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THE PRESENT STATUS OF THE RULE IN PINNELL'S CASE

JOSEPH GOLD*

The rule that the promise to pay part of a debt or the payment of part cannot be consideration for a discharge of the whole debt has been referred to by Street as one of the "greatest mysteries of the common law."¹ This rule is often referred to, particularly in England, as the Rule in *Pinnel's Case*.² For convenience it will be referred to in this way here, although that case did not as part of the *ratio decidendi* involve any such principle.

There was much discussion in the Year Book period of the question whether the payment of part of a debt could constitute satisfaction of the whole debt where part had been accepted by the creditor on that understanding.³ Since medieval lawyers insisted that things be dissolved as they be contracted, it was necessary to find a *quid pro quo*,⁴ and there could obviously be no *quid pro quo* in the payment of part of a debt. This was not, however, a doctrine of consideration. It was a principle of satisfaction, and *Pinnel's Case*, which contains an obiter statement of the rule, raised no question of consideration. In fact, in a later case⁵ Coke carefully distinguished between the requirements of consideration and satisfaction, holding that a promise to pay part of a debt could be consideration for a promise to give a full discharge. There were some cases, some as late as the end of the eighteenth century, which adopted this view, either because there were mutual promises which were consideration

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¹ Foundations of Legal Liability, ii, p. 89.

² (1602) 5 Co. 117a.

³ Y. B. 33 H. VI. 47. 32 (1455). Y. B. 10 H. VII. 4. 4 (1495). Perkins, Profitable Book, s. 749. See also Anon. (1563) Dal. 49. Anon. (1588) 4 Leo. 81. Penny v. Core (1602) Moore 677.

⁴ See Viner's Abr., Accord. A, pls. 2, 3. Y. B. 33 H. VI. 47. 32 (1455). Y. B. 34 H. VI. 43, 4 (1456). Y. B. 9 E. IV. 19. 21 (1470). Y. B. 16 E. IV. 9. 5 (1477). Y. B. 16 E. IV. 11. 11 (1477). Y. B. 12 H. VII. 14. 2 (1497).

⁵ Bagge v. Slade (1617) 3 Bulst. 162.

for each other, or because prompt payment of part was an advantage to the creditor.⁶ These cases did not prevail. The earlier decisions were misinterpreted as denying the presence of consideration,⁷ and in the nineteenth century the rule became established as one of consideration.⁸ Another consequence of this confusion was the assumption, also now established as law, that there can be no satisfaction without consideration.

There has been much criticism of the principle. It is rarely mentioned without contemptuous reference to its disregard of the realities of modern commercial life. It is said to be based on the fallacy that money has a fixed value, whereas this is far from true, whether it be considered from the point of view of the creditor or of the open market.⁹ It has also been objected that the rule fosters bad faith, and that it leads to the patent absurdity that a promise to pay 99 cents in the dollar is no consideration, but a promise to pay one cent and give a canary or tomtit is consideration.¹⁰

As a result of their extreme dislike of the rule, courts have been eager to discover a consideration in some benefit or possibility of benefit to the creditor, often of a highly fanciful character. There is a Massachusetts case which is the *reductio ad absurdum* of the rule and its encrustation of exceptions.¹¹ A creditor had distinct judgments against a husband and wife. The wife agreed to pay an amount less than her own debt in satisfaction of the two judgment debts. This sum was not apportioned between the two debts. The Court pointed out that if this money had been paid in discharge of her debt only, there would have been no satisfaction, but since she had paid in respect of her own debt and that of her husband, on which she was not liable, there was sufficient consideration for the creditor's promise of a discharge. There is a more common

⁶ Reynolds v. Pinhowe (1595) Cro. El. 429; Goring v. Goring (1602) Yelv. 11; Johnson v. Astell (1667) 1 Lev. 198; Monger v. Kett (1701) 12 Mod. 558; Rose v. Rose (1756) 1 Amb. 441; Heathcote v. Crookshanks (1787) 2 T. R. 24; Stock v. Mawson (1798) 1 B. & P. 286, 290-291.

⁷ Richard's & Bartlet's Case (1854) 4 Leo. 81; Greenleaf v. Barker (1590) Cro. El. 193; Covill v. Geffery (1620) 2 Rolle 96.

⁸ Fitch v. Sutton (1804) 5 East 230; Foakes v. Beer (1884) 9 App. Cas. 605.

⁹ Foakes v. Beer (1884) 9 App. Cas. 605, per Lord Blackburn; Ebert v. Johns (1903) 206 Pa. 395, 398, 55 Atl. 1064.

¹⁰ Couldery v. Bartrum (1881) 19 Ch. D. 394, 399.

¹¹ Barnett v. Rosen (1920) 235 Mass. 244, 126 N. E. 386.

type of case which involves an almost equal absurdity. To take one example, a Connecticut decision. The debtor owed \$300, for which the creditor brought an action. The debtor agreed to pay \$150 and the costs and expenses of the action in full discharge of the debt. The costs and expenses together amounted to \$18. It was held there was consideration in these circumstances, because the expenses included the amount payable to the plaintiff's attorney for his services, which could not have been recovered from the defendant had the action gone to judgment.¹² In another case, in which the plaintiff had consistently accepted less than he was entitled to as wages under the contract of employment, the Court found consideration in the fact that the contract was for no fixed period, so that the periodic renewal of the hiring was a sufficient benefit to the plaintiff.¹³

Normally the courts are not required to exercise such imagination in the discovery of a consideration for the acceptance of part of a debt in full discharge. The following are a few examples of more obvious considerations:

A promise to support the payee of a note for the rest of his life in discharge of the note.¹⁴

The resumption of business relations after severance over a dispute.¹⁵

The assignment of the future income, uncertain in amount, of a trust fund.¹⁶

The giving of a mortgage, although to secure a less sum.¹⁷

A promise by the lessee to his lessor to take a partner into his business for three years, and to borrow a large sum of money, in return for a reduction of rent.¹⁸

A promise by the debtor to procure the conveyance of a third party's land to the creditor.¹⁹

¹² *Mitchell v. Wheaton* (1878) 46 Conn. 315; *Larned v. City of Dubuque* (1892) 86 Ia. 166, 53 N. W. 105.

¹³ *Oien v. St. Paul City Ry. Co.* (1936) 198 Minn. 363, 270 N. W. 1.

¹⁴ *McGiverin v. Keefe* (1906) 103 Ia. 97, 106 N. W. 396.

¹⁵ *Erie Forge Co., Ltd. v. Penn Iron Works Co.* (1903) 22 Pa. Super. 550.

¹⁶ *Matter of McCoy* (1935) 157 Misc. 281, 283 N. Y. S. 597.

¹⁷ *Cobb v. Malone* (1888) 86 Ala. 571, 6 So. 6; *Thomas v. Zahka* (1917) 99 Misc. 333, 164 N. Y. S. 193; *Trovatten v. Hanson* (1928) 175 Minn. 357, 221 N. W. 238.

¹⁸ *Hastings v. Lovejoy* (1885) 140 Mass. 261, 2 N. E. 776.

¹⁹ *Reed v. Bartlett* (1839) 19 Pick. (Mass.) 273.

Some problems of consideration require fuller treatment:

I. *Giving property in satisfaction*

It seems always to have been the law that where the debtor owed a sum of money, he could give real or personal property to the creditor in satisfaction of the debt. The Court would not investigate the value of the property, and if such was the agreement, there was satisfaction notwithstanding the wildest inequality between the size of the debt and the value of the property.²⁰ It must be noted, however, that the debtor must give something of a different nature from that which he is bound by the contract to provide. If there is a present obligation to supply twenty cows, the acceptance of ten cows is no satisfaction of the obligation, although ten horses would be.²¹

A problem arises whether there is consideration for a discharge of a debt where property is taken in satisfaction of the debt, but for some reason a value is put on the property less than the total of the debt.²² The reason why property, though of less value than a debt, can be accepted in extinguishment, is that it is presumed the property has some special value to the creditor. It has been held in Missouri,²³ New York,²⁴ and Illinois²⁵ that in these circumstances the presumption is rebutted, and there is satisfaction only to the agreed value of the property. This appears to be the English view also.²⁶ In *Strang v. Holmes*, decided by the Supreme Court of New York in 1827,²⁷ the plaintiff sued on a bond conditioned in a penalty of \$7,000 for the payment of \$3,000. The defendant pleaded an accord and satisfaction in the conveyance of land to the plaintiff by a deed which fixed the value of the land at

²⁰ *Curley v. Harris* (1865) 11 Allen (Mass.) 112; *Hastings v. Lovejoy* (1885) 140 Mass. 261, 2 N. E. 776; *Hall v. Swindell* (1938) 147 Kan. 382, 76 P. (2d) 769.

²¹ *McGiverin v. Turnbull* (1872) 32 U. C. Q. B. 407. *Missouri v. American Electric Co. v. Hamilton-Brown Shoe Co.* (1908) 165 Fed. 283, 287.

²² The same problem will, of course, arise where services are accepted in satisfaction. *Morrill v. Baggott* (1895) 157 Ill. 240, 41 N. E. 639.

²³ *Griffith v. Creighton* (1895) 61 Mo. App. 1.

²⁴ *Blum v. Hartman* (1869) 3 Daly 47; *Howard v. Norton* (1873) 65 Barb 161, approved in *Re Freeman* (1902) 117 Fed. 680.

²⁵ *Morrill v. Baggott* (1895) 157 Ill. 240, 41 N. E. 639. See also *Tishomingo v. Latham* (1913) 37 Okla. 286, 132 Pac. 891.

²⁶ *Mitchell v. Cragg* (1842) 10 M. & W. 367.

²⁷ 7 Cow. 224.

\$2,500. The question argued was whether there could be an accord and satisfaction of a bond after it had become single. No argument was based upon the inadequacy of consideration. In concluding his judgment Sutherland, J., said:

"The sufficiency of the satisfaction cannot be questioned. It was the conveyance of land, which, like the gift of a horse, hawk or robe, shall be intended might be more beneficial to the plaintiff than the money; or otherwise he would not have accepted it in satisfaction."

An early Massachusetts court seemed to think there might still be satisfaction in full, although assessing the value of the property is presumptive evidence that it is to be accepted in satisfaction pro tanto only.²⁸ In a Connecticut case²⁹ the assessed value of the goods was ignored, the Court holding that they might still be worth more than the assessed sum to the plaintiff. The fact that he agrees to accept them in full satisfaction is some evidence of that. It may be possible to draw a distinction between the case where the parties fix a price on the goods as an indication of what they are worth to the plaintiff, and the case where some measure is adopted, not as indicating the value of the goods to the plaintiff, but merely as a method for deciding how much of the goods the plaintiff considers represents the equivalent of the debt in value to him. The plaintiff may think that cows to the market value of \$1,000 are worth \$2,000 to him. It would involve no absurdity to hold in such a case that giving cows of the market value of \$1,000 amounts to a satisfaction of the whole debt if the plaintiff made such a bargain. The Connecticut decision seems to imply this.

However this problem may be decided, it is reasonably clear that if the assessment is not made by the parties, or is made by them for some purpose other than deciding the value of the goods, there will be satisfaction in full if it is so agreed. In *Lilly v. Verser*,³⁰ it was agreed that the plaintiff should take certain property in full satisfaction if on sale it realized a certain figure, which was less than the debt. The plaintiff took the property and sold it, the proceeds being more than the figure fixed by the parties but less than the debt. It was held he could not sue for the balance. The case was treated as an acceptance of the property, subject to a condition the performance of which

²⁸ *Howe v. Mackay* (1827) 4 Pick. 44.

²⁹ *Rose v. Hall* (1857) 26 Conn. 392.

³⁰ (1918) 133 Ark. 547, 203 S. W. 31.

had made the acceptance absolute, and a sale by the plaintiff. In *Savage v. Everman*,³¹ a debtor in Pennsylvania agreed to convey, and the creditor to accept, land in New Jersey, in satisfaction of the debt. To effectuate the agreement the debtor went into New Jersey and submitted to service. Judgment was rendered against him by default, and in pursuance of the agreement the creditor purchased the land at the sheriff's sale under the judgment for a less sum than the debt. These facts constituted a good defense in an action by the creditor. The sale by the plaintiff was a formal method of passing title, and the price was of no consequence. Under the agreement the creditor could have purchased at a nominal price. Obviously in such a case it could not have been contended that there was satisfaction only to the extent of that nominal amount.

II. *Payment at a different place, or in a different currency -*

It is not surprising that in the medieval and later cases much should be made of the fact that payment at some place other than that at which it was agreed payment should be made is a benefit to the creditor and sufficient consideration for an abatement of part of the debt. Communications being what they were, it might be a distinct saving of trouble and expense to the creditor (and a considerable burden to the debtor) to have payment at York instead of Westminster. Modern courts are reluctant to find sufficient advantage to the creditor or detriment to the debtor in the circumstance of part payment at a different place. The English Court of Appeal has recently passed upon the matter in *Vanbergen v. St. Edmunds Properties, Ltd.*³² The plaintiff in that case was trading in London and indebted to the defendants under a judgment. The plaintiff's case was that the defendants had agreed that if the plaintiff would pay a sum of money into a bank at Eastbourne, which is about three hours by train from London, they would accept that in satisfaction of the debt and a bankruptcy notice they had issued. The plaintiff had paid according to this agreement, but the defendants had served him with the bankruptcy notice. The plaintiff claimed damages for the breach of the agreement. The trial judge held there was sufficient consideration to support the agreement, but the Court of Appeal reversed his decision. Lord Hanworth, M.R., pointed

³¹ (1872) 70 Pa. 315.

³² (1933) 2 K. B. 223.

out that the facts involved no more than a concession to the debtor. He was going to Eastbourne to raise the money, and it was for his convenience that it was agreed that he should be allowed to pay into the bank there. The mere fact of payment at a different place is not consideration for an abatement, unless it is shown to have been for the benefit of the creditor. In *Saunders v. Whitcomb*,³³ where a bill payable in London was dishonored and then paid in part in Massachusetts, the Court held there was no consideration for a discharge of the whole debt, because the defendant, who resided in Massachusetts, had not shown that he had been subjected to any additional expense in making payment in Massachusetts. He had not had to transfer funds which he had placed in London. A circumstance which weighs heavily against a debtor in these cases is the fact that, when a debt is due, the debtor must seek out the creditor in order to tender payment to him. If the debtor is allowed to pay elsewhere, that is more likely to be a voluntary benefit conferred on him by the creditor than a detriment to the debtor or advantage to the creditor.³⁴

The courts have adopted a similar attitude to payment in some other currency than that in which payment is to be made under the original contract. There is a presumption that on payment in a different currency there is no more than the payment of an equivalent, and payment in the different medium is of no advantage to the creditor or detriment to the debtor.³⁵ In a New York case in which the debtor alleged that the debt payable in American dollars had been satisfied by the payment of a sum of money in English pounds, which at the current rate of exchange was not the equivalent of the dollars owed, the Court said, "I know of no authority for treating English pounds juridically as a 'commodity,' although it is occasionally so described in economic or financial literature."³⁶ There is, however, some authority for treating foreign currency as a commodity even in the law. Thus, although in the case of a domestic currency debt, the creditor, upon breach of the contract, is entitled to interest only, where there is the breach of a

³³ (1901) 177 Mass. 457, 59 N. E. 192.

³⁴ *Foster County Bank v. Lammers* (1912) 117 Minn. 94, 134 N. W. 501.

³⁵ *Saunders v. Whitcomb* (1901) 177 Mass. 457, 59 N. E. 192.

³⁶ *Mundler v. Palmer* (1917) 162 N. Y. S. 605.

contract calling for the delivery of foreign currency, he may sue for the difference in the market prices.³⁷ Even domestic money is sometimes treated as in the nature of a commodity, as for example, where equity gives a right to follow it while still identifiable. Anglo-American law has abandoned the theory that money has no earmark.³⁸ It seems that for the purposes of accord and satisfaction and consideration, as for other matters affecting the legal meaning of money, a distinction may be drawn between two conceptions. If the parties express a monetary obligation in terms of a foreign currency, then, payment of a less sum in another currency is no satisfaction. If the contract is for the delivery of foreign currency, Dutch guilders may be treated like Dutch bulbs, and payment of a less sum in a different currency may be a satisfaction in full.³⁹

Even if this distinction does not recommend itself to the Courts, it is clear that there may be satisfaction where a dispute arises on a contract as to the currency in which the debt is payable, and the creditor accepts some currency other than he claimed, in settlement of the controversy.⁴⁰ Again, a compromise may be arranged where there is a dispute as to the current rate of exchange of a foreign currency, and the creditor accepts a less sum in a currency other than that which he claimed.⁴¹

III. *Payment before the day*

It has been uniformly held that where the debtor pays part of a debt before the debt is payable, there is consideration for a promise of a full discharge.⁴² A common case of this kind is the payment of part of a note before maturity on an agreement that the part be accepted in satisfaction of the whole.⁴³

³⁷ *Richard v. American Union Bank* (1930) 253 N. Y. 166, 170 N. E. 532. Nussbaum, *Money in the Law* (1939) 114.

³⁸ Restatement, Restitution (1937) § 202; Mann, *The Legal Aspect of Money* (1938) 122 et seq.; Nussbaum, *Money in the Law* (1939) 56.

³⁹ Nussbaum, *ibid.*, 411 et seq.

⁴⁰ *Komp v. Raymond* (1899) 42 App. Div. 32, 58 N. Y. S. 909.

⁴¹ *Mundler v. Palmer* (1917) 162 N. Y. S. 605.

⁴² *Smith v. Brown* (1825) 3 Hawks (N. C.) 580; *Brooks v. White* (1841) 2 Metc. (Mass.) 283; *Russell v. Stevenson* (1904) 34 Wash. 166, 75 Pac. 627; *Gilia v. Robbins* (1916) 134 Minn. 45, 158 N. W. 807.

⁴³ *Schweider v. Lang* (1882) 29 Minn. 254, 13 N. W. 33; *Weiss v. Marks* (1903) 206 Pa. 513, 56 Atl. 59; *Hamilton National Bank v. Nicholson* (1911) 153 Ia. 369, 133 N. W. 736; *Lockhart State Bank v. Baker* (Tex., 1924) 264 S. W. 566; *McCoy v. Wynn* (1926) 215 Ala. 172, 110 So. 129; *Crow v. Gore* (1936) 66 App. D. C. 125, 85 Fed. (2d) 291.

The principle has been applied where sixty per cent was paid in discharge of notes some of which were due and some of which were not, the part payment being treated as one transaction.⁴⁴ It has been applied where a note is payable on demand, and part payment is made before demand on the understanding that it be accepted in full satisfaction.⁴⁵ In one case a note was secured by a mortgage under which the creditor had the right on non-payment of interest to declare that the whole of the principal sum was immediately due. At the date of the part payment interest was in arrears, but the acceleration clause had not been exercised. It was held that the acceleration clause was not self-executing, so that the agreement to accept the part in satisfaction of the whole was supported by consideration.⁴⁶ The only factor which the Court takes into account in deciding the question whether there is consideration is whether the part payment is made before the date fixed for the payment of the debt. Thus, in one case, wages, though earned, were not payable until some future date. Payment of part of the earned wages before this date in satisfaction of the total sum earned was consideration for a full discharge.⁴⁷

IV. *The debtor's insolvency*

In some jurisdictions it has been held that where the debtor is insolvent, although, of course, not yet adjudged bankrupt, there is consideration for a discharge in full where the creditor agrees to accept part only of his debt. The consideration is found in the circumstance that, were it not for the accord, the creditor might get nothing at all, or if the debtor becomes bankrupt, a dividend smaller than the sum the debtor pays voluntarily. It has been so held in New Hampshire,⁴⁸ Maine,⁴⁹ Illinois,⁵⁰ California,⁵¹ Iowa,⁵² Texas,⁵³ Georgia,⁵⁴

⁴⁴ *Bowker v. Childs* (1862) 3 Allen 434.

⁴⁵ *Bank v. Shook* (1898) 100 Tenn. 436, 45 S. W. 338.

⁴⁶ *Brady v. Selberg* (1936) 154 Ore. 477, 60 P. (2d) 1104.

⁴⁷ *Princeton Coal Co. v. Dorth* (1921) 191 Ind. 615, 133 N. E. 386, 134 N. E. 275.

⁴⁸ *Frye v. Hubbell* (1907) 74 N. H. 358, 68 Atl. 325.

⁴⁹ *Hinckley v. Arey* (1847) 27 Me. 362.

⁵⁰ *Curtis v. Martin* (1858) 20 Ill. App. 557; *Winter v. Meier* (1909) 151 Ill. App. 572; *Siegel v. Cohen* (1918) 210 Ill. App. 338; *Cp. Stein v. Automatic Electric Co.* (1910) 152 Ill. App. 392.

⁵¹ *Cloyne v. Levy* (1915) 26 Cal. App. 637, 148 Pac. 224.

⁵² *Stoutenberg v. Huisman* (1895) 93 Ia. 213, 218, 61 N. W. 917; *Engbretson v. Seiberling* (1904) 122 Ia. 522, 98 N. W. 319; *Carten v. Tackaberry Co.* (1908) 139 Ia. 586, 588, 117 N. W. 953.

Arkansas⁵⁵ and Wisconsin.⁵⁶ In Minnesota it has been held that even the debtor's appearance of insolvency, or the creditor's unfounded belief that the debtor is insolvent, is consideration for the abatement of part of a debt,⁵⁷ but in most of the above jurisdictions the courts insist on actual insolvency.

It has also been held that an express or implied agreement on the part of the debtor not to take advantage of the bankruptcy law is consideration for a promise to accept part of a debt in full satisfaction. Courts taking this view proceed on the assumption that bankruptcy is an advantage to the debtor, rather than a misfortune, although some also point out that the creditor may get more by this arrangement than his dividend would amount to in bankruptcy.⁵⁸ Similarly, it has been held that a part payment from property which would be exempt from execution is consideration for a full discharge.⁵⁹

In Alabama⁶⁰ and Kentucky⁶¹ the circumstance of the debtor's insolvency is irrelevant. Whether the debtor is insolvent or not, his duty to pay remains unimpaired. It seems that in New Jersey, whereas insolvency adds nothing to the effect of part payment, an agreement not to go into bankruptcy supplies a consideration.⁶² In England it is as clear as it can be without a direct decision on the question, that part payment where the debtor is insolvent or where he agrees not to go into bankruptcy is not consideration for satisfaction in full. Lord Selborne has framed a generalized statement of consideration in

⁵⁵ *Shelton v. Jackson* (1899) 20 Tex. Civ. Apps. 443, 49 S. W. 415.

⁵⁶ *Merchants' Bank of Macon v. Davis* (1847) 3 Ga. 112; *Molyneaux v. Collier* (1853) 13 Ga. 406, 424.

⁵⁷ *Miller v. Benton* (1936) 192 Ark. 367, 91 S. W. (2d) 263.

⁵⁸ *Herman v. Schlesinger* (1902) 114 Wis. 382, 400, 90 N. W. 460. See also *Conlan v. Spokane Hardware Co.* (1921) 117 Wash. 378, 201 Pac. 26; *Gasper v. Mayer* (Okla., 1935) 43 P. (2d) 467, 473.

⁵⁹ *Rice v. London & Northwest American Mortgage Co., Ltd.* (1897) 70 Minn. 77, 72 N. W. 286.

⁶⁰ *Hinckley v. Arey* (1847) 27 Me. 362; *Dawson v. Beall* (1882) 68 Ga. 328; *Hanson v. McCann* (1904) 20 Colo. App. 43, 76 Pac. 983; *Engbretson v. Seiberling* (1904) 122 Ia. 522, 98 N. W. 319; *Frye v. Hubbell* (1907) 74 N. H. 358, 68 Atl. 325; *Melroy v. Kenmerer* (1907) 218 Pa. 381, 67 Atl. 669; *Kuhn v. Kuhn* (1912) 171 Ill. App. 298; *Hall v. Swindell* (1938) 147 Kan. 382, 76 P. (2d) 769. *But cf.* *Laird v. Campbell* (1880) 92 Pa. 470, 474.

⁶¹ *Meeker v. Requa* (1904) 94 App. Div. 300, 87 N. Y. S. 959; *Ward, Murray & Co. v. Young* (1905) 40 Tex. Civ. Apps. 294, 89 S. W. 456.

⁶² *Pearson and Fant v. Thomason* (1849) 15 Ala. 700.

⁶³ *Call v. Pinson* (1918) 180 Ky. 367, 202 S. W. 883.

⁶⁴ *Levine v. Blumenthal* (1936) 117 N. J. L. 23, 186 Atl. 457.

cases of part payment which excludes the possibility of finding consideration in these circumstances :

"What is called 'any benefit, or even any legal possibility of benefit' . . . is not (as I conceive) that sort of benefit which a creditor may derive from getting payment of part of the money due to him from a debtor who might otherwise keep him at arm's length, or possibly become insolvent, but is some independent benefit, actual or contingent, of a kind which might in law be a good and valuable consideration for any other sort of agreement not under seal."⁶³

V. *Debtor's promise to raise the money*

There are cases in which it has been held that where the debtor promises to make some specified effort to borrow or raise the money there is consideration for a promise to accept the money thus provided in full satisfaction, although it is less than the debt. In *Boshart v. Gardner*,⁶⁴ an Arkansas court decided that a promise to accept part of a debt in full discharge, if the debtor would make an effort to obtain a Federal loan, was binding where the debtor entered into negotiations for the loan. There is a similar Missouri decision, in which it was said that by borrowing the money the debtor makes available a fund which otherwise would not be liable for the satisfaction of the debt.⁶⁵ A Colorado court which was called upon to decide this problem was disinclined to find consideration, but was content to decide on the ground that it did not appear that there had been an agreement that the debtor should borrow the money, or that the creditor knew that the debtor intended to borrow it.⁶⁶ In *Harriman v. Harriman*⁶⁷ a Massachusetts case, the Court took a similar stand, holding that an agreement "to raise" the money did not imply an agreement that the debtor was to borrow it. New York courts have held consistently that there is no consideration where the debtor undertakes to borrow the money. The leading case is *Bunge v. Koop*⁶⁸ in which the debtor undertook to borrow the money from friends.

"The money, when paid, was to belong, and in fact did belong, to the defendants. It was to be paid and was paid as their money. Suppose a debtor agreed to go to work and earn the money, or to dig for it in the earth, would this furnish a new consideration to uphold the agreement of the creditor to take less than his conceded

⁶³ *Foakes v. Beer* (1884) 9 App. Cas. 605, 613-614.

⁶⁴ (1935) 190 Ark. 104, 77 S. W. (2d) 642.

⁶⁵ *Dalrymple v. Craig* (1899) 149 Mo. 345, 50 S. W. 884.

⁶⁶ *Schlesinger v. Schlesinger* (1907) 39 Colo. 44, 88 Pac. 970.

⁶⁷ (1859) 12 Gray 341.

⁶⁸ (1872) 48 N. Y. 225.

due? In all cases an embarrassed debtor must make some effort to procure the money to make a compromise, but no case can be found holding that the fact that he had agreed to make such effort furnished any consideration to uphold the compromise. The debtor is legally bound to pay, and it is utterly indifferent to the creditor where he gets the money to do it. That is a matter of the debtor, and all his efforts are expended in simply endeavoring to discharge a legal obligation. Hence the fact that the defendants agreed to induce their friends to loan them the money and that they did induce them, furnishes no new consideration to uphold the compromise."⁶⁹

VI. *Disputed and doubtful debts*

Where the plaintiff accepts in full satisfaction part of a debt, the liability for which the defendant disputes, the plaintiff cannot later sue to recover any further part of the claim. On the other hand, the defendant cannot bring proceedings to recover the money he has paid on the theory that his original contention was correct and he was not liable to pay. This was not always the law. There are cases from the sixteenth century onwards, in which it was held that the compromise of a dispute was not binding where it appeared that the payee or promisee had no cause of action.⁷⁰ This was true not merely where he had not even a prima facie cause of action, but also where there was a prima facie cause of action but the promisor would have had a defense.⁷¹ Courts of law would recognize the conclusiveness of a compromise only where the dispute would have been decided by a court in favor of the payee or promisee, although it was recognized that liability of the promisor in equity was sufficient for this purpose.⁷²

A break was made with the older authorities in the early nineteenth century. In *Leonard v. Leonard* in 1812⁷³ it was said that the validity of a compromise does not depend upon a subsequent adjudication of rights. If the rights are doubtful, whether that doubt rests upon the facts or the law, a compromise of them will be binding. This was repeated in *Longridge v.*

⁶⁹ P. 229. Followed in *Albrecht v. Johnson* (1887) 2 N. Y. City Ct. 350; *Ivy Court Realty Co. v. Knapp* (1913) 79 Misc. 260, 139 N. Y. S. 918.

⁷⁰ *Holt v. Tilcock* (1588) Moore 685; *Stone v. Wythipol* (1588) Cro. El. 126; *Tooley v. Windham* (1590) Cro. El. 207; *Mathew v. Mathew* (1595) Moore 702; *Fish v. Richardson* (1605) Yelv. 56; *Pooley v. Gilberd* (1613) 2 Bulst. 41; *Rosyer v. Langdale* (1650) Sty. 248; *Hunt v. Swain* (1665) T. Raym. 127; *Loyd v. Lee* (1718) Stra. 94; *Jones v. Ashburnham* (1804) 4 East 455.

⁷¹ *Smith v. Jones* (1611) Yelv. 184, 1 Bulst. 44.

⁷² *Scott v. Stevens* (1663) 1 Sid. 89.

⁷³ 2 B. & B. 171, 179-180.

Dorville in 1821,⁷⁴ but there are dicta in the judgment of Holroyd, J.,⁷⁵ which still suggest that the compromise will not be binding if the promisor is not liable. Moreover, it appears from this case that the compromise will be recognized only where proceedings have been instituted. The *locus classicus* of the modern law on the subject of the settlement, compromise or satisfaction of disputed rights is *Callisher v. Bischoffsheim* (1870).⁷⁶ It was decided that the mere fact that there is no valid claim does not vitiate the compromise. The compromise is binding if the claim was made in good faith, and it is immaterial that no legal proceedings were pending, although, as it was said in *Cook v. Wright*,⁷⁷ the issue of a writ might be evidence of the bona fides of a claim. Nor is it necessary that the plaintiff would have succeeded in establishing his claim. All that is required is that the plaintiff shall have a bona fide belief that he has a fair chance of success if he pursues his claim by legal action. In a later case⁷⁸ Lord Esher questioned the correctness of *Callisher v. Bischoffsheim*, reverting to something like the older principle that a compromise is not binding unless there was in fact a good cause of action. This disapproval of the *Callisher* case was not essential to the decision of the case with which Lord Esher was dealing, inasmuch as there was an absence of the bona fides insisted on in the *Callisher* case. The party who has received a sum of money under the compromise agreement believed that he could extort it from the other party, because that other would be unlikely to rely on his own shady conduct as a defense to an action brought by the former. The party receiving the money had relied entirely on his strategic position in pressing his claim. He had had no bona fide belief that he was really entitled to make the claim. In *Miles v. N. Z. Alford Estate Co.*,⁷⁹ a distinguished Court of Appeal consisting of Lords Justices Cotton, Bowen, and Fry, gave its support to *Callisher v. Bischoffsheim*, and rejected the criticisms of Lord Esher. The principle adopted in that case is now clearly the law in both England and the United States.

⁷⁴ 5 B. & Ald. 117.

⁷⁵ P. 122.

⁷⁶ L. R. 5 Q. B. 449.

⁷⁷ 1 B. & S. 559.

⁷⁸ Ex. P. Banner (1881) 17 Ch. D. 480.

⁷⁹ (1885) 32 Ch. D. 266.

All that is necessary for the validity of a compromise of a disputed or doubtful claim is the bona fide belief of the plaintiff that he has a claim.⁸⁰ In such a case the compromise will be binding although the plaintiff accepts less than he would otherwise have obtained by an action, or less than he was at all times claiming.⁸¹ It is also binding although the plaintiff would have recovered nothing, or a less sum than he accepted.⁸² The dispute may be as to the existence or the extent of the claim.⁸³ Where it was clear that one of two persons was liable for a debt, but both bona fide denied liability, the acceptance of a smaller sum from one in full satisfaction was supported by consideration.⁸⁴ A claim cannot be doubtful or disputed where by the terms of the contract⁸⁵ or a statute⁸⁶ it has become incontestable. There is no bona fide dispute where the defendant questions his liability for the purpose of extracting more favorable terms from the defendant.⁸⁷ There can be no accord and satisfaction of an unlawful claim, even though it has been the subject of a dispute.⁸⁸

⁸⁰ *Attwood v. ———* (1826) 1 Russ. 353; *Smith v. Monteith* (1844) 13 M. & W. 427; *Wilder v. St. Johnsbury & L. C. Ry.* (1892) 65 Vt. 43, 25 Atl. 896; *Rauen v. Prudential Ins. Co.* (1906) 129 Ia. 725, 106 N. W. 198; *Neubacher v. Perry* (1914) 57 Ind. App. 362, 103 N. E. 805; *Northern Assurance Co. v. Hunt* (1924) 75 Colo. 21, 223 Pac. 1083; *Detroit Belt Lacer Co. v. Eowler* (1928) 4 S. W. (2d) 651 (Tex. Civ. App.); *Nixon-Foster Service Co. v. Morrow* (1936) 41 N. M. 67, 64 P. (2d) 92.

⁸¹ *Naylor v. Winch* (1824) 1 S. & S. 555; *Barlow v. Ocean Ins. Co.* (1842) 4 Metc. 270; *Tuttle v. Tuttle* (1847) 12 Metc. 551; *Partridge v. Smith* (1863) 11 W. R. 714; *Sims v. Three States Lumber Co.* (1905) 135 Fed. 1019; *Kelley v. Hopkins* (1908) 105 Minn. 155, 117 N. W. 396.

⁸² *Lacy's Case* (1853) 4 De G. M. & G. 357; *Goodrich v. Sanderson* (1898) 35 App. Div. 546, 554, 55 N. Y. S. 881; *Frazier v. Ray* (1923) 29 N. M. 121, 219 Pac. 492; *Harvey v. Morgan* (1937) 166 Misc. 455, 2 N. Y. S. (2d) 520.

⁸³ *Lost Bonds Case* (1880) 15 S. C. 224; *Arnold v. Railway Steel Spring Co.* (Mo. App., 1910) 126 S. W. 795; *Miller's Estate* (1923) 279 Pa. 30, 123 Atl. 646; *Hopkins v. Heskett* (1933) 189 Minn. 322, 249 N. W. 584.

⁸⁴ *Chicago, Rock Is. & Pacific Ry. v. Brown* (1904) 70 Neb. 696, 97 N. W. 1038.

⁸⁵ *Sexton v. Equitable Life Ass. Co.* (1927) 130 Misc. 362, 224 N. Y. S. 63.

⁸⁶ *Yutz v. Commonwealth Life Ins. Co.* (1936) 264 Ky. 142, 94 S. W. (2d) 326; *Friedman v. State Mutual Life Ass. Co.* (Mo. 1937) 108 S. W. (2d) 156.

⁸⁷ *Demars v. Musser-Sauntry Land Co.* (1887) 37 Minn. 418, 35 N. W. 1; *Fitzgerald v. Fitzgerald and Mallory Construction Co.* (1895) 44 Neb. 463, 62 N. W. 899; *Moss v. Goldstein* (1926) 254 Mass. 334, 150 N. E. 91.

⁸⁸ *Kidder v. Blake* (1864) 45 N. H. 530; *Sierra & San Francisco*

In *Jacobsen v. Moss*,⁸⁹ a recent Iowa decision, a plaintiff sought to recover the balance of rent due under a written lease. The defendant pleaded the payment of a less sum in settlement of a dispute about the rent. This less sum was paid, he alleged, under a prior oral agreement. The Court held that as evidence could not be given of this prior agreement in contradiction of the lease, there was no bona fide dispute. Evidence of the dispute depended on inadmissible evidence of the parol agreement. This is a strained interpretation of the meaning of a bona fide claim. According to this decision, bona fides depend on an imputed knowledge of the law of evidence. Contemporary decisions in other states have rejected this conception of a bona fide claim. In *New Sicilia Loan Co. v. Perry*,⁹⁰ an accommodation maker of a joint and several note denied that he was liable for more than a quarter of the note, on the ground that this was his understanding of his obligation when he assumed it. The Rhode Island Court held parol evidence could be given to show the dispute as to his liability. Its purpose is only to prove the dispute, and not to contradict or vary the note. The accord and satisfaction was not of the defendant's alleged share of the note, but of his liability on it, whatever it might be. The implications of the Iowa decision, if logically pursued, are wider than the Court probably realized. If the lessee under a lease which is required by law to be in writing is bound by its terms to pay monthly, and then by agreement with the lessor pays a less rent yearly in advance in satisfaction of the rent reserved by the lease, it would follow from *Jacobsen v. Moss* that the lessee would not be able to prove the accord and satisfaction, because that would amount to a parol variation of the lease. Few, if any, courts would decide in this way, and there are many decisions impliedly rejecting this conclusion.⁹¹

The compromise of a dispute must be distinguished from the case where there has been a difference of opinion between

Power Co. v. Universal Electric & Gas Co. (1925) 197 Cal. 387, 241 Pac. 76; *Shortell v. Evans-Ferguson Corp.* (1929) 98 Cal. App. 650, 277 P. 519; *Adams v. Cribbis* (1936) 17 Fed. Supp. 723; *Cruze v. Life Ins. Co. of Virginia* (1938) 184 So. 735 (La.).

⁸⁹ (1936) 221 Ia. 1343, 268 N. W. 162.

⁹⁰ (1927) 57 R. I. 441, 190 Atl. 457.

⁹¹ *Holman Mfg. Co. v. Dapin* (1923) 181 Wis. 97, 193 N. W. 986; *Massachusetts Life Ins. Co. v. Peoples Loan & Investment Co.* (1935) 191 Ark. 982, 88 S. W. (2d) 831.

the parties, and one succeeds in convincing the other of the correctness of his version, so that there is no longer any dispute at the date of payment. In such a case, if the defendant pays the amount claimed by the plaintiff, the plaintiff may later recover any further sum to which he is entitled.⁹² On the other hand, it is not necessary that there should be an audible expression of dissent in order to constitute a dispute. There is one situation in which the courts have differed in this connection. The debtor sends a check which bears the legend that it is in full payment of all claims. The creditor retains it, but in his opinion more is due, and he intends to recover this balance. There has been no previous dispute between the parties. Some courts have held that the creditor is not precluded from suing to recover what he believes is the unpaid balance of his claim, on the ground that at the date of the acceptance of the check there was no dispute.⁹³ Recently, an Ohio Court has said that when a creditor received a check in these circumstances, the receipt of the check with knowledge that he is claiming more is itself the recognition of a dispute.⁹⁴ The reply which has been made to this argument is that where there has been no prior dispute, the creditor is entitled to believe that the debtor has made a mistake about the amount due. Whatever the solution adopted for the case in which at the time the creditor accepts the check he believes he has a larger claim, it is clear that if he has no such belief, but discovers facts later which induce him to believe a further sum is due to him, there will be no accord and satisfaction. In this latter case it cannot be argued that there is a dispute at the time of the alleged settlement, even on the theory of the cases holding there is a dispute where the creditor knows at the date of acceptance of the check that he has a larger claim.⁹⁵

It is of some importance to decide precisely what is the consideration for the satisfaction of a disputed claim. This

⁹² *The William Rockefeller* (1932) 57 Fed. (2d) 897; *Ralph A. Badger & Co. v. Fidelity Bldg. & Loan Assn.* (1938) 94 Utah 97, 75 P. (2d) 669.

⁹³ *Canadian Fish Co. v. McShane* (1908) 80 Neb. 551, 114 N. W. 594; *Miller Prince St. Elevator Co.* (1937) 41 N. M. 330, 68 P. (2d) 663.

⁹⁴ *Underwood v. Browning* (1937) 55 Ohio App. 268, 9 N. E. (2d) 707.

⁹⁵ *Glucksman v. Board of Education* (1917) 164 N. Y. S. 351, *rev'd on other grounds*, (1917) 101 Misc. 682, 167 N. Y. S. 1075.

problem is relevant in connection with certain troublesome problems which arise as a result of the American view of the acceptance of money or property tendered on condition that it shall be in full satisfaction. It has been said that the consideration for the debtor's promise is the creditor's surrender of a claim, and the consequent freedom of the debtor from the vexation of litigation.⁹⁶ "You do not pay the alleged debt, but you buy the abstention of the other side from enforcing it."⁹⁷ In *Cook v. Wright*,⁹⁸ Lord Blackburn criticised the view that the consideration is "the technical and almost illusory consideration arising from the extra costs of litigation."⁹⁹ He preferred to hold that consideration for the debtor's promise was the detriment to the creditor in the possibility that if he attempted to sue at some later date he would be less likely to succeed. It might be more difficult to assemble his evidence, and there would certainly be additional expense and trouble in again preparing his case. The Privy Council has stressed the settlement itself as the consideration.

" . . . In such cases the consideration which each party receives is the settlement of the dispute; the real consideration is not the sacrifice of a right, but the abandonment of a claim."¹⁰⁰

Not much attention has been paid to the question of consideration for the creditor's acceptance in full satisfaction of less than the liquidated sum he claimed. It would seem that the consideration he receives is the part payment itself, or the promise of it, coupled with the fact that he might recover nothing at all, since the debtor disputes the debt, if the matter proceeded to trial and verdict.

VII. *Unliquidated debts*

In *Adams v. Tapling*, decided in 1694,¹⁰¹ it was held that where the damages claimed by the plaintiff are uncertain, a lesser thing may be done in satisfaction. A debt is unliquidated where it cannot be fixed by computation or calculation, but rests on opinion and can be reduced to certainty only by the assess-

⁹⁶ *Callisher v. Bischoffsheim* (1870) L. R. 5 Q. B. 449, per Cockburn, C. J.

⁹⁷ *Holsworthy Urban District Council v. Rural District Council of Holsworthy* (1907) 2 Ch. 62, per Warrington, J.

⁹⁸ (1861) 1 B. & S. 559.

⁹⁹ P. 570.

¹⁰⁰ *Trigge v. Lavalee* (1863) 15 Moore P. C. 270, 292.

¹⁰¹ 4 Mod. 88. See also *Wilkinson v. Byers* (1834) 1 Ad. & El. 106.

ment of a jury.¹⁰² If the claim can be reduced to certainty by calculation, the debtor cannot refrain from making the calculation and then assert that the debt is unliquidated.¹⁰³ A payment of less than the plaintiff's unliquidated claim in full satisfaction prevents any further recovery by the plaintiff. *Pinnel's Case* could hardly apply to such a situation, since it is not possible to say that there has been a part payment unless the size of the whole debt is known.¹⁰⁴ The consideration which the creditor receives, where by possibility his claim may be larger than the payment, is that payment, or the promise of it, coupled with the chance that a court would in fact award less.

VIII. *Negotiable instruments*

*Cumber v. Wane*¹⁰⁵ is a decision as well known on this branch of the law as *Pinnel's Case*. The plaintiff sued to recover a debt of £15. The defendant pleaded that he gave the plaintiff a promissory note for £5 in satisfaction, and that the plaintiff accepted it in satisfaction. It was argued that the plea was ill on the ground that nothing of a higher nature than the debt had been given, and since the payment of £5 itself would have been no satisfaction, a note for that sum could have no other effect. Reference was made to the cases in which it was held that one bond cannot discharge another, but no mention was made of those cases in which it was held that the second bond could extinguish liability on the first where the plaintiff derived some additional advantage. The defendant relied on two arguments. The first was that the plaintiff had received some additional benefit in accepting a negotiable security. The second was that there had been mutual promises which were a satisfaction of the preexisting debt. Pratt, C.J., decided against the defendant. There can be no discharge, he said, unless the plaintiff receives a reasonable satisfaction, "or at least the contrary must not appear, as it does in this case."¹⁰⁶ This was probably just a rhetorical flourish designed to support the real reason, which was that if £5 cannot be satisfaction

¹⁰² *Shirk v. County Board of Massaco County* (1920) 216 Ill. App. 554.

¹⁰³ *Metropolitan Life Ins. Co. v. Richter* (1935) 49 P. (2d) 94 (Okla.).

¹⁰⁴ *Riggs v. Home Mutual Fire Protection Assn. of South Carolina* (1901) 61 S. C. 448, 39 S. E. 614.

¹⁰⁵ (1720) 1 Stra. 426.

¹⁰⁶ See *Watkinson v. Inglesby* (1810) 5 Johns. Cas. (N. Y.) 386.

of £15, a promise to pay £5 should not have greater efficacy. As for the cases on bonds, he recognized that one could be given so as to extinguish another, where the obligee's position is thereby improved. From this it must be taken that he discovered no element of advantage to the creditor in the negotiability of the note which the debtor had given. A good deal of criticism has been directed against this decision, but overlooking the reference to "reasonableness", which possibly was an attempt to saddle the courts with the thankless task of passing on the adequacy of consideration, and starting from the premise that *Pinnel's Case* is good law, Lord Camden's view seemed eminently reasonable. He himself was obviously convinced of the logic of his position. This appears from the fact that there was a very simple alternative ground, according to Lord Blackburn, upon which Camden could have disposed of the case. Lord Blackburn has said¹⁰⁷ that the replication in *Cumber v. Wane* was that the defendant did not give any note in satisfaction, but for some unexplained reason Lord Camden decided the case, not on the ground that the replication was good, but on the ground the plea was bad. The Common Pleas had decided for the plaintiff on the replication. These facts do not appear in the report in *Strange*, and one can only assume that Lord Blackburn obtained them from the record.

A number of American courts have refused to abandon Camden's position. If the debtor's payment of a less sum is no consideration, there is no sufficient reason why his promise to pay a less sum should be consideration. New York courts adopted this argument at an early date. "The debtor's note amounted to nothing. He only agreed by it to pay at a future time what he was bound to pay at the present moment, and afforded no new consideration. . . ."¹⁰⁸ There are dicta in at least one case suggesting that the debtor's note for less than

¹⁰⁷ Foakes v. Beer (1884) 9 App. Cas. 605, 619-620.

¹⁰⁸ Moss v. Shannon (1856) 1 Hilt. 175; Schermerhorn v. Loines (1810) 7 Johns. 311; Cole v. Sackett (1841) 1 Hill 516; Conkling v. King (1851) 10 Barb. 373, (1853) 10 N. Y. 440; Parson v. Civer (1865) 29 How. Pr. 432; Campbell v. Hurd (1893) 74 Hun 235, 26 N. Y. S. 458; Stevenson v. Dunn (1893) 3 Misc. 554, 23 N. Y. S. 294; Forest v. Davis (1897) 20 Misc. 1, 44 N. Y. S. 907. See also Molyneaux v. Collier (1853) 13 Ga. 404; Silvers Box Corp. v. Boynton Lumber Corp. (Tex. 1927) 297 S. W. 1059. But see Porter v. Talcott (1823) 1 Cow. 359, 381. Muldoon v. Whitlock (1823) 1 Cow. 290, 306; Nathan v. Smith (1898) 24 Misc. 374, 53 N. Y. S. 264.

the debt, if paid at maturity, would discharge the debt.¹⁰⁹ This would be too wildly illogical, and the suggestion was later definitely rejected.¹¹⁰ The creditor may sue to recover the balance of the debt. It is arguable, however, that the law as it is applied, for example, in New York, involves an illogicality of another kind. It is held that the debtor's own note cannot satisfy his preexisting debt, but it is also held that the acceptance of the note suspends the remedy for the original debt.¹¹¹ It has been said¹¹² that a note suspends the remedy because its negotiability is an additional consideration for an express or implied promise to extend the period of credit. If it is admitted that there is consideration for this purpose, it is difficult to avoid the conclusion that there may be consideration for some other purpose, i.e., for satisfaction of the original debt. This argument does not face the courts with an impasse. It is possible to avoid it by reference to the fact that the law of negotiable instruments is the product of the law merchant and not the common law. It might be argued further that the rationale of the rule by which the remedy is suspended is merely the injustice of subjecting the debtor to two actions, one on the debt, and a second on the note, if transferred by the creditor. This argument would conveniently dispose of all questions of consideration.

In England *Cumber v. Wane* did not survive as good law. In *Heathcote v. Crookshanks*,¹¹³ Suller refers to *Hardeastle v. Howard*, an unreported decision of 1786, in which *Cumber v. Wane* was rejected as incorrectly decided. Lord Ellenborough, who as counsel in *Heathcote v. Crookshanks* denied the correctness of *Cumber v. Wane*, approved that case in *Fitch v. Sutton*¹¹⁴ in 1804, and said that he was unable to find any report of *Hardeastle v. Howard*. He, too, preferred strict logic, pointing out that *Cumber v. Wane* is supported by the authority of *Pinnel's Case*. In *Sard v. Rhodes*¹¹⁵ the Exchequer held that where the

¹⁰⁹ *Parrott v. Colby* (1875) 6 Hun 55.

¹¹⁰ *Shanley v. Koehler* (1903) 80 App. Div. 566, 80 N. Y. S. 679.

¹¹¹ *Erisbie v. Larned* (1839) 21 Wend. 450; *Teaz v. Christie* (1855) 2 E. D. Smith 621; *Eisner v. Keller* (1871) 3 Daly 485; *J. H. Mohlman Co. v. McKane* (1901) 60 App. Div. 546.

¹¹² *Myers v. Welles* (1843) 5 Hill 463; *Nutley Contracting Co. v. Myers Contracting Co.* (1917) 165 N. Y. S. 986.

¹¹³ (1787) 2 T. R. 24, 28.

¹¹⁴ 5 East 230.

¹¹⁵ (1836) 1 M. & W. 153.

debtor's note for the same amount as a bill of exchange of which he was acceptor had been accepted in satisfaction, no action could be brought on the bill. *Cumber v. Wane* received its coup de grace at the hands of Baron Parke, who was not otherwise distinguished as an innovator, and Chief Baron Pollock in *Sibree v. Tripp*.¹¹⁶ Pollock denied that *Cumber v. Wane* could be considered a binding authority, since it did not appear from the report whether the debtor's note was negotiable. The principle of *Sard v. Rhodes* could apply where the debtor's negotiable note is for a less amount than the debt. Both Pollock and Parke stressed the fact that the note might be likened to a chattel, which no one would deny may be given in satisfaction of a debt larger than its value. Even *Sibree v. Tripp* need not have been interpreted as going so far as to decide that the debtor's note for less than a liquidated debt can satisfy that debt. Although there are strong indications that the Court meant to formulate such a principle, it appears that the debt, in satisfaction of which the note was given, was either unliquidated or disputed. In these circumstances it might well be held that the note is a sufficient consideration for a discharge of the whole claim, inasmuch as the creditor's claim is now reduced to certainty at a figure which he might not otherwise recover by action. This does not necessarily involve the further step that there would be consideration for the satisfaction of a liquidated debt presently due. In fact, this distinction has been referred to in a New York case in which it was suggested that the debtor's own note might be a satisfaction of an unliquidated demand.¹¹⁷ This restrictive interpretation of *Sibree v. Tripp* is no longer possible in England. In *Goddard v. O'Brien*,¹¹⁸ the creditor accepted his debtor's negotiable check for a less sum than the liquidated debt owed by the debtor. It was held that there had been a satisfaction of the debt. This case shows how far the courts are willing to go in this direction. The receipt given for the check read: "Received the sum of £100 by cheque, which is to be in settlement of account of £125.7s.9d., on said cheque being honored." It would seem clear from this that the check was not accepted in satisfaction, and the case stated by the County Court judge strongly

¹¹⁶ (1846) 15 M. & W. 23.

¹¹⁷ *Shanley v. Koehler* (1903) 80 App. Div. 566, 80 N. Y. S. 986.

¹¹⁸ (1882) 9 Q. B. D. 37.

reinforces this impression. On this score *Goddard v. O'Brien* has been doubted,¹¹⁹ but this criticism cannot be taken to undermine the principle that the debtor's own note for a less sum may be accepted in satisfaction of a larger liquidated debt.

In *Sibree v. Tripp* the element of negotiability is emphasized as a new consideration. This has a deceptive air of cogency. At first sight it would appear that as the creditor may obtain the money for which the note is given from a third party, by transferring the note to him, he thereby obtains some new benefit. There is really nothing in this argument where the original debt would be payable before the note matures. It is settled that there is no consideration in a part payment made more promptly than it otherwise would be made, unless payment is before the due date. Moreover, there is no substantial advantage to be derived from transferring the note to a stranger for value. The theory behind this suggested benefit is that the debtor may not be able to pay the debt, but the creditor gets some money from a third person. But if the debtor is unable to pay the amount of the note to the holder, he will be able to recover from the creditor, who has indorsed it to him. Of course, the creditor can indorse the note without recourse, but if he does so he is likely to reduce his chances of disposing of it. In spite of these objections, reliance is placed upon the element of negotiability to show a benefit to the creditor. In *Sibree v. Tripp*, however, Pollock, C. B., and Parke, B., went further, and seemed to hold that the note could be considered a chattel, and a satisfaction on that ground. This view was applied in *Curlewis v. Clark*,¹²⁰ in which the debtor gave a blank acceptance signed by the Earl of Mexborough. This was not, therefore, the simple case of the debtor's own note given in satisfaction. Actually the instrument was not a negotiable instrument at all until the name of a drawer was inserted. Parke, B., said that as the plaintiff might have accepted a diamond or a chattel of any kind in satisfaction, there was no reason why he should not be able to take a blank acceptance. Alderson, B., thought the signature of the Earl of Mexborough might be worth something as an autograph, but the Court would not investigate the question of its value. It would follow logically from this treatment of the

¹¹⁹ *Hirachand Punamchand v. Temple* (1911) 2 K. B. 330, 340, per Fletcher Moulton, L. J.

¹²⁰ (1849) 3 Ex. 375.

instrument as a chattel that the creditor may accept even the debtor's non-negotiable instrument in satisfaction.¹²¹ Not very much remains of the rule in *Pinnel's Case* if this step is taken.

It is now generally recognized that the creditor may accept in satisfaction from the debtor the bill of exchange or promissory note of some third person, or the debtor's own bill or note indorsed or secured by a third person.¹²² In such cases there is obviously a new benefit to the creditor in the additional security, and a detriment to the debtor in procuring this security,¹²³ even though the instrument is for a less sum than the debt.¹²⁴ There is no difficulty in these circumstances in regarding the instrument as a consideration.

The mere fact that such an instrument is given does not mean that the debt is necessarily extinguished. It is clear that there must be an agreement to accept it in satisfaction,¹²⁵ and in the absence of evidence of an agreement it will be presumed that the note or bill is given as a conditional payment.¹²⁶ By

¹²¹ Contra: *Bradway v. Groenendyke* (1899) 153 Ind. 508, 55 N. E. 434. And see *James v. Williams* (1845) 13 M. & W. 828.

¹²² *Boyd v. Hitchcock* (1822) 20 Johns. 76; *Booth v. Smith* (1829) 3 Wend. 66; *Glenn v. Smith* (1830) 4 Gill & J. (Md.) 493; *Abercrombie v. Mosely* (1839) 9 Port. (Ala.) 145; *Brooks v. White* (1841) 2 Metc. (Mass.) 283; *Douglass v. White* (1846) 3 Barb. Ch. 621; *Jenness v. Lane* (1847) 26 Me. 475; *Lee v. Oppenheimer* (1850) 32 Me. 253; *Carriere v. Ticknor* (1855) 26 Ala. 571; *Reid v. Hibbard* (1857) 6 Wis. 175; *Brassell v. Williams* (1874) 51 Ala. 349; *Argall v. Cook* (1875) 43 Conn. 160; *Currie v. Kennedy* (1878) 78 N. C. 91; *Bower & Co. v. Metz* (1880) 54 Ia. 394, 6 N. W. 551; *Whitsett v. Clayton* (1880) 5 Colo. 476; *Bolt v. Dawkins* (1881) 16 S. C. 198; *Singleton, Hunt & Co. v. Thomas* (1882) 73 Ala. 205; *Tucker v. Murray* (1893) 2 Pa. D. 497; *Neubacher v. Perry* (1914) 57 Ind. App. 362, 103 N. E. 805; *American Seeding Machine Co. v. Baker* (1914) 55 Ind. App. 625, 104 N. E. 524; *Vaughn v. Robbins* (1923) 254 Mass. 35, 149 N. E. 677; *Barret v. Clarke* (1928) 226 Ky. 109, 9 S. W. (2d) 1091.

¹²³ But see *Kellogg v. Richards* (1835) 14 Wend. 116.

¹²⁴ *Conkling v. King* (1851) 10 Barb. 372, (1853) 10 N. Y. 440; *Webb v. Goldsmith* (1853) 2 Duer 413; *Stagg v. Alexander* (1869) 55 Barb. 70; *Bidder v. Bridges* (1887) 37 Ch. D. 406; *Brown v. Lowndes County* (1918) 201 Ala. 437, 78 So. 815.

¹²⁵ *Glenn v. Smith* (1830) 4 Gill & J. 493; *Abercrombie v. Mosely* (1839) 9 Port. 145; *Gordon v. Price* (1849) Ired. L. (N. C.) 385; *Darnell v. Morehouse* (1868) 36 How. Pr. 520.

¹²⁶ *Tobey v. Barber* (1809) 5 Johns. 68; *Sayer v. Wagstaff* (1844) 5 Bear. 415; *Kemp v. Watt* (1846) 15 M. & W. 672; *Stone v. Miller* (1851) 16 Pa. 450; *Dolsen v. Arnold* (1855) 10 How. Pr. 523; *Buckingham v. Walker* (1873) 48 Miss. 609; *Brown v. Dunckel* (1881) 46 Mich. 29; *Hunter v. Moul* (1881) 98 Pa. 13; *Greenwich Ins. Co. v. Oregon Imp. Co.* (1894) 74 Hun 194; *Bartlett v. Woodsworth-Mason Co.* (1898) 69 N. H. 316; *Tuscaloosa Lumber Co. v. Tropical Paint &*

conditional payment is meant that there is to be an extinguishment of the debt only if the note or bill is paid at maturity. Since in this case there is really no more than a promise to accept money, a bill or note for a less sum, even though paid at maturity, should not be allowed to extinguish a larger debt.¹²⁷ In Massachusetts,¹²⁸ Maine,¹²⁹ Vermont¹³⁰ and Indiana¹³¹ it is presumed in the absence of evidence of agreement to the contrary that the bill or note is accepted in satisfaction. In Massachusetts this is true even where the debtor's own note is given, provided, however, it is negotiable.¹³² In some other cases,¹³³ there is a tendency to distinguish between contemporaneous and preexisting debts, holding that an instrument given for the former may be presumed to be a satisfaction. This distinction does not appear to be very sound, and has been expressly or impliedly rejected in other cases.¹³⁴

The acceptance of a bill or note as conditional payment only is not without legal effect, even before payment. There are two consequences which must be noted. The first is that no action can be brought on the debt until the maturity of the bill or note.¹³⁵ The second is that as a rule the acceptance of the

Oil Co. (1924) 211 Ala. 258, 100 So. 236; *Re Estate of Cunningham* (1924) 311 Ill. 311, 142 N. E. 740.

¹²⁷ *Cp. Webb v. Goldsmith* (1853) 2 Duer 413; *Stagg v. Alexander* (1869) 55 Barb. 70. But see *Jenness v. Lane* (1847) 26 Me. 475.

¹²⁸ *Thacher v. Dinsmore* (1809) 5 Mass. 299; *Johnson v. Johnson* (1814) 11 Mass. 359; *Butts v. Dean* (1840) 2 Metc. 76; *Amos v. Bennett* (1878) 125 Mass. 120; *Quimby v. Durgin* (1888) 148 Mass. 104, 19 N. E. 14.

¹²⁹ *Mehan v. Thompson* (1880) 71 Me. 492; *Bunker v. Barron* (1887) 79 Me. 62, 8 Atl. 253; *Bryant v. Grady* (1903) 98 Me. 389, 57 Atl. 92.

¹³⁰ *Collamer v. Langdon* (1856) 29 Vt. 32; *Hadley v. Bordo* (1890) 62 Vt. 288, 19 Atl. 476.

¹³¹ *Nixon v. Beard* (1887) 111 Ind. 137, 12 N. E. 131; *Bradway v. Groenendyke* (1899) 153 Ind. 508, 55 N. E. 434. See also *Porter v. Talcott* (1823) 1 Cow. 359, 381, 383; *Frisbie v. Larned* (1839) 21 Wend. 450; *Thomson-Houston Electric Co. v. Palmer* (1893) 52 Minn. 174, 53 N. W. 1137; *Burlesdon v. Langdon* (1928) 174 Minn. 264, 219 N. W. 155.

¹³² *Ely v. James* (1877) 123 Mass. 36; *Amos v. Bennett* (1878) 125 Mass. 120; *Quimby v. Durgin* (1888) 148 Mass. 104, 19 N. E. 14.

¹³³ *Hall v. Stevens* (1889) 116 N. Y. 201, 22 N. E. 374; *Gallagher v. Ruffing* (1903) 118 Wis. 284, 95 N. W. 117.

¹³⁴ *Chicago Times v. Benedict* (1890) 37 Ill. App. 250; *McLean v. Griot* (1907) 118 App. Div. 100, 103 N. Y. S. 129.

¹³⁵ *Stedman v. Gooch* (1793) 1 Esp. 4; *Kearslake v. Morgan* (1794) 5 T. R. 513; *Tobey v. Barber* (1809) 5 Johns. 68; *Booth v. Smith* (1829) 3 Wend. 66; *Kendrick v. Lomax* (1832) 2 C. & J. 405;

instrument will determine a lien, at least, where the creditor negotiates it, although authority is by no means uniform.¹³⁶ Negotiation will not, however, prevent the creditor from suing on the original debt, if at the date of the commencement of the action he has re-acquired title to the bill or note.¹³⁷ The English Sale of Goods Act, 1893, provides that a vendor who takes a bill or other negotiable instrument as conditional payment, which is dishonored, is to be deemed an "unpaid seller,"¹³⁸ the effect of which under another section is to give him a lien on the goods for their price as long as he has possession of them.¹³⁹ It has also been decided that neither the acceptance nor the negotiation of a bill or note by the vendor, who accepted it on account of the purchase price of real property, amounts to a relinquishment of his lien for the unpaid price.¹⁴⁰

It is possible that a bill or note may be accepted as neither conditional nor absolute payment. It may be given merely as a collateral security. It then affects neither the debt nor the remedy for it.¹⁴¹ It seems that a note or bill will be presumed to be conditional payment rather than collateral security.¹⁴²

IX. *Acceptance of a several liability for a joint liability*

Where there are joint debtors it was clear at all times that the acceptance of part of the debt from one debtor could not operate to discharge him, even though the part payment represented his net liability after deducting the amount he could

Frisbie v. Larned (1839) 2 Hill 450; *Myers v. Welles* (1843) 5 Hill 463; *Fry v. Patterson* (1887) 49 N. J. L. 612.

¹³⁶ *Horncastle v. Farran* (1820) 3 B. & Ald. 497; *Bunney v. Poyntz* (1833) 4 B. & Ad. 568; *Simon v. Lloyd* (1835) 3 Dowl. 813; *Crisp v. Griffiths* (1835) 3 Dowl. 752; *Price v. Price* (1847) 16 M. & W. 232; *Gunn v. Bolckow, Vaughan & Co.* (1875) L. R. 10 Ch. Apps. 491; *Re Defries & Sons, Ltd.* (1909) 2 Ch. 423.

¹³⁷ *Tarleton v. Allhusen* (1834) 2 Ad. & E. 32; *Teaz v. Christie* (1855) 2 E. D. Smith 621; *Re A Debtor* (1908) 1 K. B. 344.

¹³⁸ § 38(1).

¹³⁹ § 39(1).

¹⁴⁰ *Grant v. Mills* (1813) 2 V. & B. 306; *Ex p. Loaring* (1814) 2 Rose 79.

¹⁴¹ *Abercrombie v. Mosley* (1839) 9 Port. (Ala.) 145; *Van Etten v. Troudden* (1874) 1 Hun 432; *Torkelson v. Brandon Savings Bank* (1928) 53 S. D. 560, 221 N. W. 371.

¹⁴² *Eisner v. Keller* (1871) 3 Daly 485; cf. *Darnell v. Morehouse* (1868) 36 How. Pr. 520; *Hunter v. Moul* (1881) 98 Pa. 13.

recover under his right of contribution from those jointly liable with him.¹⁴³

Missouri has adopted the following statutory provision:

"It shall be lawful for every creditor of two or more debtors, joint or several, to compound with any and every one or more of his debtors for such sum as he may see fit, and to release him or them from all further liability to him for such indebtedness, without impairing his right to demand and collect the balance of such indebtedness from the other debtor or debtors thereof, and not so released."

It was at first decided that this section does not dispense with the necessity for consideration, so that a mere part payment or promise thereof could not discharge the whole of the debtor's liability.¹⁴⁴ More recently, this interpretation has been repudiated.¹⁴⁵ It was held that "compound" meant no more than settle amicably. It did not mean, as the earlier court had held, "compromise" in the strict legal sense. This latter interpretation deprives the phrase "for such sum as he may see fit" of its natural meaning. There are similar statutory provisions in New York, Kansas, Ohio, South Carolina and Virginia.

The situation in which a creditor "compounds" with one of two or more joint debtors must be distinguished from that in which the creditor agrees to accept the sole liability of one of the joint debtors in discharge of the others. English courts decided in two early nineteenth century cases that acceptance of a sole liability in discharge of joint liability was not supported by consideration for the creditor. These were cases in which a debtor agreed to exonerate an outgoing partner on receiving the promise of the remaining partners to assume the partnership debt.¹⁴⁶ It was held in both cases that the creditor was not prevented from suing the former partner. A few years later these cases were in effect overruled in *Thompson v. Percival* (1834),¹⁴⁷ although they were distinguished on the ground that the remaining partners had not as in this case given a new bill of exchange for the partnership debt. All doubt about the

¹⁴³ *Smith v. Bartholomew* (1840) 1 Metc. 276; *Rowland v. Hackel* (1922) 243 Mass. 160, 137 N. E. 265; *Caragulian v. Rudd* (1933) 282 Mass. 260, 184 N. E. 717; Cp. *Goodnow v. Smith* (1836) 18 Pick. 414.

¹⁴⁴ *De Buhr v. Thompson* (1908) 134 Mo. App. 21, 114 S. W. 557.

¹⁴⁵ *Monett State Bank v. Rathers* (1927) 317 Mo. 890, 297 S. W. 45.

¹⁴⁶ *Lodge v. Dicas* (1820) 3 B. & Ald. 612; *David v. Ellice* (1826) 5 B. & C. 196.

¹⁴⁷ 5 B. & Ad. 925. See *Kirwan v. Kirwan* (1837) 2 M. & W. 484, 493, per Parke, B; *Watts v. Robinson* (1872) 32 U. C. Q. B. 362.

abrogation of the older doctrine was dispelled by the case of *Lyth v. Ault* (1852),¹⁴⁸ in which no new negotiable instrument was given for the creditor's promise to discharge the former partner. The Court of Exchequer thought that a different thing had been given, much the same as if a chattel or something different from money had been given. In conformity with settled authority, this imports the possibility of a benefit to the creditor, and a detriment to the debtor, and the courts will not investigate the question of the value of the consideration. There is a fuller discussion of this possible benefit to the creditor in the opinions of Baron Parke and Baron Alderson. It shows how eager the courts are to find a new consideration. It was said that the sole liability might be more beneficial than the joint because the creditor could not sue one debtor safely where liability is joint, inasmuch as the defendant might plead in abatement the non-joinder of his co-contractor. Again, there might be an advantage in having the sole liability of a rich man rather than the joint liability of a rich man and a poor man, in that if the rich man died first, the creditor could be deprived at law (although not in equity) of the security of that man's private estate. Alderson suggested that if A and B were both rich, it would still be desirable to have A's sole liability, because then the creditor could proceed against A or his estate without joining any other parties; and the advantage in this respect becomes all the more obvious, if, instead of B, there are a hundred persons jointly liable. It might be added that the creditor of a partnership, where the assets of the firm are insufficient to satisfy his debt, has not right to payment from the estate of a deceased partner until the separate creditors have been paid. This was strongly relied upon in the New York case of *Waydell v. Luer*,¹⁴⁹ which was taken in subsequent New York decisions¹⁵⁰ to have settled the law as it was later settled in England by *Lyth v. Ault*, although no opinion on that question was necessary, since the partner had given the note of a stranger. Moreover, of the four judges who did express an opinion, only two favored the doctrine later adopted in *Lyth v. Ault*.

¹⁴⁸ 7 Ex. 669.

¹⁴⁹ (1846) 3 Denio 410.

¹⁵⁰ *LaFarge v. Herter* (1850) 11 Barb. 159; *Luddington v. Bell* (1879) 77 N. Y. 138.

The liability of partners is joint during life, with an added several liability of their estates on death. If the liability is joint, but not that of partners, it is more difficult to find consideration, since a creditor has no right to proceed against the estate of a deceased joint debtor, unless it be that of the last survivor. This rule has, however, been modified in some American jurisdictions where by statute this right is expressly conferred on creditors, or joint liability is also made several. When liability is joint and several, none of the advantages said to exist in *Lyth v. Ault* can be found, nor is there any apparent detriment to the debtor who promises to assume the sole liability.¹⁵¹ But accepting what the Court there said of purely joint liability, or the peculiar liability of partners, it would follow that the promise to pay a less sum as a several liability in discharge of a larger joint debt would be supported by consideration. That less sum could be recovered without the necessity of joining other parties, and the creditor could compete with other separate creditors. If, however, detriment to the debtor is insisted on, it becomes more difficult to find a detriment, unless advancing the creditor's right in the administration of the debtor's estate can be said to be such a detriment. Where, as in England, a debt may be satisfied by the debtor's own note or bill, a note or bill given by the debtor solely, for part of a joint liability, in discharge of the whole joint debt, will satisfy that debt, if so accepted.

After *Lyth v. Ault* an impression arose that where a partner gave his sole note, that was a discharge of the joint liability, or was, at least, presumptively a discharge.¹⁵² The matter was exhaustively discussed in *Carruthers v. Ardagh*, an Ontario case decided in 1873,¹⁵³ in which this interpretation of the law was not adopted. In that case a note given by a partnership was about to fall due, and the plaintiff agreed to renew it. It had been the practice of the two partners to sign all partnership notes with their individual names. The creditor and one of the partners sought the other partner in order to procure his signature, but as he could not be found, the first partner only signed the second note. The Court was called upon to decide

¹⁵¹ *Lyth v. Ault* (1852) 7 Ex. at p. 671.

¹⁵² See the references to Byles on Bills in *Carruthers v. Ardagh* (1873) 20 Grant Ch. 579.

¹⁵³ 20 Grant Ch. 579.

whether in these circumstances the joint liability had been satisfied by the acceptance of the second note. It held, in a very learned discussion, that there is no satisfaction in the absence of a special agreement. There was not evidence here, apart from the delivery of the old note to the partner who signed the new, that there was an intention to discharge the joint liability of the partners. There was strong evidence against it in the fact that the second partner had been sought before the second note was signed, and the creditor had joined in the search. It was, however, emphasized that the agreement to accept the sole liability of one in discharge of the joint liability of several need not be express. It may be implied from the circumstances.¹⁵⁴ In Massachusetts the presumption that a bill or note is given in satisfaction of a debt applies where it is given by a single debtor for a joint debt.¹⁵⁵

(To be concluded in the January issue.)

¹⁵⁴ *Kirwan v. Kirwan* (1834) 4 Tyr. 491; *Hart v. Alexander* (1837) 2 M. & W. 484; *Winter v. Innes* (1838) 4 My. & Cr. 101; *Re Head* (1893) 3 Ch. 426; *Re Head (No. 2)* (1894) 2 Ch. 236.

¹⁵⁵ *Washburn v. Pond* (1861) 2 Allen 474; *French v. Price* (1833) 24 Pick. 13.

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