

## ACCORD AND SATISFACTION BY A STRANGER

For centuries it was uncertain whether a stranger to an obligation could, by a satisfaction provided by him, discharge that obligation. Even today some aspects of the problem remain unsettled. The question may arise in various forms. The simplest is where somebody who is not a party to the contract under which the debtor's liability arises renders something to the creditor in return for the creditor's promise to discharge the debtor. More complicated questions arise where one party to a bill of exchange or promissory note claims that payment or satisfaction by some other party has had the effect of discharging them both. In considering the effect of a stranger's attempt to secure the discharge of an obligor it is necessary to distinguish two situations which have often been confused. The stranger may attempt to satisfy the obligation by means of an accord and satisfaction. In other words, he may render a substituted performance, which it is agreed shall operate to discharge the obligation. In the other type of case the stranger attempts to contract with the obligee for the discharge of the obligor. The stranger provides some consideration for the obligee's promise to discharge the obligor, but this consideration is not given as a substitute for the performance due from the obligor. In the former case there is a satisfaction of the obligation; in the latter there is no satisfaction, but an independent contract for the surrender of the obligee's rights. If A. is the obligor, B. the obligee, and C. the stranger, the difference between the two situations may be illustrated by the following examples.

- (1) B. owes A. 10 dollars. C. says he will "perform" B.'s obligation, but not by means of an exact "performance". He will satisfy the obligation by giving A. a horse. This is an attempted accord and satisfaction if C. delivers the horse, and A. accepts it on the understanding that it is to satisfy the debt.
- (2) B. owes A. 10 dollars. C. says he is not concerned with "performing" B.'s obligation, but he will give A. a horse if A. will promise to forego his rights against B. If A. agrees, this cannot be considered a satisfaction of B.'s obligation. That was not the intention of A. and C. What they intended was a contract for the determination or surrender of A.'s rights against B., in which the horse or the promise to give the horse was the consideration for A.'s promise.

It may be objected that this is an over-subtle distinction. But it is submitted that in the above examples there is a real difference between the intentions of the parties, and it will be shown that the law has recognised this difference.<sup>1</sup> In many cases, however, the court has failed to note the distinction. This is attributable to at least two factors. It may be extremely difficult to decide from the evidence what the parties intended. Again, both cases involve the general question whether a stranger to an obligation may intervene to discharge that obligation. Both cases involve the question of discharge by a stranger, although only the first raises the problem of satisfaction.

In connection with an attempted satisfaction by a stranger it is possible to distinguish in theory between the case in which the stranger renders to the obligee precisely that which is due from the obligor, and the case in which the stranger renders something different. This distinction would be without juridical significance. It cannot be said that in the former case the stranger performs or pays what is due from the obligor, whereas in the latter he satisfies the obligor's obligation. If A. has contracted for a performance or payment by B., he does not get what he contracted for where there is "performance" or "payment" by C.<sup>1a</sup> In this case also there is satisfaction, not performance or payment. In evolving a solution of the problem whether there can be accord and satisfaction by a stranger, the common law has not distinguished between the two cases, although the courts have sometimes loosely spoken of "payment" or "performance" where the satisfaction takes the form of that which was due from the obligor. Incidentally, this terminology is to be found in the other type of case as well. The reasons for this are perhaps the difficulty of finding satisfactory alternative terms, and the fact that the solution of the problem of satisfaction by a stranger has been found in principles of agency.

Where C. gives B. the amount of B.'s claim against A., it must first be ascertained whether C. intends to secure an assignment of the debt to himself, or whether he intends to discharge A.'s obligation. This is an important question for several reasons. Thus, if there is merely an assignment, C. may recover the debt from A., whereas if the debt is discharged it is no longer

<sup>1</sup> It has also been drawn by Ames in "*Two Theories of Consideration*," *SELECTED READINGS ON THE LAW OF CONTRACTS*, 320.

<sup>1a</sup> See Williston, "*Accord and Satisfaction*," *SELECTED READINGS ON THE LAW OF CONTRACTS*, 1193, 1203.

recoverable, and C.'s right to recoupment by A., if it exists at all, will be in quasi-contract. If there is an assignment, a counterclaim or set-off against B. may, in certain circumstances, be available against C. If, however, there is an effective discharge and C. is able to recover from A., A. will not be allowed to rely on any counterclaim or set-off as if there had been an assignment.<sup>18</sup> In short, the effect of an assignment is to keep the debt alive, but a discharge extinguishes it.<sup>2</sup> Whether there is an assignment or a discharge depends, it would seem, on the intention of the stranger and the creditor<sup>3</sup>, but it may be difficult in some cases

<sup>18</sup> Note also the difference between a promise to satisfy the debt of another, and a contract to assign, with respect to the Statute of Frauds. *Anstey v. Marden* (1804), 1 B. & P. (N.R.) 124. *Gray v. Herman* (1890), 75 Wis. 453, 44 N.W. 248. Again, where a stranger satisfies a debtor's obligation upon a negotiable instrument, any claim he may have against the debtor will be merely for what he has expended on behalf of the debtor, whereas the transferee who paid part only of the bill or note may recover the full amount of the bill or note. In fact, in English law a bill of exchange cannot be indorsed for part only. Sec. 32 (2), Bills of Exchange Act, 1882. See BYLES ON BILLS (19th ed., 1931), 157. The balance beyond what the transferee actually gave will be held by him for the person really entitled to it. By s. 62 of the American Negotiable Instruments Law, however, an instrument paid in part may be indorsed for the residue. See also *Boyce v. Shiver* (1871) 8 S.C. 515. A bill may also be transferred for part of the face value so as to entitle the transferee to recover the full amount. The practice of discounting bills is an example of this.

<sup>2</sup> *M'Intyre v. Miller* (1845), 13 M. & W. 725, 729, per Parke B. See also *Russell v. Drummond* (1855), 6 Ind. 216. *Ralph A. Badger & Co. v. Fidelity Bldg. & Loan Assn.* (1938), 94 Utah 97, 75 Pac. (2d) 669.

<sup>3</sup> *Hawkshaw v. Rawlings* (1716), 1 Stra. 23; *Merryman v. State* (1822), 5 H. & J. 423, 426 (Md.); *M'Intyre v. Miller* (1845), 13 M. & W. 725, 731; *Morris v. Lake* (1848), 9 Smedes & M. 521 (Miss.); *Whiting v. Independent Mutual Insurance Co.* (1859), 15 Md. 297, 314-315; *Champney v. Coope* (1865), 32 N.Y. 543, 551; *Pelton v. Knapp* (1866), 21 Wis. 63; *Balohradsky v. Carlisle* (1883), 14 Ill. App. 289; *King v. Barnes* (1888), 109 N.Y. 267, 16 N.E. 332; *People's and Drivers' Bank v. Craig* (1900), 63 Oh. St. 374, 59 N.E. 102, 103, 104.

A private arrangement between the debtor and the stranger cannot affect the matter. It is the agreement of the creditor and the stranger which decides whether there is satisfaction or an assignment. *Harwell v. Worsham* (1841), 2 Humph. 572, 574 (Tenn.). *Eastman v. Plumer* (1855), 32 N.H. 238. *White v. Fisher* (1871), 62 Ill. 258. *Bailey v. Malvin* (1880), 53 Ia. 371, 5 N.W. 515. *Greening v. Patten* (1881), 51 Wis. 146. *Binford v. Adams* (1885), 104 Ind. 41, 45. *Cason v. Heath* (1890), 36 Ga. 438, 12 S.E. 438. *Smith v. Vinson* (1927), 7 La. App. 309, 312. Where, however, the stranger has contracted with the debtor to satisfy his debt, the stranger cannot by agreement with the creditor keep the debt alive against the debtor. *Williams v. Thurslow* (1850), 31 Me. 392. *Shinn v. Fredericks* (1870), 56 Ill. 439. *Ellis v. Allen* (1876) 48 Vt. 545. *Rolfe v. Wooster* (1879), 58 N.H. 526. *Kelly v. Staed* (1896), 136 Mo. 430, 437, 37 S.W. 1110. *Kirby v. Scanlan* (1896), 8 S.D. 623, 67 N.W. 828. *Prather v. Hairgrove* (1908), 214 Mo. 142, 158, 112 S.W. 552. *Segno v. Segno* (1917), 175 Cal. 743, 167 Pac. 285. But see *Bishop v. Rowe* (1880), 71 Me. 263, 264, in which it was suggested that such a contract between debtor and stranger merely gives rise to a presumption of satisfaction.

In some cases there can be a satisfaction only, even though creditor and stranger may have intended an assignment. (1) Where a sheriff or other officer entrusted with levying executions himself satisfies a judgment, he cannot take an assignment of the judgment. Public policy does not

to decide what that intention was. In *Anstey v. Marden*<sup>4</sup> the plaintiff sued the defendant for a sum of money alleged to be due as the result of the defendant's breach of contract. The defendant pleaded that the plaintiff was entitled to no more than ten shillings in the pound on his claim, and that a sum arrived at on this basis had been paid into court. The defendant was indebted to a number of creditors, including the plaintiff. It had been orally agreed between these creditors and one Thomas Weston, the defendant's father-in-law, that Weston should pay ten shillings in the pound on the defendant's debts in full satisfaction and discharge of those debts, and that the creditors should assign them to Weston. The other creditors had later signed a written agreement to this effect. The plaintiff had authorised one of them to sign on his behalf when he signed for himself, but this had not been done. The plaintiff had then revoked his authority, and refused to execute the agreement or accept ten shillings in the pound on his debt. The plaintiff replied to the plea that the agreement there set forth did not comply with the Statute of Frauds. The question was, therefore, whether there had been a promise to answer the debts of another, or whether the transaction amounted to a purchase of those debts. The plaintiff argued that the plea relied upon an agreement to discharge the debts, and not an agreement to assign them. From the agreement it was obviously difficult to decide what had been intended, since in its terms it referred to both assignment and discharge. Lord Mansfield and his colleagues decided that the parties intended to assign the debts to Weston, and that it would be fraudulent for the plaintiff, having induced the other creditors to accept Weston's terms, to dissociate himself from them, and sue for the whole amount of his claim against the debtor. There are some loose *dicta* in the judgment

permit him to traffic in writs of execution, except in performance of his official duties. *Waller v. Weedale* (1604), Noy 107. *Langdon v. Wallis* (1697), Lutw. 223, 226. *Bigelow v. Provost* (1843), 5 Hill 566 (N.Y.). *Carpenter v. Stilwell* (1854), 11 N.Y. 61. Com. Dig. Viscount, E. 1. Execution, C. 6, n. (g) (4) of the 1825 ed. American practice is not uniform. See FREEMAN ON EXECUTIONS, s. 444, and the cases cited in the notes to this section. (2) A trustee or personal representative cannot acquire a negotiable instrument upon which the beneficiary or decedent is liable, except in his fiduciary character. A "fiduciary can in no event so deal with his trust as to secure to himself an individual benefit thereby, at the expense or hazard of the trust estate." *Burton v. Slaughter* (1875), 26 Gratt. 914, 919 (Va.). It cannot be considered a purchase by him in his non-representative capacity, and this is probably true of all debts, and not merely negotiable instruments. See WHITE & TUDOR, LEADING CASES IN EQUITY, (19th ed., 1928), ii, 701-702. But in *Borst v. Bovee* (1843), 5 Hill 219 (N.Y.) it was held that where an executor took up the decedent's note, there was only a presumption that he did so *animo solvendi*.

<sup>4</sup> (1804), 1 B. & P. (N.R.) 124.

of the Chief Justice tending to confuse an assignment and a discharge,<sup>5</sup> but the distinction is carefully drawn by Chambre J:

I think upon the evidence, it is perfectly clear that this was a contract to purchase the debts of the several creditors, instead of being a contract to pay or discharge the debts owing by Marden. It was of the substance of the agreement that these debts should remain in full force, to be assigned to Weston. When he had purchased them he did not mean to exact them rigorously, but the contract was a contract of purchase . . . . Instead of being a contract to discharge Marden from his debts, it was a contract to keep them on foot . . . .<sup>6</sup>

In *M'Intyre v. Miller*<sup>7</sup> Baron Parke pointed out that,

If the debt be expressly kept alive at the time, it cannot be satisfied by the very act which keeps it alive. To construe that as *payment* which is meant to be an *assignment*, is a contradiction in terms.<sup>8</sup>

In *Anstey v. Marden* the nature of the transaction was uncertain largely because of the ambiguous language of the agreement. If the parties fail to make their purpose clear, it is still a doubtful question whether it should be presumed that an assignment or a discharge was intended. In the United States the presumption appears to be in favor of generosity (or perhaps officiousness), and in the absence of a clearly expressed intention to assign, the creditor's claim will be absolutely extinguished.<sup>9</sup>

<sup>5</sup> "I did not see how one person could undertake for the debt of another, when the debt for which he was supposed to undertake, was discharged by the very bargain. . . . The Plaintiff cannot recover the original debt due from the Defendant to himself, inasmuch as he has agreed to accept ten shillings in the pound in satisfaction of that debt, and to assign it to Weston. . . ." (1804), 1 B. & P. (N.R.) at p. 132.

<sup>6</sup> (1804), 1 B. & P. at p. 133.

<sup>7</sup> (1845), 13 M. & W. at p. 728.

<sup>8</sup> See also: *Lucas v. Wilkinson* (1856), 1 H. & N. 420 (from which it appears that it will not be presumed that the stranger is satisfying the debt, rather than taking an assignment, merely because he is himself indebted to the debtor). *Pelton v. Knapp* (1861), 21 Wis. 63. *Atlantic Dock Co. v. Mayor, etc., of New York* (1873), 53 N.Y. 64, 67. *Hun v. Van Dyck* (1882), 26 Hun 567, 572 (N.Y.). *Moran v. Abbey* (1883), 63 Cal. 56. *People's & Drovers' Bank v. Craig* (1900), 63 Oh. St. 374, 59 N.E. 102.

<sup>9</sup> "The payment of a judgment, by a stranger to it, will operate an extinguishment of it, unless there is some understanding that it is to be continued in force for the benefit of the person making the payment. When such an understanding is shown, the judgment will be treated as assigned to the person paying the money, and not as extinguished, or the person making the payment will be subrogated to the rights the judgment creditor had before receiving the money from the stranger." *Terry v. O'Neal* (1888), 71 Tex. 592, 596. That the presumption is in favour of satisfaction rather than assignment is the overwhelming verdict of the many cases in which the stranger claims to be subrogated to the creditor's rights against the debtor. See, for example, the following cases: *Reed v. Pruyn* (1811), 7 Johns 426 (N.Y.). *Sherman v. Boyce* (1818), 15 Johns 443 (N.Y.). *Nolte & Co. v. Their Creditors* (1829), 7 Mart. (N.S.) 602 (La.). *Sandford v. McLean* (1832), 3 Paige 117 (N.Y.). *Harwell v. Worsham* (1841), 2 Humph. 572 (Tenn.). *Banta v. Garmo* (1844), 1 Sandf. 383 (Ch., N.Y.). *Wilkes v. Harper* (1848), 1 Coms. 536 (N.Y. Ct. of Apps.). *Morris v. Lake*, (1848), 9 Smedes & M. 521 (Miss.). *Oliver v. Bragg* (1860), 15 La.

If it is established that the stranger intended to discharge the obligee's claim, and that the obligee acquiesced in this intention, the question then arises whether the law gives effect to this arrangement. The Roman law held quite uncompromisingly that there could be discharge of an obligation by a stranger. According to Gaius, "*solvere pro ignorante et invito cuique licet, cum sit jure civili constitutum licere etiam ignorantis invitique meliorem conditionem facere.*"<sup>10</sup> This rule of Roman law was adopted in Art. 1236 of the *Code Napoleon*:

Une obligation peut être acquittée par toute personne qui y est intéressée, telle qu'un co-obligé ou une caution.

L'obligation peut même être acquittée par un tiers qui n'y est point intéressé pourvu que ce tiers agisse au nom et en l'acquit du débiteur, ou que, s'il agit en son nom propre, il ne soit pas subrogé aux droits du créancier.

It is reproduced substantially in Arts. 2134 and 2135 of the Civil Code of Louisiana. Art. 2134 states that an obligation

may be discharged by a third person no way concerned in it, provided that person act in the name and for the discharge of the debtor, or that if he act in his own name, he be not subrogated to the rights of the creditor.

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Ann. 402. *Wilson v. Brown* (1861), 13 N.J. Eq. 277. *Shinn v. Budd* (1862), 14 N.J. Eq. 234. *Pelton v. Knapp* (1866), 21 Wis. 63. *Weston v. Clark* (1866), 37 Mo. 568. *Boyd v. McDonough* (1870), 39 How. Pr. 389 (N.Y.). *Watson v. Wilcox* (1876), 39 Wis. 643. *Feamster v. Withrow* (1878), 12 W. Va. 611, 658. *Anglade v. St. Airt* (1878), 67 Mo. 434, 438. *Neely v. Jones* (1880), 16 W. Va. 625, 642. (In this case it was suggested, however, that if an attempted satisfaction is not requested or ratified by the debtor, it will take effect as an assignment, provided the purported satisfaction was made at the request of the creditor. If it was not at the creditor's request, there will be no implied assignment, but if the creditor later recovers the debt from the debtor, he will hold it for the benefit of the stranger. The difference appears to be that in the former, but not in the latter case the stranger can compel the creditor to lend his name to an action against the debtor. This was approved in *Crumlish's Adm'r. v. Central Imp. Co.* (1893), 38 W. Va. 390, 395, 18 S.E. 456, but there seems to be no sound reason why the transaction should necessarily be interpreted as an assignment merely because the creditor invites the intervention of the stranger.) *National Bank v. Cushing* (1881), 53 Vt. 321, 326. *Hun v. Van Dyck* (1882), 26 Hun 567, 572 (N.Y.). *St. Francis Mill Co. v. Sugg* (1884), 83 Mo. 476. *Pearce v. Bryant Coal Co.* (1887), 121 Ill. 590. *Bunn v. Lindsay* (1888), 95 Mo. 250. *White v. Cannon* (1888), 125 Ill. 412, 416, 17 N.E. 753. *Onry v. Saunders* (1890), 77 Tex. 278. *Thompson v. The Connecticut Mutual Life Ins. Co.* (1894), 139 Ind. 325, 344-345, 38 N.E. 796. *Poole v. Kelsey* (1900), 95 Ill. App. 233. *People's & Drivers' Bank v. Craig* (1900), 63 Oh. St. 374, 59 N.E. 102, 104.

But in *Brice's Appeal* (1880), 95 Pa. 145 it was held that the presumption was in favour of assignment. Again, in *Breck v. Blanchard* (1851) 22 N.H. 303 it was decided that a plea of payment by a third person, or generally without saying by whom, was insufficient without an averment that payment was in satisfaction of the debtor's obligation, on the ground that there was nothing in the plea to show that satisfaction rather than transfer was intended. From *Gernon v. McCan* (1871), 23 La. Ann. 84, also it would appear that the presumption, at least in the case of a negotiable instrument, is that assignment was intended.

<sup>10</sup> Dig. 46, 3, 53.

By Art. 2135,

A third person may, for the advantage of the obligor, put the obligee in default, by offering to perform the obligation on the part of the debtor, even without his knowledge; but it must be for the advantage of the debtor, not merely to change the creditor.

It has been decided in Louisiana that the right of a third person to discharge an obligation to which he is a stranger is absolute, and may be exercised even in opposition to the will of the debtor, "because on the one hand the creditor has no interest and consequently no right to refuse a regular and satisfactory payment, and it is a matter of indifference whence the money comes, and because, on the other hand, it is permitted to every one, by a kind of (fraternal mandate), to ameliorate the condition of another, even without his knowledge and against his will."<sup>11</sup>

In common law jurisdictions there are two possible approaches to a solution of the problem of the effect of a stranger's attempt to discharge another's obligation. The systems of law already mentioned concentrate on the creditor's position, and hold that his only interest is the receipt of what is due to him. If he is willing to accept satisfaction from a stranger, the transaction operates to discharge the debtor as completely as if the debtor himself had paid. It is possible to go further and insist that the creditor is bound to accept satisfaction from any stranger who volunteers it. On the other hand, it is possible to adopt the traditional approach of the common law, by which a contract is essentially personal to the parties. It confers rights and imposes duties on the parties and nobody else, and a stranger to the contract cannot enforce those rights or perform those duties. By applying this principle, not merely is it impossible for a stranger to satisfy a debtor's obligation, but he cannot by contract with the creditor confer the benefit of a discharge on the

<sup>11</sup> *Gernon v. McCan* (1871), 23 La. Ann. 84, 87. It appears from this case that not too much altruism must be expected. It was held that where, as here, a large sum of money is involved, the creditor should presume, in the absence of an express understanding to the contrary, that the payer is seeking an assignment, and is not exercising his "fraternal mandate". See at p. 88. For other Louisiana cases involving the general principle, see *State v. Pilsbury* (1877), 29 La. Ann. 787. *State v. Register of Conveyances* (1904), 113 La. 100, 36 So. 900. *Bentley v. Cavallier* (1908), 121 La. 60, 46 So. 101. *Richards v. Nylka Land Co. Ltd.* (1918), 143 La. 650, 79 So. 208. *Smith v. Vinson* (1927), 7 La. App. 309. See also POTHIER, OBLIGATIONS, (Evans trans., 1853), i, 388: "It is not essential to the validity of the payment, that it be made by the debtor, or any person authorised by him; it may be made by any person without such authority, or even in opposition to his orders, provided it is made in his name, and in his discharge, and the property is effectually transferred; it is a valid payment, it induces the extinction of the obligation, and the debtor is discharged even against his will."

debtor which the latter can enforce or rely upon.<sup>12</sup> This view of the nature of a contract has made it difficult for English law to discover a principle by which an obligation may be satisfied by the intervention of a stranger. It would seem that less difficulty would be felt in American law which has departed very considerably from the narrow view that a contract cannot confer a benefit on a third party enforceable by that beneficiary.<sup>13</sup> If A. can contract with B. for C.'s benefit so that C. can enforce the benefit, it requires little logical extension of this principle to recognise that A. may contract with B. for the discharge of C. who is under an obligation to B., so that C. may rely on the discharge. In fact, this argument has not been advanced in any American case, although it may be implicit in the many American decisions which hold that C. is discharged, without giving any explanation of the process by which that result is reached.<sup>14</sup> This principle if recognised, would not, of course, be one of accord and satisfaction. It would provide an answer only to the question whether the obligee and stranger could contract for the obligor's discharge so as to enable the obligor to plead the discharge in an action by the obligee. It would not affect the question whether the stranger could enter into an accord and satisfaction of the obligor's obligation.

Early English authority was divided on the question whether a third person could *satisfy* an obligation owed by one person to another. This authority may be summarised as follows:

(a) *For the view that there was satisfaction.*

(i) Fitzherbert's Abridgment, summarising a case in 36 Hen. 6, states:

<sup>12</sup> "Personally, I am inclined to agree that *prima facie* such an accord and satisfaction must be by virtue of an agreement made between a person who is under an obligation to another person, which he ought to have and has not performed, and that other person. I should hesitate to say that there can, properly speaking, be an accord and satisfaction in respect of a contractual obligation as between one of the parties to the contract, who ought to have but has not performed that obligation, and a stranger to the contract." *Hirachand Punamchand v. Temple*, [1911] 2 K.B. 330, 335-336, *per* Vaughan Williams L.J. See also *Gawdy J. in Wichals v. Johns* (1599), Cro. El. 703; Lord Macnaghten in *Keighley, Marted & Co. v. Durant*, [1901] A.C. 240, 246, and the cases which speak of the necessity for privity between stranger and obligor: *Grymes v. Blofield* (1594), Cro. El. 541; *Mathews v. Lawrence* (1845) 1 Den. 212, 214 (N.Y.); *Leavitt v. Morrow* (1856), 6 Oh. St. 71, 80-81; *Muller v. Eno* (1856), 14 N.Y. 597, 606; *Atlantic Dock Co. v. Mayor, etc., of N.Y.* (1873), 53 N.Y. 64, 67; *Armstrong v. School District No. 3*, (1887) 28 Mo. App. 169, 181-183; *Thomas Gordon Malting Co. v. Bartels Brewing Co.* (1912), 206 N.Y. 258, 100 N.E. 457, 460; *Weill v. Paradiso* (1921), 188 N.Y.S. 287, 289.

<sup>13</sup> See RESTATEMENT ON CONTRACT, Arts. 135-137. WILLISTON ON CONTRACT, s. 1860. But note *Armstrong v. School District No. 3* (1887), 28 Mo. App. 169.

<sup>14</sup> See *infra* n. 113.



If a stranger doth trespass to me, and one of his relations, or any other, gives anything to me for the same trespass, to which I agree, the stranger shall have advantage of that to bar me; for if I be satisfied, it is not reason that I be again satisfied. *Quod tota curia concessit.*<sup>15</sup>

There is another case in Fitzherbert<sup>15A</sup> which is relevant. Annuity was brought against an heir upon a bond by his father for the advancement of the plaintiff by the obligor or his heir to a suitable benefice. The defendant pleaded that after the death of his father, his mother "at our procurement" gave the plaintiff a certain deanery, which the plaintiff accepted. Hengham said "qui per alium facit, per seipsum facere videtur", and awarded that the plaintiff answer over. Coke<sup>15B</sup> doubted the correctness of this report, but for a reason which did not reflect upon the possibility of an accord and satisfaction by a stranger. The bond was conditioned for the performance of a collateral act, and it was well established at common law that there could be no accord and satisfaction even by the obligor of such a condition.<sup>15C</sup> Accord and satisfaction was possible in the case of bonds only where the condition was for the payment of money, and in fact Coke goes on to say, if "a man is bound to pay money at Coventry, a stranger unknown to him pays this money for him, he agrees unto it, by this he shall be discharged."

(ii) In Coke on Littleton it is said that

if any stranger, in the name of the mortgagor or his heir (without his consent or privity), tender the money, and the mortgagee accepteth it, this is a good satisfaction, and the mortgagor or his heir agreeing thereunto may re-enter into the land; *omnis ratihabitio retrotrahitur et mandato equiparatur.* But the mortgagor or his heir may disagree thereunto if he will.<sup>16</sup>

(iii) In *Rigby v. Woodward*<sup>17</sup> Lord Oxford owed Woodward £240. The debtor wrote to one Rigby requesting him to pay Woodward. Rigby informed Woodward that if he would take £220 for his debt, he would be paid this sum by Rigby within fourteen days. Woodward agreed, but the money was not paid, whereupon he brought *assumpsit* against Rigby, alleging as consideration for the latter's promise the agreement to abate £20 of Lord Oxford's debt. Judgment was given for the plaintiff, and Rigby then brought a writ of error, arguing that the promise to forego £20 was no consideration for his promise,

<sup>15</sup> "Barre", pl. 166.

<sup>15A</sup> Abr., M. 33, E. 1, "Annuities", pl. 51.

<sup>15B</sup> *Moorwood v. Dickens* (1615), Bulst. 148, 149.

<sup>15C</sup> *Moorwood v. Dickens*.

<sup>16</sup> Co. Litt. 207a.

<sup>17</sup> (1678), Freem. C. L. Rep. 464.

since he was a stranger and not liable for the debt; and, further, that notwithstanding the promise to abate £20, Woodward could still sue Lord Oxford for the whole debt. The judges unanimously affirmed the judgment of the King's Bench that there was a good consideration for Rigby's promise, North C.J. adding that the agreement was "such an one as my lord might have taken advantage of." It seems, however, that this cannot be regarded as a case of accord and satisfaction by a stranger, since Rigby held funds of the debtor, from which the debtor directed him to pay the debt. Moreover, discussion of the precise significance of the case is useless, in view of the conflicting report by Sir T. Jones, which states that the Court of King's Bench held that there was no consideration for Rigby's promise.<sup>18</sup>

(iv) In *Hawkshaw v. Rawlings*<sup>19</sup> Lord Parker C.J. said that "although payment by a stranger be not a legal discharge, yet acceptance in satisfaction is." This remark was *obiter*. The issue was whether the plaintiff's replication that he did not accept the money in satisfaction was a good reply to the defendant's plea. Furthermore, it seems that there was in this case payment by co-obligors, and not satisfaction by strangers.

(b) *For the view that there was no satisfaction.*

(i) There is a case of 1361 reported by both Stratham<sup>19A</sup> and Fitzherbert<sup>19B</sup> in which it was held that in debt on a contract it was no plea to say that the plaintiff had received a bond from a stranger for the same duty, although it would be a good defence to say that the defendant himself gave a bond.

(ii) In an anonymous case decided in 1586<sup>20</sup> Anderson C.J. is reported to have said,

Upon a wager of law . . . if I am bound to pay you a certain sum of money, and a stranger deliver you a horse by my assent, for the same debt, this is no satisfaction. So if I be indebted upon a simple contract, and a stranger make an obligation for this debt, the debtor cannot wage his law, for this doth not determine the contract.<sup>21</sup>

<sup>18</sup> Sir T. Jones 87. For a case of satisfaction by a stranger which was discussed on the basis of novation only, see *Emerson Brantingham Implementation Co. v. Sawyer* (1922), 210 Mo. App. 535, 242 S.W. 1007.

<sup>19</sup> (1716), 1 Stra. 23, 24.

<sup>19A</sup> "Dette," pl. 28.

<sup>19B</sup> "Dette," pl. 83.

<sup>20</sup> Gouldsb. 57.

<sup>21</sup> As to this latter proposition, see Brooke's Abr., tit. Contract, pl. 29; Fitzherbert's Abr., tit. Dette, pl. 83; Fitzherbert's *Natura Brevium*, 121 M; Rolle's Abr., Condition, E. 1; Viner's Abr., Condition, E.d. 1, Contract and Agreement, G. 15; *Hooper's Case* (1587) 2 Leon. 110; *White v. Cuyler* (1795) 6 T.R. 176, (1794) 1 Esp. 200. In these cases, according to Cresswell, J., in *Jones v. Broadhurst* (1850) 9 C.B. 173, 194, the obligation given by the stranger is no discharge of the obligor, because the stranger's obligation is collateral, and not given in satisfaction, extinguishment or merger of the obligor's obligation.

(iii) In *Hawes v. Birch*<sup>21A</sup> it was said that there was no satisfaction of a debt due upon a bond where a stranger gave another bond in substitution of the first. This dictum was merely an application of the rule that generally one bond could not discharge another, and should not be interpreted to deny the possibility of accord and satisfaction by a stranger in other cases.<sup>21B</sup>

(iv) By far the most important of the earlier cases, having regard to its subsequent influence, was *Grymes v. Blofield*.<sup>22</sup> It has been repeatedly and exhaustively discussed in later cases, both English and American,<sup>23</sup> and for two and a half centuries it proved a stumbling-block to the adoption of any principle whereby a stranger might satisfy the obligation of another.

The report of the case by Croke is headed, "Trinity term, 36 Eliz. Roll 844", and proceeds as follows :

Debt upon an obligation of twenty pounds. The defendant pleads, that J.S. surrendered a copyhold tenement to the use of the plaintiff in satisfaction of that twenty pounds, which the plaintiff accepted. It was thereupon demurred. Popham and Gawdy held it to be no plea; for J.S. is a mere stranger, and in no sort privy to the condition of the obligation; and therefore satisfaction given by him is no good. *Vide* 36 Hen. 6. "Barr", 166. 7 Hen. 4 pl. 31.—Afterwards, in Easter term, 31 Eliz. by Popham and Clench, *cæteris Justiciariis absentibus*, it was adjudged for the plaintiff.

The case is so stated in Comyns' Digest,<sup>24</sup> but in Rolle's Abridgment<sup>25</sup> and in Viner's Abridgment<sup>26</sup> it is said that the

<sup>21A</sup> (1615), 1 Brownl. & Golds. 71.

<sup>21B</sup> Cf. *Blythe v. Hill* (1677), 1 Mod. 225.

<sup>22</sup> (1594), Cro. Eliz. 541.

<sup>23</sup> E.g., *Edgcombe v. Rodd* (1804) 5 East 294; *Clow v. Borst* (1810) 6 Johns 37 (N.Y.); *Thurman v. Wild* (1840) 11 Ad. & E. 453; *Jones v. Broadhurst* (1850) 9 C.B. 173; *Leavitt v. Morrow* (1856) 6 Oh. St. 71, *Atlantic Dock Co. v. Mayor, etc., of New York* (1873) 53 N.Y. 64; *Snyder v. Pharo* (1885) 25 F. 398; *Crumlish's Adm'r v. Cent. Imp. Co.* (1893) 38 W. Va. 390, 18 S.E. 456; *Jackson v. Penn. Ry. Co.* (1901) 66 N.J.L. 319, 49 Atl. 730; *Wilnot Engineering Co. v. Blanchard* (1924) 208 App. Div. 218, 203 N.Y.S. 700. It was approved by the Irish Lord Chancellor in *Blundell v. Macartney* (1793) 2 Ridg. Parl. Rep. 557, 597.

<sup>24</sup> "So it is no plea, if the satisfaction accrues from a stranger: as, if an obligee plead, that A. surrendered a copyhold to the plaintiff, which he accepted in satisfaction. *Per* two J. Cro. El. 541." Accord, A. 2. So, too, Hughes' Abridgment of Croke's Reports (1665) case 1146, p. 241.

<sup>25</sup> "Si le condition dun obligation soit a paier £20 al un jour & un estranger surrender un copihold al use del obligée on satisfaction del £20 le quel obligée accept, ceo est un bon satisfaction & discharge del obligation. Trin. 39 Eliz. B.R. enter *Grimes & Blofield*." Condition F. 1 (p. 471).

<sup>26</sup> "If the condition of an obligation be to pay £20 at a day, and a stranger surrenders a copyhold to the use of the obligee in satisfaction of the £20 which the obligee accepts; this is a good satisfaction and discharge of the obligation. Trin. 39 Eliz. B.R. between *Grimes and Blofield*." Condition F.d. 1 (vol. 5, p. 296).

decision was for the defendant on the ground that there was satisfaction.

The authority of Croke's report is obviously lessened by the conflicting statements of the case by Rolle and Viner. Nor is it strengthened by the obvious inaccuracies of the report in the matter of the date of the decision. The case is reported by Croke among the cases of Hilary, 39 Eliz., it is noted at the head of the report as of Trinity, 36 Eliz., and it is said in the course of the report to have been "afterwards" decided in Easter term, 31 Eliz. In *Edgcombe v. Rodd*<sup>27</sup> counsel argued that the case as given by Croke is doubtful, since it does not appear to have been a decision of all the judges, and Comyns is careful to point out that only two judges held there was no satisfaction. Lawrence, J., replied that no doubt is discernible in the report by Croke or in the Digest, and the opinion there stated was sanctioned by three judges. Lord Ellenborough C.J. also approved the report, but in *Thurman v. Wild*<sup>28</sup> Lord Denman C.J. doubted its correctness.

It was not until 1850 that the question whether judgment in *Grymes v. Blofield* had been for the plaintiff or for the defendant was finally settled. Cresswell J., in *Jones v. Broadhurst*,<sup>29</sup> in an elaborate judgment, which is said to have been written by Lord Truro,<sup>30</sup> stated the results of a careful investigation of the rolls of the court and certain manuscript reports in the British Museum. There are three rolls, importing three distinct actions. In all three the plea was satisfaction by the stranger by the surrender of a copyhold. The rolls are of Trinity term, 36 Eliz., B.R., Nos. 844, 845 and 846. On roll 844 the plea was demurred to, and there is a joinder in demurrer, with a *dies datus* to Michaelmas term. There is no further entry upon this roll. On roll 845 the pleadings are to the same effect with a *dies datus* in blank, and no further entry. On roll 846 there are a declaration and plea like those on the other rolls, with a replication traversing the surrender of the copyhold in satisfaction and its acceptance. Issue was joined, the cause was tried, and a verdict found for the plaintiff which was entered upon the *postea*. There is then an entry that a new trial was granted, upon the ground that the *venire* had issued to a wrong county. A new *venire* was awarded, but there the entry upon this, the final roll, ends.

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<sup>27</sup> (1804), 5 East 294.

<sup>28</sup> (1840), 11 Ad. & E. 453, 460.

<sup>29</sup> (1850), 9 C.B. 173.

<sup>30</sup> *Cook v. Lister* (1863), 13 C.B. (N.S.) 543, 586.

There are three manuscript reports of the case. In the *Hargrave Mss.*, No. 7, vol. 2, p. 251, Humphrey Were (a Reader to the Inner Temple, and later a Serjeant) states the case in much the same way as Croke. But according to this report, Fenner J. doubted the opinion of Popham and Gawdy, because of the plaintiff's acceptance of the surrender. He cited the case referred to in Fitzherbert's Abridgment. Upon the case being moved again, Clench and Fenner agreed that the plea was a good bar, and this time Gawdy accepted Fitzherbert's case as good law. Finally, Were says that in Easter term, 39 Eliz., the plaintiff had judgment, only Clench and Popham being present on this occasion. There is another report in the *Hargrave Mss.*, No. 50, but this report does not state any judgment to have been given. In the *Landsdowne Mss.*, No. 1104, fo. 152b, the report resembles Were's, and judgment is again said to have been for the plaintiff. It is, therefore, impossible in the face of this accumulated evidence to doubt that judgment was given for the plaintiff, but there is nothing to indicate how the case in Fitzherbert, which was certainly referred to, was distinguished.

It was not until the middle of the nineteenth century that a principle was found by which to circumvent the effect of *Grymes v. Blofield*. This was the result of a series of cases beginning with *Edgcombe v. Rodd*.<sup>31</sup> The Toleration Act,<sup>32</sup> s. 18, provided that any person maliciously disturbing any dissenting congregation under that Act, on proof before a justice of the peace, should find sureties in £50, or in default be committed to prison until the next sessions, and should on conviction forfeit £20 to the Crown. In an action against magistrates for assault and false imprisonment, the defendants pleaded that a charge had been preferred before them against the plaintiff under this section, and that they had committed him to the next sessions for want of sureties; that before the next sessions it was agreed between the prosecutor and the present plaintiff, with the consent of the present defendants, that the prosecution should be discontinued, and the plaintiff discharged for want of prosecution; and that the plaintiff had been accordingly discharged in full satisfaction of the assault and false imprisonment. The plaintiff made two replies to this plea: (1) it was not lawful for the magistrates and the prosecutor to agree to abandon the proceedings, and nothing can be regarded as satisfaction which

<sup>31</sup> (1804), 5 East 294.

<sup>32</sup> 1 W. & M. c. 18.

is unlawful; (2) if the satisfaction was lawful, then it was given by strangers, because the magistrates had no further control over the proceedings once they had committed the plaintiff. As the magistrates could not agree to drop the prosecution, the satisfaction had been rendered by the prosecutor only. It also followed, the plaintiff argued, that the plea could not be considered one of satisfaction by a co-trespasser in discharge of all co-trespassers. All the judges of the Court of King's Bench accepted the plaintiff's first reply, holding that the agreement was for the purpose of stifling a prosecution for a public offence, and that it tended to defeat the policy of the statute. The agreement was, therefore, unlawful. But whereas Lawrence, Grose and Le Blanc JJ. made this the basis of their judgments, and approved *Grymes v. Blofield* only as a subsidiary reason for their decision, Lord Ellenborough attached equal importance to both principles. The defendants' counsel had vigorously attacked *Grymes v. Blofield*, but the whole Court was strongly disposed to accept it as good law.

The next case bearing on this problem of satisfaction by a stranger is not really part of the development of the law here outlined. Either its significance was not appreciated, or its relevance was overlooked. Whatever the reason may be, it was not cited or discussed in any of the subsequent cases. The case referred to is *Benning v. Dove*,<sup>33</sup> tried before Lord Denman at *nisi prius*. The defendant had agreed to sell to the plaintiff,

<sup>33</sup> (1833), 5 C. & P. 427. Three cases in the previous decade are also worthy of note, in that they anticipated the solution finally reached. In *Bull v. Conant* (1821), 3 B. & B. 3, counsel moved for a rule calling on the defendant to show cause why the plaintiff should not be discharged out of custody, in execution for costs (see 1 B. & B. 548), the costs having been paid to the defendant by the Treasury. The Court held that this was not a sufficient ground for granting the rule, as it did not appear that the costs had been paid on behalf of the plaintiff. In *Williamson v. Goold* (1823), 1 Bing. 171, A. was the grantor of an annuity, and B. and C., who had negotiated it, were the trustees for D., the grantee. The defendant, who was a surety for A., gave D. a bond and warrant of attorney to enter up judgment for any arrears of the annuity which might be due from A. B. and C. made certain payments out of their own funds to D., retaining the usual commission on payments of annuities passing through their hands. D. brought this action for the full amount of the arrears, but the defendant claimed that he was liable only for the balance due after the payments by B. and C. The Court accepted this argument. Dallas C.J. said, "This, therefore, is not the case of a stranger but an agent, standing as it were in the midst of several parties, and accountable to all. This, therefore, disposes of the case of B. and C., and of all other cases in which the payment in question was not made by an agent of the party." (At p. 178.) See Park J., at p. 179, and Burrough J., at p. 180, both of whom in deciding for the defendant point out that B. and C. paid as the defendant's agents. A similar decision was given on similar facts in *Carroll v. Goold* (1823), 1 Bing. 190. See also *Godsall v. Boldero* (1807), 9 East 72 which involved the payment of William Pitt's debts out of funds voted by Parliament.

and the plaintiff had agreed to purchase from the defendant, three hundred copies of a new edition of Blackstone's Commentaries edited by Mr. Chitty. The defendant agreed that he would not sell other copies below certain specified prices. The defendant did in fact make a number of sales at less than the prices agreed upon. The plaintiff then threatened proceedings, whereupon the defendant sought the intercession of Mr. Butterworth, the principal purchaser from him, in order to effect a settlement of the dispute. Butterworth agreed with the plaintiff that the latter would consider the matter settled, on the terms that Butterworth should return the copies which he had not yet disposed of. Butterworth returned these copies. Lord Denman instructed the jury that if this was in satisfaction of the whole dispute, a verdict must be found for the defendant. The jury entered a verdict for the defendant. There was no discussion of the question of the effectiveness of an attempted satisfaction by a stranger, and it does not appear that *Grymes v. Blofield* was mentioned at any stage of the case. But inasmuch as Butterworth was probably the defendant's agent for the purpose of reaching a settlement with the plaintiff, Lord Denman anticipated the principle which was formulated almost twenty years later. It is also worthy of note in this connection that in *Thurman v. Wild* Lord Denman doubted the correctness of *Grymes v. Blofield*.<sup>34</sup>

In *Thurman v. Wild*<sup>35</sup> the plaintiff brought an action of trespass against the defendants for breaking and entering the plaintiff's close and expelling him therefrom. The plaintiff had later entered and expelled one Barry. The plaintiff wished to become the tenant of a house of which Barry was possessed and Barry wished to regain possession of the close in question in this action. The plaintiff and Barry thereupon entered into an agreement by which it was agreed that Barry should let the house to the plaintiff for one year at a stipulated rent, the plaintiff was to deliver up possession of the close to Barry, and forfeit £100 if he should thereafter obstruct Barry in the possession of it, and Barry was to discontinue an action of trespass he had instituted against the present plaintiff, who undertook to pay the costs of the action. The defendants pleaded that they had committed the trespasses by the command and as the servants of Barry, to whom they had afterwards delivered possession, and who claimed to be lawfully

<sup>34</sup> (1840) 11 Ad. & E. 453, 460.

<sup>35</sup> (1840) 11 Ad. & E. 453.

entitled thereto. They averred that Barry had entered into the above contract with their consent, and that he had performed his obligations under it, that performance being accepted by the plaintiff in full satisfaction and discharge of the trespasses mentioned in the declaration. By his replication the plaintiff denied that Barry had entered into the agreement with the consent of the defendants, or that the plaintiff had accepted performance of it in satisfaction of the trespasses which were the subject of this action. There was a demurrer assigning for special causes (*inter alia*), that the replication was double and tendered an immaterial issue in traversing the defendants' averment of consent. They argued that their consent was unnecessary, and need not have been averred in the plea. If the plaintiff had accepted satisfaction from their master, that was *ipso facto* a bar to this action. Lord Denman, delivering the judgment of the Court, distinguished *Edgcombe v. Rodd* on the ground that the prosecutor who had provided the satisfaction there was a stranger to the cause of action, whereas here Barry was not a stranger. He was the author of the acts complained of, and they were done for his benefit. Although not sued in this action, he must be taken to have been a co-trespasser, and it is an established principle that an accord and satisfaction between a plaintiff and one of several co-trespassers may be pleaded in bar by the others, although he is not a party to the action against them.<sup>36</sup> The consent of the defendants was unnecessary here. There might be circumstances where such consent would be necessary, as, for example, where the co-trespasser who does not give the satisfaction believes he has cross rights of action against the plaintiff which would be compromised by the satisfaction. But no such case arose here, since the defendants have admitted the trespasses and adopted the satisfaction made by Barry. The plaintiff had accepted the satisfaction generally, and, therefore, in discharge of all parties, whether they consented to it or not. The defendants'

<sup>36</sup> *Dufresne v. Hutchinson* (1810) 3 Taunt. 117. *Knickerbocker v. Colver* (1828) 8 Cow. 111 (N.Y.), *Brown v. Marsh* (1835) 7 Vt. 320. *Smith v. Gayle* (1877) 58 Ala. 600, *Ellis v. Esson* (1880) 50 Wis. 138, *Pogel v. Meilke* (1884) 60 Wis. 248, *Kentucky & Indiana Bridge Co. v. Hall* (1890) 125 Ind. 220, 25 N.E. 219, *Wagner v. Union Stock Yards & Transit Co.* (1891) 41 Ill. App. 408. *Porter v. Chicago, Iowa & Dakota Ry. Co.* (1896) 99 Ia. 351, 68 N.W. 724, *Missouri, Kansas & Texas Ry. Co. v. McWhorter* (1898) 59 Kan. 346, 53 Pac. 135, *Miller v. Beck* (1899) 108 Ia. 575, *Western Tube Co. v. Zang* (1899) 85 Ill. App. 63.



avowment of consent was immaterial, and the plaintiff could not make it an issue.<sup>37</sup>

In *Jones v. Broadhurst*<sup>38</sup> the question was whether the holders of an accommodation bill of exchange could bring an action on the bill against the acceptor after they had received satisfaction from the drawers. The general problem of satisfaction by a stranger was raised and discussed, but the Court decided on principles applicable to negotiable instruments. It did not decide the general question, although it referred to the case in 36 Hen. 6, reported by Fitzherbert, as "consistent with reason and justice".<sup>39</sup> In the next year, however, the Court of Common Pleas in *Belshaw v. Bush*<sup>40</sup> finally discovered a method by which a stranger could satisfy an obligation binding another. The plaintiff brought an action of debt for £40, the price of goods sold and delivered, work and materials, etc. The defendant pleaded that as to £33- 10- 0, the plaintiff had drawn a bill for this sum on the defendant's father, which the latter accepted and delivered to the plaintiff, who received it. The plaintiff indorsed the bill to G., who at the commencement of the suit was the holder, and entitled to sue the acceptor thereon. The plaintiff replied that at the date of the commencement of the suit the bill was overdue and had not been paid. The defendant demurred on the ground that the replication showed that the bill had been received by the plaintiff on account of the debt, and in support of the demurrer argued that a bill of exchange given by a stranger for or on account of a debt, and accepted by the creditor in satisfaction, discharges the debtor. Maule J., delivering the judgment of the Court, held that if the bill had been given by the defendant, it would have been an answer to this action. It has that effect even though the bill is given by a stranger, provided, however, that

if a stranger give money in payment, absolute or conditional, of the debt of another, and the causes of action in respect of it, it must be a payment on behalf of that other, against whom alone the causes of action exist, and if adopted by him will operate as a payment by himself.<sup>41</sup>

Here the defendant had ratified the payment by adopting it in his plea. The solution of the problem of "privity" mentioned

<sup>37</sup> In *Ford v. Beech* (1848) 11 Q.B. 852 the replication stated that the plea was satisfaction by a stranger. In fact, this was not the nature of the plea. Parke B., at p. 859.

<sup>38</sup> (1850) 9 C.B. 173.

<sup>39</sup> (1850) 9 C.B. at p. 199.

<sup>40</sup> (1851) 11 C.B. 191.

<sup>41</sup> (1851) 11 C.B. at pp. 207-208.

in *Grymes v. Blofield* and a number of early American decisions, which problem arose from traditional conceptions of the ambit of a contract, was thus found in principles of agency. It has been adopted in a number of subsequent decisions, and has never been questioned.<sup>42</sup>

Since satisfaction by a stranger is based upon the law of agency, it is possible to formulate certain subsidiary rules derived from that branch of the law of contract which apply to this problem.

(i) The stranger must agree with the creditor *as an agent*, otherwise the debtor will be unable to ratify the contract for satisfaction.<sup>43</sup> But this principle of ratification does not apply where the stranger has the previous authority of the debtor to seek a satisfaction of his obligation.<sup>44</sup>

(ii) Where the stranger agrees with the creditor without the prior authority of the debtor, to satisfy the debtor's obligation, the stranger may at any time before ratification by the debtor, by agreement with the creditor, rescind the agreement for satisfaction of the debtor's obligation.<sup>45</sup> But if the creditor repudiates the agreement with the stranger without the latter's consent, the debtor may still ratify.<sup>46</sup>

(iii) If there is no such agreement for rescission, the debtor may adopt the satisfaction, notwithstanding the fact that he has previously repudiated it.<sup>47</sup>

<sup>42</sup> *James v. Isaacs* (1852) 12 C.B. 791, 22 L.J.C.P. 73. *Kemp v. Balls* (1854) 10 Ex. 607. *Simpson v. Eggington* (1855) 10 Ex. 845. *Cuthbert v. Street* (1859) 9 U.C. (C.P.) R. 115. *Pellatt v. Boosey* (1862) 31 L.J.C.P. 73. *Cook v. Lister* (1863) 13 C.B. (N.S.) 543, 595. *Lynch v. Wilson* (1862) 22 U.C. (Q.B.) R. 226. *Waller v. James* (1871) L.R. 6 Ex. 124. *Purcell v. Henderson* (1885) 16 L.R. Ir. 213. *Re Rowe* [1904] 2 K.B. 483. *Glascott v. Cameron* (1905) 10 O.L.R. 399. *Royal Exchange Assurance v. Hope*, [1928] Ch. 179, 194-195, 197.

<sup>43</sup> *Lucas v. Wilkinson* (1856) 1 H. & N. 420, 421. *Keighley, Marted & Co. v. Durant*, [1901] A.C. 240. *Re Rowe*, [1904] 2 K.B. 483, 487.

<sup>44</sup> *Reed v. White* (1804) 5 Esp. 122. *Waring v. Favenck* (1807) 1 Camp. 85. *Paterson v. Gandasequi* (1812) 15 East 62. *Marsh v. Pedder* (1815) 4 Camp. 257. *Tempest v. Ord* (1815) 1 Madd. 89. *Thomson v. Davenport* (1829) 9 B. & C. 78. *Robinson v. Read* (1829) 9 B. & C. 449. *Taylor v. Sheppard* (1835) 1 Y. & Coll. 271. *Morgan v. Couchman* (1853) 14 C.B. 100, 23 L.J.C.P. 36. *Whitwell v. Perrin* (1858) 4 C.B. (N.S.) 412. *Campbell v. Hicks* (1858) 28 L.J. Ex. 70. *MacClure v. Schemeil* (1871) 20 W.R. 168. *Curtis v. Williamson* (1874) L.R. 10 Q.B. 57. *Fell v. Parkin* (1882) 52 L.J.Q.B. 99. *Montagu v. Forwood*, [1893] 2 Q.B. 350. *The Huntsman* [1894] P. 214.

<sup>45</sup> *Waller v. James* (1871) L.R. 6 Ex. 124. *Glascott v. Cameron* (1905) 10 O.L.R. 399.

<sup>46</sup> *Bolton Partners v. Lambert* (1888) 41 Ch. D. 295.

<sup>47</sup> *Simpson v. Eggington* (1855) 10 Ex. 845. *Neely v. Jones* (1880) 16 W. Va. 625, 638. *Bowstead, Law of Agency*, (9th Ed., 1938), 46. See also *Hemingway v. Mackenzie* (1930) 137 Misc. 876, 244 N.Y.S. 48, 245 N.Y.S. 766, affd. 230 App. Div. 819.

The doctrine of ratification is this, that when a principal on whose behalf a contract has been made, though it may be made in the first instance without his authority, adopts it and ratifies it, then, whether the contract is one which is for his benefit and which he is enforcing, or which is sought to be enforced against him, the ratification is referred to the date of the original contract, and the contract becomes as from its inception as binding on him as if he had been originally a party.<sup>48</sup>

(iv) Where the creditor sues the debtor, and the debtor in his plea relies upon, or otherwise adopts, the satisfaction given by the stranger, there is then a sufficient ratification.<sup>49</sup>

(v) The question has, however, arisen whether express ratification by the debtor is ever necessary. There is some authority for the view that ratification must be presumed where it would be for the "principal's" benefit. In *London & County Banking Co. Ltd. v. London River Plate Bank Ltd.*<sup>50</sup> negotiable securities had been stolen from the defendants by their manager, Warden, and these instruments had come into the possession of the plaintiffs for value, and without notice of fraud. Later Warden obtained the securities from the plaintiffs by fraud, and restored them to the defendants, who did not know that the securities had been out of their possession. The question in issue was whether the defendants had accepted the replaced securities in satisfaction of Warden's obligation to restore them, so as to make the defendants *bona fide* holders for value, and entitled to retain them against the plaintiffs. The plaintiffs argued that the defendants had not accepted the bonds in satisfaction of their right of action, because they had not known of any right of action. The Court of Appeal held that their consent to accept the bonds in satisfaction must be presumed.

Their acceptance of the bonds in discharge of Warden's obligation, which existed in truth although the defendants did not know it, may, and in my opinion ought to be presumed in the absence of evidence

<sup>48</sup> *Kekewich J. in Bolton Partners v. Lambert* (1888) 41 Ch. D. 295, 301.

<sup>49</sup> *Belshaw v. Bush* (1851) 11 C.B. 191. *Simpson v. Eggington* (1855) 10 Ex. 845. *Leavitt v. Morrow* (1856) 6 Oh. St. 71. *Walter v. James* (1871) L.R. 6 Ex. 124, 128. *Neely v. Jones* (1880) 16 W. Va. 625, 636. *Bennett v. Hill* (1884) 11 R.I. 322. *Purcell v. Henderson* (1885) 16 L.R. Ir. 213. *Gray v. Herman* (1890) 75 Wis. 453, 44 N.W. 248. *Danziger v. Hoyt* (1890) 120 N.Y. 190, 24 N.E. 294. *Jackson v. Penn. Ry. Co.* (1901) 66 N.J.L. 319, 49 Atl. 730. *Chicago, R., I. & P. Ry. Co. v. Brown* (1904) 97 N.W. 1038 (Neb.). *Robinson v. St. Johnsbury & Lake Champlain R.R. Co.* (1907) 80 Vt. 129, 143, 66 Atl. 814. *Wilmot Engineering Co. v. Blanchard* (1924) 208 App. Div. 218, 203 N.Y.S. 700. *Smader v. Columbia, etc., Co.* (1925) 188 Wis. 530, 205 N.W. 816.

The stranger's claim against the debtor for money paid at his request accrues, not from the date of payment by the stranger, but from the date of ratification by the debtor. *Ahearne v. M'Swiney*. (1874) 8 Ir. C.L. 568.

<sup>50</sup> (1888) 21 Q.B.D. 535.

to the contrary. . . . The presumption of acceptance in such cases (cases on the presumed acceptance of gifts) is artificial, but is founded on human nature; a man may be fairly presumed to assent to that to which he in all probability would assent if the opportunity of assenting were given to him. . . . It would be contrary to human nature to suppose that the defendants would not have kept the bonds if they had known of their theft from themselves, and of their restoration; and we know as a fact that the defendants have insisted on their right to retain the bonds ever since they discovered the theft.<sup>51</sup>

This seems to have been implied with respect to the necessity for the debtor's ratification of satisfaction by a stranger by the Court of Common Pleas, of which Willes J. was a member, in *Pellatt v. Boosey*.<sup>52</sup> But in the next year, in *Cook v. Lister*,<sup>53</sup> Willes J. dealt with the matter expressly.

With respect to the necessity for shewing the assent of the debtor, I apprehend that it is contrary to the well-known principle of law, by which a benefit conferred upon a man is presumed to be accepted by him, until the contrary is proved. If assent were necessary, and the *invitum*<sup>54</sup> of the Civil law is to be excluded from ours, then I say that, according to familiar authorities, one of which is the case of *Atkin v. Barwick*, 1 Stra. 165, so often referred to, the assent of the debtor ought to be presumed.<sup>55</sup>

This passage was quoted by Farwell L.J., in *Hirachand Punamchand v. Temple*,<sup>56</sup> apparently with approval.<sup>57</sup> In *Walter v. James*,<sup>58</sup> however, it was argued that "the payment being for the benefit of the debtor, his consent must be presumed until the contrary is shewn; here not only is the contrary not shewn, but he expressly adopts and ratifies it."<sup>59</sup> It was sought by this argument, for which the authority of the *dictum* by Willes J. in *Cook v. Lister* was cited, to prove that there had been ratification of contract for satisfaction by a stranger, before the rescission of it by the agreement of the stranger and the creditor. But the Court of Exchequer insisted that there

<sup>51</sup> (1888) 21 Q.B.D. at pp. 541-542.

<sup>52</sup> (1862) 31 L.J.C.P. 281.

<sup>53</sup> (1863) 13 C.B. (N.S.) 543.

<sup>54</sup> See Dig. 46, 3, 543.

<sup>55</sup> (1863) 13 C.B. (N.S.) at p. 596. It is clear from subsequent decisions that *Atkin v. Barwick* cannot be cited in support of Willes' proposition. *Alderson v. Temple* (1768) 4 Bun. 2235, *Salte v. Field* (1793) 5 T.R. 211. *Smith v. Field* (1793) 5 T.R. 402. *Barnes v. Freeland* (1794) 6 T.R. 80. *Neate v. Sall* (1800) 2 East 117. *Richardson v. Goss* (1802) 3 B. & P. 119. *Bartram v. Farebrother* (1828) 4 Bing. 579. In *Re Oriental Commercial Bank* (1868) L.R. 6 Eq. 582, 589, the V.C. assumed that the drawers of a bill of exchange had paid it on behalf of the acceptor. He did so on the ground that this was most beneficial to the drawers.

<sup>56</sup> [1911] 2 K.B. 330.

<sup>57</sup> [1911] 2 K.B. at p. 341.

<sup>58</sup> (1871) L.R. 6 Ex. 124.

<sup>59</sup> (1871) L.R. 6 Ex. at p. 126.

must be a real and not a presumed ratification. In *Re Rowe*<sup>60</sup> Willes' view was again pressed,<sup>61</sup> but members of the Court of Appeal questioned it in the course of argument. Vaughan Williams L.J. thought that the *dictum* was inconsistent with *Simpson v. Eggington*<sup>62</sup> and *Jones v. Broadhurst*,<sup>63</sup> and that it had been rejected in *Walter v. James*.<sup>64</sup> In his judgment, however, he stated that no question of the soundness of Willes' *dictum* arose, inasmuch as the purported satisfaction had not been made on behalf of the debtor. It is clear from *Re Rowe* that ratification by the debtor cannot be presumed unless the stranger represented to the creditor that he was acting for the debtor. But there seems to be little doubt that ratification will never be presumed, and must always be an actual assent by the debtor. This is not unreasonable, notwithstanding the generalisations on human nature by Lindley L.J.,<sup>65</sup> since the debtor may not wish to ratify even though the satisfaction will be for his benefit. He may resent the stranger's officious interference in his affairs, or he may insist that he is not indebted to the creditor to whom the purported satisfaction is made. Again, he may not wish to be under any obligation to the stranger. But once he is deemed to have ratified he will be bound to repay whatever the stranger has given as money paid at his request.<sup>66</sup> In fact, this quasi-contractual liability to the stranger makes the talk of the satisfaction being for the benefit of the debtor, so that the debtor's ratification may be presumed, largely illusory, because the only consequence from the debtor's point of view is a change of creditors.

It has also been suggested that, where a stranger attempts to discharge another's obligation, a precedent authorisation by the debtor should be implied. What authority there is for this principle in English law is to be found in cases in which the stranger was seeking to recover from the former debtor what he had paid for the debtor's discharge. But if the debtor's authority can be implied in these cases, there is no reason why it cannot be implied where the creditor is suing the debtor after

<sup>60</sup> [1904] 2 K.B. 483.

<sup>61</sup> [1904] 2 K.B. at p. 487.

<sup>62</sup> (1855) 10 Ex. 845.

<sup>63</sup> (1850) 9. C.B. 173.

<sup>64</sup> *Re Rowe*, [1904] 2 K.B. at p. 487.

<sup>65</sup> See n. 51.

<sup>66</sup> JACKSON, HISTORY OF QUASI-CONTRACT IN ENGLISH LAW, (1936), 46-51. Notes to *Lampleigh v. Braithwait*, 1 Sm. L.C. (13th ed.), i, 156 et seq. 1 Wms. Saund. 264n. *Cook v. Lister* (1863) 13 C.B. (N.S.) 543, 594. *Crumlish's Adm'r. v. Cent. Imp. Co.* (1893) 38 W. Va. 390, 18 S.E. 456. *A. L. Underwood Ltd. v. Bank of Liverpool & Martins*, [1924] 1 K.B. 775, 794. *B. Liggett (Liverpool) v. Barclay's Bank*, [1928] 1 K.B. 48.

having accepted satisfaction from a stranger. If it is implied, it follows that the attempted satisfaction by the stranger is effective, and the creditor cannot recover again from the debtor.

In *Hayes v. Warren*<sup>67</sup> the Court said that there were some acts which would give rise to an implication of law that they had been performed with a precedent request by the person benefited. The examples given were "the being bail for one, curing one's child of a sudden sickness, performing the part of a servant." No mention was made of the discharge of another's debt, but the underlying idea is that a request will be implied wherever there is a moral obligation to pay the stranger the value of his services. In Buller's *Nisi Prius*<sup>68</sup> there is a suggestion that a request must be implied in all cases where the stranger has done something for the benefit of the defendant. Buller reports a case in which this was applied to the satisfaction of the defendant's debt, but in that case there was in addition a subsequent promise by the defendant to restore to the stranger what he had paid on the defendant's behalf.<sup>69</sup> In the well-known case of *Exall v. Partridge*,<sup>70</sup> however, Lord Kenyon said, "It has been said, that where one person is benefited by the payment of money by another, the law raises an *assumpsit* against the former, but that I deny."<sup>71</sup> Again, in *Atkins v. Banwell*<sup>72</sup> Lord Ellenborough said that a precedent request would not be implied in law from the fact that there was a moral obligation binding the defendant, unless there was also a subsequent express promise by him to the stranger. Recent cases make it clear beyond doubt that a request will not be implied from the mere fact that something was done or paid for the benefit of the defendant.<sup>72A</sup> It must be understood, however, that this relates to the request implied in law. The courts will not ignore a request which can be implied from the facts. For this there is no general rule, and each case must be decided on the peculiar circumstances of that case.<sup>72B</sup>

There is a little American authority for both the implied precedent request and the implied subsequent ratification. In

<sup>67</sup> (1731) 2 Barn. K.B. at p. 141.

<sup>68</sup> 6th ed., 1791, 147.

<sup>69</sup> *Watson v. Turner* (1767), Buller N.P. 129.

<sup>70</sup> (1799) 8 T.R. 308. See also *Paynter v. Williams* (1833) 1 C. & M. 810.

<sup>71</sup> (1799) 8 T.R. at p. 310.

<sup>72</sup> (1802) 2 East 505.

<sup>72A</sup> *Re Leslie* (1883) 23 Ch. D. 552. *Leigh v. Dickeson* (1884) 15 Q.B.D. 60. *Re Earl of Winchelsea's Policy Trusts* (1888) 39 Ch. D. 168. *Strutt v. Tippet* (1890) 62 L.T. 475. *Tapster v. Ward* (1909) 101 L.T. 503 (Cf. *Re Tyler* [1907] 1 K.B. 865). *Re Phillips*, [1914] 2 K.B. 689.

<sup>72B</sup> See JACKSON, QUASI-CONTRACT, 49-50.

*Menderback v. Hopkins*,<sup>72c</sup> an early New York decision, it was held that where a stranger had satisfied a debt from his own pocket, it must be presumed in the absence of proof to the contrary, that he had done so at the request of the debtor, so as to entitle him to recover from the debtor. But in three other New York cases decided within a few years of this case, it was held that the stranger cannot recover against the debtor unless he proves an actual request.<sup>72d</sup> In *Sargeant v. Town of Sunderland*,<sup>72e</sup> in an action between debtor and creditor, it was held that a part payment by a stranger had operated as satisfaction *pro tanto*, and, therefore, as an acknowledgment of indebtedness which made the statutory period for recovery of the debt run afresh from the date of the partial satisfaction. The Court implied either a request or ratification, but which is not clear, because it speaks of "approbation" and "sanction and approbation". On the other hand, it is quite clear that the request or ratification was implied because of the special circumstances of the case. More recently, in *Bacich v. Northland Transportation Co.*,<sup>72f</sup> which was also an action by the creditor, and not the stranger, against the debtor, ratification and authorisation were again implied from the facts. In *Snyder v. Pharo*,<sup>72g</sup> a similar action, a precedent authorisation of the stranger by the debtor, was implied, but it does not appear whether this was implied from the facts or by reason of some rule of law applicable to cases of this kind generally. Moreover, it was quite unnecessary to imply a request, inasmuch as there was a subsequent ratification. *Leavitt v. Morrow*<sup>72h</sup> one of the most frequently cited of American cases on the subject of satisfaction by a stranger, was also an action by the creditor against the debtor. In this case it is said to be incontestable, as a general rule, that,

Where one man is indebted to another, and a third person steps in and pays the debt, in the absence of all circumstances tending to show the contrary, the rational inference would be that the act done, being for the debtor's benefit, was done with his consent, or, if without his knowledge at the time, that it would as a matter of course, be ratified by him afterward.<sup>72i</sup>

<sup>72c</sup> (1811) 8 Johns. 436.

<sup>72d</sup> *Jones v. Wilson* (1808) 3 Johns. 434. *Beach v. Vandenburg* (1813) 10 Johns. 361. *Overseers of Poor of Wallkill v. Overseers of Poor of Mamakating* (1816) 14 Johns. 87.

<sup>72e</sup> (1849) 21 Vt. 284.

<sup>72f</sup> (1932) 185 Minn. 544, 242 N.W. 379. *Cp. Carter v. Black* (1839) 4 Dev. & Bat. 425, 427 (N.C.).

<sup>72g</sup> (1885) 25 Fed. 398, 401-402.

<sup>72h</sup> (1856) 6 Oh. St. 71, 77.

<sup>72i</sup> (1856) 6 Oh. St. at pp. 76-77.

Satisfaction by a stranger for and on behalf of a debtor is not, it would seem, the only method by which a stranger may discharge the debt of another. In a work on Compromises<sup>72</sup> the author says that although a stranger may contract for the discharge of a claim against another, that other can acquire no rights under the contract of discharge, since he is a stranger to this contract. In fact, the courts have allowed the obligor to rely upon the contract between the obligee and the stranger. *Welby v. Drake*,<sup>73</sup> decided at *nisi prius*, was an action of *assumpsit* against the defendant as drawer of a bill of exchange for £18-3-11 which had been returned unaccepted. From the evidence it appeared that the plaintiff had agreed that if the defendant's father would pay him £9, he would accept that sum in discharge of the whole debt, and the £9 was accordingly paid by the father. Verdict was for the defendant, Lord Tenterden (then Abbott C.J.) holding that,

If the father did pay the smaller sum in satisfaction of this debt, it is a bar to the plaintiff's now recovering against the son; because by suing the son he commits a fraud on the father, whom he induced to advance his money on the faith of such advance being a discharge of his son from further liability.

It is obvious that this principle has nothing to do with agency, and none of the awkward problems of ratification arise in connection with it.

Authority in support of Lord Tenterden's proposition is meagre. *Welby v. Drake* was followed by a Commissioner in insolvency proceedings in *Re Barnes*.<sup>74</sup> Willes J. firmly believed in the correctness of the principle expressed by Lord Tenterden. In *Pellatt v. Boosey*<sup>75</sup> it was held that the debtor had ratified *satisfaction* by the stranger, but Willes J. said,

When I say it depends on whether she so assented, I say so against my notion of what I think the law ought to be, but in accordance with the decisions on the subject.<sup>76</sup>

In the next year, however, he changed his opinion on what the law was. In *Cook v. Lister*<sup>77</sup> he said that in *Jones v. Broadhurst*<sup>78</sup> it had been laid down, though, perhaps, *obiter*, that if a stranger satisfies a debtor's debt, there is no discharge of that debt

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<sup>72</sup> EDWARDS, THE LAW RELATING TO COMPROMISES (1925), 43.

<sup>73</sup> (1825) 1 C. & P. 557.

<sup>74</sup> (1861) 4 L.T. (N.S.) 60.

<sup>75</sup> (1862) 31 L.J.C.P. 281.

<sup>76</sup> (1862) 31 L.J.C.P. at p. 284.

<sup>77</sup> (1863) 13 C.B. (N.S.) 543.

<sup>78</sup> (1850) 9 C.B. 153.



unless the debtor assents to the satisfaction, and if he does not, the creditor may recover the whole amount again from the debtor.<sup>79</sup> This, he said, was contrary to the rule of the civil law, and was supported before *Jones v. Broadhurst* by only one case, *Grymes v. Blofield*.<sup>80</sup>

I apprehend it is also contrary to the well-known rule of mercantile law as to payment; because, if the debtor pays a portion of the debt, it does not enure as a discharge of the whole, though so agreed, but if a stranger pays a part of the debt in discharge of the whole, the debt is gone, because it would be a fraud on the stranger to proceed.<sup>81</sup>

This was an *obiter dictum*, but in *Hirachand Punamchand v. Temple*<sup>82</sup> there is further support for this suggested principle.<sup>83</sup> An action was brought for 1303 rupees (or £86-17-4, its equivalent in sterling), being the balance alleged to be due for principal and interest on a promissory note for 1500 rupees, after giving credit for 650 rupees. The defendant, an officer in the Indian army, was the maker of the note. The plaintiffs were moneylenders carrying on business in India. They had failed to get payment from the debtor, and had applied to his father. The father replied that he would give 650 rupees, the actual amount advanced to the son, in full discharge of what was due on the note, and asked for the note in return for a draft for 650 rupees which he was sending to the plaintiffs. The plaintiffs cashed the draft, and gave credit for it, but refused to consider the debt discharged, or return the note. At the trial Scrutton J. held that on these facts the defendant had no defence. Before the Court of Appeal counsel for the defendant argued that the plaintiffs must be taken to have accepted the draft on the terms on which it was offered. He submitted that the plaintiffs could not recover any further sum, "though it may be a little doubtful on what ground this conclusion rests".<sup>84</sup> The plaintiffs replied that if the father was

<sup>79</sup> In fact, this was not decided in *Jones v. Broadhurst*. That case merely decided that payment or satisfaction of his liability on a bill of exchange by a drawer did not by virtue of that fact alone discharge the acceptor.

<sup>80</sup> This is an interesting explanation of *Grymes v. Blofield*, but there is nothing in the report of that case to indicate that the debtor had not ratified the stranger's act. On the contrary, it would seem from subsequent authority, that inasmuch as the debtor relied upon the stranger's act in the plea, there was thereby a ratification of the stranger's attempted satisfaction.

<sup>81</sup> (1863) 13 C.B. (N.S.) at pp. 594-595.

<sup>82</sup> [1911] 2 K.B. 330.

<sup>83</sup> *Welby v. Drake* was cited by counsel, but not commented upon by the Court.

<sup>84</sup> [1911] 2 K.B. at p. 333.

the agent of the son, then *Day v. McLea*<sup>85</sup> applied. In that case the debtor himself sent a cheque for a sum less than that which was due, in full of all demands. The creditor cashed it and retained the proceeds, but informed the debtor that he retained the money only on account of the debt, and not in full discharge. It was held that the creditor could recover the balance.<sup>86</sup> The Court decided simply on the ground that accord and satisfaction is an agreement, and that it is, therefore, a question of fact whether there is *consensus ad idem*. The fact that the creditor retained the cheque was not conclusive evidence that he retained it on the terms offered by the debtor. The plaintiffs further argued that even if the father was not acting as the son's agent, there was still no evidence that the plaintiffs had accepted the father's terms. Finally, even if the present action was wrongful as against the father, that did mean that the son could rely on that as a defence.

The Court of Appeal quite clearly disapproved of the plaintiff's conduct, but it was very embarrassed in its search for a principle which would defeat them. The Court was able to suggest no less than four reasons why the claim failed. At least three of them are highly fanciful. There is no direct suggestion in any of the judgments,<sup>87</sup> that the father was acting on behalf of his son, so as to bring the case within the *Belshaw v. Bush* principle. There was, in fact, nothing in the evidence to indicate that the father was acting as the son's agent. It was this which was responsible for the Court's difficulty in giving legal effect to its disapproval of the plaintiffs' claim. It gave the following reasons for its verdict in favour of the defendant :

(a) Vaughan Williams L.J. said that strictly speaking there could be no accord and satisfaction in the circumstances. The precise meaning of this *dictum* is not clear. It is, perhaps, a reference to the fact that the father had not purported to act as his son's agent, so that the *Belshaw v. Bush* principle did not apply. In view of *Belshaw v. Bush* and the cases adopting and following the *ratio decidendi* of that case, it is not reasonably to be supposed that he was denying the possibility that a stranger to a contract may satisfy an obligation arising under that contract, although his language could very easily be interpreted to mean that.<sup>88</sup> But although there could be no accord

<sup>85</sup> (1889) 22 Q.B.D. 610.

<sup>86</sup> See, however, WILLISTON on CONTRACTS, s. 1854, and the cases cited at pp. 5214-5215, n. 6, and the RESTATEMENT, s. 420.

<sup>87</sup> Except, perhaps, by Farwell L.J., at p. 341.

<sup>88</sup> See n. 12.

and satisfaction in this case, the effect of the transaction was that the note had been discharged, just.

as if there had been on the acceptance of the draft by the plaintiffs an erasure of the writing of the signature to the note. There was not in fact such an erasure, but to my mind the case must be considered as standing on the same footing as if there had been an erasure of the signature, and a cancellation by reason of that erasure of the promissory note, in which case, I think, the maker of the note would have had a defence, though he was not a party to the transaction in pursuance of which the note was cancelled, in the sense of being a contracting party. His defence would then have been that the document in the circumstances had ceased to be a promissory note.<sup>89</sup>

This argument was repeated by the other members of the Court, Fletcher Moulton L.J.<sup>90</sup> and Farwell L.J.<sup>91</sup> It appears to be the one they favour most strongly, but just why the case resembles that of an erasure of the signature of a promissory note is nowhere made clear.

(b) Vaughan Williams L.J. goes on to say that if the above reason is not correct, then, from the moment when the draft was cashed, a trust was created for the benefit of the father, the plaintiffs being the trustees. Any money received by them on the note would be held for the father. But in the circumstances of this case it was impossible that the father intended that the plaintiffs should sue the son. According to Farwell L.J.

If there be any difficulty in formulating a defence at common law, I have no hesitation in saying that a Court of Equity would have regarded the plaintiffs as disentitled to sue except as trustees for the father, and would have restrained them from suing under such circumstances as existed in the present case.<sup>92</sup>

(c) Farwell L. J. thought that if the assent of the debtor was necessary, the transaction "might be treated as a tripartite agreement between the father, the son, and the creditors."<sup>93</sup>

<sup>89</sup> [1911] 2 K.B. at pp. 336-337.

<sup>90</sup> At p. 339.

<sup>91</sup> At p. 340.

<sup>92</sup> At p. 342.

<sup>93</sup> At p. 341. Farwell L.J. cited *Lewis v. Jones* (1825) 4 B. & C. 506. In that case the debtor and his father gave a joint note for five shillings in the pound on the debtor's debts, in full discharge of those debts. The question in issue was whether a surety was discharged by this arrangement. It was held that there was an accord and satisfaction by the giving and receipt of the note, "and to hold the surety now liable would be a fraud upon the father". (*Per* Holroyd J. at p. 514.) Nothing is said in the case to the effect that there was really a tripartite agreement, and it differs from *Temple's Case* in that the debtor was himself a party to the new note, and in that it was he who negotiated the new arrangement and handed over the note to the creditor.

In actual fact, however, there was no such agreement, and with this in mind he continued,

But whether that is technically correct does not matter, I think, at this time of day. If the transaction in this case were translated into its equivalent taking place in the same room between the parties, the case would hardly be arguable.<sup>94</sup>

In such circumstances, however, the father would probably be acting as his son's agent, and with the son's assent.

(d) Vaughan Williams L.J. rested his decision on the first and second of the above reasons, but went on to suggest that the views of Willes J. in *Cook v. Lister*<sup>95</sup> might apply in the circumstances of this case. He did not so decide, but he wished to make it clear that in deciding as he did he was not negating this possibility.<sup>96</sup> Fletcher Moulton L.J. preferred the view that the note was cancelled, but he also thought that it would be an abuse of the process of the court to allow the plaintiffs to sue the son.<sup>97</sup> Finally, Farwell L.J. was of the opinion that on the authority of what Willes J. said in *Cook v. Lister*, the facts of this case might support a plea of fraud on the father.<sup>98</sup>

It is clear from this analysis of the case that the argument of fraud on the father was merely subsidiary. The Court of Appeal preferred to hold that there was a cancellation of the promissory note, or a trust for the father which would not be enforced, either because the father did not wish it enforced, or because a court of equity would not allow it. These two principles probably apply in English law only in the special circumstances of *Temple's* case, *i.e.*, where the debtor has given some negotiable instrument, although it is possible that more can be done with the trust concept in American than in English law. They will not apply to the simple case of a stranger paying a debt which does not arise upon a negotiable instrument. Principles (c) and (d) *supra* remain. The first of these appears to be no more than the *Belshaw v. Bush* rule. It follows that if any other rule is laid down in the case, it is that which was previously stated by Lord Tenterden and Willes J. It is said to be a fraud on the stranger to allow the creditor to sue the debtor. It is doubtful, however, whether this is fraud in the ordinary sense of the term. If A offers to pay a sum of money in return for a full discharge of B., and C., the creditor agrees,

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<sup>94</sup> At p. 341.

<sup>95</sup> (1863) 13 C.B. (N.S.) 543.

<sup>96</sup> At pp. 337-338.

<sup>97</sup> At p. 339.

<sup>98</sup> At p. 341.

honestly intending at the time not to sue B., and having received the payment as agreed from A., then changes his mind and sues B. for the balance, it is difficult to argue that C.'s conduct constitutes fraud in the usual sense. To call such conduct fraud appears to be a device to prevent unfair insistence on traditional principles of the law of contract. The *Belshaw v. Bush* rule is in conformity with these principles, because the debtor becomes a party to the agreement for satisfaction.<sup>99</sup> But where it is impossible to hold that the debtor has become a party—as where the stranger did not purport to act on behalf of the debtor, and did not have the debtor's authority—it is not possible to hold that there can be satisfaction by a stranger without resort to some such doctrine as preventing an abuse of the process of the court.<sup>100</sup>

Authority for this second principle of satisfaction by a stranger is far from being impressive. There is one case decided at *nisi prius*,<sup>101</sup> another in which that case was approved by a Commissioner in insolvency proceedings,<sup>102</sup> and two other cases in which the principle was approved in what appear to be *obiter dicta*.<sup>103</sup> There is at least one case in which the "fraud" principle could have been applied, but was not, and to that extent is inconsistent with these cases. In *James v. Isaacs*<sup>104</sup> *assumpsit* was brought for work and labour. The plea was that the money mentioned in the declaration became due to the plaintiff under an agreement between the plaintiff and the defendants whereby the plaintiff agreed to build a church for £1,140. During the progress of the work £580 was paid, and the plaintiff then discontinued work until he received a further £320. Thereupon an agreement was made between the plaintiff and one Prothero by which the plaintiff agreed to finish the work in consideration of £200 to be paid by Prothero. This sum was paid, and accepted by the plaintiff in full and complete performance of the contract between the plaintiff and the defendants. The plaintiff demurred, assigning for cause (*inter alia*) that no satisfaction was shown. The Court of Common Pleas held that *Belshaw v. Bush* did not apply, because it was

<sup>99</sup> *Leavitt v. Morrow* (1856) 6 Oh. St. 71, 80-81. *Crumlish's Adm'r. v. Cent. Imp. Co.* (1893) 38 W. Va. 390, 396-397, 18 S.E. 456. *Weill v. Paradiso* (1921) 188 N.Y.S. 287, 289-290.

<sup>100</sup> *James v. Isaacs* (1852) 22 L.J.C.P. 73, 12 C.B. 791. *Kemp v. Balls* (1854) 10 Ex. 607. *Re Rowe* [1904] 2 K.B. 483.

<sup>101</sup> *Welby v. Drake* (1825) 1 C. & P. 557.

<sup>102</sup> *Re Barnes* (1861) 4 L.T. (N.S.) 60.

<sup>103</sup> *Cook v. Lister* (1863) 13 C.B. (N.S.) 543. *Hirachand Punamchand v. Temple*, [1911] 2 K.B. 330.

<sup>104</sup> *James v. Isaacs* (1852) 22 L.J.C.P. 73, 12 C.B. 791.

not shown that the contract was intended to be made for the benefit of the defendants. But it is interesting to note that the plea stated that the £200 was accepted in full discharge of the contract between the plaintiff and the defendants. This would have permitted the Court to apply the "fraud" rule had it approved of that rule. The cases already referred to sometimes speak of this second principle of discharge by a stranger as one of satisfaction. This, however, is incorrect, for it would seem that there is no accord and satisfaction of the obligor's obligation. The essence of the transaction is not a substituted "performance" of that obligation, but a distinct contract for its discharge, without reference to its performance.

Even if the principle laid by Lord Tenterden, Willes J., and the Court of Appeal in *Hirachand Punamchand v. Temple* is correct, it by no means follows that there will be discharge of a contractor's obligation in all cases of attempted discharge by a stranger. If the stranger is not acting as the agent of the debtor, there will be a discharge of the debtor only if the creditor agrees thereto in consideration of what the stranger gives or promises.<sup>104A</sup> Thus, if the stranger pays under the mistaken impression that he is himself under an obligation to pay, and intending only to discharge his own mistaken liability, the true debtor will not be discharged.<sup>105</sup> Again, the stranger may consider himself under a moral obligation to make good a loss for which another is legally responsible. If he pays intending to discharge his own supposed moral obligation, and not the other's legal obligation, that other will remain bound.

*Re Rowe*<sup>106</sup> is such a case. The trustee in bankruptcy of one Rowe had rejected the proof of creditors, who were now

<sup>104A</sup> *Morley v. Moore* [1936] 2 K.B. 359.

<sup>105</sup> *Merryman v. The State* (1822) 5 H. & J. 423 (Md.). *Whiting v. Independent Mutual Insurance Co.* (1859) 15 Md. 297. *Chester v. Plaistow* (1862) 43 N.H. 542. *Moore v. Ligon* (1883) 22 W. Va. 292. Thus, the acceptance of a "satisfaction" from one who is not in fact a joint wrongdoer, and who pays on behalf of his own supposed liability, without reference to the liability of the real tortfeasor, does not operate to discharge the latter: *Matheus v. Lawrence* (1845) 1 Den. 212 (N.Y.). *Wardell v. McConnell* (1889) 25 Neb. 558. *Sieber v. Amunson* (1891) 78 Wis. 679. *Missouri, Kansas & Texas Ry. Co. v. McWherter* (1898) 59 Kan. 345. *Robinson v. St. Johnsbury & Lake Champlain R.R. Co.* (1907) 80 Vt. 129, 142, 66 Atl. 814. It has also been held that, where a stranger paid the amount of a note for some private purpose of his own, there was an assignment of the note, and not a discharge of the note or of any party liable on it: *The Irving Bank v. Wetherald* (1867) 36 N.Y. 335. *Manufacturers' National Bank v. Thompson* (1880) 129 Mass. 438. *Maple-Gallia Coal Co. v. Thomas* (1920) 266 Pa. 120, 109 Atl. 602. But it seems that the *Welby v. Drake* principle of satisfaction may apply, even though the stranger is acting under a mistake. *Re Wilken* (1908) 22 S.D. 132, 115 N.W. 1072.

<sup>106</sup> [1904] 2 K.B. 483.

appealing against that action. The debtor was a member of a firm. For some years prior to his bankruptcy he had engaged in large transactions on the Stock Exchange with the creditors, who were a firm of stockbrokers. Having absconded, he was adjudicated bankrupt, and at the date of the receiving order he owed the stockbrokers £3,919-9s. on his speculative account, and £16,448-13-10 for principal and interest on a loan account secured by a certified transfer of shares in the firm of which he was a member. This transfer turned out to be a forgery. The stockbroker had insured against forgery for £10,000. Rowe's firm repudiated all liability for his acts, but it later made a voluntary payment of £6,500, still insisting that the firm itself was not liable, and stating that this sum was understood to cover all losses beyond those for which the stockbrokers were insured. The stockbrokers lodged a proof for the whole-sum of £20,368-2-10. The trustee rejected this proof on the ground that credit should have been given for the £6,500 paid by the debtor's firm, since the creditors had accepted that sum on account of the debt. Buckley J. held that *Belshaw v. Bush* had no application to this case.

This is not a case in which a stranger comes and offers to the creditor a portion of the debt due, and the creditor accepts it towards satisfaction of the amount due, there being no communication with the debtor in the matter. It was not tendered or accepted in reference to any part of the debt at all, but it was offered and accepted as a voluntary payment made in consideration of the fact that the creditor had incurred losses through the act of a person for whom Bewick, Moreing & Co. held themselves to be on some moral ground, at any rate not upon any legal ground, responsible. It is simply a voluntary payment made, not on account of the debt, but in consideration of the fact that the debt is going to be a loss because the debtor's estate will not pay twenty shillings in the pound. Under these circumstances I think the creditors are entitled to prove for the full amount of their debt.<sup>107</sup>

The Court of Appeal affirmed this statement, and held that the question of the correctness of the *dictum* of Willes J. in *Cook v. Lister*<sup>108</sup> did not arise. It was not a condition of payment by the firm that Rowe should be discharged, either wholly or to the extent of £6,500.

<sup>107</sup> [1904] 2 K.B. at p. 486. See also Vaughan Williams L.J. at p. 488.

<sup>108</sup> (1863) 13 C.B. (N.S.) 543, 594-595.

In the United States *Grymes v. Blofield* was followed in some early New York<sup>109</sup> and Kentucky<sup>110</sup> decisions.<sup>111</sup> But once the *Belshaw v. Bush* principle had been adopted in English law, its recognition in the United States became general.<sup>112</sup> Moreover, as in England, American courts have employed a further principle of discharge by a stranger, although it is not clear from American decisions upon what basis this principle rests. In fact, there are more cases which adopt this than the *Belshaw v. Bush* rule.<sup>113</sup> It is held in these cases that if the creditor

<sup>109</sup> *Clow v. Borst* (1810) 6 Johns. 37. *Overseers of Poor of Wallkill v. Overseers of Poor of Mamakating* (1816) 14 Johns. 87. *Bleakley v. White* (1834) 4 Paige 654. *Daniels v. Hallenbeck* (1838) 19 Wend. 408. But note *Menderback v. Hopkins* (1811) 8 Johns. 436. *Sandford v. McLean* (1832) 3 Paige 117, 122.

<sup>110</sup> *Groshon v. Grant* (1803) 2 Ky. (Sneed) 268. *Owsley v. Thurman* (1830) 5 J. J. Marsh. 127, 129. In *Stark's Adm'r. v. Thompson's Ex'rs.* (1826) 3 T. B. Mon. 296, it was held, following *Grymes v. Blofield*, that accord and satisfaction by a stranger could not be effective at law, but it might constitute sufficient grounds for the award of an injunction and relief in equity. (At pp. 302-303.) Williston in his treatise makes a similar suggestion in s. 1860. *Contra*, HUNT, ACCORD AND SATISFACTION (1912), p. 105.

<sup>111</sup> But in contemporary decisions in other States the possibility of satisfaction by a stranger had already been recognised. *Merryman v. The State* (1822) 5 H. & J. 423, 426 (Md.). *Harrison v. Hicks* (1824) 1 Port. 423, 430 (Ala.). *Webster v. Wyser* (1827) 1 Stew. 184 (Ala.). *Brooks v. White* (1841) 2 Metc. 283 (Mass.). *Winsor v. Savage* (1845) 9 Metc. 346, 348 (Mass.). *Roundtree v. Holloway* (1848) 13 Ala. 357. *Sargeant v. Town of Sunderland* (1849) 21 Vt. 284. *Kenan v. Holloway* (1849) 16 Ala. 53 (semble).

<sup>112</sup> *Tuckerman v. Sleeper* (1851) 9 Cush. 177 (Mass.). *Muller v. Eno* (1856) 14 N.Y. 597. *Chester v. Plaistow* (1862) 43 N.H. 542, 544. *Atlantic Dock Co. v. Mayor, etc., of New York* (1873) 53 N.Y. 64. *Re Souther* (1874) 2 Lowell 320. *Dusenbury v. Callaghan* (1876) 8 Hun 541 (N.Y.). *Neely v. Jones* (1880) 16 W. Va. 625. *Moran v. Abbey* (1883) 63 Cal. 56, 61. *Bennett v. Hill* (1884) 14 R.I. 322. *Gordon v. Moore* (1884) 44 Ark. 349, 355. *Snyder v. Pharo* (1885) 25 Fed. 398. *Armstrong v. School District No. 3* (1887) 28 Mo. App. 169. *Porter v. Chicago, etc., Ry. Co.* (1896) 99 Ia. 351, 68 N.W. 724. *Saunders v. Whitcomb* (1901) 177 Mass. 457, 464, 59 N.E. 192. *Jackson v. Penn. Ry. Co.* (1901) 66 N.J.L. 319, 49 Atl. 730. *Chicago, R., I. & P. Ry. Co. v. Brown* (1904) 70 Neb. 696, 97 N.W. 1038. *Robinson v. St. Johnsbury & Lake Champlain R.R. Co.* (1907) 80 Vt. 129, 139-140, 66 Atl. 814. *Ex. p. Zeigler* (1909) 83 S.C. 78, 64 S.E. 513. *Thomas Gordon Malting Co. v. Bartels Brewing Co.* (1912) 206 N.Y. 258, 100 N.E. 457. *Beebe v. Worth* (1914) 146 N.Y.S. 287. *Sigler v. Sigler* (1916) 98 Kan. 524, 532. *Weill v. Paradise* (1921) 188 N.Y.S. 287. *Enright v. Schaden* (1922) 242 S.W. 89 (Mo.). *Nelen v. Smith Bros. Auto Sales Inc.* (1923) 45 R.I. 245, 121 Atl. 394. *Wilmot Engineering Co. v. Blanchard* (1924) 208 App. Div. 218, 203 N.Y.S. 700. *Wilson v. Muelberger* (1932) 165 S.C. 137, 163 S.E. 125. As late as 1869, however, a New York court, in *Blum v. Hartman*, 3 Daly 47, followed *Grymes v. Blofield*, *Bleakley v. White* and *Daniels v. Hallenbeck*. As late as 1881 a New York Court held that *Grymes v. Blofield* had never been authoritatively overruled: *Wellington v. Kelly* (1881) 84 N.Y. 543.

<sup>113</sup> *Merryman v. The State* (1822) 5 H. & J. 423, 426 (Md.). *Webster v. Wyser* (1827) 1 Stew. 184 (Ala.). *Harrison v. Hicks* (1834) 1 Port. 423, 430 (Ala.). *Brooks v. White* (1841) 2 Metc. 283 (Mass.). *Harriman v. Harriman* (1859) 12 Gray 341, 344 (Mass.). *Whiting v. Independent Mutual Insurance Co.* (1859) 15 Md. 297, 314-315. *Fowler v. Moller* (1863) 10 Bosw. 374 (N.Y.). *Martin v. Quinn* (1869) 47 Cal. 55. *Boyd v.*



*McDonough* (1870) 39 How. Pr. 389 (N.Y.). *Bunge v. Koop* (1872) 48 N.Y. 225, 230. *Ritenour v. Mathews* (1873) 42 Ind. 7, 8. *Underwood v. Lovelace* (1878) 61 Ala. 155. *Schmidt v. Ludwig* (1879) 26 Minn. 85, 1 N.W. 803. *Guild v. Butler* (1879) 127 Mass. 386. *Harvey v. Tama County* (1880) 53 Ia. 228, 5 N.W. 130. *Hun v. Van Dyck* (1882) 26 Hun 567 (N.Y.). *Grant v. Porter* (1884) 63 N.H. 229. *Seymour v. Goodrich* (1885) 80 Va. 303. *Laboyteaux v. Swigart* (1885) 103 Ind. 596, 3 N.E. 373. *Merrick's Ex'r. v. Giddings* (1885) 115 U.S. 300, 6 S. Ct. 65. *Roberts v. Brandies* (1887) 44 Hun 468 (N.Y.). *Green v. Petty* (1888) 101 N.C. 380. *King v. Barnes* (1888) 109 N.Y. 267, 16 N.E. 332, 338. *Danziger v. Hoyt* (1890) 120 N.Y. 190, 24 N.E. 294. *Wagner v. Union Stock Yards & Transit Co.* (1891) 41 Ill. App. 408. *Clarke v. Abbott* (1893) 53 Minn. 88, 55 N., 542. *Fowler v. Smith* (1893) 153 Pa. 639, 25 Atl. 744, 746. *Beck v. Snyder* (1895) 167 Pa. 234, 31 Atl. 555. *Miller v. Beck* (1899) 108 Ia. 575. *People's & Drivers' Bank v. Craig* (1900) 63 Oh. St. 374, 59 N.E. 102. *Marshall v. Bullard* (1901) 114 Ia. 462, 87 N.W. 427, 428. *Bradley v. Lehigh Valley R.R. Co.* (1907) 153 Fed. 350, 353 (C.C.A. 2d). *Partridge v. Moynihan* (1908) 59 Misc. 234, 110 N.Y.S. 539. *Cunningham v. Irwin* (1914) 182 Mich. 629, 143 N.W. 786. *Donaldson v. Thousand Springs Power Co.* (1917) 29 Idaho 735, 162 Pac. 334. *Wallingford v. Alcorn* (1919) 75 Okla. 295, 296-297, 183 Pac. 726. *Bradley & Metcalf Co. v. McLaughlin* (1922) 87 Okla. 34, 208 Pac. 1032. *Smader v. Columbia Wisconsin Co.* (1925) 188 Wis. 530, 205 N.W. 816. *Vaughn v. Robbins* (1925) 254 Mass. 35, 149 N.E. 677. *Braun v. Cox* (1927) 202 Ia. 1244, 211 N.W. 891. *Hemingway v. Mackenzie* (1930) 137 Misc. 876, 244 N.Y.S. 48, 245 N.Y.S. 766., aff'd. 230 App. Div. 819. *Bacich v. Northland Transportation Co.* (1932) 185 Minn. 544, 242 N.W. 379. *Grand Lodge, etc. v. Archibald* (1933) 227 Ala. 595, 151 So. 454. *Chamberlain v. Barrows* (1933) 282 Mass. 295, 184 N.E. 725. *People's Exchange Bank of Elmdale v. Miller* (1934) 139 Kan. 3, 29 Pac. (2d) 1079. *Cahn v. Shulman* (1935) 156 Misc. 612, 281 N.Y.S. 634 (semble). *Jessewich v. Abene* (1935) 154 Misc. 768, 277 N.Y.S. 599. But see *Armstrong v. School District No. 3* (1887) 28 Mo. App. 169.

In a few of these cases there is express recognition that there is a principle of discharge by a stranger quite distinct from the agency principle. In *Seymour v. Goodrich* and *Clarke v. Abbott* the Court cited *Welby v. Drake* with approval. The strongest case is *Cunningham v. Irwin*. It was held that where, as in this case, the defendant's father gratuitously undertook to pay the defendant's debt to the plaintiff, and in fact paid a less sum in satisfaction of the debt, without any consideration or promise by the defendant to pay back the amount expended by his father, there was a valid satisfaction of the debt. The defendant had not brought about the arrangement between his father and the plaintiff. The plaintiff had looked to the father as the principal. It was held, therefore, that the father had not acted as the defendant's agent. The Court held that the gratuitous payment, though made upon request, by a father, of his son's debts, to which he, the father, is a stranger, does not necessarily involve an agency. It is possible, the Court said, to act in the interests of another, with or without the knowledge of that other, without becoming his agent in the legal sense. This case is the clearest possible recognition of the fact that there are two distinct principles of discharge by a stranger, since the Court went on to mention that there would also have been a satisfaction if the father had acted as the defendant's agent. Again, in *Wallingford v. Alcorn* it was said: "It is not essential that payment should be made by the debtor himself; and, though it is made by one who is not a party to the contract and not in privity with the debtor, yet, if accepted in satisfaction of the contract, it will discharge the obligation." (75 Okla. at pp. 296-297.) This case was cited, and the above passage quoted, with approval, in *Bradley & Metcalf Co. v. McLaughlin*. Lastly, in *Underwood v. Lovelace* it was said that the circumstance of request or ratification by the debtor was relevant only on the question of recovery by the stranger against the debtor, and not on the question whether there is a satisfaction or not. This, of course, is not true, but at least it indicates that the agency principle is not the only principle of discharge by a stranger.

receives something from a stranger, which by agreement between them is to be in discharge of the debtor, then the creditor cannot be allowed to proceed against the debtor.

..... Where the creditor has actually received and accepted the contribution in satisfaction of the debt, to allow him to maintain an action on the same debt afterward, would seem to shock the ordinary sense of justice of every man.<sup>114</sup> .... To regard the debt paid, so far as he (the creditor) is concerned, is but to hold him to the result of his own act. Shall he collect the debt again? .... What matters it to the creditor who pays?<sup>115</sup>

Notwithstanding the general recognition of this second principle of satisfaction by a stranger, American courts are careful to mention that there has been ratification by the debtor wherever it exists.<sup>116</sup> This is an illustration of the fact that it is not usually realized that there are really two distinct principles of discharge by a stranger. They are not distinguished by the American Law Institute's Restatement of the Law of Contract :

A payment or other performance by a third person, accepted by a creditor as full or partial satisfaction of his claim, discharges the debtor's duty in accordance with the terms on which the third person offered it. But the debtor on learning of the payment or other performance has power by disclaimer within a reasonable time to make the payment or other performance inoperative as a discharge.<sup>117</sup>

If the stranger and the obligee enter into a contract for the obligor's discharge as distinguished from an accord and satisfaction of the obligor's obligation, the effectiveness of the discharge does not depend on any action by the obligor.

This failure to distinguish between the two quite distinct principles of discharge is particularly confusing where the stranger gives a loan of money less than that due from the debtor. It is well settled that a part payment by a debtor is not consideration for a promise by the creditor to discharge the

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<sup>114</sup> *Leavitt v. Morrow* (1856) 6 Oh. St. 71, 77, per Bartley, C.J.

<sup>115</sup> *Crumlish's Adm'r. v. Cent. Imp. Co.* (1893) 38 W. Va. 390, 396-397.

"When plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience, that the law will not permit him to recover again for the same damages." Per Miller, J. in *Lovejoy v. Murray* (1865) 3 Wall. 1, 17. This passage was cited with approval in *Miller v. Beck* (1899) 108 Ia. 575, 578, 79 N.W. 344. See in particular 108 Ia. at p. 582, and *Cunningham v. Irwin* (1914) 182 Mich. 629, 148 N.W. 786.

<sup>116</sup> *Leavitt v. Morrow* (1856) 6 Oh. St. 71, 76-77, 80-81. *Danziger v. Hoyt* (1890) 120 N.Y. 190, 24 N.E. 294. *Crumlish's Adm'r. v. Cent. Imp. Co.* (1893) 38 W. Va. 390, 396-397, 18 S.E. 456. *Porter v. Chicago, Iowa & Dakota Ry. Co.* (1896) 99 Ia. 351, 68 N.W. 724. *Bacich v. Northland Transportation Co.* (1932) 185 Minn. 544, 242 N.W. 379.

<sup>117</sup> S.421. Adopted and applied in *Grouf v. State National Bank of St. Louis* (1935) 76 F. (2d) 726 (C. C.A. 8th).

debtor in full.<sup>117A</sup> It can only operate as a payment *pro tanto*. It is submitted that where a stranger "pays" as an agent of the debtor, the same rule should apply, since this is no more than payment by the debtor himself. Thus, it has been held that part payment by the stranger on behalf of the debtor, and with his prior or subsequent consent, operates to make the statutory period for the recovery of the debt, or, more properly, the balance of the debt, run afresh.<sup>118</sup> Again, where the stranger pays as the agent of the debtor, the stranger can compel him to refund what has been paid on his behalf.<sup>119</sup> To distinguish between payment by the debtor and payment by his agent would make the rule as to the effect of part payment by a debtor completely ridiculous, and would add another absurdity to an already unsatisfactory branch of the law of contract. It is not suggested that this much criticised rule should be preserved. But as long as it exists, it should be applied logically. If a distinction is made between a payment by a debtor and a payment by his agent, logic would be wholly abandoned. A debtor would then merely commission some stranger to secure his discharge at a discount. Although the debtor would be unable to obtain a full discharge by means of a part payment, he would be able to do so by giving that sum to an agent for transmission to the creditor. This reasoning does not apply where the stranger intervenes in order to secure the debtor's discharge, but not as his agent. There is then no relationship between the stranger and the debtor. Where the stranger pays for and on behalf of the debtor, *he is paying the debtor's debt*, but where he does not act as the debtor's agent, he is giving something unconnected with the debt in return for the debtor's discharge.

The difference between the two principles is illustrated by the fact that if the stranger pays at the request or with the subsequent ratification of the debtor, the stranger can recover from the debtor whatever he has paid on his behalf, whereas if the stranger's act is not consented to by the debtor there is no basis for recovery from him by the stranger.<sup>120</sup> There would

<sup>117A</sup> But some American jurisdictions have abandoned this rule. See e.g. *Weymouth v. Babcock* 42 Me. 44. *McArthur v. Dane*, 61 Ala. 539.

<sup>118</sup> *Sargeant v. Town of Sunderland* (1849) 21 Vt. 284.

<sup>119</sup> See n. 66.

<sup>120</sup> "Money paid to and for the use of the defendant does not necessarily raise a cause of action; because a man cannot, of his own will, pay another man's debt without his consent, and thereby convert himself into a creditor." *Per Curiam, Durnford v. Messiter* (1816) 5 M. & S. 446. "It was a voluntary payment by the plaintiffs of a debt due from the defendants. Such payment gives no cause of action. It falls within the well settled rule of law, that the payment of the debt of another raises no

*assumpsit* against the person whose debt is paid, and no action will lie by reason of such payment, unless a request, either express or implied, to make the payment is proved. The law does not permit the liability for a debt to one person to be shifted so as to make him a debtor to another without his consent." *Inhabitants of South Scituate v. Inhabitants of Hanover* (1857) 9 Gray 420, 421 (Mass.). See also *Stokes v. Lewis* (1785) 1 T.R. 20, *per* Lord Kenyon. *Carter v. Black* (1839) 4 Dev. & Bat. 425 (N.C.). *Osborn v. Cunningham* (1839) 4 Dev. & Bat. 423 (N.C.). *Sleigh v. Sleigh* (1850) 5 Ex. 514, 516. *Willis v. Hobson* (1854) 37 Me. 403. *Brown v. Chesterville* (1874) 63 Me. 241. *Burton v. Slaughter* (1875) 26 Gratt. 914, 919 (Va.). *Lemans v. Wiley* (1883) 92 Ind. 436, 441. RESTATEMENT ON RESTITUTION, arts. 2, 112.

In equity, however, a volunteer who pays another's debt without a request from the debtor may be able to recover from the debtor. The question has arisen most often in cases where the stranger advances money to an agent who has no authority to borrow, or to a company which has no power to borrow, and that money is applied for the payment of debts, whereupon the lender seeks reimbursement by the principal or company. It has been argued in cases such as these that there is really the voluntary payment of debts by the stranger without the request of the debtor. Nevertheless, equity has recognised a right of recovery in certain circumstances. According to Lord Selborne in *Blackburn Building Society v. Cunliffe, Brooks & Co.* (1882) 22 Ch. D. 61, 71: "I think the consistency of the equity allowed in the *Cork and Youghal Ry. Co.'s* case with the general rule of law that persons who have no borrowing powers cannot, by borrowing, contract debts to the lenders, may be shown in this way. The test is: has the transaction really added to the liabilities of the company? If the amount of the company's liabilities remains in substance unchanged, but there is, merely for the convenience of payment, a change of the creditor, there is no substantial borrowing in the result, so far as relates to the position of the company. Regarded in that light, it is consistent with the general principle of equity, that those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people's money advanced to them for that purpose, shall not retain that benefit, so as, in substance to make those other people pay their debts. I take that to be a principle sufficiently sound in equity. . . ." For application of this principle, see *Re Cork & Youghal Ry. Co.* (1869) L.R. 4 Ch. App. 748, *Wenlock v. River Dee Co.* (1887) 19 Q.B.D. 155, *Reid v. Rigby & Co.*, [1894] 2 Q.B. 40, *Bannatyne v. MacIver*, [1906] 1 K.B. 103, *Reversion Fund & Insurance Co. v. Maison Cosway Ltd.*, [1913] 1 K.B. 364, *A. L. Underwood Ltd. v. Bank of Liverpool & Martins*, [1924] 1 K.B. 775, *B. Liggett (Liverpool) v. Barclay's Bank*, [1928] 1 K.B. 48. Cf. *Voltz v. National Bank of Illinois* (1895) 158 Ill. 532, 42 N.E. 69, *Flat Top National Bank v. Parsons* (1922) 90 W. Va. 51, 110 S.E. 491, *Mechem, Agency* (2d, ed.), i, s. 486. *Liggett's Case* is of special interest, inasmuch as it was recognised that the principle would apply even though no question of unauthorised borrowing were involved. The defendants negligently, and contrary to instructions, paid checks of their customers, the plaintiff company, which had been signed by one director only. In an action by the plaintiffs for money had and received, the plaintiffs argued that this amounted to payment by the defendants without request. It was held that, insofar as the checks were drawn in favour of the plaintiffs' trade customers for goods supplied in the course of their business, the plaintiffs' liabilities had not been increased. The defendants were, therefore, protected from liability on equitable grounds, and they were entitled to stand in the place of the creditors whom they had paid. The Court held that this would be so even if the defendants had paid from the plaintiffs' credit balance, in which case, of course, it could not be pretended that there had been any borrowing by the plaintiffs.

It has been suggested in some American cases that in all cases where a stranger voluntarily pays the debt of another, he may be able to recover from the debtor by suing in his own name or that of the creditor in equity. *Neely v. Jones* (1880) 16 W. Va. 625. *Brown v. Chesterfield* (1874) 63 Me. 241, 243. *Crumlish's Adm'r. v. Cent. Imp. Co.* (1893) 38 W. Va. 390, 18 S.E. 456.

appear to be a further difference between the two principles. A creditor must accept payment when it is tendered in the proper form by the debtor. If he refuses it, in any subsequent action for the debt costs will be awarded against him<sup>120A</sup> and all the other consequences of an improperly rejected tender will follow. It follows logically that a creditor must accept payment when it is tendered by one who is to his knowledge acting as the agent of the debtor for the purpose of payment. Where, however, the stranger does not purport to act as the debtor's agent, the creditor is under no compulsion to accept what the stranger offers.<sup>121</sup>

It remains to be seen whether there is authority in support of these statements. *Rigby v. Woodward*<sup>122</sup> is possibly a case in point, but its value on this or any other question is negligible in view of the conflicting reports. *Belshaw v. Bush*<sup>123</sup> also involved a part payment by the stranger, but the debtor did not allege that the creditor had promised a complete discharge, and it was held that there was satisfaction *pro tanto* only. There was part payment by a stranger in *James v. Isaacs*<sup>124</sup> and *Kemp v. Balls*,<sup>125</sup> but in both it was held that the stranger was not acting as the debtor's agent. There is thus no English authority on the effect of a part payment on behalf of the debtor in return for the creditor's promise of a full discharge, unless *Bidder v. Bridges*<sup>126</sup> is such a case. The report of that case, however, does not make it clear whether the stranger to the obligation alleged to have been satisfied by him was acting for and on behalf of the debtor. An action having been dismissed with costs, the defendant's solicitor had the costs taxed, and took the Taxing Master's certificate to the unsuccessful plaintiff's solicitor. The plaintiff's solicitor gave him a check for the amount of the costs, and received in return the certificate with a receipt indorsed thereon. After the check had been paid, the defendant's solicitor discovered that the defendant was entitled to interest on the amount of the taxed costs. The plaintiff then refused to pay the interest, whereupon the defendant moved for an order directing the plaintiff to appear before the proper officer and produce the certificate, so that

<sup>120A</sup> For the other consequences of an improperly rejected tender, see Williston's treatise, ss. 677, 743-744, 832-833, 1190, 1295, 1809, 1817-1818.

<sup>121</sup> Tiedeman, *Commercial Paper*, s. 372; *Bills and Notes*, s. 179.

<sup>122</sup> (1678) Freem. C.L. 464, Sir T. Jones 87.

<sup>123</sup> (1851) 11 C.B. 191.

<sup>124</sup> (1852) 22 L.J.C.P. 73, 12 C.B. 791.

<sup>125</sup> (1854) 10 Ex. 607.

<sup>126</sup> (1883) 37 Ch. D. 406.

a writ of execution might be issued for the interest. The defendant argued that *Foakes v. Beer*<sup>127</sup> applied, and the plaintiff was not discharged. Stirling J. held that there had been an accord and satisfaction. The defendant had accepted a negotiable instrument in full discharge of principal and interest, and, further, a negotiable instrument made by a third party.<sup>128</sup> This decision was affirmed by the Court of Appeal. On the face of it, this appears to be a decision to the effect that the payment of a lesser sum may amount to the satisfaction of a larger debt. In fact, it is doubtful whether the case can be cited for such a proposition, since it was held by Stirling J. and by Cotton L.J.<sup>129</sup> in the Court of Appeal, that there would have been a full discharge even if the plaintiff had given his own check.

There is direct English authority where the part payment by the stranger is not on behalf of the debtor. *Welby v. Drake*<sup>130</sup> and *Hirachand Punamchand v. Temple*<sup>131</sup> have already been discussed. On the strength of these two cases it is possible to say that in English law if a stranger gives a creditor a lesser sum than that due from the debtor, in return for the creditor's promise to consider the whole debt discharged, that promise will be binding, provided that the stranger did not purport to act as the debtor's agent in effecting the satisfaction. *Re Barnes*,<sup>132</sup> a decision hitherto completely overlooked, is a third authority. The jurisdiction of the Insolvency Court depended on whether the debtor's liabilities were less than £300. This in turn depended in this case on whether a debt of £149 had been discharged. The debtor's uncle had paid the creditor £20, and received a receipt in these terms,

Received this 4th day of December, 1860, of Mr. Thomas Bloomfield, the sum of twenty pounds in full discharge of all debts due from George Barnes to me, up to the day of the date hereof, and of all costs incurred in respect of any action or actions brought by me against the said George Barnes, for the recovery of any sum or sums due from him to me.

The Commissioner at first suggested that this receipt to constitute a discharge should have been under seal, but on being referred to *Welby v. Drake* and *Lewis v. Jones*,<sup>133</sup> "sustained the

<sup>127</sup> (1884) 9 App. Cas. 605.

<sup>128</sup> (1883) 37 Ch. D. at p. 413.

<sup>129</sup> At pp. 413-414, 418. In *Williamson v. Gould* (1823) 1 Bing. 171 the debtor claimed a discharge *pro tanto* only.

<sup>130</sup> (1825) 1 C. & P. 557.

<sup>131</sup> [1911] 2 K.B. 330.

<sup>132</sup> (1861) 4 L.T. (N.S.) 60.

<sup>133</sup> (1825) 4 B. & C. 506, as to which see n. 93.

petition upon the ground that the receipt was a valid discharge to any claim for the debt, as the part payment in discharge of the whole was made by a third party, and not by the insolvent."

American authority is more plentiful. In many cases it has been held quite unambiguously that a part payment by a stranger is sufficient consideration for the creditor's promise of a full discharge of the debtor.<sup>134</sup> In most of these cases it is not apparent what principle of satisfaction by a stranger is being applied, although since it is not said that the stranger was paying on behalf of the debtor, it may be taken that the court was relying on the other principle of discharge.<sup>135</sup> In some of the cases there would have been a sufficient consideration for a full discharge even if the part payment had been made by the debtor himself, usually because the part payment took the form of a negotiable instrument,<sup>136</sup> or because there was an agreement to accept a sum certain where the debt was unliquidated or disputed.<sup>137</sup>

There are some cases in which it has been held that even where the part payment is made by the stranger on behalf of the debtor, the debtor will be wholly discharged if the creditor

<sup>134</sup> *Blanchard v. Noyes* (1826) 1 N.H. 518 (obiter). *Pope v. Tunstall* (1840) 2 Ark. 337, 339. *Brooks v. White* (1841) 2 Metc. 283 (Mass.). *Guild v. Butler* (1879) 127 Mass. 386. *Schmidt v. Ludwig* (1879) 26 Minn. 85, 1 N.W. 803, 804. *Laboyteaux v. Swigart* (1885) 103 Ind. 596, 3 N.E. 373. *Seymour v. Goodrich* (1885) 80 Va. 303. *Roberts v. Brandies* (1887) 44 Hun 468. *Jaffray v. Davis* (1891) 124 N.Y. 164, 11 L.R.A. 710, 713. *Fowler v. Smith* (1893) 153 Pa. 639, 25 Atl. 744, 746. *Clark v. Abbott* (1893) 53 Minn. 88, 55 N.W. 542. *Marshall v. Bullard* (1901) 114 Ia. 462, 87 N.W. 427. *Chicago, R., I. & P. Ry. Co. v. Brown* (1904) 97 N.W. 1038, 70 Neb. 696. *Melroy v. Kemmerer* (1907) 218 Pa. 381, 383, 385, 67 Atl. 699 (obiter). *Partridge v. Moynihan* (1908) 59 Misc. 234, 236-237, 110 N.Y.S. 539. *Cunningham v. Irwin* (1914) 182 Mich. 629, 148 N.W. 786. *Croker v. Hotchkiss, Vail & Garrison Co.* (1919) 177 N.Y.S. 189, 107 Misc. 626. *Miller's Estate* (1924) 279 Pa. 30, 123 Atl. 646. *Lupowitz v. Victor Building Assoc.* (1930) 100 Pa. Sup. 134. *Hemingway v. Mackenzie* (1930) 244 N.Y.S. 48, 137 Misc. 876, 245 N.Y.S. 766. *Bacich v. Northland Transportation Co.* (1932) 185 Minn. 544, 242 N.W. 379. *Chamberlain v. Barrows* (1933) 282 Mass. 295, 184 N.E. 725. *People's Exchange Bank of Elmdale v. Miller* (1934) 139 Kan. 3, 29 Pac. (2d) 1079. *Grouf v. State National Bank of St. Louis* (1935) 76 F. (2d) 726, 730 (C.C.A. 8th). *Jessewich v. Abene* (1935) 154 Misc. 768, 277 N.Y.S. 599. *Contra: Beck v. Snyder* (1895) 167 Pa. 234, 31 Atl. 555. *Enright v. Schaden* (1922) 242 S.W. 89, 93 (Mo.).

<sup>135</sup> This is quite clear in *Seymour v. Goodrich* (1885) 80 Va. 303, and *Cunningham v. Irwin* (1914) 182 Mich. 629, 148 N.W. 786.

<sup>136</sup> *Brooks v. White* (1841) 2 Metc. 283 (Mass.). *Guild v. Butler* (1879) 127 Mass. 386. *Seymour v. Goodrich* (1885) 80 Va. 303.

<sup>137</sup> *Clark v. Abbott* (1893) 53 Minn. 88, 55 N.W. 542. *Chicago, R., I. & P. Ry. Co. v. Brown* (1904) 70 Neb. 696, 97 N.W. 1038. *Miller's Estate* (1924) 279 Pa. 30, 123 Atl. 646. *Chamberlain v. Barrows* (1933) 282 Mass. 295, 184 N.E. 725.

has agreed thereto. In *Sigler v. Sigler*<sup>138</sup> an action was brought on a promissory note. The defendant pleaded that the note had been assigned to H., to whom the defendant had made payment. The plaintiff replied that the assignment had been made in the following circumstances. The defendant employed one W. to purchase the note, and a mortgage given to secure it, as cheaply as possible, and agreed to provide a fund of \$1200 or more for the purpose. W. concealed from the plaintiff the fact that he was acting as the defendant's agent, and paid him \$400 for the assignment and delivery of the note and mortgage. W. wrote in the name of H. as assignee in order that H. as pretended assignee might execute a formal release. The plaintiff argued that on these facts there was merely a part payment by the debtor which could not be a satisfaction of a larger liquidated debt. The Court held that it is firmly established that a debtor may authorize and employ a third person to make a satisfaction of his debt, and where the creditor accepts money from the third person on the understanding that the debtor is to be discharged, the debt is satisfied. The third person may act on behalf of the debtor even without the debtor's knowledge, provided the debtor later ratifies his act. All that is necessary is that the creditor should agree to accept what is offered as a satisfaction of the debt. It is immaterial that he does not know that the third person is acting as the debtor's agent, because the debtor himself may be ignorant of the stranger's intervention on his behalf.<sup>138A</sup>

Apart from the failure to distinguish the two principles of discharge by a stranger, the fallacy in this argument is that if the stranger has not had the previous authority of the debtor, he must make it clear to the creditor that he is acting on behalf of the debtor. If he does not, the debtor will be unable to ratify his action, and no question of satisfaction can then arise. If the stranger has the debtor's previous authority, or,

<sup>138</sup> (1916) 98 Kan. 524. In these cases it was held that a debtor might be discharged in full by a part payment by a stranger, even though the latter was acting as the agent of the debtor: *Gordon v. Moore* (1884) 44 Ark. 349, 355 (But a release under seal was given in consideration of the part payment.). *Pettigrew Machine Co. v. Harrison* (1885) 45 Ark. 290. *Wilks v. Slaughter* (1887) 49 Ark. 235, 4 S.W. 766 (semble). *Smith v. Gould* (1895) 84 Hun 325, 32 N.Y.S. 373 (In this case a promissory note was given in part payment.). *Ebert v. Johns* (1903) 206 Pa. 395, 55 Atl. 1064. *Ex p. Zeigler* (1909) 83 S.C. 78, 64 S.E. 513. *Beebe v. Worth* (1914) 146 N.Y.S. 146.

<sup>138A</sup> As to whether there is fraud or misrepresentation in circumstances such as those in *Sigler v. Sigler*, see *Shaw v. Clark* (1834) 6 Vt. 507. *Ralph R. Badger & Co. v. Fidelity Bldg. & Loan Assn.* (1938) 94 Utah 97, 75 Pac. (2d) 669. *McGregor v. Farmers State Bank* (1923) 114 Kan. 356, 360, 219 Pac. 520.



where he purported to act on behalf of the debtor, his subsequent authority, there is really payment by the debtor himself, because in such a case the debtor is bound to reimburse the stranger. This is all the more obvious in a case like *Sigler v. Sigler*, where the debtor agrees to provide a fund for the stranger with which to buy a discharge as cheaply as possible, or where he in fact supplies him with money in advance.<sup>139</sup> But there is no substantial difference between such a case and one in which the debtor does not supply his agent with money in advance, but is compelled to reimburse his agent, either because of an express promise to do so, or because of a promise implied by law. It is this fact which makes illusory an argument accepted in a number of American decisions, and implied in several others.<sup>140</sup> It is said that the reason why a part payment by a stranger may satisfy a debt, or constitute consideration for a full discharge of the debtor, is the fact that a new fund becomes available for the satisfaction of the debt. The availability of this fund, the money of the stranger, is a new consideration for the creditor. This is perfectly sound where the stranger is not acting as the debtor's agent. Where he is acting as the debtor's agent, the effect of the payment is exactly as if the stranger had handed the money to the debtor, who then pays it to the creditor. The strongest case for the argument that there is a new fund and a new consideration, even though the stranger is paying as the debtor's agent, is where the debtor is insolvent, and would be unable to pay the creditor without the assistance of the third party. Even in this case, it is submitted, the general rule should be adhered to. The debtor is still bound to reimburse the stranger, and, further, the creditor is not concerned with the means the debtor is compelled to adopt in order to pay his debt. For this there is good authority. It has been held that where the debtor borrows money with which to make part payment, in return for the creditor's promise of a full discharge, whether the money is paid to the creditor by the debtor or by the lender, there is no consideration for the creditor's promise.

<sup>139</sup> See *Specialty Glass Co. v. Daley* (1899) 172 Mass. 460, 52 N.E. 633. *Crocker v. Hotchkiss, Vail & Garrison Co.* (1919) 177 N.Y.S. 189, 191-192, 107 Misc. 626.

<sup>140</sup> *Gordon v. Moore* (1884) 44 Ark. 349, 355. *Fowler v. Smith* (1893) 153 Pa. 639, 645, 25 Atl. 744. *Dalrymple v. Craig* (1899) 149 Mo. 345, 360-361, 50 S.W. 884. *Cunningham v. Irwin* (1914) 182 Mich. 629, 638-639, 148 N.W. 786. *Crocker v. Hotchkiss, Vail & Garrison Co.* (1919) 107 Misc. 626, 177 N.Y.S. 189, 191. WILLISTON, s. 125.

There is only satisfaction *pro tanto*, even though the money is borrowed with the knowledge, or at the instigation, of the creditor.<sup>141</sup>

What is said here of the difference between the two principles of discharge by a stranger with respect to part payments depends on the assumption that a part payment by the stranger on behalf of the debtor is equivalent to a part payment by the debtor himself. This was recognised in *Shaw v. Clark*.<sup>142</sup> This was an action on a judgment debt, to which the plea was that the debt had been assigned to W., who had discharged the defendant. At the trial it appeared that the defendant had supplied W. with \$5, a sum which was less than the debt, with which to purchase it for him. The creditor, understanding that W. was purchasing the debt for his own purposes, agreed to accept the \$5 for it. These facts, it will be seen, are similar to those in *Sigler v. Sigler*, but the Supreme Court of Vermont took a different view of them.

As the sum was really the money of the debtor, and paid over by his agent, it is the same as if paid by himself. This presents the main question in the case, to wit is a payment of a part of the debt then due by the debtor, any satisfaction of the whole, even if so received by the creditor?<sup>143</sup>

The Court held there was merely satisfaction *pro tanto*.

It is true that there was in this case an assignment, but its principle would apply all the more forcibly to a purported satisfaction by the stranger as agent for the debtor. Moreover, the principle would apply where the debtor does not provide a fund in advance, but is bound to restore to the agent whatever he pays to the creditor. For both these propositions there is authority.<sup>144</sup> *Shaw v. Clark* was approved in a 1938 Utah

<sup>141</sup> *Bunge v. Koop* (1872) 48 N.Y. 225. *Marshall v. Bullard* (1901) 114 Ia. 462, 87 N.W. 427, 428. *Schlessinger v. Schlessinger* (1907) 39 Colo. 44, 88 Pac. 970. *Ivy Court Realty Co. v. Knapp* (1913) 79 Misc. 260, 139 N.Y.S. 198. *S. A. Pace Grocery Co. v. Guynes* (1918) 204 S.W. 794 (Tex. Civ. App.). *Contra: Dalrymple v. Craig* (1899) 149 Mo. 345, 50 S.W. 884. *Ebert v. Johns* (1903) 206 Pa. 395, 55 Atl. 1064. *Allen v. McNeelan* (1916) 79 Or. 606, 156 Pac. 274. *Gillman v. Sorvetino* (1925) 101 N.J.L. 447, 130 Atl. 442.

<sup>142</sup> (1834) 6 Vt. 507.

<sup>143</sup> At p. 507.

<sup>144</sup> *Bliss v. Schwarts* (1875) 65 N.Y. 444. *Specialty Glass Co. v. Daley* (1899) 172 Mass. 460, 52 N.E. 633. *Dickerson v. Campbell* (1904) 47 Fla. 147, 35 So. 986. *Schlessinger v. Schlessinger* (1907) 39 Colo. 44, 88 Pac. 970. In *Corpus Juris Secundum*, i, 506-507, it is said that, "A payment of an amount less than that due is held to effect a satisfaction of the debt or demand, if accepted as such, where it is made by a third person, or one under no obligation to pay the debt, provided such payment is previously authorised or afterward ratified by the debtor. . . ." *Corpus Juris*, i, 545,

decision in which the facts were similar except that the Court construed the transaction as an attempted accord and satisfaction and not an attempted assignment.<sup>144A</sup> It was held that there was no discharge of the debt, because there was no consideration in the payment of part only of the debt; there was at most a satisfaction *pro tanto*. *Sigler v. Sigler* was distinguished on the ground that the debtor had not there advanced the money to the stranger before the transaction had been arranged between the stranger and the creditor. This distinction, however, is not very realistic, since the debtor had agreed to provide the stranger with a fund. *Sigler v. Sigler* was disapproved by a Kansas court<sup>144B</sup> which said that "law and equity would have required" that stranger and debtor be identified in that case. "It was a simple case of paying part of a debt for the whole, which, under the law of this state, is not accord and satisfaction."<sup>144C</sup>

It remains to consider what authority there is for the difference between the two principles of discharge by a stranger with respect to tenders. It was decided as early as 1588 that a tender by a stranger is of no effect,<sup>145</sup> and this has not since been doubted.<sup>146</sup> It has also been decided that the debtor may procure a third person to make a tender on his behalf.<sup>147</sup> Furthermore, a tender by a stranger on behalf of the debtor is effective even where made without prior authority, provided it is subsequently ratified by the debtor.<sup>148</sup> Where the debtor pleads the tender there is by virtue of that plea a sufficient

also recognises that a part payment by a stranger may operate as a complete discharge of the debtor, but not where the stranger is the agent of the debtor for the purpose of obtaining a settlement. "Payment by agent is the same as payment by himself."

<sup>144A</sup> *Ralph A. Badger & Co. v. Fidelity Bldg. & Loan Assn.* (1938) 94 Utah 97, 75 Pac. (2d) 669.

<sup>144B</sup> *McGregor v. Farmers State Bank* (1923) 114 Kan. 356, 219 Pac. 520.

<sup>144C</sup> 114 Kan. at 360.

<sup>145</sup> *Walkins v. Ashwicke* (1588) Cro. El. 132.

<sup>146</sup> *Jones v. Moore* (1833) 1 Edw. Ch. 631 (N.Y.). *Mahler v. Newbauer* (1867) 32 Cal. 168, 170. *Harris v. Jex* (1873) 66 Barb. 232, aff'd. (1874) 55 N.Y. 421. *Rowell v. Jewett* (1882) 73 Me. 365. *Delaware Motor Sales Co. v. Wright* (1930) 152 Atl. 809, 810.

<sup>147</sup> *McDougald v. Dougherty* (1852) 11 Ga. 570, 588. *Mahler v. Newbauer* (1867) 32 Cal. 168. *Eslow v. Mitchell* (1873) 26 Mich. 500. *Arnold v. Empire Mutual Annuity & Life Insurance Co.* (1907) 3 Ga. App. 685, 708, 60 S.E. 470. *Sampson v. Macrae* (1922) 29 Ga. App. 690, 691, and *Turner v. Williams* (1922) 29 Ga. App. 751, 752, holding that under s. 4322 of the Civil Code of Georgia of 1910 a valid tender may be made by an agent or a friend at the instance of an interested party. *St. George's Soc. v. Sawyer* (1927) 204 Ia. 103, 214 N.W. 877.

<sup>148</sup> *Forderer v. Schmidt* (1907) 154 F. 475, 84 C.C.A. 426.

ratification.<sup>149</sup> There is one requirement the stranger must observe in making a tender.

A party having no interest in the premises, or tender made, has no right to make a tender. The plaintiff would not be bound to regard a tender made by, or on behalf of, a stranger to the transactions. (*Watkins v. Ashwicke*, 1 Cro. Eliz. 132.) When a tender is in fact made by a stranger, and not the party in interest, it would seem to follow that the creditor must be informed on whose behalf it is made, otherwise he would not be required to accept the money, or reject it at his peril.<sup>149A</sup>

### SUMMARY

(1) Satisfaction by a stranger of another's obligation is possible where the stranger gives something for and on behalf of that other. The stranger must act with the obligor's prior authority, or as his agent and with his subsequent ratification. The obligor may ratify the stranger's act by adopting it in his plea, provided that the obligee and the stranger have not in the meantime rescinded the agreement for satisfaction. If there is no such rescission, the obligor may ratify even though he has previously repudiated the stranger's act. It seems that there must be an actual ratification, and that it will not be presumed merely because the stranger's act benefits the obligor.

(2) There is authority for a second principle of discharge by a stranger. He may discharge another's obligation by means of an agreement with the creditor by which the latter agrees to consider the obligor discharged in consideration of what the stranger gives. The stranger does not act for and on behalf of the obligor. It is necessary that the obligee should agree that the obligor shall be discharged. The most important practical differences between the two principles are: (a) A part payment for and on behalf of the debtor can operate only as a part payment by the debtor himself, and so can take effect only as a satisfaction *pro tanto*. A part payment<sup>150</sup> not made for and on behalf of the debtor, or in respect of the debt, but made in consideration of a full discharge of the debtor, can take

<sup>149</sup> *Harding v. Davies* (1825) 2 C. & P. 77. *Kincaid v. School District No. 4* (1834) 11 Me. 188.

<sup>149A</sup> *Mahler v. Newbaur* (1867) 32 Cal. 168, 170. See also *Eslow v. Mitchell* (1873) 26 Mich. 500. *St. George's Soc. v. Sawyer* (1927) 204 Ia. 103, 214 N.W. 877.

<sup>150</sup> Just as it is incorrect, strictly speaking, to call this form of discharge by a stranger "satisfaction" of the obligor's obligation, so it is equally incorrect to speak of what the stranger gives to, or does for, the obligee as payment or performance. Those terms refer only to the obligor's obligation, and not to the independent one assumed by the stranger as consideration for the obligor's discharge.

effect as a full discharge, or as consideration for the creditor's promise of a full discharge. (b) An obligee is not bound to accept a tender of payment or performance unless it is made for and on behalf of the obligor, and with his prior consent or subsequent ratification.<sup>151</sup>

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<sup>151</sup> Note that a stranger may improve the subject-matter of a contract to which he is a stranger, *e.g.*, by paying insurance premiums (*Re Leslie* (1883) 23 Ch. D. 552, *Re Earl of Winchilsea's Policy Trusts* (1888) 39 Ch. D. 168, *Strutt v. Tippet* (1890) 62 L.T. 475, *Royal Exchange Assurance v. Hope* [1928] Ch. 179), or by expending money on repairs (*Leigh v. Dickeson* (1884) 15 Q.B.D. 60).

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