RECENT ENGLISH DECISIONS.

High Court of Justice. Queen's Bench Division.

GODDARD *v.* O'BRIEN.

Payment of a check for 100*l.* payable on demand and duly honored, given and accepted in settlement of a debt of 125*l.*, is a good accord and satisfaction as to the whole debt.

Cumber v. *Wane*, 1 Str. 426, commented on.

THIS was a special case stated by Mr. STONOR, Judge of the Southwark county court, as follows:

The plaintiffs are billiard and bagatelle slate manufacturers, of Vine street, York Road, S. W., and the defendant is a billiard table maker carrying on business at Manchester.

The action is brought to recover the sum of 42*l.* 2*s.* 9*d.* for goods sold and delivered, made up as follows: 25*l.* 7*s.* 9*d.*, balance of account for goods sold and delivered between the 6th of May 1879, and the 26th of April 1880; 5*s.*, extra charge on delivery of goods already paid for; and the balance of 18*l.* 10*s.*, for goods manufactured by the plaintiffs for the defendant in the year 1881.

I found for the defendant in respect of the second and third items of claim for 5*s.* and 18*l.* 10*s.* respectively, and the plaintiffs are not desirous of appealing from my judgment in respect of either of these two amounts.

On the 16th of August 1880, the defendant was indebted to the plaintiffs in the sum of 125*l.* 7*s.* 9*d.* for slates for billiard tables sold and delivered by them to him, which sum was then due and payable. On that day Mr. Newill, a member of the plaintiffs' firm, met the defendant, and agreed to accept the sum of 100*l.* in discharge of the said sum of 125*l.* 7*s.* 9*d.* The defendant thereupon gave to the plaintiffs a check for 100*l.*, payable on demand, and the plaintiffs gave him a receipt in the following form

"Received the sum of 100*l.* by check, which is to be in settlement of an account of 125*l.* 7*s.* 9*d.* on said check being honored.
August 16th 1880. GODDARD & SON."

The check was duly honored. There was no consideration given by the defendant or received by the plaintiffs in satisfaction of the said sum of 125*l.* 7*s.* 9*d.*, other than the said check for 100*l.*

This action was tried before me on the 2d of December 1881, and I gave judgment on the 12th of January 1882, for the defendant,

and held that the payment to and acceptance by the plaintiffs of the check for 100*l.* in settlement of their claim of 125*l.* 7*s.* 9*d.* was a good accord and satisfaction by reason of the check being a negotiable security, although the payment of 100*l.* in cash would not have been a good accord and satisfaction.

The plaintiffs allege that they were induced to agree to accept the sum of 100*l.* in discharge of their debt of 125*l.* 7*s.* 9*d.* by certain representations made to them by the defendant, which subsequently proved to be false, but I found that no such representations had been made.

The questions submitted for the opinion of the court are:—

1. Whether the payment by the defendant to the plaintiffs of the check for 100*l.* in settlement of the debt of 125*l.* 7s. 9*d.* was a good accord and satisfaction of the whole of the plaintiffs' debt.

2. Whether the plaintiffs are entitled to judgment for the said sum of 125*l.* 7*s.* 9*d.*

Broun, for the appellants.—The question is whether a payment by a check for 100*l.* is good accord and satisfaction for a debt of 125*l.* and I rely on *Cumber* v. *Wane*, 1 Str. 426, 1 Sm. Lead. Cas., 7th ed., p. 591.

Woodward, for the respondent, was not called upon.

GROVE, J.—I am of opinion that the county court judge was right in his decision. No doubt the difficulty in this and similar cases arises from the decision in *Cumber* v. *Wane*, which is entitled to all respect, although we may not perceive the reasoning on which the decision is founded. *Cumber* v. *Wane* has, however, been much qualified by the case of *Sibree* v. *Tripp*, 15 M. & W. 23, and the only way in which *Cumber* v. *Wane* appears to have been kept alive is by the court saying that it did not appear in that case that the note was a negotiable one. In the present case the payment was by a check which is a negotiable instrument, and *Sibree* v. *Tripp* is a direct authority for saying that a negotiable security may operate, if so given and taken, in satisfaction of a debt of a greater amount.

I admit I cannot follow the reasoning of *Cumber* v. *Wane*, or why the argument that applies to negotiable instruments should not equally apply to money.

HUDDLESTON, B.—I am of the same opinion, and on the grounds on which the county court judge has decided, viz., that this payment was a good accord and satisfaction by reason of the check being a negotiable instrument.

The doctrine of *Cumber* v. *Wane* is, no doubt, very much qualified by *Sibree* v. *Tripp*, and I cannot find that better stated than in 1 Sm. Lead. Cas., 7th ed., p. 595: "The general doctrine in *Cumber* v. *Wane*, and the reason of all the exceptions and distinctions which have been engrafted upon it may, perhaps, be summed up as follows, viz., that a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount, such an agreement being *nudum pactum*, but if there be any benefit, or even 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."

Appeal dismissed with costs.

Few legal propositions strike a business man with more surprise than this, that a creditor is not bound by his fair and explicit agreement to accept part of his debt in full satisfaction of the whole, and that he may, notwithstanding such agreement, and its prompt and faithful fulfilment by the debtor, immediately upon its receipt, sue for and recover the balance of his original debt. But this is only the logical and necessary result of the elementary doctrine that every contract requires a legal consideration to support it; and that the receipt of what one is already legally entitled to is not such a gain, nor the payment of what one is already fully bound to pay such a loss, as to form a sufficient consideration for any promise or undertaking by a creditor to his debtor.

The doctrine is said to have been derived from the civil law, but was early adopted in the common law, for, in 1602, is was solemnly resolved in *Pinnel's Case*, 5 Co. R. 117, *a*, "that payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole; and when the whole sum is due, by no intendment the acceptance of parcel can be a satisfaction to the plaintiff." And the line of authority from that day to this is unbroken, when all the requisite conditions concur.

But the rule itself is so technical, its operation so harsh and apparently so unjust, that courts have ever been ready to confine it within its strictest limits, and have seized upon every opportunity to refuse its application. And in the light of modern decisions, it cannot safely be stated to extend beyond this, "that part payment of a liquidated or undisputed account, made by a debtor to his creditor in money, at the time when, and place where the whole is then payable, not made by way of a joint composition with creditors, is not a legal consideration for the creditor's express but unsealed promise to waive or postpone payment of the balance, and he may immediately sue and recover the rest, notwithstanding a receipt is given in full of all demands."

This conclusion therefore does not follow, unless upon the exact premises above stated. The rule does not apply therefore, 1. Where the claim is unliquidated or disputed. If it be a doubtful claim, or

even *bona fide* disputed, though not in one sense really doubtful; or if it be unliquidated, as a claim in tort where the damages are wholly uncertain, payment of any sum given and received in full satisfaction, is a bar to a suit for any more, however strong the proof might be that the whole was justly due; *Tuttle* v. *Tuttle*, 12 Met. 551; *O'Donohue* v. *Woodbury*, 6 Cush. 148; *McDaniels* v. *Lapham*, 21 Vt. 222; *Palmerton* v. *Huxford*, 4 Denio 166; *Coon* v. *Knap*, 4 Seld. 402; *Pierce* v. *Fierce*, 25 Barb. 243; *Powell* v. *Jones*, 44 Id. 521; *Bull* v. *Bull*, 43 Conn. 455; *United States* v. *Child*, 12 Wall. 232, and many other cases.

2. The question usually arises upon the part payment of an *account*, or open claim; but the rule seems to apply equally to part payment of a bond or note; and the balance of the note, if unsurrendered and uncancelled, may be recovered notwithstanding an endorsement upon it of the receipt of part thereof in full: *Pearson* v. *Thomason*, 15 Ala. 700. And see *Mordecai* v. *Stewart*, 36 Geo. 126.

If, however, the note be surrendered or cancelled, the whole claim is discharged, and no action can afterwards be maintained upon such instrument for the unpaid balance: *Kent* v. *Reynolds*, 8 Hun 559; *Ellsworth* v. *Fogg*, 35 Vt. 355; *Draper* v. *Hitt*, 43 Id. 439; *Beach* v. *Endress*, 51 Barb. 570; *Silvers* v. *Reynolds*, 22 N. J. 275.

And the same result would follow upon a mere surrender or cancellation of a note with intent to discharge it, even without a partial payment upon it; *Vanderbeck* v. *Vanderbeck*, 30 N. J. Eq. 265; *Booth* v. *Smith*, 3 Woods 19.

This is giving much more effect to a surrender of a note than the delivery of the bill or account, with a receipt in full attached; for it is well settled that even such a receipt does not bar a recovery for the balance of the account: *Fitch* v. *Sutton*, 5 East 230; *Harriman* v. *Harriman*, 12 Gray 341; *Ryan* v. *Ward*, 48 N. Y 204; *Hendrickson* v. *Beers*, 6 Bosw. 639.

3. A partial payment, to be an ineffectual extinguishment of a larger debt, must have been made *by the debtor himself*. If made by another from his own money, it is operative, though done at the debtor's instance and request. Therefore, while if a debtor borrows the money of a friend and positively pays the debt, the whole is not discharged, yet if he procures the same friend to go and pay the same amount in person, the creditor is bound by his agreement to accept it in full satisfaction. This certainly seems like forsaking the substance, and clinging to the shadow, but *ita lex scripta est*.

And this rule applies to notes, checks or indorsements of third persons, accepted in payment, as well as to present payment in money: *Steinman* v. *Magnus*, 11 East 390; *Lewis* v. *Jones*, 4 B. & C. 506; *Boyd* v. *Hitchcock*, 20 Johns. 76; *Brooks* v. *White*, 2 Met. 283; *Kellogg* v. *Richards*, 14 Wend. 116; *Smith* v. *Ballou*, 1 R. I. 496; *Colburn* v. *Gould*, 1 N. H. 279; *Guild* v. *Butler*, 127 Mass. 386; *Lee* v. *Oppenheimer*, 32 Me. 253, and numerous other cases.

Therefore if the debtor's wife pays part of the debt, or gives her note and mortgage to secure it, and in consideration therefor the creditor discharges the husband, this is valid and binding: *Keeler* v. *Salisbury*, 33 N. Y. 648; *Bowker* v. *Harris*, 30 Vt. 424.

And even one partner's private note for half of a partnership debt, has been thought a good consideration for the creditor's agreement to discharge him from the balance; since thereby the creditor acquires the right to look to the private assets of such partner, *pari passu* with his other private creditors, and this *may be* such a new advantage as to come within the rule of law: *Ludington* v. *Bell*, 77 N. Y. 138.

4. It is essential also that the part payment should be to the *creditor himself*, in order to be unavailing. A partial payment to another, though at the creditor's in-

stance and request, is a good discharge of the whole debt. The debtor in such case has done something more than he was originally bound to do; or at least something different; it may be more or it may be less, as a matter of fact. His original contract was to pay $100 to A. His second was a payment of $50 to B. Thus where H. had a judgment claim against G. for $1700 and agreed with G. that if he would pay him $550, and $100 more to his attorney, this should discharge the whole judgment, and G. did so, the whole debt was held to be cancelled: *Harper* v. *Graham*, 20 Ohio 106.

5. *In Money.*—Part payment in property, real or personal, personal services or other thing given and received in full payment, is a full discharge, whatever the value of the thing received. COKE states it thus (Co. Litt. sec. 344): "If the debtor pay the creditor a horse, a cup of silver, a ring of gold, or any other such thing, in full satisfaction of the money, and the other receives it, this is good enough, and as strong as if he had received the sum of money; though the horse or other thing were not of the twentieth part of the value of the sum of money; because the other hath accepted it in full satisfaction." This is perfectly well settled law, though the reason given by Ld. COKE may not be entirely satisfactory, for had the payment been in money, the creditor may have "accepted it in full satisfaction," but nevertheless it would not be such in law. The result, however, is sustained by innumerable authorities, some of which are, *Watkinson* v. *Inglesby*, 5 Johns. 386; *Blinn* v. *Chester*, 5 Day 359; *Gaffney* v. *Chapman*, 4 Roberts. 275; *Rose* v. *Hall*, 26 Conn. 392; *Bull* v. *Bull*, 43 Id. 455.

Therefore a bar of gold worth $100 will discharge a debt of $500; while 400 gold dollars in current coin will not.

And this brings us to the exact question involved in *Goddard* v. *O'Brien*. Will the debtor's own negotiable note or check for part of his debt, given and actually received in full payment of the entire claim, and duly paid at maturity, operate in law as such? If the original claim were an account, or an unnegotiable claim, or note, it would seem on principle there could be no doubt about it. The debtor gives and the creditor receives what was not originally contemplated. The advantage, real or supposed, of a negotiable note, for part of an unnegotiable claim, is a sufficient consideration in law for the creditor's agreement not to collect the rest. And this result would seem to follow whether the negotiable note be actually paid or not at maturity, provided it was itself received as an accord and satisfaction. For if an immediate part payment in cash would not discharge the debt, it is difficult to see how payment at some future day, when the new note matures, could have that effect.

The doctrine in *Goddard* v. *O'Brien*, had been already distinctly announced and acted upon, by the Supreme Court of Pennsylvania, in *Mechanics' Bank* v. *Huston*, (Feb. 13th 1882), 11 Weekly Notes Cases 389, in which the decided advantage which a creditor acquires by the receipt of a negotiable note for part of his debt, as by the increased facility of recovering upon it, the presumption of a consideration for it, the ease of disposing of it in market, &c., was held to furnish ample reasons why it should be a valid discharge of a larger account or open claim unnegotiable.

The question still remains, will the debtor's own unnegotiable note for part of an account, if taken in discharge, have that effect. When we remember how slight a new advantage or benefit to the creditor, or how trifling a new and additional burden, or loss incurred by the debtor is sufficient, it would seem that a written promise, over the debtor's own signature, might be so much better than an open account, or an unwritten or implied promise, even for a larger sum, as to satisfy this technical rule of

law, and operate, if so agreed, as a complete accord and satisfaction.

There certainly seems to be good ground for holding that if as a matter of fact, it be proved that the creditor positively agreed to take a new security or form of obligation in full satisfaction of a larger claim, that the old is extinguished. If a barley corn received in payment can discharge a money claim for $100, why may not the debtor's note for $500 if really so agreed upon. If such partial note be secured by a new mortgage of the debtor's property, there is authority for holding that it operates to extinguish the old debt: *Warren* v. *Skinner*, 20 Conn. 561, ELLSWORTH, J.; *Pulliam* v. *Taylor*, 50 Miss. 251. If so, and the new note be unsecured, and so not so valuable to the creditor, it is only a difference in degree of benefit; in each case the creditor acquires a new advantage, and the law does not attempt to measure the adequacy or sufficiency of the benefit conferred. That the tendency of modern decisions is to hold that a new note for part of an open account is, if so agreed, a valid discharge of the old debt, see *Babcock* v. *Hawkins*, 23 Vt. 561; *Jaffray* v. *Crane*, 50 Wis. 349.

It is true *Cumber* v. *Wane*, 1 Str. 426, is directly against it: but it should be remembered that the law on this subject was not so well understood at that day as at present, and in the light of the modern decisions the question may still be considered an open one.

6. The next requisite for the application of the rule is, that the part payment must be made at, or not *before the time the whole is due*, and not at some different place. For it is clear that a payment in advance is, if agreed to, full satisfaction for a larger claim not yet due; Co. Litt. 212 *b.*; *Brooks* v. *White*, 2 Met. 283. *Bowker* v. *Childs*, 3 Allen 434; *Smith* v. *Brown*, 3 Hawks 580.

In *Mitchell* v. *Wheaton*, 46 Conn. 315, this rule was applied to a case where one half the debt and the costs of suit were agreed to be paid, while the suit was pending, and therefore before the claim for costs had become fully perfected by a judgment, for though the principal debt was long overdue, the costs were not, and might never become a debt. So if the partial payment be made at some *different place* from that of the original debt, this is such, or may be such, an additional advantage or convenience to the creditor as to make his agreement binding; *Harper* v. *Graham*, 20 Ohio 105, 117; *Jones* v. *Perkins*, 29 Miss. 140; *Smith* v. *Brown*, 3 Hawks 580; *McKenzie* v. *Culbreth*, 66 N. C. 534; *Reid* v. *Hibbard*, 6 Wis. 175.

7. The last requisite for the rule is that such partial payment must not have been made by way of or as a part of a joint scheme with all the creditors to accept a percentage of their claims in full discharge of the whole. For it is now well agreed that if one's creditors sign a joint instrument of discharge, agreeing mutually to accept a part in lieu of the whole, and the debtor agreeing thereto, pays the stipulated amount, no such creditor can afterwards collect the balance, even though the discharge of the debtor be not under seal; *Good* v. *Cheesman*, 2 B. & Ad. 328 (1831); *Reay* v. *White*, 1 Cr. & M. 748; 3 Tyr. 596; *Murray* v. *Snow*, 37 Iowa 410: *Daniels* v. *Hatch*, 1 Zab. 391; *Farrington* v. *Hodgdon*, 119 Mass. 453, and many other cases.

In *Steinman* v. *Magnus*, 11 East 390, *Browne* v. *Stackpole*, 9 N. H. 478, and many others cited in support of this doctrine, the debtor had also given the security of some third person, for his payment of the composition, and, therefore, for that reason alone, the compromise would be binding.

This effect of a joint composition has been said to rest, however, much, if not entirely, on the ground of the mutual agreement between the creditors, and not merely on the contract between debtor and creditor, and it is con-

sidered unfair to the other creditors to allow one to subsequently recover his debt in full, when the others cannot. And this has been carried so far, as not to allow one creditor to recover on a note subsequently given to him by the debtor for the balance of his debt: *Cocksholtt* v. *Bennett*, 2 T. R. 763; *Case* v. *Gerrish*, 15 Pick. 50; *Wiggin* v. *Bush*, 12 Johns. 306.

And in England the creditor has been even compelled to refund to the debtor a payment actually made in excess of the proportion agreed upon by all, and paid to all the others: *Atkinson* v. *Denby*, 7 H. & N. 934; *In re Lenzberg's Policy*, 7 Ch. Div. 650.

But if the debtor has enough to pay all the creditors in full, or gives his notes to each for the balance due him, is there any reason in law why this arrangement should be invalid merely because it embraces all the creditors, when it clearly would not be if it extended to only one, and that one was all? It seems not. Perhaps this modification of the rule originally rested upon the ground that the debtor in the joint composition conveys all his property, real and personal, to his creditors, or to trustees for them, and therefore, their agreement to accept part would be binding, upon the principles before stated of accepting property instead of money.

That the whole doctrine of composition rests upon peculiar grounds is evident from the fact that if all the creditors separately agree with their debtor to take a part in full, and do this unbeknown to each other, and not induced thereto by the action of the others, such an arrangement is not a bar to a future recovery of the balance, by each separate creditor, though all had in fact agreed to a similar deduction: *Bliss* v. *Shwarts*, 65 N. Y. 444; *Sage* v. *Valentine*, 23 Minn. 102; *Wheeler* v. *Wheeler*, 11 Vt. 60. And see *Perkins* v. *Lockwood*, 100 Mass. 249.

The course of decisions on this subject fully illustrate how eager, it may be said, courts are to discover some slight reasons for evading the general rule, and holding the agreement binding on the creditor, whenever the slightest additional advantage to him, or loss to the debtor can be discovered. Perhaps the rule has been sometimes pushed too far. Thus in *Hinckley* v. *Arey*, 27 Me. 362, it was held that a creditor was bound by his agreement to accept part in full payment, on being informed that the debtor would otherwise go into bankruptcy, and that he would not probably receive so large a dividend, as the composition offered.

But the insolvency of the debtor, his inability to pay others an equal percentage, his pains and trouble in earning or borrowing the money to pay his stipulated sum, cannot be considered any additional legal gain to the creditor or legal loss to the debtor. The latter, in making his payment has done only what he was legally bound to do, and what the creditor had a legal right to demand, and it can make no legal difference whether the debtor inherited the money, or procured it only by extraordinary exertions, or self sacrifice. See *Harriman* v. *Harriman*, 12 Gray 341; *Bunge* v. *Koop*, 48 N. Y. 225; *Pearson* v. *Thomason*, 15 Ala. 700.

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