When hardships shall arise, provision is made by law for affording relief under authority much more competent to decide on such cases than this court ever can be.

"In the eternal struggle that exists between the avarice, enterprise, and combination of individuals on the one hand, and the power charged with the administration of the laws on the other, severe laws are rendered necessary to enable the executive to carry into effect the measures of policy adopted by the legislature."

RECENT ENGLISH DECISIONS.

Exchequer Chamber.

LOCKE *v.* FURZE.[1]

The plaintiff, being in possession under an old lease, had an *interesse termini* under a reversionary lease of the same premises from the same lessor. Before the expiration of the original lease, V., claiming under the lessor by a good title, repudiated the reversionary lease, and subsequently granted to the plaintiff a lease for a shorter term at an increased rent.

Held (affirming the judgment of the Court of Common Pleas), that the ordinary rule of law, that on a breach of contract the person injured is entitled to be put in the same position as that in which he would have been had the contract been fulfilled, applied; and that therefore the plaintiff was entitled to recover the difference between the value of the reversionary lease and that granted by V., although he had never entered under the reversionary lease.

Flureau v. *Thornhill*, 2 Wm. Bl. 1077, distinguished.

APPEAL from a judgment of the Common Pleas discharging a rule calling upon the plaintiff to show cause why the verdict found for him should not be set aside and be entered for the defendant, and why the damages should not be reduced to a nominal sum.

In the court below a demurrer to one of the pleas was argued with the rule, and judgment on the demurrer was given to the defendant. Error had not been assigned upon that judgment, and the appeal was now argued alone.

The case is fully reported 13 W. R. 971, 34 L. J. C. P. 201.

Garth, for the appellant.—The sum paid into court is sufficient

[1] *Coram*—POLLOCK, C. B., BLACKBURN and MELLOR, JJ., MARTIN, CHANNELL, and PIGOTT, BB.

to cover the damages. Up to the 4th of December, 1864, the plaintiff had a mere *interesse termini* and not a lease in possession, and the measure of damages is the sum which he paid for the reversionary lease and the expenses of that lease. In New York and many American states the rule is as the appellant contends: Mayne on Damages 98; Sedgwick on Damages 177 (ed. 1852), citing *Staat* v. *Ten Eyck's Executors*, 3 Caines 111, 4 Kent's Comm., par. 475. [BLACKBURN, J.—Kent, in his note to that paragraph, says: "The rule is now settled in South Carolina according to the English common law," so that he evidently thinks that our law is opposed to that of New York.] The case of *Williams* v. *Burrell*, 1 C. B. 402, is not on all fours with the present case, as the plaintiff had been in possession for some time under the lease; here the plaintiff has never had the term, and cannot be said to have lost it. [MARTIN, B.—*Robinson* v. *Harman*, 1 Ex. 850, is a positive authority against you.] That case was decided on the ground that the lessor knew he had no title, and *Hopkins* v. *Grazebrook*, 6 B. & C. 31, was decided on similar grounds. The present case more nearly resembles *Flureau* v. *Thornhill*, 2 Wm. Bl. 1077. [CHANNELL, B.—It is very common to overlook the fact that this is an action brought on an express covenant. Lord St. Leonard's has well pointed out the distinction between this class of action and that for money had and received to recover back a deposit.[1]] The lessee never having had possession, cannot be said to have lost anything except the consideration-money and the expenses of the lease.

Mellish, Q. C. (*Archibald* with him), for the respondents.—This is a covenant that the plaintiff shall quietly enjoy the premises during the whole of the term, and differs from a covenant for title, which is a covenant relating to the state of things which exists at the time it is entered into. That covenant is broken if the lessee has no title at that time, and the damages are the damages suffered at that time. In the case of a covenant for quiet enjoyment, there is no breach until the lessee is evicted or prevented from obtaining the lease, and it is clear that the damages are what he loses at the time of the breach, and not at

[1] The passage to which the learned judge referred is in Sugden's Vendor and Purchaser, where *Flureau* v. *Thornhill*, and the subsequent cases on this subject, are collected and reviewed.

the time the covenant was entered into. No doubt it was some advantage to the plaintiff to get the new lease: if he had not obtained it, he would be entitled to all the damages incurred by the loss of the twenty-one years' lease. The question is, what is the difference in the plaintiff's position? He would have had to pay 175*l.* a year, and would have had a lease for twenty-one years; he has now to pay 300*l.* a year and has only got a seven years' lease. The question of the amount of loss he has sustained has been decided by the jury, and it is submitted that he is in law entitled to retain the verdict.

Garth replied.

MARTIN, B.[1]—I am of opinion that the judgment of the Court of Common Pleas was right. The law is correctly laid down by PARKE, B., in *Robinson* v. *Harman*, and seems to be in accordance with good sense. In an ordinary contract, if one of the parties fails to carry it out, he is liable to the other for the loss he may sustain consequent upon the breach, and I cannot see why the lessor in this case should not pay what would have been the value of this contract had it been carried out. The case of *Flureau* v. *Thornhill* has qualified the ordinary rule of common law, and that case has been upheld by *Sykes* v. *Wild*, 1 B. & S. 587, and is good law, but it applies to an exceptional state of circumstances. The case of *Hopkins* v. *Grazebrook* does not come within the exception established by it, but engrafts another exception upon it.

BRAMWELL, B.—I also think that the judgment was right. The question with which we have to deal is, on what principle the damages ought to be estimated, and I think that on the facts shown by the case, the plaintiff is not limited to the sum of 400*l.* and the expense of the lease. It is a general rule of law that when a contract has been broken, the party injured should be compensated to the extent to which he has been injured by the breach. Some authorities have been cited to show that this rule does not apply to a case of this nature, and it has ben attempted to make a distinction between this and mercantile cases. No doubt, had the action been for money had and received, the

[1] POLLOCK, C. B., left at the close of the argument, after intimating that he agreed in opinion with the rest of the court.

plaintiff could only have recovered back the original consideration; but the present case is distinguishable from that, and is not a contract *in pari*, or one which has been rescinded. It is a contract which the defendant's testator executed as far as he was able to do so, and in the deed he covenanted for quiet enjoyment during the whole term; and it is on this covenant that the action is brought. I think that an *interesse termini* passed to the plaintiff, and that to entitle him to recover, it is not necessary that he should have actually been evicted. The principle laid down by the court below, that the plaintiff is entitled to recover what he has actually lost, is, in my opinion, correct, and therefore I think that this judgment should be affirmed.

BLACKBURN, J.—I think that the general rule is that laid down by PARKE, B., and that the plaintiff is entitled to be put in the same position as if the contract had been fulfilled. Where a contract would give the enjoyment of a particular thing, the measure of damages would be the value of the thing lost. That is clearly laid down in *Robinson* v. *Harman*. There is an exception to the rule of common law in the case of contracts for the sale of real estate. The law as to real property is such that a vendor may well be in doubt whether he has a good title or not, and, therefore, it is prudent in him to bargain, that if he fails in showing a good title he shall not be liable to pay full damages, and to stipulate that the bargain shall be off, he repaying the sum which has been deposited. The case of *Flureau* v. *Thornhill* shows that there is a tacit understanding that such terms as this are inserted in contracts for the sale of land. So in *Walker* v. *Moore*, 10 B. & C. 416, PARKE, J., says—"In the absence of express stipulation about it the parties must be considered as content that the damages, in the event of the title proving defective, shall be measured in the ordinary way, and that excludes the claim of damages on account of the supposed goodness of the bargain." I think that is the true principle, and that there is only that one case to which the exception applies, and is always understood to apply. The present contract is not a contract for sale but an out-and-out conveyance of an *interesse termini*, and a covenant which has been broken; and I can see no principle upon which the ordinary rule should not apply. There is no case in the English reports to support the appellants' contention. In

those American states in which the rule for which he contends is adopted it may be that there is such a well-established custom to this effect that it is tacitly incorporated, but if we were to hold that there is any such custom here, we should be deciding against the facts.

MELLOR, J.—The real question is what did the plaintiff, who had got a lease actually executed, containing a covenant for quiet enjoyment, lose? It is clear that he was entitled to quiet enjoyment under the lease. The lessor had no title to grant such a lease, and upon his death it is avoided by his successor, who makes a new lease, upon advanced terms. It is to be assumed that this new lease was the best thing that could be done, and in ease of the plaintiff rather than against him. I cannot see any objection to the mode in which the case was left to the jury, and am of opinion that the judgment should be affirmed.

PIGOTT, B.—I have come to the same conclusion after considerable hesitation. I thought at one time that it could hardly be said that the plaintiff had been evicted, because although the lessor *bonâ fide* granted the lease, it turned out afterwards that he had no title, and I thought, therefore, that the plaintiff had not actually acquired any estate and could not claim damages for an eviction from what he had not really had; this seemed to me to be a fallacy, but on considering that the lease had actually been granted to him, I think that he is entitled to recover.

Judgment affirmed.

The fact that the title to landed property is evidenced mainly by written instruments, the legal interpretation of which often involves questions of nicety and perplexity, is a sufficient reason for approving the judicial policy, which established the important principle in the case of *Flureau* v. *Thornhill*, 2 W. Black. 1078, that a vendor of real property who (without fraud) fails to make out a title shall not be liable to the purchaser in damages for the loss of his bargain. This principle has held its ground to the present day, though an important modification of the rule has, not without symptoms of fluctuation in the course of decision, been admitted. The doctrine was accepted without challenge, in the cases referred to by Lord St. Leonard's, and stated in the appendix to the Vendors and Purchasers—*Bratt* v. *Ellis*, p. 7, and *Jones* v. *Dykes*, p. 9; and it seems also to have been assumed as the ground on which the damages were estimated in the case of *Johnson* v. *Johnson*, 3 Bos. & Pull. 132, where a purchaser who had taken possession, but had not taken a legal conveyance, recovered from the parties beneficially entitled to the purchase-money the sums they had respectively received as the consideration for a messuage, &c.,

from which the purchaser had been evicted by title paramount.

However, in the case of *Hopkins* v. *Grazebrook*, 6 B. & C. 31, it was held that the purchaser of an estate, who had resold in lots by auction, before he had obtained his own conveyance, and was unable to make a good title by the time appointed, by reason of his vendor never conveying to him, was liable to the sub-purchaser, not only for the expenses which the sub-purchaser had incurred, but also for damages for the loss of his bargain. Lord TENTERDEN intimated that he was not prepared to admit, as a general proposition, that where a vendor could not make a good title, the purchaser should recover nothing more than nominal damages. His Lordship, however, considered this case clearly distinguishable from *Flureau* v. *Thornhill*; as there the vendor appeared to be the owner of the estate, and when the objection was made to the title, he offered to convey such title as he had; here, the defendant had put the estate up to auction before he got a conveyance, a step he ought not to have taken without ascertaining if he would be in a situation to offer some title; and having entered into a contract to sell without the power to confer even the shadow of a title, he must be responsible for the damage sustained by his breach of contract.

In the subsequent case of *Walker* v. *Moore*, 10 B. & C. 416, a purchaser of property prematurely sold a portion of it at a considerable profit after he had received the abstract of title from his own vendor, but before he had examined it with the original deeds, and, upon such examination subsequently had, the title was discovered to be defective, whereupon the sub-purchaser refused to complete, and the purchaser himself also rescinded his contract; it was held in an action by the original purchaser against his vendor that he could only recover the expenses incurred in the investigation of the title, and nominal damages for the breach of contract; but nothing for the profit he would have gained by the resale; nor for the expenses attending the resale; nor for the sums he was liable to pay the sub-contractors for their expenses in examining the title. BAILY, J., said that the purchaser ought not to have acted on the faith of having the estate until the abstract had been examined with the deeds and found correct, after that had been done he thought he might have recovered the expense of any sub-contract entered into, and if there had been *mala fides* (but not otherwise), the profit to arise from a resale; and PARKE, J., laid it down that a jury ought not, *in the case of a vendor in possession*, to give any other damages in consequence of a defect being found in the title, than those which were allowed in *Flureau* v. *Thornhill*. And, as there was no fraud in this case, negligence in preparing the abstract was the only thing that could be imputed to the defendants; and the plaintiff, by exercising ordinary care, might have averted the loss that had arisen from that negligence.

The principle which is thought to have been established by *Hopkins* v. *Grazebrook* was, however, fully recognised in the case of *Robinson* v. *Harman*, 1 Exch. 850, where it was held that a party who agrees to grant *a good and valid lease*, having full knowledge that he has no title, is liable in damages for the loss of the purchaser's bargain. On the other hand, in *Pounsett* v. *Fuller*, 17 C. B. 660, it was held that a sale of right of shooting by one who had only an equitable right thereto under a written agreement from the owner of the manor, but which the latter refused to confirm, did not render the vendor liable to his vendee for damages for the loss of the bargain, or for the expenses of an abortive attempt to obtain other shooting; and it was said by WILLIAMS, J., that ignorance of law (*e. g.*, that an incorporeal here-

ditament would only pass legally by deed) was not that sort of misconduct that brought the case within the rule of *Hopkins* v. *Grazebrook*.

The whole doctrine was again very elaborately reviewed in the case of *Sikes* v. *Wild*, 1 B. & S. 587, when the Court of Queen's Bench fully recognised the general doctrine of the case of *Flureau* v. *Thornhill*, and the majority of the court, consisting of WIGHTMAN and BLACKBURN, JJ., considered that the case then under consideration was unaffected by the distinction established by *Hopkins* v. *Grazebrook*. The Lord Chief Justice (COCKBURN) disagreed. He seemed to consider that the defendant in *Sikes* v. *Wild* fell under that category of persons who would be obnoxious to the doctrine of *Hopkins* v. *Grazebrook* and *Robinson* v. *Harman*, being "a person who, not having an estate, takes upon himself to sell, in the expectation of acquiring the estate in time, and making out a title." The majority of the court, however, differed from the chief justice in their view of the facts, and decided the case without impugning the doctrine of *Hopkins* v. *Grazebrook* and *Robinson* v. *Harman*; but BLACKBURN, J., said, "Though the latter cases had been expressly recognised as binding by the Court of Common Pleas in *Pounsett* v. *Fuller*, that court considered the general rule applicable under such circumstances as leaves it very difficult to say to what cases (if any) the exception supposed to be established by *Hopkins* v. *Grazebrook* still applies."

The principal case has again brought the doctrine of these cases under discussion. The general rule established by *Flureau* v. *Thornhill*, and the distinction engrafted thereon by *Hopkins* v. *Grazebrook*, were assumed by the Courts of Common Pleas and Exchequer Chamber as both remaining unimpeached.

It was admitted that if the case could be treated as an executory contract, then the rule of *Flureau* v. *Thornhill* would apply, and the lessee could only recover back the premium and his expenses; but the courts held that although this was only an *interesse termini* it must be considered as a contract *executed*, in which, being corroborated by express covenants, the lessor was bound to all the consequences of the obligation he had undertaken by those covenants. This case is, it is believed, one of first impression, as affirming the proposition that that species of contract called an *interesse termini*, although it may never have lost its inchoate character, and been ripened into an actual *estate*, is sufficient to furnish a support to which an ancillary and concomitant contract, such as a covenant for title, may be knit and superadded.

Those covenants that run with the land have always been considered as requiring an actual *estate* for their support (*Spencer's Case*, 5 Rep. 17, and per Lord ELLENBOROUGH, 1 B. & A. 607); and, though after much doubt, it has been held that estates actually created in incorporeal hereditaments (being in fact *tenements*) will attract the rule as well as those in corporeal hereditaments (see *Bally* v. *Wells*, Wilmot's Notes 341; *Earl of Limerick* v. *Keene*, 2 Jones Ex. Ir. 307; *Martyn* v. *Williams*, 1 H. & N. 817); but the reasoning on which these decisions proceed has no bearing on a case like a mere *interesse termini*, *which never becomes other than executory*, and by no construction could be deemed a "tenement," and under which no *present right* to the land or any profits out of it is vested, and therefore cannot be such an *estate* in the land as the covenantee ought to have in order that the assignee from him of the *same estate* may have advantage of covenants annexed thereto: *Webb* v. *Russell*, 3 T. R. 393.

Now an *interesse termini* has always been affirmed not to be an *estate* in the land: 2 Prest. Conv. 215. It would seem, therefore, that the covenant in

Locke v. *Furze* could not have been assigned, though the *interesse termini* itself clearly might (Co. Litt. 46 b); so that, if the lessee had assigned his right under the *interesse termini*, the right of action on the covenant would have been lost; for it should seem that, under such circumstances, the assignor could not sue: *Beely* v. *Parry*, 3 Lev. 154; *Green* v. *James*, 6 M. & W. 656. The case of *Locke* v. *Furze* is one deserving the attention of conveyancers; and it may, perhaps, appear not so easy to reconcile the decision with established principles, as the unanimity of the two courts before which the subject has been brought, would seem to imply.—*Solicitors' Journal.*

Vice-Chancellor Stuart's Court.

LOVETT v. HANKINS.

An agreement to take, in lieu of arrears of income, in respect of a life interest, recoverable in equity, a certain sum, less than the estimated amount of such arrears, recoverable at law, is, in equity, void for want of consideration, and will not be supported.

THIS suit was instituted for the purpose of setting aside two agreements, of the 2d and 11th of May 1864 respectively, the first having been entered into between the plaintiff, Mary Lovett, widow, and Thomas Hankins, her brother, who died between the dates of the two agreements, and the second having been signed by the plaintiff after her brother's death at the instance of his representatives, who were the principal defendants in the suit. The circumstances which led to these agreements being signed were as follows:—Joseph Hankins, father of the plaintiff and Thomas Hankins, by his will, dated December 17th 1823, directed a sale of certain real estates, and bequeathed one-third of the proceeds to Thomas Hankins, one-third in trust for the plaintiff for life, with remainder for the benefit of her children (if any), and if none, as to one moiety of the plaintiff's share, to Thomas Hankins absolutely, and as to the other moiety upon such trusts as were declared of the remaining one-third part, which he bequeathed in trust for another daughter, Sarah Penner, for life, with remainder to her children. After the death of the testator (which occurred in 1824) the trustees of his will agreed with Thomas Hankins for sale to him of the real estate for 19,700*l.* At the time of this sale Thomas Hankins only paid 1320*l.* 10*s.*, which went to clear off encumbrances on the estate. Of the remaining purchase-money (18,379*l.* 10*s.*), a part, viz., 1002*l.*,

represented a legacy charged by the testator on his real estate, and the ultimate remainder of 17,377*l.* 10*s.* represented the residuary proceeds of the sale to be divided in thirds and appropriated as above mentioned. It was agreed at the time that Thomas Hankins should retain 5792*l.* 10*s.* (being his own third part), and should grant a mortgage to the trustees of the will to secure the legacy, and also the two-third parts or shares of his sisters, the plaintiff and Sarah Penner.

To carry this arrangement into effect, Thomas Hankins, by an indenture dated 14th May 1835, mortgaged the estates to the trustees for one thousand years, to secure the same sums with interest at 4*l.* per cent. Shortly afterwards the legacy was paid.

The plaintiff at the time of the hearing was about seventy-four years old, and had never had a child. Sarah Penner had children who were interested in remainder under the will of the testator.

Shortly after the date of the mortgage above mentioned, Thomas Hankins purchased the reversionary interests of all the children of Sarah Penner, in the sum of 11,585*l.* (being the sum in which the plaintiff and Sarah Penner were interested in moieties during their respective lives), and so became absolutely entitled to that sum, subject only to the respective life interests of the plaintiff and Sarah Penner therein. In order to raise the sum necessary for purchasing these interests, Thomas Hankins was obliged to mortgage the estate, which he did by an indenture dated 17th November 1852, his sisters, the plaintiff and Sarah Penner, joining therein for the purpose of postponing their security for the 11,585*l.*

By another indenture, dated the same 17th November, Thomas Hankins assigned all the rents and profits of the estate which should accrue during the life of the plaintiff and Sarah Penner (subject to the mortgage of even date) to the surviving trustee of the will of the testator upon trust to satisfy and keep down the interest to become thereafter due to the plaintiff and Sarah Penner.

Sarah Penner died in 1853.

Subsequently to the last-mentioned deed Thomas Hankins made the plaintiff unequal payments on account of her life interest, the income of which fell considerably into arrear.

Thomas Hankins died in May 1864, having made a will whereby he devised his real estate to his sons, Thomas and William Han-

kins, and his son-in-law, Richard Hobbs, in trust for all his children (two sons and three daughters) in equal shares.

The bill stated that a few days before the death of Thomas Hankins, his son William Hankins came to plaintiff and asked her to sign an agreement to take 1000*l.* (a sum less than the estimated amount of arrears) in discharge of all arrears. The plaintiff was then ill and in bed, and supposing that her brother, Thomas Hankins, was in difficulties, and knowing that he was dying, she consented to sign, and did sign, the first agreement, whereby she agreed to take 1000*l.* in full of all arrears, and Thomas Hankins agreed to pay the plaintiff 1000*l.* with interest at 4*l.* per cent., on the plaintiff giving him twelve months' notice requiring payment thereof. And the plaintiff agreed to give to Thomas Hankins, on payment of 1000*l.* and interest, a receipt for the arrears of her annuity up to the day of the agreement.

The bill proceeded to state that after the death of Thomas Hankins, William Hankins and Richard Hobbs induced the plaintiff to consent to give up her claim for interest on the 1000*l.*, telling her that it was the only plan to avoid leaving her brother's debts unpaid, and she accordingly signed the second agreement, dated the 11th May 1864, releasing her claim for interest

The plaintiff alleged that she was induced by misrepresentation to sign these agreements, and that there was, in fact, no consideration for them. The defendants to the suit were the two sons and three daughters of Thomas Hankins, the respective husbands of two of the daughters, and the representatives of the last surviving trustee of the will of the original testator, who was also trustee of the securities given by Thomas Hankins for the plaintiff's life interest.

Malins, Q. C., and *B. Rogers*, for the plaintiff, contended that the agreements could not stand. They were wholly without consideration. They cited *Cumber* v. *Wane*, 1 Str. and 1 Sm. Lead. Cas. new ed. 288; *Heathcote* v. *Crookshanks*, 2 T. R. 24, 27; *Fitch* v. *Sutton*, 5 East 230; *Cross* v. *Sprigg*, 6 Ha. 552, 555; *Peace* v. *Hains*, 11 Id. 151.

Bacon, Q. C., and *De Longueville Giffard*, for some of the principal defendants, argued that there was a consideration for these agreements. Previously the plaintiff had only a general charge in equity for whatever arrears she could claim. The first

agreement gave her a distinct legal right to a fixed sum. These agreements were such as would be enforced at law, and there was no ground for setting them aside in equity. They also referred to *Cumber* v. *Wane*, loc. cit.

Archibald Smith, for other defendants in the same interest, cited *Topham* v. *Morecraft*, 8 Ell. & Bl. 972, and commented upon *Peace* v. *Hains*, loc. cit.

Freeman and *Phear*, for the representatives of the last surviving trustee of the will of Joseph Hankins.

STUART, V. C., said that he could not but hold that both agreements had been executed under such circumstances that they could not be supported in equity. The counsel for the defendants had not attempted to uphold the second agreement, but as to the first an attempt had been made to show that it was founded upon a sufficient consideration. It was argued that, before that agreement, the plaintiff had only a right enforceable in equity, and that the effect of that agreement was to give her a remedy at law. His Honor was not aware of any authority for saying that an agreement to take 500*l.* recoverable at law for 1000*l.*, recoverable in equity, could be said to be founded upon a sufficient consideration. Again, it had been contended that this agreement was one which would be enforced at law: it might be so, but it was not necessarily, on that account, valid in equity. His Honor made a declaration that the two agreements were invalid and ought to be set aside, and directed an account of what was due to the plaintiff for arrears of her life interest.

It was decided in the leading case of *Cumber* v. *Wane*, 1 Sm. Lead. Cas. 439, that the acceptance of a smaller sum cannot be pleaded in an action for a larger amount; and this doctrine has been so frequently acted upon in subsequent cases that it has come to be regarded as one of the *non tangenda non movenda* of our legal system. But while the lawyers of the present day display such unbounded respect for the memory of Lord CAMDEN (who pronounced the decision in *Cumber* v. *Wane*), they have engrafted so many exceptions upon the original rule, that the doctrine seems to be fast disappearing beneath the embellishments which time and legal ingenuity have added to its own simple outline.

The first class of exceptions to the general rule appears to have originated in *Longridge* v. *Dorville*, 5 B. & A. 117, where it was held that the doctrine in *Cumber* v. *Wane* should not be considered as extending to claims for unliquidated damages. This case has been followed by a multitude of decisions founded upon some microscopic perception that the plaintiff's demand was a hair's breadth more or less unliquidated, or was disputed: *Edwards* v. *Baugh*, 11 M. & W.

641. The joint result of the decisions in *Cumber* v. *Wane*, *Longridge* v. *Dorville*, and *Edwards* v. *Baugh*, accordingly, has been that few cases of settlements of disputed accounts are not open to the objection that they are not strictly within the letter of the ruling in *Cumber* v. *Wane*. So that, to use the words of Mr. J. W. Smith (Sm. Lead. Cas. 444), "If there be any benefit, or even any legal possibility of benefit, to the creditor thrown in, that additional weight will turn the scale, and render the consideration sufficient to support the agreement." The doctrine in *Cumber* v. *Wane*, in fact, appears to have been founded upon the civil law, which inquired into the adequacy of the consideration; while the numerous exceptions to that leading case are more in accordance with our common-law doctrines, which have always eschewed such inquiries.

The greatest recorded departure from the principle of *Cumber* v. *Wane* occurred in the case of *Sibree* v. *Tripp*, 15 M. & W. 23. The action in the former case was on a promissory note given in satisfaction of a larger sum; yet, in *Sibree* v. *Tripp*, Chief Baron POLLOCK held that the acceptance of a negotiable security may be in law a satisfaction of a debt of a greater amount. This important class of exceptions is not referred to by the learned compiler of the leading cases, although the case of *Sibree* v. *Tripp* is noticed by him. Mr. Smith, however, refers to the converse rule, which is now better established than when he wrote, and is in fact undoubted law, that even a liquidated demand, founded upon a bill of exchange or promissory note, and even though overdue, may be forgiven by word of mouth, and *à fortiori* by the acceptance of a smaller sum. Mr. Smith merely says (p. 444) that "there is authority for saying this." But Byles on Bills (p. 182) asserts that this has been determined by numerous decisions. Although he cites only two cases (*Foster* v. *Dawber*, 6 Exch. 839, and *Dobson* v. *Espie*, 2 H. & N. 79) in support of this position, yet there is no doubt that it is at the present day irrefragable, the general law merchant of the world having thus superseded the doctrine of the common law, so far as bills of exchange are concerned.

The principal case, though strictly an instance of the application of the common-law rule under consideration, is in fact a decision of a court of equity. In that case Vice-Chancellor STUART has held that an agreement to take, in lieu of arrears of income, recoverable in equity, a certain sum less than the estimated amount of such arrears, recoverable at law, is in equity void for want of consideration. This decision, therefore, is in immediate contrast with the cases placed by Mr. Smith in his third class of exceptions to the doctrine in *Cumber* v. *Wane*. To this class belong all agreements in which there is what civilians would term a novation of a previous debt, or, as we should say, a commutation of the mode of payment; thus a thousand pounds may be commuted for a peppercorn, or for a negotiable instrument of less amount; and if the new contract itself, and not its performance, be accepted in discharge of a previous liability, it will operate as a novation and satisfaction thereof, even though it be never performed.

To this category may, we think, be fairly appended every case of accord and satisfaction where a less amount than the amount due to him is accepted by the creditor, a new remedy for its recovery being superadded by the agreement. This additional element has always been considered a sufficient consideration for an agreement by a creditor to accept a composition of his claim. And even if the debt were a specialty or on bond, another bond has always been allowed to be pleaded in satisfaction, though it did not improve the plaintiff's security except