

THE

AMERICAN LAW REGISTER.

DECEMBER, 1863.

ACCORD AND SATISFACTION.

It is proposed to consider, in a very brief way, the objection which is raised to the introduction of the doctrine of Novation into the Common Law. If that objection rests upon any well-settled principle, it should by all means be sustained; but if, on the other hand, it has no rational foundation, it should not be permitted to obstruct the operation of so useful a doctrine.

Novation is a term of the Civil Law, and it was employed to denote the substitution of one contract in the place of another. A transaction of this kind was equally valid whether the original contract had been already executed as to one of the parties, or whether it still remained executory as to both. It is only in the latter event that the new is substituted for the old contract at the Common Law. The maxim of the Common Law is, that an accord without satisfaction is no bar to a suit upon the original obligation: and it is accordingly laid down, that an agreement to accept anything other than the original debt is not binding unless founded upon some new consideration. This, it will be observed, is not simply an application of the well-known principle of law which requires that each contract shall have a consideration, but it is an

additional requirement that the consideration on both sides shall be *equal*.

If a substituted stood upon the same footing with an original contract, the debtor's promise to give something else would be a consideration for the relinquishment of the old debt, and its relinquishment would in turn be a consideration for the debtor's promise. And why may not a creditor relinquish a debt in consideration of the debtor's promise? Is it because a sum of money due is thought to be of greater value than the same amount of money in hand? Such seems to be the drift of the reasoning against such relinquishment; for it is advanced as an argument, that a creditor having performed his part of the contract has a "perfect right" to the debt. (Byles on Bills, Am. edition, 182, note by the distinguished American editor.) This is true; but it makes in favor of, instead of against, the validity of the new contract; it is a reason why the creditor *can* give the money due, but by no means why he *cannot*. One has a "perfect right" to money in his possession, but that was never heard of as an objection to his using it. A lawful way to use money is to give it in consideration for a contemporaneous promise. The relinquishment of a debt to which the creditor has a "perfect right," is equivalent to an advance of an equal amount of money. Why does not the law treat it, then, as a consideration for a present promise? It is said, in answer, that the creditor cannot be bound by a naked agreement to release a debt. But it is a mistake to consider the agreement naked, and here lies the fallacy of the argument. It has a consideration; to wit, the promise of the debtor to give something else. Such a promise is deemed sufficient to sustain an agreement to pay money *outright*; and, if so, it must, of necessity, be sufficient to sustain a promise to release a debt; for however "perfect" may be the "right" to the debt, possession is still necessary to make the ownership complete.

Thus it appears that substituted and original contracts stand in reason upon the same footing. How then is the distinction which the law makes between them to be accounted for? It probably arose from the following considerations.

Should the Courts examine into the consideration of contracts, they would be constrained by the principles of equity which guide their action, to require that the consideration on one side should be equal to that on the other. In order to enforce such a rule, it would be necessary to put a specific valuation upon each article that could become the subject-matter of a contract. But as the value of goods fluctuates according to the state of the market, this could not be done. The Courts, therefore, would be obliged either to pronounce all contracts void for want of equality of consideration, or to assume to be the agent of both parties to re-adjust the terms of the contracts. It is to avoid either alternative that they refuse to inquire into the *sufficiency* of the consideration.

There is one exception to the refusal to inquire into the adequacy of the consideration; to wit, in contracts for the exchange of money. Here the value of the articles to be exchanged is fixed by law, and the Courts cannot refuse, but are bound to take judicial notice of the fact. They accordingly hold that, as money is the legal standard of value, contracts to exchange different amounts of money are not binding, because there is no consideration for the balance of, or difference between, the two amounts.

An agreement to give a different amount of money from that due, or even the same amount upon a different time (time being an additional legal consideration without a return), is not binding, because it lacks the equality of consideration which the law requires in exchanges of money; and without a legal sanction to give the agreement efficacy, it amounts to nothing; hence it cannot be a substitute for, or satisfaction of, the debt. As agreements of this kind make up the bulk of substituted contracts, which are, for the most part, agreements either for a reduction in the amount of the debt, or for an extension of credit, it was inferred, though erroneously, that *all* substituted contracts are likewise not binding. It was not observed that where something other than money is offered in consideration for the money which is due, the transaction stands upon the same footing with other bargains; in such case, as in ordinary barter, the debtor agrees to give one thing in return for another. "And where," said Baron PARKE, in

Cooper vs. Parker, 15 C. B. 822, "the matter pleaded in satisfaction of a liquidated demand is of uncertain value, the Court will not set a value upon it, or inquire into the sufficiency of the consideration." In consequence of this oversight in not discriminating between the two classes of contract,—that is, between contracts for the exchange of money, and contracts not for the exchange of money,—the ambiguous maxim, that an accord without satisfaction is no bar, was devised in order to prohibit all substituted contracts. That maxim *says*, that an agreement is not satisfaction of a debt; it *means*, that a void agreement, which is not an agreement, is not satisfaction of a debt. The question always is, whether the agreement is binding; that is, whether it amounts to a legal agreement. It is only when it wants some essential of a valid agreement, as *e. g.* a consideration, that it is said not to be a satisfaction of a debt. Where there is no doubt about the consideration, as in case of a fresh consideration, the agreement is invariably held to be satisfaction, if such was the intention of the parties.

It is easy to see how the maxim, that an accord without satisfaction is no bar, originated. It is an undue extension of the familiar rule, that an agreement to do what the party is already bound to do is not binding. Thus, in trespass for taking the plaintiff's cattle, it was held not to be a good plea to say, that there was an accord that the plaintiff should have his cattle again; that not being satisfaction, unless accompanied by delivery of the cattle. 1 Bac. Abr. 22. Accordingly, where the new agreement is merely to do what the party is already bound to do, it is strictly true that the additional agreement is not satisfaction unless executed. The new agreement is not binding because it wants a consideration, and, therefore, having no legal existence, it could not be satisfaction of the demand.

It is contended that the law must protect the creditor's rights, which would be impaired if the debtor could escape from the terms of one contract by making another. But the answer to this is, that the new contract, like any ordinary contract, requires the consent of both parties; and if the creditor cannot take care of

his interest in making it, the reason must be that he is incapable of making any bargain. The argument proves too much; it would prevent all contracts. Instead of an injury, however, the new contract works a benefit to the creditor, as well as to the debtor. Take, for the sake of illustration, the following case:—A contractor, who is unable to raise money, is indebted to a person who is about to have a house built. Why should not the creditor be allowed to relinquish his debt, in consideration of his debtor's agreeing to build him a house of which he stands in need? In this way the debtor would be enabled to pay his debt, which otherwise he could not do, and a creditor to save himself the expenditure of an equal amount of money. Thus it is often the only, as well as the best mode in which a creditor is able to collect his debts.

It is evident that the maxim is not now looked upon by the Courts with favor. Thus Baron PARKE, following Mr. Justice BYLES in his Treatise on Bills, p. 153, decided in *Foster vs. Dawber*, 6 Exch. 839, that the rule does not apply to commercial paper; which he held to be governed by the law merchant, and to follow, in this respect, the civil law and the continental law of Europe. By this decision, contracts for the exchange of money, which mainly take the form of promissory notes and bills of exchange, and to which alone, as has been shown, the reason of this rule applies, are withdrawn from its application. This decision looks like the precursor of the total overthrow of the maxim; for it is inconceivable that the same Court will continue, for any length of time, to hold an agreement to accept a part of a sum of money in discharge of the whole to be satisfaction, if put in the form of a promissory note or bill of exchange, but not if put in any other form of a contract, even though it be followed by actual payment or execution.

This short article, which investigates the ground-work of the doctrine of Accord and Satisfaction, is taken from *the London Law Magazine and Law Review* for May, 1863; a periodical which, besides abundant professional information, frequently contains

original suggestions upon recondite points of law which are worthy the consideration of the student of jurisprudence.

The maxim, which the writer of this article shows to have been an imperfect generalization, is an illustration, though an unfortunate one, of the independent growth of the common law. Had the civil law been consulted when a case first arose which called for an examination of the subject, the doctrine of Novation would have been adopted, as it was in Continental Europe, without hesitation. A strict analysis of the doctrine would have shown, it is true, that its application should be limited to such contracts as are not for the exchange of money, in which contracts there exists a perfect bargain,—one thing is agreed to be given in exchange for another. Money contracts, either original or substituted, which have but a consideration in part and none for the residue, should, in strictness, be pronounced void, but the decision should be distinctly put upon the ground of partial absence of consideration, which does not apply to any other class of contracts. It is more than probable, however, that the great convenience of leaving to the parties themselves the question of the sufficiency of the consideration would have determined the Courts not to exact equality of consideration even in money contracts. Their subsequent conduct justifies this opinion. The maxim has been abandoned in all contracts which are put in the form of negotiable instruments; in short, to speak generally, in all money contracts. The English Courts are now in the awkward position of having subverted the maxim in money contracts, which gave rise to its invention, and to which it justly applies, and yet of upholding it in other classes of contracts to which it was, without reason, extended.

The reason ordinarily, given for the maxim is delusive. It is said that the old debt is a past consideration which will not sustain a promise to do or give anything else in its stead. Now, as our author says, it is not a consideration for a promise of its own payment, for that is already due, and an additional promise would not add to the strength of the obligation. But it is a subsisting consideration to support a contract to do anything else, instead of

paying the old debt. This is an independent transaction which the parties enter into after abandoning the old contract, which they are at liberty to do. Is there any doubt that a promise made by a third person in consideration for a transfer of the debt would be binding? and, if so, how can the consideration be said not to subsist? and may not a creditor contract with his debtor as well as with a third person? The law does not incapacitate a man from transacting business because he has once failed to meet an engagement. If it did, business would come to a dead stop. Now, if the debt still subsists, what a puerile formality to require it to be first paid over and then paid back again before the new agreement is held binding! Does this ceremony change the character of the money thus juggled? or is this circumlocution in harmony with the common law, which abhors circuitry?

There is in this instance, as there is generally, a mode to test the soundness of the maxim, a species of legal verification. The method is to ascertain whether the maxim is in unison with other legal principles. If it conflicts with them, it is an incongruity, and is necessarily unsound, whereas if it harmonizes with them, it may justly be deemed verified. Now suppose a creditor agrees with his debtor to advance, in cash, a sum of money equal to the debt in return for the debtor's agreement to furnish a specified quantity of merchandise. What is there to prevent the creditor from setting off the debt which he owes by this new contract against that which is due him by the old? Absolutely nothing. The old debt is extinguished by a set-off of an equal amount of money; so that it is, in reality, this advance of money which is the consideration for the new promise by the debtor. A novation is, therefore, but a set-off, and to deny its validity is to impeach that of set-off.

An important decision in confirmation of the view here taken, is that of *Christie vs. Craige*, 8 Harris Pa. R. 430. In that case the creditors agreed, on the day the note became due, to accept, in full satisfaction of the debt, a quantity of yarn. BLACK, C. J. : "An accord is generally no bar to an action unless it has been followed by satisfaction. But where a debt is due by one contract,

the parties may abolish it and substitute another in its place. Here the original contract was for the payment of money. The parties agreed that no money should be paid, but that yarn should be furnished instead of money. They had the right to do this; and having done it, the bargain was for yarn, as much as if money had never been thought of. If a creditor consents to accept merchandise in satisfaction for his claim, and the debtor invests the money with which he would otherwise have paid it in the goods contracted for, and has those goods ready at the time and place agreed upon, it would be wrong to say that money might be claimed afterwards. This principle needs no case to support it; and common justice will not tolerate that any authority should be set up against it."

This clear and emphatic language uttered in a case in which the point was directly before the Court, should, it would seem, settle the law upon this point, at least in Pennsylvania. Instead of that, however, the recent case of *Hearn vs. Kiehl*, 2 Wright Pa. R. 147, re-establishes the maxim with a new gloss upon it, which makes it a still greater restraint upon the freedom of contracting. The facts of this case are well stated in the syllabus as follows:

"A promise to take as payment of two notes, one over due and one not yet due, fifty *per cent.* of the amount of them, half in cash and half in a new note at three months, is without consideration, and the agreement is not binding unless executed."

WOODWARD, J.: "Accord and satisfaction is a good plea by a debtor to the action of his creditor, but the legal notion of an accord is a new agreement on a new consideration, to discharge the debtor, and it is not enough that there be a clear agreement or accord, and a sufficient consideration, but the accord must be executed. The plea must allege that the matter was *accepted* in satisfaction. * * * Such is the law between debtor and creditor.

"The only consideration discernible in the agreement alleged in the affidavit of defence in this case is time. The sum stipulated to be paid in satisfaction of the debt was to be paid a little sooner than the whole debt would fall due, and that was the considera-

tion for the plaintiff's promise. There was no other. Granting the sufficiency of this consideration, there was no execution of the accord. * * There was, therefore, no satisfaction and so no defence set forth in the affidavit."

With great deference it is submitted that Mr. Justice WOODWARD stated the law in this case incorrectly. His Honor seems to have been misled by the inaccuracy of the terms of the maxim. The meaning of an accord is not a legal agreement; if it were, accord would be satisfaction. It is an agreement which lacks some essential of a legal agreement, and by consequence, wants the sanction which makes an agreement binding, and thereby gives it a legal existence. Whether the consideration be new or old is not material, provided it is sufficient. But his Honor's new definition that "the legal notion of an accord is a new agreement on a new consideration," and the decision of *Hearn vs. Kiehl*, in which case there was the new consideration of time, in accordance with that definition, makes the maxim still more comprehensive than ever. Heretofore there has been no question as to an accord being satisfaction if founded upon a new consideration and accepted as satisfaction. Chitty on Contracts 659; Story on Contracts, § 982 a; Parsons on Contracts 194-5-6, and cases cited; *Hart vs. Boller*, 15 Sergeant & Rawle 162. There is, it is true, an assertion to be found in 1 Smith's Leading Cases 446, that an accord is not satisfaction, though founded upon a sufficient consideration; but the authorities cited, so far from supporting, actually contradict the assertion. If Mr. Justice WOODWARD'S interpretation of the maxim be received, and an accord, though founded on a new consideration, must be executed before it can be pleaded in satisfaction, then nothing but actual payment will discharge a debt.

In the State of Maine the principle of the maxim of accord and satisfaction, which is the equality of consideration in all substituted contracts, has been abolished by statute. R. S. of 1857, c. 82, § 44, which is in the following terms: "No action shall be maintained on a demand settled by a creditor, or his attorney intrusted to collect it, in full discharge of it by the receipt of money or other valuable consideration, however small."