanner v. Utah Poultry and Farmers Coop., George Rudd and Charles P. Rudd : Petition for Rehearing

Utah Supreme Court

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Recommended Citation

Petition for Rehearing, *Tanner v. Utah Poultry & Farmers Cooperative*, No. 9270 (Utah Supreme Court, 1961).
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IN THE SUPREME COURT
of the
STATE OF UTAH

RAY TANNER,

Plaintiff and Appellant,

vs.

UTAH POULTRY & FARMERS
COOPERATIVE, a corporation,
GEORGE RUDD AND CHARLES
P. RUDD,

Defendants and Respondents.

FILED
JUN 28 1961

Clerk, Supreme Court, Utah
Case

No. 9270

PETITION FOR REHEARING

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INDEX

	<i>Page</i>
BRIEF ON PETITION	2
AMBIGUITY IN THE RELEASE.....	3
IF IT IS NECESSARY TO LOOK BEYOND THE RE- LEASE FOR ITS INTERPRETATION, THE SEC- ONDARY EVIDENCE IS ALREADY BEFORE THE COURT.	6
ADDITIONAL CONSIDERATION TO UPHOLD RELEASE	12
A—Defendants Performed an Act Not Obligatory.....	13
B—Benefit to Plaintiff.....	14
PAYMENT OF CONCEDED PART OF CLAIM AS CONSIDERATION.	18
SETTLEMENT OF A DISPUTED CLAIM AS CONSIDER- ATION FIFTH CAUSE, FOR \$4,000 MORE THAN PAID.	23
THIS COURT'S REVERSAL IS TOO BROAD	25

CASES CITED

Ashton v. Skeen, 85 Utah 489, 39 P. 2nd 1073 at 1076.....	23
Brooks v. White, 2 Met. 283, 37 Am. Dec. 95.....	15
Browning v. Equitable Life Assurance Society, 94 Utah 532, 72 P. 2nd 1060 at 1068.....	23
Chicago, M. & S. P. Railway Co. v. Clark, 178 U.S. 353, 44 L. Ed. 1099.....	14

INDEX

	<i>Page</i>
Continental Bank v. Bybee (6 Utah 2nd 98, 306 P. 2nd 773)....	6
Fuller v. Kemp, 138 N.Y. 231, 33 NE 1034.....	24
Johnson v. Brannan, 5 Johns. 268, 271.....	14
Pinnel's Case, 5 Coke 117a, 77 Reprint 237.....	16

TEXT BOOKS CITED

1 Am. Jur., Section 53, page 245.....	15
1 Am. Jur., Section 60, page 249.....	24
1 Am. Jur., Section 64, page 251.....	19-23
12 Am. Jur., Section 80, page 574.....	13
1 Corpus Juris Secundum, page 496.....	16
1 Corpus Juris Secundum page 513.....	19-23
1 Williston on Contracts, Revised (8 vol.) Ed., Section 121, page 423	13-17
1 Williston on Contracts Revised (8 vol.) Ed. page 439.....	19-23
1 Williston on Contracts, (1936 Ed.) P. 437 and 438.....	24

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PETITION FOR REHEARING

Come now the Defendants and Respondents and respectfully move this court for a rehearing on the appeal herein and the decision on the same and urge the following error in support of the motion.

1. There was no ambiguity in the Release.
2. If it is necessary to look beyond the Release for contemporaneous writings relating to its meaning, those are already before the court in the cover letters admit-

ted in the answers to the defendants' Interrogatories to the plaintiff.

3. There is additional consideration to uphold the Release.

4. Payment of the conceded part of an unliquidated or disputed claim is consideration.

5. The \$4,000 sued for in the fifth cause of action establishes that the claim was disputed.

6. The court's reversal is too broad — while holding that the Release is limited to the 1951 crop, the Court reverses the judgment of the lower court and allows the plaintiff to sue for \$4,000 more for that crop.

BRIEF ON PETITION

It is with considerable trepidation that this motion for a rehearing is submitted because the decision sought to be reconsidered was a unanimous one and because five judges of wide experience, learning and integrity united in that decision. But it is thought that there is vital evidence for which the case is being sent back to the lower court, that is now before this court and which has been overlooked. And the engaging thought that this case can be disposed of by the fact that the consideration, which the plaintiff received was only what he was

entitled to, does not solve the problem because such consideration is actually held to be sufficient and adequate as noted by Williston and other authorities.

For a reappraisal of these matters this motion for rehearing is submitted.

AMBIGUITY IN THE RELEASE

The court concludes that there was ambiguity in the Release because it was stated therein that the \$9,350.06 was the balance owing under the marketing of the 1951 crop of turkeys and this court then says that:

“ . . . This would suggest that the release deals with the obligations of the Cooperative arising out of its marketing Tanner’s 1951 crop of turkeys.’ (First paragraph at the top of page 2 of the decision.)

As the court says in the next sentence that, while the release does not confine its scope to the 1951 operations,

“it clearly suggests that such was the intention of the parties.”

The Release expressly covers a discharge from:

“any and all debts, claims, demands and accountings of whatsoever name, nature and description. . . .”

It covers all debts, all claims, all demands and all accountings. Then to make it more certain that everything was included, there is added,

“... of whatsoever name, nature and description.” Isn’t the statement in the court’s opinion; “While the words dealing with the Release do not confine it strictly to the obligations arising out of the 1951 marketing. . . .” a gross understatement? Do the words “any and all debts” etc, confine the meaning at all? Do those words restrict the meaning in any way? Of course, they don’t.

The only restriction, the only confinement that is found in the Release follows these boundless, all embracing words:

“of whatsoever name, nature and description” when there is added:

“excepting only that I reserve the right to receive as the same may become due, whatever sums may be paid from time to time under the certificates of interest issued to me and under the letters to me from the Cooperative advising me that certain credits have been retained.” (Emphasis added.)

“Excepting Only”. That is the only restriction found in this broad, limitless Release. Where in the words which follow “*Excepting Only*” is there any confinement of those all inclusive words “*any and all debts, claims, demands and accounting*” to claims arising from the

marketing of the 1951 crop? There is no confinement, no restriction and no reservation “*excepting only*” the right to receive any future payments made on certificates of interest already issued and retains described in advises of credit.

How could it have more clearly stated that “*any and all debts*” meant all debts and not just those for 1951? Would the addition of the words “from the beginning of time to the present” really have added anything to “*any and all debts*”?

Does this court want to go on record that it is necessary to add “from the beginning of time to the present” in order to make a release of “all debts” mean what it says—“all debts”? Especially when the broad, all-inclusive words are followed by:

“... excepting only ...”

and the claims excepted from this broad, all-inclusive language do not name the claims arising from dealings in prior years.

The holding of this court that so clear-cut a statement as “any and all debts . . . of whatsoever name, nature and description excepting only. . . .” is ambiguous, is to cloud the law of this state and will force this court, in future decisions, to qualify such holding until it is eroded away and it is finally adjudged that the release

of “all debts . . . of whatsoever name, nature and description” means exactly what it says.

IF IT IS NECESSARY TO LOOK BEYOND THE RELEASE FOR ITS INTERPRETATION, THE SECONDARY EVIDENCE IS ALREADY BEFORE THE COURT.

This court, after holding the words, “. . . any and all debts . . . of whatsoever name, nature and description. . . .” are ambiguous and might mean only those arising from the 1951 crop, says that other evidence of the intent is admissible and cites *Continental Bank v. Bybee* (6 Utah 2nd 98, 306 P. 2nd 773). There this court held that if the instrument was ambiguous and the uncertainty could not be cleared up within the “four corners of the instrument itself” that evidence should be admitted of “other contemporaneous writings concerning the same subject matter” (306 P. 2nd 775).

It is not necessary to send the case back to ascertain these facts nor that intent. The lower court summarized its findings on this subject in paragraph numbered 2 of the findings—portion of its written judgment and particularly in subparagraphs j and k of paragraph 2. This court has all that evidence before it now.

In the letter to the plaintiff dated September 2, 1952 (Tr. 110) it was stated that the settlement (un-numbered sheet between Tr. 98 and 99) on the 1951 crop

was enclosed and explained it. Then reference was there made to plaintiff's letter of August 25, 1952 (Tr. 100) demanding the right:

“... to inspect the records concerning all business transactions between the Association and myself for the past *three years*. . . .”; (emphasis added.)

and threatening:

“to institute the necessary proceedings in a court of law to obtain the records. . . .

“It is my sincere desire that you respond as requested upon receipt of this demand; thus avoiding expenses and unnecessary litigation.”

Returning again to the letter of September 2, 1952 (Tr. 110) addressed to the plaintiff on behalf of the defendants, attention is called to the fact that:

“You have had your auditors inspect our records on two occasions for a total of three or four days in all and on each one your auditors were given access to all of the records they desired. . . . However, in view of the accountings furnished from time to time to your attorneys and the records made available to your different auditors on their inspections, I believe that you will agree with me that the blanket demand to be subject to audit is not timely. If, however, there is information to which you are entitled, with which you have not been favored, it will

be furnished upon request, or your auditors will be permitted to inspect the records. We will, therefore, await your further word on this point.

“Under the circumstances, I believe that we should ask that you satisfy yourself as to the completeness and honesty of our accounting before we pay the balance of the funds due you under such accounting. I am therefore asking the Bank to present a receipt for your execution if you are to use the check, a copy of which receipt is enclosed herewith.

“If you are willing to accept the check under these limitations, please do so, or if you do not, please return the check to the Cooperative.”

Another contemporaneous written instrument was a letter (Tr. 112) to the Farmers and Merchants Bank, also of September 2, 1952 in which the \$9,350.06 check, payable to the plaintiff and to the bank, was enclosed. Reference is made to the “several demands for accounting from us. . . .” made by Mr. Tanner and the end of the second paragraph reads:

“But so that this matter may be at rest, I am enclosing a Release for his signature.

“Please do not cash the enclosed check or deliver the same to Mr. Tanner until he has executed the enclosed Release in duplicate. Upon such execution, please have it witnessed and forward both copies thereof to me, and deliver the

check. If Mr. Tanner refuses to execute the Release, please return the check to me.”

The plaintiff, in his answer to our Interrogatory No. 24, admits that he received a copy of this letter to the bank.

If there is need for further examination of contemporaneous communications between the parties, there are the two reports of the auditors of the plaintiff, one (Tr. 103) dated August 21, 1952 (four days before the pre-emptory demand by plaintiff for all of our records for the last three years and the threat of litigation if they were not furnished) in which Mr. Mann stated that the investigation on which he was then reporting covered the 1949 crop and the report of the investigation is set forth quite at length. This report ends with the caution:

“More work by me for your account should not be done, in my opinion, until you have had time to think over the information in this letter and we have met and talked further with Mr. Lamoreaux who is getting a copy of this letter.”

And then there is the final report (Tr. 105) dated one month after the defendant's tender of the Release and the \$9,350.06 in which Mr. Mann begins:

“Having spent quite some time at the office of the Utah Poultry and the Utah Ice it is my

feeling I had better report my findings to date and let you decide the future course.

“Utah Poultry supplied me with all inventories and supporting data for the three years, 1949, 1950, and 1951. When I saw the amount of work involved in checking the items out, I decided to concentrate on 1950 at present, as I told you over the phone.”

Then follows a detailed report concerning the results of investigation of the 1950 crop and again there is the caution in the closing sentence of the report (Tr. 109):

“Perhaps you will want to have a meeting now with Mr. Lamoreaux and myself to discuss possible further procedures.”

Other contemporaneous letters which throw light on this include the one from Mr. Lamoreaux to the plaintiff dated August 11, 1952 (Tr. 120) wherein the plaintiff's attorney reports concerning the three crop years—1949 to 1951. This attorney for the plaintiff closes his letter with the somber statement:

“It is my judgment that they will give something of an accounting next week after which time we will have something tangible *upon which to proceed.*” (Emphasis added)

If a still wider investigation is sought for contemporaneous writings, then see the letter from the attorney for

the plaintiff, Mr. Brockbank, dated June 24, 1952 (Tr. 116) in which this attorney accepts the defendant's statement that the plaintiff did not market his turkeys through the defendants, but sold his 1949 crop of turkeys outright to the Utah Poultry. Plaintiff's attorney then asks for information concerning the 1950 and 1951 crops and specifically when and to whom they were sold and the charges made for processing, eviscerating, storage, interest and insurance.

All of this information was before the lower court when it reached the conclusion that the release applied to all claims, not just those relating to 1951. This same information is available to this court and clearly shows what the issue was between the parties—that the defendants wished to get through with the agitation and threat of litigation and to lay at rest all matters between the parties.

If further evidence is needed by the court to definitely ascertain that “. . . . any and all debts of whatsoever name, nature, and description. . . .” in the Release meant just what it said, and not the mere 1951 crop, observe the five weeks that intervened between the dispatch of this \$9,350 check and its acceptance. And during that five weeks, the plaintiff sent his auditors in, not to check out the 1951 records as this court felt might be the case, but the 1950 records, as evidenced by Mr. Mann's report of October 2, 1952 (Tr. 105).

This was not a Release which was accepted without adequate counsel, for plaintiff was being advised not only by Mr. Brockbank (Tr. 116) but also by Mr. Lamoreaux, who reported to Plaintiff on August 11, 1952 (Tr. 120) and to whom reference is made by the auditor in his two reports (Tr. 104 and Tr. 109). Both of these attorneys were furnished copies of the two letters of September 2, 1952 (See bottom of Tr. 111 and Tr. 112 for notations of persons to whom copies were sent).

It is respectfully submitted that the Release is not ambiguous but that “. . . and all debts . . . of whatsoever name, nature and description . . .” means exactly what it says and that this is borne out by the contemporaneous writings by the parties during the period in question, and by the failure of the plaintiff to add to the exceptions from the scope of the Release, claims which arose from earlier years’ transactions, if he or his lawyers had in mind that they were holding out claims additional to those specifically mentioned in the Release as being excepted from the terms thereof.

ADDITIONAL CONSIDERATION TO UPHOLD RELEASE

In addition to the settlement of an unliquidated and of a disputed claim, there is other consideration which courts have frequently used to sustain releases.

A

DEFENDANTS PERFORMED AN ACT NOT OBLIGATORY

In 12 Am. Jur., Section 80, page 574, it is stated:

“Performance of an act by a promisee which he is not legally obligated to perform is sufficient consideration for a promise, since it is a legal detriment irrespective of whether it is an actual detriment or loss to him.” See 1 Williston, Contracts Revised (8 vol.) Ed. Sec. 121, page 423.

Defendants were under no obligation to pay the \$9,350.06 to plaintiff until a release of the Bank's second mortgage had been furnished to defendant. There was no duty to issue a check with the names of both the plaintiff and the bank (as was done—see fourth paragraph of the letter of September 2, 1952, from Defendants to Plaintiff, Tr. 110) and to make the same available to plaintiff. But defendants did so in conjunction with their offer to release that check to the plaintiff and the bank upon the execution and delivery of the Release in question. That offer was accepted by plaintiff by executing and delivering the Release.

There was sufficient and adequate consideration to sustain the Release in question.

BENEFIT TO PLAINTIFF

In the much quoted U. S. Supreme Court case of Chicago, Milwaukee & St. Paul Railway Co. v. Clark, 178 U. S. 353, 44 L. Ed. 1099 this authority, after stating that the compromise of a liquidated, undisputed claim by the payment of a smaller sum is unavailing as consideration for a release, goes on to add that while this rule is well settled,

“ . . . it is considered so far with disfavor as to be confined strictly to cases within it” (44 L. Ed. 1105, middle right column 178 U. S. 365, top);

and just below this quote, the court adds:

“In Johnson v. Brannan, 5 Johns. 268, 271, it was referred to as ‘that rigid and rather unreasonable rule of the old law’”;

and further quotes from cases critical of such a rule where, in one of them, Mr. Justice Nelson of the Supreme Court of New York said of the rule that it:

“‘. . . is technical and not very well supported by reason. Courts therefore have departed from it upon slight distinctions.’” (end of the paragraphs just referred to, 44 L. Ed. 1105, 178 U. S. 365)

And the Supreme Court in the Clark case further quotes from *Brooks v. White*, 2 Met. 283, 37 Am. Dec. 95, where the Massachusetts court criticizes the doctrine and states:

“Hence judges have been disposed to take out of its application all those cases where there was any new consideration, or any collateral benefit received by the payee, which may raise a technical legal consideration although it was quite apparent that such consideration was far less than the amount of the sum due.” (44 L. Ed. 1105, 178 U. S. 365, end of page in both)

In 1 Am. Jur., Section 53, page 245, this exception to the general rule is treated thusly:

“In a number of instances, it has been held, in the case of a liquidated demand, that the giving of the debtor’s negotiable note or check to the creditor is a benefit to the latter, and that therefore, if the creditor receives the debtor’s note or check for an amount less than is owing in full satisfaction of his claim, it is a good accord and satisfaction.” (Citations)

This authority then discusses some cases critical of the doctrine just referred to and then at the bottom of the same page, discusses the consideration as follows: (1 Am. Jur. p. 245)

“From a practical standpoint it would seem almost self-evident that the note is of less value than the cash, yet this might not always be true, as where the note bears interest. But the reason

why the note might constitute a good consideration, while the cash might not, is the same as that given by the courts where a chattel, which may be of little value, is the consideration for the discharge. The courts will not go into the question of the value of the consideration in the latter class of cases, but will assume that the chattel had a value to the creditor sufficient to support the agreement, else he would not have made it."

In 1 C.J.S. at page 496, it is said:

"Even where the rule [of Pinnel's Case, 5 Coke 117a, 77 Reprint 237] is firmly established, however, it is regarded with disfavor having repeatedly been criticized as technical, harsh and of doubtful validity, and it is accordingly followed with reluctance in many instances and is strictly confined by the courts to cases falling within its terms and reason. Moreover, a number of exceptions to the rule are recognized. . . . and it has been said that the modern tendency of the courts is to enlarge the exceptions, in order to avoid the harshness of the rule and to carry settlements, adjustments and compromises into effect."

In addition to the consideration arising from the settlement of a dispute and the settlement of an unliquidated debt, there is this consideration in defendants' offer which plaintiff accepted:

The plaintiff had mortgaged this crop of turkeys to the Farmers and Merchants Bank of Provo, as indicated in the letter to Defendants (Tr. 110).

Their's was a second mortgage. The Farmers and Merchants Bank of Provo is the one so named in the letter (Tr. 112), a copy of which plaintiff admits receiving in his answer to Interrogatory No. 24. It was to that bank that the check and Release were sent.

Defendants were under no obligation to pay over the \$9,350.06 surplus arising from the sale of the 1951 turkeys, to either plaintiff or the bank. Until the latter two, jointly, made demand for the money, specifying the proportion to which each was entitled or plaintiff and the bank litigated their respective claims, defendants could only pay at their peril.

The defendants tendered payment of the \$9,350.06 on multiple-payee check if the Release in question was signed by plaintiff (Tr. 111 and 112.) Plaintiff accepted the offer and signed the Release.

The Plaintiff benefited:

a. by getting immediate payment of \$9,350.06 instead of suffering a delay until the matter could be litigated or proof produced to satisfy as to the respective rights of the parties in the surplus, that is, by paying before it was due (Note 2, 1 Williston on Contracts, Section 121, page 423), and

b. by avoiding the necessity of litigating the issue as to what was due Bank and what was due Plaintiff, and

c. by avoiding the necessity of going to the bank and then to defendants to get this sum.

Even though the court should hold that the settlement of the dispute between the plaintiff and defendants as to whether the amount owing was \$9,350.06 as claimed by defendant or \$4,000 more than that as claimed by plaintiff in his fifth cause of action, was insufficient consideration, and even though the court should hold that the settlement of the unliquidated amounts as to the sums received on each of the sales, as to the charge for each hundreds of purchases of supplies, and as to the charges for processing, eviscerating, freight, storage, etc., was not consideration, yet there was consideration for the Release in the tender of a check for the \$9,350.06.

PAYMENT OF CONCEDED PART OF CLAIM AS CONSIDERATION

Payment of the conceded part of a disputed or unliquidated claim is generally held to be valid consideration for a release of the entire claim.

“On the other hand, the tendency of the later cases, evidently influenced by a desire to avoid

the rigid and unjust rule of the old law, seems to be to sustain the discharge where there is a dispute as to any part of the claim made by the creditor, although the payment is only of the smaller amount which was conceded by the debtor to be due. In other words, the general rule that acceptance of a part of an indebtedness with a promise to discharge the whole is not binding does not apply where there is a dispute as to whether a larger or smaller amount is due, although the payment upon receipt of which the promise to release is made is only the smaller amount conceded to be due." (1 Am. Jur. sec. 64, page 251)

"Not infrequently though a claim is unliquidated, or the subject of a bona fide and reasonable dispute, it is conceded that at least a certain amount is due. It might seem that in paying this conceded part of the claim, or any lesser amount, *the debtor was merely doing what he was previously bound to do*, and that, therefore, the payment could not be valid consideration and some courts so hold. The majority, however, looks at an unliquidated or disputed claim as a whole and so looking at it, does not attempt to set a value upon it, or to define the extent of the debtor's legal obligation. Accordingly, such a claim is dealt with as a horse is dealt with, as something the adequacy of which as consideration will not be measured; and the payment of the amount admittedly due will support a promise to discharge the whole claim." (1 Williston on Contracts Revised (8 vol.) Ed. p. 439) See also 1 CJS 513.

Plaintiff and defendants could have agreed, when contracting initially, that the amount which the defendants would pay plaintiff for his turkeys would be \$9,350.-06 but they did not do so because no one knew the number or sales price of the turkeys nor the amount nor price of the feed to be fed and supplies required nor the amount of the charges for processing, eviscerating, storage, freight, etc. So the claim was unliquidated during the time the turkeys were being fed, killed, processed, etc. When did it become liquidated? Only when defendants accounted and the plaintiff accepted (agreed to) the accounting. Was there an acceptance of the accounting prior to the execution and delivery of the Release? There was none. As argued in more detail below, there was no time when the plaintiff was legally bound by the accounting until he delivered his executed Release and received his money. Until that moment, the obligation between the parties was unliquidated.

This court says at the conclusion of the last long paragraph at the end of the opinion:

“The payment being for the exact amount which the parties had agreed was owing to plaintiff from the marketing of his 1951 turkeys, there was no consideration given for the release of any other liability owed to plaintiff.”

As pointed out above, the authorities agree that payment of only the portion of the claim conceded by the one

paying, is sufficient consideration if the claim is either disputed or unliquidated. The obligation between the parties was both unliquidated in many particulars (sales price of the turkeys on each of many sales at varying prices, purchase price of the hundred odd lots of feed and supplies charged against this herd, the terms of the contract as to defendants' right and obligation to sell, the amount charged for hauling to the plant, for killing, processing, eviscerating, storage, insurance, freight, etc.) and also disputed (as to the \$4,000 claimed to be owing on the 1951 crop and as to the threats of litigation which were actually made by plaintiff and implied in the audits and the demands of the attorneys).

May we ask the court *when* the parties "... had agreed [what amount] was owing ..."? Plaintiff had not agreed that \$9,350.06 was owing at the time he sent his auditor, Mr. Mann in to make the last examination which was reported (Tr. 105) one month after the defendants offered plaintiff the \$9,350.06 in full settlement of "any and all claims . . . of whatsoever name, nature and description. . . ." There was no agreement until plaintiff accepted defendants' offer by delivering the executed Release and received the check. Until that moment the claim was unliquidated.

Until plaintiff delivered the executed release in exchange for the check in liquidation of "any and all claims . . . of whatsoever name, nature and description"—until that moment plaintiff could have refused to agree

to accept the \$9,350.06 as full payment. He could have claimed an additional \$4,000 for which he is now suing in the fifth cause of action, or questioned the prices obtained for his turkeys or the charges for feed, supplies, hauling, processing, eviscerating, storage, insurance, taxes or freight.

Until he accepted defendants' offer by the delivery of the executed Release and accepted the \$9,350.06, there was no liquidation of this unliquidated obligation. He could have gone to the Bank, signed the release and, as he handed it over and reached for the check, he could have changed his mind and refused to accept the offer to liquidate, by refusing to deliver the release and sued for the \$9,350.06 and the \$4,000 he now claims is owing; or sued for not \$9,350.06, but \$20,000 or \$30,000 or more. Could we have successfully defended such suit by showing that there was an agreement between the parties that the amount owing was \$9,350.06? When did plaintiff so agree? He didn't. In the illustration, he was about to agree but he changed his mind and on trial we would have to prove each sale and the price received therefor and each charge for feed, eviscerating, taxes, freight, etc. And on the other hand, defendants could show any new calculation that reduced its obligation below \$9,350.06 and the plaintiff could show our indebtedness was \$1,000 or \$50,000.

Since the obligation was unliquidated (and also because it was disputed) the payment of the conceded part was ample consideration for the Release in bar of the present action. This is in accordance with the authorities (1 Am. Jur. Sec. 64, p. 251; 1 Williston p. 439; 1 CJS 513) cited and quoted above. And this is true because there was no agreement liquidating the \$9,350.06 as the total amount owing, until the offer to so agree was accepted by the delivery of the executed release.

SETTLEMENT OF A DISPUTED CLAIM AS CONSIDERATION FIFTH CAUSE, FOR \$4,000 MORE THAN PAID

The settlement of a disputed claim is generally recognized as consideration for an accord and satisfaction.

“Settlement of an unliquidated or *disputed* claim, where the parties are apart in good faith presents such consideration.” *Browning v. Equitable Life Assurance Society* 94 Utah 532, 72 P. 2nd 1060 at 1068 (emphasis added), *Ashton v. Skeen*, 85 Utah 489, 39 P. 2nd 1073 at 1076.

“Where a claim is not a money demand, or, if so, is unliquidated, or, if liquidated, there is a bona fide dispute as to the sum actually due, or a bona fide doubt or controversy exists as to whether anything is due then an accord and satisfaction may be established and held binding, although there is a payment of a sum less than that

claimed by the creditor, or even a sum less than that which, on an actual computation, might be found due to the creditor." 1 Am. Jur. Section 60, p. 249.

"A disputed claim may be either liquidated or unliquidated. A claim of A against B for \$5, admittedly lent by A to B, but concerning the payment of which there is a dispute, is a disputed claim; but the amount of the claim, if it exists at all, is fixed. As the amount of an unliquidated claim is unknown, and as either the existence or the amount of a disputed claim is unknown, whether a claim is unliquidated or disputed, it comes under the rule generally applicable to consideration, that the law, where it can avoid doing so, will not attempt to put a value on a consideration agreed upon by the parties. The surrender of a disputed claim, whether unliquidated or liquidated, if the dispute is honest and not obviously frivolous is, therefore, consideration which the law cannot attempt to value. Accordingly, any sum given and accepted as consideration for an agreement to discharge a claim which is unliquidated or the subject of bona fide and reasonable dispute is sufficient consideration." 1 Williston on Contracts (1936 Ed) p. 437 and 438. See Fuller v. Kemp, 138 N.Y. 231, 33 N.E. 1034.

The plaintiff received the payment of \$9,350.06 but now claims (in the fifth cause of action of the case at bar) that \$4,000 more is owing. In other words, plaintiff is claiming that the amount owed was not \$9,350.06 but \$13,350.06. Defendants offered and plaintiff accepted

\$9,350.06 in full payment of this disputed claim. The release was given to evidence the accord and satisfaction of this disputed claim.

Courts have always encouraged men to settle their differences without court assistance if possible. The release in the case at bar was such a settlement, one entered into advisedly — while the plaintiff's two attorneys looked on. The release should be upheld.

“The payment and acceptance of a lesser amount than is claimed by a creditor may constitute a good accord and satisfaction of the whole claim, where it is unliquidated or in dispute, even though the creditor was not bound to make any reduction in his claim, or the amount paid is no more than the debtor concedes to be due.”
1 CJS 512.

In view of the claim for \$4,000 additional on the fifth cause of action, it is inescapable that the amount owing on the 1951 crop was in dispute. Because it was in dispute, the payment of the \$9,350.06 and the acceptance of it was sufficient consideration for the Release and the same should be upheld and the judgment of the lower court, sustained.

THIS COURT'S REVERSAL IS TOO BROAD

This court concludes that the Release applies only to the 1951 crop.

“... the release was only of liability arising out of the 1951 marketing of turkeys” (Third line from bottom of the third paragraph from the end of the judgment of February 9, 1961).

If the Release applied to 1951, then the discharge claimed by defendants applied to the debt sued on in the fifth cause of action. There it is claimed that \$4,000 more is owing on the 1951 crop than was paid. If, as held by this court, the Release applied only to the 1951 crop, it still was a release of liability for that crop and a bar to the fifth cause.

It is submitted that the judgment of this court should sustain the court below so far as concerns the fifth cause of action.

It is respectfully submitted that:

1. The judgment of the lower court should be sustained because

a. If there is ambiguity in a release from “any and all debts . . . of whatsoever name, nature and description” it is cleared up by the exception which follows but does not exclude any claims for prior years.

b. If resort need be to contemporaneous writings, they are before the court in the other letters admitted by plaintiff.

c. There is additional consideration for the Release since giving the multiple-payee check and making the funds immediately available without a showing by the second mortgagee of its interest and without requiring litigation through suing both the bank and plaintiff and paying the money into court.

d. The payment of the *conceded* part of a disputed or unliquidated claim is consideration for the Release.

e. The settlement of a disputed claim is consideration for the Release.

f. The settlement of an unliquidated claim is consideration for the Release.

g. The holding that the Release applied only to the 1951 crop and the reversal of the judgment sustaining Release as to the 1951 crop are inconsistent.

Respectfully submitted,

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