

THE DISCHARGE OF CONTRACTS BY AGREEMENT

1. *The Several Kinds of Discharge.*

To discharge a contract is to end it. There are therefore as many kinds of discharge as there are different ways of ending a contractual obligation. The simplest form of discharge is the performance of a contract on both sides, sometimes called "discharge by performance".¹ Conversely, there is the "discharge by breach" since a breach may end the contractual relationship, though of course it does not terminate the legal remedies.² Thirdly, we speak of a discharge where the deed or document containing the agreement is fatally altered or destroyed;³ or where performance is terminated by such things as impossibility, illegality or the statute of limitations.⁴ Finally, a contract is discharged where the parties expressly agree to this effect or agree to compose or compromise their respective claims and remedies. Indeed, there now exist various methods by which such a discharge can be obtained, as the parties may terminate an existing contract either by parol or under seal, or after performance or while the contract is still executory, or before or after a breach. It is these methods of discharge by the parties' own agreement that will occupy us here. For the law is still quite disorderly; and we simply ought to know much more about what the law is and why indeed it is what it is.⁵

2. *The Release.*

Let us first take the release.⁶ This is the discharge by deed which, like any other deed, must be signed and sealed as well as delivered either to the debtor himself or in escrow.⁷ The release

1. See Restatement of *Contracts*, §§ 386-394 (hereafter referred to as Restatement); 6 Williston on *Contracts* (Rev. Ed. 1938) §§ 1795 *et seq.*; 5 Corbin on *Contracts* (1951) §§ 1230 *et seq.*; and see Corbin, *Discharge of Contracts* (1913) 22 *Yale L.J.* 513; Selected Readings, 1165.
2. Restatement, §§ 397 *et seq.*
3. See now Tarlo, *The Unilateral Alteration of Instruments* (1959) 2 *Melb. Un. L.R.* 43.
4. See the enumeration in Restatement, § 385, giving a total of no less than twenty different methods of discharge.
5. See an earlier article, *The Modification of Contracts* (1957) 35 *Can. B.R.* 485.
6. For general treatment, see 6 Williston, *op. cit.*, §§ 1820 *et seq.*; 5 Corbin, *op. cit.*, §§ 1238 *et seq.*; Restatement, § 402; and Fallon, *The Nature of Release* (1937) 11 *Temple L.R.* 179.
7. This requirement of delivery excluded the release by testament: *Pidgeon v. Harrison* (1669) 1 *Sid.* 421. Delivery is also insisted on by the Restatement (§ 402), though perhaps somewhat obliquely, making the release effective "when the maker puts [the writing] out of his possession". On the other hand, the Restatement also provides that a release can be "either under seal or supported by sufficient consideration", an obvious concession to the many U.S. jurisdictions which have abolished the seal. Yet this release, unsealed but supported by consideration may overlap with the discharge by an executory accord (§ 5 *infra*). It is otherwise with the release, unsealed but in formal writing introduced by some states and the Uniform Written Obligations Act: see 6 Williston, *op. cit.*, § 1822; 5 Corbin, *op. cit.*, § 1238; and further Lloyd, *Consideration and the Seal in New York* (1946) 46 *Col. L.R.* 1.

is therefore like a formal grant;⁸ it consists of a formal waiver of a claim. Once, however, the formal requirements are satisfied, a release has very wide effect. Two examples will suffice: (i) A owes B £1,000 and B gives A a deed stating that A is released from paying the debt: the debt is immediately discharged, whether that debt is or is not due. (ii) A having broken his covenant to marry B, B by deed releases A from paying damages for the breach: A's liability is entirely discharged.⁹ Moreover, for a liability such as an overdue debt, the release is at the present time the only valid method of discharge. The reason is that an agreement to discharge a debt requires, like any other contract, either a sufficient consideration or the formality of the seal; since however there can be no sufficient consideration in such a case,¹⁰ the agreed discharge will have to be by deed.

But, historically, it would be wrong to think that the force of the release is due to the seal or to the theory that consideration is imported by the seal. The true explanation why releases are by deed is that they date from a time when sealed covenants were still the usual form of contract, *i.e.* the time before the advent of mutual promises. Yet as regards the early history of the release, Professor Williston has advanced the interesting thought that "in very early times it may be that a release did not operate as a legal discharge of a specialty, since payment or judgment did not".¹¹ But this seems an improbable view. Surely a formal release must have been necessary if only to stop further recovery by the creditor because payment alone was no sufficient bar;¹² nor does it seem likely that one could not discharge a debt otherwise than by destroying or damaging the whole deed.¹³ Be this as it may, it

8. In the early history of conveyancing, a release lay more fully in grant than any other conveyance of rights to land. For the usual conveyance was accompanied by livery of seisin, but the release made to a donee already in possession dispensed with this ceremony, so that the transfer of property depended solely on the grant. For such releases to a tenant or lessee, see Plucknett, *Concise History of the Common Law* (5th ed. 1956) 613; and Co. Litt., §§ 444, 504-8.
9. See Restatement, § 402, Illustrations, 1 & 2.
10. The reason is that the agreement here involved does not constitute an exchange but constitutes a concession by the creditor. This, of course, is the result of *Pinnel's Case* (1602) 5 Co. Rep. 117a, as to which see in greater detail further § 6 *infra*.
11. *Op. cit.* § 1821. Williston here relied on *Fowell v. Forrest* (1670) 2 Wm. Saund. 47n. which does not however bear out this point. Nor does Ames, *Specialty Contracts and Equitable Defences* (1895) 9 Harv. L.R. 49, dealing with the earlier cases, ever say that a release by deed was no defence. At any rate, payment gradually emerged as a defence in bonds in the sixteenth century: see *Anon.* (1543) 1 Dy. 56a; *Anon.* (1549) Benl. 6; *Sharplus v. Hankinson* (1595) Cro. Eliz. 420; *Norton v. Rishden* (1596) Cro. Eliz. 458.
12. See on this 8 Holdsworth, *H.E.L.*, 81. The fact that payment did not discharge without a formal release was, in the middle ages a frequent cause of application to the chancellor: 5 Holdsworth, *op. cit.*, 292-3.
13. A formal cancellation or destruction of the deed would anyhow have been a most inappropriate method of discharge where the deed contained more than one debt only one of which was to be released.

is significant that, when in the sixteenth century, releases begin to be seriously discussed by the courts, it is immediately admitted that they operate as a complete "extinguishment."¹⁴ For where (as the matter is put) a man acknowledges himself satisfied by deed, it is a good bar without anything received.¹⁵ And it is also quickly recognised that while informal agreements can be discharged informally, a formal covenant is not dischargeable except by deed; not (to repeat) because of any doctrine of consideration, but because *eodem modo quo oritur, eodem modo dissolvitur*.¹⁶ The only exception to this was a claim in damages for breach of covenant which became dischargeable informally. In *Blake's Case*¹⁷ it was specifically objected that a mere accord and satisfaction could not bar an action based on a covenant (the plaintiff claimed damages for the breach of a covenant to repair); but the whole court resolved that "forasmuch as the end of the action is but to have amends, and damages in the personalty for this wrong, therefore amends and satisfaction given the plaintiff is a good plea."¹⁸ The court distinguished between the "certain duty" to pay a fixed or liquidated sum and the breach of covenant giving rise to unliquidated damages; so that while a formal release was (and remains) necessary to extinguish the bond between debtor and creditor, an informal accord and satisfaction was enough to settle unliquidated claims, whether arising from breach of covenant or from trespass, waste, ravishment or other wrongs.¹⁹

Two further historical points need mention here. First, if A released B (in the time-honoured formula) of "all manner of actions, suits, quarrels and demands whatsoever", how extensive was this immunity? The early cases make certain terminological distinctions which, at first sight, seem overdone. So it is said that a release of "all actions" is more limited than a release of "all demands", since the former phrase only refers to "actions depending" at the time of the release.²⁰ Later it is said that even a release of "all demands" will not discharge a lessee from future rent nor will it discharge a covenant not yet infringed,²¹ though

14. *Anon.* (1507) Keil. 88.

15. *Anon.* (1563) Dal. 49, pl. 13, Moo. K.B. 48; *Pinnel's Case* (1602) 5 Co. Rep. 117a, 117b.

16. *Hayford v. Andrews* (1598) Cro. Eliz. 697, Moo. K.B. 573; *Treswallier v. Keyne* (1621) Cro. Jac. 620; *Fortescue v. Brograve* (1646) Sty. 8; and see *The Modification of Contracts* (1957) 35 Can. B.R. 485, 492-3.

17. (1605) 6 Co. Rep. 43b.

18. At 44a.

19. One may be tempted to read into this distinction between the discharge of debts and that of other claims a deeper difference between the strictness of bond-law and the freer settlement of wrongs. But whatever it may have been, *Blake's Case*, *supra*, both modified and confined it to a straight-forward distinction between liquidated and unliquidated claims.

20. *Hall v. Kirby* (1562) 2 Dy. 217b; *Altham's Case* (1610) 8 Co. Rep. 150b.

21. *Diggs v. Choute* (1581) 1 And. 64; *Anon.* (1582) Godb. 11; *Hancock v. Field* (1607) Cro. Jac. 170; *Henn v. Hanson* (1663) 1 Sid. 141, 1 Lev. 99.

this did not extend to debts which became immediately discharged whether they were still future or whether they had already become due.²² But the purpose of this distinction was not just technical. For example, where a father was tenant for life and the son held the remainder in fee as well as an annuity during the father's life, and the son then released "all arrears of rent, annuities, titles, and demands", was the release to extinguish his inheritance as well as the annuity?²³ Obviously, to save the inheritance, the son's release had to be confined to payments already due. Similarly, where a lessee was to pay so much rent at the four feasts, it was said that till the feasts "there is neither *debitum* nor *solvendum*, and therefore there a release of all actions before the feast is no bar, but . . . the rent after every feast is demandable by action of debt".²⁴ Again, a literal interpretation of the release would have meant a double loss for the lessor: one loss consisting of the release of the rents already accrued, the other loss being the rents to accrue during the further currency of the term, an interpretation almost certainly against the presumable intention of the releasor.²⁵ Although these particular difficulties no longer occur, they survive in the broad rule of construction, which still obtains, namely, that despite any general words releases are to be restrictively construed.²⁶

A second bit of old law has left behind a much greater difficulty. From the very beginning the release operated as an immediate and total extinction of a claim;²⁷ so that it followed that a release could be neither conditional nor temporary.²⁸ These requirements

22. *Tynan v. Bridges* (1612) Cro. Jac. 301, *sub. nom. Eynan v. Bridges* 1 Bulst. 178, *Bridges v. Enion* 1 Brownl. 115.
23. *Austin v. Lippencott* (1673) 1 Mod. Rep. 99; see also *Collins v. Harding* (1598) Cro. Eliz. 606, Moo. K.B. 544.
24. *Altham's Case* (1610) 8 Co. Rep. 150b.
25. This distinction between claims *in esse* and future claims also served to defeat the machinations of sureties, for interesting examples of which see *Hoe v. Marshall* (1592) Cro. Eliz. 579, Gouldsb. 166, 5 Co. Rep. 70b; *Porter v. Phillips* (1620) Palm. 218, Cro. Jac. 623. Applied to other situations, however, the above distinction could yield very curious results. In *Neale v. Sheffield* (1610) Yelv. 192, Bulstr. 66, 1 Brownl. 109, in consideration of A at once delivering to B a load of lime, B undertook to release A from a bond under which A was to pay B £7 on the birth of B's child. This agreement was held ineffective, since a mere "contingency" or "possibility" could not be released: B's child was not yet born, nor was it certain that it would. For other curious applications, see *Belcher v. Hudson* (1609) Cro. Jac. 222; *Clark v. Thomason* (1620) Cro. Jac. 571.
26. See *Payler v. Homersham* (1815) 4 M. & S. 423; *Lindo v. Lindo* (1839) 1 Beav. 496; *Re Perkins* [1898] 2 Ch. 182. More generally see 11 Halsbury's *Laws of England* (3rd ed. 1955) 421-2; Restatement, § 403. This restrictive rule of construction, as Williston points out, may dispense with the necessity of having the deed rectified; *op. cit.* § 1825.
27. See also at note 14 *supra*.
28. See *Buxton v. Nelson* (1699) 1 Lutw. 635. Accordingly, a debt once released could not be revived, though in some cases the courts must have had much sympathy with creditors who might have been perhaps too hasty or too generous in granting a release. An interesting example is *Moss and Browne's Case* (1641) March N.R. 151, where after obtaining a release, the debtor nevertheless promised his creditor to repay him

produced a curious result when applied to covenants not to sue. These covenants were of two kinds: the covenant never again to sue for a debt, and the covenant not to sue for a certain time. The former covenant was soon held to have the same effect as a release, if only to avoid circuity of action between the debtor and creditor.²⁹ But what about the temporary covenant? In *Deux v. Jefferies*,³⁰ the debtor argued that the creditor could no longer sue in debt once he had covenanted not to sue before Michaelmas, for any covenant took effect like a release since an action once suspended was gone forever. The court however held that a covenant not to sue for a time did not enure as a release, but gave the covenantee only an action in damages if the covenantor sued before the time agreed. Later, even a covenant not to sue for ninety-nine years was held, being a temporary covenant, not to constitute a defeasance or release.³¹ In one respect this distinction between permanent and temporary covenants not to sue was of course sensible enough, since a debtor could not be allowed to avoid his debt where the creditor had benevolently consented to give him more time to pay without however completely releasing the debt.³² But, in another respect, the distinction had this paradoxical effect, that it deprived the covenant not to sue for a time of precisely that temporary effect which it was meant to have; for the creditor could now repudiate this temporary covenant and reclaim the debt. The debtor, it is true, retained a right of action for the breach of that covenant; but in practice this was a sterile right since the debtor would hardly sue for breach if he had already repaid the debt and when anyhow it would be most difficult to assess what the creditor's breach of covenant amounted to in actual damages. In short, the distinction between permanent and temporary covenants produced the rule that it was impossible to effect a temporary modification or suspension of obligations by deed³³. This rule, moreover, was picked up in the nineteenth

"whenever God should please to make him able", and often renewed this promise. The Common Pleas would not stop the plaintiff from enforcing this subsequent promise to repay, a promise they likened to a "trust". See also the discussion in *Acton v. Symon* (1636) Cro. Car. 414.

29. *Hodges v. Smith* (1598) Cro. Eliz. 623.

30. (1594) Cro. Eliz. 352.

31. *Aloff v. Scrimshaw* (1689) 2 Salk. 573; *sub. nom. Ayliff v. Scrimshaw* Holt K.B. 619, 1 Show. 46; *Ayliffe v. Scrimshire* Carth. 63, *Anon.* Comb. 123.

32. This differentiation between (permanent) releases and (temporary) covenants should not be confused with another distinction which evolved in relation to joint debts: see on this *Lacy v. Kinnaston* (1701) Holt, K.B. 178, 12 Mod. Rep. 548; *Walmesley v. Cooper* (1839) 11 Ad. & E. 216; *Price v. Barker* (1855) 4 E. & B. 760; and 5 Corbin, *op. cit.*, § 1239.

33. Perhaps another reason for this distinction between permanent and temporary covenants is that it was a by-product of the technical rules then pertaining to deeds. The temporary covenant (not to sue for a while) was only meant to modify the existing specialty, but this must have seemed an impossible thing, since as each individual deed or covenant continued to exist until destroyed or cancelled or totally discharged,

century and extended to simple contracts; but we shall return to it at a later stage.³⁴

3. *The Rescission.*

The "rescission" is our second method of discharge. A word of several connotations,³⁵ it will here be confined to the case where the parties agree to terminate their contract informally.³⁶ There are three aspects of this. To begin with, executory simple contracts can be rescinded by informal mutual consent, something which has been clear ever since the early cases which established the plea of exoneration before breach, *i.e.* the plea that the plaintiff had "absolved, exonerated, and discharged the defendant".³⁷ Such discharge by rescission will usually be express; but a rescission can also be inferred since "mutual assent to abandon a contract, like mutual assent to form one, may be manifested in other ways than by words".³⁸ Inevitably, an implied or inferred rescission will be a rare thing, but one good example is the *Pearl Mill Case*.³⁹ D agreed in September 1913 to deliver 50 dozen skins as and when required. Several deliveries were requested and made in 1913 and 1914, but thereafter no further deliveries took place, nor were requested by P who had completely forgotten that this contract existed; indeed, when D asked for further orders, he was informed that P was getting his supplies from elsewhere. Yet in 1917 P suddenly made a request for some 30 dozen skins which had remained undelivered under the original contract. D however refused to comply with this request, saying that the contract had ceased to exist. And this refusal the court upheld as in their view the contract had been suspended for so long that it justified the inference that it had been abandoned never to be revived.⁴⁰

mere modification would produce as many separate obligations as one deed could follow and modify the next. It therefore seemed perhaps easier to say that a deed should either be a total bar or no bar at all rather than allow a multiplicity of separate and possibly contradictory covenants all dealing with the same debt. Interestingly, in *Aylloffe v. Scrimpsire* Carth. 63, mention is made of a "letter of licence", given by the creditor to the debtor, according to which the debt was to be forfeited if sued on before the agreed time. This device certainly made the creditor's temporary waiver pleadable in bar, but at the cost of forfeiture of the whole debt. At any rate, little is again heard of this device.

34. See the discussion of *Ford v. Beech* (1848) 11 Q.B. 852, § 5 *infra*.

35. For the various uses of the word, see Morison, *Rescission of Contracts* (London 1916) 8.

36. This is now its "official" meaning: 6 Williston *op. cit.*, § 1826; 5 Corbin, *op. cit.*, § 1236; and see Restatement, § 406 and Comments thereto.

37. *Comiers v. Holland* (1588) 2 Leon. 214; *Langden v. Stokes* (1634) Cro. Car. 383; see Stoljar, *op. cit.*, 492-3.

38. Restatement, § 406, Comment *b*.

39. *Pearl Mill Co. v. Ivy Tannery Co.* [1919] 1 K.B. 78.

40. It may be pointed out that in *Jones v. Gibbons* (1853) 8 Ex. 920 the decision had been that a vendor could not abandon a contract without first giving notice to this effect, even after unreasonable lapse of time. This was now distinguished as being merely a long lapse rather than an inordinate delay. In the *Pearl Mill Case*, McCardie J. also held that

Next we turn to contracts under seal. The ancient rule was that a deed or covenant could not be avoided by parol,⁴¹ since it was alterable or avoidable only by deed: *unumquodque dissolvitur eodem legamine quo ligatur*.⁴² This rule has now changed, but the change has come about in a most indirect way which deserves to be sorted out. The story begins in *White v. Parkin*.⁴³ P demised to D a ship by charterparty under seal, sailing to commence at a certain time and place. P and D then verbally agreed to alter the original dates, and the voyage took place according to the modified terms. Could P still recover his freight from D? P had no action on the deed, nor on the deed as verbally modified. On the other hand, Ellenborough C.J. had no doubt that assumpsit lay on the parol agreement, for this agreement "merely borrowed some of the terms of the charterparty by reference to it, but does not contradict or dispense with it".⁴⁴ Similarly in *Nash v. Armstrong*⁴⁵ P by deed let some rooms to D who was to pay a rent to be determined by a valuer. Afterwards the parties verbally agreed that if P would forego the valuation, D would pay a rent of £70. D was held liable in this latter sum, for the court saw the variation as an independent enforceable contract regarding D's promise to pay the rent as consideration for P's counter-promise not to enforce the original covenant.⁴⁶ Though this solution was good enough to uphold an informal rescission or modification of a deed, the theory that there was an entirely new agreement was not very satisfactory. First, the approach was technically unsound. Since the plaintiff (as the former case of the charterparty shows more clearly than the latter case of the lease) could no longer sue

the buyers' conduct estopped them from denying that the contract was at an end: [1919] 1 K.B. 78, 83. In point of fact, there is no difference between this and the first ground. As we are dealing with a rescission implied by law, *i.e.* a contract terminated not by the parties but by the court, the important thing is what the circumstances are in which rescission will be imposed, not what it is called. Of course, this implied rescission, must be carefully distinguished from a failure to object when a contract is broken or repudiated by the other side, a failure which is clearly no manifestation of assent, but the non-voluntary acceptance of a *fait accompli*.

41. *Anon.* (1485) Jenk. 166; *Hayford v. Andrews* (1598) Cro. Eliz. 697, Moo. K.B. 573; *Blomerhasset v. Pierson* (1685) 3 Lev. 234; *Heard v. Wadham* (1801) 1 East 619; *Braddick v. Thompson* (1807) 8 East 344; *Thompson v. Brown* (1817) 7 Taunt. 656; *Cordwent v. Hunt* (1818) 8 Taunt. 596; *Rippinghall v. Lloyd* (1833) 5 B. & Ad. 742 (where parol extension of time was held no defence in an action of covenant for late performance).
42. *Countess of Rulland's Case* (1604) 5 Co. Rep. 25b, 26a.
43. (1810) 12 East 578.
44. At 585. Yet in a (unreported) case, *Leslie v. De la Torre* (1795) mentioned by counsel, a shipowner failed to recover freight on the common counts as the voyage took place under terms which were verbally altered, not under the original (sealed) charterparty.
45. (1861) 10 C.B.N.S. 259. The common law rule against parol variation of deeds had only recently been reaffirmed: *Gwynne v. Davy* (1840) 1 Man. & G. 857, 9 Dowl. 1; *West v. Blakeway* (1841) 2 Man. & G. 729, 10 L.J.C.P. 173.
46. For this explanation see 10 C.B.N.S. 259 at 266, *per* Williams J.

on the original deed, simply because the transaction did not proceed under the terms of that deed, the promise not to sue on that deed was therefore an empty promise and as consideration illusory. Second and more importantly, though the verbal modification looked like a *separate* agreement, it was still mere pretension to say that the latter agreement did not affect or vary the deed. Indeed, the pretension becomes obvious where the subsequent modification is not an agreement to be sued on, but is to take effect as a bar to the original covenant. *Berry v. Berry*⁴⁷ illustrates this. By a deed of separation a husband had agreed to pay an allowance to his wife, but they afterwards agreed by parol to halve the allowance. The wife then changed her mind and proceeded to claim the full amount under the original covenant. Clearly the theory of independent agreement could furnish no answer to this claim since the wife was suing on the covenant, not on the agreement subsequently made. Hence assistance was sought in equitable principles which (it was said) permitted the verbal modification of deeds, indeed equitable principles which of course had to prevail in any conflict with the corresponding rules at common law. Yet, as a matter of historical fact, the existence of these equitable principles was only a recent discovery. No recourse to equity, it would appear, was suggested before *Gwynne v. Davy*.⁴⁸ But somehow the conviction then grew that equity might grant a perpetual injunction against a party trying to disregard the informal modification of a deed;⁴⁹ and in one case it was confidently asserted that equity had corrected one of the "worst and most odious technicalities of the common law".⁵⁰ More bluntly, it is mainly through repeated suggestion that the equitable rules crept in; yet whether historically sound or not, *Berry v. Berry* does establish a change in the law. In short, it is now possible to have an informal variation or rescission both of simple contracts and of contracts under seal.⁵¹

Our third and final question is how far the right of rescission extends; does it apply to executed as well as executory contracts? So long as a contract remains executory (*i.e.* is completely unperformed), the parties may simply agree to abandon it. But what happens where the parties wish to terminate a contract under which something has already been done? Needless to say, the parties

47. [1929] 2 K.B. 316.

48. (1840) 1 M. & G. 857, 871.

49. *Nash v. Armstrong* (1861) 10 C.B.N.S. 259, 262.

50. *Steeds v. Steeds* (1889) 22 Q.B.D. 537, 539.

51. Some American jurisdictions (especially Illinois) still follow the old common law rule forbidding parol alterations or rescissions. Yet even here a parol modification will take effect, provided it is executed and acted upon (such as paying a reduced rent or acting under enlarged time provisions), on a theory of equitable estoppel: *Wavder etc. v. Arnold* (1897) 75 Illin. App. 674. A larger number of jurisdictions, however, have abandoned the old rule: *Chesapeake etc. v. Ray* (1879) 101 U.S. 522; and see Annotation, 55 A.L.R. 685.

may agree to restore the partial benefits already received or they may agree to apportion a price for the part performance and to terminate the contract at that point. But can they, in addition, rescind a contract without such restitution or apportionment? To take a concrete example. Suppose that S having agreed to supply a hundred tons of rice, only delivers fifty to B. Can S give up his right to the price for the fifty tons in exchange for B giving up his right to the delivery of the fifty still to be supplied? That the parties should be able to terminate such a contract is not only a practical business necessity, it is also established by precedent.⁵² But what is the correct theory on which this termination is to be based? Professor Williston argued that the parties can always rescind their contract even after part performance and even after breach, provided neither party has completely performed; for where a contract is completely executed on one side, the party so having performed would have nothing to give up and the agreement to rescind would lack consideration on his part; where, on the other hand, the contract is not yet completely performed, no similar difficulty about consideration can arise, particularly since the consideration supporting the agreement to rescind need not be adequate.⁵³ On this view, however, there would be a valid rescission even if S (to revert to our previous example) gave up the price for ninety-nine tons already delivered in consideration for B's forbearance not to sue for the delivery of the one remaining ton. Yet this result would seem in disharmony with the rule and rationale of *Pinnel's Case*,⁵⁴ according to which (very briefly) one cannot forego a larger debt in exchange for a lesser liability. To avoid this disharmony, it would therefore be better to put the discharge of part-performed contracts not on the basis of rescission, but on that of accord and satisfaction. The latter method (as we shall later see in greater detail) is directly concerned with the discharge of existing debts, the broad rule being that to be validly given up an existing liability or debt needs to be properly satisfied. On this basis, the discharge of a part-performed contract would not depend on whether one has still got something to give up (however inadequate or small), but would rather depend on whether the particular settlement or satisfaction between the parties is reasonable commercially.⁵⁵ Nor can a contract be informally rescinded

52. See, e.g., *Morris v. Baron* [1918] A.C. 1.

53. See particularly 6 Williston, *op. cit.*, §§ 1826-1829. This view apparently derives from *Lamburn v. Cruden* (1841) 2 M. & G. 253 where a premature resignation by an employee was eventually accepted by the employer after a month. Thus the employee had made himself liable for breach of contract even though the employer did not sue; yet being so liable this affected his right to recover for work done. Williston's view is followed in the Restatement, § 409. See also 5 Corbin, *op. cit.*, §§ 1236, 1243-4.

54. (1602) 5 Co. Rep. 117a.

55. And see at note 122 *infra*.

after it has been broken by one side, because for a breach of contract the proper discharge is that by accord and satisfaction, a method which has its own peculiar rules.⁵⁶

The true rules concerning rescission, then, are these. First, purely executory contracts can be rescinded by informal mutual consent, whether the original contract is under seal or is a simple one. Secondly, after part performance we can rescind a contract, if the rescission is accompanied by a restitution of the benefits received or by an apportionment of the part performance in terms of its value or price. But, thirdly, it is submitted that (apart from such restitution or apportionment) a contract cannot be simply rescinded after part performance or after breach, but that such contracts are dischargeable by accord and satisfaction as regards which the conditions of validity are somewhat different. It follows, fourthly, that it is impossible to rescind informally a (unilateral) contract completely executed on one side. However, an exception obtains in the law of negotiable instruments. The holder or creditor may (in writing) gratuitously renounce his rights against the acceptor or debtor. This was settled in *Fogster v. Dawber*⁵⁷ where on a promissory note for money lent the defendant pleaded that he had been expressly exonerated and discharged (he was the plaintiff's son-in-law) before payment became due, and this plea was upheld, though on grounds that purported to adopt the separate rules of the law merchant.⁵⁸ Does this mean that, outside bills of exchange, a creditor cannot renounce a debt (say) as a matter of gift? We shall return to this question when discussing the exceptions to *Pinnel's Case*.

4. Accord and Satisfaction.

Accord and satisfaction is our third method of discharge. The "accord" means the agreement to discharge and "satisfaction" is the performance or execution thereof.⁵⁹ As the accord is an agreement

56. Williston's view that a contract can be informally rescinded even after breach can be traced to some dicta in *Dobson v. Espie* (1857) 2 H. & N. 79, where in an action for breach of contract the defendant pleaded "leave and licence". This plea was held bad, because the phrase "leave and licence" was only appropriate in tort, but the court said that had the defendant pleaded that he was "exonerated and discharged" the decision would have been different. Still, the court clearly meant that the defendant should have shown that he was exonerated *before* and not after breach.

57. (1851) 6 Exch. 839; and see *Dingwall v. Dunster* (1779) 1 Doug. 247; *Edwards v. Walters* [1896] 2 Ch. 157. Though not immediately followed in the U.S., the American Negotiable Instruments Law copied the Bills of Exchange Act (s. 62) providing for a written renunciation of negotiable debts: 6 Williston, *op. cit.*, § 1832-3.

58. An argument that such a debt may be waived by parol only between remote, not between immediate, parties was rejected by Parke B.: 6 Exch. 839 at 852-3.

59. See generally 6 Williston, *op. cit.*, § 1268; 6 Corbin, *op. cit.*, §§ 1268, 1278. Restatement, § 417. The latter (in Comment *a*) mentions, apart from the usual accord, the possibility of an accord (called "unilateral")

it rests on mutual consent which means, among other things, that one party's offer of accord must be accepted by the other side.⁶⁰ But a more special and traditional requirement has been that an accord must also be satisfied, that "upon an accord no remedy lies"⁶¹ or that "an accord without satisfaction has no legal effect".⁶² It is necessary to know a little more about this requirement.

Accord and satisfaction is very old law. The early cases, which (Ames has shown) go back to the time of Edward I, establish that the acceptance of anything in satisfaction of an injury would bar further actions in tort.⁶³ The same idea was adopted for contracts as soon as simple contracts began to be enforced. But, as previously in tort, much emphasis was put on the actual satisfaction of the accord. So it was said in *Peytoe's Case*⁶⁴ that "every accord ought to be full, perfect and complete: for if divers things are to be performed by the accord, the performance of part is not sufficient, but all ought to be performed".⁶⁵ This was to remain the law. In *Allen v. Harris*⁶⁶ the plea was an accord to pay 20s. for trover committed by D, but the accord was not satisfied. "The books are so numerous [said the court] that an accord ought to be executed, that it is now impossible to overthrow all the books. But if it

where the creditor in consideration of a special price paid by the debtor (but not as part of the debt) promises to accept from the debtor (say) an automobile in satisfaction of a debt. This device is reminiscent of an option-contract, since it means paying a price for the enforceability of the accord as such.

60. A well-known American case neatly illustrates this rule. In *Petterson v. Pattberg* (1928) 248 N.Y. 86, 161 N.E. 428, the creditor promised the debtor to accept a lesser sum in satisfaction of a mortgage debt, if the debtor would pay on an earlier date than maturity. The debtor made no return promise, but he came on the earlier day specified to the creditor's house and knocked on the door. Asked who it was, the debtor replied that he had brought the money to pay off the mortgage debt. But the creditor had changed his mind and refused to accept the money. The courts held that the debtor had no cause of action to recover damages for breach, since the creditor's promise having remained unaccepted had thus remained freely revocable.
61. *Lynn v. Bruce* (1794) 2 H. Bl. 317.
62. *Morris v. Baron* [1918] A.C. 1 at 35 per Lord Atkinson.
63. Ames, *Lectures on Legal History* (1913) 110. The early cases are collected in Rolle's *Abridgment*, sub. tit. "Accord".
64. (1611) 9 Co. Rep. 77b.
65. *Ib.* at 79b. This explanation of Lord Coke's connects with the doctrine of *Pinnel's Case* (1602) 5 Co. Rep. 117a, i.e. that a smaller cannot discharge a larger sum. Indeed, it seems that the doctrines in *Pinnel* and *Peytoe* have the same forerunners: see *Richards & Barillet's Case* (1584) 1 Leon. 19 and *Onely v. Earl of Kent* (1577) 3 Dyer 355b, where a still unexecuted satisfaction was held no bar. The *Pinnel* doctrine is even more apparent in connection with part performance: *Rayne v. Orton* (1593) Cro. Eliz. 305; *Anon.* (1576) Cro. Eliz. 46; *Ballton v. Baxter* (1593) Cro. Eliz. 304, in which latter Gawdy J. is already suggesting the difference between "naked" and "sufficient" satisfaction.
66. (1696) 1 Ld. Raym. 122. To the same effect, *James v. David* (1793) 5 T.R. 141 where the parties had settled a claim in trespass, but an accord without satisfaction was held to be bad.

had been a new point, it might be worthy of consideration.”⁶⁷ In *Lynn v. Bruce*⁶⁸, D owing P £105, they agreed that P would accept a composition of 14s. in the pound. This D paid off except for a small amount, and this P now claimed by suing on the accord. But the court held that a mere accord was no ground of action against D and unless completely satisfied the accord was no bar to the original debt.⁶⁹ Similarly, in *Reeves v. Hearne*⁷⁰ where D, indebted to P for goods sold and delivered, offered to make a suit of clothes in lieu of paying the debt, an offer which was accepted by P. Much time elapsed, but D did nothing at all. Sued for the original debt, he argued that the clothes he had undertaken to supply made this a new contract on which alone he could be sued. This argument found no favour at all, for the important thing (the court said) was whether or not the accord was entirely satisfied; if not, the old debt remained undischarged. These results were re-inforced by other decisions which held that even part-performance would have no effect. Thus it had been said well before *Peytoe's Case* that a “parcel” was no satisfaction, since “a concord is always to be entirely executed, and not to be executory in part”.⁷¹ This was much repeated in the seventeenth century,⁷² and again in the nineteenth,⁷³ the strongest example perhaps being *Gabriel v. Dresser*.⁷⁴ In an action for failing to deliver one lot of timber, D pleaded that P had agreed to take another lot in full satisfaction and discharge, and that in execution of this accord D had already made a number of deliveries accepted by P and was always ready and willing to complete the accord. But not only D's part-performance, even his tender and P's refusal were held not to amount

67. 1 Ld. Raym. 122. In *Case v. Barber* (1681) T. Ray. 450, the defendant had argued (unsuccessfully) that though formerly an accord had to be executed, “of late it hath been held that upon mutual promises an action lies, and consequently there being equal remedy on both sides an accord may be pleaded without execution as well as an arbitrament”. There was but little authority for this assertion, except possibly *Goring v. Goring* (1602) Yelv. 11, though even there the argument was mainly procedural. Still, the idea that an executory accord could be as valid as an ordinary bilateral contract survived, notwithstanding all the authorities against it, and was later incorporated in Comyns's *Digest*, sub. tit. Accord (B. 4) whence it found its way into *Good v. Cheesman* (1831) 2 B. & Ad. 328.

68. (1794) 2 H.Bl. 317.

69. At 319. Obviously, the law had moved a long way from the time when the possibility of an executory accord was still “worthy of consideration”. And see also at note 67 *supra*.

70. (1836) 1 M. & W. 323.

71. *Rayne v. Orton* (1593) Cr. Eliz. 305, 306.

72. See *Bree v. Sayler* (1667) 2 Keb. 332; *Cock v. Honychurch* (1679) 1 Mod. Rep. 69; *Brown v. Wade* (1671) 2 Keb. 851; *Shepherd v. Lewis* (1671) T. Jones 6, where D pleaded that he had done part of the agreed satisfaction and tendered the residue which P refused. It was held that this plea was not good.

73. See *Collingbourne v. Mantell* (1839) 5 M. & W. 289; *Wray v. Milestone* (1839) 5 M. & W. 21.

74. (1855) 15 C.B. 622.

to satisfaction: to constitute an effective discharge, the satisfaction had to be complete to the last shilling of the agreed value of the accord.⁷⁵

This rigid application of the rule in *Peytoe's Case* was not entirely irrational. For consider the situation where the contract-breaker obtains an accord: if he does little or nothing to satisfy the new accord, why should he not be sued on the original debt?⁷⁶ Or consider the situation where the accord is not itself enforceable as a contract. In an interesting case, *Case v. Barber*,⁷⁷ P sued D for £20 for board and lodging that P had provided to D's wife at D's request. D pleaded an accord according to which P was to receive £9 from D's son which sum the son was able and willing to pay. Nevertheless, judgment went against D, for (as the court explained) the son's guarantee was not in writing so that he could not be sued, and where one pleads an accord in bar, one "must plead it so as it may appear to the Court, that an action will lie upon it, for he shall not take away the plaintiff's present action, and not give him another upon the agreement pleaded".⁷⁸ But this insistence on actual satisfaction could also be troublesome. It gave the creditor the chance to repudiate the accord wherever a debtor, however willing and able, had not yet had the time or opportunity to execute it.⁷⁹ To close this gap, what was needed was some recognition of an executory accord, *i.e.* an accord valid without actual satisfaction. This, indeed, was to occur; we shall now see how.

5. *Composition and the Executory Accord.*

The first development to be traced caused an extension of the meaning of satisfaction. Thus in 1793 Lord Kenyon could say that "the law was clear, that if in payment of a debt the creditor is content to take a bill or note payable at a future day, that he cannot legally commence an action on his original debt, until such bill or note becomes payable, or default is made in the payment; [or] such bill or note is of no value".⁸⁰ But this extension was

75. See *Flockton v. Hall* (1849) 14 Q.B. 380 at 384.

76. See, e.g., 6 Corbin, *op. cit.*, § 1269.

77. (1681) T. Ray. 450.

78. At 451.

79. A neat illustration is *Francis v. Deming* (1890) 51 Conn. 58, 21 A. 1006. The creditor had agreed to discharge a debt if debtor should pay up a certain amount as well as do another service on or before July 10. In an action by the creditor on the original debt, the debtor argued that on and two days before July 10, he had tried to find the plaintiff who however could not be found; moreover, the debtor tendered full performance after the action had begun. Yet this plea was rejected being an accord without satisfaction and therefore invalid. Corbin suggested to call this a mere offer of an accord: 6 Corbin, *op. cit.*, § 1270. But though this may save Corbin's theory making the executory accord valid as such, the solution is purely verbal and removes none of the legal impediments to the recognition of the executory accord.

80. *Stedman v. Gooch* (1793) 1 Esp. 3 at 5-6; see also *Kearlake v. Morgan* (1794) 5 T.R. 513. Lord Mansfield had, a little earlier, decided to similar effect: *Richardson v. Rickman* (1776) cited 5 T.R. 513, 517.

confined to negotiable instruments,⁸¹ being sometimes put on the ground that a bill "resembles a specialty"⁸² and sometimes on the ground that the instrument superseded the original debt as the creditor took the bill in substitution "for better or for worse".⁸³ A better explanation was that payment by note was a conditional payment,⁸⁴ for the creditor was given if not cash at least something of value which he could negotiate or discount.⁸⁵ Moreover, payment by negotiable instrument was made to perform another job. In *Sibree v. Tripp*,⁸⁶ P sued D for £1,000 in money had and received and D alleged that the parties had terminated their "dispute and difference" when D gave P some promissory notes to the value of £300 which P accepted in full satisfaction and discharge. P argued that a smaller sum could not discharge a larger indebtedness; yet payment by note was held a good discharge and the well-known previous authority of *Cumber v. Wane*⁸⁷ was now distinguished as having been incorrectly reported, though there was no evidence for this.⁸⁸ Be that as it may, the principle has prevailed that payment by negotiable instrument will constitute a good accord and satisfaction of an existing debt.⁸⁹

The second development has revolved around the composition between one debtor and several creditors. In an early case, *Steinman v. Magnus*,⁹⁰ 17 creditors agreed *inter se*, but not under seal, to take 20 p.c. of the debts owed to them by one debtor in full satisfaction. Lord Ellenborough thought this a valid agreement as he saw a clear difference between a composition with only one and with many creditors, for where "other creditors have been lured in by the agreement to relinquish their further demands . . .

81. *James v. Williams* (1845) 13 M. & W. 828, 833, aff'd 2 Exch. 798; and see *Price v. Price* (1847) 16 M. & W. 232.

82. *Baker v. Walker* (1845) 14 M. & W. 465, 468; *Ford v. Beech* (1848) 11 Q.B. 852, 873.

83. *Sard v. Rhodes* (1836) 1 M. & W. 153 at 155, per Parke B. However, the modern rule is that the discharge will be conditional upon full payment eventually being made without which the original debt revives. See *Re Romer and Haslam* [1893] 2 Q.B. 286, 296; *Allen v. Royal Bank of Canada* (1925) 95 L.J.P.C. 17.

84. *Griffiths v. Owen* (1844) 13 M. & W. 58, 64; *James v. Williams* (1845) 13 M. & W. 828, 833. In *Ford v. Beech*, *supra*, Parke B. (at 854) made the same point in argument in saying that giving a promissory note for a debt was making a payment, not an agreement.

85. Regarded as payment, the bill therefore had to reach the creditors' possession, *i.e.* the debtor had to seek out the creditor and tender the bill. In *Cranley v. Hillary* (1813) 2 M. & S. 120, a composition would have been a bar but for the fact that the debtor omitted to tender the promissory note.

86. (1846) 15 M. & W. 23.

87. (1721) 1 Stra. 426, 1 Sm. L.C. 373; and similarly *Thomas v. Heathorn* (1824) 2 B. & C. 477.

88. See on this Lord Blackburn in *Foakes v. Beer* (1884) 9 App. Cas. 605 at 619-20.

89. *Curlewis v. Clark* (1849) 3 Exch. 375; *Goddard v. O'Brien* (1882) 9 Q.B.D. 37, where a cheque for £100 was held to be good satisfaction for a debt of £125.

90. (1809) 11 East 390.

that makes all the difference in the case, and the agreement will be binding.”⁹¹ A few years earlier Lord Ellenborough had still thought such compositions to be *nuda pacta*,⁹² but he now found much help in the idea that one creditor could not recover more than his dividend lest there be a fraud on the other creditors.⁹³ At any rate, composition-agreements were firmly recognised in *Good v. Cheesman*.⁹⁴ A debtor agreed to assign to a trustee nominated by his creditors two-thirds of his annual income, but as no trustee was ever appointed, the debtor never paid anything, though always willing to pay. The present accord, Lord Tenterden said, “was not an accord and satisfaction properly and strictly so called, but it was a consent by the parties signing the agreement to forbear enforcing their demands, in consideration of their own mutual engagement of forbearance”.⁹⁵ Little Dale J. also stressed this aspect of “new agreement” which would make it “unjust that the plaintiff by this action should prejudice the other three creditors”.⁹⁶ We can see that the decision rested on an amalgam of two theories: one that the accord or composition was supported by new consideration, and the theory of avoiding fraud on the other creditors, though obviously neither theory was particularly strong. The consideration-theory clashed with the rule against a debtor discharging himself by paying anything less than his original debt.⁹⁷ The fraud-theory was inadequate because it is difficult to see why a breach of contract in this case was to be seen as more fraudulent than any other breach.⁹⁸ Moreover, the effect of these joint theories was to confine such composition-agreements to a relation with several creditors; there could be no valid composition between one debtor and one creditor. Even so confined, however, compositions with creditors have lost much of their previous significance. And this simply because these informal compositions have been superseded by such devices as trusts for the payment of debts⁹⁹ or more public arrangements now regulated by the Bankruptcy Acts.¹⁰⁰

Still the idea was planted that such a composition or executory

91. At 394. See also *Boothbey v. Sowden* (1812) 3 Camp. 175.

92. See *Fitch v. Sutton* (1804) 5 East 230 and *Heathcote v. Crookshanks* (1787) 2 T.R. 24, the latter also a case of composition with many creditors.

93. This notion had been enunciated in *Cockshott v. Bennett* (1788) 2 T.R. 763; and see *Wood v. Roberts* (1818) 2 Stark 417.

94. (1831) 2 B. & Ad. 328.

95. At 333.

96. At 334.

97. But compare the somewhat specious arguments in support of the consideration-theory: 1 Williston, *op. cit.*, § 126.

98. In England, the fraud-theory is generally preferred: see *Cook v. Lister* (1863) 13 C.B.N.S. 543; and *West Yorkshire Darracq. Co. v. Coleridge* [1911] 2 K.B. 326. See on this Cheshire and Fifoot, *op. cit.*, 82-3.

99. See, e.g., L. A. Sheridan, *Trusts for Paying Debts* (1957) 21 *The Conveyancer and Property Lawyer* 280.

100. See also at note 110 *infra*.

accord was a valid agreement in its own right, indeed an agreement with a sufficient consideration consisting of the new contract in substitution of the original liabilities. Thus it has come about (though the exact steps of this are still obscure) that "substitution" has been regarded as an entirely separate method of discharge.¹⁰¹ In other words, the view is that, if as a matter of interpretation it is clear that the parties want to discharge the original contract by a substitution or executory accord rather than by an accord with actual satisfaction, then the new executory contract will hold between them.¹⁰² Yet this theory overlooks important difficulties which arise not where the contract is still executory (for here the parties can simply rescind the bargain, so that by the same token they can replace it with a different one), but where the contract is (say) partly executed on one side; for if (as we have seen) such a contract cannot be simply rescinded, it cannot be substituted or replaced, since one cannot substitute one contract for another unless that other is in fact rescindable. The substitution-theory might have been taken more seriously had it applied more generally. Why, for example, did it not apply to the composition between one debtor and one creditor?¹⁰³ Could it not be said that this composition was as much a substitution as a composition with many creditors? Indeed, good instances of substitution are hard to find. In *Hall v. Flockton*,¹⁰⁴ P sued for the infringement of his patent, and D's plea was that they had made an "arrangement and agreement" under which D was to pay for a new licence from P, after which their dispute was to be "settled, satisfied, discharged and terminated". Moreover, D had drawn a cheque and delivered it to a third party for payment to P. Yet the Exchequer Chamber thought that this new agreement could not at all be said to be in substitution and discharge of the older arrangement.¹⁰⁵ We can therefore see that despite much talk about substitution as a method of discharge, a valid accord without satisfaction (*i.e.* the purely executory accord) was confined to two recognised instances: the composition with many creditors and the payment by bill of exchange.

More recently, however, the executory accord has been extended to a third case which has to do with the settlement of

101. *Evans v. Powis* (1847) 1 Exch. 601, 606-7; *Morris v. Baron* [1918] A.C. 1, 35; Restatement, § 419. For some earlier expressions of the substitution-theory, see *Boothbey v. Sowden* (1812) 3 Camp. 175, and note 67 *supra*.

102. 6 Corbin, *op. cit.*, § 1269; *Elton Cop Dyeing Co. Ltd. v. Broadbent & Son Ltd.* (1919) 89 L.J.K.B. 186.

103. *Evans v. Powis* (1847) 1 Exch. 601. *Page v. Meeh* (1862) 3 B. & S. 259, which superficially seems to contrary effect, can be distinguished as a special case of payment.

104 (1851) 16 Q.B. 1039.

105. See also *Gabriel v. Dresser* (1855) 15 C.B. 622.

an unliquidated claim. Thus in the *British Russian Gazette Case*¹⁰⁶ P agreed to compromise two actions of libel by agreeing to accept (about) £1,000 for costs and expenses in full discharge and settlement of his claims. Before the money was actually paid by D, P changed his mind and proceeded with his suit. Said Greer L.J.:

“On the question whether such an agreement can be a binding contract opinions of judges have varied. I therefore feel that we are now entitled to decide the question on principle, and I think at the present stage of the development of the law we ought to decide that an agreement for good consideration, whether it be an agreement to settle an existing claim or any other kind of agreement, is enforceable at law by action if it be an agreement for valuable consideration, and such valuable consideration may consist of the promise of the other party.”¹⁰⁷

And Scrutton L.J.:

“Accord and satisfaction is the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative.”¹⁰⁸

Though right in practical result, the court's arguments were far from sound. To speak of “binding contract”, “consideration” and so on was to put the cart before the horse; the real question was whether an accord without satisfaction would in this case have any effect. Again, to describe this settlement as a “binding contract” is apt to mislead. Suppose, for example, that the party trying to withdraw from the settlement is the original contract-breaker or tortfeasor or debtor. Why should the other party then be kept to the compromise? As regards compositions with creditors the rule has been that the old debt revives where the debtor fails to pay the agreed dividends to his creditors.¹⁰⁹ Even a composition-agreement under seal does not operate as a contract in the ordinary sense, but operates principally as a bar to an action by creditors, and the old debt revives where the debtor defaults,¹¹⁰ for where

106. *British Russian Gazette Ltd. v. Associated Newspapers Ltd.* [1933] 2 K.B. 616.

107. At 654.

108. At 643-4.

109. *Edwards v. Hancher* (1875) 1 C.P.D. 111.

110. *Newington v. Levy* (1870) L.R. 6 C.P. 180. The same applies to a composition by resolution of creditors: see *Edwards v. Coombe* (1872) L.R. 7 C.P. 519 at 522-3, per Willes J.; *Slater v. Jones* (1873) L.R. 8 Ex. 186 at 193-5, per Bramwell B. These resolutions were under the Bankruptcy Act, 1869, replacing the Act of 1861 under which composition was still by deed instead of a resolution amongst creditors. Before the latter Act, the courts had much difficulty in holding a dissentient creditor bound by a deed to which he was no party. The 1861 Act changed that: *Walker v. Nevill* (1864) 3 H. & C. 403; but the

the creditors "agree to accept a composition, the debtor is not discharged unless he pays the composition, for that is the only thing which compels him to pay it, and that is the only hold which the creditors have upon him."¹¹¹ In this sense, it seems quite wrong to regard the executory accord as a "binding contract"; it should rather be seen as the device which suspends the right of action pending actual satisfaction of the settlement. In short, the typical legal effect of such an executory accord is more akin to a waiver or a temporary bar; it is not at all like a bargain with mutual rights of exchange.

It is important to stress this legal possibility of an effective temporary bar because this has been denied by an allegedly ancient doctrine reaffirmed as late as *Ford v. Beach*.¹¹² Here D pleaded to an action on some promissory notes that, after the notes had become due, it was mutually agreed between D, P and A (a third party) that A should pay £25 per annum and that so long as A did so pay, P's right of action was to be suspended. The Exchequer Chamber held the plea bad, though there had been no default by A. The reason, as given by Baron Parke, was that on a temporary suspension the creditor's rights were extinguished altogether and could never be revived, a principle the judge found "repeated throughout the text books of authority, and recognised and applied through a long course of decision".¹¹³ Thus the present agreement between P, D and A could not operate as a bar since such a bar would mean the complete forfeiture of the debt, and the present agreement therefore could only give rise to damages (whatever they were) but to no other remedy. It may be true (as Professor Shepherd has shown)¹¹⁴ that Baron Parke exaggerated the strength of the doctrine he confirmed.¹¹⁵ Still there were a number of authorities which did suggest that once a claim was suspended it disappeared for good.¹¹⁶ As we have seen, the mistake was to think that because a temporary bar should not be used permanently,

cases were most confused: see *Garrod v. Simpson* (1864) 3 H. & C. 395.

The 1869 Act clarified the law by replacing the composition deed with a resolution by creditors together with a new code for liquidation.

111. *In re Hatton* (1872) L.R. 7 Ch. App. 723 at 726, *per* Mellish L.J.
112. (1848) 11 Q.B. 852.
113. At 866-8. "It is a very old and well established principle of law, that the right to bring a personal action, once existing and by act of the party suspended for ever so short a time, is extinguished and discharged, and can never revive": *ib.* at 867.
114. Shepherd, *The Executory Accord* (1931) 26 Illin. L.R. 22, 33 ff.
115. For example, some of the cases relied on by Parke B. were cases where a creditor married the debtor or appointed him executor, all cases in which the change or merger of legal status justified the imposition of a permanent bar: *Platt v. Sheriffs of London* (1550) Plowd. 35, 36; *Woodward v. Lord Darcy* (1558) Plowd. 184; *Lord North v. Butts* (1558) 2 Dy. 139b; *Sir J. Needham's Case* (1610) 4 Co. Rep. 409; *Wankford v. Wankford* (1704) 1 Salk. 299; *Freakley v. Fox* (1829) 9 B. & C. 130; and see *Jenkins v. Jenkins* [1928] 2 K.B. 501.
116. *Deux v. Jefferies* (1594) Cro. Eliz. 352; *Aloff v. Scrimshaw* (1689) 2 Salk. 573; and see discussion at note 29 ff. *supra*.

that therefore a temporary bar should be, or should remain, impossible. Yet this mistake has gradually been rectified, though as so often in the law the rectification has been somewhat indirect. At any rate, it is now settled that all covenants not to sue are subject to an injunction in equity.¹¹⁷ Further, even a covenant not to sue for a time can now be construed as a release subject to a condition subsequent¹¹⁸ or can be construed as a composition barring creditors so long as the debtor makes no default.¹¹⁹ It is obvious that these developments as well as those making for the recognition of the executory accord all pursued this main objective, namely, to provide for a temporary suspension pending the defendant's full satisfaction of the agreed composition or compromise.

6. *The Problem of Pinnel's Case.*

Our last inquiry must inevitably turn to *Pinnel's Case*,¹²⁰ that is, to the rule that "by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum". Now this doctrine only applied to debts, did not apply to compromises or settlements of unliquidated claims.¹²¹ Yet even applied to debts the rule was never inflexible. For, as Pratt C.J. said, "it must appear to the court to be a reasonable satisfaction; or at least the contrary must not appear."¹²² More particularly, the satisfaction of a debt was regarded as reasonable if the payment, even if less than the amount actually due, was made before time or in a different place,¹²³ or adopted a different medium (*e.g.* peppercorns),¹²⁴ or where the parties came to an account between them.¹²⁵ Later, a debt was held to be satisfied if payment was by negotiable instrument¹²⁶

117. See *Beech v. Ford* (1848) 7 Hare 208.

118. *Newington v. Levy* (1870) L.R. 5 C.P. 607, 612; L.R. 6 C.P. 180 at 190-1 *per* Blackburn J.

119. *Slater v. Jones* (1873) L.R. 8 Ex. 186 at 193-5, *per* Bramwell B.

120. (1602) 5 Co. Rep. 117a. For antecedents see *Richards and Bartlet's Case* (1584) 1 Leon. 19; *Tassall v. Shane* (1590) Cro. Eliz. 193.

121. Thus in *Adams v. Tapling* (1692) 4 Mod. Rep. 88, 89 the court said that "where the damages are uncertain, and to be recovered, . . . a lesser thing may be done in satisfaction, and there 'accord and satisfaction' is a good plea. But in an action of debt upon a bond, where the sum to be paid is certain, there a lesser sum cannot be paid in satisfaction of a greater." See also *Andrew v. Boughey* (1552) 1 Dy. 75a. The uncertainty-doctrine, perhaps needless to add, now even extends to the compromise of what turn out unfounded claims: *Longridge v. Dorville* (1821) 5 B. & Ald. 117; *Cook v. Wright* (1861) 1 B. & S. 559; and *Callisher v. Bischoffsheim* (1870) L.R. 5 Q.B. 449.

122. *Cumber v. Wane* (1721) 1 Str. 426 at 427.

123. See generally 1 Williston, *op. cit.*, § 121.

124. See *Sturlyn v. Albany* (1587) Cro. Eliz. 67; and see Kessler and Sharp, *Contracts: Cases and Materials* (1953) 313.

125. *Cartwright v. Cooke* (1832) 3 B. & A. 701; *Owens v. Denton* (1835) 1 Cr. M. & R. 711; *Gingell v. Purkins* (1850) 4 Exch. 720. For earlier discussion on account as a mode of discharge see *Milward v. Ingram* (1675) 1 Mod. Rep. 206, 2 Mod. Rep. 43; and *May v. King* (1701) 12 Mod. Rep. 537.

126. *Goddard v. O'Brien* (1882) 9 Q.B.D. 37.

or there was a composition with creditors.¹²⁷ Even more important, *Pinnel's Case* did not prevent the creditor from making a gift of the debt. For example, in *Foakes v. Beer*,¹²⁸ Julia Beer had certainly no intention of making a gift to her debtor; had she expressly made such a gift, there would have been enough authority to hold her to it.¹²⁹

Just this possibility of a gift-discharge throws light on what we might consider to be both a modern and rational justification of the old rule. For if we ask why a gift-discharge is valid while payment of a lesser sum is not, the explanation would have to be this. By making a gift-discharge, the creditor deliberately and willingly foregoes the debt; however, where a creditor merely accepts less than the amount due, one can presume that he has been forced or misled into this acceptance by a debtor protesting his inability to pay or having been persuaded to take less by an economically stronger debtor (such as an insurance company).¹³⁰ Thus there is a clear distinction between (i) a creditor who accepts less than the sum due either somewhat unwillingly or *faute de mieux*, and (ii) a creditor who accepts a lesser amount yet accepting this quite deliberately either by way of a gift to the debtor or by deliberately or formally releasing the debt. Hence it becomes nonsense to say that (to quote Lord Blackburn's words) "prompt payment of a part of their demand may be more beneficial to [creditors and businessmen] than it would be to insist on their rights and enforce payment of the whole".¹³¹ A lesser amount would, needless to say, be beneficial where the creditor receives it at an earlier date or where the debtor is insolvent; but apart from this, it would be even more beneficial to the creditor to have part payment as well as retaining a right to the remainder of the debt. So seen, the rule in *Pinnel's Case*, far from being the product of the scholastic legal mind¹³² or reduced to insignificant or "infinitesimal remains"¹³³ still performs a very vital role. For while, on the one hand, the doctrine cannot cause much inconvenience (when so simple a device as payment by bill of exchange will discharge a debtor), on the other hand it requires some formality in the discharge of debts (either by a formal deed of release, or the symbolical peppercorn, or by express words of gift), because without this formality a discharge would always remain suspect, and creditors would be

127. See § 5 *supra*.

128. (1884) 9 App. Cas. 605.

129. It should perhaps be pointed out that such gift-discharges are more recognised in American than in English law: for the American view, see 5 Corbin, *op. cit.*, § 1247.

130. Havighurst, *Problems Concerning Settlement Agreements* (1958) 53 Nw. U.L.R. 283 at 292.

131. *Foakes v. Beer* (1884) 9 App. Cas. 605 at 622.

132. See Fifoot, *History and Sources of the Common Law* (London 1949) 412.

133. *Foakes v. Beer*, *supra*, at 628, *per* Lord FitzGerald.

tempted to go back on their informal promise to forego the debt.¹³⁴ More generally, we can say that *Pinnel's Case* expresses an important datum of human experience, namely, that it does not occur to people to think of a partial payment as capable of being a positive satisfaction of a debt, and this is as true today as in the sixteenth and seventeenth centuries.¹³⁵ In other words, an agreement to discharge a debt or other liability arising from contractual non-performance is informed by other criteria of validity than those which inform an agreement in its formatory stage. In this way, indeed, *Pinnel's Case* symbolises just this necessary difference between, firstly, the ordinary principles of contractual formation and, secondly, the principles by which we can agree to bury our contractual liabilities where a contract has collapsed.

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134. The American experience bears this out very vividly. With the seal abolished and other formalities relaxed, the "release" has become an informal agreement or promise not to sue for a debt. The practical result has been an enormous increase in the number of cases in which creditors have attacked their agreement to discharge on the grounds of duress, fraud and mistake. For these recent developments, see Havighurst, *op. cit.*, 295 ff.

135. This must explain the otherwise puzzling fact, mentioned by Lord Blackburn in *Foakes v. Beer*, *supra*, at 619, that there seems to be no explicit instance of *Pinnel's Case* being applied since its origin until the date of *Cumber v. Wane* (1721) 1 Str. 426.

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