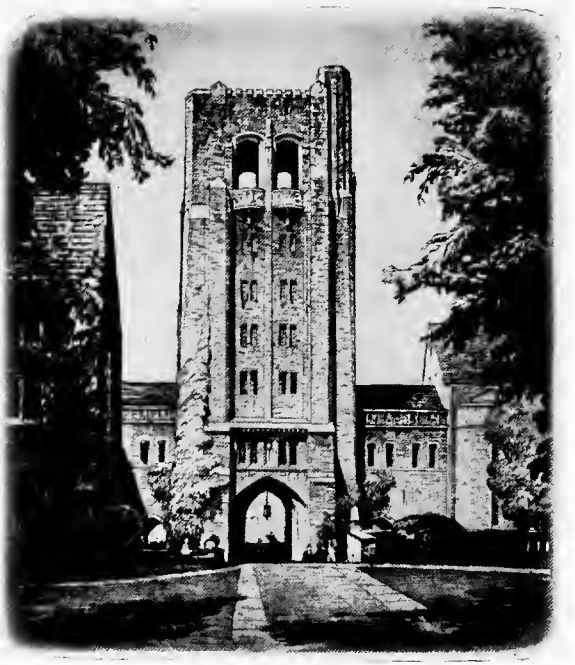

A TREATISE

ON THE LAW OF

ACCORD AND SATISFACTION

COMPROMISE

AND

COMPOSITION AT COMMON LAW

WITH FORMS FOR USE IN COMPOSITION PROCEEDINGS

IN THREE BOOKS

BY ALVA R. HUNT

OF THE MINNESOTA BAR

AUTHOR OF A TREATISE ON THE LAW OF TENDER, BRINGING MONEY INTO COURT AND OFFER OF JUDGMENT; ALSO "TENDER" IN CYC.

KANSAS CITY, MO.

VERNON LAW BOOK CO.

1912

PREFACE

THIS work is the result of four years of almost constant application during what might be termed the leisure moments of a practicing lawyer. That such moments so devoted, mean in the aggregate, days—and nights—and months of toil, can readily be proven by any one merely reading and analyzing a few hundred decisions of the five thousand examined by us. It was our aim to write a small volume covering the three cognate subjects that should be practically useful; but the size of the volume has exceeded our expectations. Our purpose to make it useful did not permit of any abridgment and we sincerely hope that those of the profession into whose hands this volume may come will appreciate our effort to make it comprehensive and will find it helpful in lightening their labor.

We know from experience that such a work as this is needed. The lawyer in general practice is constantly making settlements; in fact more than half of his business is adjusting disputes and avoiding litigation; and in trying to relieve clients who have been overreached in a previous settlement. A client authorizing a settlement wants repose, and nothing is more damaging to the reputation of a lawyer than to effect a settlement that leads to another and more acrimonious controversy.

The subjects of Accord and Satisfaction, and of Compromise, do not appear ever to have been the subject of a text book; but Composition at Common Law has twice been considered: first, by Basil Montagu, in a small volume of some forty four pages of text, published in London in 1823; now chiefly valuable for the appendix containing a full report of the early English cases, where the doctrine of Composition at Common Law has its origin; and

lastly, by the late Orlando F. Bump, in a volume of less than eighty pages of text, published in St. Louis in 1879. The latter, although without a table of contents, chapters or sections, indicating methodical treatment, is nevertheless a methodical and an excellently written treatise; and, although a copy of the work did not reach our hands until after we had collected and digested the cases, we wish to acknowledge obtaining from it much valuable information. The forms, for use in composition proceedings, found in our book, are taken from this work and used by permission of Sarah E. Bump, to whom we acknowledge our grateful appreciation.

The labor of preparing these pages has been in a very great measure agreeable to us, notwithstanding we were at all times weighed down with the consciousness of an unfinished task and the end, at times, by reason of the call of professional duties, seemed beyond hope of successful attainment. We scarcely know whether it was the mental relaxation arising from a cessation of constant thinking and studying innumerable legal questions, together with the relief derived from having completed a lingering task, or pride in the production, that, at the conclusion of our labor, afforded the pleasure experienced. Be that as it may, we are not without pride in the production, nor hope, that in sending forth these pages they will receive indulgent consideration from the profession and some measure of praise.

ALVA R. HUNT.

LITCHFIELD, MINNESOTA, October, 1912.

BOOK ONE

ACCORD AND SATISFACTION

BOOK TWO

COMPROMISE

BOOK THREE

COMPOSITION AT COMMON LAW

APPENDIX

FORMS FOR USE IN COMPOSITION PROCEEDINGS

TABLE OF CONTENTS

BOOK ONE

ACCORD AND SATISFACTION

Sec. 1. Definition—Accord—Accord and satisfaction—Distinguished from payment and release—Novation.
Sec. 2. Requisites—In general.
Sec. 3. Execution necessary—Accord executory—Right of action how extinguished.
Sec. 4. Part performance.
Sec. 5. Tender of performance of an accord.
Sec. 6. Accord how executed.
Sec. 7. Accord unenforceable—Specific performance.
Sec. 8. Acceptance in satisfaction necessary.
Sec. 9. Effect of an accord and satisfaction—Absolute bar—Discharges joint debtor, joint and several debtor, surety, indorser.
Sec. 10. Subsequent promise to pay residue.
Sec. 11. Time when an accord and satisfaction may be made—Sunday contracts.
Sec. 12. Rescission—Tender—Rescission on a Sunday.
Sec. 13. The agreement—Writing unnecessary when—Must be certain—Must be in absolute discharge—Mutuality.
Sec. 14. Mistake as to amount—Legality of consideration.
Sec. 15. The agreement may be implied.
Sec. 16. Agreement arising from acceptance of a conditional offer or tender—Prescribing terms of acceptance by debtor, by creditor—Receding from or persisting in claim.
Sec. 17. Same subject—Acceptance without words of assent—Transaction when a contract—Rule in equity.
Sec. 18. The condition may be implied—When an offer or tender is conditional.
Sec. 19. Same subject.

Sec. 20. Whether an offer or tender is conditional or unconditional is not necessarily a question of law.
Sec. 21. Agreement arising from acceptance of check in full.
Sec. 22. Same subject—Erasing words "in full" from check.
Sec. 23. Subject matter—In general—Legal demands—Existing demands—Severance.
Sec. 24. Right of action *ex-contractu*—Simple contracts—Damages—Contracts under seal.
Sec. 25. Same subject.
Sec. 26. Actions—Appeals—Writ of error—Judgments.
Sec. 27. Right of action concerning realty.
Sec. 28. Right of action *ex-delicto*.
Sec. 29. The particular claim or demand discharged—Proof.
Sec. 30. All demands—Claims—Quarrels—Actions—Causes—Writs of error—Appeals.
Sec. 31. Demands *in præsenti*.
Sec. 32. Future liability—Contingent liability—Contingent demands—Counter-claims—Mutual demands settled when.
Sec. 33. Demands under consideration—Whole subject matter.
Sec. 34. Accrued damages—Future and consequential damages—Continuing nuisance—Undiscovered injury.
Sec. 35. Parts of demands—Splitting causes.
Sec. 36. Construction of release—Of contracts of compromise—Words of limitation.
Sec. 37. Receipt in full of all demands, claims, accounts—Restricted to what—Not conclusive when—Receipts containing contracts—How construed.
Sec. 38. What persons may make an accord and satisfaction—In general—Between partners—Ignoring lien holders—Where obligor and tort feasor are liable for loss of property—By pledgee of note—Assignee.
Sec. 39. By partner, as debtor, as creditor.
Sec. 40. By joint and several debtor—By joint debtor—Settlement of individual liability—Joint creditors.
Sec. 41. Same subject—Statutory provisions.
Sec. 42. By one joint tort feasor—Covenant not to sue one—No contribution.
Sec. 43. By attorney—Agent—Corporation officers.
Sec. 44. Liability of attorney or agent for unauthorized settlement.
Sec. 45. By executor—Administrator—Administrator *de son tort*—A common law right—Statutory authority not exclusive.
Sec. 46. Same subject—Good faith and prudence required—Liability of personal representative.
Sec. 47. By guardian—Next friend—Guardian *ad litem*—Parent.

Sec. 48. By public official.
Sec. 49. By assignee—Receiver—Trustee.
Sec. 50. By a stranger.
Sec. 51. Same subject—Ratification by debtor.
Sec. 52. Same subject—Intent of the parties—Cancellation of the payment—Payment available to subsequent lien holder.
Sec. 53. Same subject—Subrogation—Liability of debtor to stranger—Subsequent promise to pay the stranger—Consideration—Adopting the payment as a defence.
Sec. 54. Consideration—In general.
Sec. 55. Payment of a less sum—Recovery of residue—Rescission unnecessary.
Sec. 56. Same subject—Application of the rule.
Sec. 57. Same subject—Acceptance of less than amount fixed by law—Salary—Fees.
Sec. 58. Payment of an undisputed claim no consideration for relinquishing another claim.
Sec. 59. Insolvency of debtor as a consideration.
Sec. 60. Payment before due—At another place.
Sec. 61. Less sum furnished by third person.
Sec. 62. Substituting debtor's note for a less sum—Note of joint debtor—Of one partner.
Sec. 63. Payment of a less sum to a third person.
Sec. 64. Security for a less sum—Surety—Mortgage.
Sec. 65. Note of third person—Bills—Drafts—Checks—Orders on third person.
Sec. 66. Delivery and acceptance of property—Services.
Sec. 67. Accepting a less sum and surrendering note or security—Gift.
Sec. 68. Payment of principal without accrued interest.
Sec. 69. Effect of receipt in full.
Sec. 70. Statutory change or modification of the rule.
Sec. 71. Accepting a less sum and giving a release.
Sec. 72. By allowing cross demand—Set-off—Recoupment.
Sec. 73. By surrender of rights—Assuming new obligation.
Sec. 74. By acceptance of new or substituted agreement.
Sec. 75. The consideration necessary to support a compromise of unliquidated and disputed demands and of a composition.

BOOK TWO

COMPROMISE

Sec. 76. Definition.
Sec. 77. A compromise a new agreement—Must be executed—Accepting an executory contract—Mutuality of remedies.
Sec. 78. Distinguished from payment—Settlement—Account stated—Accord and satisfaction.
Sec. 79. Requisites—In general—Parties—Subject matter must be uncertain.
Sec. 80. Mutuality—Offer and acceptance—Effect of unaccepted offer—Payment under protest—Acceptance of amount allowed by county, town, municipality—Withdrawal of offer.
Sec. 81. Mutuality continued—Acceptance of tender—Excluding items from an account—Acceptance of amount allowed by county, town, municipality—Part disallowed by board—Payment of costs to secure a discontinuance—Withdrawal of offer—Agreement upon a settlement how construed.
Sec. 82. Consideration—In general.
Sec. 83. Same subject—Unliquidated demand.
Sec. 84. Same subject—What are unliquidated demands.
Sec. 85. Same subject—Disputed claims—Dispute must be *bona fide*.
Sec. 86. Same subject—Doubtful claims—Must not be legally groundless.
Sec. 87. Same subject—Claim of set-off—Counter-claim.
Sec. 88. Compromise of action—Consideration—Payment of costs—Compromise after an arrest—After attachment.
Sec. 89. Compromise of actions, how taken advantage of, and how enforced.
Sec. 90. Family settlements.
Sec. 91. Form of agreement—Certainty—Oral and written compromises.
Sec. 92. Effect of a compromise—Bars an action on original demand—Extinguishes defense—Set-off and counter-claim—Bars claim for damages.
Sec. 93. Same subject—Other claims not discharged—Compromise after judgment embraces what—Installments—Splitting demand—Parties and privies concluded.
Sec. 94. Performance—Repudiation—Breach—Rights of the parties.
Sec. 95. Time of performance—Condition as to time waived when—Effect of acceptance after default.

Sec. 96. Default after part payment—Payment *pro tanto*—Stipulation for recovery of residue—When a stipulation for the payment of an additional sum on default is a stipulation for a penalty.
Sec. 97. Specific performance.
Sec. 98. Necessity for a tender before suit for specific performance—Contrary rule—A tender is necessary to bar right to specific performance.
Sec. 99. Offer of compromise inadmissible in evidence.
Sec. 100. Same subject.
Sec. 101. Same subject.
Sec. 102. Admission of independent facts as evidence.
Sec. 103. Admission by whom made—Partner—Joint obligor—Joint and several obligor—Joint tort feasor.
Sec. 104. Admissions by infants—Guardians and personal representatives.
Sec. 105. Admissions by agents or attorneys—By attorney after action brought.
Sec. 106. Pleading—Accord and satisfaction, and a compromise must be pleaded—Kind of plea—Effect.
Sec. 107. Allegations necessary.
Sec. 108. Same subject.
Sec. 109. When pleaded—Practice.
Sec. 110. Joining issue—Demurrer—Motions—Amendments.
Sec. 111. Reply to avoid the agreement—Pleading a tender.
Sec. 112. Pleading a release.
Sec. 113. Same subject—Reply.
Sec. 114. Evidence—Burden of proof—Weight.
Sec. 115. Same subject—Admissibility.
Sec. 116. Same subject—Implied agreement—When question is for the court or jury.
Sec. 117. Rescission—Election of remedies on discovery of ground for rescission—Mode—Measure of damages.
Sec. 118. Ratification—Laches—Time when rescission should be made.
Sec. 119. Tender required upon a rescission—Exceptions.
Sec. 120. Same subject—Before suit to rescind.
Sec. 121. Same subject—Where a party is entitled to retain what he received—When judgment will give a defendant all he is entitled to—Tender of release—Promissory note.
Sec. 122. Manner of making a tender—Actual offer—Ability—Actual production—Waiver of formalities—Notice of intention to rescind—Unconditional tender.
Sec. 123. Tender by whom made—To whom—Amount.
Sec. 124. Place of making a tender.
Sec. 125. Rescission by agreement—Agreement implied—Abandonment by one party.

Sec. 126. Rescission upon the ground of mistake of law.
Sec. 127. Same subject.
Sec. 128. Same subject.
Sec. 129. Same subject—Mistake as to existing legal rights.
Sec. 130. Rescission on the ground of mistake of fact—Mistake of fact defined.
Sec. 131. Same subject—Requisite to relief—Materiality of fact—Negligence.
Sec. 132. Same subject—Mutual mistake.
Sec. 133. Rescission upon the ground of fraud—Definition of fraud.
Sec. 134. Same subject—Fraud in general—Actual fraud.
Sec. 135. Same subject—Misrepresentation of the law—Of matter of opinion—Future events.
Sec. 136. Same subject—Misrepresentation by debtor as to his finances—Setting up sham claim.
Sec. 137. Same subject—Compromises effected by physicians.
Sec. 138. Same subject—Concealment and suppression of facts.
Sec. 139. No rescission for fraud after the fraud is compromised.
Sec. 140. Rescission for fraud, etc.—Evidence in general—Burden of proof.
Sec. 141. Rescission on the ground of surprise.
Sec. 142. Rescission upon the ground of duress—Duress in general.
Sec. 143. Same subject—Effect of performance of contract on right to rescind—Right affected by time—Manner of rescission—Pleading—By whom rescinded—Duress to stranger—Defense by surety—Duress of master, of servant.
Sec. 144. Same subject—Duress by whom exercised—Stranger—Rule by the civil law—At common law—Burden of showing want of knowledge of duress or fraud shifts when.
Sec. 145. Same subject—Duress of imprisonment—Lawful and unlawful arrest—In settlement of just claim.
Sec. 146. Same subject—Duress of goods—Personal and real property—Refusal to pay a debt.
Sec. 147. Same subject—Duress *per minas*—Threats of lawful and unlawful arrest—Of battery—Of injury to father or son—Duress a question of fact when.
Sec. 148. Same subject—Threats to enforce demand by legal means—Good faith of claimant—Unfounded claim.
Sec. 149. Same subject—Undue influence.
Sec. 150. Same subject—On the ground of infancy.
Sec. 151. Same subject—On the ground of insanity—Mental and physical weakness.
Sec. 152. Same subject—Persons *in vinculis*.
Sec. 153. Same subject—For illegality—Compounding a felony—Parties *in pari delicto*—Relief in equity, at law—Unequal guilt.

Sec. 154. Same subject—Gaming contract—Immoral consideration—Compromise when liability is both civil and criminal—Contracts violating the statute—By municipalities—In violation of revenue laws—Sunday contracts—Usury.

Sec. 155. Rescission for want of consideration—Failure—Inadequacy.

Sec. 156. Avoidance of compromise by a creditor.

BOOK THREE

COMPOSITION AT COMMON LAW

Sec. 157. Definition—Distinguished from payment, accord and satisfaction and compromise.

Sec. 158. Kinds of composition agreements—Assignments—Agreement for payment of *pro rata*—Letter of license—Deed of inspectorship.

Sec. 159. Form of the agreement—Writing under seal—By parole—Oral—Agreements affected by statute of frauds—Form of letter of license.

Sec. 160. Consideration—Mutual promises of creditors—Surrender of property.

Sec. 161. Other essentials to the validity of agreement—Equality among creditors.

Sec. 162. Fraud and estoppel as ground for sustaining the contract.

Sec. 163. The agreement—Mutuality between debtor and creditors.

Sec. 164. Same subject—Mutuality between creditors.

Sec. 165. Same subject—Agreement how executed—What amounts to an acceptance.

Sec. 166. Same subject—Stipulations.

Sec. 167. Same subject—The release.

Sec. 168. Same subject—Construction.

Sec. 169. Withdrawal from agreement by creditor.

Sec. 170. Parties—Necessary parties—Debtor—Stranger in debtor's behalf.

Sec. 171. Same subject—Creditors—Preferring a creditor—Failure to come in as a party within the time limited—Relief in equity.

Sec. 172. Same subject—Stipulation requiring certain creditors to join—Oral evidence inadmissible to vary stipulation—Effect of a failure to sign—Surety not bound if all do not sign.

Sec. 173. Same subject—Time when creditors may come in—Objection that some have not joined available to whom—Compelling lagging creditors to elect to come in or renounce.

Sec. 174. Same subject—Construction of stipulation as to who shall sign—Waiver of condition.
Sec. 175. Same subject—Partners as debtors, as creditors—Joint and several debtors—Joint creditors.
Sec. 176. Same subject—Negotiating composition through agent or attorney—Guardian—Personal representatives.
Sec. 177. Performance—Agreement must be strictly complied with.
Sec. 178. Same subject—Immaterial and unimportant variations—Mistake.
Sec. 179. Same subject—Tender of performance.
Sec. 180. Same subject—Formal tender excused—Waiver of formalities.
Sec. 181. Same subject—Strict performance excused—Waiver.
Sec. 182. Breach by debtor—Effect—Rights of the parties—Retaining partial payments—Remedies—Statute of limitation.
Sec. 183. Breach by creditor—Right of debtor—Of other creditors.
Sec. 184. Specific performance—Restraining threatened violation.
Sec. 185. Subsequent promise to pay residue of debt discharged by a composition.
Sec. 186. Composition effected by assignment.
Sec. 187. Duties of assignee—Rights of creditors.
Sec. 188. Same subject.
Sec. 189. Title to what property vests in assignee—Exempt property—Partnership property—After acquired property—Salary of public official—Title of assignee subject to equities.
Sec. 190. When non-assenting creditors may avoid the assignment.
Sec. 191. Same subject.
Sec. 192. Operation and effect of a composition—Binds parties and privies—Effect of composition with surety or indorser—Mistake as to liability—Recovery of overpayment—Effect upon the rights of non-assenting creditors.
Sec. 193. Effect upon the liability of joint debtor.
Sec. 194. Effect upon the creditor's security; upon liability of a surety, indorser, drawer, guarantor.
Sec. 195. Same subject—Reserving right to hold security—Right of surety not affected—When discharged notwithstanding reservation by creditor.
Sec. 196. Effect upon debts.
Sec. 197. Debts included—Construction of agreement—Bill in equity to determine what claims are included—Parol evidence as to claims included or excluded inadmissible when.
Sec. 198. Same subject—Demands not due—Secured and unsecured claims—Judgment debts—Existing debts—Contingent liability—Demand of partner against firm—Debts subsequently contracted—Counter-claims.

Sec. 199. Same subject—Splitting demands—Withholding demands—Transferring demands after signing agreement.
Sec. 200. Surety for composition—Rights and liabilities.
Sec. 201. Fraudulent representations by debtor as to his affairs avoids the composition—Creditor as a decoy—Mistake of fact as ground for rescission—Equitable relief—Release vacated—Security reinstated.
Sec. 202. Secret preference fraudulent—Agreement unenforceable—An affirmative defence—When *res adjudicata*.
Sec. 203. Recovery of fraudulent preference by debtor, near relative, stranger—Recovery when agreement is not executed—When debtor is in default—When not recoverable—Relief in equity.
Sec. 204. Fraudulent preference—Illustrations—Evidence—Question for the jury.
Sec. 205. Effect of fraudulent preference upon liability of surety—Remedy at law, in equity.
Sec. 206. Fraudulent preference—Avoidance of composition by innocent creditor—Preference paid by stranger—Waiver of the fraud—Avoidance optional—Remedies—Rescission.
Sec. 207. Fraudulent preference—Creditor *particeps fraudis* cannot avoid the composition for fraud—Cannot enforce composition agreement nor recovery on original demand.
Sec. 208. Pleading a composition.
Sec. 209. Evidence.

TABLE OF CASES

[THE FIGURES REFER TO SECTIONS]

A

Abb v. Northern Pac. Ry. Co., 42.
Abbott v. Wilmot, 115.
Abel v. Allemannia Bank, 160, 172, 174, 176.
Abercrombie v. Skinner, 96.
Aborn v. Rathbone, 69.
Abrans v. Los Angeles Co., 140.
Acker v. Phœnix, 159, 160, 172, 184.
Acton v. Woodgate, 186.
Adams v. Adams, 90.
v. Friedlander, 122.
v. Hamell, 11.
v. Helm, 16.
v. Irving Bank, 147.
v. McKinzie, 154.
v. Reeves, 148.
v. Sage, 134.
v. Tapling, 13, 54.
Ætna Ins. Co. v. Middleport, 53.
v. Swayze, 45.
Agnew v. Brall, 48.
Alabama S. Co. v. Dewy, 99.
Alabama R. Co. v. Turnbull, 137.
Albany v. McNamara, 53.
Albrecht v. Milwaukee Ry. Co., 131, 151.
Alchin v. Hopkins, 159, 165.
Alden v. Blaque, 24.
v. Thurber, 9, 34.
Alexander v. Kelso, 45.
v. Monroe, 38.
v. Owen County, 132.
v. Strong, 106.
Allen v. Cheever, 175.
v. Christianson, 41.
v. Harris, 3, 5.
v. Jaquish, 24.
v. Procter, 86, 115.
v. Roosevelt, 56.
v. Webster, 80.
Allis v. Billing, 86.
Allison v. Connor, 9, 35.
v. Abendroth, 54, 62, 65, 119.
Almon v. Hamilton, 199, 201, 205.
Almquist v. Wilcox, 42.
Alsager v. Spaulding, 203, 204.
Altham's Case, 30, 31.
Altman v. Walker, 92.
Alvord v. Baker, 32.
v. Marsh, 45, 72.
American v. Rimpert, 115.
American Forwarding Co. v. Lindsay, 21.
Ames v. Cameron, 90.
Amour v. Gaffey, 102.
Anderson v. Highland, 6, 9, 66, 108.
v. Scholey, 114.
v. Tompkins, 175.
Andrews v. Brewster, 85, 86.
v. Morse, 38.
Angell v. Lomis, 124.
Anstey v. Marden, 159, 169, 162, 165.
Anonymous, 25, 108.
Anonymous v. Gelpieke, 49.
Antoine v. Smith, 91.
A. P. Brantley v. Lee, 114.
Appleton v. Donaldson, 122.

[The figures refer to sections]

Apthorp v. Shepard, 74.
Arbuthnot v. Norton, 189.
Argall v. Cook, 64, 164.
Arkansas City Bank v. Leach, 3.
Armandale v. Harris, 154.
Armstead v. Shreveport, 94.
Armstrong v. Clarion, 42.
v. Gilchrist, 44.
v. Lenon, 116.
v. Mechanics' Bank, 201, 203, 207.
v. O'Brien, 80.
Arnett v. Missouri Pac. R. Co., 42.
v. Smith, 70, 114.
Arnold v. Camp, 62.
v. Green, 53.
v. Park, 60.
v. Railway Steel Spring Co., 85.
Artman v. Truby, 168, 172.
Ash v. Prupperville, 107.
Ashley v. Reynolds, 146.
Ashurst v. Peck, 98.
Asken v. Millington, 89.
Askew v. Carr, 98.
Atchinson v. Atchinson, 106.
Atchinson R. Co. v. Bennett, 137.
Atkinson v. Heine, 22.
Atlantic v. Blanton, 26, 109.
Atlantic Dock Co. v. Mayor, 50.
Attorney General v. Supreme Council, 55, 85.
Auburn Bank v. Marshall, 192, 195.
Aultman v. Olson, 117.
Auken v. Kiener, 45.
Austin v. Bainter, 109.
v. Bell, 186, 190.
v. Hall, 38, 40.
v. Moore, 115.
v. Piedmont Mfg. Co., 119.
v. Smith, 70.
Averell v. Wood, 119.
Averill v. Lyman, 197.
Aydlett v. Brown, 22, 33.
Ayers v. Ashmead, 42.

B

Babcock v. Bonnell, 67.
v. Dill, 161, 170, 182, 200, 202, 206.
Babcock v. Farwell, 92.
v. Hawkins, 6, 74.
Bacon v. Campbell, 64.
Bagley v. Horman, 3.
Bahrenburg v. Conrad, 17, 114.
Bailey v. Boyd, 182, 205.
v. Cowles, 71. 106, 107, 112.
v. Day, 55.
v. Dilworth, 45, 46.
Baileyville v. Lowell, 48, 56.
Bain v. Cooper, 175.
Bainbridge v. Lox, 110.
v. Moss, 138.
Bakeman v. Pooler, 122.
Baker v. Hall, 190.
v. Lovett, 42.
v. Ring, 76, 77, 106.
v. Stackpoole, 103.
Balde v. Smith, 3.
Baldwin v. Bank, 110.
v. Daly, 60.
Baldwin v. Davis, 92.
v. Jeffries, 93.
v. Rosenman, 207.
Ball v. Bank, 43.
v. McGeoch, 140, 201.
Ballard v. Beveridge, 33, 92, 121.
Balohradsky v. Carlisle, 52.
Baltimore v. Hughes, 53.
Baltis v. Dobin, 38.
Bamford v. Clewes, 180, 208.
Bannantine v. Cantwell, 207.
Bantle v. Krebs, 94.
v. Curtis, 114.
Bank v. Dodge, 130.
v. Hoeber, 176, 202, 206.
v. McCalmont, 32.
v. McGrauw, 114.
v. Severin, 112.
Bank of Monroe v. Field, 105.
Barelli v. Brown, 65.
Barham v. Bank, 22, 115.
Barkley v. Clark, 94.
Barnes v. Dickey, 53.
Barnet v. Houston, 39.
Barnum v. Green, 106, 107.
Barrett v. Third Ave. Ry. Co., 42, 43.
v. Weber, 147, 153.

[The figures refer to sections]

Barry v. Equitable Life, 144.
Bartleman v. Douglas, 184, 208.
Bartleson v. Vanderhoff, 117.
Bartlett v. Blain, 205, 206.
v. Cappes, 85.
v. Hoyt, 102.
v. Railway Co., 32.
v. Rogers, 66, 186, 192, 199, 208.
v. Tarbox, 102.
v. Woodworth Co., 160, 182.
Barton v. London, 97.
Bascom v. Danville Stove Co., 102.
Bass v. Roberts, 16, 22, 82, 85.
Bassett v. Shores, 101.
Bassian v. Railway Co., 151.
Batchelder v. Batchelder, 101.
v. Sturgis, 24.
Bates v. Cobb, 33, 93.
Battles v. Forbes, 165, 171, 173.
Bauer v. Weber, 99.
Baumier v. Antian, 77, 88.
Baxter v. Bell, 157, 160, 175, 192, 198, 199.
v. State, 78, 81.
Bayley v. Boyd, 157.
v. Holman, 107.
Beach v. Fulton Bank, 188.
v. Ollendorf, 175, 203.
v. Schroeder, 85.
Bean v. Arnsinck, 165, 181, 203, 204.
v. Brookmore, 172.
Bearden v. Wood, 98.
Beard v. Boylan, 171, 172.
v. Kimball, 190.
Beaumont v. Greathead, 68.
Beaver v. Porter, 16, 22.
Beck v. Parker, 190.
v. Shippam, 199.
Beckwith v. Frisbie, 148.
Beers v. Hendrickson, 44.
Behrenburg v. Conrad, 18.
Belding v. Mercer, 191.
Bell v. Anderson, 119.
Belshaw v. Bush, 50, 51.
Belt v. Mehew, 131.
Bement v. Ohio Valley R. Co., 112.
Benedict v. Batchelder, 12.
Bender v. Sampson, 39.
Benihan v. Wright, 112.
Benjamin v. McCormic, 71.
Bennett v. Walker, 140.
Benson v. Larson, 94.
Benton v. Roberts, 39.
Berdell v. Bissell, 106, 110.
Berdeu v. Tillma, 114.
Bernheim v. Porter, 39.
Berrien's Est., 45.
Berry v. American Ins. Co., 120, 121, 135.
v. Paokes, 45.
Beutman v. Kirkpatrick, 16.
Bickele v. Beseke, 17.
Bidder v. Bridges, 65.
Bigler v. Toy, 43.
Billings v. Vanderbeck, 74, 167, 196.
v. Ware, 151.
Binford v. Adams, 50, 52.
v. Young, 99, 102.
Bingham v. Browning, 55.
Bird v. Caritat, 6, 106, 108.
v. Randall, 106.
v. Smith, 52, 55.
v. Mount, 171.
Bisbee v. Ham, 70, 119.
Bishop v. McGillis, 42.
Bissenger v. Guilterman, 172, 181.
Bissett v. Burgess, 199.
Black v. Carlyle, 16.
Black v. Rogers, 43.
Black's Appeal, 46.
Blackburn v. Ormsby, 3, 114.
Blackstone v. Wilson, 201.
Blain v. Wait, 207.
Blair v. Wait, 192.
Blakeley v. Blockley, 151.
Blake's Case, 24, 28, 108.
Blanchard v. Noyes, 61.
Blazinsky v. Perkins, 105.
Bleakly v. White, 50.
Blinn v. Chester, 66.
Bliss v. Mattson, 202, 204.
v. Railway Co., 119, 151.
v. Schwartz, 55, 164.
v. Stewart, 62, 65, 171.
Blue v. Marshall, 46, 49.

[The figures refer to sections]

Blodgett v. Hogan, 184, 203.
v. Webster, 206.
Bloomington v. Brooklyn Ice Co., 14.
Board v. Bassett, 48.
v. Dunnell, 81.
v. Louisville, etc., R. Co., 109.
Boatman's Bank v. Johnson, 166, 195.
Boatright v. Enewood, 140.
Bock v. Gooch, 165.
Bodenhofer v. Hagan, 57.
Boffandick v. Raleigh, 115.
Boffinger v. Tuyer, 26.
Boget v. Hertell, 45.
Bohrabacher v. Walsh, 41.
Bolin v. Crosby, 41.
Bonner v. Beard, 81.
Bonney v. Morrill, 43.
Boody v. McKenny, 150.
Bookmire v. Bean, 207.
Bool v. Mix, 150.
Boosey v. Wood, 28.
Booth v. Alpena, 117, 118, 119, 129, 132.
v. Smith, 64, 65.
Boothby v. Snowden, 157, 158, 159, 160, 177.
Boston & M. R. Co. v. Union Mut. Fire Ins. Co., 3.
Boston Rubber Co. v. Peerless Co., 17.
Bostrom v. Gibson, 55.
Bostwick v. Insurance Co., 119.
Boswell v. Gillen, 91, 95.
v. Williams, 115.
Bound v. Lathrop, 103.
Bourne v. Wooldridge, 39.
Bowman v. Ogden City, 34, 81.
v. Parker, 117.
v. Teall, 3.
Bowen v. Bell, 10.
v. Childs, 60.
v. Holly, 177, 179, 181, 182.
v. Lockwood, 93.
v. Marquard, 175.
v. Metz, 65, 202, 206.
v. Owen, 18.
Bowers v. Good, 135.
Boyce v. Berger, 82, 91.
v. Frances, 98.
Boyce v. Palmer, 99.
v. Watson, 103.
Boyd v. Chase, 38.
v. Hind, 169.
v. Hitchcock, 64, 65.
v. Moats, 60.
v. Oglesby, 45, 46.
Boydan v. Haberstampf, 144.
Boyer v. Berryman, 151.
Boyle v. Metropolitan, etc., R. Co., 38.
Brace v. Doble, 98.
Braden v. Ward, 55.
Bradley v. Boynton, 40.
v. Gregory, 159, 165, 179, 208.
v. Lally, 202.
v. Oliver, 129.
v. Palen, 77, 94, 114.
Bradshaw v. Bradshaw, 202, 203, 206.
v. Davis, 5, 74, 114.
Brady v. Hill, 103.
v. Shell, 169, 176.
Braggs v. Pierce, 4.
Brainard v. Van Dyke, 111, 119.
Brassell v. Williams, 64, 65, 66.
Brandling v. Plumner, 171.
Branger v. Batchelder, 43.
Brantley v. Lee, 110.
Breatson v. Harris, 39.
Breckenridge v. Shrives, 39.
Brennan v. Ostrander, 4, 7.
Breoster v. Gilston, 140.
Brett v. Universalist Soc., 106.
Brick v. Plymouth Co., 80.
Bridenbecker v. Lowell, 43.
Briggs v. Lewiston, 148.
v. Pierce, 3.
v. Smith, 93.
Bright v. Coffman, 81, 82.
Brink v. O'Donnell, 45.
Brisbane v. Boyd, 103.
Briscoe v. Callahan, 74.
Briscot v. Aier, 32.
Britten v. Hughes, 199.
Broadbent v. Thornton, 173.
Brockley v. Brockley, 43.
Brooks v. Hewit, 98.
v. White, 60, 64, 65, 66, 69.

[The figures refer to sections]

Brooklyn Bank v. De Grauw, 3, 5, 114.
Brooklyn Co. v. Miller, 98.
Brosnan v. Kramer, 45.
Brown v. Allebach, 49.
v. Byers, 39.
v. Cambridge, 42.
v. Chesterville, 53.
v. Dakeyne, 172, 208, 209.
v. Dysinger, 47.
v. Eaton, 98.
v. Farnham, 157, 160, 164, 167, 175, 176, 177, 182, 196.
v. Feeter, 66.
v. Gilmore, 19, 122.
v. Hartford Ins. Co., 119.
v. Hazen, 16.
v. Maryland Co., 47.
v. Marquard, 194.
v. Perkins, 38.
Brown v. Spofford, 94.
v. Stackpole, 162, 208.
v. Stewart, 197, 198.
v. Williams, 40.
Browning v. Crouse, 114, 181, 182.
Brownvill v. Lockwood, 206.
Bruce v. Bruce, 114.
Bruen v. Margard, 9.
Brumskill v. Metcalf, 159.
Brunswick v. Clem, 4, 74, 107.
Brush v. Railway Co., 80.
Brussian v. The Milwaukee, etc., R. Co., 113, 137.
Bryant v. Brazil, 55.
v. Christie, 203.
v. Gale, 3, 4.
v. Proctor, 60.
Bryce v. Berger, 77.
Buchanan v. Harvey, 124.
v. Paddleford, 74.
v. Sahlein, 142.
Buck v. Mosley, 39.
Buffington v. Tuyee, 26
Bulkley v. Dayton, 39.
Bull v. Bull, 66, 82, 166.
v. Hepworth, 45, 83.
Bullem v. Blain, 204.
Bullett v. Farriar, 134, 140.
Bung v. Koop, 55, 61.
Bunnell v. Bunnell, 47, 86, 90.
v. Springfield, 39.
Burhaus v. De Saussure, 45, 46.
Burnap v. Patridge, 37.
Burney v. Ludeling, 47.
Burns v. National Co., 109.
Burnsides v. Terry, 189.
v. Smith, 107.
Burge v. Dishman, 106.
Burges v. Denison, 114.
Burgess v. Dennison, 114.
v. Pollock, 151.
Burgraff v. Byrnes, 43, 44.
Burrus v. Cook, 38.
Burt v. McBain, 47.
Burton v. Stewart, 118, 119.
Bush v. Shipman, 171.
Bussian v. The Milwaukee, etc., R. Co., 117, 140, 142.
Butleman v. Douglas, 162.
Butcher v. Butcher, 32.
v. Railroad Co., 151.
Butler v. Rhodes, 158, 160, 162, 165, 167, 169.
Butler Realty Co. v. Swecker, 8.
Butternut v. O'Malley, 48.
Buxton v. Edwards, 103.
Byington v. Bookwalter, 53.
Byrnes v. Byrnes, 13, 55.
Byrd v. Bryd, 9.

C

Cabe v. Gyer, 154.
v. Jameson, 24.
Cadwallander v. Kroesen, 39.
Cahoon v. Hollenback, 86.
California Packers' Co. v. Meritt, 37.
Calkins v. State, 81, 86.
Callaghan v. Hallett, 2.
Callahan v. Ackley, 185.
Callen v. Rose, 99, 100.
Calton v. Stanford, 138.
Cameron v. Warbritton, 3, 112.
Campbell's Est., In re, 3.
Camp v. Page, 39.
Canadian Fish Co. v. McShane, 21.
Canfield v. Robertson, 93.

[The figures refer to sections]

Cannon v. Wildman, 39.
Cannon River Ass'n v. Rogers, 3, 5, 77, 110.
Cantonwine v. Bosch, 85.
Capitol City Ins. Co. v. Detwiler, 24.
Caravia v. Levy, 21, 22.
Carlston v. Ryan, 116.
Carpenter v. Chicago Ry. Co., 3, 5, 70, 77, 107, 114.
Carpenter v. Myers, 38.
Carr v. Clough, 150.
Carriere v. Tichnor, 65.
Cartan v. Thackaberry, 21.
Carter v. Carter, 15.
v. Chicago Ry. Co., 1, 3, 74.
v. Jones, 53.
v. Kemlin, 86.
Carter v. Wilson, 115.
Cartwright v. Crooke, 74.
Carver v. Barrett, 166, 168, 171, 174, 182.
v. Louthain, 81.
Cary v. McIntyre, 6.
Case v. Barber, 74, 91.
v. Baxter, 5.
Casey v. Ballon Bank Co., 44.
Castelton v. Fenshaw, 161.
Caswell v. Pure Bred Cattle Co., 62.
Catskill Bank v. Messenger, 40.
Catt v. Howard, 103.
C. Aultman & Co. v. Martin, 161.
Cavaness v. Ross, 60.
Cecil v. Plaistow, 199.
Ceples v. Alexander's Adm., 104.
Chadbourn v. Chadbourn, 45.
Chadwick v. Burrows, 192.
Chamberlain v. Smith, 16, 55.
Champion Mach. Co. v. Mann, 122.
Champlin v. Laytin, 126.
Champney v. Coope, 52.
Chance v. Isaac, 189.
Chandler v. Sanger, 145.
v. Simmons, 150.
Chapman v. Cowles, 44.
v. Dennison, 177, 182.
Chapin v. Chicago, 42.
Chappell v. Phillips, 106.
Chase v. Bailey, 166, 172, 174.
v. Bradley, 45.
Cheeves v. Donilly, 114.
Chemical Nat. Bank v. Kohner, 91, 94, 157, 165, 169, 171, 176, 179.
Chesire v. Des Moines, 76, 92, 99, 100.
Cheveront v. Textor, 171, 201.
Chicago v. Babcock, 42, 106.
Chicago, etc., R. Co. v. Brown, 50, 51. 85.
v. Boyles, 119.
v. Buckstaff, 16.
v. Clark, 16, 55, 69, 85.
v. Doyle, 119.
v. Green, 140.
v. Roberts, 99.
v. Wilcox, 137.
Chicago Land Co. v. Peck, 198.
Child v. Dandridge, 184.
v. Stevens, 188.
Chilton v. Willford, 53, 76.
Chittenden v. Woodbury, 166, 171.
Chittock v. Chittock, 93.
Chouteau v. Suydam, 45.
Christianson v. Chicago, etc., R. Co., 113, 117, 151.
Christie v. Craig, 66, 74.
Chrystal v. Gerlach, 70.
Chubbuck v. Varnam, 140.
Church v. Steele's Heirs, 102.
Citizens' Bank v. Barnes, 119.
v. Jorda, 94.
City Council v. Shirley, 107.
City of Crawford v. Darrow, 48.
City of Longview v. Capps, 78, 82.
City of Memphis v. Brown, 55.
City of New York v. New York City R. Co., 48.
City of San Antonia v. Stevens, 99.
City Railway Co. v. Floyd, 115.
City Sav. Bank v. Stevens, 1.
Clabaugh v. Southern W. G. Co., 42.
Claggett v. Salman, 9.
Clancey v. Losey, 92.
Clark v. Abbott, 61.
v. Brown, 7, 79.
v. Dinsmore, 5, 40.
v. Lonmann, 39.

[The figures refer to sections]

Clark v. Pope, 80.
v. Ring, 74.
v. Ritchey, 200, 205, 207.
v. Rowling, 6.
v. State, 23.
v. Upton, 162, 192, 200.
v. White, 177, 178, 184, 201.
v. Wilson, 38, 187.
Clay v. Hoysradt, 88.
v. Williams, 46, 97.
Clayton v. Clark, 55, 67.
v. Traction Co., 151.
Cleeve v. Cleeve, 46.
Clemant v. Thornton, 19.
Clement v. Clement, 39, 103.
v. Brush, 39, 175.
Cleveland v. Richardson, 138, 201.
v. Rothschild, 106, 112.
v. Toby, 16.
Cleveland, etc., R. Co. v. Maguire, 99.
Clew v. Rielly, 94.
Clifton v. Litchfield, 3, 5.
Close v. Close, 166, 195.
Clough v. Murray, 107.
Clow v. Brost, 50.
Coal Co. v. Buges, 151.
Coans v. Hunter, 44.
Cobb v. Cowdery, 26.
v. Fogg, 170, 201, 205.
v. Lunt, 104.
v. Terrell, 206.
Cobleigh v. Pierce, 168, 172, 181, 206.
Coblentz v. Manufacturing Co., 55.
Coburn v. Cedar Valley Land Co., 109.
Cochran v. Baker, 99.
v. Perry, 189.
Cockburn v. West, 53.
Cockshott v. Bennett, 158, 159, 160, 162, 202, 204.
Coddington v. Davis, 199.
Coe v. Hobby, 25, 27, 91.
v. Hutton, 198.
Cohen v. Levine, 17, 22.
Coit v. Houston, 6, 107.
v. Woolsey, 3.
Coke v. Pottsville Bank, 43.
Colburn v. Gould, 64, 94.
Cole v. Gibson, 26.
Coles v. Railway Co., 151.
v. Soulsby, 106.
Coleman v. Waller, 204.
Collier v. Hecht, 38.
v. Nokes, 101.
Collingham v. Sloper, 80.
Collins v. Welch, 48, 76.
Commercial Bank v. Cunningham, 192.
v. McCormick, 55.
Condict v. Flower, 171, 174, 191.
Conn v. Conn, 129.
Conery v. Hayes, 103.
Conkling v. King, 65, 94, 95.
Consequa v. Flanning, 68.
Constable v. Andrews, 177, 182.
Constantine v. Blache, 171.
Continental Bank v. Koehler, 174, 176.
v. McGeoch, 1, 76, 86, 110, 111, 157, 159, 160, 171, 204, 206.
Continental Ins. Co. v. Bank, 78.
v. Erie Ry. Co., 38.
Conton v. Parline, 17.
Converse v. Blumrich, 134.
Cook v. Blake, 39.
v. Insurance Co., 80.
v. Nathan, 135.
v. Reindskoph, 175.
Cool v. Stone, 83.
Coolbough v. Roemer, 98.
Cooling v. Noyes, 160, 172, 201.
Coon v. Stoker, 185.
Cooper v. Parker, 77, 88.
v. Phillips, 180, 208.
v. Whitney, 190.
Copenrath v. Klenly, 151.
Copley v. Highland, 82.
Corbett v. Swinburn, 107.
Corder v. Roberts, 113.
Cornell v. Taylor, 85, 86.
Corps v. Robertson, 103.
Corse v. Minnesota Grain Co., 117. 119, 120, 123.
Corser v. Paul, 43.
Cory v. Betton, 100.
v. Cory, 97.
Cotter v. O'Connell, 16.

Couch v. Miller, 40.
Coughlin v. New York Cent. Ry., 38, 43.
Coulter v. Board, 34.
Covell v. Carpenter, 106.
Cowan v. Sapp, 70, 97.
Cowling v. Ely, 104.
Cowper v. Green, 192.
v. Smith, 194.
Cox v. Cox, 89.
v. Livingston, 44.
Coyne v. Weaver, 49.
Crabtree v. Rowand, 115.
Crandall v. Cochran, 182, 216.
Cranley v. Hillary, 159, 177, 182.
Crans v. Hunter, 77, 85, 86.
Crawford v. Engram, 86.
v. Krueger, 159, 161, 171, 176, 194, 198.
v. Millpaugh, 25.
v. Rooke, 154.
v. Scovelle, 151.
v. Swearington, 198.
Craigo v. Craigo, 114.
Cribbs v. Sowle, 142, 147.
Crilly v. Rungle, 18, 106.
Crippen v. Hope, 119.
Cristchell v. Loftis, 21, 80.
Cristler v. Williams, 16.
Cromwell v. Brooklyn Ins. Co., 38.
Crondolet v. Desnoyer, 40.
Crosby v. Hillyer, 186.
Cross v. Smith, 45.
Crosser v. Radford, 172.
Crossley v. Moore, 203.
Crow v. Kimball, 7.
Crowe v. Lysaght, 39.
Crumlish v. Improvement Co., 50, 51, 52, 53.
v. Webb, 36.
Cullin v. Vulcan Iron Work, 38, 43.
Cullingworth, 165, 166, 195, 202.
Culp v. Stanford, 47.
Cumber v. Wane, 54, 55, 62.
Cumbey v. Lowett, 105.
Cummings v. Arnold, 25.
v. Baars, 36, 37, 140.
Cunningham v. Freeborn, 186.
Cunningham v. Littlefield, 39.
v. Patrick, 77.
v. Standard Co., 16, 22, 55.
Curley v. Harris, 83.
Curlewis v. Clark, 64.
Curran v. Rummell, 55.
Currie v. Steel, 134.
Currier v. Bilger, 9.
Curris v. Kennedy, 65.
Curtiss v. Brown, 74.
Cutler v. Cox, 24.
Cutter v. Mayor, 68.
v. Reynolds, 161, 164, 208.
Cuyler v. Cuyler, 32.
Cwynne v. Neaton, 155.

D

Dakota County v. Glidden, 109.
Dalpine v. Lane, 128.
Dalrymple v. Craig, 59, 60, 61, 94.
Dalson v. Arnold, 177.
Dalton v. Railway Co., 43.
Dana v. Taylor, 115.
Danglish v. Tennant, 161, 206.
Daniels v. Des Moines, 57.
v. Hallenbeck, 3, 50, 107, 110.
v. Hatch, 55, 160, 162, 164, 165.
v. Saunders, 166.
v. Wilkinson, 80.
Danzier v. Hoyt, 84.
Danzig v. Gumersell, 177, 181, 182.
Darnell v. Morehouse, 65.
Dauchy v. Goodrich, 158, 174, 181.
Davis v. Beall, 47.
v. Cockham, 72.
v. Catlettsburg Water Co., 99.
v. Detroit Boat Works, 32.
v. Dow, 18.
v. Noaks, 107.
v. Spencer, 72.
Dawson v. Beall, 59.
v. Lee, 53.
v. Lumber Co., 151.
Day v. Gardner, 54, 64.
v. Jones, 172, 194.
v. Roth, 114.
v. Studebacker, 148.

D. C. Heath v. Commonwealth, 43.
Dean v. Newhall, 9.
Deacon v. Stodhart, 167.
De Buhr v. Thompson, 55.
Dearborn v. Cross, 25.
Deckard v. Case, 39.
Decker v. Livingston, 40.
Decordora v. Korte, 47.
Dederick v. Leman, 55, 107.
De Diemar v. Van Nogenen, 46.
Deering v. Hamilton, 122.
v. Sechler, 92.
De Freist v. Bloomingdale, 115.
Delabigarra v. New Orleans, 46.
Delacroix v. Bulkley, 11, 14, 24, 25.
Deland v. Hiett, 55.
Del Campos v. Camorillo, 119.
Delta Lumber Co. v. Williams, 43.
De Louis v. Meek, 43.
Demars v. Musser, 82, 85.
Demeules v. Jewell, 21, 87.
Dennison v. Mudge, 113.
Denny v. Bean, 54.
v. Gilman, 201.
Dent v. Coleman, 110.
Denver v. Brennaman, 99.
Depuy v. Clark, 38.
Desaman v. Butler, 38.
Detloff v. Ideal Mfg. Co., 14.
Devlin v. Mayor, 68.
Devou v. Ham, 62, 160, 171.
Dewort v. Loomer, 43.
Dickinson v. Barr, 106, 114.
Dighton v. Whitney, 72.
Diller v. Brubaker, 54, 107.
Dillon v. Lee, 121.
Dobinson v. McDonald, 70.
Dodge v. Crandall, 25.
Dominick v. Michael, 150.
Dolson v. Arnold, 3, 64, 136, 177, 208.
Donaldson v. Carmichael, 69, 106.
Donley v. Bailey, 99.
Donohue v. Woodbury, 16, 17, 80, 83, 86.
Doohan v. Lake Shore, 119.
Dooley v. McEwing, 102.
Dormus v. McCormick, 39.
Doty v. Chicago R. Co., 137.
Dougherty v. Deeney, 52.
Doughty v. Savage, 172, 200, 202, 204, 205, 207.
Douglas v. Allen, 188.
v. McClelland, 92.
v. Staterlee, 45.
v. White, 9, 54, 55, 64.
Dover v. Buck, 187.
Dow v. Planter, 49.
Down v. Hatcher, 107, 110.
Downer v. Church, 88.
Doyle v. Donnelly, 74.
Draper v. Hitt, 19, 67, 74.
v. Owsley, 62, 92.
Drewry v. Davis, 70.
Drohan v. Lake Shore R. Co., 119.
Dr. Shoop v. Schowalter, 88.
Drurg v. Defountain, 11.
Dubois' Appeal, 39.
Duck v. Magell, 42.
Dudley v. Kennedy, 3.
Duff v. Hutchinson, 120.
Duffy v. Orr, 198.
Dulin v. Prince, 98.
Duluth v. Knolton, 87.
Du Moulin v. Board, 57.
Dunch v. Kent, 173.
Dunbar v. Dunbar, 30.
Dunham v. Griswold, 77, 78, 147, 148.
v. Jackson, 180.
v. Ridgel, 106.
Dunnage v. White, 138.
Dusenberry v. Hoyt, 165.
Dusenbury v. Callaghan, 52.
Durgin v. Ireland, 172, 182.
Durfer v. Abbott, 46, 104.
Durnford v. Messiter, 53.
Dyer v. Tymewell, 142.
Dyrenforth v. Palmer, 92.

E

Eadie v. Slimmon, 147.
Eagle Packet Co. v. De Friez, 137, 151.
Eames v. Prosser, 16, 21, 22.
Earl of Bath & Montague's Case, 141.
Earnest v. Parks, 185.

[The figures refer to sections]

Eastman v. Amoskeog Mafg. Co., 102.
v. Coos Bank, 43.
v. District Township, 122.
v. Green, 42.
v. Porter, 74.
Eastabrock v. Scott, 158.
Easton v. Easton, 86.
East Tenn. R. Co. v. Davis, 99.
Eaton v. Eaton, 151.
v. Knowles, 43.
v. Lincoln, 165, 208.
v. Winnie, 137.
Eaves v. Henderson, 72.
Eccles v. Union P. Ry. Co., 137.
Eckford v. De Kay, 66, 114.
Eckhert v. Wallace, 55.
Eckstein v. Reynolds, 18, 20.
Eddy v. Graves, 24.
Edens v. Williams, 189.
Edgcombe v. Rudd, 50.
Edwards v. Bryan, 6.
Edwin S. Hartwell Co. v. Bork, 199.
Egbert v. Wood, 39, 175.
Eichhatz v. Taylor, 94, 107.
Elderkin v. Fellows, 19.
Eldred v. Peterson, 12, 40, 55, 56, 62.
Eldridge v. Strenz, 202, 205.
Elfelt v. Snow, 176, 201, 207.
Ellis v. Bitzer, 3, 6, 28, 42, 74.
v. Esson, 42.
v. McHenry, 158, 208.
v. Mills, 106.
Ellison v. Dezell, 194.
Ellsworth v. Fogg, 67.
Elston v. Joseph, 151.
Elwood v. Deiferdorf, 104.
Emerson v. Baylies, 39.
v. Thompson, 104.
Emlen v. Lehigh, 180.
Emmet v. Dewhirst, 159, 170, 171, 172, 184, 200.
Emmett v. Mayor, 37.
Emmettsburg v. Donoghue, 2.
Emont's Succession, 47.
Enderby v. Corder, 172, 200.
Engbertson v. Seiberling, 59.
English v. Reid, 70.
Enneking v. Stahl, 55, 201, 206.
Ennis v. Harmony Fire Ins. Co., 38.
Ensign v. Webster, 37.
Erkens v. Nicolin, 127.
Erwin v. Ruthford, 40.
Escanaba Boom Co. v. Two Rivers Co., 93.
Esterbrook v. Scott, 119, 160, 199, 208.
Estwick v. Cailland, 190.
Evans v. Bell, 185.
v. Cross, 199.
v. Drummond, 62.
v. Gellatine, 173, 182, 208.
v. Jones, 186, 190, 198.
v. Judkins, 19.
v. Powis, 107, 167, 177, 179, 182, 208.
v. Wells, 44.
Eve v. Moseley, 55, 60.
Everingham v. Meigham, 154.
Exley v. Berryhill, 154.
Ex parte Bateson, 182.
Bennett, 182.
Clark, 167.
Dank, 180.
Gibbord, 160.
Gifford, 192.
Gilbey, 182, 200.
John B. Cross, 181.
King, 181.
Milner, 206.
Oliver, 203, 207.
Peele, 182.
Reay, 182.
Richardson, 167.
Sadler, 158, 165, 195.
Slater, 175.
Sullivan, 177.
Topping, 182.
Vere, 167, 182.
Webster, 194.
White, 187.
Wilson, 194, 195.
Wood, 182.
Exter Bank v. Gordon, 38.

F

Fabrigas v. Mostyn, 105.
Fahey v. Clarke, 172.
Fairbank v. Snow, 144.

[The figures refer to sections]

Fairbanks v. Mann, 45.
Fake v. Eddy, 68.
Falconbury v. Kendall, 172, 173, 174.
Fall v. Hazelrig, 98.
Fanam v. Brooks, 151.
Farmer v. Walter, 142, 145.
Farmers' Bank v. Hawn, 41.
v. Trester, 99.
Farmers' etc., Co. v. Chesnut, 85.
Farmers' etc., Ins. Ass'n. v. Caine, 83, 85, 107.
Farnsworth v. Dinsmore, 90.
v. Howard, 122.
Farnur v. Walter, 88.
Farr v. Summer, 150.
Farrent v. Blanchford, 149.
Farrington v. Hodgdon, 160, 167, 168, 181, 199.
Fawcett v. Gee, 165, 184, 204.
Fay v. Burditt, 151.
v. Fay, 53, 202.
Fazakerly v. McKnight, 198.
Fearson v. Thompson, 59.
Feeter v. Weber, 92, 138.
Fellows v. Stevens, 159, 162, 164, 165, 166, 167, 168, 169, 171, 179, 208.
Fensler v. Prather, 55.
Fenwick v. Phillips, 60.
Fessard v. Mugnier, 179, 208.
Fickey v. Merriam, 70.
Field v. Aldrich, 74.
v. Cappers, 110, 112.
v. Cook, 173.
v. Donoughmore, 158, 171, 188.
v. Newport, 19.
Finley v. Frost, 99.
Fidelity Co. v. Gillette, 127, 128.
Filley v. Phelps, 39.
Fire Ins. Ass'n. v. Wickham, 60.
First Nat. Bank v. National Bank. 177.
v. Prior, 43.
v. Sargent, 142, 146.
v. Steel, 171, 204.
v. Watkins, 148.
Fischer v. Railway Co., 38.
Fish v. Morse, 104.
Fisher v. Appollinaris Co., 154.
v. May, 23, 66, 86, 127.
v. Shattuck, 143, 145.
Fitch v. Haight, 107.
v. Forman, 40.
v. Scott, 43, 44.
v. Sutton, 13, 37, 55, 160, 164.
Fitts v. Hall, 150.
Fitzgerald v. Fitzgerald, 55, 85, 118, 142, 146.
v. Paisley, 119.
v. Union Stockyards Co., 42.
Fitzpatrick v. Bourne, 197.
Flack v. Garland, 177.
Flegal v. Hoover, 78, 125.
Fleming v. Gilbert, 25.
Flener v. Flener, 60.
Fletcher v. Wurgler, 55, 83.
Flummerfelt v. Flummerfelt, 151.
Foakes v. Beer, 54, 55.
Fogg v. Sanborn, 70.
Foley v. Green, 147.
v. Holtry, 118.
Folk v. Schaeffer, 102.
Foltz v. Harden, 38.
Forbes v. Petty, 121.
Ford v. Campfield, 24.
Forsyth v. Manton, 89.
Forshaw v. Higginson, 47.
Forsha v. Prosser, 43, 44.
Foshay v. Ferguson, 142, 143, 147.
Foss v. Hildreth, 121.
Foster v. Collins, 74.
v. Drew, 16, 18, 20.
v. Kennedy's Adm'r, 117.
v. Lammers, 55, 60, 61, 107.
v. Latham, 190.
v. Trull, 26, 28, 54, 72, 88.
Fowler v. Moller, 52.
v. Smith, 61.
Fraky v. Thomas, 45.
Francis v. Crywell, 107.
v. Deming, 114.
Fraley v. Thomis, 45.
Franklin Ins. Co. v. Homill, 1, 24.
Fraschieris v. Hewriques, 121.
Freamster v. Withrow, 50.
Fred v. Fred, 26, 64.

[The figures refer to sections]

Freeman v. Brehm, 43.
v. Freeman, 115.
v. Tiffany, 83.
Freeson v. Bissell, 98.
Fretelliere v. Hindes, 47.
Frey v. Fon du Lac, 104.
Frick v. Algeier, 8, 13.
v. Joseph, 74.
Fridge v. Buhler, 45.
Friermuth v. McKee, 106.
Frieberg v. Freitschke, 204.
Friedburg v. Knight, 113.
Frisbie v. Larned, 65, 115.
Fritz v. Fritz, 74.
Frize v. Randall, 158.
Frognell v. Lewelyn, 101.
Frost v. Gage, 201, 207.
v. Johnson, 74.
Fuller v. Burrel, 113.
v. Kemp, 2, 13, 16, 17, 21, 22, 69, 80.
v. Roberts, 142.
v. Smith, 15, 20, 70.
v. The Town, 102.
Fulton v. Monona County, 81.

G

Gabriel v. Dresser, 107.
Gaffney v. Chapman, 66.
Gage v. Punchard, 38.
Gallaher v. Lincoln, 57.
Galveston, etc., R. R. Co. v. Cade, 118, 119, 137.
Galvin v. Annan, 118.
Gandolfo v. Appleton, 78.
Gans v. Thieme, 53.
Garbutt L. Co. v. Wilcox, 82, 83.
Gardner v. Callender, 72.
v. Lewis, 159, 176, 183.
v. Short, 94.
Garlick v. James, 38.
Garner v. Mangum, 121.
Garnier v. Papin, 158, 159, 166, 199.
Garrard v. Lauderdale, 163, 186.
v. Woolner, 182.
Garrard v. Woolner, 169.
Garret v. Mason, 9.
Garrod v. Simpson, 208.
Gaskin v. Wells, 115.
Gasscock v. Hamilton, 112.
Gassett v. Audorer, 16.
Gates v. Fisk, 103.
Gavin v. Annan, 66, 106.
Geary v. Page, 3.
Geisher v. Kershner, 65.
Genberling v. Spaulding, 88.
George v. Chicago, etc., R. Co., 88, 109.
George Knapp & Co. v. Pepsin, 22.
Gernow v. McCar, 52.
Gerrish v. Sweetser, 100, 102.
Getty v. Devlin, 118.
Gibbons v. Bellas, 184.
v. Caunt, 86.
v. Vouillian, 158, 208.
Gibbs v. Wall, 116.
Giboney v. Insurance Co., 5.
Gibson v. Soper, 151.
Gilbert v. Finch, 42.
Gilfillan v. Farrington, 65, 106, 171.
Gilford v. Ware, 163, 164, 170.
Gill v. Bradley, 179.
Gilmore v. Thompson, 203.
Gilson v. Nesson, 72.
Ginn v. Coal Co., 21.
Girard v. Car Wheel Co., 151.
Gladish v. Pennsylvania R. Co., 140.
Gleason v. Allen, 5.
v. Clark, 103.
Glenn v. Smith, 64.
Glouchester Bank v. Worchester, 195.
Goble v. Bank, 107.
Goddard v. O'Brien, 54, 62.
Good v. Cheesman, 74, 158, 160, 167, 171, 181, 183, 196.
Goodloe v. Empson, 22.
Goodnow v. Smith, 40, 60.
Goodrich v. Lincoln, 171.
v. Proctor, 188.
v. Sanderson, 23, 84.
v. Stanley, 23, 74, 167, 196.
Goodwin v. Blake, 202.
v. Follett, 55, 83.
v. National Acc. Ass'n., 14.
v. Smith, 62.

[The figures refer to sections]

Goldsmith v. Coleman, 90.
Gordon v. Butler, 137.
v. Cannon, 189.
v. Gordon, 97.
v. Moore, 61.
v. Nugent, 24.
v. Price, 64.
v. Robertson, 171.
Gould v. Cayuga Bank, 117, 118, 119, 120, 121, 122.
v. Cremer, 107.
Gue v. Kline, 115.
Guichard v. Brande, 14.
Guild v. Butler, 65.
Gulf, C. & S. F. R. Co. v. Bagly, 99.
v. Gordon, 74.
v. Harriett, 74.
v. Hugett, 137.
Guldager v. Rockwell, 9.
Guliano v. Whitenack, 109.
Gulledge v. Barry, 45.
Guenther v. State, 93.
Gumbey v. Lovett, 102.
Gunther v. Lee, 42.
Gunn v. McAden, 64.
Grace v. Helin, 104, 123.
Gracy v. St. Louis, 56.
Grabenheimer v. Blum, 201, 206.
Graham v. Ackroyd, 199.
v. Anderson, 188.
v. Gibson, 107.
v. Hester, 47.
v. Moyer, 84, 119, 138, 157, 201.
Grand Lodge v. Grand Lodge, 106.
Grand Rapids R. Co. v. Cheboygan, 38.
Grannis v. Hooker, 32, 139.
Grant v. Holden, 38.
v. Porter, 10, 61.
Grantham v. Hawley, 189.
Gray v. Barton, 67.
v. Herman, 50, 51, 52.
v. Hill, 186.
Grece v. Helen, 46.
Green v. Folgham, 189.
v. Helm, 123.
v. Lancaster Co., 48, 81.
v. Langdon, 112.
Green v. Morris, 188.
v. McArthur, 177.
v. Wynn, 195.
Greenfield v. Kennett, 101.
Greenlee v. Mosnot, 22, 76, 85, 162
Greenwood v. Lidbetter, 162, 164.
Greenough v. Turner, 189.
Greenup v. Strong, 98.
Greer v. Shirer, 172, 174, 182, 206.
Griffin v. Pothey, 52.
Griffith v. Creighton, 66.
v. Owen, 6.
Griggs v. Bank, 53.
v. Voorhies, 112.
Grim v. School Dist., 148.
Grimmell v. Warner, 115.
Grinnell v. Spink, 55, 106.
Groff v. Hansel, 99.
Groom v. Wray, 140.
Groshon v. Grant, 50.
Grossman v. Lauber, 40.
Grove v. Buch, 97, 114.
Grumley v. Webb, 30, 36, 115.
Grundy v. Johnson, 158.
Grymes v. Blofield, 50.
v. Sanders, 40.
Gue v. Kline, 115.

H

Hackley v. Headly, 142, 146, 148.
Hadley Falls Bank v. May, 177, 182.
Hagan's App., 204.
Hagen v. Townsend, 21.
Hagerty v. Simpson, 95, 96.
Haggarth v. Wearing, 135.
Hagy v. Avery, 47.
Haile v. Lillie, 104.
v. McGhee, 46.
Hait v. Haule, 189.
Hale v. Grogan, 112.
Hale v. Kobbert, 151.
Hale v. Owensby, 140.
Hall v. Clagett, 97.
v. Baker, 48, 80.
v. Flockton, 208.
v. Gavitt, 57.
v. Gray, 40.

[The figures refer to sections]

Hall v. Hutchons, 194.
v. Levy, 208.
v. Merill, 165, 177.
v. Reed, 126.
v. Seabright, 4.
v. Smith, 74, 86, 93, 127.
v. Wright, 47.
Hall Safe Co. v. Howell, 43.
Halley v. Troester, 151.
Hallock v. Loft, 43.
Halmer v. Viner, 199.
Halsey v. Fairbanks, 175.
Ham v. Potter, 24, 118.
Hamill v. Copeland, 94.
Hamilton v. Coons, 106.
v. Van Rensselaer, 68.
Hammond v. Antonia, 113.
v. Hopping, 154.
Hancock v. Field, 32.
Hand Lumber Co. v. Hall, 11.
Hanley v. Noyes, 77, 78, 94, 117, 118, 119.
Hanover v. Blake, 205, 206, 207.
Hanover Ins. Co. v. Stoddard, 99.
Hansbrough v. Peck, 55.
Hanson v. McCann, 55, 59.
v. Todd, 17.
Harbeck v. Pupin, 175.
Harbour v. Morgan, 5.
Hardcastle v. Fisher, 188.
Hardesty v. Graham, 65.
Hardy v. Coe, 55, 106.
Harding v. Commercial Land Co., 3, 60.
Harland v. Binks, 186.
Harley v. Riverside Mills, 119.
Harloe v. Foster, 199.
Harmony v. Bingham, 80.
Harrhy v. Wall, 198.
Harriman v. Harriman, 54, 55, 61, 64, 65, 69.
Harrington v. Close, 40, 55.
Harris v. Battum, 113.
v. Carmody, 147.
Harrison v. Barney, 40.
v. Close, 9, 40, 62, 106.
v. Gamble, 177, 179, 182.
v. Hicks, 50, 52, 53.
v. Sterry, 39.
Harrison's Devisees v. Baker, 105.
Harron v. Farrow's Heirs, 43.
Hart v. Accident Ass'n, 77, 94.
v. Alexander, 62.
v. Boller, 74.
v. Smith, 182, 208.
v. Western Ry. Co., 38.
Harper v. Graham, 63.
v. Hampton, 24.
Hartigan v. Dickson, 42.
v. Southern Pac. Ry. Co., 45.
Hartford v. Hartford, 168.
Hartford Bridge Co. v. Granger, 100, 102.
Hartford F. Ins. Co. v. Kirkpatrick, 110, 121.
Harvey v. Hunt, 181.
v. Tama Co., 50.
Hascomb v. Standing, 143.
Haskins v. Newcomb, 153, 157, 160.
Hascock v. Rogers, 62.
Hasted v. Dodge, 66.
Hasting v. Baldwin, 191.
v. Lovejoy, 25.
v. Thorley, 19.
Hatch v. Smith, 34, 190.
Hathaway v. Orient Ins. Co., 38.
Haven v. Fester, 130.
v. Neal, 117.
Havens v. Hassey, 175.
Hatton v. Eyre, 9.
Hawkshaw v. Perkins, 175.
v. Rawlings, 50.
Hawley v. Beverly, 160, 176, 183, 199.
v. Foot, 3, 5, 65.
v. Peacock, 112.
Haws v. Burlington, etc., Ry. Co., 119, 150.
v. Merchant, 143.
Hayes v. Atlantic, etc., R. Co., 119.
Hayes v. Insurance Co., 47.
Hazard v. Mare, 179, 208.
H. C. Pollman v. St. Louis, 16.
Headley v. Hackley, 136.
Heaps v. Durham, 47, 92, 145, 153.
Hearn v. Kiehl, 3, 4, 5, 7, 101, 160.
Heath v. Doyle, 107.
v. Potlach Co., 85.

Heathcote v. Crookshank, 5, 160.
v. Paignow, 155.
Heavenrich v. Steel, 12, 125.
Heck v. Missouri Pac. R. Co., 113.
Heden v. Minneapolis, 135, 137, 140.
Hedley v. Bainbridge, 39.
Hedlum v. Holy, 119.
Hedrick v. Wagoner, 80.
Heffelfinger v. Hummel, 78.
Heffron v. Chapin, 115.
Hefter v. Cohn, 161, 176, 201, 205, 206.
v. Spunner, 43.
Hein v. Carron, 5, 28, 107.
Heirs of Burney v. Ludeling, 150.
Helling v. United Order, 140.
Henderson v. Brand, 121.
v. Cass Co., 19.
v. Hayter, 116.
v. McRea, 94.
v. San Antonio, etc., R. Co., 134, 135.
Hendrickson v. Beens, 55.
v. Hendrickson, 119.
Hendrix v. Bull, 38.
Henning v. Connor, 109.
Hennessey v. St. Paul City R. Co., 1, 2, 13.
Henry v. Cass Co. Mill, 92.
v. Patterson, 158, 159, 160, 163, 170, 182.
Henselman v. Doyle, 13.
Henshaw v. Summer, 190.
Henson v. Stever, 54.
Henwood v. Oliver, 18, 19.
Hermann v. Orcutt, 114.
Herr v. Stough, 99.
Herrington v. Lowman, 45.
Herrman v. Laemmle, 33.
Hersey v. Walsh, 44.
Herzog v. Sawyer, 25.
Hespen v. Hespen, 33.
Hewitt v. Railway Co., 13.
Hewett v. Crane, 135.
Heysham v. Dettre, 148.
Hicks v. Leaton, 37.
v. Stevens, 137.
v. Wisconsin Cent. R. Co., 79.
Higgins v. Boom, 142.
v. Dole, 10, 185.
v. Mayers, 202.
v. Newell, 161.
v. Petts, 207.
High v. Emmerson, 43.
Higley v. Burlington Ry., 110.
Hilburn v. Phœnix Ins. Co., 99.
Hill v. Buckminster, 104.
v. Johnson, 85.
v. Northern Pac. R. Co., 119.
v. Parsons, 92.
v. Syracuse, 29.
v. Wertheimer, 168, 171, 176, 182, 183.
Hill-Ingham Co. v. Neal, 77.
Hills v. Mesnard, 72.
v. Sommer, 22.
Hillstead v. Lee, 16, 18, 21, 22.
Hinckle v. Minneapolis, etc., R. Co., 15, 82, 83, 116.
Hinckley v. Avery, 55, 59, 176.
Hitchcock v. Hassler, 6.
Hoadley v. Jenkins, 179.
Hobson v. Watson, 38.
Hodges v. Truax, 55.
Hoeger v. Ohio Valley, etc., Co., 113.
Hoe's Case, 32.
Hoge v. Hoge, 86, 132.
Hoidale v. Wood, 7, 55.
Hoit v. Underhill, 104.
Hoitt v. Holcomb, 113.
Holbird v. Anderson, 190.
Holcomb v. Stimpson, 74.
Holladay v. Beekman, 85.
Holmer v. Viner, 199.
Holmes v. Love, 172.
Holt v. Brown, 122.
Holton v. Bent, 198.
v. Noble, 107.
Home Ins. Co. v. Baltimore W. Co., 99, 102.
v. Bredehoff, 85, 92, 131, 140.
v. Howard, 117.
v. Western Transp. Co., 114.
Homuth v. Metropolitan St. R. Co., 137.

Hooker v. Hyde, 62, 85.
v. Knob, 154, 155.
Hoover v. Epler, 53.
Hopkins v. Banks, 103.
Horn v. Tuft, 189.
Horsley v. Cox, 106.
Horton v. Horton, 106, 112.
v. Riley, 203.
Horton's Appeal, 189.
Hosack v. Rogers, 9, 39, 40, 175, 193.
Hosier v. Eliason, 112.
Hosler v. Hursh, 5.
Houbie v. Valkening, 179.
Houdeck v. Merchants' Ins. Co., 99.
Housenick v. Miler, 43.
Houston v. McCarthy, 137.
Howard v. McMillan, 121, 138.
v. Norton, 37, 64, 66.
Howden v. Haigh, 207.
Howe v. Mackay, 66, 106.
Hoxsie v. Lumber Co., 114.
Hoyt v. Cote, 80.
v. Sprague, 16.
Hubbard v. Railway Co., 42.
Huckins v. Hunt, 207.
Hudson v. Revett, 166, 198.
v. Williams, 99, 102.
Hughes v. Alexander, 202.
v. Wheeler, 11, 14.
Hull v. Johnson, 22, 87.
Humphrey v. Bank, 95, 96.
v. Merriam, 134, 140.
Hunt v. Chapin, 39.
v. Clark, 72.
v. Ogden, 22, 115.
v. Rousmanier's Adm'r., 128.
v. Wheeler, 94.
Hunter v. Bayles, 98.
v. Moul, 65.
v. Waynick, 175.
Huntington v. Clark, 207.
Hurst v. Taylor, 85.
Hust v. Clark, 39.
Husbant v. Davis, 40.
Hussey v. Cross, 16, 22.
Hutchinson v. Wallace, 80, 95.
Hutton v. Stoddart, 60.
Hyde v. Wats, 177, 181, 182.
Hyslop v. Clark, 190.

I

Ilderton v. Castrique, 180, 208.
Illinois Central R. Co. v. Nelson, 99.
v. Reed, 71, 112.
Illinois Ins. Co. v. Archdeacon, 77, 78.
Illinois Land Co. v. Bonner, 150.
Illinois Life Ins. Co. v. Benner, 8.
Illinois Steel Co. v. Ferguson, 140.
Indiana, etc., R. Co. v. Fowler, 119.
Indiana U. T. Co. v. McKinney, 113.
Ingersoll v. Roe, 143.
Ingle v. Angell, 81.
Ingram v. Hilton, 106.
Inman v. Griswold, 55.
In Matter of Leslie, 184.
In re Alexander, 49.
Baker, 173.
Barber, 171.
Black Diamond Copper Mining Co., 74.
Clement, 187.
Decker, 168, 182.
Farrell, 191.
Hatton, 208.
Melbourn Locomotive Works, 176.
Meredith, 171.
Merriman's Est., 10.
Mills, 93.
Nethaway, 38.
Patten, 45.
Perbhefter, 191.
Richardson's Estate, 45.
Shotwell, 49.
Smith, 194.
Standard Oak Veneer Co., 191.
Stock, 182.
Sturges, 182.
Sullivan, 179, 180.
Whaley, 162, 186.
Ireland v. Potter, 188.
International, etc., R. Co. v. Shuford, 137.
Irving v. Humphry, 136, 201.
v. Kirkpatrick, 138.
v. Millbank, 42.
v. Vitch, 182.
Irwin v. Gregory, 98.
v. Keen, 188.
Isaacs v. Boyd, 47.

J

Jackman v. Mitchell, 184, 195, 202, 203, 205, 206.
Jackson v. Bartlett, 44.
v. Clopton, 80.
v. Hodges, 201.
v. Mitchell, 205.
v. Security Mut. Ins. Co., 69.
v. Stackhouse, 36, 40, 55.
v. Packard, 154.
Jacobs v. Day, 106.
v. Jacobs, 46.
v. Marks, 114.
Jacoby v. Black, 80.
Jacot v. Emmett, 68.
Jaffray v. Davis, 64, 74.
James v. David, 3, 5.
v. Davit, 54.
v. Isaac, 50, 108.
Jaques v. Denehie, 107.
Jefferson v. Burham, 115.
v. Mutual Life Ins. Co., 45.
v. Rust, 151.
Jeffrey v. Davis, 54.
Jeffry v. Crane, 62.
Jenks v. Burr, 16, 17.
v. Fritz, 131.
Jenkins v. Hopkins, 115.
v. Insurance Co., 53, 120.
v. Jenkins, 119, 150.
v. Schields, 45, 46.
Jenness v. Jones, 99, 102.
v. Lane, 2, 62, 64.
Jennings v. Ft. Worth, 74.
v. Jennings, 82, 86, 90.
Jervis v. Berridge, 111.
Jessup v. Chicago, etc., R. Co., 117.
Jevron v. Bush, 49.
Jewett v. Pettitt, 117.
J. M. Robinson v. Meyers, 194.
Joannin v. Ogilvie, 146.
Joebisch v. Von Minden, 185, 198.
Johnson v. Baker, 172, 200.
v. Brannan, 54, 68, 107.
v. Chicago, etc., R. Co., 140.
v. Collins, 114.
v. Dun, 43, 44.
Johnson v. Johnson, 97.
v. Kershaw, 171, 173.
v. Parker, 159, 165, 171, 172, 201.
v. Zink, 53.
Johnson County v. Chamberlain, 56.
Johnson's Appeal, 45, 46.
Jolly v. Wallis, 157, 160, 165.
Jones v. Alabama, etc., R. Co., 119.
v. Broadhurst, 50, 108.
v. Bullett, 60, 66.
v. Fennimore, 8, 18, 114.
v. Foxall, 100, 101.
v. Horsey, 43.
v. Innis, 43.
v. Johnson, 116.
v. Jones, 46.
v. Lusk, 39.
v. Peet, 66, 95.
v. Perkins, 54, 60.
v. Pullen, 94.
v. Qumnipiack Bank, 40.
v. Ransom, 26, 43, 65.
v. Ricketts, 55, 69.
v. Sawkins, 6, 72.
v. Tallant, 93.
v. Wait, 2.
v. Wright, 192.
Jordan v. Elliott, 142.
v. Great Nor. Ry. Co., 115.
v. Humphrey, 154.
v. Valkenning, 135.
Jorgensen v. Kingsley, 78.
Joslyn v. Capron, 37.
Judd v. Oil Co., 42.

K

Kahn v. Gumberts, 206.
v. Metz, 114.
Kaiser v. Hancock, 43.
Kane v. Kane, 119, 150.
Kansas City R. Co. v. Hicks, 9.
Karn v. Blackford, 188, 192.
Kassing v. Walter, 100.
Kay v. Meyers, 21.
Kaye v. Waghorn, 24, 108.
Kauffman v. Phillips, 38.
Kearseley v. Cole, 166, 195.

[The figures refer to sections]

Kearslake v. Morgan, 106.
Keck v. Insurance Co., 17, 82.
Kee v. Kee, 45.
Keeler v. Salisbury, 25, 44, 55, 64, 105.
Kehn v. State, 57.
Kelchner v. Forney, 53.
Keller v. Strong, 55.
v. Baker, 106.
Kellogg v. Richards, 37, 54, 64, 65, 74.
Kelly v. Bullock, 16.
v. Chicago, etc., R. Co., 45, 46, 140, 151.
v. Hopkins, 85.
v. Louisville, etc., R. Co., 118, 119.
v. Pioneer Press, 140.
v. Wright, 43.
Kelsey v. Hobby, 109.
Kemmerer v. Kokendifer, 64.
Kemp v. Balls, 50, 108.
v. Reymond, 85.
Kenan v. Holloway, 51, 53.
Kent v. Reynolds, 67.
Kenyon v. Southerland, 106, 109.
Kentucky River L. Co. v. Moore, 32.
Kercheval v. Doty, 85, 86, 136.
Kerby v. Taylor, 40.
Kerr v. Sanders, 70.
Kershaw v. Robinson, 106.
Kesterton v. Sobery, 167, 182, 187.
Ketcham v. Clark, 189.
Ketchem v. Gulick, 115.
Kidder v. Blake, 23, 155.
Kiefer v. Rodgers, 120.
Kiler v. Wohletz, 148.
Kilmartin v. Chicago, etc., R. Co., 82, 140, 151.
Kimball v. Wilson, 107–109.
Kimbrough v. Curtis, 98.
King v. Brewer, 73.
v. Hoar, 40.
v. Miller, 93.
v. Phillips, 80.
Kinkinfore v. Tree, 180.
Kinney v. American Yeomen, 4, 6, 77, 94, 95, 96, 121.
v. Kierman, 32–35.
Kinsing v. Bartholew, 172, 174.
Kinsler v. Pope, 74.
Kiskadden v. United States, 58.
Kirby v. Berguin, 143, 144, 148.
v. Schoonmaker, 175.
v. Taylor, 42.
Kirchevel v. Doty, 85.
Kirchner v. New Home Ins. Co., 29, 132.
v. New Home Sew. Machine Co., 121.
Kirchoff v. Voss, 60.
Kirkpatrick v. Tipton, 78.
Kleimann v. Geiselmann, 53.
Klein v. French, 46.
Kley v. Healy, 121.
Klyce v. Broyles, 98.
Knapp v. Hyde, 142.
v. Roche, 42.
Knappen v. Freeman, 111, 120.
Knickerbocker v. Colver, 42.
v. Voorhees, 38.
Knight v. Burgess, 187.
v. Hunt, 161, 199, 206.
Knights v. Clayton, 47.
Knotts v. Preble, 136, 155.
Knowlton v. Black, 70.
v. Schultz, 144.
Knoxville, etc., R. Co. v. Acuff, 111, 119.
Koopidlowski v. Pfister, 42.
Kromer v. Heim, 3, 4, 54, 74, 107.
Kronenberger v. Binz, 78.
Kruetson v. Krook, 30.
Kullman v. Greenebaum, 206.
Kutcher v. Love, 102.

L

Laboyteacox v. Swigart, 65.
Laird v. Campbell, 160, 171, 172, 174, 176, 201.
Lake v. Tysen, 115.
Lamb v. Lamb, 33.
Lambert v. Shutter, 95, 174.
Lampkins v. Vicksburg, etc., R. Co., 91.
Lancaster v. Elce, 188.

[The figures refer to sections]

Lane v. Applegate, 106.
v. Husband, 173.
v. Dayton Coal Co., 119.
Lanes v. Squires, 158, 164, 182, 208.
Langdon v. Stokes, 25.
Lansing v. Gaines, 103.
Lanyan v. Davey, 199.
Larkins v. Hardenbrock, 67.
Larned v. Dubuque, 38, 43, 59, 93.
Laroe v. Dairy, 16.
Latham v. Hartford, 16.
Lathrop v. King, 202.
v. Page, 55.
Latter v. White, 171, 182.
Lattimore v. Hanson, 24, 25, 40, 54.
Laughman v. Sun Pipe Line Co., 85.
Laurence v. Hopkins, 80.
Lauzon v. Belleheumer, 29, 93, 128.
Lawrence v. Clark, 202.
Lawver v. Slingerland, 189.
Lazell v. Pinnick, 151.
Leach v. Owensboro St. R. Co., 45, 46.
Leaird v. Smith, 98.
Leak v. Waller, 167.
Leake v. Young, 177, 200.
Lease v. Gillette, 13.
Leavitt v. Morrow, 50, 51.
Leaycroft v. Dempsey, 78.
Le Changeur v. Gravier, 161.
Leddy v. Banney, 42.
Lee v. Dodd, 16, 17.
v. Lancashire, etc., R. Co., 119.
v. Oppenheimer, 55.
v. Tinken, 63.
Leeson v. Anderson, 5, 12, 55, 121.
Leicester v. Rose, 160, 165, 204.
Leigh v. Berry, 177, 782.
Leonard v. Winslow, 39.
Le Page v. McCrea, 65, 165, 175, 192.
Leslie v. Baillie, 130.
v. Keepers, 110, 111, 121.
Letcher v. Bank, 65.
Levenson v. Gillen, 21.
Levy v. Very, 24, 66.
Lewinson v. Montauk, 17, 18.
Lewis v. Donohue, 73, 155.
v. Harris, 102.
v. Insurance Co., 123.
Lewis v. Jones, 65, 166, 177, 194, 202, 206.
v. Pendegast, 98.
v. Woodworth, 103.
Lewless v. Detroit R. Co., 140.
Liebbrandt v. Mayron Lodge, 122.
Light Co. v. Rambold, 151.
Ligon v. Dunn, 24, 108.
Lim v. Nelson, 55.
Lincoln Bank v. Allen, 65.
Lincoln Trust Co. v. Davis, 48.
Lindsey v. Gager, 107.
v. Moore, 32.
Line v. Nelson, 4.
Lipman v. Lowits, 197, 198.
Litchfield v. Barwell, 104.
v. White, 187.
v. Winslow, 36.
Littell v. Elleson, 33.
Livingston v. Bishop, 42.
v. Penn, 138.
Lobdell v. Nauvoo Bank, 184.
Lockhart v. Watt, 43.
Lofts v. Hudson, 100.
Logan v. Davidson, 116.
Loney v. Bailey, 55, 186.
Long v. Long, 42.
Longridge v. Dorvill, 86.
Longstreet v. Ketchem, 106.
Looby v. West Troy, 106.
Loomis v. Wainwright, 158.
Lord v. Association, 151.
v. Tiffany, 42.
Louisville v. Wheat, 94, 96.
Louisville Dry Goods Co. v. Lanman, 191.
Louisville, etc., Co. v. Clemonts, 119.
Louisville R. Co. v. Carter, 137.
v. Helm, 123.
v. McElroy, 119.
v. Veneer Mills Co., 123.
v. Wright, 99.
Love v. Van Every, 94.
Lovejoy v. Murray, 41.
Lowe v. Eginton, 24, 159, 164, 208.
Lower v. Clement, 177, 181, 208.
Lubbock v. Tribe, 78.
Lucas v. Wilkinson, 50.

Lucas County v. Hunt, 86.
Luce v. Springfield Ins. Co., 77.
Luddington v. Bell, 9, 39, 40, 54, 62.
Luehrmann v. St. Louis Fur. Co., 202, 206.
Lumley v. Wabash R. Co., 137.
Lunday v. Thomas, 47.
Lusted v. Chicago R. Co., 131, 151.
Luton v. Wilcox, 47.
Lyman v. Gedney, 98.
Lynch v. Jennings, 98.
v. Reynolds, 9.
Lynde v. Budd, 150.
Lynn v. Bruce, 3, 7, 40.
Lyon v. Jerome, 43.
Lysaght v. Phillips, 194, 195.
Lytle v. Ault, 62.

M

McAllister v. Engle, 140.
v. Sexton, 115.
McBride v. Hogan, 39.
v. Scott, 42.
McCall v. Peachy, 45.
McCallion v. Saving Society, 80.
McCarty v. Belom, 189.
McCarver v. Nealey, 43.
McClintock v. Cummins, 143.
McClung v. Lyster, 94, 96.
McCollough v. Franklin, 26.
McCoon v. Smith, 104.
McCormick v. Fuller, 105.
v. Garrett, 130.
v. Hamilton, 147.
v. Har. Machine Co., 124.
v. Littler, 151.
McCrary v. Slaughter, 39.
McCreary v. McCreary, 66, 106.
McCreery v. Day, 68, 74.
McDaniels v. Bank, 17, 130, 131.
v. Lapham, 16, 83, 84.
McEleroy v. Tulane, 98.
McFarland Adm'r. v. Louisville, etc., R. Co., 45, 46.
McGee v. San Jose, 53.
McGiverin v. Keefe, 73.
McGlynn v. Billings, 10.
v. Scott, 14, 82, 85.
McIntyre v. Kennedy, 64.
v. Williamson, 36.
McIntosh v. Johnson, 55.
McKay v. Meyers, 14.
McKean v. Read, 5, 7.
McKennon v. Holden, 21, 114.
McKenzie v. Culbreth, 55, 60.
v. Harmon, 67.
v. Harrison, 25, 67.
v. Stefford, 58.
McKenty v. Oceanus Mfg. Co., 22.
McKnight v. Dunlop, 3, 14.
McKinney v. Bright, 39.
McKinster v. Hitchcock, 78.
McLaven v. Baxter, 168.
McLean v. Railway Co., 15.
McLendon v. Wilson, 115.
McLendon Bros. v. Finch, 194.
McLeod v. Adams, 91.
McMannomy v. Railway Co., 182.
McMichael v. Kilmer, 119, 138.
McNamara v. Boston El. R. Co., 131, 140, 151.
McNight v. McNight, 104.
McNutt v. King, 189.
McPherson v. Fargo, 98.
McReady v. Rogers, 42.
McWhorter v. Wright, 190.
Mabbett v. White, 39, 175.
Mack v. Miller, 20.
Mackenzie v. Mackenzie, 117, 181, 184.
MacLean v. Stewart, 175.
Maddox v. Bevans, 43, 54, 55.
v. Blain, 116.
Magee v. Kast, 166, 172, 173, 177.
Magill v. Kauffman, 105.
Mahle v. Elder, 47.
Mahler v. Corder, 134.
Maine v. Chicago, etc., Ry. Co., 119-123.
Makepeace v. Harvard, 4, 94, 95, 96.
Mallalieu v. Hodgson, 198, 207.
Mallory v. Moriner, 43.
Malmstrom v. Railway Co., 119.
Malpass v. Graves, 47.
Malsons v. Connelly, 192.
Mamby v. Berwick, 79.
Mandt Wagon Co. v. Fuller, 112.
Maness v. Henry, 112.

[The figures refer to sections]

Mannakee v. McCloskey, 55, 65.
Manning v. Albee, 121.
Mansfield v. Rutland, 165, 182.
Mapes v. Minneapolis Ry. Co., 119, 140.
Marple v. Minneapolis & St. L. R. Co., 118, 134.
Mare v. Warner, 203.
Margetson v. Aitken, 198, 199.
Market's Est. v. Gobe, 90.
Martin v. Adams, 201, 202, 206.
v. Accident Ins. Co., 43, 69.
v. Ask, 121.
v. Bott, 19.
v. United States, 23, 48.
v. White, 66.
Marbury v. Brooks, 190.
Marion v. Field, 6.
v. Heimbaugh, 13, 16, 87.
Marr v. Burlington Ry. Co., 58.
Marquard v. New York Mfg. Co., 189.
Marsden v. Good, 20.
Marshall v. Ballard, 61.
v. Mathers, 112.
v. Moody, 13.
Marvin v. Richmond, 102.
M. A. Seed v. Wunderlich, 168, 172, 174, 198.
Mason v. Campbell, 10.
v. United States, 48.
Mason v. Wickersham, 8, 62.
Massillion Eng. Co. v. Prouty, 16, 77, 94.
Massing v. The State, 81.
Masson v. Bovet, 117, 118.
Matheney v. Edwards, 38, 80.
Mathewson v. Henderson, 177.
Mathews v. Taylor, 172.
Mathis v. Bryson, 83.
Matter of Farley, 45, 46.
Leslie, 178, 192.
Loper, 45, 176.
Oatman, 45.
Maurer's Est., 94.
Mawson v. Stock, 195.
Maxwell v. Day, 62.
May v. King, 25, 72.
v. Le Claire, 94.
Maynard v. Johnson, 115.
Mayo v. Stevens, 70.
Maze v. Miller, 37, 64.
Mechanic's Bank v. Hazard, 55.
v. Huston, 62.
Meech v. Lee, 143, 147, 153.
Meeker v. Regua, 59.
M. E. Church v. Robbins, 174.
Melchoir v. McCarthy, 154.
Melhop v. Tathwell, 158, 177, 179, 182.
Melroy v. Kimmerer, 59.
Mellen v. Goldsmith, 157, 162, 165, 169.
Memphis v. Brown, 4, 70.
Merchants' Bank v. Curtiss, 42.
v. Spaulding, 130.
Mercier v. Mercier, 97.
Merriman's Est., In re, 10.
Merritt v. Bucknam, 193.
Merry v. Allen, 74.
Mesorole v. Archer, 180.
Metcalf v. Rycroft, 175.
Meyers v. Fishburn, 151.
v. Hass, 137.
v. Meinwrath, 12.
v. McKee, 199.
v. Zoll, 47.
Mhoon v. Wilkinson, 98.
Miedreich v. Rank, 38, 89.
Mikolajewski v. Pugell, 80.
Miles v. Asp, 13, 91.
v. Gresham, 49.
v. Kaigler, 47.
Miller v. Chippewa Co., 128.
v. Fenton, 40, 42, 109.
v. Fox, 70, 112.
v. Holden, 20.
v. Lathrop, 105.
v. Mutual Reserve F. Ass'n., 16.
Milligan v. Solomon, 177, 181.
Mills County v. Burlington Ry. Co., 48.
Mills' Heirs v. Lee, 138.
Milnes v. Vanhorn, 24.
Minneapolis Bank v. Steele, 171.
Minneapolis Ry. Co. v. Chisholm, 98.
Minor v. Fike, 85.

[The figures refer to sections]

Missouri Coal Co. v. Consolidated Coal Co., 87.
Missouri Pac. R. Co. v. Goodholm, 119, 137.
Mitchell v. Allen, 78.
v. Craig, 66.
v. Hawley, 1, 3, 8, 13, 24, 26, 114.
v. King, 19.
v. Knight, 53.
v. Long, 98, 151.
v. Wheaton, 88.
Moberly v. Alexander, 117.
Molyneaux v. Collier, 59.
Monby v. Bewick, 151.
Montague's Adm'r v. Massey, 57.
Montgomery v. Lampton, 185.
Montgomery v. Pickering, 118.
Montgomery Bank v. Buggy Co., 158, 160.
v. Ohio Co., 182.
Monor v. Graw, 39.
Moody v. Leavett, 24.
v. Moody, 53.
Mooney v. Bossom, 158, 207.
Moore v. Graus, 99.
v. Hitchcock, 102.
v. Norman, 19.
v. White, 104.
Moran v. Abbey, 1, 52.
Mordecai v. Stewart, 55.
Morehouse v. Bank, 72, 74.
Morgan v. Dyer, 109.
v. Smith, 40.
Moritz v. Koenig, 91.
Morrill v. Baggott, 66.
Morris v. Great Nor. R. Co., 118, 119.
Morrison v. Lincoln, 49.
v. Most, 189.
Morse v. Crofort, 188.
v. Woodworth, 121.
Mosier's Appeal, 53.
Mosley v. Missouri Pac. R. Co., 102.
Moss v. Goodman, 189.
Motley v. Southern F. Co., 8.
Moulton v. Aldrich, 110.
v. Holmes, 45.
Mutual Ins. Co. v. Hutchinson, 38.
Mulholland v. Bartlett, 86.
Mullen v. Goldsmith, 157.
v. Railway Co., 119, 159.
Muller v. Eno, 50.
Mullin v. Martin, 160, 182.
Multnomah v. Dekum, 48, 138.
Mulville v. Insurance Co., 45.
Mundhenk v. Central Iowa R. Co., 99, 105.
Murchie v. McIntyre, 160, 171, 172.
Murdock v. Williams, 116.
Murphy v. Kostner, 69.
v. Lever, 115.
v. New York, 30, 36.
Murray v. Coster, 99, 102.
v. Blatchford, 45.
v. Judson, 188.
v. Rigg, 190, 191.
v. Shaw, 66.
Musgat v. Wybro, 204, 206.
Musolf v. Duluth Elec. Co., 42.
Musselman v. Cravens, 151.
Myers v. Byington, 179.
Mygatt v. Tarbell, 43.

N

N. Frank & Son v. Gump, 62.
Nabours v. Cooke, 131.
Nall v. McIntire, 39.
Nassoiy v. Tomilson, 22, 80, 83, 84, 85.
Nathan v. Smith, 88.
National Bank v. Cushiug, 50.
National Bank v. Mapes, 39.
v. McGeoch, 201, 202.
v. Potter, 182.
National Imp. Co. v. Makin, 119, 124.
National Life Ins. Co. v. Ninch, 131.
National T. R. Co. v. Feypel, 160.
Naylor v. Winch, 90, 128.
Neal v. Cowles, 109.
v. Handley, 66.
v. Lamar, 46.
v. Sheffield, 25, 108.
Neale v. Neale, 97.
Nedan v. White R. L. Co., 105.
Neederhausen v. Detroit St. Ry., 119.
Neel v. Sheffield, 24.

Neely v. Jones, 53.
Neibles v. Railway Co., 73, 85.
Neibuhr v. Gage, 118.
Neiderhouser v. Detroit S. R. Co., 119.
Nelby v. Osborn, 99.
Neldon v. Smith, 24.
Nelson v. Chicago & N. W. Ry. Co., 137.
v. Brodhack, 106.
v. Minneapolis, 137.
v. Nelson, 43, 98, 117.
v. Weeks, 72.
Nephew v. Railroad Co., 43.
Ness v. Minneapolis Co., 14, 54, 57, 82, 85.
Neustadt v. Joel, 191.
Nevill v. Boyle, 177, 208.
Nevins v. Depierries, 65.
New Amsterdam Casualty Co. v. Mester, 32.
Newell v. Higgins, 160, 164, 202, 203, 205.
New England Bank v. Lewis, 186, 187.
Newington v. Levy, 177, 208.
New Orleans v. Bank, 109.
New York Land Co. v. Chapman, 118.
New York L. Ins. Co. v. Rankin, 99.
Nichol v. Dunn, 53.
Nicholai v. Lyon, 201.
Nicholl v. Munford, 186.
Nicholas v. Nicholas, 121.
Nichols v. Norris, 166, 195.
v. Pinner, 117.
v. Scott, 92, 114.
v. White, 103.
Nicholson v. Revell, 192.
v. Tutin, 173.
Niggle v. Foehry, 106.
Nixon v. Kiddy, 55.
Noble v. McClintock, 39.
Noe v. Christie, 3, 4, 5, 107, 114.
Norman v. Thompson, 159, 160, 169, 171, 208.
North v. Wakefield, 113, 166, 192, 195, 206, 208.
North Am. F. Co. v. Handy, 9.
Northern Chief I. Co. v. Hosmer, 92, 93.
Northrupt v. Hayward, 38.
Northwestern Co. v. Blankership, 151.
Norton v. Highleyman, 53.
Noyes v. Chapman, 168, 198, 199.
v. Hopgood, 24.
v. New Haven, 39.
Nunn v. Wilsmore, 188, 190.
Nusolf v. Duluth Elec. Co., 13.
Nye v. Chase, 101.

O

Oak v. Dustin, 143.
Oberndorff v. Union Bank, 9, 55.
Och v. Missouri, etc., R. Co., 119.
Ockford v. Barelli, 90.
Odum v. Rutledge, 122.
Ogilvie v. Hallam, 3, 77, 94, 114.
Oilwell v. Wolf, 8, 114, 116.
Oliver v. Phelps, 28.
Oliwell v. Verdenhalven, 4.
Only v. Walker, 176, 183, 184.
Ordinary v. Dean, 47.
Orr v. Bligh, 195.
v. Hamilton, 91, 115.
Osborn v. Fredrick, 154.
v. Hubbard, 112.
v. Railway Co., 40, 108.
v. Robbins, 143, 145, 147.
Osgood v. Manhattan Co., 104.
Ostrander v. Scott, 22, 87.
Otto v. Klauber, 55, 56.
Oughton v. Trotter, 177.
Oury v. Saunders, 50.
Overend v. Oriental Financial Co., 195.
Overstreet v. Dunlap, 115.
Overton v. Connor, 66, 74.
Owen v. Chandler, 106.
v. Mynatt, 143.
Owsley v. Thompson, 50.
O'Beirne v. Lloyd, 23, 93.
O'Brien v. Chicago, etc., R. Co., 119, 121.
v. Greenbaum, 207.
v. Lloyd, 35.
v. Railway Co., 111, 121.

O'Donnell v. Clinton, 119.
O'Donoghue v. Corby, 44.
O'Keson v. Barclay, 86.
O'Neil v. Lake Superior Co., 119.
O'Riley v. Wilson, 110.
O'Shea v. Collier, 161, 195, 202, 206.
v. New York Ry. Co., 42.

P

Pabodie v. King, 55.
Pabst v. Lueder, 32, 92.
Pacific Mut. L. Ins. Co. v. Webb, 117, 140.
Packard v. Railway Co., 42.
Paddeford v. Thatcher, 159, 160, 194.
Paddock v. Forrester, 102.
Page v. Akins, 115.
v. Carter, 205, 206, 207.
v. Pentice, 106.
v. Wells, 117.
Palmer v. Yager, 3, 6, 8, 54, 66, 74, 77.
Palmerton v. Huxford, 83.
Pangborn v. Continental Ins. Co., 119.
Pardee v. Wood, 64.
Paris v. Dexter, 151.
Parker v. Bayles, 54.
Parker v. Lowell, 106.
v. Mayes, 55.
v. Providence, 45.
Parmelee v. Dunn, 189.
Parmentier v. Pater, 142, 147.
Parks v. Doty, 109.
Parr v. Greenbush, 92, 93.
Parrott v. Colby, 62.
Parrow v. Vandervent, 2.
Parson v. Brown, 99.
Parsons v. Hill, 150.
Patterson v. Bloomer, 130.
v. Garret, 4.
Patridge v. Messer, 206.
Paulin v. Kaigh, 172.
Paulson v. Osborn, 124.
Pavey v. Pavey, 106.
Pawnee Coal Co. v. Royce, 117, 118, 119.
Peachy v. Whitter, 55, 81.
Peacock v. Dickerson, 19.
Pearson v. Clver, 62.
v. Thomason, 59, 60, 64.
v. Thompson, 65.
Peck v. Batsford, 104.
Pelton v. Knapp, 50, 52, 99.
v. Schmidt, 99.
v. Smith, 100.
Pemberton v. Hoosier, 2.
Pence v. Langdon, 12, 118.
Pener v. Smock, 108.
Pendleberg v. Walker, 200, 205.
Penitentiary Co. v. Gordon, 48.
Penniman v. Elliott, 176, 177, 181, 182.
People v. Board of Managers, 16.
v. Board of Police, 57.
v. County, 68.
v. Keyser, 40.
v. Ontario, 109.
v. Pleas, 46.
v. Wells, 48.
People's Bank v. Stewart, 106.
Perdew v. Tillma, 5, 107.
Perin v. Cathcart, 1, 8, 16, 17, 18, 114, 116.
Perkins v. Frinks, 127.
v. Hasbrouck, 80.
v. Headley, 16, 22.
v. Lockwood, 160, 164.
v. Trinka, 86, 93.
Perley v. Balch, 121.
Perrot v. Wells, 165.
Perry v. Armstrong, 194, 197.
v. Philadelphia, etc., R. Co., 93.
v. Railway Co., 125.
Person v. Bowe, 101.
Persse v. Persse, 132.
Peter v. Davenport, 57.
Peterson v. Chicago, etc., Ry. Co., 118, 137.
v. Railway Co., 117, 151.
v. Reeves, 155.
Petersburg v. Mappin, 48.
Petit v. Woodlief, 80.
Pettigrew v. Harmon, 61, 65.
Peytoe's Case, 3, 4, 27, 28, 42, 107, 108.

[The figures refer to sections]

Pfenninger v. Benedict, 103.
Pfleger v. Brown, 192, 194, 195, 203, 204.
Phettiplace v. Sayles, 201.
Phelan v. Mayor, 34.
Phelps v. Dennett, 70.
Phillips v. Berger, 97.
v. Kelly, 106.
v. Pullen, 154.
Phinizy v. Bush, 64.
Phœnix Bank v. Sullivan, 171.
Phœnix Ins. Co. v. Rink, 2.
Pickering v. Pickering, 138.
Pickett v. Bates, 43.
v. King, 188.
Pickstock v. Lyster, 190.
Pierce v. Jones, 159.
v. New Orleans Bldg. Co., 86.
v. Pass, 39.
v. Pierce, 83.
v. Toby, 103.
v. Wood, 12, 55, 121, 206.
Pierson v. Hooker, 39.
v. McCahill, 160, 167, 171.
Pierrepont v. Sassee, 43.
Pike v. Buzzell, 115.
v. Dickinson, 192.
Pinnel's Case, 25, 54, 55, 60, 66, 107.
Pinneo v. Higgins, 204, 205.
Pinney v. Jorgenson, 122.
Piper v. Kingsbury, 7.
Pitkins v. Noyes, 23.
Pitts v. Commercial Bank, 158, 159.
Pittsburg Ry. Co. v. Gipe, 45.
Pixler v. Salmon, 109.
Platt v. Castle, 29.
v. Walrath, 64.
Playford v. Playford, 97.
Plummer v. Great Nor. R. Co., 38.
Policastro v. Ritske, 85.
Pollen v. Huband, 184.
Pollman v. St. Louis, 16, 54, 87.
Pomeroy v. Prescott, 43.
Ponce v. Wiley, 45.
Pope v. Turnstall, 60, 61, 64, 74.
Post v. Springfield Bank, 64.
Poteat v. Badget, 80.
Potter v. Green, 9, 55.
Potter v. Parsons, 43.
v. Smith, 26, 109.
v. Taggert, 119.
Pottlitzer v. Wesson, 21, 110.
Powell v. Jones, 83.
Powers v. Harlin, 202, 205, 206, 207.
Powles v. Hargreaves, 166, 197.
Prarie Grove v. Luder, 25, 55.
Pratt v. Adams, 186, 188.
v. Castle, 93, 115.
v. Page, 103.
Preston v. Boston, 142, 148.
v. Christmas, 24, 25, 108.
v. Etter, 198.
v. Grant, 16, 18.
v. Hill, 43.
Price v. Barker, 42, 195.
v. Estill, 53.
v. Freeman, 119, 150.
Prichard v. Sharp, 93.
Prince v. Ruckett, 106.
Pritt v. Clay, 117.
Probst v. Ehrat, 16.
Pryer v. Tribble, 89.
Pullen v. Ready, 97.
Pulliam v. Taylor, 1, 64.
Pulling v. Columbia County, 81.
Pulsford v. Richards, 202.
Pupke v. Churchill, 177, 182.
Purdy v. Independence, 57.
v. Powers, 39.
Pusey v. Clemson, 45, 46.
Putnam v. Lewis, 37.

Q

Quarles v. Jenkins, 94.
Quayle v. Bayfield, 23, 48.
Quebe v. Gulf, etc., R. Co., 137.

R

Rabitte v. Alabama R. Co., 121.
Radburn v. Morris, 34.
Rahn v. McElrath, 188.
Railroad Co. v. Brown, 151.
v. Clark, 85.
v. Doyle, 151.

[The figures refer to sections]

Railroad Co. v. Fowler, 151.
v. Green, 151.
v. Harris, 151.
v. Hayes, 119.
v. Lewis, 119, 151.
v. Phillips, 151.
v. Uhter, 151.
Rains v. Jones, 16.
Ramapo F. & W. Co. v. Carey, 21.
Ramsdell v. Edgerton, 202, 203, 204, 206.
v. United States, 55.
Ramsden v. Hylton, 36.
Randohl v. Lindholn, 41.
Randell v. Broadhead, 106.
Randolph v. Armstrong, 39.
Rankin v. Duryer, 186.
v. Schofield, 76.
Ranlett v. Moore, 74.
Rapp v. Gidding, 13.
Rase v. M., St. P. & S. S. M. Ry., 119, 140.
Rasmussen v. State Bank, 185.
Ratcliffe v. Winch, 49.
Rauen v. Prudential Ins. Co., 55, 129, 151.
Raudenbush v. Bushong, 172.
Ravenwood Paper Co. v. Dix, 22, 85.
Raworth v. Parker, 171, 173.
Rayne v. Orton, 4, 5, 40.
Rea v. Owens, 55.
Read v. Great Western Ry. Co., 34.
v. Golding, 18.
v. McLemore, 80.
Reagan v. McKibben, 99.
Reay v. Richardson, 171, 172, 208.
v. White, 180.
Reddick v. Keesling, 116.
Re Croton Ins. Co., 49.
Redpath v. Wiggs, 158.
Reed v. Bartlett, 66.
v. McCrum, 38.
v. Warner, 176.
Reichel v. Jeffry, 110.
Reid v. Hibbard, 26, 44, 65, 117.
Reinhold v. Kerrigan, 55.
Remington v. Wright, 142.
Renard v. Tuller, 166, 168, 171, 172, 178.
Repp v. Wiles, 43.
Reynolds v. Cox, 117.
v. Brandon, 90, 97.
v. French, 67, 136.
v. Westchester F. Ins. Co., 121.
Reynold's Adm'r. v. Minning, 100.
Reves v. Hearns, 7.
Rhettiplace v. Sayles, 136.
Rhinelander v. Barlow, 38.
Rice v. London Mortg. Co., 55, 59.
v. Rudineau, 102.
v. Wood, 197.
Richards v. Hunt, 136, 201.
v. Noyes, 100.
Richardson v. Duncan, 145.
Richardson v. Eyton, 89.
v. Independent Dist., 85.
v. Pierce, 166.
v. Taylor, 22.
Riches v. Evans, 190.
Richley v. Proone, 110.
Ricketts v. Hall, 60, 61.
Rideal v. Great Eastern Ry. Co., 9, 28, 34.
Ridlon v. Davis, 66.
Riehl v. Bingenheimer, 189.
Riley v. Kershaw, 69.
v. Riley, 26.
Rising v. Cummings, 6.
Rising v. Patterson, 55, 60, 83.
Rist v. Hartner, 150.
Ritenour v. Mathews, 50.
Rittenhouse v. Ashland, 1, 23.
Rivers v. Blom, 92, 106.
Rives v. McLosky, 38.
Rivinus v. Langford, 44.
Robb v. Hewitt, 101.
Robbins v. Barton, 137.
v. Eaton, 150.
v. Magee, 186, 187.
Roberts v. Bause, 54, 59.
v. Barnum, 160.
v. Central Land Co., 118.
v. Eastern Ry. Co., 33.
v. Minneapolis Thresh. Mach. Co., 99, 105.

[The figures refer to sections]

Robertson v. Campbell, 95.
v. Flower, 192, 194.
v. Robertson, 57.
Robinson v. Detroit, etc., R. Co., 115, 116.
v. Ferriday, 18.
v. Flanigan, 24.
v. Harboar, 98.
v. Maulden, 189.
v. O'Brien, 125.
Rockford R. Co. v. Rose, 81.
Rockville Bank v. Holt, 166.
Rogers v. Ball, 55, 70.
v. Batchelor, 39.
v. Kimball, 70, 112.
v. Spokane, 107, 114.
Rohr v. Anderson, 43.
Rollins v. Loshus, 145.
Root v. New Haven Trust Co., 83.
Rose v. Eggers, 119, 120, 121.
v. Hall, 54, 55, 65, 66.
v. Rose, 102.
Rosema v. Porter, 17.
Rosencrantz v. Mason, 115.
Rosenthal v. Rudnick, 16.
Rosling v. Muggeridge, 177, 208.
Ross v. Seaver, 136, 140.
Rotan v. Noble, 54, 59.
Rothchild v. Mosbacker, 17, 21.
Roundtree v. Holloway, 53.
v. Stevens, 46.
Rouse v. Hughes, 188.
Rowan v. Lytle, 25, 27.
Rowe v. Collier, 115.
Rowell v. Marcy, 33.
Rowley v. Stoddard, 40, 62.
Royce v. Watrous, 121.
Rubble v. Furnir, 28.
Ruddock's Case, 39, 40, 42.
Ruffle v. Ruffle, 3.
Rumsey v. McCulloch, 175.
Russell v. Cook, 82, 86.
v. Green, 39.
v. Lambert, 77.
v. Leland, 39.
v. Lytle, 3, 4, 5, 7, 55, 74.
v. Meek, 55, 60.
v. Rogers, 199.
Russell's Patent, 189.
Rust v. Hanset, 39.
Rustler v. Sweeker, 8.
Ryan v. Brown, 16.
v. Halligan, 82.
v. Ward, 55, 69.

S

Sage v. Valentine, 160, 164.
Salmon v. Davis, 39, 40.
v. Pixlee, 26.
Salomonson v. Blythe, 117.
Sampson v. Northwestern Ins. Co., 21.
San Antonio R. Co. v. Sehorn, 38.
v. Stone, 99.
Sanborn v. Neilson, 102.
Sanders v. Bank, 26, 65.
v. Whitcomb, 55.
Sanderson v. McRea, 121.
Sandlin v. Kennedy, 99.
Sands v. Gelston, 80.
v. Lyons, 180.
Sanford v. Adams, 116.
v. Bartholomew, 98.
v. Insurance Co., 119.
v. McLean, 53.
v. Story, 46.
Sard v. Rhodes, 74.
Saul v. Buck, 206.
Savage v. Blanchard, 26.
v. Everman, 26, 66.
Saxton v. Feiberling, 120.
Scammon v. Denio, 81.
Schagun v. Scott, 34.
Scheldon v. Scofield, 121.
Schenck v. Lincoln, 109.
Scheurle v. Husband, 99.
Schiffer v. Deitz, 117, 118.
Schlitz v. Meyer, 26, 65.
Schlessinger v. Schlessinger, 59, 61.
Schmidt v. Ludwig, 63, 64.
Schnell v. Nell, 82, 86, 155.
Schoben v. Brunning, 78.
Schoener v. Lissaner, 147.
Scholey v. Munford, 146.
Schrader v. Neoflin, 122.
Schreiber v. Straus, 43.

[The figures refer to sections]

Schroeder v. Pissis, 160, 171, 179.
Schuller v. Robinson, 55, 116.
Schultz v. Cullerson, 143, 147, 153.
v. Railway Co., 151.
v. Schultz, 116.
Schwartz v. Evans, 110.
v. Hirsch, 22.
v. Southerland, 106.
Schweider v. Lang, 5, 60, 94.
Scofield v. Clark, 60.
Scott v. Austin, 154.
v. Scott, 112.
v. Sebright, 142.
Scouton v. Eislord, 185.
Seabrock v. Brady, 93.
Seaver v. Wilder, 106.
Sebastian v. Rose, 38.
Sebree v. Smith, 99.
Seehorn v. Bigmeadow, 109.
Seigmiller v. Kelley, 59.
Selser's Est., 115.
Senior v. Anderson, 98.
Senn v. Joseph, 43.
Serving v. Gale, 201.
Settle v. Sterling, 23, 57.
Severance v. Kimball, 145.
Sewall v. Sparrow, 40.
Sewell v. Bridge, 38.
v. Mead, 140.
v. Musson, 3, 7, 60, 179.
Sexton v. Sexton, 42.
Seymour v. Goodrich, 60, 61.
v. Minturn, 23, 25, 55.
Snow v. Alley, 121.
v. Griesheimer, 16, 155.
Snyder v. Mutual Tel. Co., 42.
v. Pharo, 108.
Shampeau v. Lumber Co., 113.
Shank v. Shoemaker, 43, 138.
Shanley v. Koehler, 62.
Shaver v. Armstrong, 54.
Shaw v. Clark, 61.
v. Railway Co., 93, 94.
Shed v. Pierce, 40.
Shelbley v. Dixon, 55.
Sheanon v. Insurance Co., 131, 151.
Sheldon v. Dutcher, 140.
v. Warner, 46.
Shelton v. Cocke, 103.
Shepard v. McEvers, 186.
v. Rhodes, 10, 185.
v. Saltus, 45.
Sheplar v. Green, 98.
Shinkle v. Sherman, 157.
Shipton v. Casson, 181.
Shoemaker v. Benedict, 103.
Sholes v. The State, 81.
Shurte v. Fletcher, 151.
Sibree v. Tripp, 62.
Siboni v. Kirkman, 115.
Sicotte v. Barber, 17, 115.
Siddall v. Clark, 45.
Sieber v. Amunson, 42.
Siggers v. Evans, 186.
Sigler v. Platt, 182.
Silver v. Reynolds, 67.
Silver Lake Bank v. North, 53.
Simmons v. Almey, 38, 68.
v. Clark, 74, 95, 96.
v. Walker, 53.
v. Oullahan, 114.
Simon v. Kendig, 107.
v. Legion of Honor, 85.
Sims v. Marryal, 189.
v. State Lumber Co., 16.
Simpson v. Eggington, 50, 51.
Singer v. Lee, 60.
Singleton v. Thomas, 64.
Sisson v. Hill, 119.
Sizer v. Miller, 94.
Skeate v. Beall, 148.
Skilbeck v. Hilton, 117.
Slade v. Elevator, 85.
Slater v. Jones, 208.
Slaughter v. Cunningham, 90.
v. Hamm, 37, 57.
v. Heneken, 36.
Sloan v. Becker, 140.
v. Herrick, 42.
Small v. Gray, 43.
v. Marwood, 165, 187, 191.
Smith v. Angell, 47.
v Atwood, 115.
v. Bach, 91.
v. Bank, 107.
v. Bartholomew, 55.

Smith v. Bean, 11.
v. Bessell, 115.
v. Boruff, 54, 86.
v. Bromley, 203.
v. Bronstein, 22.
v. Brown, 24, 60.
v. Cuff, 202, 203.
v. Dixon, 43.
v. Elrod, 74, 106, 114.
v. Gayle, 42, 70.
v. Gibson, 98.
v. Grable, 23.
v. Insurance Co., 131.
v. Keating, 186.
v. Keels, 5.
v. Kerr, 88.
v. Kron, 189.
v. Leavitt, 186.
v. Lovell, 108.
v. Meyers, 99.
v. Morrow, 80.
v. Ogilva, 140.
v. Owen, 106, 202, 204, 208.
v. Phillips, 2.
v. Salmon, 201, 206.
v. Satterler, 99.
v. Shirley, 96.
v. Sloan, 39.
v. Smith, 90, 97.
v. Stone, 175.
v. Tyler, 2.
v. Zeigler, 203.
Smitherman v. Kidd, 25.
v. Smith, 66
Smithwick v. Ward, 71.
Smock v. Dade, 44.
Smythe v. Graydon, 168, 182, 208.
Sobieski v. St. Paul, etc., R. Co., 15, 119.
Sohier v. Loring, 195.
Solinger v. Earl, 161, 202, 206.
Solomon v. Graham, 112.
Solomon v. Laverick, 166, 177, 182.
Sonneberg v. Riedel, 54, 60, 108, 115.
Soully v. Dalemater, 34.
Sons of Temperance v Brown, 98.
Southerlin v. Bloomer, 26, 116.
Southern Oil Co. v. Wilson, 80.
Southern Ky. Co. v Brewer, 140.
South Soituate v. Hanover, 53.
Southwick v. Herring, 115.
v. Ward, 109.
Sovering Camp v. Bridge, 83.
Soward v. Palmer, 177.
Spann v. Baltzell, 24, 54, 74.
Specialty Co. v. Daly, 55.
Speck v. Jarvis, 92.
Spence v. Spence, 80.
Spencer v. Chrisman, 115.
Springfield R. Co. v. Allen, 16.
Spooner v. Whiston, 172, 206.
Spottswood v. Stockdale, 165.
Spurret v. Spiller, 184, 202, 205.
Squire v. Ford, 195.
St. Louis Ry. Co. v. Brown, 119.
v. Davis, 60, 69, 74.
v. Dysart, 38.
v. Higgins, 119.
v. Smith, 113, 118.
St. Regis v. Tonawanda, 22.
Stache v. Insurance Co., 131.
Staggs v. Alexander, 65, 66.
Stafford v. Bacon, 10, 65, 138, 167, 185, 201.
v. Roof, 150.
Stan v. Regelin, 16.
Stapilton v. King, 40.
v. Stapelton, 90, 97.
Stark v. Thompson, 50.
State v. Bisping, 48.
v. Carson City Sav. Bank, 19.
v. Collier, 57.
v. Cordor, 24.
v. Davenport, 2.
v. District Court, 109.
v. Doughter, 28.
v. Hastings, 189.
v. Nashville, 23.
v. Purdy, 57.
v. Reigart, 127.
v. Story, 40, 108, 148.
v. Superior Court, 93.
State Bank v. Dutton, 99.
v. Littlejohn, 107, 108, 110.
State National Bank v. Syndicate, 191.

Stead v. Pryer, 110.
Stebbins v. Niles, 40.
Steele v. White, 88.
Steeds v. Steeds, 25.
Stearnes v. Hall, 25.
v. Johnson, 55, 83, 140.
Stenton v. Jerome, 14, 146.
Stein v. La Dow, 175.
Steinman v. Magnus, 64, 158, 159, 160, 162.
Stephens v. Gavaza, 175, 198.
Stephenson v. Allison, 155.
v. Chappell, 47.
v. Kirkpatrick, 122.
Sterne v. Beck, 177.
Sternberg v. Bowman, 202.
Stevens v. Barnes, 78.
v. Barrington, 68.
v. Earles, 188.
v. Stevens, 166, 195.
v. Wiley, 37.
Stevenson v. Maxwell, 98.
Stewart v. Ahrenfeldt, 77.
v. Bank, 105.
v. Blum, 207.
v. Hidden, 67.
v. Langston, 160.
v. Saybrook, 106.
v. Stephens, 58.
Stillmann v. U. S., 146.
Stillwell v. Cope, 78.
Stinton v. Jerome, 80.
Stockley v. Stockley, 97, 132.
Stock v. Mawson, 158, 160.
Stockton v. Frey, 82, 83, 106.
Stomme v. Hanford, 110, 111.
Stone v. Billing, 122.
v. Dickman, 42.
v. Elliott, 11.
v. Hahn, 82.
v. Railway Co., 151, 155.
Stoney Creek Co. v. Smalley, 58.
Strange v. Holmes, 24, 25, 40, 66, 106, 108, 115.
Strauss v. Trotter, 64.
Strickland v. Harger, 172.
Strobridge v. Randall, 77, 89, 94, 109.
Strong v. Harvey, 19.
v. Strong, 117, 118, 119.
Strusser v. Conklin, 44.
Struther v. Peltz, 46.
Stuart v. Blum, 206.
Stuber v. McEntee, 45.
Stuht v. Sweesy, 101.
Stultz v. Newhall, 74.
Sullivan v. Finn, 55.
Supervisors v. Birdsall, 48.
Sutton v. Hawkins, 19.
Swartz v. Brown, 177, 194.
Sweet v. Burdett, 106.
Sweetlman v. Prince, 118.
Sykora v. J. I. Case Co., 45.
Synnot v. Simpson, 184.

T

Tank v. Rohweder, 78.
Tanner v. Merrill, 16, 68, 87.
Tatlock v. Smith, 169.
Taylor v. Bay City St. R. Co., 102.
v. Evans, 43.
v. Farmer, 182.
v. Funk, 45.
v. Hite, 47.
v. Hogan, 106.
v. Purvis, 118.
v. St. Louis, etc., Bridge Co., 38.
v. Tigerton, 99.
T. B. Redmond v. Atlantic Ry. Co., 22, 119.
Teed v. Johnson, 175, 187, 194, 199.
T. M. Patridge v. Phelps, 16, 83.
Tennant v. Dudley, 99, 100.
v. Stoney, 186.
Tenney v. State, 80.
Tenth Nat. Bank v. New York, 68.
Terrill v. Deavitt, 81.
Terry v. O'Neal, 52.
v. Taylor, 80.
Texas R. Co. v. Crow, 151.
Thayer v. Turner, 122, 124.
Therasson v. Peterson, 6, 66, 157, 208.
Thatcher v. Dudley, 64.
Thicknesse v. Bromilow, 39.
The Queen v. Cooban, 160, 186.

[The figures refer to sections]

The St. Cuthbert, 42.
Thomas v. Armitage, 43.
v. Courtney, 194.
v. Heathorn, 107.
v. Hodgson, 185.
v. Mallory, 3, 74.
v. Maxwell, 115.
v. McDaniels, 69.
Thompkins v. Wheeler, 190.
Thompson v. Blackhannon, 143.
v. Gunthorp, 173.
v. Hardy, 111, 120.
v. Hudson, 96, 177.
v. Lack, 192, 195.
v. Libby, 117.
v. Lockwood, 142, 143, 145.
v. McMillan, 94.
v. Percival, 39, 62, 65.
v. Peters, 104.
v. Robinson, 2.
Thorn v. Mosher, 122.
Thornton v. Scheratt, 166, 185.
Thrash v. Starbuck, 151.
Thurman v. Wild, 42.
Thurston v. Sprague, 66.
v. Thurston, 121.
v. Vian, 178, 179.
Tiddy v. Harris, 70.
Tillotson v. Preston, 68, 107.
Tilton v. Alcott, 3.
v. Morgaridge, 109.
Titus v. Insurance Co., 135.
T. J. Scott & Sons v. Rawls, 55, 107.
Toby v. Ellis, 195.
Toby v. Barber, 37.
Todd v. Lorah, 39.
Tompkins v. Betie, 19.
Tomson v. Heidenheimer, 94.
Torry v. Black, 47.
v. United States, 107.
Town v. Rublee, 158, 192.
Town Council v. Barnett, 142.
Townsend v. Newell, 165, 181, 202, 203.
Toy v. Hoskins, 43.
Tracy v. Jefts, 192.
Treadwell v. Himmelman, 74.
Treasurer v. McDowell, 43.
Treat v. Price, 16, 82.
Trenton St. R. Co. v. Lawler, 43, 44, 77, 89, 98.
Trigg v. Read, 90, 97, 128.
Triggs v. Lavalee, 126.
Trisler v. Williamson, 37.
Troutman v. Lucas, 70.
Troxall v. Silverton, 151.
Troy Min. Co. v. Thomas, 8, 70.
v. White, 70.
True v. Huntoon, 40.
Trunkey v. Crosby, 172.
Tucker v. Barnes, 78.
v. Bartle, 2.
v. Edwards, 106, 107.
v. Maxwell, 37.
v. Moreland, 150.
v. Murray, 55, 62.
Tuckes v. Dolan, 54.
Tuckerman v. Newhall, 167, 193, 208.
Tuesdell v. Callaway, 53.
Turmbull v. Nicholson, 44.
Turner v. Corner, 172.
v. Hitchcock, 42.
v. Railton, 102.
v. Turner, 129.
v. Vaughan, 154.
Turpin v. Chesterfield, 46.
v. Turpin, 150.
Tutt v. Price, 159.
Tuttle v. Tuttle, 55, 68, 83.
Tweed v. Oswald, 25.
Twitchell v. Shaw, 55, 69.
Tyler v. Chevalier, 70.

U

Ulerg v. Ginrich, 39.
Ullman v. Myrick, 39.
Underwood v. Brockman, 47, 86, 107.
Union Bank v. Geary, 66.
v. Rogan, 160, 194.
Union Co. v. Erie R. Co., 80.
Union Nat. Bank v. Post, 38.
Union Pac. R. Co. v. Anderson, 80.
Union Trust Co. v. Rigdon, 38.
United States v. Columbia Bank, 43.

United Surety Co. v. Iowa Mfg. Co., 191.
Upton v. Dennis, 55, 123.
v. Tribelcock, 131.
Urtz v. New York Cent. R. Co., 117.

V

Van Allen v. Jones, 4.
Van Bakkelen v. Taylor, 159, 171, 172.
Van Brunt v. Van Brunt, 29, 197.
Van Dyke v. Davis, 86.
Van Keuven v. Parmelee, 103.
Van Trott v. Wiese, 117, 134, 139.
Vanbebber v. Plunkett, 78.
Vance v. Lukenbell, 55.
Vanderline v. Smith, 43.
Vandervelden v. Chicago, etc., R. Co., 119.
Vanhousen v. Broehl, 107.
Vantrain v. Railroad Co., 151.
Valley v. Boston & M. R. Co., 119, 140.
Varney v. Commey, 64.
Vaught v. Cain, 91, 98.
Vedder v. Vedder, 29, 30, 34, 72, 116.
Vermont St. B. Convention, 16.
Vernon v. Morton, 191.
Vernon's Case, 27.
Vickery v. McClellan, 43.
Villet v. Consolidated R. & P. Co., 137.
Village v. Fish, 154.
Vine v. Mitchell, 201.
Vogt v. Fosola, 177.
Volles v. Beard, 112.
Von Gerhard v. Lighte, 55.
Vosburg v. Diefendorg, 144.
v. Teator, 93.
Vroom v. Van Horn, 45.
Vyne v. Glenn, 146.

W

Wabash R. Co. v. Brow, 112.
Wade v Wade, 89.
Wadsworth v. Board, 48, 77, 154.
Wahl v. Barnum, 77, 85, 86, 92.
Wagner v. Ladd, 78.
v. Union Stockyards Co., 42.
Wain v. Egmont, 188.
Wakefield v. Georgetown Bank, 166.
Walan v. Kerby, 69.
Walbourn v. Kingston, 113.
Walden v. Sherburn, 103.
Waldridge v. Kenneson, 80.
Walker v. Freeman, 80.
v. McCulloch, 40.
v. Nevill, 158.
v. Seaborn, 177.
Walmsley v. Cooper, 175.
Walla Walla F. Ins. Co. v. Spencer, 148.
Wallace v. Kelsall, 40, 72, 108.
v. Kendall, 40.
v. Small, 99.
Wallace's Appeal, 53.
Wallner v. Chicago Traction Co., 42, 83.
Walon v. Kerby, 72.
Walsh v. Curtis, 64, 96.
v. New York Cent. R. Co., 42.
v. Sisson, 117.
Walston v. Calkin Co., 58.
Walter v. James, 51, 52.
Walton v. Newson, 31.
Wapell Co. v. Simann, 81.
Warbury v. Wilcox, 171, 177, 179.
Ward v. Bird, 203.
v. Howell, 103.
v. Munson, 80, 99.
v. Young, 59.
v. Wilson, 89.
Wardell v. McConnell, 42.
Warren v. Cole, 117.
v. Gentry, 70, 112.
v. Hodges, 2, 55.
v. Skinner, 55, 83.
v. Whitney, 10, 185.
Warshawsky v. Bonewier, 176.
Washburn Co. v. Thompson, 48.
v. Winslow, 116.
Washington v. Johnson, 80.
v. Louisville, 45, 109.

[The figures refer to sections]

Watkins v. Ashwick, 47.
v. Brant, 151.
v Morgan, 68.
Watkinson v. Inglesby, 66, 109, 157, 186, 208.
Watson v. Elliott, 54.
v. James, 32.
v. Knight, 171.
Watts v. French, 43, 55.
v. Hyde, 181, 185, 207.
v. Lawson, 99.
v. Robinson, 39, 74.
Waydel v. Luer, 9, 39, 54, 62.
Webb v. Harris, 134, 163.
v. Stewart, 170.
v. Weatherby, 110.
Weber v. Couch, 26.
v. Board, 16, 18.
v. Dun, 101.
Webster v. McLaren, 70, 72.
v. Wyser, 50, 110.
Wedigen v. Fabric Co., 18, 114.
Weed v. Terry, 86, 97.
Weeks v. Zimmerman, 66.
Weiderhauser v. Detroit, 122.
Weidner v. Standard Ins. Co., 54, 55.
Weinberg v. Novick, 55.
Weiser v. Welch, 119, 147.
Weitzell v. Leyson, 120.
Weiss v. Guerineau, 53.
Weiss v. Marks, 60.
Welby v. Drake, 50.
Welch v. Lynch, 106.
Weller v. Stevens, 21.
Wells v. Evans, 39, 175.
v. Greenhill, 172, 190.
v. March, 175.
v. Morrison, 65.
v. Yates, 121, 132.
Wellington v. Kelly, 50, 53.
Wellsburg Bank v. Kimberlands, 106.
Welsh v. Sisson, 117.
Wentworth v. Wentworth, 65.
West v. Carolina Ins. Co., 107.
v. Smith, 100.
Westby v. Westby, 90, 132.
Westcott v. Walker, 68.
Western Bank v. Kyle, 94, 95.
Western Union Co. v. Smith, 81.
Westfall v. Preston, 54.
Weston v. Barker, 186.
Wetmore v. Crouch, 55.
Weymouth v. Babcock, 70.
Whalan v. Kirby, 23, 55.
Wharton v. Anderson, 78.
Wheat v. Louisville Bank, 43.
Wheeler v. Baker, 16, 84.
v. Curtis, 39.
v. Essex, 66.
v. Meriden Cutlery Co., 85.
v. Smith, 127.
v. Wheeler, 55, 60.
Wheelwright v. Jackson, 203.
Wherley v. Rowe, 69, 85, 115.
Whisnand v. Small, 93.
Whitcomb v. Whitney, 103.
White v. Davidson, 43.
v. Dobson, 98.
v. Dodds, 121.
v. Gray, 74.
v. Jordan, 55.
v. Kuntz, 160, 202, 204, 205, 206 207.
v. Ledgard, 104.
v. Old Dominion S. S. Co., 99 102.
v. Vinson, 39.
Whitehall v. Squite, 45.
Whiteside v. Hyman, 206, 209.
Whitewell v. City of Aurora, 38.
Whiting v. Insurance Co., 32.
Whitmore v. Stephens, 182, 208.
v. Tarquand, 158, 160, 167.
v. Wakerley, 208.
Whitney v. Cook, 74.
v. Richards, 114.
Whitsett v. Clayton, 5, 74.
Whittemore v. Obear, 200.
Wickstrom v. Swanson, 88.
Wiglesworth v. White, 167, 182.
Wilber v. Sctcherd, 85.
Wilder v. St. Johnsbury, 23.
Wilcox v. Howland, 148.
Wilcoxon v. Logan, 52.
Wilkes v. Harper, 53.
v. Slaughter, 45, 61.

Wilkins v. Davis, 189.
v. Hukill, 93.
Wilkinson v. Byers, 83.
v. Crookston, 9.
Williams v. Bagley, 147.
v. Bayley, 153.
v. Blumenthal, 54.
v. Carrington, 164.
v. Fitzhugh, 154.
v. Gotzian, 165.
v. Hitchings, 112.
v. Langford, 107.
v. Mostyn, 159, 170, 171, 172, 173, 200.
v. Nolan, 43.
v. Otey, 188.
v. Phelps, 66.
v. Price, 80.
v. Stanton, 66.
v. The London C. Exch. Co., 72.
v. Thorp, 99.
v. Williams, 90.
v. Witson, 140.
Williamson v. Nor. Pac. L. Co., 140.
Willoughby v. Backhouse, 3.
v. Irish, 103.
Wilmer v. Harris, 179.
Wilson v. Brown, 50, 53.
v. Curry, 148.
v. Insurance Co., 43, 116.
v. Kansas City, etc., Co., 112.
v. Northwestern Ins. Co., 107.
v. Palo Alto Co., 81.
v. Ray, 202, 203.
v. Reed, 142.
v. Samuels, 157, 160, 163, 166, 179.
v. Sopen, 175.
Wimberg v. Adams, 88.
Windmuller v. Goodyear, 17.
Winkler v. Patten, 80.
Winn v. Thomas, 204.
Winsor v. Savage, 51, 53.
Winton v. Sherman, 98.
Wipperman v. Hardy, 65.
Wisheart v. Legro, 112.
Wistar's Appeal, 97.
Wittowsky v. Baruch, 70, 159.
Woerz v. Schumacher, 49.
Wolford v. Powers, 55.
Wood v. Bangs, 55.
v. Barker, 205.
v. Edwards, 3.
v. Goss, 39.
v. Harris, 110.
v. Hitchcock, 19.
v. Kansas City Tel. Co., 85, 117, 118, 140.
v. Mathews, 38.
v. Nicholis, 150.
v. Roberts, 162, 169.
v. Rowe, 89.
v. Tunnicliffe, 45, 46.
v. Williams, 31.
Woodbridge v. Scott, 53.
Woodfolk v. McDowell, 65, 94.
Woodford v. Marshall, 32, 139.
Woodrowe v. Hennen, 44.
Woodruff v. Saul, 201, 206.
Woodward v. Horst, 39.
v. Miles, 74.
Woolfolk v. Woolfolk, 94.
Woolfork v. Sullivan, 45.
Worcester v. Heald, 54, 86.
Works v. Hershey, 55.
Wormer v. Waterloo, 53.
Worthington v. Worthington, 47.
Wright v. Acres, 110.
v. Crockery Ware Co., 65.
v. Garlinghouse, 53.
v. Kansas City, etc., R. Co., 38.
v. Remington, 142.
v. Syracuse R. Co., 34.
v. Wright, 43.
Wyatt v. Hudson, 103.
Wyman's Appeal, 45, 46.
Wynkoop v. Cowing, 122.

Y

Yandes v. Lefavour, 103.
Yazoo R. Co. v. Fulton, 74.
Yeomans v. Chatterton, 202.
Young v. Bierman, 25.
v. Daniels, 98.
v. Hudson, 43.
v. Jones, 107.

[The figures refer to sections]

Young v. Van Benthuysen, 189.
v. West Virginia, etc., Co., 119, 150.

Z

Zchnell v. Nell, 86.
Zelenka v. Port Huron Mach. Co., 44.
Zell v. Emery, 160, 182, 204, 206.
Zeobisch v. Van Minden, 171, 177, 182.
Zimmer v. Beeker, 76, 86.
Zimpleman v. Veeder, 38.
Zouch v. Parson, 150.

THE
LAW OF ACCORD AND SATISFACTION, COMPROMISE AND COMPOSITION AT COMMON LAW

BOOK ONE

ACCORD AND SATISFACTION

Sec. 1. Definition—Accord—Accord and satisfaction—Distinguished from payment and release—Novation.
Sec. 2. Requisites—In general.
Sec. 3. Execution necessary—Accord executory—Right of action how extinguished.
Sec. 4. Part performance.
Sec. 5. Tender of performance of an accord.
Sec. 6. Accord how executed.
Sec. 7. Accord unenforceable—Specific performance.
Sec. 8. Acceptance in satisfaction necessary.
Sec. 9. Effect of an accord and satisfaction—Absolute bar—Discharges joint debtor, joint and several debtor, surety, indorser.
Sec. 10. Subsequent promise to pay residue.
Sec. 11. Time when an accord and satisfaction may be made—Sunday contracts.
Sec. 12. Rescission—Tender—Rescission on a Sunday.
Sec. 13. The agreement—Writing unnecessary when—Must be certain—Must be in absolute discharge—Mutuality.
Sec. 14. Mistake as to amount—Legality of consideration.
Sec. 15. The agreement may be implied.
Sec. 16. Agreement arising from acceptance of a conditional offer or tender—Prescribing terms of acceptance by debtor, by creditor—Receding from or persisting in claim.

Sec. 17. Same subject—Acceptance without words of assent—Transaction when a contract—Rule in equity.
Sec. 18. The condition may be implied—When an offer or tender is conditional.
Sec. 19. Same subject.
Sec. 20. Whether an offer or tender is conditional or unconditional is not necessarily a question of law.
Sec. 21. Agreement arising from acceptance of check in full.
Sec. 22. Same subject—Erasing words "in full" from check.
Sec. 23. Subject matter—In general—Legal demands—Existing demands—Severance.
Sec. 24. Right of action *ex-contractu*—Simple contracts—Damages—Contracts under seal.
Sec. 25. Same subject.
Sec. 26. Actions—Appeals—Writ of error—Judgments.
Sec. 27. Right of action concerning realty.
Sec. 28. Right of action *ex-delicto*.
Sec. 29. The particular claim or demand discharged—Proof.
Sec. 30. All demands—Claims—Quarrels—Actions—Causes—Writs of error—Appeals.
Sec. 31. Demands *in præsenti*.
Sec. 32. Future liability—Contingent liability—Contingent demands—Counter-claims—Mutual demands settled when.
Sec. 33. Demands under consideration—Whole subject matter.
Sec. 34. Accrued damages—Future and consequential damages—Continuing nuisance—Undiscovered injury.
Sec. 35. Parts of demands—Splitting causes.
Sec. 36. Construction of release—Of contracts of compromise—Words of limitation.
Sec. 37. Receipt in full of all demands, claims, accounts—Restricted to what—Not conclusive when—Receipts containing contracts—How construed.
Sec. 38. What persons may make an accord and satisfaction—In general—Between partners—Ignoring lien holders—Where obligor and tort feasor are liable for loss of property—By pledgee of note—Assignee.
Sec. 39. By partner, as debtor, as creditor.
Sec. 40. By joint and several debtor—By joint debtor—Settlement of individual liability—Joint creditors.
Sec. 41. Same subject—Statutory provisions.
Sec. 42. By one joint tort feasor—Covenant not to sue one—No contribution.
Sec. 43. By attorney—Agent—Corporation officers.
Sec. 44. Liability of attorney or agent for unauthorized settlement.
Sec. 45. By executor—Administrator—Administrator *de son tort*—A common law right—Statutory authority not exclusive.

Sec. 46. Same subject—Good faith and prudence required—Liability of personal representative.
Sec. 47. By guardian—Next friend—Guardian *ad litem*—Parent.
Sec. 48. By public official.
Sec. 49. By assignee—Receiver—Trustee.
Sec. 50. By a stranger.
Sec. 51. Same subject—Ratification by debtor.
Sec. 52. Same subject—Intent of the parties—Cancellation of the payment—Payment available to subsequent lien holder.
Sec. 53. Same subject—Subrogation—Liability of debtor to stranger—Subsequent promise to pay the stranger—Consideration—Adopting the payment as a defence.
Sec. 54. Consideration—In general.
Sec. 55. Payment of a less sum—Recovery of residue—Rescission unnecessary.
Sec. 56. Same subject—Application of the rule.
Sec. 57. Same subject—Acceptance of less than amount fixed by law—Salary—Fees.
Sec. 58. Payment of an undisputed claim no consideration for relinquishing another claim.
Sec. 59. Insolvency of debtor as a consideration.
Sec. 60. Payment before due—At another place.
Sec. 61. Less sum furnished by third person.
Sec. 62. Substituting debtor's note for a less sum—Note of joint debtor—Of one partner.
Sec. 63. Payment of a less sum to a third person.
Sec. 64. Security for a less sum—Surety—Mortgage.
Sec. 65. Note of third person—Bills—Drafts—Checks—Orders on third person.
Sec. 66. Delivery and acceptance of property—Services.
Sec. 67. Accepting a less sum and surrendering note or security—Gift.
Sec. 68. Payment of principal without accrued interest.
Sec. 69. Effect of receipt in full.
Sec. 70. Statutory change or modification of the rule.
Sec. 71. Accepting a less sum and giving a release.
Sec. 72. By allowing cross demand—Set-off—Recoupment.
Sec. 73. By surrender of rights—Assuming new obligation.
Sec. 74. By acceptance of new or substituted agreement.
Sec. 75. The consideration necessary to support a compromise of unliquidated and disputed demands and of a composition.

Sec. 1. Definition—Accord—Accord and satisfaction—Distinguished from payment and release—Novation.—An accord is an executory agreement whereby one person promises to pay or perform, and the other agrees to receive, in satisfaction of an existing

liquidated or unliquidated demand, something of value different from that which the one party is legally bound to render and the other to receive. Accord with satisfaction is the new agreement executed by the payment or performance of the thing agreed to be rendered in satisfaction, and its acceptance as satisfaction of the original demand.[1] The transaction then becomes what is known in legal parlance, an accord and satisfaction.[2] This arrangement at Civil Law, is known as a novation;[3] although under that law this term includes all manner of substituted agreements. An accord and satisfaction differs from a payment in that payment is not an agreement but a delivery of the exact amount of money, or, if property be substituted, then an equal amount of property at a

[1] Carter v. Chicago, etc., R. Co., 119 S. W. (Mo. App.) 35.

[2] "Accord is a satisfaction agreed upon between the party injuring, and the party injured; which, when performed, is a bar of all actions upon the account. As if a man contract to build a house or deliver a horse, and fail in it; this is an injury for which the sufferer may have his remedy by action; but if the party injured accepts a sum of money or other thing as a satisfaction, this is a redress of that injury, and entirely takes away the action." 3 Bl. Com. 15.

The Supreme Court of Minnesota has laid down the following comprehensive definition: "Accord and satisfaction is the discharge of a contract, or cause of action, or disputed claim, arising either in contract or tort, by the substitution of an agreement between the parties in satisfaction of such contract, cause of action, or disputed claim, and the execution of that agreement." Hennessy v. St. Paul City R. Co., 65 Minn. 13, 67 N. W. 635. Pulliam v. Taylor, 50 Miss. 251; Mitchell v. Hawley, 4 Denio, 414, 47 Am. Dec. 260; Perin v. Cathcart, 115 Iowa, 553, 89 N. W. 12; Continental Bank v. McGeoch, 92 Wis. 312, 66 N. W. 614; Rittenhouse v. Ashland, 82 N. W. (Wis.) 555; Rapalje & L. Law Dic.; Bouvier's Dic.

The statutes of North Dakota, Sec. 3824, and of South Dakota, Sec. 3483, defines an accord thus: "An accord is an agreement to accept in extinguishment of an obligation something different from or less than that to which the person agreeing to accept is entitled." Although the Supreme Court of N. D. in Arnett v. Smith, 11 N. D. 55, 88 N. W. 1037, said that this section was but declaratory of the common law, the last part is directly contrary, as applied to certain demands; for by that law an agreement to accept a part of a liquidated demand is not an accord, and when performed is not an accord and satisfaction. See also Ga. Code, Sec. 4326–4330, for a statutory definition.

[3] Pothier's Ob. 545.

valuation, in compliance with a prior agreement or obligation to make payment.[4] It differs from a release in that a release under seal (and in some states a release not under seal) does not require any actual consideration to support it. The discharge of the demand follows from the force and effect the law gives to the instrument regardless of satisfaction in fact.

Sec. 2. Requisites—In general.—To constitute a valid accord and satisfaction there must be two debts contracted, or a non-contract demand and a debt contracted, one of which must precede the other in point of time; the prior, as we shall presently see, being extinguished by the substitution of the later and its performance and acceptance as satisfaction. It is apparent that the satisfaction of the two agreements, or the demand and the new agreement, is simultaneous and that both transactions are closed. This is true even where the parties agree to accept an executory agreement in satisfaction, for it is the execution and delivery of the executory agreement, or the meeting of the minds of the parties upon its terms where it is not to be in writing, in pursuance of the accord, and its acceptance, that constitutes the satisfaction of the old debt or demand; and, unquestionably, it is the performance and extinguishment of the accord. In such cases a new obligation is left to be performed according to its terms.[1]

It is necessary to the validity of an accord and satisfaction that the new agreement be different, and for the payment or performance of something other than that mentioned in the former obligation or due upon the demand; or, different in the accessory part of the agreement; otherwise the accord and satisfaction would be of no significance. An agreement to satisfy a debt or demand or perform a duty, which one is already under legal obligation to do is without consideration,[2] and unnecessary, as the same end,

[4] Moran v. Abbey, 63 Cal. 56. See City Sav. Bank v. Stevens, 59 N. Y. Super. Ct. 549, 15 N. Y. Supp. 139. Performance means an exact fulfillment of an obligation: Franklin Ins. Co. v. Homill, 5 Md. 170.

[1] See Sec. 74.

[2] See 1 Pär. Cont. 451, n. 1, cltlng Jones v. Wait, 5 Bing. N. C. 341;

namely satisfaction, is attained by payment or performance of the old obligation or demand. Like all other agreements, there must be an assent to, and a meeting of the minds of both parties upon the terms of the new agreement.[3] There must be a new, valuable and legal consideration to support it; but not necessarily adequate, and the agreement must be unambiguous, from which the conclusion may clearly be drawn that the parties intended that the new consideration should satisfy and extinguish the old demand.

Sec. 3. Execution necessary—Accord executory—Right of action how extinguished.—An accord must be executed in order to constitute a bar to an action on the original demand, otherwise, as has been observed, it would be only substituting one cause of action for another which might go on to any extent.[1] "It is not enough that there be a clear agreement or accord, and a sufficient consideration, but the accord must be executed."[2] Readiness to

Tucker v. Bartle, 55 Mo. 114; Smith v. Phillips, 77 Va. 548; Barrow v. Vandvert, 13 Ala. 232; Thompson v. Robinson, 34 Ark. 44; Phœnix Ins. Co. v. Rink, 110 Ill. 538; Smith v. Tyler, 51 Ind. 512; State v. Davenport, 12 Io. 335; Pemberton v. Hoosier, 1 Kan. 108; Jenness v. Lane, 26 Me. 475; Emmittsburg v. Donoghue, 37 Md. 383; Warren v. Hodges, 121 Mass. 106; Callagan v. Hallett, 1 Caines, 104, and other cases.

[3] Hennessy v. St. Paul City R. Co., 65 Minn. 13, 67 N. W. 635; Fuller v. Kemp, 138 N. Y. 234, 20 L. R. A. 785, 33 N. E. 1034.

[1] In Lynn v. Bruce, 2 H. Bl. 317, Ld. Ch. J. Eyre remarked: "*Interest reipublicæ ut sit finis litium.* Accord executed is satisfaction; accord executory is only substituting one cause of action in room of another, which might go on to any extent." S. P. Peytoe's Case, 9 Coke, 79; Russell v. Lytle, 6 Wend. 390; Hawley v. Foot, 19 Wend. 516; Coit v. Woolsey, 3 Johns. Cas. 243. An agreement, by a joint maker, to pay the whole note, is no consideration for the release of a surety of the other joint maker: Cameron v. Warbritton, 9 Ind. 351.

[2] Hearn v. Kiehl, 38 Pa. St. 147, 80 Am. Dec. 472. That an accord must be executed in order to furnish the consideration necessary to uphold the agreement is all the more apparent where the agreement is to receive a less sum in satisfaction, if paid before the due day. The creditor receives his advantage in the earlier payment: Palmer v. Yager, 20 Wis. 87. Until performed it amounts to no more than an option: Harding v. Commercial Loan Co., 84 Ill. 251. See Sewell v. Musson, 1 Vern. 210,

perform is not enough.[3] That an accord executory is no bar to an action upon the original demand is upheld by such a great number of authorities [4] that, as was said by Ld. Raymond, a different decision would "overthrow all the books." [5] A right of action once vested can only be extinguished by satisfaction or release,[6] or by an executed gift of it,[7] and it follows, that an accord being merely an executory agreement to substitute a different satisfaction for the one which the party is already bound to render

where the money was tendered within a day or two after the time agreed. A demurrer, to the debtor's bill setting up some equitable excuse for not paying on the date, was sustained. An agreement to receive property in part payment of a judgment and an indorsed note for the balance, is not a discharge, so as to prevent the filing of a creditor's bill, or the appointment of a receiver: Balde v. Smith, 5 Ch. Sent. 11.

[3] Hearn v. Kiehl, 38 Pa. St. 147, 80 Am. Dec. 472; Russell v. Lytle, 6 Wend. 390, 22 Am. Dec. 537; Dudley v. Kennedy, 63 Me. 465; Blackburn v. Ormsby, 41 Pa. St. 71.

[4] Ellis v. Bitzer, 2 Oh. 89, 15 Am. Dec. 534; Brooklyn Bank v. De Grauw, 23 Wend. 342; Daniel v. Hallenbeck, 19 Wend. 408; Noe v. Christie, 51 N. Y. 272; Kromer v. Heim, 75 N. Y. 577; Tilton v. Alcott, 16 Barb. 598; Geary v. Page, 9 Bosw. 300; Mitchell v. Hawley, 4 Denio, 417; Dolsen v. Arnold, 10 How. Pr. 530; Palmer v. Yager, 20 Wis. 91; Clifton v. Litchfield, 106 Mass. 38; Boston & M. R. Co. v. Union Mut. F. Ins. Co., 83 Vt. 554, 77 Atl. 874; Arkansas City Bank v. Leach, 94 Fed. 310; Brauninger v. National Co., 147 Ill. App. 4; James v. David, 5 T. R. 141; Ruffle v. Ruffle, 3 Lev. 189, Yelv. 124; Bagley v. Hornan, 3 Bing. (N. C.) 915; Carter v. Chicago R. Co., 119 S. W. 35; Thomas v. Mallory, 6 U. C. Q. B. 521; Com. Dig. Accord B. 1, B. 4; Vin. Abr. Accord, A. An accord is nothing more in effect than a proposition on the part of a creditor to accept something else in satisfaction of his demand, which requires performance by the debtor to render it effectual: Cannon River Manfg. Ass'n. v. Rogers, 46 Minn. 376, 49 N. W. 128; Harding v. Commercial Loan Co., 84 Ill. 251. "Where the performance of the new promise was the thing to be received in satisfaction, then, until performance, there is not complete accord, and the original obligation remains in force." Kromer v. Heim, 75 N. Y. 574, 31 Am. Rep. 491.

[5] Allen v. Harris, 1 Ld. Raym. 122.

[6] McKnight v. Dunlop, 5 N. Y. 537, 55 Am. Dec. 370; Bowman v. Teall, 23 Wend. 306, 35 Am. Dec. 562; Willoughby v. Backhouse, 2 Barn. & Cress. 821.

[7] In re Campbell's Estate, 7 Pa. St. 100, 47 Am. Dec. 503.

upon an existing demand, there is no consideration moving between the parties either way to uphold the accord, and there can be no satisfaction of the old demand until there has been complete performance of the accord and acceptance as such. There is no mutuality and the creditor has no means of enforcing it,[8] and either party is at liberty to draw back before performance and acceptance.[9] A refusal to accept is a breach only of an executory agreement without consideration.[10]

If the debtor brings forward and delivers something different, which is or may be to the advantage of the creditor and it is accepted as satisfaction of the old demand, then the necessary consideration is supplied and all the requisites necessary to uphold a valid contract are present. The accord is executory until every thing is performed according to its terms.[11] If the accord be to do a certain thing at a future day, in satisfaction of a cause of action, and the thing is done at the day and accepted, it is a good bar to an action, although it was executory at the time it was made.[12] It is executory where satisfaction is conditional upon

[8] An agreement must in general be obligatory upon both parties, or it will be binding upon neither. Chitty Cont. 15. a. Lynn v. Bruce, 2 H. Bl. 317, was assumpsit for the composition agreed to be given the plaintiff for his debt due on a bond, and it was held that the action would not lie. Where an agreement, intended as a substitute for an existing agreement between the same parties, was drawn up and sent to the defendant, who approved of it, and promised to execute it, but it was not executed by the plaintiff, it was held to be inoperative for want of consideration and mutuality. Wood v. Edwards, 19 Johns. 206. s. p. Bryant v. Gale, 5 Vt. 416.

[9] The plaintiff wrote to the defendant accepting the latter's offer of compromise of a claim against the defendant; on the next day he wrote countermanding his acceptance. Immediately afterwards defendant tendered in full satisfaction of the claim, the amount previously offered. It was held there was no accord and satisfaction. Carpenter v. Chicago M. & St. P. Ry. Co., 64 N. W. (S. D.) 1120. s. p. Cannon River Manf'g Ass'n. v. Rogers, 46 Minn. 376, 49 N. W. 128.

[10] Clifton v. Litchfield, 106 Mass. 38.

[11] Noe v. Christie, 51 N. Y. 270; Briggs v. Pierce, 53 Me. 65.

[12] Roll. Abr. Tit. Accord. 129.

performance,[18] as where a note with surety for a less sum is accepted under an agreement that when paid it shall constitute satisfaction, in which case there is not an accord and satisfaction until the note is paid. Before performance the creditor may surrender the note and sue upon the original demand.

Sec. 4. Part performance.—Part performance of an accord does not constitute satisfaction. In Peytoe's Case it was said—"And every accord ought to be full, perfect, and complete; for if divers things are to be done and performed by the accord, the performance of part is not sufficient, but all ought to be performed." [1] The terms of an accord must be strictly complied with.[2] In assumpsit for fifty shillings, a plea of payment of fifteen shillings upon an accord to accept fifteen shillings and thirty five shillings in hats in satisfaction, and always ready to pay the residue in hats, was held bad.[3] So, where a plaintiff stipulated that a suit was discontinued and the cause of action released in consideration of the payment of the costs, and seventy dollars to his attorney, and defendant paid the seventy dollars and tendered the costs, it was held at most, a simple accord and not a satisfaction.[4] Part performance and readiness to perform the rest will not suffice.[5] Part payment and an agreement to take the residue at a future day cannot be pleaded as satisfaction in bar, to a debt on a bond.[6]

[18] Ogilvie v. Hallam, 58 Iowa, 714, 12 N. W. 730.

[1] Peytoe's Case, 9 Coke, 79; Kromer v. Heim, 75 N. Y. 577, 31 Am. Rep. 491; Kinney v. American Yeoman, 15 N. D. 21, 106 N. W. 44; Memphis v. Brown, 20 Wall. (U. S.) 289, 22 L. Ed. 284; Braggs v. Pierce, 53 Me. 65; Bryant v. Gale, 5 Vt. 416; Patterson v. Garret, 7 J. J. Marsh. (Ky.) 112; Oliwill v. Verdenhalven, 15 N. Y. Supp. 94; Brennan v. Ostrander, 50 N. Y. Super. Ct. 426; Van Allen v. Jones, 10 Bosw. (N. Y.) 369; Brunswick v. Clem, 80 Ga. 534, 7 S. E. 84.

[2] Makepeace v. Harvard College, 10 Pick. 298.

[3] Rayne v. Orton, Cro. Eliz. 305.

[4] Noe v. Christie, 51 N. Y. 270; Hall v. Seabright, 2 Keb. 534.

[5] Hearn v. Kiehl, 38 Pa. St. 147, 80 Am. Dec. 472.

[6] Peytoe's Case, 9 Co. Rep. 79; Russell v. Lytle, 6 Wend. 390, 22 Am. Dec. 537.

The entire debt must be satisfied in order to constitute an accord and satisfaction.[7] If a part only of the sum agreed upon in an accord be paid, the creditor may disregard the accord and either return the payment and sue for the amount of the original claim or treat the sum received as part payment and sue for the residue. The retention of the part payment does not estop the plaintiff to deny that the accord had been executed.[8]

Sec. 5. Tender in performance of an accord.—The authorities are not entirely in harmony on the question whether an accord with an unaccepted tender of performance is a defense to an action on the original contract.[1] A creditor's simple promise to receive from his debtor, in discharge of a liquidated demand the promissory note of the latter, or a less sum in payment than the full sum due, without more, is a *nudum pactum*,[2] and a tender of the note or the lesser sum is insufficient to bar an action on the original claim.[3] Here, however, the tender if accepted would not discharge the original demand. An agreement to take government bonds in satisfaction of a debt was held to be no defence to an action for the recovery of the debt, where the tender of the bonds in pursuance of the agreement was not accepted.[4] So, a tender of performance on an agreement to surrender land in satisfaction of the mortgage debt, was held to be no defence to an action upon the bond.[5] The same rule was applied where the ac-

[7] Line v. Nelson, 38 N. J. L. 358; Fitch v. Sutton, 5 East, 230.

[8] Kinney v. American Yeomen, 15 N. D. 21, 106 N. W. 44; Makepeace v. Harvard College, 10 Pick. 298.

[1] See Bradshaw v. Davis, 12 Tex. 336, for a review of the authorities; also Story on Contracts, Sec. 982b., 3 Ed.

[2] Smith v. Keels, 15 Rich. 318.

[3] Clefton v. Litchfield, 106 Mass. 38; Leeson v Anderson, 58 N. W. (Mich.) 72; Clark v. Dinsmore, 5 N. H. 136; Hearn v. Kiel, 38 Pa. St. 147, 80 Am. Dec. 472; Hosler v. Hursh, 151 Pa. St. 415; Heathcote v. Crookshanks, 2 T. R. 24, Cro. Eliz. 193.

[4] Smith v. Keels, 15 Rich. 318.

[5] Russell v. Lytle, 6 Wend. 390, 22 Am. Dec. 537.

cord was to accept a note of a third person in satisfaction of a debt;[6] and where a deed of trust and a mortgage were to be given in satisfaction of a note,[7] and to like cases.[8] In Mississippi, in an action of trespass, it was held that the plea of accord and tender of the amount of the accord was tantamount to a plea of accord and satisfaction.[9]

Where the holder of a note agreed to accept before maturity a less sum than the amount of the note, in full satisfaction, and upon a tender of performance refused to accept the less sum, he, having transferred the note to a third party without notice, was held liable for damages in an action based on a breach of the accord.[10] So, where a new promise to pay a less sum with surety,

[6] Hawley v. Foot, 19 Wend. 519.

[7] Brooklyn Bank v. De Grauw, 23 Wend. 343, 35 Am. Dec. 569.

[8] Rayne v. Orton, Cro. Eliz. 305; Allen v. Harris, 1 Ld. Raym. 122; James v. David, 5 T. R. 141; Harbor v. Morgan, 4 Ind. 158; Hawley v. Foot, 19 Wend. 517; Noe v. Christie, 51 N. Y. 270; Gleason v. Allen, 27 Vt. 364; McKean v. Reed, Litt. Sel. Cas. (Ky.) 395, 12 Am. Dec. 318; Giboney v. Insurance Co, 48 Mo. App. 185; Carpenter v. Chicago M. & St. P. R. Co., 64 N. W. (S. D.) 1120; Cannon River Man'f'g Ass'n. v. Rogers, 46 Minn. 376, 49 N. W. 128. See Perdew v. Tillma, 88 N. W. (Neb.) 123, where the statement as to a tender seems to have been carelessly made.

[9] Heirn v. Carron, 11 S. & M. 361, 49 Am. Dec. 65. In this case the authorities cited by the court do not sustain its position. Coit v. Houston, 3 Johns. Cas. 243, correctly analyzed, will be found to turn upon the question of evidence as to the acceptance of the tender upon the accord, and is thus explained in a later New York case. See Hawley v. Foot, 19 Wend. 517. Allen v. Harris, 1 Ld. Raym. 122, also relied upon, distinctly repudiates the doctrine of Case v. Baxter, Sir T. Raym. 450, s. c. Sir T. Jones 158, which held that an accord with tender was equivalent to satisfaction. Lynn v. Bruce, 2 H. Bl. 317 and Peytoe's Case, 9 Co. 80, also cited, do not hold that an accord with tender is good. In Bradshaw v. Davis, 12 Tex. 336, the tender appears to have been made upon a new agreement to receive property substituted in place of one to pay money.

[10] Schweider v. Lang, 29 Minn. 254. In this case the plaintiff, at the proper time, had the amount of the first payment ready at the place where the creditor was to call for it; and, later, within the time specified, secured at considerable expense the balance of the money and offered it

payable at a future date, was to be received in satisfaction of the old claim, a tender of the new promise duly executed and kept good was held to be a bar to an action on the original demand.[11] The rule that an unaccepted tender upon an accord will not bar an action upon the original demand seems to be supported by an abundance of authorities, as well as by the better reasoning. According to the general principles of the law of accord, the agreement is without consideration whatever the thing proposed as a substituted performance may consist of. Hence, fundamentally, it is the want of consideration to uphold the accord that gives the right to reject the tender. Tender of performance upon a new contract, accepted as satisfaction, is not here referred to.

Sec. 6. **Accord how executed.**—An accord like all contracts must be executed by the delivery or performance of every thing which the creditor agreed to accept in satisfaction of the original demand.[1] If the agreement is to accept a collateral thing to be delivered to a person appointed to receive it, a delivery to the latter is an execution of the accord,[2] unless the creditor before the performance repudiates the accord. Where a party owing another money is directed by the latter to expend the money for the other's benefit, and he does so, there is a good accord and satisfaction.[3] Where coal was to be delivered at a certain place at a stated price,

to the creditor. This case is apparently contrary to the rule that part performance with tender of the balance is insufficient.

[11] Whitsett v. Clayton, 5 Colo. 476. Here there was in reality a performance by the execution of the new agreement and procuring the surety to join.

[1] Babcock v. Hawkins, 23 Vt. 561; Kinney v. American Yeomen, 15 N. D. 21, 106 N. W. 44; Therasson v. Peterson, 2 Keyes (N. Y.) 636. See Edwards v. Bryan, 88 Ga. 248, 14 S. E. 595.

[2] Anderson v. Highland Turnpike, 16 Johns. 88. A plea of accord and satisfaction was held bad which did not allege that the person to whom a note was to be given for another, had authority to receive it; Bird v. Caritat, 2 Johns. 345.

[3] Hitchcock v. Hassler, 16 Neb. 467, 20 N. W. 396.

in satisfaction of a pre-existing debt, a delivery of the coal at the place was held to constitute performance.[4] So, where a new agreement is to be received as satisfaction, if fully executed in the manner contemplated, and legal, the accord is executed whether the new contract be ever performed or not.[5] The precise thing to be received must be actually delivered and received in satisfaction. Something else will not do.[6] Where certain promissory notes were to be delivered in satisfaction of a claim, the delivery to the creditor of an order on a third person for the notes, was held to be no performance of the accord.[7] Symbolical delivery, however, where that is the usual and practical way of effecting the change of possession, would no doubt be sufficient. Relinquishing a right to goods, already in a creditor's hands, upon an agreement that they will be accepted in satisfaction of his demand constitutes performance.[8] A creditor may waive the performance of some of the conditions of an accord.[9]

[4] Coit v. Houston, 3 Johns. Cas. 243. This case has been several times cited as authority that accord with tender was a bar, and numerous statements in the several opinions filed by the different judges composing the court seem to warrant the conclusion. Kent, J., however, goes to the pith of the case; he says: "I think this case may be decided upon this simple point, whether there was evidence of satisfaction received, or performance tendered, sufficient to warrant a verdict." It appeared there was sufficient coal ready at the place.

Where a defendant was to deliver 1,000,000 feet of lumber at specified times, and after the first date and before the last date, no lumber having been delivered, the plaintiff and defendant entered into a contract amounting to a sale of 750,000 feet then lying in the river, and the old agreement was surrendered and cancelled, it was held an accord and satisfaction of the previous executory agreement. Meriam v. Field. 29 Wis. 592.

[5] Babcock v. Hawkins, 23 Vt. 561; Ellis v. Bitzer, 2 Oh. 89, 15 Am. Dec. 534. The creditor's remedy is upon the new agreement: Palmer v. Yager, 20 Wis. 90.

[6] Clark v. Rowling, Lalor (N. Y.) 105. See Rising v. Cummings, 47 Vt. 345.

[7] Griffiths v. Owen, 13 Mees. & W. 58.

[8] Jones v. Sawkins, 5 C. B. 142; 2 Par. Cont. 685.

[9] Cary v. McIntyre, 7 Colo. 173, 2 Pac. 916.

Sec. 7. Accord unenforceable—Specific performance.—It follows from what has been said as to the want of consideration, and mutuality, that an accord cannot be enforced by action upon the part of the creditor,[1] or by the debtor. A refusal to accept the satisfaction agreed upon furnishes no ground for specific performance.[2] The remedy of the creditor is upon the original cause of action.[3]

Sec. 8. Acceptance in satisfaction necessary.—"To constitute a valid accord and satisfaction, not only must it be shown that the debtor gave the amount in satisfaction, but that it was accepted by the creditor as such,"[1] and in an action to recover upon the original claim where the accord and satisfaction is set up in bar, acceptance in satisfaction must be shown.[2] The bar rests on the agreement to accept as satisfaction and not on the mere receipt of the property.[3] The agreement need not be express; it may be

[1] Lynn v. Bruce, 2 H. Bl. 317; Russel v. Lytle, 6 Wend. 390, 22 Am. Dec. 537; Reeves v. Hearne, 1 M. & W. 323; Brennan v. Ostrander, 50 N. Y. Super. Ct. 426; Hoidale v. Wood, 93 Minn. 190, 100 N. W. 1100; Sewell v. Mussow, 1 Vern. 210.

[2] McKean v. Reed, Litt. Sel. Cas. 395, 12 Am. Dec. 318. In this case, after judgment for damages for the breach of a contract to convey, the judgment creditor agreed to accept part, or all of the land in satisfaction. It was held merely an accord executory which the judgment creditor might or might not accept.

[3] Piper v. Kingsbury, 48 Vt. 480; Clark v. Bowen, 22 How. (U. S.) 270, 16 L. Ed. 337; Crow v. Kimball, 69 Fed. 61, 30 U. S. App. 354, 16 C. C. A. 127; Reeves v. Hearne, 1 M. & W. 323.

[1] Perin v. Cathcart, 115 Iowa, 553, 89 N. W. 12; s. p. Palmer v. Yager, 20 Wis. 91.

[2] Hearn v. Kiehl, 38 Pa. St. 147, 80 Am. Dec. 472; Frick v. Algeier, 87 Ind. 256; Edmonson v. Lovan, 130 S. W. (Mo. App.) 64; Motley Co. v. Southern F. Co., 126 N. C. 339, 35 S. E. 601. A resolution of the board of directors of a corporation accepting certain property in satisfaction of an accord, the whereabouts of such property being at the time known to and accessible to them, has been held an acceptance: Troy Min. Co. v. Thomas, 15 S. D. 238, 88 N. W. 106.

[3] Mitchell v. Hawley, 4 Denio, 414; Mason v. Wickersham, 4 Watts & S. 100.

implied from the circumstances,[4] as where the debtor accepted the thing agreed to be delivered on the accord without saying any thing; or, where the claim is unliquidated or disputed, he accepts a tender made on condition that if accepted it must be in full satisfaction. Receiving a part, even where the claim is unliquidated,[5] or disputed,[6] does not amount to an accord and satisfaction where the sum is delivered without condition. Where there is no accord made prior to the time of the offer of performance from which, in absence of a repudiation of it, a presumption of law would arise that the acceptance was in pursuance of its terms, whether or not there has been such a giving and acceptance as amount to an accord and satisfaction is generally a question for the jury.[7]

Sec. 9. Effect of an accord and satisfaction—Absolute bar—Discharges joint debtor, joint and several debtor, surety, indorser. —The accord and its execution and acceptance as satisfaction, becomes substituted for the old contract or demand, extinguishes the same and is a bar to any action thereon, either for the whole or any part thereof.[1] It is one mode of extinguishing a demand, and in its effect is equivalent to payment in full of the original claim; or to a technical release. Subsequent dealings between the

[4] Perin v. Cathcart, 115 Iowa, 553, 89 N. W. 12; Jones v. Fennimore, 1 G. Green. 134; Illinois Life Ins. Co. v. Benner, 97 Pac. (Kan.) 438.

[5] Motley Co. v. Southern F. Co., 126 N. C. 329, 35 S. E. 601.

[6] Rustler Realty Co. v. Swecker, 134 Iowa, 679, 112 N. W. 169.

[7] Perin v. Cathcart, 115 Iowa, 553, 89 N. W. 12; Rustler v. Swecker, 134 Iowa, 679, 112 N. W. 169; Robinson v. Railway Co., 84 Mich. 685, 48 N. W. 205; Oil Well Supply Co. v. Wolf, 127 Mo. 616, 30 S. W. 145; Illinois Life Ins. Co. v. Benner, 97 Pac. (Kan.) 438.

[1] Anderson v. Highland Turnpike, 16 Johns. 88; Harrison v. Close, 2 Johns. 448, 3 Am. Dec. 444; Guldager v. Rockwell, 14 Colo. 459, 24 Pac. 556; Byrd v. Byrd, 44 Ga. 258; Allison v. Connor, 36 Mich. 283; Wilkinson v. Crookston, 75 Minn. 184; Kansas City, etc., R. Co. v. Hicks, 30 Kan. 288, 1 Pac. 396; Currier v. Bilger, 149 Pa. St. 109, 24 Atl. 168; Alden v. Thurber, 149 Mass. 271, 21 N. E. 312; Rideal v. Great Western R. Co., 1 F. & F. 706.

parties, even as to the same matter, will not revive a claim discharged by an accord and satisfaction, so that the creditor may include it in an action to recover for the whole series of transactions, although credit for the amount previously paid be given upon the sum claimed to be due for all the items of the demand.[2] At common law where the obligation is joint and not joint and several, if one party bound to pay compounds the debt, it enures to the benefit of all. A partnership debt while equally the debt of all the partners and all the partners are bound to satisfy the partnership debt to the fullest extent, yet the debt is in no sense the several debt of either and it cannot be enforced against one only;[3] so if one partner enters into an accord and satisfaction of his liability as a partner to pay the partnership debt, the entire debt is discharged as to all the partners.[4]

In a case where one partner made an accord and satisfaction of his liability for a debt of the firm by delivering his individual note for a portion of the demand, the court said: "It is of no importance, where a consideration exists, that the effect of the transaction is to release and discharge one joint debtor, without a consent by the other, and thus discharge both, * * * * and the party who consents to such discharge can have no real ground of complaint that the bargain which he has made produces such an effect, as it is to be presumed that he entered into the contract with full knowledge of the legal consequences."[5] The rule that a

[2] Wilkinson v. Crookston, 75 Minn. 184. In this case an attorney rendered a bill for his services in an action, which bill was mutually adjusted and paid; afterwards he performed further services in the same action. In an action to recover for his entire services less the sum previously paid, it was held that the payment of the first bill was an accord and satisfaction of all services to that date.

[3] Waydel v. Luer, 3 Den. 410. A debt of a partnership is a joint debt and not a joint and several debt: Lawrence v. Trustees, 2 Denio, 377.

[4] See North Am. F. Co. v. Handy, 2 Sandf. Ch. 492, which holds that a successful defence by one joint debtor, whose liability is joint and not several, enures to the benefit of the other, although the latter suffered the suit to go by default.

[5] Luddington v. Bell, 77 N. Y. 138, 33 Am. Rep. 601. See Waydell v. Luer, 2 Denio, 410. The acceptance of a part of the partnership debt

joint debtor cannot be discharged without discharging all, in some of the states is changed by statute, so that a creditor may discharge one joint debtor without impairing his right to recover of the other.[6] If a creditor enters into an accord and satisfaction with one joint and several debtor of a part of his demand it discharges the whole debt as to all, as an accord and satisfaction discharges the whole demand; but a creditor may accept a part of his demand from one joint and several debtor and covenant never to sue the one paying, for the balance of the debt, and recover of the remaining co-debtor the part remaining unpaid. As to the paying co-debtor, to avoid a circuity of actions, it will be treated as a release, but as to the co-debtor not included in the covenant it is but a covenant. Such a transaction does not affect the liability of the co-debtors as between themselves, and if the co-debtor not discharged, is compelled to pay more than his proportionate part, he may recover the overplus from the creditor previously discharged. An accord and satisfaction which discharges an obligation as to one primarily liable for its payment, releases and discharges an indorser,[7] surety,[8] or other person secondarily liable thereon.[9] The accord and satisfaction, like payment in full, discharges the whole debt, and as the creditor can have but one

from one of two partners and covenanting never to sue the one paying, for the balance of the debt, is held to discharge neither partner, and both may be sued for the balance of the debt. See Hosack v. Rogers, 8 Paige Ch. 229. See, also, Hatton v. Eyre, 1 C. Marsh. 613; Dean v. Newhall, 8 T. R. 168; Claggett v. Salman, 5 Gill & J. 314; Garrett v. Mason, 6 Call, 341, cited in 8 Paige Ch. 229.

[6] Minn. Rev. Code, 1905, Sec. 4283.

[7] Douglass v. White, 3 Barb. Ch. 621. In this case it was held that an indorser was entitled to a perpetual injunction against an assignee of a judgment, where the creditor had voluntarily discharged the acceptor of the draft sued upon. See also Farmer's Bank v. Blair, 44 Neb. 653.

[8] See Bruen v. Margard, 17 Johns. 58; Oberndorf v. Union Bank, 31 Md. 126. A surety is not discharged by a new agreement giving the principal time unless the new agreement is valid: Potter v. Green, 6 Allen, 442.

[9] See Lynch v. Reynolds, 16 John. 41. An accord and satisfaction of a claim for personal injuries against an employer was held to discharge an

satisfaction, nothing remains to be paid. But a release of the principal, reserving a right against the indorser or surety, will not discharge the latter so long as the rights between the principal and indorser or surety are not affected, or the surety prejudiced.

Sec. 10. **Subsequent promise to pay residue.**—There is no legal or moral obligation to pay the residue of a debt discharged by an accord and satisfaction, and, therefore, a simple promise to pay such balance made subsequent to the accord and satisfaction does not revive the original debt, and the agreement is a *nudum pactum*, and cannot be enforced by action.[1] So a promissory note given for the residue is without consideration and void.[2] The reason for the rule is that a creditor, having entered into an accord and satisfaction with his debtor for a consideration by him deemed sufficient, has already received legal value for the residue, and being voluntarily done there is not any moral obligation to pay.[3] This rule does not obtain where the discharge of the original cause of action is not conventional.[4] However, at common law, if the contract to pay the residue of the debt be under seal, the seal imports sufficient consideration to uphold the promise.[5]

insurer who participated in the defence, where the insurer with plaintiff's knowledge furnished the money for the settlement: Breeden v. Marine Ins. Co., 119 S. W. (Mo.) 576.

[1] Stafford v. Bacon, 1 Hill, 532, 37 Am. Dec. 366. In this case an opinion to the contrary, by Nelson, Ch. J., was erroneously reported in 25 Wend. 384. The opinion by the court is by Cowen, J. See 2 Hill, 352. Higgins v. Dale, 28 Minn. 127, 9 N. W. 583; In re Merriman's Est., 44 Conn. 587; Shepard v. Rhodes, 7 R. I. 470; Warren v. Whitney, 24 Me. 561.

[2] Mason v. Campbell, 27 Minn. 54, 6 N. W. 405; Grant v. Porter, 63 N. H. 229.

[3] Some authorities refer to a moral obligation, but so imperfect as not to amount to a consideration.

[4] See Sec. 185 *Post.*

[5] Where it is intended that there should be a consideration, the conderation of a sealed instrument may be enquired into (McMillan vs

Sec. 11. Time when an accord and satisfaction may be made—Sunday contracts.—Accords and satisfactions and compromises of demands founded upon contracts and debts of record, differ somewhat from the ordinary contract with respect to the time when they may be made, inasmuch as they deal with pre-existing demands. They must be made in such manner and at such time as will accord with the existing rules of law governing the original demand, having in mind the character of the subject matter of the original obligation, and whether the demand be evidenced by a simple written agreement, one under seal, or lay in parol. This subject is so interwoven with the subject matter of accords and satisfactions and of compromises, that to consider it here, were we able wholly to disentangle it, would be at the risk of repetition. For any thing upon the subject of time, beyond what follows here, the reader is referred to that part of this treatise concerning the subject matter. As to damages founded upon a tort, the party liable may at any time seek the injured party and make amends.

At common law contracts made on a Sunday are not void,[1] but a contract made on a Sunday, which is in violation of an express

Ames, 33 Minn. 257), but not for the purpose of destroying its validity (Bowen v. Bell, 20 Johns. 338), and undoubtedly a want or failure of consideration may be shown. See 1 Par. Cont. 429 and n. (dd). But where it is intended that there should be no consideration, a want of an actual consideration to a sealed instrument, in absence of a statute, is generally held no defence. 1 Par. Cont. 429 n. The common law rule as to a seal importing a consideration is well settled; but the statute, and the courts, in many states, have unsettled the rule. Under the early New York Code, Sec. 840, a seal is only presumptive evidence of a consideration. Case v. Boughton, 11 Wend. 106. The precise question, whether a want of consideration, as applied to a subsequent promise under seal to pay the residue of a debt discharged by an accord and satisfaction, in those states where sealed instruments have been reduced to the level of unsealed instruments, does not seem to have been before the courts.

[1] Story v. Elliott, 8 Cow. 27, 18 Am. Dec. 423; Adams v. Hamell, 2 Doug. (Mich.) 73, 43 Am. Dec. 455; Drury v. Defountain, 1 Taunt. 135; 2 Par. Cont. 881, n.

provision of a statute prohibiting the performance of certain business on a Sunday, is void. The term void is commonly used in reference to such contracts, but the term does not correctly express the result; otherwise, if it did, the parties might recover their property and the statute would cease to have any deterring effect. The contract is illegal, and the law leaves the parties to suffer the consequence of their illegal act.[2] An accord and satisfaction or compromise made on a Sunday, of a matter within a prohibited calling, is not distinguishable from other contracts, except that it has to do with a pre-existing demand. The Sunday contract being illegal, the only question for consideration is the effect upon the original demand. It is everywhere held that a void or illegal contract is no consideration for the relinquishment of rights under a valid contract.[3] Consequently the original contract would not be impaired. If the consideration received upon a Sunday contract is a note or other new contract, the consideration for the Sunday contract would itself be a Sunday contract subject to the defence of illegality, and, excepting the expense of litigation, if any, the parties would be none the worse off. But where an accord and satisfaction, or compromise, concerning one of the prohibited occupations is consummated on a Sunday and money or other property is delivered in satisfaction of the accord or contract of compromise, the question will arise whether the creditor will be allowed to retain what he received on the Sunday contract, and at the same time recover upon the original demand. Since the passage of the Sunday act, during the reign of Charles II, many intricate and difficult questions concerning Sunday contracts have been before the courts, but if there are any decisions upon this question they have escaped our notice. In absence of authority, upon analogy, both questions must be answered in the affirmative.

[2] Smith v. Bean, 15 N. H. 577.

[3] Delacroix v. Buckley, 13 Wend. 71; Hughes v. Wheeler, 8 Cow. 79.

Sec. 12. Rescission—Tender—Rescission on a Sunday.—An accord and satisfaction may be rescinded by a subsequent agreement of the parties, and the effect will be to restore the debt to its original status.[1] If a creditor is induced by fraudulent representations to accept in full satisfaction a per cent. on a claim, the amount of which is not in dispute, he may rescind and recover the balance due without a tender of the part received.[2] In such cases, and those where there is no fraud, the agreement being void for want of consideration and the creditor entitled to the sum received in any event, his rescission need amount to no more than merely treating the agreement as void and bringing his action to recover the residue.[3] A rescission of a contract is as much business as the original contracting and if made on a Sunday in violation of a statute, it is illegal and void; particularly where the necessary steps needed for its undoing cannot be done on that day.[4] More on the question of rescission will be found in that part of the work devoted to compromise.

Sec. 13. The agreement—Writing unnecessary when—Must be certain—Must be in absolute discharge—Mutuality.—An accord and satisfaction of ~~a simple~~ contract debt,[1] or of damages, or other unliquidated demand need not be in writing. When an accord

[1] Heavenrich v. Steele, 57 Minn. 221, 58 N. W. 982.

[2] Pierce v. Wood, 23 N. H. (3 Foster) 519.

[3] See Eldred v. Peterson, 80 Iowa, 246, 45 N. W. 755, 20 Am. St. Rep. 416, where a co-maker of a note paid a portion of the note to a son of the payee, who erased the co-maker's name; it was held that if the payee himself had erased the name on receiving a part, it would have been void, and that the payee was under no obligation to inform the one paying the part that he repudiated the act of his son in receiving a part and erasing the name. S. P. Leeson v. Anderson, 58 N. W. (Mich.) 72.

[4] Benedict v. Batchelder, 24 Mich. 425, 9 Am. Rep. 130. See Meyers v. Meinwrath, 101 Mass. 366, 3 Am. Rep. 368, n. In Pence v. Langdon, 99 U. S. 578, a notice of rescission was held not void as it did not come within the Nevada Sunday law.

[1] Miles v. Asp, 70 N. W. (S. D.) 1050.

and satisfaction of sealed instruments and debts of record, should be in writing and under seal, in order to comply with the statute of frauds, is considered under the title subject matter. An accord and satisfaction must be certain;[2] an accord that the defendant shall employ workmen in two or three days,[3] or shall pay a less sum on the same or some subsequent day is not sufficient.[4] The agreement and its performance must be an absolute discharge. If the thing delivered is to be returned to the payor in a certain contingency, it is not an accord and satisfaction.[5] So, if the agreement be that the sum paid is to be in full, if certain credits are just, it is a conditional settlement and not an accord and satisfaction.[6] The term accord like the word contract, implies an agreement; a meeting of the minds—"the *aggregatio mentium,* or mutual assent of the parties."[7] Both parties must understand that the thing delivered is in full discharge,[8] as the bar rests not upon the delivery but on the agreement to accept the less amount for the greater.[9]

The mere fact that a claim is unliquidated or disputed is insufficient to work a discharge of the whole upon acceptance of part; its uncertainty merely renders it a proper claim for compromise. It is the agreement of the parties upon the terms of the compromise and its execution and not any dispute that furnishes the consideration for the release, and a payment of part

[2] 3 Bl. Com. 15, n.

[3] Adams v. Tapling, 4 Mod. 88.

[4] Fitch v. Sutton, 5 East, 230.

[5] Nusolf v. Duluth Elec. Co., 122 N. W. (Minn.) 499.

[6] Marshall v. Moody, 92 Minn. 66, 99 N. W. 356.

[7] Fuller v. Kemp, 138 N. Y. 231.

[8] Henselman v. Doyle, 51 N. W. 195. A check "in full of all demands" received in payment, is a receipt in full only when the creditor knew of the presence of the words, or is charged with knowledge of the condition by other facts: Rapp v. Gidding, 57 N. W. 237.

[9] Mitchell v. Hawley, 4 Denio, 414, 47 Am. Dec. 262; Frick v. Algeier, 87 Ind. 256; Duluth v. Knowlton, 42 Minn. 229.

of the demand will in no case discharge the whole as upon an accord and satisfaction, without the agreement to release the remainder.[10] Where there had never been any negotiation between the parties in relation to any claim of the defendant against plaintiff, but the defendant arbitrarily assumed to deduct certain sums from the plaintiff's wages and required him to sign the pay roll without calling his attention to an agreement therein that he consented to the reduction, it was held no accord and satisfaction, although the plaintiff knew of the deduction but did not demand the amount for fear of being discharged.[11] Accepting wages at the usual rate from a railroad company, by an employee while he was disabled from work, in absence of an agreement to the effect that it is paid and received in satisfaction of the damages arising from the injury, does not amount to an accord and satisfaction barring him from recovering of the company the damages for the injury sustained.[12] So, under a contract of employment entitling an employee to a certain percentage of the profits of the business each year, the mere acceptance of a portion of the profits due him for any year, not being paid and accepted in settlement of a disputed claim, does not bar a recovery of the balance of the profits.[13]

Sec. 14. Mistake as to amount—Legality of consideration.—If a less sum is accepted through mistake, as where a check was sent as the amount due on the account and the creditor accepted it not knowing that there were unauthorized items credited in the account, and having no reason to believe the debtor's statement untrue, an action to recover the residue is not barred on the

10 Byrnes v. Byrnes, 92 Minn. 73, 99 N. W. 426; Marion v. Heimbach, 62 Minn. 214, 64 N. W. 386.

11 Hennessy v. St. Paul City Ry. Co., 63 Minn. 13, 67 N. W. 635.

12 Hewitt v. Railway Co., 34 N. W. (Mich.) 658.

13 Lease v. Gillette, 55 Minn. 349, 57 N. W. 58.

ground of accord and satisfaction.[1] The rule of accord and satisfaction does not apply to a settlement for goods sold, so as to bar a recovery for goods delivered of which the parties at the time of the settlement were ignorant, although a receipt in full is given.[2] So where a beneficiary is entitled to $5,000, but through mistake settles for $1,000, the beneficiary may recover the balance due, since he gained nothing by the settlement and the insurer paid nothing for which he was not already bound.[3] An accord and satisfaction or compromise must be supported by a sufficient legal consideration. What constitutes a sufficient consideration will be considered in subsequent sections.[4]

It is a rule as old as jurisprudence itself, that a cause of action once vested cannot be discharged except by the delivery of something of legal value, or by a technical release which imports a consideration,[5] or by an executed gift; therefore there can be no accord and satisfaction of a liquidated, or unliquidated or disputed claim, unless something of value was received in full payment thereof, to which the creditor had no previous right.[6] If a party has no claim against another and knows it, a note given in settle-

[1] McKay v. Meyers, 168 Mass. 312, 47 N. E. 98. In Detlaff v. Ideal Manf'g Co., 144 Mich. 342, 108 N. W. 76, a check in settlement of a balance for wages was handed plaintiff, based upon the assumption by the employer that plaintiff had commenced work April 1st, whereas he commenced work January 1st. The plaintiff not knowing how defendant kept the account, it was held that the acceptance of the check was not a settlement of the claim.

[2] Bloomington v. Brooklyn Ice Co., 171 N. Y. 673, 64 N. E. 1118; 68 N. Y. S. 699, 58 App. Div. 66, affirmed.

[3] Goodson v. National Acc. Ass'n, 91 Mo. App. 339.

[4] Sec. 55–75, 82–90 et seq.

[5] Stenton v. Jerome, 54 N. Y. 480; McNight v. Dunlop, 5 N. Y. 544, 55 Am. Dec. 370.

[6] Ness v. Minnesota Co., 87 Minn. 413, 92 N. W. 333. An agreement by one party to pay another a sum of money and each mutually agrees to discharge the other from all obligations on account of a breach of contract of marriage, was held not enforceable as an accord and satisfaction, when the plaintiff showed no right or advantage yielded up by reason of the agreement: Conrad v. Bare, 29 Oh. Cir. Ct. R. 153.

ment is without consideration and unenforceable.[7] If the consideration be a new executory agreement, or a note or securities, the new contract must be a valid one upon which the creditor can have his remedy.[8] Satisfaction cannot be made by a transfer of forged securities,[9] or of an usurious note,[10] or by a contract void by the Statute of Frauds.[11] Nor would a contract to do any thing against public policy, or unlawful by statutory enactment, constitute a consideration. So a contract to do that which is obviously impossible does not furnish a consideration sufficient to uphold an accord and satisfaction.

Sec. 15. The agreement may be implied.—It is not essential in an accord and satisfaction or compromise more than in other contracts that the agreement be expressed. It may be implied from circumstances indicating the intention of the parties.[1] Demanding and receiving from a railroad company by one injured by the company's negligence, one half of his wages and the amount of his doctor bill, on account of the injury, was held to raise the presumption that it was intended by the parties as a full recompence for the injury and operated as an accord and satisfaction.[2] But a voluntary payment of wages to an employee injured by the

7 McGlynn v. Scott, 58 N. W. 460.

8 Guichard v. Brande, 57 Wis. 534.

9 Guichard v. Brande, 57 Wis. 534.

10 Hughes v. Wheeler, 8 Cow. 79.

11 Delacroix v. Buckley, 13 Wend. 71.

1 Hinckle v. Minneapolis, etc., R. Co., 31 Minn. 434, 18 N. W. 275; Fuller v. Smith, 77 Atl. (Me.) 706. See Jencks v. Burr, 56 Ill. 450. An instruction that if defendant tendered plaintiff a certain sum in full satisfaction, yet if the jury found defendant afterwards let plaintiff have the money without an agreement that it should be in full satisfaction, then it would be no bar to a recovery if more was due, was held erroneous, as tending to mislead the jury into the belief that a special agreement was necessary, since if the tender was accepted on the condition attached, the law would imply the agreement from the acts of the parties.

2 Hinckle v. Minneapolis, etc., R. Co., 31 Minn. 434, 18 N. W. 275.

negligence of the employer, does not constitute a satisfaction of the cause of action for such injury.[3] Where a vendor of land disputed the vendee's computation of the acreage, but afterwards withdrew from a bank the sum deposited to pay for the land at the vendee's calculation, it was held an accord and satisfaction.[4] If the facts relied upon to establish an implied agreement are undisputed and unexplained, and susceptible of but one reasonable construction, their effect is properly one for the court to determine.[5]

Sec. 16. Agreement arising from acceptance of a conditional offer or tender—Prescribing terms of acceptance by debtor, by creditor—Receding from or persisting in claim.—If a demand be open and unliquidated or disputed and the debtor makes an offer of a certain sum in payment of the claim and attaches to his offer the condition that the sum, if taken, must be received in full satisfaction of the claim, and the creditor receives the money, he takes it subject to the condition attached to it and it operates as an accord and satisfaction.[1] This has been said to be the effect,

[3] Sobieski v. St. Paul & D. R. Co., 41 Minn. 169, 42 N. W. 863.

[4] Carter v. Carter, 107 S. W. 467.

[5] Hinckle v. Minneapolis, etc., R. Co., 31 Minn. 434, 18 N. W. 275.

[1] Foster v. Drew, 39 Vt. 51; McGlynn v. Billings, 16 Vt. 329; Vermont St. B. Convention v. Ladd, 4 Atl. (Vt.) 634; Donohue v. Woodbury, 60 Mass. 150, 52 Am. Dec. 777; Cotter v. O'Connell, 48 Iowa, 552; Beaver v. Porter, 129 Iowa, 41, 105 N. W. 346; Latham v. Hartford, 27 Kan. 249; Cunningham v. Construction Co., 119 S. W. (Ky.) 765; Probst v. Ehrat, 140 Ill. App. 309; Bass v. Roberts, 61 S. E. (Ga. App.) 1134; Weber v. Board of Commissioners, 93 Minn. 320, 101 N. W. 296; Hillstad v. Lee, 91 Minn. 335, 97 N. W. 1055; Marion v. Heimbaugh, 62 Minn. 215, 64 N. W. 386; Fuller v. Kemp, 138 N. Y. 231, 33 N. E. 1034, 30 L. R. A. 785; Eames v. Prosser, 157 N. Y. 289, 51 N. E. 986, and see note 157 N. Y. 289, L. ed.; People v. Board of Managers, 96 N. Y. 640; Cleveland v. Toby, 73 N. Y. Supp. 544, 36 Misc. Rep. 319; Rosenthal v. Rudnick, 78 N. Y. Supp. 415, 76 App. Div. 624; Kelly v. Bullock, 94 N. Y. Supp. 517; Jenks v. Burr, 56 Ill. 450; Snow v. Greisheimer, 220 Ill. 106, 77 N. E. 110, affirming 120 Ill. App. 516; Ryan v. Brown, 59 Ill. App. 394; Miller v. Mutual Reserve

even though the creditor at the time of receiving it, declares that he will only receive it in part satisfaction of the claim.[2] The creditor cannot, against the consent of the debtor, prescribe the terms of acceptance.[3] "If he (the creditor) takes it his claim is cancelled, and no protest, declaration, or denial of his, so long as the condition is insisted on, can vary the result."[4] In such a case whether the offer or tender, if accepted, will constitute an accord and satisfaction, depends upon whether the debtor persists in his claim.[5]

Where a creditor had agreed to accept notes secured by a deed of trust, in payment of a balance due him, on a tender of the notes and deed of trust, took them but declared that they would not

Fund L. Ass'n, 113 Ill. App. 481; Stan v. Regelin, 147 Ill. App. 550; Treat v. Price, 47 Neb. 875, 66 N. W. 834; Massilon Engine Co. v. Prouty, 65 Neb. 496, 91 N. W. 384; Chicago R. I. & P. R. Co. v. Buckstaff, 65 Neb. 334, 91 N. W. 426; Wheeling v. Baker, 132 Mich. 507, 93 N. W. 1069, 9 Detroit Leg. N. 677; Cristler v. Williams, 130 S. W. (Tex. Civ. App.) 608; Pollman v. City of St. Louis, 145 Mo. 651, 47 S. W. 563; Chamberlain v. Smith, 110 Mo. App. 657, 85 S. W. 645; Perkins v. Hadley, 49 Mo. App. 556; Lee v. Dodd, 20 Mo. App. 271; Brown v. Hazen, 24 Oh. Clr. Ct. R. 681; Hussey v. Cross, 53 S. W. (Tenn.) 986; Hand Lumber Co. v. Hall, 147 Ala. 561, 41 So. 78; Springfield R. Co. v. Allen, 46 Ark. 217; Chicago, M. & St. P. Ry. Co. v. Clark, 20 S. Ct. 924, 44 L. ed. 1099, rev's'g 92 Fed. 968, 35 C. C. A. 120; Sims v. State Lumber Co., 68 C. C. A. 413, 135 Fed. 1019. Accepting and cashing a check which recited that it is in full payment for work to date, was held to raise the presumption that all items properly chargeable at the time, including a claim for extra work, are settled: Robinson v. Webb, 73 Ill. App. 569.

[2] McDaniels v. Lapham, 21 Vt. 222; Bass v. Roberts, 61 S. E. (Ga. App.) 1134; T. M. Partridge v. Phelps, 136 N. W. (Neb.) 65.

[3] Cunningham v. Standard Co., 119 S. W. (Ky.) 765; Hoyt v. Sprague, 61 Barb. 497; Perin v. Cathcart, 89 N. W. (Ia.) 12; Adams v. Helm, 55 Mo. 468; Deutman v. Kirkpatrick, 46 Mo. App. 624; Pollman v. St. Louis, 145 Mo. 651, 47 S. W. 563; Rains v. Jones, 23 Tenn. 490; Black v. Carlyle, 133 Ill. App. 61.

[4] Preston v. Grant, 34 Vt. 201. S. P. Rosema v. Porter, 70 N. W. (Mich.) 316.

[5] Fuller v. Kemp, 138 N. Y. 231, 33 N. E. 1034.

be received in satisfaction, but only as collateral, and held them notwithstanding the protest of the debtor that they were delivered as a tender in full satisfaction, and that if retained they must be taken as tendered, it was held that the tender being made on the express condition and under protest to the effect that if retained it must be in full satisfaction, it was the creditor's duty either to have accepted the tender on the terms prescribed or to have returned the notes and deed of trust, and not having done so, the creditor was bound by the terms of the tender as prescribed by the debtor.[6] Protesting that more is due, yet giving a receipt in full,[7] or questioning the right of an employer to make any deduction from the sum claimed to be due for wages, and at the same time giving a receipt in full, does not save the right of the employee to recover any further sum in absence of mistake, fraud, duress or undue influence.[8] On the other hand it has been held, that where a debtor tenders a sum in money in full for all legal demands against him upon account, and the creditor receives the money protesting that it is not sufficient, but saying that he will take it and pass it to the debtor's credit, and the debtor does not dissent from this course, the acceptance of the money tendered did not bar the creditor's right to recover such sum as may be found due exceeding the amount received.[9]

[6] Adams v. Helm, 55 Mo. 468.

[7] Treat v. Price, 66 N. W. (Neb.) 834; T. M. Partridge v. Phelps, 136 N. W. (Neb.) 65.

[8] Tanner v. Merrill, 108 Mich. 58, 31 L. R. A. 171, 65 N. W. 664.

[9] Gassett v. Andover, 21 Vt. 341. See Perin v. Cathcart, 89 N. W. (Io.) 12. Retaining a check on which appeared the words "to check in full," sent in payment of goods delivered upon a contract, after repudiating it, was held to be no accord and satisfaction, where the vendee afterwards accepts other goods after notice that they were delivered solely under the contract: Laroe v. Dairy Co., 180 N. Y. 367.

Sec. 17. Same subject—Acceptance without words of assent—Transaction when a contract—Rule in equity.—The proof must be clear and unequivocal that the observance of the condition was insisted upon, and it must not admit of the inference that the debtor intended that his creditor might keep the money tendered in case he did not assent to the condition.[1] Remaining silent after being notified that the tender will not be accepted in full payment but upon account only, may be considered in determining whether there was an accord and satisfaction.[2] In a case where the debtor sent a check for the sum he admitted to be due, in full satisfaction of a claim for a larger sum, and the creditor credited it upon account and sent the debtor a statement for the balance, in which the sum tendered was shown as a credit on account, and the debtor protested that he must accept the tender as made or return the money, the court observed that had the debtor remained silent it might have been presumed that he assented to the use the creditor had made of the check, and in time he would have been bound to pay the balance as upon a stated account.[3] The negotiations need not be continued indefinitely. If a conditional offer be made personally, the creditor has but to

[1] Fuller v. Kemp, 138 N. Y. 231, 33 N. E. 1034. Sending a statement of a disputed account and a note for the balance, and closing the communication; "Trusting you will find this correct and satisfactory, we remain, etc." was held not to indicate an unequivocal request that the note be accepted in full or not at all: Boston Rubber Co. v. Peerless Co., 38 Vt. 551, 5 Atl. 497.

[2] Bahrenburg v. Conrad, 107 S. W. (Mo. App.) 440.

[3] Fuller v. Kemp, 138 N. Y. 231, 33 N. E. 1074. In Windmuller v. Goodyear, 107 N. Y. S. 1095, a check "in settlement" of an invoice was sent with a statement that the balance was ascertained under a warranty that the rubber would not shrink more than forty per cent., which plaintiff credited upon account and demanded the balance, denying that any such warranty was made, the retention of the check was not an accord and satisfaction. In Cohen v. Levine, 114 N. Y. Supp. 840, there being a dispute, a retention of a check reading "in full to date for all claims," was held an accord and satisfaction although the creditor demanded payment of the balance claimed by him.

reject or accept it as made, and if the debtor surrenders possession of the thing tendered after the condition is rejected the presumption would be that he withdrew his condition.[4] If the conditional offer was made by a remittance and notice is given that it will be applied on account only, the debtor may close the transaction by merely reiterating the condition,[5] and any subsequent protest on the part of the creditor will be to no purpose.

Where, after a conditional tender is made, there is further negotiations between the parties, the question whether the tender was accepted subject to the condition, is generally one for the jury.[6] If the sum offered upon certain terms and conditions, is taken without words of assent, the acceptance is an acceptance *de facto,* and the party is bound by it.[7] It has been said that "The mere act of receiving the money is an agreement to accept the same on the conditions upon which it was offered."[8] And again, that the assent of the creditor to the terms proposed by the debtor will be implied.[9] Where a conditional tender or offer is made, the party to whom it is made has no alternative but to refuse it or accept it upon such a condition,[10] and must accept it as made or reject it.[11] The tender or offer and the condition will not be dissevered.[12] If a conditional tender is made and accepted,

[4] See Rothchild v. Mosbacker, 26 App. Div. 167.

[5] See Conton v. Parline, 74 N. E. (Ill.) 43.

[6] Perin v. Cathcart, 115 Iowa, 553, 89 N. W. 12; Sicotte v. Barber, 83 Wis. 421, 53 N. W. 697. See Jenks v. Burr, 56 Ill. 450; Bahrenburg v. Conrad, 107 S. W. (Mo. App.) 440.

[7] Donohue v. Woodbury, 6 Cush. 148.

[8] McDaniels v. Bank of Rutland, 29 Vt. 230. S. P. McDaniels v. Lapham, 21 Vt. 222.

[9] Fuller v. Kemp, 138 N. Y. 231, 33 N. E. 1074.

[10] Rosema v. Porter, 70 N. W. 316, 3 Det. Law N. 869; Perin v. Cathcart, 115 Iowa, 553, 89 N. W. 12; Keck v. Insurance Co., 89 Iowa, 200, 56 N. W. 438.

[11] Hanson v. Todd, 10 So. Rep. 354.

[12] Fuller v. Kemp, 138 N. Y. 231, 33 N. E. 1074; Lewinson v. Montauk, 60 App. Div. 572, 69 N. Y. Supp. 1050.

it becomes a matter of contract.[13] The same rule as to the acceptance of a conditional tender prevails in equity as at law. It is sufficient that when the money is offered a *bona fide* controversy exists in relation to the matter; that the claim is of an unliquidated, or uncertain character.[14]

Sec. 18. The condition may be implied—When an offer or tender is conditional.—The condition upon which money or other thing is offered need not be expressed; it may be implied from the circumstances.[1] The conditional nature of the tender must appear so clearly that a court would declare its acceptance was an accord and satisfaction, or the creditor will not be required to elect to accept it in full or reject it.[2] We have now to enquire what acts and declarations make an offer conditional. The question has arisen very frequently in cases where, upon a plea of tender, the creditor sought to justify his refusal by proof of the conditional nature of the offer. The cases supporting the text in this and the two succeeding sections are mainly of this character. Every person who makes a tender, in effect, tries to get rid of the demand by a payment of only the sum proffered—a part of it—for the whole demand. Which, "means that the amount tendered, though less than the plaintiff's bill, is all that he is entitled to demand in respect to it."[3] A tender is valid if it implies merely that a given sum is offered as being all that is admitted to be

13 Bickle v. Beseke, 23 Ind. 18.

14 McDaniels v. Bank of Rutland, 29 Vt. 230.

1 Lewinson v. Montauk, 60 App. Div. 572, 69 N. Y. Supp. 1050; Lee v. Dodd, 20 Mo. App. 271; Weber v. Board of Commissioners, 93 Minn. 320, 101 N. W. 296; Hillstad v. Lee, 91 Minn. 335, 97 N. W. 1055; Perin v. Cathcart, 115 Iowa, 553, 89 N. W. 12; Weddigen v. Fabric Co., 100 Mass. 422; Jones v. Fennimore, 1 G. Greene, 134.

2 Bahrenburg v. Conrad, 107 S. W. (Mo. App.) 440; Fuller v. Smith, 77 Atl. (Me.) 706.

3 Henwood v. Oliver, 1 Gale & D. 25 (2 C. & P. 51, n.).

due,[4] and a tenderee will not preclude himself from recovering any balance remaining, by accepting an offer of part, accompanied by expressions that are implied in every tender.[5]

It has been held that "The person making the tender has a right to exclude presumptions against himself, by saying, 'I pay this as the whole that is due.'"[6] A party may tell his creditor that the sum offered is all that he considers to be due,[7] or all that is due. It has been said that, "This differs from an offer upon the condition that it shall be received only as closing the matter."[8] The expression, "I am come with the amount of your bill," when accompanied by a statement of the sum offered, does not vitiate the tender.[9] But the statement by the party, on offering a given sum, that he has "come to settle," although thought, in an English case, not to be inconsistent with a good tender,[10] yet such a statement would seem to imply that he had come to close the transaction entirely by a payment of the sum offered. In another case, somewhat similar, the party offering the money said, "I have called to tender £— in settlement of R.'s bill," and it was held that it was for the jury to determine whether it was conditional or not.[11] Where a party tendered three dollars and ten cents in payment of a note, "saying that he tendered said sum as the balance due upon said note," it was held to be merely an assertion of what he claimed to be due and an identification of the demand upon which he made the tender; that the language used was un-

[4] Bowen v. Owen, 11 Q. B. 131.

[5] Henwood v. Oliver, 1 Gale & D. 25 (2 C. & P. 51, n.).

[6] Bowen v. Owen, 11 Q. B. 131. S. P. Davis v. Dow, 83 N. W. (Minn.) 50.

[7] Robinson v. Ferriday, 8 C. & P. 752.

[8] Foster v. Drew, 39 Vt. 51. Payment of a part of a demand and at the same time stating that he owes no more is not an accord and satisfaction: Crilly v. Ruyle, 127 N. W. (Neb.) 251.

[9] Henwood v. Oliver, 1 Gale & D. 25 (2 C. & P. 51, n.).

[10] Read v. Golding, 2 M. & S. 86.

[11] Eckstein v. Reynolds, 2 Nev. & P. 256.

equivocal, only expressing the intent and purpose with which every tender is made.[12]

Sec. 19. Same subject.—It is not enough that the person making the tender says: "I assert this to be all that is due." He must say in effect: "Take this in full discharge, or take nothing." [1] If the tenderor implies by his declaration, that if the other party takes the money, he is required to admit that no more is due, the tender will be conditional.[2] Where the offered is to be accepted in full discharge of all demands,[3] or "in full of his demand," [4] or "as a settlement," [5] or "in full settlement," [6] or "in full satisfaction," [7] or "in payment and extinguishment of the creditor's lien," the offer is not a tender. Where a note was payable in neat stock, a declaration, "if you will take forty-eight dollars in full for the note, I will bring the stock forward," was held an insufficient tender, as being conditional.[8] Where the defendant stated that, "I showed him five hundred dollars, and told him he could have it for his claim," the tender was held bad.[9] So where a party took out his pocket-book and said there was fifteen dollars in it which he would pay for the services, a tender was not made.[10] Offering

12 Preston v. Grant, 34 Vt. 201. S. P. Foster v. Drew, 39 Vt. 54. See Davis v. Dow, 83 N. W. (Minn.) 50.

1 Henwood v. Oliver, 1 Gale & D. 25 (2 C. & P. 51, n.).

2 Henderson v. Cass Co., 107 Mo. 50; Moore v. Norman, 52 Minn. 83; Evans v. Judkins, 4 Camp. 156; Wood v. Hitchcock, 20 Wend. 47.

3 Wood v. Hitchcock, 20 Wend. 47; Strong v. Harvey, 3 Bing. 304, 11 Moore, 72; Draper v. Hitt, 43 Vt. 439.

4 Clemant v. Thornton, 2 C. & P. 50.

5 Mitchell v. King, 6 C. & P. 237.

6 Martin v. Bott, 46 N. E. 151.

7 State v. Carson City Sav. Bank, 17 Nev. 146, 50 Pac. 703.

8 Brown v. Gilmore, 8 Greenl. 107.

9 Tompkins v. Betie, 11 Neb. 147, 38 Am. Rep. 361, 7 N. W. 747.

10 Elderkin v. Fellows, 60 Wis. 339, 19 N. W. 101.

a sum as a half year's rent, was held to be a conditional tender, for, if taken it would have been an admission of the amount of the rent due.[11] It is everywhere held that where the tender is made as being all that is due,[12] or as payment in full, it is not good.[13]

Sec. 20. Whether an offer or tender is conditional or unconditional is not necessarily a question of law.—If the sum offered "is to be taken in full of all demands," or, "as all that was due," or, "for what the defendant owed the plaintiff," and is taken, "it must always be a question of fact, whether it was by way of compromise, received in full satisfaction, though the plaintiff, on trial, should establish his claim to a greater sum." [1] If the language used in making a tender admit only of one construction, whether it is conditional or unconditional is properly a question of law. If the meaning is not clear, it is a question of fact for the court or jury, as the case may be. In a case where, in making a tender, the party representing the tenderor used these terms: "I have called to tender £8 in settlement of Reynold's account," Lord Denman, C. J., left it to the jury whether it was conditional or unconditional, but observed that, if the words "in settlement" merely meant "in payment," the tender was good. The jury found for the defendant. On an appeal the court refused to disturb the verdict, observing that "there is enough ambiguity to make the matter fit for the jury and they have decided it." [2] The supreme court of Vermont has said that the language used in making a tender must be interpreted as it was used with rela-

11 Hasting v. Thorley, 8 C. & P. 573.

12 Field v. Newport, 3 H. & N. 409; Sutton v. Hawkins, 8 C. & P. 259.

13 Moore v. Norman, 52 Minn. 83; Sutton v. Hawkins, 8 C. & P. 259; Thomas v. Evans, 10 East, 101; 9 Bac. Abr. Tender (B); 3 Stark. Ev. 1393; Peacock v. Dickerson, 2 C. & P. 51, n.

1 Miller v. Holden, 18 Vt. 337.

2 Eckstein v. Reynolds, 7 A. & E. 80, 2 N. & P. 256. S. P. Marsden v. Goode, 2 C. & K. 133; Fuller v. Smith, 77 Atl. (Me.) 706.

tion to the previous transactions between the parties, to determine correctly whether its effect is to affix a condition to the offer, or merely to explain what the party claims and intends that the tender will cover.[3]

Sec. 21. Agreement arising from acceptance of check in full.—The question whether the acceptance of a less sum offered upon condition constitutes payment pro tanto or is an accord and satisfaction or compromise, arises frequently in cases where the amount conceded to be due is offered, or remitted by post, by draft or check "in full of account." It is of no significance that a remittance or offer is made by draft, or check, if the parties treat it as money.[1] Ordinarily, the retention of a check enclosed in a letter which merely refers to the amount as the balance due on the account between the parties, will not be held to be an accord and satisfaction so as to bar an action for the balance due.[2] Merely sending a statement of account which included charges in the nature of a set-off, and inclosing a check for the balance as shown by the statement, without attaching any condition to the acceptance of the check, and the retention of the check by the creditor does not amount to an accord and satisfaction.[3] So where a debtor struck out of an itemized account, certain items for goods not accepted, and sent the statement with a check "in full satisfaction of account to date," to the creditor, it was held that the creditor had a right to conclude that the debtor intended to withdraw the items stricken out, from the account and to pay for the items

[3] Foster v. Drew, 39 Vt. 51.

[1] Fuller v. Kemp, 138 N. Y. 231, 33 N. E. 1074.

[2] Eames v. Prosser, 157 N. Y. 289, 51 N. E. 986, citing Kay v. Myers, 168 Mass. 312; Day v. McLea, L. R. 22 Q. B. Div. 610. S. P. Hillestad v. Lee, 91 Minn. 335, 97 N. W. 1055. In Critchell v. Loftis, 100 Ill. App. 196, the check retained recited "balance in full for property," but it was tendered in payment of a matter in dispute.

[3] McKinnew v. Holden, 123 N. W. (Neb.) 439; Cartan v. Thackaberry, 117 N. W. (Io.) 953.

accepted, and that the transaction was not an accord and satisfaction of the items not received.[4] Where there was no previous dispute between the parties as to the amount due, the acceptance of a check remitted by the debtor for the sum admitted by him to be due, although sent with a statement of account and letter stating that it is a "check to balance," [5] or with the statement that it was for the correct balance,[6] or where the check is marked "In full to date," and the account rendered "Check to bal. in full," [7] does not constitute an accord and satisfaction. So a check which contained the words "paid in full to day, eight hundred and ninety one and 20/100 dollars," was held to mean that no more than $891.20 was fully paid, and, there being no dispute as to the amount due its acceptance did not bar an action to recover the balance.[8]

The same principles were held applicable to a case where an employee had deposited $150 as a bond for the faithful performance of his duties, and, after the termination of the employment, the employer sent a check for $66.34 which recited that it was the return in full of the cash bond less the money he wrongfully appropriated. The court observing that the employer yielded no part of his claim and suffered no detriment by paying what he admitted to be due; that, while conceding that $66.34 only was due, had he paid any greater sum thereby suffering a detriment and to that extent yielding his claim, there would have been a consideration for the acceptance of the less sum.[9] Enclosing a

[4] Ginn v. Coal Co., 106 N. W. 867. S. P. Ramapo F. & W. Co. v. Carey, 113 N. Y. S. 10.

[5] Eames v. Prosser, 157 N. Y. 289, 51 N. E. 986.

[6] American Forwarding Co. v. Lindsay, 129 Ill. App. 542. S. P. Sampson v. Northwestern Nat. L. Ins. Co., 123 N. W. (Neb.) 302.

[7] Canadian Fish Co. v. McShane, 114 N. W. (Neb.) 594. S. P. Caravia v. Levy, 119 N. Y. Supp. 160.

[8] Prarle Grove v. Luder, 115 Wis. 20, 90 N. W. 1085.

[9] Demeules v. Jewell Tea Co., 103 Minn. 150, 114 N. W. 733. Giving a check for the amount conceded to be due, even when there is a dispute,

check for a less sum with a letter stating "We trust this will prove satisfactory," [10] or, sending a check for a certain sum "as a very liberal amount on account of your very unsatisfactory work," [11] or, with the statement "I think this will pay you well for what you have done for me," [12] is not imposing an absolute and unqualified condition, but is merely an expression of an opinion that the sum sent will be ample pay, and it does not amount to an accord and satisfaction. In such cases the debtor does not concede or forego any part of his claim, nor attach any condition to the acceptance of his remittance, but merely remits the sum he concedes to be due by his calculation. If a debtor, in reply to the declaration of his creditor that he will receive the sum offered in full, only as part payment, says: "That is all you are going to get, you can take it or leave it, if you want more you can sue me," the matter is left open for the creditor to sue for any further sum that may be due, and it does not amount to an accord and satisfaction.[13]

Sec. 22. Same subject—Erasing words "in full" from check.—It is only when a dispute has arisen between the parties as to the amount due, or as to the liability, and the check is offered in full satisfaction of the claim in controversy, that the creditor will be deemed to have accepted the condition by a retention of

is not an accord and satisfaction, where its acceptance was not made conditional upon it being received in full payment: Hagen v. Townsend, 131 N. W. (S. D.) 512. s. p. Weller v. Stevens, 108 Pac. (Cal. App.) 532.

10 Pottlitzer v. Wesson, 35 N. E. (Ind. App.) 1130.

11 Levenson v. Gillen, 30 Misc. (N. Y.) 454.

12 Mack v. Miller, 87 App. Div. 359, 84 N. Y. S. 440.

13 Rothchild v. Mosbacker, 26 App. Div. 167. See Stratton v. Hunt, 100 N. Y. Supp. 846, where an employer placed in a pay envelop the amount of the employee's wages, less a certain sum claimed for broken material, and on the employee demanding the balance and threatening to collect it, the employer said "Go ahead and do so." Accepting the money was held no accord and satisfaction.

the check.[1] But to have this effect it must appear by a recital in the check that it is in full payment of the claim, or be so declared expressly when the check is tendered, or appear by necessary implication.[2] Thus, where the items of an account were not disputed, but defendant claimed a certain amount as commission earned in the transaction and sent the plaintiff a check for the difference with notice that it was in full settlement of his account, and if not accepted as such to return it, and the plaintiff retained the check, it was held that the plaintiff could not recover the residue.[3] So, where a check was enclosed in a letter in which it was stated "If you choose to accept the enclosed check in satisfaction of all demands" sign and return the enclosed receipt, which was not done but the check was retained, it was held an accord and satisfaction.[4] Where a vendee returned to the vendor certain goods claimed to be defective and sent a check for the amount due for the balance of the goods, in full satisfac-

[1] Eames v. Prosser, 157 N. Y. 289, 51 N. E. 986; Perkins v. Headly, 49 Mo. App. 562; George Knapp & Co. v. Pepsin, 119 S. W. (Mo. App.) 38; Greenlee v. Mosnat, 116 Iowa, 535, 90 N. W. 339; Caravia v. Levy, 119 N. Y. Supp. 160; Beaver v. Porter, 129 Iowa, 41, 105 N. W. 346; Atkinson v. Heine, 119 N. Y. Supp. 122. Where an action is pending to recover on a demand, the retention of a check, sent in a letter stating that it was in full payment of the demand sued on, is an accord and satisfaction: Goodloe v. Empson, 122 S. W. (Mo. App.) 771.

[2] Hillestad v. Lee, 91 Minn. 335, 97 N. W. 1055; Universal Mach. Co. v. Rosenfield, 125 S. W. (Mo. App.) 524; St. Regis v. Tonawanda, 186 N. Y. 563, 79 N. E. 115, affirming 107 App. Div. 90, 94 N. Y. Supp. 946; Aydlett v. Brown, 69 S. E. (N. C.) 243; Hunt v. Ogden, 125 S. W. (Tex. Civ. App.) 386; Fuller v. Kemp, 138 N. Y. 231, 20 L. R. A. 785, 33 N. E. 1034; Ravenwood Paper Co v. Dix, 113 N. Y. Supp. 721; Cunningham v. Standard Co., 119 S. W. (Ky.) 765; Nassoy v. Tomlinson, 148 N. Y. 326; Cohen v. Levine, 114 N. Y. Supp. 840; Barham v. Bank, 126 S. W. (Ark.) 394; McKenty v. Oceanus Mfg. Co., 123 N. Y. Supp. 983. Sending a check with a statement in the body of the check "Balance account railing," was held not to be a good tender: Hough v. May, 4 Ad. & El. 954.

[3] Ostrander v. Scott, 161 Ill. 339, 43 N. E. 1089. S. P. Bass v. Roberts, 61 S. E. (Ga. App.) 1134.

[4] Richardson v. Taylor, 60 Atl. (Me.) 779.

tion and settlement of all claims, disputes and matters between them, it was held that the acceptance of the check involved the acceptance of the conditions imposed and constituted a complete accord and satisfaction.[5] The same rule was held to apply to the acceptance of a draft sent in payment of the amount of an invoice, less a certain rebate previously claimed by the vendee, and which the vendor had refused to allow.[6] Where a check for a less sum is offered in full payment; erasing the words "in full" from the check without the debtor's consent, does not change the effect of the acceptance.[7]

Sec. 23. Subject matter—In general—Legal demands—Existing demands—Severance.—It is a general rule that where parties are bound by contract, or under obligation to make and receive amends, where the thing to be done or delivered may be resolved into money damages, they may make an accord and satisfaction or compromise the debt or demand upon such terms and for such consideration as they may deem sufficient; provided, however, the contract sought to be supplanted is not in violation of the law,[1] or offends against public morals and decency, or in contravention of public policy.[2]

[5] Schwartz v. Hirsch, 56 Misc. 618, 107 N. Y. Supp. 796.

[6] Hills v. Sommer, 53 Hun. 392, 6 N. Y. Supp. 469.

[7] Hussey v. Crass, 53 S. W. (Tenn. Ch.) 986; Smith v. Bronstein, 107 N. Y. Supp. 765; Hull v. Johnson, 46 Atl. (R. I.) 182. Accepting a check offered in full settlement of an unliquidated demand, constitutes a good accord and satisfaction although the creditor enters on the check "E. & O., E." meaning thereby "errors and omissions excepted." T. B. Redmond v. Atlantic Ry. Co., 58 S. E. 874.

[1] Quayle v. Bayfield Co., 114 Wis. 108, 89 N. W. 892; Kidder v. Blake, 45 N. H. 530; Smith v. Grable, 14 Iowa, 429; Martin v. United States, 4 T. B. Mon. (Ky.) 487; Goodrich v. Sanderson, 35 N. Y. App. Div. 546, 55 N. Y. Supp. 881; Walan v. Kirby, 99 Mass. 1.

[2] Rittenhouse v. Ashland, 82 N. W. (Wis.) 555; Clark v. State, 142 N. Y. 101, 36 N. E. 817; Settle v. Sterling, 1 Idaho, 259; State v. Nashville, 15 Lea, 697, 54 Am. Rep. 427. See Sec. 57 *Infra.*

The demand must be in existence at the time. An accord and satisfaction or release of all demands, does not comprehend a claim afterwards arising by reason of the creditor paying an accommodation note loaned to the debtor and by him negotiated prior to the accord and satisfaction or release.[3] A demand, however, asserted in good faith, and with some color of right, based upon doubtful and conflicting questions of law or fact, may be the subject of a valid accord and satisfaction, or compromise;[4] and, such accord and satisfaction, or compromise is valid, although it afterwards appears that there was no enforceable demand. Courts favor compromises and will not investigate the relative merits or demerits of the two claims with a view to set aside the compromise.[5] But the surrender of a claim which is utterly without foundation, and known to be so, is not a good consideration for a promise.[6] A creditor and debtor need not necessarily compromise the entire demand, they may sever it and compromise part and leave the rest to stand.[7]

Sec. 24. Right of action ex-contractu—Simple contract—Damages—Contracts under seal.—An accord and satisfaction entered into before or after breach,[1] is a good plea in bar of an action upon a simple contract, oral or written, brought to recover the thing contracted to be paid or delivered, or to recover damages arising from a breach of the contract.[2] In this respect a written

[3] Seymour v. Minturn, 17 Johns. 169, 8 Am. Dec. 380.

[4] Pitkin v. Noyes, 48 N. H. 294, 97 Am. Dec. 615; Wilder v. St. Johnsburry R. Co., 65 Vt. 43, 25 Atl. 896; Goodrich v. Sanderson, 35 N. Y. App. Div. 546, 55 N. Y. Supp. 881.

[5] Fisher v. May, 2 Bibb (Ky.) 448, 5 Am. Dec. 626.

[6] Kidder v. Blake, 45 N. H. 330; Pitkin v. Noyes, 48 N. H. 294, 97 Am. Dec. 615.

[7] O'Beirne v. Lloyd, 43 N. Y. 248.

[1] Spann v. Baltzell, 1 Flo. 301, 46 Am. Dec. 349, citing Goss v. Nugent, 5 Barn. & Ad. 65.

[2] A compromise of a breach of promise of marriage is good. Ham v. Potter, 101 Minn. 439.

contract not under seal is considered of no greater dignity than an oral accord and satisfaction.[3] At common law an obligation under seal not broken, can not be discharged by an accord and satisfaction, or by an instrument not under seal.[4] A distinction is made in Blake's case, between cases "where a duty accrues by the deed in certainty, * * * as by a covenant, bill, or bond, to pay a sum of money, there this certain duty takes its essence and operation originally and solely by the writing; and therefore ought to be avoided by a matter of as high a nature, although the duty be merely in the personality;" [5] and, cases where no certain duty accrues by the deed, but a wrong or default subsequent

[3] Allen v. Jaquish, 21 Wend. 628; Ford v. Campfield, 6 Halst. 327; Spann v. Baltzell, 1 Flo. 301, 46 Am. Dec. 346, citing Goss v. Nugent, 5 Barn. & Ad. 63; Chit. on Cont. 112, 5th Am. Ed.

[4] Blake's Case, 6 Co. 44; Kaye v. Waghorne, 1 Taunt. 428; Lowe v. Egginton, 7 Price 604; Tweed v. Oswald, 1 E. & B. 295, 72 E. C. L. 295; Preston v. Christmas, 2 Wils. C. P. 86; Noyes v. Hopgood, Cro. Jac. 649; Olden v. Blaque, Cro. Jac. 99; Batchelder v. Sturgis, 3 Cush. 201; Ligon v. Dunn, 28 N. C. 133; Smith v. Brown, 10 N. C. 580; Cabe v. Jameson, 10 Ired. L. 193, 51 Am. Dec. 386; Harper v. Hampton, 1 Har. & J. (Md.) 622; Milnes v. Vanhorn, 8 Blackf. 198; Levy v. Very, 12 Ark. 148; Robison v. Flanigan, 22 U. C. Q. B. 417; Delacroix v. Bulkley, 13 Wend. 68; Mitchell v. Hawley, 4 Denio, 414, 47 Am. Dec. 260; Sedgwick on Damages, 2nd Ed. p. 579. In Eddy v. Graves, 23 Wend. 82, where the defendant set up an oral contract, made before default, to extend the time of performance, Cowan, J., said: "We wish to be understood as adopting the rule that a subsequent executory contract, in order to operate as a defeasance or modification of a previous contract by specialty, though that be executory, must itself be under seal, whether it have a consideration or not, and whether it be made before or after a breach of the previous contract or not."

A summary of the common law doctrine upon this point has been stated thus—a sealed executory contract cannot be released or rescinded by a parol executory contract; but, that, after a breach of a sealed contract, a right of action may be waived or released by a new parol contract in relation to the same subject matter, or by any valid parol executed contract. Delacroix v. Bulkley, 13 Wend. 72.

[5] Blake's Case, 6 Co. 44; s. p. Preston v. Christmas, 2 Wils. 86. A bond with a penalty falls within this rule provided it is to pay a sum certain. See Neal v. Sheffield, Cro. Jac. 254.

together with the deed gives an action to recover damages for such wrong or default, there an accord and satisfaction of the damages is a good plea in bar of the action.[6]

The distinction referred to in Blake's case, is between a discharge of the deed or other obligation under seal, itself, which should be by an instrument of as high a nature and not by parol; and, a discharge of the damages arising from a wrong or default in the performance of the terms of an instrument with condition, which wrong is the cause of action; in which case an accord with satisfaction may be pleaded in satisfaction of the damages or condition. Thus, in an action of debt upon a guardian's bond, where the guardian upon a settlement of his account fell in debt to his ward,[7] or debt for breach of a covenant to purchase land,[8] or debt on a bond with a penalty,[9] or in covenant, as in Blake's case, where the breach assigned was for not repairing a house,[10] and like cases where the action sounds in damages, an accord with satisfaction is a good plea in bar. It follows of course that an action may be maintained upon a new agreement accepted in satisfaction, if supported by a sufficient consideration, to recover whatever is due upon it.[11]

[6] Blake's Case, 6 Co. 44. S. P. Cabe v. Jameson, 10 Ired. L. 193, 51 Am. Dec. 386; Delacroix v. Bulkley, 13 Wend. 71; Mitchell v. Hawley, 4 Denio, 414, 47 Am. Dec. 260; Capitol City Ins. Co. v. Detwiler, 23 Ill. App. 656; Cutler v. Cox, 2 Blackf. 178, 18 Am. Dec. 152; Neldon v. Smith, 36 N. J. L. 148; Franklin v. Hamill, 5 Md. 170; Harper v. Hampton, 1 Har. & J. 622; Moody v. Leavett, 2 N. H. 171; Payne v. Barnet, 2 A. K. Marsh. 312; Levy v. Very, 12 Ark. 148.

[7] State v. Cordon, 8 Ired. L. 179.

[8] Cabe v. Jameson, 10 Ired. L. 193, 51 Am. Dec. 386.

[9] Strange v. Holmes, 7 Cow. 234.

[10] Blake's Case, 6 Co. 44.

[11] Lattimore v. Hansen, 14 John. 330. In this case the plaintiff notified defendant that he would not go on with the original contract. The court said the plaintiff had a right to forfeit the penalty. Notice of intention to forfeit the bond amounted to a breach and the new verbal contract was held binding. In Monroe v. Perkins, 9 Pick. 298, after performing part of a

Sec. 25. Same subject.—The same question arises frequently in reference to a modification or discharge by parol of a sealed instrument, and it seems to be well settled that after a breach of a sealed agreement it may be modified in any respect, or wholly rescinded, by an executed parol agreement founded upon a sufficient consideration.[1] It is important at this point, though not strictly within the line of inquiry, to mention that the common law rule requiring an obligation without condition and under seal, before a breach, to be dissolved by an instrument of equal solemnity seems to be confined to those obligations conferring a benefit in certainty. If the obligation to be performed has no fixed or certain advantage to the parties, the agreement before it is broken may be discharged or rescinded by parol,[2] as where the agreement is to go a certain voyage before a particular day,[3] or to

contract under seal to build a house, the plaintiff refused to proceed. A new oral contract was made and it was held that plaintiff could recover. Here, also, was a breach before the new oral contract was made.

[1] Dodge v. Crandall, 30 N. Y. 294; Lattimore v. Harsen, 14 Johns. 330; Dearborn v. Cross, 7 Cow. 48; Fleming v. Gilbert, 3 Johns. 528; Delacroix v. Bulkley, 13 Wend. 71. It has been said that in the United States the tendency of judicial decisions has been to apply the same rule, in reference to parol modification or discharge, to sealed instruments as to simple contracts (Hastings v. Lovejoy, 140 Mass. 261, 2 N. E. 776), and, in the case referred to the court assumed to relax the rule by holding that an oral agreement to abate rent was good. But the case does not seem to be in conflict with the strict common law rule, as that part of the lease vesting the estate was executed, leaving executory only a money demand for rent payable from time to time, and an agreement, based upon a valuable consideration, to accept a less sum as rent was made and executed.

A landlord may by parol, abate a part of the rent before it is due and when executed it will be binding. McKenzie v. Harrison, 120 N. Y. 260, 17 Am. St. Rep. 638, 8 L. R. A. 257. See Wharton v. Anderson, 28 Minn. 301. It follows, of course, that after it is due he may abate a part by way of a gift, but in an action to recover the whole rent due, an executory parol agreement to abate a part, is no defense. Coe v. Hobby, 72 N. Y. 141, 28 Am. Rep. 141.

[2] See Seymour v. Minturn, 17 Johns. 169.

[3] Langdon v. Stokes, Cro. Car. 383. See May v. King, 12 Mod. 538.

sell and convey land, or personal property, or to perform services; for, here, it can truthfully be said that before the day there is no certainty of benefit, and the parties can waive or rescind the contract and when fully carried out it is valid. This does not infringe upon the rule that a cause of action, once vested, can not be discharged except by satisfaction or release. In the case of a bond with a penalty or condition to pay a certain sum, the thing to be paid is as much due before the day, though not to be paid until the day, as it is after the day, and therefore an accord and satisfaction of the money or condition without a deed either before or after default is a good plea.[4] The reason given, is that the end of the action is to have amends, therefore satisfaction given the plaintiff is good. Another equally good reason supporting an accord and satisfaction in such cases, is that the obligor may release himself from the agreement by incurring the penalty in the bond, which, if threatened, or impending through force of circumstances, is a sufficient consideration for a new promise.[5]

A parol modification or rescission of a contract under seal, even where the original contract is required by the Statute of Frauds to be in writing, does not offend against the statute. For parol evidence is admissible to prove a new and distinct agreement founded upon a new consideration, and it is immaterial whether the new agreement be entirely oral, or whether it refers to and partially or wholly adopts the provisions of the former written contract, provided the old agreement is abandoned.[6] In such cases the oral agreement is relied upon simply by way of an

[4] Strange v. Holmes, 7 Cow. 224; Anonymous, Cro. Eliz. 46; Preston v. Christmas, 2 Wils. 86; Neal v. Sheffield, Cro. Jac. 254. In Pinnel's Case, 5 Co. 117, the question was one of pleading. A plea of accord and satisfaction was held bad in not stating that the money was paid in full satisfaction, but only that the plaintiff accepted it in satisfaction. But for that defect in the plea the demurrer would have been overruled. See Strange v Holmes, *Ante.*

[5] Lattimore v. Harsen, 14 Johns. 330.

[6] 1 Greenl. on Ev. Sec. 303 and cases cited. Cummings v. Arnold, 3 Metc. 486; Stearns v. Hall, 9 Cush. 31.

accord and satisfaction.[7] If it be agreed that a new parol executory agreement shall supplant the old obligation, to have the effect of an accord and satisfaction it must not be within the Statute of Frauds, for a void agreement can never be considered an alteration of a valid agreement.[8] Under the Statute of Frauds a leasehold estate for more than one year cannot be surrendered except by a deed or conveyance, or by act and operation of law; and as the latter phrase is defined to mean a surrender by law, by taking a new lease, valid in law, to begin presently or during the continuance of the first,[9] it therefore follows that a new lease for a term exceeding one year or surrender lying in parol, of a valid leasehold estate for more than one year, will not constitute a good defense in an action upon the original lease.[10] In New York, where money is due by the condition of a bond, and the defendant under the statute has a right to be discharged by bringing the money into court, it was held that an accord and satisfaction by parol might be set up against it.[11] A party will not be permitted to take advantage of his own wrong,[12] and upon this principle an accord and satisfaction which was the cause of the breach of the original instrument, has been held a good defense in an action on the original contract.[13] In some jurisdictions an

[7] Brown on St. of Frauds, Sec. 423. See Chitty on Cont. 790, where it is said: "But after breach, the discharge must be by release under seal, unless it operates as an accord and satisfaction." Citing Crawford v. Millspaugh, 13 Johns. 87: Bender v. Sampson, 11 Mass. 42.

[8] Delacroix v. Bulkley, 13 Wend. 71.

[9] Coe v. Hobby, 72 N. Y. 141, 28 Am. Rep. 141; Rowan v. Lytle, 11 Wend. 616.

[10] **"Surrender—Acts Constituting.**—An unexecuted agreement for the surrender of leased premises is not a 'surreuder'; but there must also be an abandonment by the lessee, and a resumption of possession by the lessor, or such a relinquishment as will justify resumption of actual possession by the lessor." Young v. Berman, 131 S. W. 62.

[11] Keeler v. Salisbury, 33 N. Y. 648; Strange v. Holmes, 7 Cow. 224.

[12] Fleming v. Gilbert, 3 Johns. 530.

[13] Herzog v. Sawyer, 61 Md. 344.

accord and satisfaction of a sealed instrument seems to be favored in Equity on the ground that the agreement of the parties is enforceable in equity without regard to a seal.[14]

Sec. 26. Actions—Appeals—Writ of error—Judgments.—Litigants absolutely control their actions and suits, in so far, that they may, at any stage of the proceedings, declare a truce and drop the proceedings, or consent to a dismissal, or to a judgment for one or the other parties consistent with the issues. The parties to any action, suit or proceeding, upon a valuable consideration, may, out of court, settle the same by an accord and satisfaction, or compromise.[1] If, after such agreement, one party proceeds with the action, the accord and satisfaction or compromise may be set up by a supplemental pleading. In order, however, to be effective as a bar to the further prosecution of the action, the accord must be executed; merely giving an order on an attorney for the sum of money agreed to be paid in full satisfaction, which the attorney refused to pay, is no accord and satisfaction.[2] Discontinuance of depending mutual suits for false imprisonment has been held to be a good accord and satisfaction.[3] Matters involved in an action which has been removed to a higher court are in litigation until final judgment, and the parties after an appeal, or removal of the cause by certiorari, or writ of error, may still compromise and settle their differences. It has been held that an accord and satisfaction is a good plea in bar of a writ of error;[4] although this has been doubted.[5] No reason was assigned for the doubt and none suggests itself to us.

14 See Smitherman v. Kidd, 36 N. C. 86; Steeds v. Steeds, 22 Q. B. D. 537.

1 Southerlin v. Bloomer, 93 Pac. (Or.) 135.

2 Schlitz v. Meyer, 21 N. W. (Wis.) 243.

3 Foster v. Trull, 12 Johns. 456.

4 Salmon v. Pixlee, 2 Day (Conn.) 242; Atlanta v. Blanton, 80 Ga. 563, 6 S. E. 584.

5 Potter v. Smith, 14 Johns. 444.

At common law, a judgment being a debt in the nature of a record, payment or an accord and satisfaction could not be pleaded in bar of an action to recover on the judgment.[6] This rule has been recognized in a number of American decisions.[7] If the creditor has actually received satisfaction and is using the judgment for any purpose, the debtor has a remedy by motion in the action to compel a discharge of record. In England the ancient common law rule was long ago changed by statute,[8] so that payment of a debt of record could be pleaded in bar of an action. Quite a respectable number of American authorities hold that a parol accord and satisfaction of a judgment is good, and may be pleaded in bar, or otherwise set up to defeat any attempt to use the judgment.[9] And this is as it should be, especially in those states where the court administer both law and equity in the same action.[10]

[6] Mitchell v. Hawley, 4 Denio, 414, 47 Am. Dec. 260; Boffington v. Tuyes, 120 U. S. 198, 7 S. Ct. 529, 30 L. Ed. 649.

[7] Riley v. Riley, 20 N. J. L. 114. See Weber v. Couch, 134 Mass. 26, 45 Am. Rep. 274.

[8] 4 Anne, Ch. 16, Sec. 12.

[9] Reid v. Hibbard, 6 Wis. 175; Sanders v. Bank, 13 Ala. 353; Jones v. Ransom, 3 Ind. 327; McCollough v. Franklin, 21 Md. 256; Cobb v. Cowdery, 40 Vt. 25, 94 Am. Dec. 370; Savage v. Blanchard, 148 Mass. 348, 19 N. E. 396; Savage v. Everman, 70 Pa. St. 315, 10 Am. Rep. 676; Boffington v. Tuyes, 120 U. S. 198, 75 Cl. 529, 30 L. Ed. 649. A decree of alimony may be discharged by an accord and satisfaction: Fred v. Fred, 50 Atl. 776. Acceptance of specific articles which a judgment creditor has agreed to receive in payment operates as an appropriation in satisfaction of the judgment: Brown v. Feeter, 7 Wend. 301, 11 L. Ed. 140. In Potter v. Smith, 14 Johns. 444, after the rendition of a judgment, the judgment creditor agreed to purchase a pair of horses of the defendant and apply so much of the purchase price thereof as would be necessary to satisfy the damages and one-half the costs and discharge the defendant; this, the Court said, was no doubt a good accord and satisfaction.

[10] In Boffington v. Tuyes, 120 U. S. 198, 7 S. Ct. 529, 30 L. Ed. 649, the court said: "At common law actual payment of record could not be pleaded in bar of an action for the recovery of the debt. This has been changed by statute both in England and in this country, and no reason can be assigned

Sec. 27. Right of action concerning realty.—It was resolved in Vernon's Case—"That by the rule of the common law, a right or title which any one has to any lands or tenements of any estate of inherit. or freehold cannot be barred by acceptance of any manner of collateral satisfaction or recompense: * * * for a right or title of freehold or inheritance cannot be barred by any collateral satisfaction, but by release or confirmation, or an act which *tantamounts,* and therefore it is commonly said in our book, that accord and satisfaction is a good plea in personal actions, where damages are only to be recovered, and not in real actions:"[1] and this is the law at the present day. By this is meant that a title or interest in land can only be transferred by deed. In ejectment for the recovery of a chattel real and damages for the trespass, an accord and satisfaction is good, for, in such cases as was said in Peytoe's Case, trespass and ejectment are so woven and mixed together that they cannot be severed.[2] In such cases, however, the accord and satisfaction must not offend against the Statute of Frauds. If the leasehold estate is such that it can only be surrendered in writing, the accord and satisfaction must be evidenced by a writing properly signed though not necessarily by deed. A verbal agreement between the parties cannot cancel a lease for years.[3]

why an accord and satisfaction should not have the same effect." See, also, Savage v. Blanchard, 148 Mass. 348, 19 N. E. 396, where the court observed: "But this rule has been much broken in upon by statute, and by decisions upon equitable grounds in modern times."

[1] Vernon's Case, 4 Co. 1; Peytoe's Case, 9 Co. 79.

[2] Peytoe's Case, 9 Co. 79.

[3] Rowan v. Little, 11 Wend. 616. The phrase surrender "by act and operation of law" used in the Statute of Frauds means the acceptance of another written lease to commence presently or before the termination of the original lease: Coe v. Hobby, 12 N. Y. 141, 28 Am. Rep. 141.

Sec. 28. **Right of action ex delicto.**—At common law, in all actions founded upon a tort where nothing but amends are to be recovered in damages, an accord and satisfaction is a good plea.[1] It may be pleaded in trespass,[2] assault, mayhem,[3] ravishment or seduction of ward,[4] or seduction of servant, alienation, waste,[5] conversion,[6] conspiracy, maintenance,[7] and actions for damages for wrongfully causing death, and in all actions to recover for personal injuries,[8] an accord and satisfaction with the person injured in his life time is binding upon personal representatives.[9] An accord and satisfaction is a good plea to an action for libel or slander. An agreement that apologies from the plaintiff and defendant shall appear in the several newspapers of the respective parties, and executed by the one pleading, it was held to be a valid plea.[10] But where the agreement was that, in discharge of the suit, the defendant should make a submission in writing, in a place appointed, and before certain persons, which was performed; it was held no defense, it being a point of honor only, and could be no discharge of the damages.[11] An agreement to dismiss mutual depending suits for false imprisonment, and an actu-

1 Peytoe's Case, 9 Co. 77; Blake's Case, 6 Co. 44.

2 Peytoe's Case, 9 Co. 77; Heim v. Carron, 11 Sm. & Mar. 361, 49 Am. Dec. 65; Ellis v. Bitzer, 2 Ohio, 89, 15 Am. Dec. 534; Rubble v. Furnir, 2 Hen. & M. 38; Oliver v. Phelps, 20 N. J. L. 180.

3 Peytoe's Case, 9 Co. 77; Blake's Case, 6 Co. 44.

4 Peytoe's Case, 9 Co. 77.

5 Peytoe's Case, 9 Co. 77; Blake's Case, 6 Co. 44.

6 Peytoe's Case, 9 Co. 77.

7 Peytoe's Case, 9 Co. 77.

8 Rideal v. Great Western Ry. Co., 1 F. & F. 706.

9 Read v. Great Eastern Ry. Co., 37 L. J. Q. B. 278, 3 L. R. Q. B. 555, 16 W. R. 1040, 18 L. T. N. S. 82, 9 B. & S. 714.

10 Boosey v. Wood, 3 H. & C. 484, 11 Jur. N. S. 181, 34 L. J. Exch. 65, 13 W. R. 317.

11 Bac. Abr. Tit. Accord, A; Roll. Abr. 128, 129. In 2 Roll. Rep. 96, where the defendant pleaded that it was agreed the defendant should confess to

al discontinuance, is a good accord and satisfaction.[12] In bastardy, the putative father may effect a compromise and settlement with the mother of the bastard, but such compromise does not preclude the state from proceeding in its usual way to protect the interest of the child, and the public against the possibility of the child becoming a public charge.[13]

Sec. 29. The particular claim or demand discharged—Proof.—The claim or demand discharged by an accord and satisfaction or compromise, in absence of a writing, may be proven by parol evidence. If a receipt is passed, and it be no more than a mere acknowledgment of payment or delivery, resort must still be had to oral evidence to identify the claim or demand settled. But if the receipt contains recitals disclosing the contract between the parties, that part of it stands on the footing of other written contracts, and cannot be varied or contradicted by parol.[1] It is a common practise for the parties effecting an accord and satisfaction or compromise to execute and deliver a release, and such instrument unavoided is the only competent evidence of the agreement.[2]

On the rule of law that every man's deed is taken most strongly against himself, a general release is to be taken most strongly against the releasor. But this does not mean that the quality of the agreement alters the meaning of the language designating the subject matter. When given upon an accord and satisfaction, or upon a compromise, it is no more than evidence of the contract; the writing merely constituting the proof, and it is sub-

the plaintiff that he had done him wrong, and should ask forgiveness on his knees, the question was whether this was sufficient consideration or satisfaction, but it was not decided. Bac. Abr. Tit. Accord A.

12 Foster v. Trull, 12 Johns. 456.

13 State v. Doughter, 47 Minn. 436.

1 Hill v. Syracuse, 73 N. Y. 351; Morris v. St. Paul Ry., 21 Minn. 91; Platt v. Castle, 91 Mich. 484, 52 N. W. 52; 1 Greenl. Ev. 305.

2 Kirchner v. New Home Co., 135 N. Y. 182.

ject to no different construction than is a like oral contract when proven. Where an accord and satisfaction, or contract of compromise is established by proof, either by a formal release or other writing, any restriction upon its operation is matter of construction only. The intention of limiting it to a particular debt or demand, when general words are used, must be ascertained from the deed itself, or the instruments in *pari materia* containing the agreement and release. Extrinsic evidence is inadmissible to show that a particular debt or demand was not intended to be discharged contrary to the plain letter of the instrument.[3] An accord and satisfaction, or compromise, of all demands, is governed by like principle as a release discharging all demands, and discharges all causes of demand.[4] We may, therefore, for the purpose of determining what claims and demands are included in a settlement, examine with profit the kindred question of release, as well as oral and written accords and satisfaction, and compromises.

Sec. 30. All demands—Claims—Quarrels—Actions—Causes—Writs of error—Appeals.—According to Littleton, "if a man release to another all manner of demands, this is the best release to him to whom the release is made, that he can have, and shall enure most to his advantage." Commenting upon this, Lord Coke said: "'*Demande*,' '*Demandum*,' is a word of art, and in the understanding of the common law is of so large an extent, as no other one word in the law is, unless it be *clameum*." [1] A release of all demands, "discharges all sorts of actions, rights, title and con-

[3] Van Brunt v. Van Brunt, 3 Edw. Ch. 13. See Lauzon v. Belleheumer, 66 N. W. (Mich.) 345, where it is held that a contract stating that it is in full settlement of all actions and cause of actions on account of all matters of any kind between the parties, is conclusive as to any controversy existing, when there was no fraud or mutual mistake.

[4] Vedder v. Vedder, 1 Denio, 257.

[1] Co. Litt. Sec. 508, 291, b. The word claim embraces every species of legal demand: Knutson v. Krook, 111 Minn. 357, 127 N. W. 11.

ditions before or after breach, executions, appeals, rents of all kind, covenants, annuities, contracts, recognizances, statutes, commons." [2] Quarrels extend not only to real and personal actions, but to causes of actions and suits, "So that by release of all quarrels, not only actions depending in suit, but causes of action and suit also are released, and it is where one releases to another all actions, not only actions depending, but also causes of actions are released." [3] Quarrels, controversies, and debates, are synonymous and of one and the same signification.[4] "A release of suits is larger and more beneficial than a release of quarrels, or of actions; so a release of demands is more large and beneficial than any of them, for thereby is released all that is by the other released, and more." [5]

A release is general when by its terms it is not applicable to any particular demands. So it is general if it purports to release all demands including a particular demand.[6] If the words fairly import a general discharge their effect may not be limited so as to exclude a demand, the existence of which, at the time of the settlement, the releasor had no knowledge.[7] Neither is the effect limited by the subjects considered in the preliminary discussion, for if the parties intentionally embrace in an instrument all subsisting causes of action when only certain of them were discussed, it will be operative according to its terms and unassailable. Releases and other written contracts do not differ in this respect.

[2] Bac. Abr. Tit. Release I; Co. Litt. 508, 291, b; Altham's Case, 8 Co. 294; Vedder v. Vedder, 1 Denio, 257; Grumley v. Webb, 44 Mo. 444, 100 Am. Dec. 304.

[3] Altham's Case, 8 Co. 305.

[4] Altham's Case, 8 Co. 305.

[5] Altham's Case, 8 Co. 305.

[6] See Murphy v. New York, 83 N. E. 29, where a particular demand was mentioned, following the words importing a general release. Dunbar v. Dunbar, 5 Gray, 103.

[7] Slayton v. Heneken, 91 Hun, 582, 36 N. Y. Supp. 251; Kirchner v. New Home Co., 135 N. Y. 182.

Their effect can be avoided only for fraud, mistake, duress, or some like cause.[8] A general release of all demands, although of great extent, does not extend to writs by which nothing is demanded neither in fact, nor in law, but lie only to relieve the plaintiff by way of discharge, as writs of error, appeals and the like.[9] It is otherwise if the plaintiff is to be restored to anything. It may be released by the name of action.[10]

Sec. 31. Demands in præsenti.—An accord and satisfaction or release of all demands technically operates upon a present interest.[1] A present right, to take effect *in futuro* may be presently released.[2] Where the debt is *in præsenti,* a release of "all actions or demands" discharges it although the money is not then due.[3] But it is otherwise before breach of a covenant to build a house or do any other thing, where there is no debt or duty, or cause of action in being, a discharge of all actions, suits and quarrels does not discharge the covenant. The covenant itself before it is broken may be discharged.[4] A compromise or release of all actions or demands does not bar a lessor of rent not due, "because it was neither *debitum* nor *solvendum* at the time of the

[8] Kirchner v. New Home Co., 135 N. Y. 182; Pierson v. Horker, 3 Johns. 68.

[9] Altham's Case, 8 Co. 306, citing Frescullard's Case, 11 H. 4.

[10] Bac. Abr. Tit. Release, I.

[1] Woods v. Williams, 9 Johns. 123. Littleton says: "No right passeth by a release, but the right which the releasor hath at the time the release made." Litt. Sec. 446. One reason given for the rule is that the release itself supposes a right in being. See Pelletrean v. Jackson, 11 Wend. 110. Many nice diversities are to be found in the old books concerning this subject, which followed would carry us into other fields of research, but we do not find it laid down anywhere that a general release operates upon anything but rights *in esse.*

[2] Wood v. Williams, 9 Johns. 123.

[3] Co. Litt. Sec. 512, 291, b.

[4] Co. Litt. 292, b. See, upon this question, Littell v. Ellison, 17 N. Y. Supp. 294; Barchelder v. Sturgis, 3 Cush. 201.

release made." An eviction before the rent becomes due avoids the rent. Here, also, the rent is not earned.[5] A settlement of a dispute over certain lands whereby articles of compromise were entered into giving to one party possession of the land and reserving to the other one-half of a mill site, was held to convey no title and did not estop the plaintiff from asserting any subsequently acquired rights against the defendant or any purchaser from him.[6]

Sec. 32. Future liability—Contingent liability—Contingent demands—Counter claims—Mutual demands settled when.—A release of all demands, given upon receipt of the amount of a judgment, was held not to release a covenant for repairs not then broken.[1] Such a release will not discharge a bond of indemnity not forfeited.[2] A release of all actions, duties, and demands, will not discharge a bail bond not then chargeable.[3] So, when one, in consideration of the sale of goods to another, promises to pay for them, if the purchaser does not pay by a certain time, a release of all actions and demands to the guarantor, does not release the contingent liability.[4] The contingent liability itself, as that of a guarantor, surety or indorser, may be released.[5] But where an accommodation indorser, who was the payee named in the note, covenanted never to sue the maker upon any existing demand, it was held to discharge an action on the note, although not paid by the indorser until after the date of the bond.[6] The court observed, however, that had the suit been for money

[5] Co. Litt. Sec. 513; Altham's Case, 8 Co. 304.

[6] Walton v. Newson, Humpr. (Tenn.) 140.

[1] Bac. Abr. Release, I, citing Hancock v. Field, Cro. Jac. 170.

[2] Butcher v. Butcher, 4 Bos. & Pul. 113.

[3] Hoe's Case, 5 Coke, 70.

[4] Bac. Abr. Tit. Lease I, citing Briscot v. Aier, 2 Roll. Abr. 407.

[5] Bank v. McCalmont, 4 Rawl. 307.

[6] Cuyler v. Cuyler, 2 Johns. 186.

paid as surety the cause of action would have arisen subsequent to the date of the bond and would not have been affected by it. A compromise or settlement in absence of any explanation is presumed to embrace the whole of the subject matter or transaction had under consideration by the parties.[7] Where an employee, who kept an account of the overtime of other employees, and throughout a long period of time made weekly settlement with his employer and gave a receipt in full without rendering any account for his own overtime, it was held that the settlements and receipts bound him.[8]

Where a compromise and payment is made of a sum claimed to be due upon a contract, it is presumed that all matters growing out of the contract and known to the parties are included, but a matter constituting a counter claim arising out of the fraud of the vendee unknown to the vendor and not intended to be settled is not discharged by the compromise.[9] But where a vendee, upon discovering fraud upon the part of the vendor, does not rescind the sale, but makes a reduction from the purchase price and comes to a settlement, it is an accord and satisfaction which is not affected by the subsequent discovery of new incidents in the fraud, for this does not confer a new right to rescind but merely confirms the previous knowledge of fraud, and a counter claim for anything further by reason of the fraud cannot be sustained.[10] A compromise or settlement for goods purchased without reserving a right of set-off for shortage or other cause, ex-

[7] Kinney v. Kierman, 49 N. Y. 164. Where no controversy has arisen at the time of making a payment, the payment does not operate as an accord and satisfaction: New Amsterdam Casualty Co. v. Mesker, 106 S. W. (Mo. App.) 561.

[8] Davis v. Detroit Boat Works, 80 N. W. (Mich.) 38. S. P. Bartlett v. Railway Co., 82 Mich. 658, 46 N. W. 1034.

[9] Watson v. James, 33 N. W. (Iowa) 622. In this case the vendor falsely represented the character of a coal mine and the quality of the coal.

[10] Woodford v. Marshall, 39 N. W. (Iowa) 376; Grannis v. Hooker, 31 Wis. 474.

tinguishes the right to such set-off.[11] Where parties have mutual demands and one of them accepts a sum of money and gives a receipt in full of all accounts, unexplained, a court or jury may infer that the accounts on both sides were settled.[12] So, upon like principle, if, upon a settlement of mutual demands, a promissory note is given by one of the parties to the other, it will be presumed, in absence of evidence to the contrary, that all claims in controversy were embraced in the settlement.[13]

Sec. 33. Demands under consideration—Whole subject matter.—An accord and satisfaction does not discharge demands not contemplated by the parties.[1] Where an agent fraudulently retained certain property of his principal, and on a compromise and settlement of his compensation, accounted for the property as having been used for a specific purpose, such compromise and settlement was held to be no bar to an action for conversion of the property.[2] So, accepting a surrender of certain leased premises and giving a release "of and from all obligations to pay rent," was held not to bar a recovery for a breach of covenant to take

11 Pabst v. Lueders, 64 N. W. 872.

12 Alvord v. Baker, 9 Wend. 324. In Kentucky River L. Co. v. Moore, 24 Ky. L. Rep. 587, 69 S. W. 704, the parties having mutual accounts and demands, an agreement to "relinquish and cancel all book accounts, contracts and demands existing between said parties," was construed to be in full of all mutual accounts.

13 Lindsey v. Moore, 70 N. W. (Iowa) 695. S. P. Burrows v. Williams, 100 Pac. (Wash.) 340.

1 Rowell v. Marcy, 47 Vt. 627; Bates v. Cobb, 5 Bosw. 29; Littell v. Elleson, 17 N. Y. Suppl. 294. A written settlement of all demands arising out of a lease, which specifies certain property, was held not to cover other property not mentioned: Lamb v. Lamb, 125 N. W. (Mich.) 722. Where a creditor had two disputed claims and the debtor asked for an itemized statement of one of the claims and he thereupon sent a check for the amount thereof with a letter stating that it was in full of all accounts to date, it was held to justify a finding that the check was sent and accepted in settlement of the latter claim: Aydlett v. Brown, 69 S. E. 243.

2 Ballard v. Beveridge, 171 N. Y. 194.

good care of the premises and to repair.[3] Where a compromise and settlement is for the damages to clothes, it cannot be set up as an accord and satisfaction for an injury received in the same accident, to the brain and spine.[4] A compromise and settlement of a will contest, whereby the defendant agreed to pay the debts of the estate, was held to be no bar to a claim against defendant, growing out of the settlement of another estate, where the plaintiff at the time of the settlement did not know they had any such claim against the other estate.[5] If a sum is to be paid in installments and the creditor may have a several judgment for each installment, a compromise or release of all actions or demands will be a satisfaction of all the installments then due.[6]

Sec. 34. Accrued damages—Future and consequential damages—Continuing nuisance—Undiscovered injury.—If an act which lays the foundation of a future liability has occurred at the time of giving a release, a general release of all causes of actions, will discharge the releasee from all liability, in respect to such transaction.[1] A compromise and settlement of a claim for labor includes all claims for damages caused by the negligent manner in which the work was performed.[2] Where, under a contract, all claims in connection with the contract were to be presented and liquidated, and a certificate of that fact furnished before the final payment, and such payment was to be in full of all claims and demands whatever, it was held that such certificate precluded the contractor from recovering damages for delay in performing the contract occasioned by the defendant.[3] So, where upon receiving

[3] Herrman v. Laemmle, 107 N. Y. S. 73.

[4] Roberts v. Eastern Ry. Co., 1 F. & F. 460.

[5] Hespen v. Hespen, 105 S. W. 99.

[6] Co. Litt. 513.

[1] Chit. Cont. 675; Radburn v. Morris, 1 M. & P. 654, 4 Bing. 649.

[2] Gall v. Dickey, 58 N. W. (Iowa) 1075.

[3] Coulter v. Board, 63 N. Y. 366.

the final payment, a contractor executed a release of actions, causes of actions and damages which he had resulting or arising from the contract, it was held a good defense to a claim for damages occasioned by defendant delaying performance by neglecting to remove certain obstructions.[4] If a person elects to compromise the immediate damages resulting from a wrongful act, such compromise is a bar to the consequential damages as well. Thus, where a plaintiff, having a cause of action for a tortious entry by defendant upon his land and causing a nuisance thereon, upon sufficient consideration settled with defendant and gave a receipt reciting "in full of all demands to date," it was held a good accord and satisfaction of the damages which from time to time might result from his wrongful act.[5] Here the defendant could not abate the nuisance without a second trespass.

But, where a person is in a position to abate a nuisance, an accord and satisfaction or compromise made on a certain day, of all demands on account of a nuisance, will not bar an action for a continuance of the nuisance after that day, as every succeeding injury is a new cause of action.[6] So, it has been held that a settlement and compromise of the damages to land for diverting water from a natural channel, will not bar an action for damages subsequently accruing from the same cause.[7] Where there has been a settlement and compromise of several specific claims for damages, the injured party, in order to overcome any presumption arising from the acceptance of the money, may prove that the particular claim sued upon was at the time unknown to him and could not reasonably have been discovered by him at the time of the settlement of the other demands.[8] Where goods sold

[4] Phelan v. Mayor, 119 N. Y. 86.

[5] Vedder v. Vedder, 1 Denio, 257.

[6] Vedder v. Vedder, 1 Denio, 257.

[7] Wright v. Syracuse R. Co., 49 Hun, 445, 3 N. Y. Suppl. 480, 23 N. Y. St. 78.

[8] Scully v. Delemater, 28 Fed. Rep. 114.

proved to be inferior in quality, and the seller stated that if they were returned credit would be given for them and the amount paid as freight would be refunded, a return of the goods and acceptance of a check for the freight was held an accord and satisfaction, and a bar to a claim for a breach of sale.[9] A resale to the seller of a machine at a greater price than was paid for it, the amount to be credited upon the purchase price of a new machine, is an accord and satisfaction of any claim the purchaser may have had for fraud and deceit in the sale of the first machine.[10] If the minds of the parties meet upon a compromise and settlement of the damages for injuries arising from a concussion, caused by a collision of trains, the injured party is bound by the terms of the settlement although it appeared that he sustained serious and permanent injuries, latent and undiscovered until afterwards, and of which he had no idea at the time of making the agreement.[11] So, where a person having a claim for personal injuries against a city, presents his claim and receives a sum on account thereof, there being no agreement that the sum paid shall be in satisfaction in whole or in part, the presumption is that it was intended as full payment for the injury and will bar an action based upon the same injury.[12] If a man be injured by the wrongful act of another and afterwards enters into an accord and satisfaction of the damages, it is binding upon his representatives after his death,[13] and is a defense to an action for wrongfully causing his death.

Sec. 35. Parts of demands—Splitting causes.—It is well settled that a judgment in an action which embraces only part of an entire demand merges the whole demand, so that no subsequent

[9] Alden v. Thurber, 149 Mass. 271.

[10] Schagun v. Scott, 162 Fed. 209.

[11] Rideal v. Great Western Ry. Co., 1 F. & F. 706.

[12] Bowman v. Ogden City, 93 Pac. (Utah) 561.

[13] Read v. Great Western Ry. Co., 37 L. J., Q. B. 278, 3 L. R., Q. B. 555.

action can be maintained to recover the part omitted; but it does not necessarily follow that a voluntary accord and satisfaction, compromise, or release of a claim has that effect. The parties may sever a demand; compromise a part and leave the residue to stand; and where such an agreement is made, either in express terms or can be inferred from the circumstances, the settlement of part will be no bar to a recovery of the residue not settled.[1] But in absence of an agreement splitting a cause of action, an accord and satisfaction or compromise of part of a claim, discharges the whole. Thus, where a number of items included in an action, and others not included arise under the same contract, and were due at the time of the commencement of the action, an accord and satisfaction of the demand sued upon will bar an action on the item not included in the suit.[2] In such a case, a stipulation fixing "the amount of the plaintiff's claim in this action," at a certain sum, with a provision for entry of judgment for that sum in case of default in its payment, was held not to imply an agreement to sever the demand inasmuch as the protection afforded the defendant by an entry of judgment would be to convert the penalty into an inducement to violate his agreement. The rule permitting the parties to sever a demand does not apply where the right is based upon fraud. Where the fraud is single the cause is indivisible and it cannot be separated into two causes of action and a settlement for a part made and the balance left open.[3]

[1] O'Brien v. Lloyd, 43 N. Y. 248. S. P. Kinney v. Kiernan, 49 N. Y. 248. In this case, after a rescission, plaintiff compromised and settled for the part of the goods retained by defendant, and it was held not to affect the title to the residue. The plaintiff expressly excluded the balance of the goods from the settlement.

[2] O'Brien v. Lloyd, 43 N. Y. 248.

[3] Allison v. Connor, 36 Mich. 283. See *Post* Sec. 93.

Sec. 36. Construction of release—Of contract of compromise—Words of limitation.—The general rule of construction of a release is, that words of limitation in order to restrict the effect of general words must precede and not follow the general words.[1] Where there are general words alone in a release, they shall be taken most strongly against the releasor; but where there is a particular recital in a deed, and then general words follow, the general words are qualified by the particular recital;[2] therefore, if a particular debt or other demand is first released, and this is followed by general words, however comprehensive in character and scope, such general words are held to relate solely to the debt or demand specifically mentioned.[3] Thus, if a party receives ten pounds of another and acknowledges the receipt thereof, and "releases, acquits, and discharges him of all actions, suits, debts, duties, and demands;" nothing is discharged but the ten pounds, for the last words have reference to the first.[4] So, where a release acknowledged the receipt of one dollar in full satisfaction of a certain judgment, and also in full of all debts, demands, executions, and accounts whatsoever, it was held that the par-

[1] Slayton v. Heneken, 91 Hun, 582, 36 N. Y. Supp. 251. After notifying a city of a claim for damages suffered during a long period of time from the maintenance of a defective sewer, upon a settlement, the plaintiff executed a release broad enough to cover the whole claim, and it was held that the release was not limited by the words: "Being particularly a release and discharge of all claims of every nature, character, and kind * * * by reason of damages suffered by the overflowing of the sewer * * * on the 5th day of July, 1901" that the word "particularly" being used in the sense of "especially": Murphy v. New York, 83 N. E. 39.

[2] Bac. Abr. Tit. Rel. K.; Grumley v. Webb, 44 Mo. 444, 100 Am. Dec. 304.

[3] In Littlefield v. Winslow, 19 Me. 394, the court said: "Persons often use general language when speaking of the subject on which the mind is then employed. If another subject be presented to the mind in connection with it, the language usually gives some indication of it. And when it does not, if general language were not limited to the subject then under consideration, it would occasion mischief, not only in the common business of life, but in the construction of contracts, and even judicial proceedings."

[4] 2 Roll. Abr. 409; Bac. Abr. Tit. Rel. K.

ticular judgment only was discharged.[5] The same rule of construction applies to receipts, and agreements disclosing the terms of a compromise or other settlement. Where, by a receipt a certain sum was acknowledged as satisfaction of a certain judgment, and it concluded with, "said sum is in full satisfaction of all claims and demands I have or hold * * * up to this date," it was held no bar to an action upon a claim not connected with the judgment.[6]

Sec. 37. Receipt in full of all demands, claims, accounts—Restricted to what—Not conclusive when—Receipts containing contracts—How construed.—A mere receipt "in full of all demands," or "all claims and demands," or "all accounts," or "of all claims and demands then or theretofore existing," is restricted to the subject matter had under consideration by the parties.[1] It is not a contract but a mere acknowledgment of payment upon the particular demand under consideration, and where the receipt does not specify the particular demand, parol evidence is admissible to identify the demand.[2] A receipt for $10 in full of all demands applies only to the demand or demands upon which the ten dollars was due and must of necessity be explained. A mere receipt being merely an admission against the party giving it, is always

[5] Jackson v. Stackhouse, 1 Cowen, 122, 13 Am. Dec. 514; McIntyre v. Williamson, 1 Edw. 34; Noble v. Kelly, 40 N. Y. 415. It has been declared that the foregoing rule of construction "is more emphatically the rule in equity." McIntyre v. Williamson, 1 Edw. Ch. 34. But from an examination of that case and those cited (Ramsden v. Hylton, 2 Ves. Sr. 310; Cole v. Gibson, 1 Ves. Sr. 507), it does not appear that the equity courts have adopted any stricter rule in matters of construction than have the law courts.

[6] Grumley v. Webb, 44 Mo. 444, 100 Am. Dec. 304; Cummings v. Baars, 36 Minn. 350, 31 N. W. 449.

[1] California Packers' Co. v. Merritt, 92 Pac. (Cal. App.) 509; Slaughter v. Hamm, 2 Ham. Oh. Rep. 271; Ensign v. Webster, 1 Johns. Cas. 145. See Hicks v. Leaton, 67 Mich. 371, 34 N. W. 880.

[2] See California Packers' Co. v. Merritt, 92 Pac. (Cal. App.) 509.

open to explanation or contradiction, and the party may show by parol that the consideration therein mentioned was not received,[3] or that it was for a greater or less sum, or that it was something different, as where the party gave a receipt absolute in its terms, and a note was received as conditional payment.[4] Whether the receipt recites a full consideration when less was paid in full of all demands, or merely acknowledges the receipt of the less sum in full of all demands, the creditor is not precluded by the receipt or the agreement from recovering the residue upon a showing that the demand was liquidated and undisputed.[5] In such case there is no consideration for releasing the residue.

It is apparent that some confusion has resulted from a failure to observe a distinction between a mere receipt acknowledging money paid, and a receipt containing a condition or agreement between the parties. If the latter, and it is apparent from the instrument that the consideration mentioned goes to support a valid accord and satisfaction, or contract of compromise of a disputed or unliquidated claim, while it may still be shown that the consideration was not delivered, in absence of mutual mistake or fraud, it cannot be shown by parol for the purpose of defeating the written contract, that the consideration was different. Thus, where, upon a compromise, the creditor indorsed on the note of the debtor that he had received the note of a third person as a compromise for the full payment of the note, the writing was held to be a contract, and oral evidence, offered to show that the debtor was to pay a certain sum in money in addition to the note, was held inadmissible; that the rule allowing evidence to

[3] Cumming v. Baars, 36 Minn. 350, 31 N. W. 449; Tobey v. Barber, 5 Johns. 68; Howard v. Norton, 65 Barb. 761; Burnap v. Partridge, 3 Vt. 144.

[4] Tobey v. Barber, 5 Johns. 68. S. P. Putnam v. Lewis, 8 Johns. 389; Trisler v. Williamson, 4 Har. & M. 219; Maze v. Miller, 1 Wash. C. C. 328; Tucker v. Maxwell, 11 Mass. 143.

[5] Fitch v. Sutton, 5 East, 230; Slaughter v. Hamm, 2 Ham. Oh. Rep. 271. See *Post*, Sec. 69.

vary or explain a receipt did not apply.[6] In conclusion we may observe that a receipt is conclusive only in so far as it establishes a valid accord and satisfaction, or contract of compromise of a disputed or unliquidated demand.[7] And, that in such cases, as to the demands included in the settlement, as before stated, the agreement is subject to the same rule of construction as are other like contracts; and, that upon the same principle which governs the recital of the consideration in a receipt, a mere receipt which mentions a particular demand as having been settled, is no more than *prima facie* evidence of the demand settled and in case of mistake oral evidence is admissible to show that other demands were covered by the payment.

Sec. 38. What persons may make an accord and satisfaction—In general—Between partners—Ignoring lien holder—Where obligor and tort feasor are liable for loss of property—By pledgee of note—Assignee.—As the consent which a creditor gives upon receiving the new consideration and the intent of the debtor to give it in extinguishment of the original demand, is equivalent to payment, it follows that only those persons having the present right to make and receive payment may enter into an accord and satisfaction. After an assignment, or payment of the claim by a surety, or indorser, or co-obligor, only those thus substituted to the rights of the creditor may compromise the claim. If a co-surety compromise a demand he can recover of his co-surety no more than he paid for the latter.[1] A payment of a sum of money by one partner to the other, and its acceptance in lieu of all demands, is equivalent to an accord and satisfaction and is a good defence to an action for an accounting.[2] Wherein it dif-

[6] Kellogg v. Richards, 14 Wend. 116. S. P. Sterens v. Wiley, 165 Mass. 402, 43 N. E. 177.

[7] Cummings v. Baars, 36 Minn. 350, 31 N. W. 449.

[1] Burnes v. Cook, 114 S. W. (Mo.) 1065.

[2] 2 Lindley on Part. 971.

fers from payment, as the object of an action for an accounting is to ascertain how much is or was payable. Where satisfaction lies in the performance the agreement must be executed.[3] But the agreement itself, if founded on a sufficient consideration, and free from fraud or undue influence, will bar an action between the partners with respect to the matters or accounts waived.[4] As a general rule if a demand is owned by several by such a unity of interest that all must be joined in a strictly personal action for its recovery, a release by one owner is as effectual as the release of all.[5] But this rule does not apply where the fund must be marshalled in satisfaction of prior rights of certain persons, thus—"In case a claim arises in favor of A. and B., against C., out of a contract entered into by the three, to which claim by the contract A. has the prior and B. the subsequent right, C. and B. cannot without the consent of A. effect an accord and satisfaction which will cut off the right of A." [6] Cases where insurance companies enter into a compromise with the insured, where the loss, if any, is payable to the mortgagee, give rise most frequently to the application of the foregoing rule, but the rule applies to all cases where a third person has a valid lien upon the fund to be paid over,[7] as where an attorney has a lien for services upon the judgment of his client.[8]

If the right of the third person be disregarded and he fails

[3] Brown v. Perkins, 1 Ha. 564.

[4] Sewell v. Bridge, 1 Ves. Sen. 297.

[5] Austin v. Hall, 13 Johns. 286, 7 Am. Dec. 376.

[6] Hathaway v. Orient Ins. Co., 134 N. Y. 409, 17 L. R. A. 514. S. P. Reed v. McCrum, 91 N. Y. 412; Cromwell v. Brooklyn F. Ins. Co., 44 N. Y. 42, 4 Am. Rep. 641; Ennis v. Harmony F. Ins. Co., 3 Bosw. 516; Baltis v. Dobin, 67 Barb. 507. In such cases, the lien holder is not a necessary party, though the debtor will ordinarily have him brought in.

[7] A debtor cannot ignore an assignee of a part of a judgment: Alexander v. Monroe, 101 Pac. (Or.) 903.

[8] Larned v. Dubuque, 53 N. W. (Iowa) 105.

to receive what is due him, the debtor is liable to him for his interest in the fund.[9] A client may always release and discharge his claim upon terms agreeable to him,[10] but the attorney will be protected, providing he has brought himself within the law giving him a lien, as to notice.[11] Where a plaintiff compromises his cause of action upon which his attorney has a lien, in an action by the attorney against the defendant with notice of the lien, the amount paid upon the compromise and not the amount of the demand forms the basis of the judgment against the defendant.[12] A compromise of an action by the parties without the knowledge of the plaintiff's attorney is viewed with suspicion and will be closely scrutinized for fraud,[13] and the courts will protect the attorney by allowing him to proceed with the action and recover the amount of his fees,[14] or if judgment has been obtained, the satisfaction will be set aside and the judgment re-

[9] It was decided in Minnesota under the 1894 statute that actual notice to the judgment debtor of the attorney's claim either verbal or written, will protect the rights of the attorney, and if payment be made by the debtor to the creditor, the judgment may be reinstated to the extent of the attorney's lien: Northrup v. Hayward, 102 Minn. 307, 113 N. W. 701; Taylor v. St. Louis, etc., Bridge Ry. Co., 105 S. W. (Mo.) 740.

[10] Coughlin v. New York Cent. Ry., 71 N. Y. 44; Simmons v. Almy, 103 Mass. 36; Plummer v. Great Nor. R. Co., 110 Pac. (Wash.) 989. An attorney cannot enjoin the client from compromising an action: Hendrix v. Bull, 74 Atl. 572. An agreement that the client may not settle his cause of action without the consent of his attorney who is employed to enforce it is champertous and void: Kauffman v. Phillips, 134 N. W. (Io.) 574.

[11] An attorney's lien can be enforced only under statutory authority: Plummer v. Great Nor. R. Co., 110 Pac. (Wash.) 989. No such lien exists at common law: Kauffman v. Phillips, 134 N. W. (Io.) 575.

[12] Parsons v. Hawley, 60 N. W. (Iowa) 520; Boyle v. Metropolitan St. R. Co., 114 S. W. (Mo. App.) 588; Fischer v. Railway Co., 173 N. Y. 492, 66 N. E. 395. After verdict or judgment, the amount paid on a collusive settlement does not limit the extent of the attorney's lien: Desaman v. Butler, 136 N. W. (Minn.) 747.

[13] Miedreich v. Rank, 82 N. E. (Ind. App.) 117.

[14] Carpenter v. Myers, 51 N. W. (Mich.) 206; Collier v. Hecht, 66 S. E. (Ga. App.) 400.

instated to the amount of the fees to enable the attorney to proceed by execution to satisfy his claim.[15] So, if necessary to protect the attorney, he will be permitted to sue in the name of his client; thus, where, after a defendant was taken into custody upon execution and had given bond for his release, the creditor settled and discharged the judgment and bond, the attorney was permitted to sue upon the bond in the name of his client, to recover his fees.[16] Receiving a part of the damages for the wrongful destruction of property by fire from the wrong-doer and reserving

[15] Northrup v. Hayward, 102 Minn. 307, 113 N. W. 701. (See opinion for a review of authorities upon the question of notice of lien); Knickerbocker v. Voorhees, 112 N. Y. Supp. 842; Andrews v. Morse, 12 Conn. 444, 31 Am. Dec. 752. See extension note in 31 Am. Dec.

[16] Hobson v. Watson, 34 Me. 20, 56 Am. Dec. 632. In Michigan it has been held that where the action has been settled by the client, in order to enable the attorney to proceed in the original action, it is necessary to have the stipulation of settlement set aside, or stricken from the files; thereupon the attorney, upon proof of the agreement for fees and the compromise, may recover in his client's name the amount due him under his agreement: Grand Rapids R. Co. v. Cheboygan Circuit Judge, 126 N. W. 56, 17 Det. Leg. N. 270. Where a defendant has knowledge of the agreement that the attorney is to have a certain per cent. the lien attaches immediately upon the amount of the settlement being determined: Faley v. Grand Rapids R. Co., 134 N. W. (Mich.) 446. The attorney may proceed direct against the defendant in the original action: San Antonio R. Co. v. Sehorn, 127 S. W. (Tex. Civ. App.) 246; Whitewell v. City of Aurora, 123 S. W. (Mo. App.) 1045; St. Louis, etc., R. Co. v. Dysart, 130 S. W. (Tex.) 1047. An attorney may proceed in equity to enforce his lien although pending an appeal the action was settled and dismissed and the case has never been remanded: In re Nethaway, 121 N. W. (Minn.) 418. Where the attorney is to have 40 per cent. of the cause of action, a compromise by the debtor and creditor to which the attorney is not a party, will not limit his fee to 40 per cent. of the amount paid claimant, when the debtor undertakes to pay claimant whatever sum she is compelled to pay her attorney. The amount paid the claimant will be treated as 60 per cent. of the amount of her recovery: Boyd v. Chase, 115 S. W. (Mo. App.) 1052. A contract for a contingent fee including a stipulation that the client shall not compromise the demand without the attorney's consent is not void as against public policy: Beagles v. Robertson, 115 S. W. (Mo. App.) 1042; Wright v. Kansas City, etc., R. Co., 126 S. W. (Mo. App.) 517. If plaintiff is irresponsible and the judgment settled by him has not been satisfied, the attorney may enforce his lien by execution against the defendant: Bloch v. Bloch, 121 N. Y. Supp. 475

a right to recover from the insurer, does not preclude the insured from recovering upon the policy, the balance of his loss. The wrong-doer is, in legal effect, principal, and liable to the owner and whoever joins with him in assuming the risk of loss, for the full amount of the damages; and the insurer, after paying the balance of the value of the property up to the limit of the policy, may recover of the wrong-doer, in his own name or in the name of the insured, the amount paid upon the policy,[17] and, where the insurer pays the insured first, the latter cannot defeat the insurer's right of subrogation by executing a release to the wrong-doer.[18] Nor, can the wrong-doer, with knowledge of the payment by the insurer, escape his liability to the latter, by paying the insured.[19]

The power of a pledgee of a promissory note extends only to collect the money upon the note, and he cannot compromise with the payee for a less sum than is due on the note pledged,[20] without the pledgor's consent.[21] The pledgee has no right to accept a part in money and a note for the balance;[22] nor can he surrender the note pledged and take another note.[23] In such cases the pledgee will be presumed to have received payment of his debt in full. A pledgee is not bound to accept an accord and satisfaction of collateral held by him, by accepting property in discharge of the

[17] Continental Ins. Co. v. Erie Ry. Co., 73 N. Y. 399, 29 Am. Rep. 171.

[18] Hart v. Western Ry. Co., 13 Metc. 99, 46 Am. Dec. 719.

[19] Continental Ins. Co. v. Erie Ry. Co., 73 N. Y. 399, 29 Am. Rep. 171, citing Clark v. Wilson, 103 Mass. 223, 4 Am. Rep. 532; Mon. Mut. Ins. Co. v. Hutchinson, 21 N. J. Eq. 107; Graff v. Kipp, 1 Edw. 621.

[20] Garlick v. James, 12 Johns. 146; Bowman v. Wood, 15 Mass. 534; Grant v. Hallen, 1 E. D. Smith, 545; Gage v. Punchard, 6 Daly, 229; Foltz v. Hardin, 139 Ill. 405, 28 N. E. 786.

[21] Union National Bank v. Post, 64 Ill. App. 404; Zimpleman v. Veeder, 98 Ill. 613; Depuy v. Clark, 12 Ind. 427; Union Trust Co. v. Rigdon, 93 Ill. 458.

[22] Depuy v. Clark, 12 Ind. 427.

[23] Gage v. Punchard, 6 Daly, 229.

note, even though requested to do so by the pledgor, and he is not liable for any loss occasioned by a refusal.[24] Nor is he under any obligation to notify the pledgor that an offer of settlement by way of an accord and satisfaction or compromise by the delivery of property, has been made to him.[25] If a payee of a collateral note be insolvent and the note is uncollectible by process of law and the pledgee makes an advantageous settlement for less than the face of the note, he will not be liable for any thing beyond what he received,[26] upon the well established rule of damages applicable in conversion of chose in actions, that damages must be shown. If a pledgee surrenders a pledged note without payment or transfers it as his own, he is *prima facie* liable for the full amount,[27] but he may reduce this amount by showing the note was not worth its face value by reason of the insolvency of the maker. So he may show that the maker had a good defence, but he may not prove a set-off.[28] Where a joint debtor pledged his individual property as security for the joint debt, his co-debtor cannot complain of any agreement between the pledgor and the creditor made before or after the pledging, as to the value at which the creditor shall take the pledged property.[29] An assignee of all money to become due under a contract, where the assignment is made as security for advances, has no authority where a dispute has arisen over the amount due, to compromise for the contractor, and the acceptance by the assignee of city warrants drawn in full payment of the work done will not preclude the contractor from recovering the entire amount claimed by him to be due.[30]

[24] Rhinelander v. Barlow, 17 Johns. 538.

[25] Rives v. M'Losky, 5 Stew. & P. (Ala.) 330.

[26] Exter Bank v. Gordon, 8 N. H. 66.

[27] Union Trust Co. v. Rigdon, 93 Ill. 458; Wood v. Mathews, 73 Mo. 477.

[28] Union Trust Co. v. Rigdon, 93 Ill. 458.

[29] Foltz v. Hardin, 139 Ill. 405, 28 N. E. 786.

[30] Matheney v. Eldorado, 82 Kan. 720, 109 Pac. 166.

Sec. 39. By partner, as debtor, as creditor.—Each member of a firm is authorized to transact any business for the co-partnership within the scope of the partnership agreement, and debt owing by the firm may be discharged by an accord and satisfaction entered into by one partner in the name of the firm. In so doing he may transfer a single item of property,[1] or all the partnership effects direct to a creditor,[2] although the latter right has been questioned. It would seem that where there are other assets and the partnership solvent, one partner could not bind his co-partner by a transfer of property without which the co-partnership business could not go on, as this would amount virtually to a dissolution. One partner may compromise the debt by giving his individual note,[3] and when conducting a commercial business, he may give the firm note with surety or other security. He may transfer notes, checks, and drafts of third persons belonging to the firm, or effect a compromise by surrendering to the creditor any property which he would be authorized under the partnership agreement to sell for cash. He can not bind his co-partner by deed, but he may assign a debt and the mortgage securing the same; and, binding the firm by a sealed instrument in such a case, was held not to violate the common law rule that

[1] Harrison v. Sterry, 5 Cranch, 289; Deckard v. Case, 5 Watts, 22; Dubois' Appeal, 38 Pa. St. 231, 80 Am. Dec. 478.

[2] Mabbett v. White, 12 N. Y. 442; Egbert v. Wood, 3 Paige Ch. 517, 24 Am. Dec. 236. See, upon the subject of implied authority of one partner to transfer firm property in satisfaction of firm debts. Russell v. Leland, 12 Allen, 349; Randolph v. Armstrong, 11 Iowa, 515; Ullman v. Myrick, 93 Ala. 532, 8 So. 410; Bernheim v. Porter, 4 Pac. (Cal.) 446; White v. Vinson, 14 Mont. 405, 36 Pac. 828; Barnet v. Houston, 18 Tex. Civ. App. 134, 44 S. W. 687. Release by one partner binds all. Bulkley v. Dayton, 14 Johns. 387; Pierson v. Hooker, 3 Johns. 68; Wells v. Evans, 20 Wend. 251, n.; McBride v. Hogan, 1 Wend. 326, n.; Salmon v. Davis, 4 Binn. 375, 5 Am. Dec. 410; Wood v. Goss, 21 Ill. 604. Fraud will vitiate a release. 1 Lindley on Part. 293.

[3] Luddington v. Bell, 77 N. Y. 138, 33 Am. Rep. 601; Waydell v. Luer, 3 Den. 410; Watts v. Robinson, 32 U. C. Q. B. 362; Thompson v. Percival, 5 B. & Ad. 925; Clement v. Brush, 3 Johns. Cas. 180.

one partner cannot bind his co-partners by a sealed instrument whereby an original obligation was imposed upon the firm, as this was not a charge but a discharge.[4] One partner in a non-trading partnership, without express authority, cannot bind his co-partner by a bill or note even for a debt of the firm.[5] And in such cases, of course, he cannot give the firm note for a less sum with surety so as to constitute a valid accord and satisfaction. The transaction, however, would become binding if ratified by the remaining partner. Where all the partners are agreed, a firm, as such, may enter into an accord and satisfaction, or compromise any demand, either due to them or owing by them, to the same extent as may a sole debtor or creditor.

One partner cannot make a valid accord and satisfaction with a creditor of the firm, of his separate liability for the firm debt and leave the other bound; nor of the aliquot portion for which he is bound as between his co-partner and himself. An accord and satisfaction must discharge the entire demand.[6] Dissolution of a partnership does not revoke the authority of one partner as agent for the others, to arrange, liquidate and settle, and pay the debts created before dissolution,[7] and this power to settle necessarily includes the power to effect an accord and satisfaction or compromise of claims due from and to the partnership and give the necessary acquittance. But, for all other purposes, the agency of one for the other, is revoked, and thereafter as to all parties having previous dealings with them they stand as joint debtors merely, and, in effecting an accord and satisfaction or

[4] Dubois' Appeal, 38 Pa. St. 231, 80 Am. Dec. 478.

[5] Smith v. Sloan, 37 Wis. 285; Ulerg v. Ginrich, 57 Ill. 531; McCrary v. Slaughter, 48 Ala. 230; Hunt v. Chapin, 6 Lans. 139; Benton v. Roberts, 4 La. Ann. 216; Breckenridge v. Shrieve, 4 Dana, 375; Brown v. Byers, 16 M. & W. 252; Thicknesse v. Bromilow, 2 Cr. & J. 425; Hedley v. Bainbridge, 3 Q. B. 315.

[6] See Luddington v. Bell, 77 N. Y. 138, 33 Am. Dec. 601. See Sec. 9, Effect of Accord and satisfaction by partners and joint and several obligors.

[7] Clement v. Clement, 69 Wis. 599, 35 N. W. 17.

compromise they have no power to bind the partnership by a new contract or make admissions against a copartner's interest.[8] A covenant not to sue one partner is not a release of either and both may be sued upon the partnership demand to recover the part not paid.[9] As to debts due to a partnership, each partner has power to receive payment and give a receipt or release,[10] or compound the partnership demand,[11] but he has no implied power to compromise a debt in any way he likes without payment. A partner cannot compromise by receiving land from a debtor instead of money, money being due.[12] He cannot off-set his individual debt against a debt due the firm without the consent of the remaining partners.[13]

[8] See Sec. 103, as to admissions made after dissolution of the partnership.

[9] Hosack v. Rogers, 8 Paige Ch. 29.

[10] Pierson v. Hooker, 3 Johns. 68, 3 Am. Dec. 467; Ruddock's Case, 6 Co. 25; Wheeler v. Curtis, 11 Wend. 653; Cook v. Blake, 98 Mich. 389, 57 N. W. 249. A release by one of two partners obtained through connivance is void: Breatson v. Harris, 60 N. H. 83. Getting a partner drunk for the purpose of securing the release vitiates it: Clark v. Lonmann, 52 Ill. App. 637.

[11] Pierson v. Hooker, 3 Johns. 68; Noyes v. New Haven, 30 Conn. 1; Dormus v. McCormick, 7 Gill, 49; Cunningham v. Littlefield, 1 Edw. Ch. 104.

[12] Russel v. Green, 10 Conn. 269. Where a debtor surrendered certain land in satisfaction of a debt due to a firm, and it was accepted by one of the partners who dies, it was held that the other partner could not maintain an action for the recovery of the debt, it not being alleged by the plaintiffs that there was any fraud in the transaction and no allegation by the defendant that the deceased partner had authority to do what he did: Crowe v. Lysaght, 12 Ir. C. L. 411. Where a settlement and compromise was beneficial to the firm a settlement made by one member was not disturbed: Connow v. Wildman, 28 Conn. 472.

[13] Rust v. Hauset, 41 N. Y. Super. Ct. 467; Nall v. McIntire, 31 Ala. 532; Hust v. Clark, 56 Ala. 19; Bunwell v. Springfield, 15 Ala. 273; Todd v. Lorah, 75 Pa. St. 155; McKinney v. Bright, 16 Pa. St. 399; Purdy v. Powers, 6 Pa. St. 492; Noble v. McClintock, 2 Watts & S. 152; Leonard v. Winslow, 2 Grant Cas. 139; Filley v. Phelps, 18 Conn. 294; Jones v. Lusk, 2 Met. 356; Buck v. Mosley, 24 Miss. 170; Minor v. Gaw, 19 Miss. 322; National Bank v. Mapes, 85 Ill. 67; Rogers v. Batchelor, 12 Pet. 221; Pierce v. Pass,

Sec. 40. By joint and several debtor—By joint debtor—Settlement of individual liability—Joint creditors.—A creditor may accept from one joint and several debtor a less sum than is due upon his demand and covenant never to sue him for the remainder of the debt, and such covenant, as between the covenantor and covenantee, to prevent a circuity of action, will be treated as a release,[1] and the creditor may recover the residue of the debt from the remaining co-debtor.[2] As to the remaining co-debtor

1 Port. 232; Bourne v. Woodbridge, 10 B..Mon. 492; Cadwallader v. Kroesen, 22 Md. 200; Woodward v. Horst, 10 Iowa, 120; Camp v. Page, 42 Vt. 729; 1 Lindley on Part. 277. See Emerson v. Baylies, 19 Pick. 55, holding that a bond given by one partner to a debtor of the firm to pay the debt and save the debtor harmless, cannot be pleaded in bar to an action by the firm against the debtor.

[1] Harrison v. Close, 2 Johns. 448, 3 Am. Dec. 444; Sewall v. Sparrow, 16 Mass. 24; Stebbins v. Niles, 25 Miss. 267; Jones v. Qumnipiack Bank, 29 Conn. 267; Walker v. McCulloch, 4 Greenl. 421; Jackson v. Stackhouse, 1 Cow. 122; Brown v. Williams, 4 Wend. 360.

[2] Harrison v. Close, 2 Johns. 448, 3 Am. Dec. 444; Rowley v. Stoddard, 7 Johns. 207; Couch v. Miller, 21 Wend. 424; Catskill Bank v. Messenger, 9 Conn. 37; Goodnow v. Smith, 18 Pick. 414, 29 Am. Dec. 600; Shed v. Pierce, 17 Mass. 623; Crondolet v. Desnoyer, 27 Mo. 36. It is no release of the remaining co-debtor though made upon a good consideration: Catskill Bank v. Messenger, 9 Conn. 37.

Oral agreement not to sue termed a covenant—Consideration.—An agreement not to sue the paying co-debtor for the residue, or to look to the other co-debtor for the the balance, is usually termed a covenant not to sue, even though it lies in parol, or is a writing not under seal. See Catskill Bank v. Messenger, Harrison v. Close, and Goodnow v. Smith, *Ante*. This is a confusion of terms. In such cases in order to be of avail to the paying co-debtor there must be a new consideration. Paying a part of the debt, or even half of it, will not do: Harrison v. Close, 2 Johns. 448, 3 Am. Dec. 444; Eldred v. Peterson, 45 N. W. (Iowa) 754. Payment of one-half of the note before due and taking at par the note of a third person for a small sum, was held to constitute a sufficient consideration: Goodnow v. Smith, *Ante*. But where it is a technical covenant, the seal imports a sufficient consideration.

Release of joint debtor.—A release of one joint debtor or joint and several debtor is a release of all, as it is an admission that the debt is paid.

it is not a release as to either, for if it discharged one co-debtor the creditor could have no remedy against the other although he had expressly or impliedly reserved the right to proceed against him.[3] This rule is the same both at law and in equity.[4] But an accord and satisfaction being a bar to the entire demand, a settlement of the share of one jointly and severally liable upon a debt or demand does not amount to an accord and satisfaction.[5] Upon the question of an accord and satisfaction by one jointly liable, Mr. Parsons, in his valuable work said: "If an action be brought against many, and to this an accord and satisfaction by one be pleaded in bar, it must be complete, covering the whole ground, and fully executed. It is not enough if it be in effect only a settlement with one of the defendants for his share of the damages; nor would it be enough if it were only this in fact, although in form an accord and satisfaction of the whole claim," [6] for the reason that he is contracting for a discharge of half of the debt or demand for which he is liable and not all of it. The accord and satisfaction must go to the whole demand, and if it does it discharges the debt as to all.

One joint and several debtor may make an accord and satisfaction or compromise of the entire demand,[7] and if it be a case where contribution should be made he may recover over from his co-debtor his aliquot portion of the amount paid.[8] Where an

Couch v. Miller, 21 Wend. 424; Hosack v. Rogers, 8 Paige Ch. 229; Morgan v. Smith, 70 N. Y. 537; 1 Lindley on Part. 433. In equity if an instrument, which is otherwise a technical release, contains any reservation against a co-debtor as to the latter's liability, it will be construed as a covenant not to sue: Kerby v. Taylor, 6 Johns. Ch. 242.

[3] Goodnow v. Smith, 18 Pick. 414, 29 Am. Dec. 600.

[4] Miller v. Fenton, 11 Paige Ch. 18.

[5] Clark v. Dinsmore, 5 N. H. 136.

[6] 1 Pars. Cont. 29, citing Clark v. Dinsmore, 5 N. H. 136; Rayne v. Orton, Cro. Eliz. 305; Lynn v. Bruer, 2 H. Bl. 317.

[7] Strange v. Holmes, 7 Con. 224.

[8] See Morgan v. Smith, 70 N. Y. 537.

obligation is joint and not joint and several, in absence of statutory authority, one joint obligor cannot settle with his creditor the proportion of the debt for which he would be liable to contribute as between his co-debtor and himself, and leave the other liable, and if the creditor releases one, or enters into an accord and satisfaction with one with respect to the liability of the one for the entire demand, he releases all.[9] If a sum is to be paid *in solido* to many, the promise to pay is to all jointly. The agreement as to the creditors is single in its nature, and not joint and several. Hence, there arises an implied authority to act each for the other.[10] There is such a unity of interest that all the persons interested in the matter must join in an action to recover the sum due, and, whether the sum is due by an implied or express contract, or recoverable by way of damages for a breach of contract or for a tort, a release or discharge by way of an accord and satisfaction [11] by one binds all.[12] Thus, where tenants in common are entitled to recover damages for a trespass,[13] or for rent

[9] Luddington v. Bell, 77 N. Y. 138, 33 Am. Rep. 601. In King v. Hoare, 13 Mees. & W. 494, Parks, B. said: "An action on a joint debt, barred against one, is barred altogether." In Ward v. Johnson, 13 Mass. 148, the court said: "We know of no principle of law which can authorize us to give separate judgments in an action on a joint contract."

[10] 1 Par. Cont. 24.

[11] 1 Par. Cont. 25, citing Wallace v. Kelsall, 7 M. & W. 264; and Osborn v. Railway Co., 140 Mass. 549.

[12] Bradley v. Boynton, 22 Me. 290; Hall v. Gray, 54 Me. 231; Fitch v. Forman, 14 Johns. 172; Austin v. Hall, 13 Johns. 286, 7 Am. Dec. 376; True v. Huntoon, 54 N. H. 121; Grossman v. Lauber, 29 Ind. 622; Stapleton v. King, 33 Iowa, 35; State v. Story, 57 Miss. 738. See cases relating to release and compromise by partners. Erwin v. Rutherford, 1 Yerg. 169; (*Dictum*) Wallace v. Kelsall, 7 M. & W. 264; Husband v. Davis, 10 C. B. 645 (Trustees); Salmon v. Davis, 4 Binn. (Pa.) 375. Where one person contracted to do a certain piece of work with two for a certain price, but before it was completed, one of the two made a new agreement with the contractor whereby he was to finish the work by the day, it was held binding on both: Lattimore v. Hausen, 14 Johns. 330.

[13] Austin v. Hall, 13 Johns. 286, 7 Am. Dec. 379.

arising out of land,[14] or upon any other cause of action merely personal,[15] a release or discharge by way of accord and satisfaction by one binds all.[16] Where several are joined as defendants in trespass or replevin and judgment goes against them, they have no such joint interest, that upon an appeal or writ of error to discharge themselves of damages and costs, a release by one will bind the others. Otherwise, as was said in Ruddock's Case, a plaintiff "might by confederacy join one with them who would release all errors to him." [17]

Sec. 41. Same subject—Statutory provision.—Under the statute in some of the states a creditor may compromise or otherwise discharge one partner, or one joint debtor, without impairing his right to recover from the other co-obligors or partners their equal portion of the debt.[1] In New York, however, a release or other instrument exonerating the joint debtor must be given. And, as to a partnership liability, one member cannot compound for the partnership debt

[14] Decker v. Livingston, 15 Johns. 479.

[15] People v. Keyser, 28 N. Y. 226.

[16] It was decided in Harrison v. Barney, 3 T. R. 249 (according to Spencer J. in 15 Johns. 479) that a tenant holding under tenants in common cannot pay the whole rent to one of them, after notice from the other not to do so. A release by one of several joint creditors discharges the debt: Chitty on Cont. p. 676.

[17] Ruddock's Case, 6 Coke, 26.

[1] Minn. Rev. Code 1905, Sec. 4283; Allen v. Christianson, 83 Minn. 21, 85 N. W. 824; Randahl v. Lindholm, 86 Minn. 16, 89 N. W. 1129. The Minnesota statute also provides that in an action against the other co-obligor the plaintiff must allege the discharge. The last case holds that the burden of proving the discharge is upon the plaintiff. Tenn. Code, Sec. 5570, 5571; N. Y. Code Civ. Pro. Sec. 1942; Bolin v. Crosby, 49 N. Y. 183; Farmers' Bank v. Hawn, 79 N. Y. App. Div. 640, 79 N. Y. Supp. 524. Similar statutes are in force in Pennsylvania, Vermont, Missouri, Wisconsin, Montana, Nevada, Mississippi, and South Carolina. See Mich. Comp. Laws, 10, 449. In Bohrabacher v. Walsh, 135 N. W. (Mich.) 907, the statute was held to apply to judgment debtors.

until after a dissolution.[2] In some states the statute provides that a release of one joint debtor will not release the others, unless they are guarantors.[3]

Sec. 42. By one joint tort feasor—Covenant not to sue one—No contribution.—Where several unite to do an unlawful act, each is responsible for the acts of the others, and the injured party may elect to sue them jointly or severally and may pursue them until he obtains satisfaction, but he can have but one recompense for the same injury.[1] The cause of action is single and indivisible.[2] An accord and satisfaction by one enures to the benefit of all.[3] By making the claim and accepting compensation therefor, all persons against whom an action might be brought for such injury are released, whether the party with whom the compromise was made could have been legally

[2] N. Y. Code Cir. Proc. Sec. 1942.

[3] (1895) N. D. Code, Sec. 5279; (1887) S. D. Comp. L. Sec. 3493; (1891) Cal. Civ. Code, Sec. 1543.

[1] In Knickerbocker v. Colver, 8 Cow. 111, two joint trespassers were sued jointly, but appeared separately and the action was thereafter conducted separately as to each; judgments by confession for $5 damages and full costs against each were entered. It was held that a payment of one judgment satisfied the damages, although costs of both actions were collectible. If he obtains two or more separate judgments, he may receive payment of the damages on one and recover his costs in each action; but if he settles with one against whom he has obtained judgment, he cannot recover the costs in another action then pending, for costs can only be recovered as incident to the damages, and if the damages are discharged there is nothing to which the costs can be an incident: Ayers v. Ashmead, 31 Conn. 447, 83 Am. Dec. 154. The party injured may collect all his damages from any one joint wrongdoer: Kropidlowski v. Pfister, 135 N. W. (Wis.) 839.

[2] Almquist v. Wilcox, 131 N. W. (Minn.) 796.

[3] Wallner v. Chicago Traction Co., 245 Ill. 148, 91 N. E. 1053; McReady v. Rogers, 1 Neb. 124, 93 Am. Dec. 333; Lovejoy v. Murray, 70 U. S. 1, 18 L. Ed. 129; Peytoe's Case, 9 Co. 79; Ellis v. Bitzer, 2 Ohio, 89, 15 Am. Dec. 534; Barrett v. The Third Ave. Ry. Co., 45 N. Y. 635; Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271; Knapp v. Roche, 94 N. Y. 333; Lord v. Tiffany, 98 N. Y. 412, 50 Am. Rep. 689; Knickerbocker v. Colver, 8 Cow. 111; Livingston v. Bishop, 1 Johns. 289, 3 Am. Dec. 330; Long v. Long, 57 Iowa, 487, 10 N.

held in an action for such damages or not.[4] It has never been held permissible to apportion the damages; nor in an action against the one not released to establish that one was liable and the other not.[5] However, a mere gratuity paid by one as to whom no claim is asserted, will not constitute a satisfaction of a claim against the actual tort feasor.[6] So where it is admitted pending an action, that one co-defendant is not liable and the action is dismissed as to him, a gratuity paid by the latter does not release the other defendants.[7] The injured party and the party paying can make no agreement impairing the rights of the remaining tort feasors,[8] and he may avail himself of the discharge as a defence although the parties agreed that only the party

W. 875; Turner v. Hitchcock, 20 Iowa, 310; Chapin v. Chicago, 18 Ill. App. 47; Ruddock's Case, 6 Coke, 26; Thurman v. Wild, 11 A. & E. 453, 3 P. & E. 489; Kropidlowski v. Pfister, 135 N. W. (Wis.) 839; The St. Cuthbert, 57 Fed. 799; Leddy v. Barney, 139 Mass. 394, 2 N. E. 107; Hubbard v. Railway Co., 173 Mo. 249, 72 S. W. 1073; Packard v. Railway Co., 181 Mo. 421, 80 S. W. 951, 103 Am. St. Rep. 607; Hartigan v. Railway Co., 86 Col. 142, 24 Pac. 851; Fitzgerald v. Union Stockyards Co., 131 N. W. (Neb.) 612.

[4] Hartigan v. Dickson, 81 Minn. 284, 83 N. W. 1091; Clabaugh v. Southern W. G. Co., 181 Fed. 706; Snyder v. Mutual Tel. Co., 135 Iowa, 215, 112 N. W. 776, 14 L. R. A. (N. S.) 321. See Turner v. Hitchcock, 20 Iowa, 310, and Wilson v. Reed, 3 Johns. 175, which hold that a release of a person as a joint trespasser who is not in fact liable to the releasor does not destroy the right of such releasor against those who are liable.

[5] Hartigan v. Dickson, 81 Minn. 284, 83 N. W. 1091. The comparative degree in the culpability of the two will not affect the liability of either. If the negligence of both contributed to the injury, they are liable jointly or severally: Barrett v. 3rd Ave. Ry., 45 N. Y. 628.

[6] *(Dictum)* Snyder v. Mutual Tel. Co., 135 Iowa, 215, 112 N. W. 776, 14 L. R. A. (N. S.) 321; Wagner v. Union Stockyards, 41 Ill. App. 408, citing Wilson v. Reed, 3 Johns. 175; Turner v. Hitchcock, 20 Iowa, 310. Paying $5 and promising to pay $50 more, by a person who was not shown to be in any way responsible for the injury, on representations being made to him that the plaintiff was needy was held not to be an accord and satisfaction, but a mere gratuity by one not a joint tort feasor: Sieber v. Amunson, 78 Wis. 679, 47 N. W. 1126.

[7] Wardell v. McConnell, 25 Neb. 558, 41 N. W. 548.

[8] Ellis v. Bitzer, 2 Ohio, 89, 15 Am. Dec. 534.

paying shall be discharged.[9] Nor will an offer on the part of the injured party to surrender that which he had received in satisfaction deprive the other tort feasor of his defense.[10]

An accord and satisfaction between an infant and one joint tort feasor is no bar to an action by the infant against any or all of them, as the law will not trust an infant to fix a value on his own rights.[11] A payment by one joint tort feasor, in order to constitute a discharge of all, must be in full satisfaction of the damages, as to the one paying.[12] The money must be received as an accord and satisfaction of the whole injury.[13] Receiving a part of the damages from one and covenanting never to sue him for the balance of the damages, or what is the same thing, promising to look to the other tort feasors for the balance, does not release any of them, and the injured party may pursue those not paying or all of them until he obtains full satisfaction.[14] In such cases the amount paid by one amounts to a

[9] Ellis v. Bitzer, 2 Ohio, 89, 15 Am. Dec. 534; McBride v. Scott, 132 Mich. 176, 93 N. W. 343, 61 L. R. A. 445, 102 Am. St. Rep. 416; Ayer v. Ashmead, 31 Conn. 447, 83 Am. Dec. 154; Arnett v. Missouri Pac. R. Co., 64 Mo. App. 368. Where different parts of a crop are converted by the same co-defendants, a settlement with one tort feasor as to one portion so converted and reserving a right to proceed against the other for the balance of the rent due, will not bar an action against the other tort feasor, as the conversion of different parts of the crop were not joint torts: Sexton v. Sexton, 106 S. W. (Tex. Civ. App.) 728.

[10] Ellis v. Bitzer, 2 Ohio, 89, 15 Am. Dec. 534.

[11] Baker v. Lovett, 6 Mass. 78, 4 Am. Dec. 88.

[12] McBride v. Scott, 132 Mich. 176, 93 N. W. 243, 61 L. R. A. 445, 102 Am. St. Rep. 416; Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271; Smith v. Gayle, 62 Ala. 446.

[13] Ellis v. Esson, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830; Kropidlowski v. Pfister, 135 N. W. (Wis.) 839.

[14] Ellis v. Esson, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830; Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271.

In all cases where a defendant may set up a covenant not to sue as a release as to him; it is permitted to be done to prevent a circuity of actions; for manifestly the damages recovered for a breach of such a covenant would be the sum the covenantor had forced the covenantee to pay upon the orig-

partial payment and is available as such to all.[15] It appears that the weight of modern decisions, both in England and in this country, support the rule that an instrument in the form of a technical release, given to one joint tort feasor, will be construed as a covenant not to sue, if it contains any reservation of a right to recover from the other tort feasors, or otherwise discloses that the sum received was intended as a part payment only.[16] It is held that as between the tort feasor not released and the injured party, the former is a stranger

inal demand in violation of his covenant. Again it but carries out by a short method the real intention of the parties; that is to receive part satisfaction, release one and reserve a right to recover the residue from the other. But where such a covenant is made in cases where the obligation is joint and not joint and several, the intention of the creditor to accept only a part of the demand and reserve a right to recover the balance of his demand cannot be carried out if the covenant is treated as a release, for that would release the whole joint demand. It would be contrary to the covenant itself which discloses upon its face an intent to recover the whole demand. Hence, in such cases, the covenant must stand as a covenant. This is so, even though technical words of release are used, if the instrument discloses otherwise an intent to accept a part satisfaction only. Gilbert v. Finch, 173 N. Y. 455, 66 N. E. 133, 61 L. R. A. 807, 93 Am. St. Rep. 623.

[15] Smith v. Gayle, 58 Ala. 600; Merchants' Bank v. Curtiss, 37 Barb. 317; Walsh v. New York Cent. R. Co., 124 N. Y. Supp. 312; Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271; Ellis v. Esson, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830; Kropidlowski v. Pfister, 135 N. W. (Wis.) 839.

[16] Duck v. Mayell, L. R., 2 Q. B. 511; Price v. Barker, 2 Ellis & Bl. 760; Sloan v. Herrick, 49 Vt. 327; Kirby v. Taylor, 6 Johns. Ch. 250; Irving v. Millbank, 56 N. Y. 635; Judd v. Oil Co., 124 N. Y. 565, 21 Am. St. Rep. 708, 33 Cent. Law J. 50; Gilbert v. Finch, 173 N. Y. 455, 66 N. E. 133, 61 L. R. A. 807, 93 Am. St. Rep. 623; Ellis v. Esson, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830; Kropidlowski v. Pfister, 135 N. W. (Wis.) 839; Bishop v. McGillis, 82 Wis. 120, 51 N. W. 1075. *Contra*, Abb. v. Northern Pac. Ry. Co., 68 Pac. 954. In Hartigan v. Dickson, 81 Minn. 248, 83 N. W. 1091, the release given to one tort feasor embraced "All causes of action, costs, charges, claims, or demands of every name and nature arising and growing out of said injuries set forth in the complaint." This was held to discharge all the tort feasors. In Gilpatrick v. Hunter, 24 Me. 18, 41 Am. Dec. 370, where the plaintiff received of one co-trespasser, five dollars "in full of said Leonard's trespass, where he and Wilson P. Hunter were in company, together and others," it was held to discharge the other joint trespassers.

to the instrument and either party may contradict it by parol.[17] Where the contract between the injured party and the joint wrong-doer is not of such a nature that the law deems it conclusive evidence that the injured person has been satisfied for the wrong, then it is a question of fact for the court or jury whether what he has received was received in full satisfaction of the injury or as part payment.[18]

In absence of evidence of an express agreement or of other facts in the case disclosing that the amount received was not to be accepted as the full amount of the damages, a court or jury, in cases where the damages cannot be ascertained by any fixed legal measure but are based upon opinion and judgment, as in the cases of assault, slander, false imprisonment and cases of that nature, will more readily infer that the acceptance of a specific sum from one joint tort feasor was intended as full satisfaction of the whole injury, than where a sum has been received from one of two or more joint tort feasors who have tortiously converted property, where damages is a matter of computation based upon some fixed data.[19] If it is apparent that the sum received from one was in full satisfaction and discharge of the liability of the party paying, all are discharged, even though a right to recover from the other tort feasors is reserved by the agreement.[20] The question turns upon the right of the injured person to have but one satisfaction, and having received that, any attempted reservation

[17] In Fitzgerald v. Union Stock Yards, 131 N. W. (Neb.) 612, it was held that oral evidence was admissible to show that a written instrument discharging one wrong-doer was intended only as a release of one. That in Nebraska under the statute a private seal does not effect the legality of contracts. See O'Shea v. New York Ry. Co., 105 Fed. Rep. 559.

[18] Ellis v. Esson, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830; Chicago v. Babcock, 143 Ill. 358, 32 N. E. 291.

[19] Ellis v. Esson, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830, citing Brown v. Cambridge, 3 Allen, 475; Stone v. Dickinson, 5 Allen, 29. See upon the same question, Eastman v. Green, 34 Vt. 390.

[20] McBride v. Scott, 132 Mich. 176, 93 N. W. 243, 61 L. R. A. 445, 102 Am. St. Rep. 416; Ellis v. Bitzer, 6 Ohio, 89, 15 Am. Dec. 534.

would be repugnant to the law.[21] Mr. Cooley said: "The bar arises not from any particular form that the proceedings assume, but from the fact that the injured party has actually received satisfaction, or what in law is deemed the equivalent." [22] The sum paid by one joint tort feasor or one claimed to be jointly liable must be paid unconditionally in satisfaction. If it is to be returned upon a certain contingency it is not paid by way of an accord and satisfaction.[23] It is a general rule that as between joint tort feasors there exists no right of contribution, each being liable on account of his own wrong for the whole damages, and, if before judgment, one wrong-doer make an accord and satisfaction or compromise the damages he cannot recover any portion paid by him from those jointly responsible for the wrong done.[24]

Sec. 43. By attorney—Agent—Corporation officers.—In the conduct and management of prudential affairs a person may always do through an attorney or agent that which he may lawfully do in person, and an accord and satisfaction or compromise entered into by an attorney or agent under express authority from the client [1] is binding upon the client. The instruction of the client must be strictly followed and the thing authorized must be done, and not something else.[2] Authority to compromise, settle and arrange the

[21] See Gunther v. Lee, 45 Md. 60, which was a case of a release under seal, reciting a consideration to be in full satisfaction of the wrong complained of, with a reservation that the release should not prejudice the plaintiff's right to proceed against the other wrong-doers for damages.

[22] Cooley on Torts, 139.

[23] Musolf v. Duluth Elec. Co., 122 N. W. (Minn.) 499.

[24] Miller v. Fenton, 11 Paige Ch. 18. See Note to same case, 5 L. Ed. 40. It has been said that the rule is confined to cases where it must be presumed that the parties knew they were doing an unlawful act. See Armstrong v. Clarion Co., 66 Pa. 220, 5 Am. Rep. 369.

[1] Mallory v. Moriner, 15 Wis. 172; Freeman v. Brehm, 30 N. E. (Ind. App.) 712; Vickery v. McClellan, 61 Ill. 311; Allee v. Hayden, 25 Minn. 267; Small v. Gray, 6 Mass. 239; Wilson v. Life Ins. Co., 114 N. W. (Minn.) 251.

[2] Nephew v. Railway Co., 128 Mich. 599, 87 N. W. 753.

matter as to the attorney may seem fit, does not authorize the attorney to forgive the debt; nor postpone or discharge the security, except upon receiving payment in full, or such amount, as upon compromise, will be taken as satisfaction.[3] If the power is delegated to three one cannot execute it.[4] Nor can an attorney or agent delegate his authority to another.[5] Otherwise a principal would be deprived of the judgment and discretion of the person upon whom he relied to effect a judicious settlement. In the United States, with possibly a few exceptions,[6] the decisions hold that an attorney without special power, is not by reason of a general retainer, authorized to settle his client's claim by an accord and satisfaction or compromise,[7]

[3] Chilton v. Willford, 2 Wis. 1.

[4] White v. Davidson, 8 Md. 169, 63 Am. Dec. 699.

[5] Lyon v. Jerome, 26 Wend. 485, 37 Am. Dec. 271.

[6] See Bonney v. Morrill, 57 Me. 368, where it is held that an attorney employed to recover possession of land may compromise a claim for *mesne profits* during the pendency of the action.

[7] (1910) Nelson v. Nelson, 126 N. W. (Minn.) 731, and cases cited; D. C. Heath & Co. v. Commonwealth, 113 S. W. (Ky.) 69; Trenton St. R. Co. v. Lawlor, 71 Atl. (N. J.) 234; Mygatt v. Tarbell, 85 Wis. 457, 55 N. W. 1031; Jones v. Ransom, 3 Ind. 327; Repp v. Wiles, 3 Ind. App. 167, 20 N. E. 441; Maddox v. Bevan, 39 Md. 483; Rohr v. Anderson, 51 Md. 205; Lockhart v. Watt, 10 Ala. 231, 44 Am. Dec. 481; Barrett v. Third Ave. Ry. Co., 45 N. Y. 628; De Louis v. Meek, 2 G. Green. 50, 50 Am. Dec. 491; McCarver v. Nealey, 1 G. Green, 360; Martin v. Insurance Co., 85 Iowa, 643, 52 N. W. 542; Eaton v. Knowles, 61 Mich. 625, 28 N. W. 740; Treasurers v. McDowell, 1 Hill (S. C.) 184, 26 Am. Dec. 166; Taylor v. Evans, 16 Tex. Civ. App. 407, 41 S. W. 877; Senn v. Joseph, 106 Ala. 454, 17 So. 543; Ball v. Bank, 8 Ala. 590, 42 Am. Dec. 649; Hallock v. Loft, 19 Colo. 74, 34 Pac. 568; Kaiser v. Hancock, 106 Ga. 217, 17 So. 543; Preston v. Hill, 50 Cal. 43, 19 Am. Rep. 647; Helfer v. Spunner, 147 Ill. App. 448; Schreiber v. Straus, 147 Ill. App. 581; Pomeroy v. Prescott, 76 Atl. (Me.) 898; Dewort v. Loomer, 21 Conn. 245; Jones v. Innis, 32 Kan. 177, 4 Pac. 95; Fitch v. Scott, 3 How. (Miss.) 314, 34 Am. Dec. 86; Smith v. Dixon, 3 Metc. (Ky.) 438; Dalton v. Railway Co., 159 Mass. 221, 34 N. E. 261, 38 Am. St. Rep. 410; Brockley v. Brockley, 122 Pa. St. 1, 15 Atl. 644; High v. Emerson, 62 Pac. 455; Fosha v. Prosser, 97 N. W. (Wis.) 924; Cullin v. Vulcan Iron Works, 124 S. W. (Ark.) 1023. Cases are to be found to the same effect in almost every state.

or discharge it upon receiving a part payment,[8] either before or after judgment.[9] The same rule applies with equal force to agents who are not attorneys.[10] The general power of an attorney pending an action, by stipulation, to waive a particular defence, or dismiss an action without consulting his client, has its foundation upon the right of the attorney to form and act upon his professional opinion as to whether his client has in fact a cause of action or defence, and is a usual proceeding in an action, but a compromise of an action and dismissal pursuant thereto is held to be clearly not within the power of the attorney to manage and conduct the litigation.[11] It has been held that where an attorney is confronted with an emergency, and prompt action is necessary to protect the interest of his client, and there is no opportunity for consultation with him, a compromise and dismissal of the action will be sustained.[12]

[8] Bigler v. Toy, 68 Iowa, 687, 28 N. W. 17; Hall Safe Co. v. Howell, 88 Ala. 441, 6 So. 750; Watts v. French, 19 N. J. Eq. 407; Pickett v. Bates, 3 La. Ann. 627; Harron v. Farrow's Heirs, 7 B. Mon. 126, 45 Am. Dec. 60; Vanderlin v. Smith, 18 Mo. App. 55; Pierrepont v. Sassee, 1 Tex. App. Cir. Cas. Sec. 1294; Kelly v. Wright, 65 Wis. 236, 26 N. W. 610.

[9] Johnson v. Dun, 75 Minn. 533; Burgsaff v. Byrnes, 94 Minn. 418, 103 N. W. 212; Sebastian v. Rose, 122 S. W. (Ky.) 120. Accepting the costs of a discontinuance and dismissing an action does not amount to an accord and satisfaction where the attorney was not authorized to compromise and settle the claim, although it is within his authority to discontinue the action: Barrett v. Third Ave. Ry. Co., 45 N. Y. 628.

[10] First Nat. Bank v. Prior, 10 N. D. 146, 86 N. W. 362.

[11] Thomas v. Armitage, 126 N. W. (Minn.) 731; Housenick v. Miller, 93 Pa. St. 514.

[12] Nelson v. Nelson, 126 N. W. (Minn.) 931. In Bates v. Bates, 66 Minn. 131, 68 N. W. 845, the court refused to vacate a judgment for $1,500 entered upon a stipulation. The action was to recover damages for malicious prosecution and had been pending for about a year; the defendant resided in another state several hundred miles away, and his attorney had not heard from him and was afraid he would not be present. The court, however, based its decision more upon the conduct of the defendant in neglecting his own interest in leaving home and placing himself beyond reach of a communication from his attorney, presumable after he knew the case was noticed for trial at a certain term.

But, it would seem that the circumstances should be exceptional, and the compromise within reason.

It has been said that where the compromise is *bona fide* and works no considerable hardship, the courts will be slow to disturb it,[13] but this seems to have more to do with the evidence required to convince the court of the absence of authority. An attorney cannot make an assignment of his client's property for the benefit of creditors.[14] The fact that the client resides abroad or in another state does not confer any greater powers upon the attorney.[15] The fact that his fee is contingent upon success does not give him such an interest in his client's claim that he would be, under a general retainer, authorized to compromise it; and such contingent interest will not preclude the client from effecting a compromise independent of the attorney.[16] A party to a compromise may serve notice of a dismissal of the action upon the other party, notwithstanding a statute or rule of court requiring all papers to be served upon the attorney and not upon the client. Such provisions "have reference more particularly to notice of motion and other proceedings served during the pendency of the action." [17] The effect of a compromise by the client where the attorney has a valid lien is mentioned elsewhere.[18] A party negotiating a compromise with an agent or attorney is bound to take notice of the extent of his authority to compromise.[19] After a debtor is informed

[13] White v. Davidson, 8 Md. 469, 63 Am. Dec. 699; Block v. Rogers, 75 Mo. 441; William v. Nolan, 58 Tex. 708; Potter v. Parsons, 14 Iowa, 286.

[14] Jones v. Horsey, 4 Md. 306, 59 Am. Dec. 81; Hatch v. Smith, 5 Mass. 42.

[15] Branger v. Batchelder, 54 Vt. 248, 41 Am. Rep. 846.

[16] Larned v. Dubuque, 53 N. W. (Iowa) 105; Coughlin v. N. Y. Cent. Ry. Co., 71 N. Y. 443, 27 Am. Rep. 75; Wright v. Wright, 70 N. Y. 96; Shank v. Shoemaker, 18 N. Y. 489. See Toy v. Hoskin, 128 Cal. 558, 61 Pac. 89, 79 Am. St. Rep. 70, where the general rule is recognized, but the right of the client to appear in an action and sign a stipulation for dismissal is denied.

[17] Thomas v. Armitage, 126 N. W. (Minn.) 731.

[18] Sec. 38.

[19] Nelson v. Nelson, 126 N. W. (Minn.) 731.

that an agent or attorney is authorized to compromise, he may rely upon the information until notified that the authority has been withdrawn or abridged; or receives knowledge from other sources sufficient to put him upon inquiry. The fact that the written instrument remains in the hands of the attorney is a strong circumstance warranting the creditor in negotiating a compromise with him although it be somewhat delayed.[20] A principal may by his conduct be estopped from denying the authority of his agent or attorney to effect a compromise, but the acts or silence, must be such that the other party was warranted in relying upon them and changed his position upon the faith thereof.[21] Corporate officers are governed by the general rules of agency, and an officer cannot compromise a claim due the company in absence of authority from the corporation. The authority need not necessarily be in express terms, but may be implied from custom. Cashiers of banks, general managers and other executive officers of business corporations intrusted with the management of its business, have authority to compromise claims due the company when acting in accordance with the general practice, usage and course of business.[22] Officers other than those mentioned must have special authority in order to bind the corporation, either expressed through a resolution of the board of directors, or in the charter, or by laws.[23] A president of a bank is not authorized to make a compromise,[24] unless specially authorized, or the general management of bank is given up to him.[25]

20 Mallory v. Mariner, 15 Wis. 172.

21 See Mygatt v. Tarbell, 85 Wis. 457, 55 N. W. 1031.

22 Young v. Hudson, 99 Mo. 102, 12 S. W. 632; Corser v. Paul, 41 N. H. 24, 77 Am. Dec. 753; Eastman v. Coos Bank, 1 N. H. 23; Bridenbecker v. Lowell, 32 Barb. 9; U. S. v. Columbian Bank, 21 How. U. S. 356, 16 L. Ed. 130.

23 Delta Lumber Co. v. Williams, 73 Mich. 86, 40 N. W. 940.

24 Wheat v. Louisville Bank, 9 Ky. L. Rep. 738, 58 S. W. 305.

25 Coke v. Pottsville Bank, 116 Pa. St. 264, 9 Atl. 302, 2 Am. St. Rep. 600.

Sec. 44. Liability of attorney or agent for unauthorized settlement.—An attorney, or agent, is liable in damages or in trover, for an unauthorized compromise of his client's claim, or for the surrender of a note [1] or satisfaction of a judgment on receiving a part of it,[2] or on receiving anything other than money.[3] The measure of damages, where the matter compromised is a note, book account, judgment or other debt, is *prima facie* the amount of the debt, less the amount received upon the compromise.[4] If the debt is of less value by reason of facts over which the law has no control, as insolvency of the debtor, that may be shown in reduction of the damages.[5] No debt can be said to be of no value, and a client (or principal) is entitled to nominal damages in any event.[6] If something else than money was received upon the compromise, as between the attorney and client it would be taken at its value as established by evidence and not at the estimate placed upon it on the compromise. No rule of law is more firmly settled than the rule that if one, with full knowledge of the facts, accepts the avails of an unauthorized compromise made in his behalf by another, he thereby ratifies the transaction and is bound by the terms as fully as he would be had he negotiated it himself.[7]

[1] Fitch v. Scott, 3 How. 314, 34 Am. Dec. 86.

[2] Johnson v. Dun, 75 Minn. 533; Burgraff v. Byrnes, 94 Minn. 418, 103 N. W. 212; Rivinus v. Langford, 75 Fed. Rep. 959; Woodrow v. Hennen, 6 Mart. (La.) 156; Beers v. Hendrickson, 45 N. Y. 665; Jackson v. Bartlett, 8 Johns. 361; Trumbull v. Nicholson, 27 Ill. 149; Chapman v. Cowles, 41 Ala. 103.

[3] Smock v. Dade, 5 Rand. 639, 16 Am. Dec. 780.

[4] Johnson v. Dun, 75 Minn. 533; Burgraff v. Byrnes, 94 Minn. 418; Rivinus v. Langford, 75 Fed. Rep. 959. This rule is applied to actions for the conversion of a note (Hersey v. Walsh, 38 Minn. 521; Felch v. Scott, 3 How. 314, 34 Am. Dec. 86), or book accounts (Casey v. Ballon Bank Co., 98 Iowa, 107, 67 N. W. 98; O'Donoghue v. Corby, 22 Mo. 393).

[5] Rivinus v. Langford, 75 Fed. Rep. 959; Johnson v. Dun, 75 Minn. 533.

[6] See Cox v. Livingston, 2 Watts & S. 103, which was an action for damages for a failure to sue upon a note.

[7] Strusser v. Conklin, 54 Wis. 102, 11 N. W. 254; Reid v. Hibbard, 6 Wis. 175; Zelenka v. Port Huron Mach. Co., 123 N. W. (Iowa) 332; Coans

And the rule is applicable alike to compromises effected through attorneys, agents, or strangers. If the principal does not want to be bound by the compromise, he must upon discovery of the agent's unauthorized acts, repudiate the transaction and return or tender back what was received by the agent.

But the rule requiring a tender does not apply to those transactions where the agent or attorney merely receives a part of a demand about which there is no dispute as to the liability or amount due, in satisfaction of the whole; as where an attorney compromises a note,[8] judgment,[9] or other debt, by receiving a part of the amount due in satisfaction of the whole. In such cases the client is entitled to retain the amount received in any event and the debtor is entitled to have it credited upon the demand. As between the attorney and client it is not necessary to rescind the transaction and return the money or other thing to the debtor. And it is no defense that the client may have the satisfaction of a judgment vacated, or his security reinstated. In such a case the court said: "They had a right to acquiesce in what had been done and look to the parties through whose interference with their property the contest had been thrown upon them, and hold the parties for a conversion." [10] Nor is it necessary for the client to refuse to accept the money or other thing from the attorney. The thing received upon the compromise does not belong to the attorney and the client may, by summary process,[11] or other appropriate proceedings, compel the attorney to turn over what he has received. If the client accepts the property received by his attorney upon an unauthorized compromise, his remedy is an action for damages; if he

v. Hunter, 28 N. Y. 389; Keeler v. Salisbury, 33 N. Y. 648; Evans v. Wells, 22 Wend. 224; Armstrong v. Gilchrist, 2 Johns. Cas. 424; Trenton St. R. Co. v. Lawlor, 71 Atl. (N. J.) 234.

[8] Fosha v. Prosser, 97 N. W. (Wis.) 924.

[9] Burgraff v. Byrnes, 94 Minn. 418, 103 N. W. 212; Johnson v. Dun, 75 Minn. 533.

[10] Johnson v. Dun, 75 Minn. 533.

[11] Burgraff v. Byrnes, 94 Minn. 418, 103 N. W. 212.

rejects it he may bring trover; and, a recovery in such action and satisfaction of the judgment, vest the title to the property converted in the wrongdoer.[12]

Sec. 45. By executor—Administrator—Administrator de son tort—A common law right—Statutory authority not exclusive.—Executors and administrators at common law have power to compromise a claim or compound a debt in favor of the estate,[1] and it is the duty of a personal representative to effect an accord and satisfaction or compromise whenever it will be for the best interest of the estate to do so.[2] The right is founded upon their legal title to the assets of the deceased, and is a necessary incident to their power to collect the assets and settle and adjust claims in which the estate is interested. The power may be exercised in reference to all claims and demands the title to which, under the law, is vested in the executor or administrator. A claim for life insurance, or for damages for wrongfully causing the death of the intestate may be compromised by an administrator.[3] An administrator may employ an attorney to prosecute

[12] Johnson v. Dun, 75 Minn. 533; Cooley on Torts, 458.

[1] Chouteau v. Suydam, 21 N. Y. 179; Wood v. Fannicliff, 74 N. Y. 38; Auken v. Kiener, 9 N. Y. St. 661; Bailey v. Dilworth, 10 Sm. & M. 408, 48 Am. Dec. 760; Berry v. Parkes, 3 Sm. & M. 625; Woolfork v. Sullivan, 23 Ala. 548, 58 Am. Dec. 305; Johnson's Appeal, 71 Conn. 590, 42 Atl. 662; Washington v. Louisville R. Co., 136 Ill. 49, 26 N. E. 653; Kelly v. Chicago, etc., R. Co., 114 N. W. (Iowa) 536; Jenkins v. Schields, 47 Iowa, 708; Wilks v. Slaughter, 49 Ark. 235, 48 S. W. 766; Pittsburg Ry. Co. v. Gipe, 160 Ind. 360, 65 N. E. 1036; Pusey v. Clemson, 9 Serg. & R. 204; Parker v. Providence Steamboat Co., 17 R. I. 376, 22 Atl. 284, 23 Atl. 102, 33 Am. St. Rep. 869, 14 L. R. A. 414; Alexander v. Kelso, 3 Baxt. 311; Boyd v. Oglesby, 23 Gratt. 674; McCall v. Peachy, 3 Munf. 288; Siddall v. Clark, 89 Cal. 321, 26 Pac. 829; Moulton v. Holmes, 57 Cal. 337. An administrator of a deceased partner may compromise with the surviving partner; Boyd v. Oglesby, 23 Gratt. 674.

[2] Matter of Oatman, 5 N. Y. Leg. Obs. 378.

[3] Hartigan v. Southern Pac. Ry. Co., 86 Cal. 142, 24 Pac. 851; Washington v. Louisville Ry. Co., 136 Ill. 49, 26 N. E. 253, aff'm'd. 34 Ill. App. 658; Brink

a claim and empower him to compromise it.[4] Where there is more than one administrator a compromise effected with one or more, without the concurrence of the remainder, will not be set aside where no collusion or bad faith is shown.[5] One executor or administrator is not chargeable with the *devastavit* of his companion,[6] and is only chargeable with the assets which come to his hands. Each may act independently as to assets coming to his hands,[7] but, having once received assets he is answerable for the due administration of them, even if he delivers them over to his co-executor or co-administrator.[8] As to such assets the one first having them would be answerable only for the fraudulent or collusive compromise of the other resulting in a loss to the estate.

An administrator *de son tort* cannot convey a good title to property belonging to the estate for which he assumed to act and cannot therefore enter into a valid accord and satisfaction or compromise of a claim due to the estate.[9] But if the one assuming to act is afterwards appointed administrator, his title to the property relates back and vests as of the date of the death of the intestate and the appointment legalizes all intermediate acts of the administrator. A court will not set aside a compromise made by such administrator before his appointment, if free from collusion and not prejudicial to creditors. Thus where an ad-

v. O'Donnell, 88 Ill. App. 459; Pittsburg Ry. Co. v. Glpe, 160 Ind. 360, 65 N. E. 1034; Parker v. Providence, 17 R. I. 376, 22 Atl. 284, 23 Atl. 102, 33 Am. St. Rep. 869, 14 L. R. A. 414.

[4] Jeffries v. Mutual Life Ins. Co., 110 U. S. 305, 28 L. Ed. 156.

[5] Murray v. Blatchford, 1 Wend. 583. The power to compromise does not authorize an executor to receive personal property in payment from a debtor who is perfectly solvent: Gulledge v. Barry, 31 Miss. 346.

[6] Douglass v. Saterlee, 11 Johns. 16.

[7] Douglass v. Saterlee, 11 Johns. 16; Boget v. Hertell, 4 Hill, 492.

[8] Douglass v. Saterlee, 11 Johns. 16; Cross v. Smith, 7 East, 246.

[9] Woolfork v. Sullivan, 23 Ala. 548, 58 Am. Dec. 305; Vroom v. Van Horne, 10 Paige, 549, 42 Am. Dec. 94.

ministrator before his appointment delivered a horse to another for his expenses in burying the decedent, it was held that the administrator could not recover the horse against his own agreement.[10] The rule that a subsequent appointment as administrator cures his tortious acts, is applied all the more strictly where the appointee is entitled to the succession as heir or sole legatee.[11] In a case where a person before his appointment as administrator received a sum of money from an employer of the decedent in satisfaction of the damages for wrongfully causing the latter's death, it was held that the receipt of the money did not operate as an accord and satisfaction; that the rule above referred to had no application to cases for the recovery under a statute, by the next of kin, of unliquidated damages.[12] In such cases the person liable, may settle and compromise the claim for damages directly with the parties for whose benefit an action may be brought.[13]

A person in possession of the entire estate of a decedent, either under a deed,[14] or as heir or devisee, takes the estate burdened with the debts of decedent, and he may, to avoid the expense of an administration or threatened litigation, compromise and set-

[10] Whitehall v. Squite, Holt, 45, Cath. 103; Alvord v. Marsh, 12 Allen, 603. See Witt v. Elmore, 2 Bailey, 595.

[11] Woolfork v. Sullivan, 23 Ala. 548, 58 Am. Dec. 305; Vroom v. Van Horne, 10 Paige, 549, 42 Am. Dec. 94. The rule was applied where the settlement was made by the widower in presence of the only child. The latter as administrator after thirty months was not permitted to recover on the claim: Herrington v. Lowman, 22 N. Y. App. Div. 226, 47 N. Y. Supp. 863.

[12] Stuber v. McEntee, 142 N. Y. 200, 30 N. E. 878. A settlement of damages for wrongfully causing death made by an administrator prematurely appointed was held good: Leach v. Owensboro City R. Co., 125 S. W. (Ky.) 708.

[13] Sykora v. J. I. Case Thresh. Mach. Co., 39 Minn. 130, 60 N. W. 1008. The provision that such actions must be brought by the personal representatives is designed for the benefit of the defendant by making it certain that the party entitled thereto will receive it and thus escape the danger of having to pay twice; but he may waive the provision for his benefit.

[14] Bull v. Hepworth, 124 N. W. (Mich.) 569.

tle a claim against the estate, and forbearance to sue is a sufficient consideration to uphold the agreement. Authority to compromise may be given by will.[15] In some jurisdictions the probate court is empowered by the statute to authorize an executor or administrator to compromise claims due the estate.[16] A necessity for a compromise must be shown.[17] And, it must be something more than the mere belief of the executor or his attorney that it will be for the best interest of the estate.[18] Authority to compromise will be granted where there is doubt as to the validity of the claim or of the solvency of the debtor.[19] Upon a proper showing the court may authorize a debt compounded whether the debtor is solvent or insolvent.[20] The New York statute authorizing a court to empower an administrator to compromise, has been held not to authorize joining in a composition deed giving a long term of payment.[21] A previous agreement fixing definitely the terms of settlement is not necessary.[22] Ordinarily the personal representative must make oath that the compromise is made in good faith.[23] In some states the power to compromise is vested in

[15] Buerhaus v. De Saussure, 41 S. C. 457, 19 S. E. 926, 20 S. E. 64.

[16] Chouteau v. Suydam, 21 N. Y. 179; Johnson's Appeal, 71 Conn. 590, 42 Atl. 662; Kelly v. Chicago, etc., Ry. Co., 114 N. W. (Iowa) 536; Mulville v. Insurance Co., 19 Mont. 95, 47 Pac. 650; Hartigan v. Southern Pac. Ry. Co., 86 Cal. 142, 24 Pac. 851; Moulton v. Holmes, 57 Cal. 337; Leach v. Owensboro St. R. Co., 125 S. W. (Ky.) 708; Fraky v. Thomas, 98 Ga. 375, 25 S. E. 446.

[17] Brosnan v. Kramer, 135 Cal. 36, 66 Pac. 679.

[18] In re Richardson's Estate, 9 N. Y. Supp. 638, 2 Connoly's Surr. 276.

[19] Shepard v. Saltus, 4 Redf. Surr. (N. Y.) 232; In re Patten, Tuck. Surr. (N. Y.) 56.

[20] Berriens' Est., 16 Abb. P. (N. S.) 23, disapproving Howell v. Blodgett, 1 Redf. Surr. 223.

[21] Matter of Loper, 2 Redf. Surr. 545.

[22] Mulville v. Insurance Co., 19 Mont. 95, 47 Pac. 650.

[23] Ponce v. Wiley, 62 Ga. 118. In Rhode Island the power under the statute, to authorize compromises is held to be limited to demands existing at the date of decedent's death. Fairbanks v. Mann, 19 R. I. 449, 34 Atl. 1112.

personal representatives direct.[24] Acts authorizing personal representatives to compromise claims due the estate, in most states are held not restrictive of their common law powers, but designed to afford them additional protection.[25] And an executor or administrator may make a compromise of a demand or compound a debt due the estate without first obtaining an order of the court,[26] excepting in Kansas [27] and possibly some other states. If he neglects to obtain express authority from the court, and his acts are questioned the burden is upon him to show that he acted prudently and for the best interest of the estate.[28] Obtaining an order of the court authorizing a compromise does not release an administrator of his liability for negligence which rendered the compromise imperative or advisable.[29] It merely affords him more complete protection in the exercise of his common law power.[30]

[24] McFarland's Adm'r v. Louisville, etc., R. Co., 113 S. W. (Ky.) 82.

[25] Chouteau v. Suydam, 21 N. Y. 179; Wood v. Tunnicliff, 74 N. Y. 38; Kelly v. Chicago, etc., Ry. Co., 114 N. W. (Iowa) 536; Wyman's Appeal, 13 N. H. 18; Johnson's Appeal, 71 Conn. 590, 42 Atl. 662; Wilks v. Slaughter, 49 Ark. 264, 4 S. W. 766; Moulton v. Holmes, 57 Cal. 337.

[26] Chouteau v. Suydam, 21 N. Y. 179; Wood v. Tunnicliff, 74 N. Y. 38; Washington v. Louisville Ry. Co., 136 Ill. 49, 26 N. E. 653, affirming 34 Ill. App. 658. Brink v. O'Donnell, 86 Ill. App. 457; Moulton v. Holmes, 57 Cal. 337; Wyman's Appeal, 13 N. H. 18; Kee v. Kee, 2 Gratt. 116; Pittsburg Ry. Co. v. Cipe, 160 Ind. 360, 65 N. E. 1034. This was an action to recover damages for wrongfully causing the death of decedent; the right to compromise was held to be incident to the right to maintain an action.

[27] See Ætna Ins. Co. v. Swayze, 30 Kan. 118, 1 Pac. 36.

[28] Chase v. Bradley, 26 Me. 531; Chadbourn v. Chadbourn, 9 Allen, 173; Wyman's Appeal, 13 N. H. 18; Fridge v. Buhler, 6 La. Ann. 272; Wilks v. Slaughter, 49 Ark. 235, 4 S. W. 766; Matter of Farley, 15 N. Y. St. 727.

[29] Fraley v. Thomas, 98 Ga. 375, 25 S. E. 446.

[30] Johnson's Appeal, 71 Conn. 590, 42 Atl. 662; Chouteau v. Suydam, 21 N. Y. 179. See Taylor v. Funk, 2 Iowa, 84

Sec. 46. Same subject—Good faith and prudence required—Liability of personal representatives.—Whether they act independently or pursuant to an order of the court, executors and administrators in the management of their trust, are held to the most exact good faith, and are bound to the exercise of such prudence and caution in the administration, as a judicious man would exercise in regard to his own affairs.[1] At common law if the compromise resulted in a loss to the estate it was regarded as waste.[2] But under modern authorities it seems that a compromise will be upheld and the executor or administrator protected if he acted with prudence and without fraud, misconduct, or negligence,[3] even though the compromise proves not to be the best that could have been made.[4] An accord and satisfaction or compromise by a personal representative is always at some risk.[5] But only parties in interest who have not given their assent can attack the compromise and hold the executor or administrator for the loss occasioned by his acts.[6] If a personal representative is guilty of fraud, negligence or gross error amounting to a fraud in making a compromise he will be held liable for the loss. Thus, where an administrator in good faith entered into a composition of a lease-hold estate believing it had been forfeited, but afterwards, on learning that the estate had not been forfeited but belonged

[1] Bailey v. Dilworth, 10 Sm. & M. 404, 48 Am. Dec. 760; Boyd v. Oglesby, 23 Gratt. 674; Neal v. Lamar, 18 Ga. 746.

[2] See Wood v. Tunnicliff, 74 N. Y. 38; De Diemar v. Van Nogenen, 7 Johns. 404.

[3] People v. Pleas, 2 Johns. Cas. 376; Bailey v. Dilworth, 10 Sm. & M. 404, 48 Am. Dec. 760; Jacobs v. Jacobs, 99 Mo. 427, 12 S. W. 457; Pusey v. Chemson, 9 Serg. & R. 204; Turpin v. Chesterfield, 82 Va. 74; Jenkins v. Schields, 47 Iowa, 708; Blue v. Marshall, 3 P. Wms. 381.

[4] Jenkins v. Schields, 47 Iowa, 708.

[5] Johnson's Appeal, 71 Conn. 590, 42 Atl. 662; Wyman's Appeal, 13 N. H. 18; Blue v. Marshall, 3 P. Wms. 381, 24 Eng. Reprint 1110.

[6] Jones v. Jones, 118 N. C. 440, 24 S. E. 774; Black's Appeal, 25 Pa. St. 235; Delabigarre v. New Orleans, 3 La. Ann. 230.

to the heirs, and that his former acts did not amount to a surrender of the estate, his execution of a release of the estate to complete the contract, was adjudged wilful and done in fraud.[7] As to compromising secured debts the test seems to lie in the actual value of the security.[8]

Advice of counsel will be taken into consideration by the court in determining whether the administrator acted judiciously and honestly,[9] but it will afford no protection for negligence.[10] A court of equity will not decree specific performance of "composition of claims by executors or other fiduciaries, unless the party praying it will first unfold and disclose the whole circumstances of the case to the court, that it may see there has been no fraud, and that everything was fair."[11] An approval of a compromise by a probate court, will not operate as a condonation of any fraud on the part of a debtor in negotiating the compromise.[12] Under a probate system which provides for the proving of all claims against the estate, a personal representative cannot bind the estate by an account stated, or by admissions. Nor can he compromise a

[7] People v. Pleas, 2 Johns. Cas. 376; Struther v. Peltz, 18 Pa. St. 278; Klein v. French, 57 Miss. 662; Ellis v. Appleby, 18 Pa. St. 278; Jones v. Jones, 118 N. C. 440, 24 S. E. 774; Haile v. McGhee, 29 La. Ann. 350; Rountree v. Stevens, 8 Ky. L. Rep. 433; Gulledge v. Barry, 31 Miss. 346. A release obtained by one who concerts with an administrator in the application of assets of the estate to the administrator's individual use will be set aside: Weir v. Mosier, 19 Wis. 311. If an administrator in collusion with the adverse party, settles a claim for the negligent death of the decedent in fraud of the beneficiaries, the settlement may be opened and the case tried on its merits: Leach v. Owensboro St. R. Co., 125 S. W. (Ky.) 708.

[8] Buerhaus v. De Saussure, 41 S. C. 457, 19 S. E. 926, 20 S. E. 64; Sanford v. Story, 15 Misc. (N. Y.) 536, 38 N. Y. Supp. 104.

[9] People v. Pleas, 2 Johns. Cas. 376.

[10] Klein v. French, 57 Miss. 662.

[11] Clay v. William, 2 Munf. (Va.) 105, 5 Am. Dec. 453. S. P. Cleeve v. Cleeve, 82 Ala. 581, 3 So. 107, 60 Am. Rep. 750.

[12] Kelly v. Chicago, etc., Ry. Co., 114 N. W. (Iowa) 536.

claim against the estate. They must be proven.[13] But an executor, who, as residuary legatee, has given bond to pay the debts and legacies of the estate, may compromise a claim against the estate as he may see fit. Upon the giving of the bond the debts and legacies become the personal obligations of the executor.[14] It has been held that an administrator is not bound to defend against a just claim against an estate, upon a revivor of action against the estate, but may consent to a judgment against the estate.[15] A compromise effected with an administrator whose appointment is voidable is binding on the administrator appointed after the removal of the illegal appointee.[16]

Sec. 47. By guardian—Next friend—Guardian ad litem—Parent.—At common law a general guardian has power to compromise and release claims due the estate of his ward.[1] A general guardian is required to take into his custody the property of the ward, manage the same, keep the funds invested and protect the property for his benefit, and the law gives him the necessary power to accomplish the purpose of his appointment. The rights of infants by reason of their immature years and inexperience have at all times been guarded with jealous care by the courts and a guardian's transactions with respect to his ward's estate is subject to a more searching scrutiny than are the acts of most any other trustee, though all trustees are held to absolute good faith and fair dealing. A compromise by a guardian upon his own

[13] Grece v. Helen, 51 N. W. (Mich.) 1106; Matter of Farley, 15 N. Y. St. 727; Durfee v. Abbott, 50 Mich. 283, 15 N. W. 454.

[14] See Durfee v. Abbott, 50 Mich. 283, 15 N. W. 454.

[15] Sheldon v. Warner, 59 Mich. 444, 26 N. W. 667; Grece v. Helen, 51 N. W. (Mich.) 1106.

[16] McFarland's Adm'r v. Louisville, etc., R. Co., 113 S. W. (Ky.) 82. See Leach v. Owensboro St. R. Co., 125 S. W. (Ky.) 708.

[1] Ordinary v. Dean, 44 N. J. 64; Worthington v. Worthington, 35 S. W. 1039, 18 K. L. Rep. 215; Torry v. Block, 58 N. Y. 185; Malpass v. Graves, 111 Ga. 743, 36 S. E. 955; Fretelliere v. Hindes, 57 Tex. 392.

responsibility is at best a perilous undertaking. If a compromise is fairly made, free from fraud, and made in the exercise of a sound discretion it is binding upon the ward upon his arriving of age.[2] And, the converse is true, and the ward is not bound by a compromise if made in fraud of his rights and unfair to him.[3] A compromise by a guardian of a baseless, improvident and unjust claim will entitle an infant to a rescission, and the same relief would be afforded the guardian when free from blame and there was actual or constructive fraud, surprise, or ignorance of fact.[4] A guardian cannot be held for a loss occasioned by a compromise unless the compromise was made in bad faith and in fraud of the rights of the ward, and the burden of impeaching the compromise is upon the ward.[5] Actual fraud or unfair dealing is not necessary in all cases; the guardian's conduct may be so negligent or grossly lacking in sound discretion that his conduct amounts to legal fraud. Thus, where a guardian accepted on a good claim less than was due, he was held liable.[6] In many, if not all the states, the courts having jurisdiction of guardianships have power under the statute to authorize compromises,[7] and a guardian who obtains the previous sanction of the court is more amply protected.

If the statute requires it the order of the court must first be obtained.[8] Notice to the minor of the application is not required.[9]

[2] Torry v. Block, 58 N. Y. 185; Ordinary v. Dean, 44 N. J. 64.

[3] Lunday v. Thomas, 26 Ga. 537; Luton v. Wilcox, 83 N. C. 20; Culp v. Stanford, 112 N. C. 664, 16 S. E. 761; Taylor v. Hite, 61 Mo. 142.

[4] Underwood v Brockman, 4 Dana, 309, 29 Am. Dec. 407.

[5] Torry v. Block, 58 N. Y. 158.

[6] Emonot's Succession, 109 La. 359, 33 So. 368.

[7] In Louisiana it appears that a compromise should be ratified by a family meeting, followed by the sanction of the Court. Burney v. Ludeling, 47 La. Ann. 73, 16 So. 507; Mahle v. Elder, 26 La. Ann. 681; Graham v. Hester, 15 La. Ann. 148; Nantz v. Wyatt, 1 Rob. 10.

[8] Knights v. Clayton, 209 Ill. 550, 70 N. E. 1066, affirming 110 Ill. App. 648; Hayes v. Ins. Co., 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303; Bunnell

[9] Hagy v. Avery, 69 Iowa, 434, 29 N. W. 409.

If a compromise be made pursuant to the directions of the court, in absence of a showing of fraud or undue advantage, it is legal and binding on the ward,[10] even though the estate is charged with new liabilities.[11] We apprehend, however, that if a compromise of a claim was effected without the sanction of the court, that, as between the guardian and ward, it would be good if shown to be in all respects fair and for the best interest of the ward. The burden would be upon the guardian to establish this.[12] A guardian by nature cannot compromise a claim for a minor.[13] A parent, of course, may settle his claim for injuries to his child.[14] A settlement by a parent is presumed to cover only his claim. The authority of a *prochein ami* or next friend is limited merely to conducting the litigation. He has no authority to receive the fruits of the litigation, and he cannot therefore compromise the demand or the judgment obtained for the infant.[15] His authority ceases with the entry of the judgment. A guardian *ad litem* appointed to defend an action brought against an infant has no power to compromise before or after judgment. Any compromise

v. Bunnell, 111 Ky. 566, 64 S. W. 420, 65 S. W. 607, 23 Ky. L. Rep. 800, 1101; Stephenson v. Chappell, 36 S. W. (Tex. Civ. App.) 482; Davis v. Beall, 32 Tex. Civ. App. 406, 74 S. W. 325.

10 Hagy v. Avery, 69 Iowa, 434, 29 N. W. 409.

11 Smith v. Angell, 14 R. I. 192.

12 *Dictum*, Hagy v. Avery, 69 Iowa, 434, 29 N. W. 409. See Brown v. Maryland Co., 80 S. W. 693 (Modifying 76 S. W. 944), holding that a payment to a guardian of a less sum than the amount of a note without an order of the court, was a payment *pro tanto* only.

13 Isaacs v. Boyd, 5 Port. (Ala.) 388; De Cordova v. Korte, 7 N. M. 678, 41 Pac. 526, affirmed in 171 U. S. 638, 19 S. Ct. 35, 43 L. Ed. 315; Miles v. Kaigler, 10 Yerg. 10, 30 Am. Dec. 425.

14 Meyers v. Zoll, 119 Ky. 480, 84 S. W. 543. In bastardy the right of settlement is in the parent who is entitled to the minor's services: Heaps v. Dunham, 95 Ill. 583.

15 Miles v. Kaigler, 10 Yerg. 10, 30 Am. Dec. 425; Burt v. McBain, 29 Mich. 260. See Hall v. Wright, 127 S. W. (Ky.) 516, where it is said that a settlement of an infant's rights to land, effected by a brother, is not binding although he employs counsel to represent the infant.

effected pending the litigation must be by order of the court. A judgment recovered in favor of an infant, belongs to his estate and a compromise can only be effected through his general guardian. If a judgment goes against the infant it must be paid or compromised with funds in the hands of his general guardian if he has one, if not, and it is necessary in order to protect the estate of the infant that the judgment (or other lien upon his property) be paid or compromised, we apprehend the principles applicable to a tender would apply, and that if the infant be of tender years, that is within the age of fourteen years, his natural guardian could effect the compromise.[16] Although the prudent course to pursue would be to have a general guardian appointed.

Sec. 48. By public official.—Tax collectors and other public receiving and disbursing officers, in absence of statutory authority, do not have power to compromise demands due the state or the political subdivision they serve. In some states county boards are by statute authorized to compromise delinquent taxes and other demands due the county.[1] The law is well settled, however, that public corporations and political subdivisions having power to sue and be sued, acting through their proper boards, in absence of express statutory authority, have power to effect the compromise of claims in favor of or against them. Such power is a necessary incident to the right to sue and be sued.[2] The power to compromise is confined to disputed and doubtful claims,[3]

[16] Watkins v. Ashwick, 1 Croke, 132, Cro. Eliz. 132 (Tender); Brown v. Dysinger, 1 Rawle (Pa.) 407. In the latter case a tender made by au uncle; though the mother was living, was held good.

[1] Lincoln Trust Co. v. Davis, 92 Pac. (Kan.) 707; Martin v. U. S., 4 T. B. Mon. 487.

[2] Beach on Pub. Corp. Sec. 638; Dillon, Mun. Corp. Sec. 477; Washburn Co. v. Thompson, 99 Wis. 585, 75 N. W. 309; Sackett v. City of Morris, 149 Ill. App. 152; Hall v. Baker, 74 Wis. 118, 42 N. W. 104; Supervisors v. Birdsall, 4 Wend. 453; Wadsworth v. Board, 124 N. Y. Supp. 334; Collins v. Welch, 58 Iowa, 72.

[3] See City of New York v. New York City R. Co., 87 N. E. (N. Y.) 1117, where it was held that a payment of a license fee according to the company's

and may be exercised at any time before the validity of the claim is settled by final judgment.[4] It has been said that a claim is not so far removed from the region of doubt as to prevent a compromise, merely because of a judgment in a trial court, if the judgment is open to reversal in a higher court and an appeal is pending.[5] Mere threats or an expressed intent to take an appeal it would seem is enough.[6] There must be some reasonable ground for saying that a claim is doubtful. Merely asserting a claim against a county does not make it doubtful so as to justify a compromise, and a county board will be enjoined from compromising or paying a claim founded upon a contract made in direct violation of the law.[7] Such contracts are void.

A municipal corporation cannot compromise with a county a claim for taxes collected for the municipality and in the county treasury. Such taxes are raised in the exercise of governmental functions and for governmental purposes and held for that purpose, and there is a continuing duty of the county to execute the trust by paying over the money.[8] A public board cannot discharge a debt against a solvent and responsible person without payment;[9] nor can it discharge a disputed or doubtful claim without receiving something of value which, as upon a compromise, would be a consideration for a discharge, for a board cannot give away public property. Where a claim has been reduced to judgment

estimate was no accord and satisfaction, where the law fixed the amount or the fee to be paid.

[4] Beach on Pub. Corp. Sec. 638; Mills County v. Burlington Ry. Co., 47 Iowa, 66. A county board cannot upon a compromise allow a sheriff a greater compensation than allowed by law: People v. Wells, 140 Ill. App. 235.

[5] Quayle v. Bayfield Co., 114 Wis. 108, 89 N. W. 893; Board v. Bassett, 95 Pac. (Idaho) 774.

[6] Petersburg v. Mappin, 14 Ill. 193; Agnew v. Brall, 124 Ill. 312.

[7] Quayle v. Bayfield Co., 114 Wis. 108, 89 N. W. 892.

[8] State v. Bisping, 130 N. W. Rep. (Neb.) 1034.

[9] Agnew v. Brall, 124 Ill. 312; Butternut v. O'Malley, 50 Wis. 329.

and all questions pertaining to the rightfulness of the demand put at rest and the occasion for a compromise at an end, a public board may nevertheless settle and compound with the debtor, if his financial condition is such that the board is unable to discover any way of collecting any part of the judgment. "The rules of business conduct, by which a prudent person is governed, are applicable to a county in the management of its affairs under similar circumstances." [10] This seems to be at variance with the doctrine that a consideration is necessary to uphold an agreement to accept less than the sum due. It has been held that where a debt is against the corporation there must be some consideration to support the agreement of the creditor to take less than the whole sum due.[11] Where a claim is disputed, a compromise effected with an officer authorized to adjust the account, whereby the creditor accepts less than the contract price, is good.[12] One who accepts from a county the fruits of a compromise, will not be permitted to show that the meeting of the board at which the compromise was made was not regular.[13]

Sec. 49. **By assignee—Receiver—Trustee.**—Assignees appointed by judicial officers and receivers of insolvents, and of estates in process of liquidation have no power upon their own motion to settle and compromise a demand due from or to the estate.[1] Their acts are merely expressions of the will of the court and are not

[10] Collins v. Welch, 58 Iowa, 72; Washburn Co. v. Thompson, 99 Wis. 585; Multnomah Co. v. DeKum, 93 Pac. (Or.) 821.

[11] City of Crowford v. Darrow, 127 N. W. (Neb.) 891. See Baileyville v. Lowell, 20 Me. 178.

[12] Mason v. U. S., 17 Wall. 67, 21 L. Ed. 564.

[13] Green v. Lancaster Co., 61 Neb. 473, 85 N. W. 439. A compromise by a county board apparently made within the scope of their authority will be taken as valid until successfully questioned in an appropriate proceeding: People v. Wells, 140 Ill. App. 235. There can be no compromise or accord and satisfaction where an officer has no power to settle: Penitentiary Co. v. Gordon, 85 Ga. 159.

[1] Woerz v. Schumacher, 161 N. Y. 531, Aff'g 37 App. Div. 374.

ordinary contracts.[2] Authority to compromise ought first to be obtained from the court[3] upon notice to all parties interested.[4] In case of private assignments, the insolvent debtor may grant to his assignee power to compromise disputed and doubtful claims and compound debts that are doubtful and precarious.[5] A power authorizing an assignee to compound good as well as bad debts is void for it would be an authority to waste the funds. A power "to collect the said choses in action, with the right to compound for said choses in action, taking a part for the whole, when he shall deem it expedient," was held not to be void by reason of the failure to distinguish between precarious debts and those good for their entire amount; that the qualifying words implied a duty to exercise a sound discretion.[6] Where an assignee or receiver without authority has effected a compromise of a demand, or compounded a debt of doubtful value, the court will ordinarily make an order confirming it or allow it in his account if the compromise was made in good faith and beneficial to the estate. It has been decided that where a compromise of a demand was conditional upon the money being refunded if the claim is held to be illegal, the court must pass upon the legality of the claim, and that its allowance in the assignee's account on the ground that he acted in good faith was error.[7] A trustee, acting in good faith, may generally compromise a demand or compound a debt due to the

[2] Woerz v. Schumacher, 161 N. Y. 531, Aff'g 37 App. Div. 374. An unlawful compromise by a receiver of a corporation of a claim against one of its officers, or of calls against a stockholder, is no defense by another stockholder to an action against him to recover on his subscription contract: Brown v. Allebach, 166 Fed. 488.

[3] Re Croton Ins. Co., 3 Barb. Ch. 642; Morrison v. Lincoln Bank, 89 N. W. (Neb.) 996.

[4] Anonymous v. Gelpicke, 5 Hun, 251. A trustee in bankruptcy may compromise an action: In re Kranich, 174 Fed. 908.

[5] Dow v. Platner, 16 N. Y. 562; Coyne v. Weaver, 84 N. Y. 386.

[6] Coyne v. Weaver, 84 N. Y. 386.

[7] In re Shotwell, 49 Minn. 170, 52 N. W. 1078.

trust estate.[8] But if he compounds a debt for a grossly inadequate sum when by the exercise of diligence more could have been realized, or compromise a demand without sufficient ground therefore he will be held for the loss occasioned by his acts.[9] Only those creditors who have not consented to a compromise may object to it.[10]

Sec. 50. By a stranger.—An accord and satisfaction moving from a third person having no pecuniary interest in the subject matter and made without any request by the debtor, if accepted by the creditor in satisfaction of the debt, discharges the debt and is a good defense in an action against the original debtor.[1] This rule is not sustained by an unbroken current of authorities. In England during the reign of Elizabeth, a decision was rendered which was reported to have decided that an accord and satisfaction moving from one who was a stranger and in no way privy to the condition of the obligation could not be pleaded in bar by the obligor.[2] And this rule was followed in other English decisions.[3] But doubt was afterwards expressed as to whether the case was

[8] Blue v. Marshall, 3 P. Wms. 381; Ratcliffe v. Winch, 17 Beav. 216; Forshaw v. Higginson, 8 De G., M. & G. 827; 2 Perry on Trusts, 482.

[9] Jevon v. Bush, 1 Vern. 342; Wiles v. Gresham, 5 De G., M. & G. 770; Re Alexander, 13 Ir. Ch. 137; 2 Perry on Trusts, 482.

[10] In re Shotwell, 49 Minn. 170, 52 N. W. 1078.

[1] Gray v. Herman, 75 Wis. 453, 44 N. W. 248, 6 L. R. A. 691; Pelton v. Knapp, 21 Wis. 64; Chicago, etc., Ry. Co. v. Brown, 97 N. W. 1038; Leavitt v. Morrow, 6 Oh. St. 71, 67 Am. Dec. 334; Harvey v. Tama County, 53 Iowa, 233, 5 N. W. 130; Wilson v. Brown, 13 N. J. Eq. 377; Harrison v. Hicks, 1 Port. (Ala.) 423, 27 Am. Dec. 638; Webster v. Wyser, 1 Stew. (Ala.) 184; Hawkshaw v. Rawlings, 1 Stra. 23; Welby v. Drake, 1 Car. & P. 557; Binford v. Adams, 104 Ind. 41; Ritenour v. Mathews, 42 Ind. 7; Oury v. Saunders, 77 Tex. 278; National Bank v. Cushing, 53 Vt. 326; Crumlish v. Improvement Co., 38 W. Va. 390, 23 L. R. A. 120, and extensive note; Freamster v. Withrow, 12 W. Va. 658.

[2] Grymes v. Blofield, Cro. Eliz. 541, Com. Dig., title Accord, A. 2.

[3] Edgcombe v. Rudd, 5 East, 294.

correctly reported.[4] However, later English decisions have materially modified the doctrine by holding that if the discharge be afterwards ratified it is a good defense.[5] The early English decision giving rise to the contrary doctrine was approved, and followed in a decision given in New York in 1810,[6] and the rule has been recognized as the law in subsequent cases before the courts of that state.[7] As late as 1881, we find it announced that the decision given in that state in 1810, had not been authoritatively overruled, and the question was left undisturbed except possibly by a doubt raised by the court observing that it was unnecessary to determine whether it should any longer be regarded as authority.[8] The early English and New York cases responsible for this doctrine, came before the court upon the sufficiency of the plea, and in New York in a case decided in 1838 the doctrine seems to

[4] Bartley, C. J., in Leavitt v. Morrow, 6 Ohio St. 71, 67 Am. Dec. 334, gives a brief historical summary. He says: "And it is not a little remarkable that this same case is reported by Rolle in his abridgment as having been decided exactly the other way, and in favor of the defendant, and referred to as a decision at Trinity term, 30 Eliz.: 1 Roll. Abr. 471, tit. Condition, F. * * * And in the case of Thurman v. Wild, 39 Eng. Com. L. 188, Lord Denman, C. J., strongly questions the authority, not only of the case of Grimes v. Blofield (Cro. Eliz. 541), but also the case of Edgcombe v. Rudd, 5 East, 294; and in reference to the former says: 'But the reporter, in a note, observes truly that in Rolle's abridgment of the same case the judgment is stated exactly the other way—to have been for the defendant, and that the plea was good. This circumstance,' adds Chief Justice Denman, 'and some inaccuracies which are manifest in Croke's report, certainly detract from the authority of the case in East (Edgcombe v. Rudd) as to this point, which depends on the report in question.'"

[5] Simpson v. Eggington, 10 Exch. 845, 24 L. J. Exch. 312; Kemp v. Balls, 10 Exch. 607, 3 C. L. R. 105, 24 L. J. Exch. 47; Jones v. Broadhurst, 9 C. B. 173; James v. Isaacs, 22 L. J. C. P. 73, 12 C. B. 791, 17 Jur. 69; Belshaw v. Bush, 11 C. B. 191, 22 L. J. C. P. 24, 17 Jur. 67; Lucas v. Wilkinson, 26 L. J. Exch. 13.

[6] Clow v. Borst, 6 Johns. Rep. 38.

[7] Daniels v. Hallenbeck, 19 Wend. 459; Bleakly v. White, 4 Paige, 566; Muller v. Eno, 14 N. Y. 605; Atlantic Dock Co. v. Mayor, 53 N. Y. 64.

[8] Wellington v. Kelly, 84 N. Y. 543.

have been materially weakened by the court declaring that the best and most secure form of pleading such a defense is by way of satisfaction.[9] This doctrine has been followed in Kentucky,[10] although it was held that in equity an accord and satisfaction moving from a stranger might be taken advantage of by way of injunction.[11] The better reasoning and the decided weight of the authorities support the rule first stated. The rules governing the rights and liabilities of the parties being applicable alike to a payment by a stranger, and to an accord and satisfaction moving from a stranger, in the succeeding sections upon this topic, the principles will be illustrated and supported by reference to cases of payment as well as cases of accord and satisfaction.

Sec. 51. Same subject—Ratification by debtor.—Under the civil law a stranger may discharge the debt of another even against his will.[1] But the rule of the civil law goes further than the rule established by the American and English decisions. The payment or accord and satisfaction must be adopted by the debtor. This is the view taken by eminent text writers.[2] It has been said that if a stranger steps in and discharges a debt for another, it being for the latter's benefit, the inference is that it was done with his consent or if without his knowledge that he will subsequently ratify it.[3] "If he refuses to ratify it, he disclaims the payment, and the debt stands unpaid as to him (the debtor.)"[4] Whether or not the debtor adopts the payment or accord and satisfaction as having been made for his benefit, as between himself

[9] Daniels v. Hallenbeck, 19 Wend. 408.

[10] Stark v. Thompson, 3 T. B. Mon. 296; Owsley v. Thompson, 5 J. J. Marsh. 127; Groshon v. Grant, 2 Ky. Dec. 268.

[11] Stark v. Thompson, 3 T. B. Mon. 296.

[1] 1 Pothier Ob. 463.

[2] Chitty Cont. 779; 2 Par. Cont. 688.

[3] Leavitt v. Morrow, 6 Ohio St. 71, 67 Am. Dec. 334.

[4] Crumlish v. Improvement Co., 38 W. Va. 390, 23 L. R. A. 120.

and the creditor, is of little importance unless the creditor afterwards sues him to recover the debt. Payment or accord and satisfaction being matter of defense, the debtor, if sued, is then bound to ignore the satisfaction made in his behalf or plead and prove it by way of defense. He may have a good reason for not recognizing the discharge, such as a defense founded upon a failure of consideration, recoupment of damages, or, perhaps, set-off; particularly if there is any question about the volunteer's right to recover over. If the debtor pleads the payment or accord and satisfaction he thereby ratifies the act of the stranger, and the creditor cannot recover.[5] The debtor may ratify the payment in express terms, but on being informed of the payment, merely asking why the payment was made does not amount to a ratification.[6] Nor, it seems, will a statement by the debtor to a third person, expressing an intention to reimburse the volunteer, constitute a ratification.[7]

Sec. 52. Same subject—Intent of the parties—Cancellation of the payment—Payment available to subsequent lien holder.—The payment or accord and satisfaction must be accepted from the stranger in satisfaction.[1] If the creditor received the payment believing the debtor authorized it, on discovering the want of authority he may cancel the payment by returning the thing paid to the stranger.[2] But if the debtor ratified it before he takes steps

[5] Leavitt v. Morrow, 6 Ohio St. 71, 67 Am. Dec. 334; Gray v. Herman, 75 Wis. 458; Chicago, etc., Ry. Co. v. Brown, 97 N. W. 1036; Simpson v. Eggington, 10 Exch. 845, 24 L. J. Exch. 312; Belshaw v. Bush, 11 C. B. 191, 22 L. J. C. P. 24, 17 Jur. 67; Walter v. James, L. R. 6 Exch. 124, 40 L. J. Exch. 104, 24 L. T. N. S. 188, 19 Week. Rep. 472.

[6] Winsor v. Savage, 9 Met. 348.

[7] Kenan v. Holloway, 16 Ala. 53, 50 Am. Dec. 762.

[1] Under Art. 2130 Civil Code of La., an obligation may be discharged by a third party in no way concerned in it, provided he acts in the name and for the discharge of the debtor, or that if he acts in his own name he is not subrogated to the rights of the creditor. Gernow v. McCan, 23 La. Ann. 84.

[2] Walter v. James, L. R. 6 Exch. 124, 40 L. J. Exch. 104, 24 L. T. N. S. 188, 19 Week. Rep. 472.

to cancel it he will be bound.[3] The payment or accord and satisfaction must be made by the stranger with the intent of relieving the debtor from his liability.[4] An implied agreement is sufficient.[5] The intent expressed at the time of the payment to discharge the debt or in absence of an express declaration, that deducible as a matter of law from the act of payment and acceptance, must govern and the debt is discharged. The mere intention of a third party to purchase the debt, not communicated to the creditor at or before the time of payment, will not change the nature of the transaction.[6] If a secret intent could be shown the stranger would be permitted to claim the debt was paid, or that it was not, as it might afterwards suit his purpose. Whether payment by a stranger discharges the debt or is a purchase of it, is one of fact,[7] unless the facts admit of but one conclusion. The burden is upon the debtor to show that the third party intended to discharge the debt and that the thing delivered was received in satisfaction.[8]

In England it has been decided that where the payment was not a gift to the debtor, the stranger, before it is ratified may withdraw the payment.[9] But the correct rule seems to be that if the stranger pays the debt of another with the intent of discharging the liability of the latter and the creditor accepts the thing paid in satisfaction, the debt is paid and the stranger cannot reclaim the thing paid, whether it was intended as a gift to the debtor or the stranger expected to be reimbursed by him. It has

[3] Walter v. James, *ante.*

[4] Dusenburg v. Callaghan, 8 Hun, 541.

[5] Griffin v. Pettey, 101 N. C. 380.

[6] Pelton v. Knapp, 21 Wis. 64; Champney v. Coope, 32 N. Y. 543.

[7] Dougherty v. Deeney, 45 Iowa, 443; Binford v. Adams, 104 Ind. 41; Moran v. Abbey, 63 Cal. 56; Wilcoxon v. Logan, 91 N. C. 449; Balohradsky v. Carlisle, 14 Ill. App. 289.

[8] Whiting v. Insurance Co., 15 Md. 297.

[9] Walter v. James, L. R. 6 Exch. 124.

been held that if a stranger induces a creditor to accept goods in satisfaction of another's debt he is estopped from avoiding the contract and claiming the price of the goods.[10] Payment by a stranger and its acceptance as such by the creditor extinguishes the debt as to the creditor,[11] although the debtor does not ratify it. No other reasonable conclusion can follow from the act of acceptance. In reality, as has been aptly said, what matters it to the creditor who pays?[12] The discharge is available to any person whose property is relieved by the payment,[13] or whose security would be postponed, if the payment was allowed to be withdrawn or changed to a purchase of the debt.[14] After the payment of a judgment by a stranger a purchaser at an execution sale acquires no title to property sold in satisfaction of the judgment.[15] Although the debt is discharged as to the creditor, nothing it would seem, will prevent the creditor from recovering from the debtor, unless the latter chooses to avail himself of the defense. For, upon a familiar principle, if a debtor discharges a debt himself and neglects afterwards in an action to recover the debt to set up the payment as a defense he has only himself to blame and must pay the judgment.[16]

Sec. 53. Same subject—Subrogation—Liability of debtor to stranger—Subsequent promise to pay the stranger—Consideration—Adopting the payment as a defence.—If a stranger in no way privy to the obligation, is compelled to discharge the debt of

[10] Fowler v. Moller, 10 Bosw. 374.

[11] Crumlish v. Improvement Co., 38 W. Va. 390, 23 L. R. A. 120; Harrison v. Hicks, 1 Port. 423, 27 Am. Dec. 638.

[12] Gray v. Herman, 75 Wis. 453, 6 L. R. A. 691; Crumlish v. Improvement Co., 38 W. Va. 390, 23 L. R. A. 120.

[13] Harrison v. Hicks, 1 Port. 423, 27 Am. Dec. 638.

[14] Pelton v. Knapp, 21 Wis. 64; Champney v. Coope, 32 N. Y. 543.

[15] Terry v. O'Neal, 71 Tex. 592.

[16] Bird v. Smith, 34 Me. 63, 56 Am. Dec. 635.

another to protect his interest in certain property as owner,[1] or junior lien holder,[2] he will be subrogated to all the rights of the creditor. And, it is equally as familiar principle, that the right of subrogation is never extended to a mere volunteer or intermeddler who, without any obligation to pay, voluntarily discharges the debt of another.[3] The rule comprehends persons paying who do so under the belief that they are legally bound.[4] In such cases, their rights, if any they have, are against the creditor. A voluntary payment made by a stranger does not entitle him to recover upon the original contract in the name of the creditor,[5] or as assignee. Nor can he charge the debtor, and recover upon an implied contract.[6] The rule is founded upon the principle that one man cannot make himself the creditor of another without his consent.[7] Administrators[8] and guardians[9] are not considered

[1] Cockrum v. West, 122 Ind. 372; Weiss v. Guerineau, 109 Ind. 438; Arnold v. Green, 116 N. Y. 566; Gans v. Thieme, 93 N. Y. 225; Johnson v. Zink, 51 N. Y. 333; Ellsworth v. Lockwood, 42 N. Y. 89; Sandford v. McLean, 3 Paige, 117, 23 Am. Dec. 773.

[2] Jenkins v. Insurance Co., 12 How. Pr. 66; Mosier's Appeal, 56 Pa. St. 76, 93 Am. Dec. 783; Silver Lake Bank v. North, 4 Johns. Ch. 370; Grigg v. Bank, 59 Ala. 317.

[3] Ætna Ins. Co. v. Middleport, 124 U. S. 534, 31 L. Ed. 537; Moody v. Moody, 68 Me. 155; Hoover v. Epler, 52 Pa. 522; Truesdell v. Callaway, 6 Mo. 605; Kleimann v. Geiselmann, 45 Mo. App. 497; Woodbridg v. Scott, 69 Mo. 669; Wormer v. Waterloo, 62 Iowa, 699, 14 N. W. 331; Byington v. Bookwalter, 7 Iowa, 512, 74 Am. Dec. 274; Fay v. Fay, 43 N. J. Eq. 438; Wilkes v. Harper, 1 N. Y. 586; Nichol v. Dunn, 25 Ark. 129; Wilson v. Brown, 13 N. J. Eq. 277.

[4] Dawson v. Lee, 83 Ky. 49; Norton v. Highleyman, 88 Mo. 621; Price v. Estill, 87 Mo. 378.

[5] Brown v. Chesterville, 63 Me. 241; Simmons v. Walker, 18 Ala. 664.

[6] Kenan v. Holloway, 16 Ala. 53, 50 Am. Dec. 162; South Scituate v. Hanover, 9 Gray, 420; MeGee v. San Jose, 68 Cal. 91.

[7] Dawson v. Lee, 83 Ky. 49 (Payment by a surety not bound); Baltimore v. Hughes, 1 Gill & J. 480, 19 Am. Dec. 243; Durnford v. Messiter, 5 Man. & S. 446; Kenan v. Holloway, 16 Ala. 53, 50 Am. Dec. 162; 1 Par. Cont. 472.

[8] Wallace's Appeal, 5 Pa. St. 103.

[9] Kelchner v. Forney, 29 Pa. St. 47; Mosier's Appeal, 56 Pa. St. 76, 93 Am. Dec. 783.

strangers and if they advance their own funds for the payment of a claim against the estate, they are entitled to be reimbursed, or if necessary for their protection, to subrogation of the rights of the creditor. Where there is a previous request to pay the debts, or a subsequent ratification of the payment, the question is not one of subrogation, but of an express or implied agreement by the debtor to reimburse the stranger for the money paid for his benefit. If there was no previous request and the debtor does not voluntarily ratify the payment, there is no way known to the law whereby the volunteer may force the debtor to ratify it. If sued by the stranger, the debtor may plead and prove that it was a voluntary payment and the law will leave the volunteer where he placed himself.[10] If the payment was made pursuant to a request without any express agreement to repay the third party, an agreement will be implied.[11] And, in this case, as well as where the debtor expressly promises to reimburse the stranger the latter may recover the amount paid by him.[12] However, with the qualification that a subsequent promise to pay must be founded upon a sufficient consideration. A consideration sufficient to support the promise is present, if the payment was beneficial to the debtor. In such cases there is a moral obligation to reimburse the stranger.[13] Mere detriment to the party paying is no consideration, where the payment was not induced by a previous request.[14] If the debtor is not bound to pay the debt, and makes the promise to reimburse the stranger in ignorance of his nonliability, there is no consideration for the promise.[15]

[10] Wright v. Garlinghouse, 26 N. Y. 539; Albany v. McNamara, 117 N. Y. 168.

[11] 1 Par. Cont. 471.

[12] Wellington v. Kelly, 84 N Y. 543.

[13] Wellington v. Kelly, 84 N Y. 543.

[14] Kenan v. Holloway, 16 Ala. 53, 50 Am. Dec. 162.

[15] Kenan v. Holloway, 16 Ala. 53, 50 Am. Dec. 162.

Where the debtor afterwards adopts the payment as his own, either as a defense or by making it the basis for affirmative relief, the question then arises—is the debtor liable to the stranger for the money paid for his benefit? Obviously, if the voluntary payment was intended as a gratuity, taking advantage of the payment would in no way render the debtor liable to the donor. If it developed upon an inquiry that the third party purchased the debt, or paid it under circumstances amounting to an equitable assignment of it,[16] it is equally obvious that the remedy of the third party is upon the assignment.[17] Whether the transaction is a purchase of the debt, or a gratuitous payment, or an advance with the expectation of being reimbursed by the debtor, is to be determined by the intent of the party making the payment, either expressly stated or implied from the facts and circumstances. It has been said that a simple payment raises the presumption that the stranger merely expected to be repaid by the debtor and that there was no express or implied agreement for an assignment of the debt inferred.[18] Recurring to the main question it may be observed that it is not free from uncertainty. If a liability arises it is founded upon an inference drawn from the act of taking advantage of the payment. General statements disassociated from concrete facts are always perplexing. Perhaps the supreme court of Alabama has pronounced as clear a *dictum* upon this question as may be found. It said: "Where, however, the consideration

[16] "One voluntarily guaranteeing a bond, unknown to the obligors, but at the request of the obligee and of the person he gives it to in payment of a debt, he becomes an equitable purchaser of it on paying the amount thereof, and can recover the same from the obligors." Carter v. Jones, 5 Iredell's Eq. 196, 49 Am. Dec. 425.

[17] See Crumlish v. Improvement Co., 38 W. Va. 390, 23 L. R. A. 120, where a third party, in order to get certain bonds that had been attached, out of the way of a new loan to be made by him, agreed with the judgment creditor to take over the bonds after a sale, and pay them the amount of the judgment, which was done, it was held that the third party was the equitable owner of the judgment, although paid as to the creditor.

[18] Neely v. Jones, 16 W. Va. 625, 37 Am. Rep. 794.

is beneficial to the party sought to be charged, and is actually adopted or taken advantage of by him, the person executing the consideration becomes the agent of the promisor, by the adoption of his act by the latter." [19] Again, it has been said that a ratification is equivalent to an original request.[20] Similar *dictum* is to be found in other decisions.[21] In West Virginia in a late case we not only find the same *dictum,* but another to the effect that if the payment be not ratified by the debtor, the stranger "may bring a suit in equity praying relief in the alternative: that is if the debtor do not ratify such payment the debt may be enforced in his favor, as its equitable assignee, or if so ratified, that he be decreed repayment of the amount paid for the use of the debtor." [22] This seems to us to be going too far, notwithstanding the court declared that it does not at all infringe the rule that one cannot at law make another his debtor without his consent, and recover the debt. If applied in cases where the transaction did not amount to an equitable assignment, equity would be invoked to override a strict legal right.[23]

Sec. 54. **Consideration—In general.**—An accord is unlike other contracts executory on both sides, in that the mutual promises of the parties do not furnish any consideration to uphold the contract. This exception arises out of the previous relation of the parties as debtor and creditor, and the object sought to be attained; namely, the substitution of one right of action for an-

[19] Kenan v. Holloway, 16 Ala. 53, 50 Am. Dec. 162. S. P. Roundtree v. Holloway, 13 Ala. 357. See Story on Cont. 2nd Ed. Sec. 373.

[20] Winsor v. Savage, 9 Met. 348: Merely asking the question "Why did you pay it?" is no ratification.

[21] Harrison v. Hicks, 1 Port. 423, 27 Am. Dec. 638; Neely v. Jones, 16 W. Va. 625, 37 Am. Rep. 794.

[22] Crumlish v. Improvement Co., 38 W. Va. 390, 23 L. R. A. 120. S. P. Neely v. Jones, 16 W. Va. 625, 37 Am. Rep. 794.

[23] As to subrogation, it has been said it will not be enforced at the expense of a strict legal right. Barnes v. Dickey, 131 Pa. 86.

other.[1] Manifestly, no present benefit or corresponding detriment result from mutual promises to give and receive satisfaction at a future time, where the parties are already legally and morally bound to render and accept satisfaction. A debtor may promise to do something to his detriment and to his creditor's benefit, but until he does it, neither one nor the other result follow. Hence, the necessity for execution. On an accord being executed, and its validity questioned it must be tested by the inflexible principle of law which requires all contracts to be supported by a sufficient legal consideration. It is everywhere held that there must be a new and sufficient consideration to support an accord and satisfaction.[2] Where a creditor, moved by the promise of a consideration by him deemed sufficient, joins in the execution of an accord, the courts go no further than to ascertain if there is a consideration, and if so that it is legal, and uniformly hold that any distinct benefit accruing to the creditor, or even the possibil-

[1] Where a lessor is bound by the lease to make repairs an oral agreement to repair is no accord and satisfaction: Adams v. Topling, 4 Mod. 88.

[2] Spann v. Baltzell, 1 Flo. 301, 46 Am. Dec. 346; Jeffrey v. Davis, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710; Allison v. Abendroth, 108 N. Y. 470.

Scarcely any branch of the law furnishes a more varied assortment of opinions than that concerning the sufficiency of the consideration to uphold an accord and satisfaction. This is due, no doubt, in many cases, from the shock to the moral sense of the individual judge when called upon to apply the inflexible rule requiring a consideration, in disregard of an unequivocal promise. And we find many criticisms of the principles governing the consideration required; as, "technical and not very well supported by reason." (Kellogg v. Richards, 14 Wend. 119); a "rigid and rather unreasonable rule of the old law." (Johnson v. Brannan, 5 Johns. 268); as "purely technical and not very creditable to the common law." Potter, J., said: that while the courts "have rarely failed, upon any recurrence of the question, to criticise and condemn its reasonableness, justice, fairness, or honesty, no respectable authority that I have been able to find has, after such unanimous disapproval by all the courts, held otherwise than was held in Pinnel's case, *supra* [5 Coke, 118] and Cumber v. Wane, 1 Str. 426; Foakes v. Beer, 9 App. Cas. 605; 36 Eng. Rep. 194; Goddard v. O'Brien, 9 Q. B. Div. 37; 30 Am. Law. Reg. 637, and notes." Jaffray v. Davis, 124 N. Y. 164. Perhaps the moral sense would not so often be shocked were it possible and permissible to fathom the minds of the parties and determine their motives.

ity of a benefit, however slight, will support the substituted contract.[3] "A new and sufficient consideration arises when the substituted contract is advantageous to the creditor, that is, when he derives a distinct benefit from it—something of value to which he would not have been entitled under the original contract."[4]

It must appear that the satisfaction made was advantageous to the creditor.[5] An agreement to cancel a part of a judgment, based

[3] Palmer v. Yager, 20 Wis. 91; Allison v. Abendroth, 108 N. Y. 470.

[4] Palmer v. Yager, 20 Wis. 91. S. P. Dilion v. Brubaker, 52 Pa. St. 488, 91 Am. Dec. 177; Allison v. Abendroth, 108 N. Y. 470; Ness v. Minn. Co., 87 Minn. 413, 92 N. W. 333; Roberts v. Banse, 72 Atl. (N J. Sup.) 452; Douglas v. White, 3 Barb. Ch. 621.

The common law rule defining a consideration sufficient to uphold a contract, as a benefit to the party promising, or some detriment or loss to the party to whom the promise is made (Pow. on Cont. 343, 344, 2 Kent's Com. 465), undoubtedly, was had in mind by the court in many cases of accord and satisfaction. Indeed, we find it quoted, and expressly stated that "It is not necessary that there should be a benefit. Damage or loss by one party, sustained at the request of the other, is sufficient." Luddington v. Bell, 77 N. Y. 138, 33 Am. Rep. 601. But more often we find the rule stated in general terms thus—"But when a new duty is undertaken by the debtor, which is or may be burdensome to him or beneficial to the creditor, a new consideration arises out of such undertaking, and sustains the agreement of the creditor:" Rose v. Hall, 26 Conn. 392, 68 Am. Dec. 402. S. P. Maddox v. Bevan, 39 Md. 485. In Watson v. Elliott, 57 N. H. 511, the court said: "It is enough that something substantial, which one party is not bound by law to do, is done by him, or something which he has a right to do he abstains from doing at the request of the other party."

After an examination of many authorities we believe that the common law definition of a consideration applicable to contracts in general, is too broad and does not fit the case; but, that upon correct reasoning, the cardinal principle governing the consideration necessary to support an accord and satisfaction, arising from the previous situation of the parties, requires, as stated in the text, that in all cases the consideration must move from the debtor to the creditor, that is conferring upon him a distinct benefit or possibility of such benefit. If a debtor inconveniences himself, at the request of the creditor, by discharging his debt or other obligation in a different way from that originally agreed, he may confer a benefit or the possibility of a benefit upon the creditor, and if he does and it satisfies the creditor at the time, whether it afterwards turns out beneficial is immaterial.

[5] Diller v. Blubaker, 52 Pa. St. 498, 91 Am. Dec. 177.

on the debtor's agreement not to appeal, made after the time to appeal had gone by, is without consideration.[6] But a waiver of a right to appeal before the time to appeal is by, and the payment of a less sum, is a good consideration to support a promise to accept a less sum than is claimed.[7] The claim compromised must have some foundation in fact or the new promise will be without consideration.[8] An agreement to receive payment of a part of a debt in goods at the market price, confers no benefit upon the creditor beyond what he would receive by a purchase upon the open market.[9] Nor does the performance of that which the party was under a previous valid obligation to do, as by paying a part of an acknowledged debt in money, confer any benefit upon the creditor to which he was not before entitled, and the creditor may enforce collection of the balance.[10] Where nine cows were sold but one died before delivery, accepting pay for eight after the vendee had refused to pay for the dead cow, is no accord and satisfaction.[11] An extraordinary effort by a poor man, at the instigation of his creditor, to raise a less sum in satisfaction of the whole debt and paying that sum, does not constitute a consideration sufficient to support the agreement to discharge the whole debt.[12] Accepting the surplus realized from an illegal tax sale is not an accord and satisfaction of the damages arising from the trespass.[13] Restoring to a creditor his own property

[6] Denny v. Bean, 93 Pac. 693.

[7] Williams v. Blumenthal, 27 Wash. 24, 67 Pac. 393; Roberts v. Banse, 72 Atl. (N. J. Sup.) 452.

[8] Smith v. Boruff, 75 Ind. 416: There must be at least colorable ground of a claim, in law or in fact.

[9] Kromer v. Heim, 75 N. Y. 574.

[10] Weidner v. Standard Ins. Co., 130 Wis. 10, 110 N. W. 246.

[11] Shaver v. Armstrong, 52 Misc. Rep. 626, 103 N. Y. Supp. 926.

[12] Harriman v. Harriman, 12 Gray, 341.

[13] Westfall v. Preston, 49 N. Y. 349.

is not sufficient to support a plea of accord and satisfaction.[14] It is stated in Bacon's Abridgment that in trespass for taking plaintiff's cattle, if the agreement was to drive them to a certain place so that it would be a charge to him to do it, if performed, it would be a good accord and satisfaction.[15] But here, undoubtedly, there is a possibility of benefit to the plaintiff. Laying out money by a debtor for his sole benefit, though done at the request of the creditor is not a consideration sufficient to support a promise.[16] But where a mortgagor paid delinquent taxes, pursuant to an agreement with the mortgagee to reduce the amount of the mortgage, it was held to confer a substantial benefit upon the mortgagee by bettering his security and supported the agreement to accept less.[17] Mere threats to throw up a contract and incur a penalty is a sufficient consideration for relinquishing the old agreement and substituting another.[18] A mutual agreement to discontinue two actions pending, and acted upon, is a good accord and satisfaction.[19] An accord that each of the parties should be quit of actions against the other, is not good, because it is not any satisfaction.[20] But an accord that each should give the other a quart of wine in satisfaction of action, is good.[21] As the strict legal right founded upon a want of consideration may be urged in violation of good faith, the rule requiring a consideration to support a contract, when sought to be applied to an accord and satisfaction, is not extended beyond its precise import, and in such cases where there is any new consideration, or any

14 Diller v. Brubaker, 52 Pa. St. 498, 91 Am. Dec. 177; Bac. Abr. Tit. Accord, (A).

15 2 Roll. R. 96, Bac. Abr. Tit. Accord (A).

16 Parker v. Bayles, 2 Bos. & Pul. 73.

17 Day v. Gardner, 42 N. J. Eq. 199, 7 Atl. 365.

18 Lattimore v. Harsen, 14 Johns. 330.

19 Foster v. Trull, 12 Johns. 456.

20 Roll. Abr. 128; Styles, 245; Lut. 57; James v. Davit, 5 T. R. 14.

21 Roll. Abr. 128.

collateral benefit to the creditor which amounts to a technical legal consideration, the rule does not apply.[22] It is not essential that the consideration be adequate in point of value, for the law does not decide upon this.[23] Hence, the value of the thing received in satisfaction is not material.[24] Indeed, as before observed, a very slight consideration is sufficient,[25] if it be substantial and valuable. It is the difficulty of ascertaining and measuring the benefit under such contracts, and the policy of the law not to interfere with the rights of parties to make their own contracts upon such terms as they may deem advantageous to themselves, that furnish the reason for not inquiring into the amount of the benefit; the courts only applying the unvarying rule of law requiring a new consideration, and that the consideration be legal.

Sec. 55. Payment of a less sum—Recovery of residue—Rescission unnecessary.—Lord Ellenborough said, it is impossible to contend that acceptance of seventeen pounds and ten shillings is an extinguishment of a debt of fifty pounds; "There must be some consideration for the relinquishment of the residue; something collateral to show a possibility of benefit to the party relinquishing his further claim; otherwise, the agreement is *nudum pactum*." [1] This rule, however, is to be understood with reference only to cases where the debt is liquidated and due.[2] The rule is supported by an unbroken current

22 Sonnenberg v. Riedel, 16 Minn. 81.

23 Spann v. Baltzell, 1 Flo. 301, 46 Am. Dec. 346; Worcester v. Heald, 72 Atl. (N. J. Sup.) 421; Trenton St. R. Co. v. Lawlor, 71 Atl. (N. J.) 234.

24 Pinnel's Case, 5 Coke, 118.

25 Jones v. Perkins, 29 Miss. 139, 64 Am. Dec. 136; Palmer v. Yager, 20 Wis. 91; Waydell v. Luer, 3 Denio, 410; Tuckes v. Dolan, 109 Mo. App. 442, 84 S. W. 1126; Pollman v. City of St. Louis, 145 Mo. 651, 47 S. W. 563; Henson v. Stever, 69 Mo. 136; Rotan v. Noble, 36 Tex. Civ. App. 226, 81 S. W. 586.

1 Fitch v. Sutton, 5 East, 231.

2 Stearns v. Johnson, 17 Minn. 142; Foster v. Lammers, 134 N. W. (Minn.) 501; Chicago, M. & St. P. R. v. Clark, 178 U. S. 353, 44 L. Ed. 1099, 20 Sup. Ct. Rep. 924; Cunningham v. Standard Co., 119 S. W. (Ky.) 765.

of authorities from Pinnel's Case to those of the present day.[3] It has been said that "The rule * * * supposes the part performance of the original obligation—the payment of a part at the time and in the manner originally stipulated for the payment of the whole;

[3] [1602] Pinnel's Case, 5 Coke, 118; Fitch v. Sutton, 5 East, 230; Cumber v Wane, 1 Str. 426; Chicago, etc., Ry. Co. v. Clark, 178 U. S. 353, 44 L. Ed. 1099; Hansbrough v. Peck, 5 Wallace, 487; Rice v. London Mortgage Co., 70 Minn. 77, 72 N. W. 826; Hoidale v. Wood, 93 Minn. 190, 100 N. W. 1100; Otto v. Klauber, 23 Wis. 471; Prarie Grove v. Luder, 115 Wis. 20, 90 N. W. 1085; Weidner v. Standard Ins. Co., 130 Wis. 10, 110 N. W. 246; Works v. Hershey, 35 Iowa, 340; Rea v. Owens, 37 Iowa, 262; Bryant v. Brazil, 53 Iowa, 350, 3 N. W. 117; Sullivan v. Finn, 4 G. Greene, 544; Eldred v. Peterson, 80 Iowa, 246, 45 N. W. 755; Kellar v. Strong, 104 Iowa, 585, 73 N. W. 1071; Marshall v. Ballard, 114 Iowa, 462, 87 N. W. 427, 54 L. R. A. 862; Rauen v. Prudential Ins. Co., 129 Iowa, 725, 106 N. W. 198; Nixon v. Kiddy, 66 S. E. (W. Va.) 500; De Buhr v. Thompson, 114 S. W. (Mo. App.) 557; T. J. Scott & Sons v. Rawls, 48 So. (Ala.) 710; Wheeler v. Wheeler, 11 Vt. 60; Goodwin v. Follett, 25 Vt. 386; Harriman v. Harriman, 12 Gray, 341; Attorney General v. Supreme Council, 81 N. E. (Mass.) 966; Warren v. Hodge, 121 Mass. 106; Smith v. Bartholomew, 42 Mass. 276, 25 Am. Dec. 365; Tuttle v. Tuttle, 53 Mass. 554, 46 Am. Dec. 701; Twitchell v. Shaw, 64 Mass. 46, 57 Am. Dec. 80; Curran v. Rummell, 118 Mass. 482; Grinnell v. Spink, 128 Mass. 25; Warren v. Skinner, 20 Conn. 559; Douglass v. White, 3 Barb. Ch. 621; Pabodie v. King, 12 Johns. 426 (Payment of part of a debt is not a consideration which will support a promise to forbear to sue); Dederick v. Leman, 9 Johns. 333; Bunge v. Koop, 5 Robt. 1; Ryan v. Ward, 48 N. Y. 204; Schuller v. Robinson, 123 N. Y. Supp. 881; Watts v. French, 19 N. J. Eq. 407; Eckert v. Wallace, 67 Atl. (N. J. Sup.) 76; Russel v. Lytle, 6 Wend. 390, 22 Am. Dec. 537; Potter v. Green, 6 Allen, 442; Whalan v. Kirby, 99 Mass. 3; Lathrop v. Page, 129 Mass. 21; Mechanics' Bank v. Hazard, 13 Johns. 353; Jackson v. Stackhouse, 1 Cow. 224; Inman v. Griswold, 1 Cow. 199; Von Gerhard v. Lighte, 13 Abb. Pr. 101; Weinberg v. Novick, 88 N. Y. Supp. 168; Ramsdell v. United States, 2 Ct. Cl. 508; Rising v. Patterson, 5 Whart. 316; Mordecai v. Stewart, 36 Ga. 126; Hardey v. Coe, 5 Gill, 189; Ex parte Zeigler, 64 S. E. (S. C.) 513; Oberndorff v. Union Bank, 31 Md. 126; Commercial Bank v. McCormick, 97 Md. 703, 55 Atl. 439; Eve v. Moseley, 2 Strobh. 203; McKinzie v. Culbreth, 66 N. C. 534; Vance v. Lukenbill, 9 B. Mon. 249; Daniel v. Hatch, 1 Zabriskie, 391, 47 Am. Dec. 168; Byrnes v. Byrnes, 92 Minn. 73, 99 N. W. 426; Lee v. Oppenheimer, 32 Me. 254; Bailey v. Day, 26 Me. 88; Fitzgerald v. Fitzgerald, 62 N. W. (Neb.) 899; McIntosh v. Johnson, 51 Neb. 33, 70 N. W. 522; Sheibley v. Dixon, 61 Neb. 409, 85 N. W. 399; Maddux v. Bevan, 39 Md. 485; Loney v. Bailey, 43

from which payment of a part rather than the whole no benefit can accrue to the creditor, and no injury to the debtor." [4] There is no difference between an admitted debt created by the sale of property and an admitted debt created upon a loan of money. They stand upon the same plane, neither can be satisfied by part payment.[5] The rule is applicable to judgment debts.[6] Reducing the agreement to

Md. 22; Jones v. Ricketts, 7 Md. 108; Upton v. Dennis, 133 Mich. 238, 94 N. W. 728; Leeson v. Anderson, 58 N. W. (Mich.) 72; Chamberlain v. Smith, 110 Mo. App. 657, 85 S. W. 645; Reinhold v. Kerrigan, 85 Mo. App. 256; Wetmore v. Crouch, 150 Mo. 671, 51 S. W. 738; Hodges v. Truax, 19 Ind. App. 651, 49 N. E. 1079; Fletcher v. Wurgler, 97 Ind. 223; Bostrom v. Gibson, 111 Ill. App. 457; Snow v. Griesheimer, 220 Ill. 106, 77 N. E. 110, aff'ng 120 Ill. App. 516; Wood v. Bangs, 2 Pennewill (Del.) 435, 48 Atl. 189; Peachy v. Whitter, 131 Cal. 316, 63 Pac. 468.

In Deland v. Hiett, 27 Cal. 611, 87 Am. Dec. 102, a less sum was accepted in satisfaction of a judgment for a larger amount and a satisfaction piece given. The court said that inasmuch as the discharge was of record, it might operate by way of estoppel were it not for the fact that the complaint went behind the record and disclosed that the satisfaction was entered upon a *nudum pactum*. A written agreement not under seal, expressing a consideration of one dollar, discharging a defendant from all debts and demands, where the demand was a note for $2,900, was held not to operate as a release and the consideration being nominal, it did not operate as an accord and satisfaction: Seymour v. Mintum, 17 Johns. 169, 8 Am. Dec. 380. Payment of a part of a judgment by a co-debtor furnishes no consideration for releasing the party paying from the whole: Fletcher v. Wurgler, 97 Ind. 223. See Clayton v. Clark, 74 Miss. 499, 21 So. 265, 22 So. 189, 37 L. R. A. 771, 60 Am. St. Rep. 521, to the contrary. In this case, however, the creditor accepted a less sum and surrendered the note, which is considered high evidence of an intent to make a gift of the balance of the debt, although the decision is not based upon that ground. An abatement at the time of payment of a debt of part of the debtor's claim for usury paid, is no accord and satisfaction: Rogers v. Ball, 54 Ga. 15.

[4] Rose v. Hall, 26 Conn. 392, 68 Am. Dec. 402. S. P. Ryan v. Ward, 48 N. Y. 204.

[5] Hendrickson v. Beens, 6 Bos. 639; 1 Greenl. Ev. Sec. 212.

[6] Hanson v. McCann, 20 Colo. App. 43; Russell v. Meek, 22 Ky. Law Rep. 498; Upton v. Dennis, 133 Mich. 238, 94 N. W. 728, 10 Det. Leg. N. 132; Deland v. Hiett, 27 Cal. 611, 87 Am. Dec. 102; Fletcher v. Wurgler, 97 Ind. 223; Coblentz v. Manufacturing Co., 40 Ark. 180.

writing does not affect the rule,[7] unless it be under seal.[8] Where the agreement was to pay a less sum in cash, an acceptance afterwards of a note in part settlement of the amount agreed to be paid, was held not to furnish any consideration to uphold the agreement to accept a less sum in satisfaction of the entire demand.[9]

The same rule was applied where an agent gave his draft for the amount agreed to be paid in cash,[10] and where the debtor passed over the check of a friend who had agreed to loan him the money to pay the less sum,[11] and where the debtor deposited the money in a bank and gave his own check.[12] So, accepting certificates of deposit issued by the creditor to the debtor for a less sum than the debt, in full satisfaction,[13] or accepting in the United States a less sum in dollars in satisfaction of a greater sum payable in pounds in London, does not furnish any consideration for the agreement to relinquish the balance due.[14] In all such cases the check, draft or other thing delivered is merely the means whereby the cash is paid. The consideration is wanting whether there is a mere agreement to pay a part,[15] or the money has been actually paid over and accepted in full satisfaction.[16] And it makes no difference how positive the creditor's

[7] Bingham v. Browning, 197 Ill. 122, 64 N. E. 317, aff'ng 97 Ill. App. 442. See Seymour v. Mintum, 17 Johns. 169, 8 Am. Dec. 380.

[8] Specialty Co. v. Daley, 172 Mass. 460, 53 N. E. 633. See Ex parte Zeigler, 64 S. E. (S. C.) 513.

[9] Mannakee v. McCloskey, 63 S. W. 482, 23 Ky. Law Rep. 515.

[10] Bliss v. Schwartz, 65 N. Y. 444.

[11] Bunge v. Koop, 48 N. Y. 229, 8 Am. Rep. 546.

[12] Tucker v. Murray, 2 Pa. Dist. C. 497.

[13] Russell v. Meek, 22 Ky. Law Rep. 498, 58 S. W. 378.

[14] Sanders v. Whitcomb, 177 Mass. 457, 59 N. E. 192.

[15] Bird v. Smith, 34 Me. 63, 56 Am. Dec. 635; City of Memphis v. Brown, 1 Flipp. 205; Daniels v. Hatch, 1 Zabriskie (N. J.) 391, 47 Am. Dec. 169; Lim v. Nelson, 38 N. J. Eq. 360; Braden v. Ward, 42 N. J. L. 522.

[16] Rose v. Hall, 26 Conn. 392, 68 Am. Dec. 402; White v. Jordan, 27 Me. 370.

agreement to accept the less sum in satisfaction may be,[17] or whether the debt sought to be discharged is created by simple contract or by a specialty,[18] or that it has been reduced to a judgment.[19] Payment of a part and a promise to pay the residue when able, puts a creditor in no better condition than he was before, and the promise to forbear until the debtor is able to pay is without consideration.[20] A payment of part in satisfaction of the whole sum due upon an undisputed claim is a payment *pro tanto* merely, and a creditor may recover the residue of the debt without a tender or offer to return the part received.[21] Whether the payment and acceptance of a less sum in satisfaction of the entire debt, will operate as a satisfaction and discharge, depends entirely upon whether there is in fact any new consideration existing to support the agreement to relinquish the residue, and not upon the agreement or opinion of the parties fixing the consideration. If the consideration be money, the court will determine its adequacy, as money has a fixed and known value, but if the consideration be an indeterminate thing, the courts leave the parties to estimate its own value to them.[22] As before observed, a slight consideration will suf-

[17] Bung v. Koop, 48 N. Y. 231, 5 Robt. 1.

[18] Keeler v. Salisbury, 33 N. Y. 648; Fitch v. Sutton, 5 East, 230; Harrison v. Close, 2 Johns. 448; Dederick v. Leman, 9 Johns. 333; Mechanics' Bank v. Hazard, 13 Johns. 353; Seymour v. Mintum, 17 Johns. 167.

[19] Deland v. Hiett, 27 Calf. 611, 87 Am. Dec. 102; Fletcher v. Wurgler, 97 Ind. 223; Foakes v. Beer, 9 App. Cas. 605.

[20] Fitch v. Sutton, 5 East, 231.

[21] Leeson v. Anderson, 58 N. W. (Mich.) 72; Parker v. Mayes, 67 S. E. (S. C.) 559; Pierce v. Wood, 23 N. H. (3 Foster) 519; Ennekin v. Stahl, 9 Mo. App. 390. See Eldred v. Peterson, 80 Iowa, 246, 45 N. W. 755, 20 Am. St. Rep. 416, where a co-maker of a note claimed a discharge by reason of a payment of a part and the unauthorized erasure of his name from the note. The court held that if the erasure had been done by the payee it would not have discharged the co-maker, and therefore he need not notify the co-maker of his repudiation of the unauthorized erasure. Accepting one half of a partnership debt from one partner is no consideration for releasing him from the payment of the whole debt: Fensler v. Prather, 43 Ind. 119.

[22] See Wolford v. Powers, 85 Ind. 301.

fice to answer the requirements of the law.[23] What, in addition to the payment of a smaller sum, will constitute a valid consideration and make the agreement binding will be considered in succeeding sections.

Sec. 56. Same subject—Application of the rule.—Where a creditor made a voluntary assignment to an assignor of his own selection, with a proviso in the deed, that no creditor should receive any payment or dividend, unless he should fully acquit and discharge the assignor from all demands, it was held that the acceptance of a dividend and the giving of a receipt reciting that the sum was received under the assignment, in absence of a technical release, was not a bar to a recovery of the residue.[1] Receiving dividends from a receiver, is not available as a defence, by way of accord and satisfaction, to the liability of sureties.[2] The payment of a less sum than the total upon two claims, one due to K. and one to K. & Co. under an agreement that it will be received in satisfaction of the two claims; both accounts being receipted in full, signed by K. & Co., it was held that the total indebtedness was not extinguished, but that the receipt being signed by K. & Co., and the debtor not having directed how the payment should be applied, the account of K. & Co. was extinguished and the creditor was entitled to receive the balance due upon the individual claim.[3] Accepting half of the amount due upon a joint note and erasing the signature of the party paying does not discharge the party paying nor estop the payee from recovering of him the balance due on the note.[4] Where a debtor has an option of discharging a debt in different ways, as where he may pay in money or property, or in a lump sum or in install-

[23] Hinkley v. Avery, 27 Me. 362; Bailey v. Day, 26 Me. 88.

[1] Allen v. Roosevelt, 14 Wend. 100.

[2] Johnson County v. Chamberlain, 113 N. W. (Neb.) 1055.

[3] Otto v. Klauber, 23 Wis. 471.

[4] Elred v. Peterson, 80 Iowa, 246, 45 N. W. 755, 20 Am. St. Rep. 416.

ments, a payment of a less sum than the debt in full satisfaction, under an agreement whereby the creditor chooses the manner of payment, is binding upon the creditor.[5] Accepting the salary due up to the time of an illegal removal from office is not a final settlement.[6]

Sec. 57. Same subject—Acceptance of less than amount fixed by law—Salary—Fees.—The principle requiring a consideration to uphold an agreement to accept a less sum than that due, is applied to agreement to accept a less sum in satisfaction than the amount fixed by law, as where a deputy sheriff, fireman, police surgeon or other public officer accepts as his salary a sum less than the amount fixed by law.[1] But the agreement is void upon another ground. It has always been held that any contract made before or after the performance of the services, on the part of a public officer to render services required of him, for less than the compensation provided by law is against public policy and void.[2] As between the state, county or municipality and a citizen claiming money due for services rendered, the law of estoppel does not apply, for the reason that an estoppel must be reciprocal and mutual, and is founded upon the principle that the acts of the party estopped resulted in injury to the other party

[5] Baileyville v. Lowell, 20 Me. 178.

[6] Gracey v. St. Louis, 111 S. W. (Mo.) 1158.

[1] Bodenhofer v. Hogan, 120 N. W. (Iowa) 659; People v. Board of Police, 75 N. Y. 38; Kehn v. State, 93 N. Y. 291; Slaughter v. Hamm, 2 Ham. Oh. Rep. 271.

[2] State v. Collier, 72 Mo. 13, 37 Am. Rep. 417; State v. Purdy, 36 Wis. 213, 17 Am. Rep. 485; Bodenhofer v. Hogan, 120 N. W. (Iowa) 659, citing Daniels v. Des Moines, 108 Iowa, 484, 79 N. W. 269; Peter v. Davenport, 104 Iowa, 625, 74 N. W. 6; Purdy v. Independence, 75 Iowa, 356, 39 N. W. 641; Robertson v. Robertson, 65 Ala. 610, 39 Am. Rep. 17; Settle v. Sterling, 1 Idaho, 259; Hall v. Gavitt, 18 Ind. 390; Emmitt v. Mayor, 128 N. Y. 117, 28 N. E. 19; Hope v. Linden Park, 58 N. J. L. 627, 34 Atl. 1070, 55 Am. St. Rep. 614. 7 Bac. Abr. Title Office and Officers.

and a fraud upon him, which does not arise where a public official's salary is fixed by law.[3]

But where the law fixing the salary of a public official is of doubtful construction, and there is a dispute between the parties in reference thereto, a compromise or accord and satisfaction of the claim for salary is binding.[4] But as between the public officer and an individual requiring his services, a contract made in advance of the time of performance of the services, whereby he agrees to accept less than the statutory fee, would be upheld on the ground of estoppel, if not upon the general ground that a person may make any contract he pleases, and he will be bound by it, providing, however, there is a consideration to uphold it and it is legal. Any reduction from his fees otherwise than by way of a gift, in absence of such prior agreement, would fall within the general principles governing an accord and satisfaction, requiring a new consideration.

Sec. 58. Payment of an undisputed claim no consideration for relinquishing another claim.—Payment of a sum admitted to be due to a creditor for work and labor, made upon condition that creditor release the debtor from all demands is without consideration and of no validity as to a previous existing disputed claim for a breach of contract,[1] or for damages arising out of a wrongful discharge,[2] or for damages on account of fraud in the sale of

[3] Montague's Adm'r v. Mossey, 76 Va. 307; Gallaher v. Lincoln, 65 Neb. 339, 88 N. W. 505; Gracey v. St. Louis, 111 S. W. (Mo.) 1158.

[4] Du Moulin v. Board, 124 N. Y. Supp. 901.

[1] Ness v. Minnesota Co., 87 Minn. 413, 92 N. W. 333. The court held that there can be no accord and satisfaction unless something of legal value has been received in full payment of the claim, to which the creditor had no previous right. Payment of the amount due for the hire of a wagon train is not an accord and satisfaction and the owner may recover for damages done to the wagons: Kiskadden v. United States, 44 Ct. C. 205; Stewart v. Stephens, 67 S. E. (Ga. App.) 199.

[2] Walston v. Calkin Co., 119 Iowa, 150.

land.[3] So paying for board actually furnished under a contract is no bar to an action for damages for a failure to furnish other boarders under the contract.[4] In all such cases the creditor does not receive anything for the relinquishment of his second demand, or anything to which he was not entitled to receive upon the demand paid. A wife, by receiving from her husband a part of her estate in his possession, is not precluded from recovering the residue of her separate estate by reason of the agreement to accept a part in satisfaction, or by reason of a contract subsequently made relinquishing her dower interest in her husband's lands and confirming the first contract.[5]

Sec. 59. Insolvency of debtor as a consideration.—The insolvency of the debtor does not furnish any consideration for an agreement to accept a less sum than the entire debt in full satisfaction. It was observed by the court in one case, that whether the debtor was insolvent or not, the obligation to pay was not impaired, and the moral duty remained in full force.[1] A few modern authorities are to be found holding that where an in-

[3] Stoney Creek Woolen Co. v. Smalley, 69 N. W. 722.

[4] Marr v. Burlington Ry. Co., 121 Iowa, 117, 96 N. W. 716.

[5] McKenzie v. Sifford, 52 S. C. 270, 29 S. E. 736.

[1] Pearson v. Thompson, 15 Ala. 700, 50 Am. Dec. 159. One decision at least, is to be found in the books, holding directly to the contrary, but upon an examination it will be found to be based wholly upon loose and general statements in other cases, which led the court to observe that the suggestions in those cases indicated that perhaps such an exception should be made in a proper case: Engbretson v. Seiberling, 122 Iowa, 522, 64 L. R. A. 75, 98 N. W. 319, 101 Am. St. Rep. 279. Followed by the same court, on demurrer, in Seegmiller v. Kelley, 99 N. W. 1131, where insolvency of one of the judgment debtors was alleged, and that the other debtor at the time of the settlement claimed that she had never been served with notice of the action and was threatening to begin suit to prevent its collection, and that the purpose of the agreement was the adjustment of the indebtedness without further litigation. The adjustment of a litigated claim does not seem to have been taken into account, as the court said the case was ruled by Engbretson v. Seiberling.

solvent debtor pays part of a debt in satisfaction of the whole in pursuance of an agreement to forego or relinquish some right or privilege vouchsafed by law to a debtor, a sufficient consideration arises to uphold the agreement; as where an insolvent contemplates resorting to voluntary bankruptcy,[2] or making an assignment for the benefit of creditors,[3] and the creditor upon being informed of this agrees to accept a less sum in full satisfaction. So, when an insolvent debtor pays the portion of the debt agreed to be paid out of the proceeds of the sale of exempt property,[4] or out of salary exempt from execution,[5] it was held that the whole debt was discharged. In our view, the principle announced in these cases seems very doubtful in point of law or of justice. Nevertheless, in those jurisdictions responsible for the decisions they must be taken as the law. When the claim was one that would not be discharged in bankruptcy, an agreement to accept a less sum than is due in satisfaction of the debt, was held not supported by a sufficient consideration.[6]

There are other decisions in which the courts have laid considerable stress upon the insolvency of the debtor, but they may be distinguished, and brought into harmony with the well known rules defining the considerations necessary to uphold an accord and satisfaction. Thus, where it was supposed by all parties that

[2] Hanson v. McCann, 20 Colo. App. 43, 76 P. 983; Hinckley v. Arey, 27 Me. 362; Dawson v. Beall, 68 Ga. 328. Accepting thirty per cent. of a debt in satisfaction of the whole debt from one contemplating bankruptcy, was held to constitute a sufficient consideration to support the agreement to relinquish the residue. The reason assigned was that the creditor received a certain sum instead of an uncertain dividend: Melroy v. Kemmerer, 218 Pa. 381, 67 Atl. 699.

[3] Rotan Grocery Co. v. Noble, 36 Tex. Civ. App. 226, 81 S. W. 586.

[4] Ward v. Young, 80 S. W. (Tex. Civ. App.) 456.

[5] Meeker v. Regua, 87 N. Y. S. 959, 94 App. Div. 300. See Molyneaux v. Collier, 13 Ga. 406, which also holds that where the debt is joint, insolvency of one joint debtor is not enough; all must be insolvent.

[6] Schlessinger v. Schlessinger, 88 Pac. 970, 8 L. R. A. (N. S.) 863; Id. 88 Pac. 972.

the estate of an intestate was insolvent, and a mortgagee, by reason of that fact, accepted an amount less than his claim in full satisfaction, it was held that the entire debt was satisfied, though it turned out that the estate was solvent. The court said there was sufficient consideration for the acceptance of the less sum in satisfaction; for, if the estate was insolvent, the mortgagee would have had to exhaust his security before participating in the distribution of the funds in the hands of the administrator, which rendered it a contingent and uncertain claim, and that by the payment of the less sum he received it absolutely and without any contingency or uncertainty.[7] Where an insolvent debtor, before the obligation was due, paid a smaller sum in discharge of a larger sum, out of funds that could not have been reached by the creditor, it was held to be a binding contract.[8] If after one codebtor is discharged in bankruptcy he pays a part of a debt discharged as to him in such proceedings, on the creditor's agreement to accept it in full satisfaction there is a complete satisfaction of the debt.[9]

Sec. 60. Payment before due—At another place.—A mere change in the accessory part of the original agreement, whereby there is a possibility of a benefit to the creditor, will be a sufficient consideration for the agreement on the part of the creditor to relinquish the residue of his demand, as where the creditor agrees to accept a less sum in satisfaction of his demand if paid at an earlier date; for, as said in Pinnel's case, "peradventure, parcel of it before the day would be more beneficial to him than the whole at the day."[1] So, if the agree-

[7] Rice v. London Mortgage Co., 70 Minn. 77, 72 N. W. 826.

[8] Dalrymple v. Craig, 149 Mo. 345, 50 S. W. 884. See Jones v. Jones, 15 Oh. Cir. Ct. R. 618, 8 O. C. D. 628, where a payment of a less sum by an insolvent debtor was held good as a compromise pending litigation. See also, Larned v. Dubuque, 53 Iowa, 105, where the city, being insolvent, upon a compromise paid certain costs.

[9] Ex parte Zeigler, 64 S. E. (S. C.) 513.

[1] Pinnel's Case, 5 Coke, 118; Co. Litt. 212 b. In Palmer v. Yager, 20 Wis. 87, the court said: "The creditor has his advantage in the earlier payment

ment be to pay a less sum at a different place than that mentioned in the original contract, and it be paid and accepted in satisfaction of the entire demand, the residue is extinguished. Throughout all the books we do not find any better illustration of the rule than that given in Pinnel's case, where it is said, "if I am bound in 20L. to pay you 10L. at Westminster, and you request me to pay you 5L. at the day at York, and you will accept it in full satisfaction of the whole 10L., it is a good satisfaction for the whole: for the expense to pay it at York is sufficient satisfaction." [2] The agreement, however, to pay at

of the money." Sonnenberg v. Riedel, 16 Minn. 81; Schweider v. Lang, 29 Minn. 254, 13 N. W. 33, 43 Am. Rep. 202; Boyd v. Moats, 75 Iowa, 151, 39 N. W. 237; Scofield v. Clark, 67 N. W. (Neb.) 754; Brooks v. White, 2 Metc. 283, 37 Am. Dec. 95; Goodnow v. Smith, 18 Pick. 314, 29 Am. Dec. 600; Bowker v. Childs, 3 Allen, 434; Jones v. Perkins, 29 Miss. 139, 64 Am. Dec. 136; Hutton v. Stoddart, 83 Ind. 589; Bryant v. Proctor, 14 B. Mon. 451; Ricketts v. Hall, 2 Bush (Ky.) 249; Kirchoff v. Voss, 67 Tex. 320, 3 S. W. 548; Singer Sewing Mch. Co. v. Lee, 66 Atl. (Md.) 628; Fire Ins. Ass'n. v. Wickham, 141 U. S. 564, 12 S. Ct. 84, 35 L. Ed. 860. The accord must be executed: Sewell v. Musson, 1 Vern. 210; Harding v. Commercial Loan Co. 84 Ill. 251. Some mention is made of the rule in the following cases: Wheeler v. Wheeler, 11 Vt. 60; Singer v. Lee, 66 Atl. (Md.) 628; McKenzie v. Culbreth, 66 N. C. 534; Smith v. Brown, 10 N. C. 580; Cavaness v. Ross, 33 Ark. 575; Pope v. Turnstall, 2 Ark. 209; Seymour v. Goodrich, 80 Va. 303; Dalrymple v. Craig, 149 Mo. 345, 50 S. W. 884; Flener v. Flener, 30 Ky. Law Rep. 543, 99 S. W. 258; Arnold v. Park, 8 Bush (Ky.) 249; St. Louis Ry. Co. v. Davis, 35 Kan. 464, 11 Pac. 421; Weiss v. Marks, 206 Pa. 513, 56 Atl. 59; Russell v. Stevenson, 34 Wash. 166, 75 Pac. 627; Baldwin v. Daly, 41 Wash. 416, 83 Pac. 724.

[2] Pinnel's Case, 5 Coke, 118. Jones v. Bullitt, 2 Litt. 40. In the last case the court said, "if the creditor accepts of a part of the debt before it was payable, or at a different place, in satisfaction of the whole, it will bar the recovery of the residue; for the debtor being under no obligation to pay the debt before it was due, or at a different place, and the creditor having no right to demand it, the agreement to accept a part of the debt at such time or place is obviously founded upon a consideration." In Jones v. Perkins, 29 Miss. 139, 64 Am. Dec. 136, the agreement was to pay $1,500 in New York in satisfaction of a $2,000 demand payable in Mississippi. Sonnenbery v. Riedel, 16 Minn. 81; Pearson v. Thomason, 15 Ala. 700; McKenzie v. Culbreth, 66 N. C. 534; Smith v. Brown, 10 N. C. 580; Fenwick v. Phillips, 3 Met. (Ky.) 87; Cavaness v. Ross, 33 Ark. 572; Smith v. Brown, 3 Hawks, 580.

a different place must be made before the due day, for an agreement made after default to pay a less sum at a different place is no consideration for an agreement to relinquish the residue of the debt.[3] Before maturity a creditor cannot enforce payment at any other time or place than that named, but after maturity he may collect his debt whenever and wherever the debtor may be found.[4]

Sec. 61. Less sum furnished by third person.—It is a universal rule that where one not the debtor, nor under any legal or moral obligation to pay a debt, agrees to pay, and does pay a sum less than the whole debt, in consideration of an agreement on the part of the creditor to satisfy and discharge the whole, no action will lie against the debtor to recover the balance of his indebtedness.[1] The consideration must actually move from the third person, as it is his undertaking to pay the less sum and the payment of it by him that furnishes the new consideration. An agreement on the part of a creditor that if the debtor would induce his friends to raise and loan him the portion of the debt to be paid in cash, he would accept the sum, together with some further consideration making the total seventy-five per cent of the whole debt, in full satisfaction of the entire debt,

[3] Foster v. Lammers, 134 N. W. (Minn.) 501; Rising v. Patterson, 5 Whart. 316.

[4] Id.

[1] Clark v. Abbott, 53 Minn. 88, 55 N. W. 542, 39 Am. St. Rep. 577; Fowler v. Smith, 153 Pa. St. 639, 25 Atl. 744. In Marshall v. Ballard, 114 Iowa, 462, 87 N. W. 427, 54 L. R. A. 862, where a judgment creditor issued an execution against one of the two debtors, whom he knew could not satisfy it, but before levying accepted one half of the judgment from a third party in satisfaction of the whole, the agreement was upheld. Pope v. Turnstall, 2 Ark. 209; Gordon v. Moore, 44 Ark. 349, 51 Am. St. Rep. 606; Pettigrew v. Harmon, 45 Ark. 290; Wilks v. Slaughter, 49 Ark. 235, 4 S. W. 766; Seymour v. Goodrich, 80 Va. 303; Grant v. Porter, 63 N. H. 229; Blanchard v. Noyes, 3 N. H. 518; Ricketts v. Hall, 2 Bush (Ky.) 249. The rule has been held to apply to a payment by an assignee of the debtor, to whom the debtor assigned his property for the payment of his debts, and who was acting as the debtor's agent to procure his discharge: Pettigrew v. Harmon, 45 Ark. 290. But this holding does not appear to be sound in principle.

which was done, was held to furnish no consideration for the discharge of the residue; the court said: "The money, when paid, was to belong, and in fact, did belong, to the defendants. It was to be paid, and in fact, was paid, as their money." The court further observed that in all cases an embarrassed debtor must make some effort to procure money to make a compromise, but no case can be found holding that the fact that he had agreed to make such effort furnished any consideration to uphold the compromise; that all the efforts of the debtor were expended simply endeavoring to discharge a legal obligation.[2] So where a debtor secretly furnishes money to a third person to buy up a judgment or other claim against him, at a discount, and the third person does so, the creditor may recover the balance of the debt; for, as said in one case, "the sum paid was really the money of the debtor, and paid over by his agent, it is the same as if paid by himself." Under such circumstances the transaction would be so far fraudulent as would render the sale voidable.[3] Money furnished by a joint debtor to pay the share of one of their number who is insolvent, is not a consideration for an agreement to accept a less sum in satisfaction of the entire debt.[4]

Sec. 62. **Substituting debtor's note for a less sum—Note of joint debtor—Of one partner.**—The acceptance by a creditor of the debtor's unsecured note for a less sum than the debt, in satisfaction of the whole sum due, does not extinguish the debt. This appears to be the rule at common law.[1] The agreement to accept the cred-

[2] Bunge v. Koop, 48 N. Y. 225. See also Schlessinger v. Schlessinger, 8 L. R. A. (N. S.) 863, 88 Pac. 970, 8 Am. Rep. 546. In Harriman v. Harriman, 12 Gray, 341, the creditor agreed, "that, if the defendant would raise and pay plaintiff the sum of twenty dollars, he would receive the same in full satisfaction of his judgment," and it was held that payment under such circumstances did not furnish any consideration to uphold the agreement. See Dalrymple v. Craig, 149 Mo. 345.

[3] Shaw v. Clark, 6 Vt. 507, 27 Am. Dec. 578.

[4] Foster v. Lammers, 134 N. W. (Minn.) 501.

[1] N. Frank & Sons v. Gump, 104 Va. 306, 51 S. E. 358; Cumber v. Wane, 1 Stra. 426; Jenness v. Lane, 26 Me. 475; Pearson v. Civer, 28 How. Pr. 432.

itor's unsecured note for part of the debt in satisfaction of the whole is without consideration.[2] The same rule has been held to apply where a part is paid in cash and a note given for a certain amount, the total of the cash and note being less than the total indebtedness.[3] If, however, a note for a less sum be given by a defendant upon a compromise of an action and the action is dismissed, the plaintiff may recover upon the note.[4] The giving of a note for a less sum by one jointly and severally liable, in satisfaction of the whole debt; or in satisfaction of his proportionate part of the joint liability, will not discharge the whole debt, nor release the payee from his liability for the entire debt.[5] Ordinary joint and several debtors with respect to their liability to their creditor do not stand in any different position than does a debtor upon a sole liability. It may be observed, although not strictly within the object of these inquiries, that the giving of a note by one joint and several debtor for the entire amount of his proportionate liability under an agreement that it shall be taken as

See to the contrary. Sibree v. Tripp, 15 M. & W. 23; Tucker v. Murray, 2 Pa. Dist. 497, and Mechanics' Bank v. Huston, 11 Wkly. Notes Cas. (Pa.) 389. In Devon v. Ham, 17 Ind. 472, the note given was upon a composition agreement and was secured. Other courts have said in general terms that any negotiable security was of greater advantage to the creditor than a simple debt, but the cases were mostly where notes of third persons were used.

Acceptance of debtor's check.—A., being indebted to B. to the extent of 125£, gave B. a check drawn by himself for 100£, payable on demand, which B. accepted as satisfaction. This was held a good accord and satisfaction. Goddard v. O'Brien, 9 Q. B. D. 37, following the reasoning in Sibree v. Tripp, 15 M. & W. 23.

[2] *Dictum*, Hooker v. Hyde, 61 Wis. 204, 21 N. W. 52. Jeffry v. Crane, 50 Wis. 349, 7 N. W. 300, appears to be a case of composition with creditors.

[3] Shauley v. Koehler, 80 N. Y. S. 679, 80 App. Div. 566, 12 N. Y. A. Cas. 444, affirmed, 178 N. Y. 556, 70 N. E. 1109; Parrott v. Colby, 6 Hun, 55, affirmed, without opinion, 71 N. Y. 597; Bliss v. Stewart, 65 N. Y. 444.

[4] Draper v. Owsley, 15 Mo. 613, 57 Am. Dec. 218. S. P. Kiler v. Wohletz, 101 Pac. (Kan.) 474.

[5] Eldred v. Peterson, 80 Iowa, 246, 45 N. W. 755, 20 Am. St. Rep. 416.

payment of such part, or even paying such amount in cash,[6] will not release the payor from his liability for the whole debt, or the remainder of the debt if cash be paid, in absence of a statute, a technical release, or a covenant never to sue him for the residue of the debt.[7]

The rule applicable to joint and several debtors, as to giving a note for a less sum by one co-debtor in satisfaction of the whole debt, does not apply to the giving of such a note by one partner in satisfaction of a partnership debt. A partnership is a separate entity and the partnership property is primarily liable for the debts of the firm; and whether the individual partners will have to pay anything upon the partnership debts is contingent upon whether the partnership has sufficient funds to meet all demands. Assuming a certain liability by a person whose likelihood of having to pay is only contingent, furnishes a possibility of a benefit to the creditor, which alone is a consideration for the relinquishment by him of the residue of his claim. It has been said that "an individual obligation may be a higher security than that of a copartnership, and a debt due from partners may not always be as substantial and safe as a debt against one of them; for such copartnership debt must be first collected out of the copartnership assets and not out of the individual property of the several partners, until these are exhausted; and then only after the individual debts are fully paid."[8] The benefit to the creditor may arise either in respect of the insolvency of the parties or the convenience of the remedy.[9] But whether or not the benefit afterwards actually accrues to the creditor is wholly immaterial.[10] As to the possible ad-

[6] Eldred v. Peterson, 80 Iowa, 246, 45 N. W. 755, 20 Am. St. Rep. 416; Harrison v. Close, 2 Johns. 448; Rowley v. Stoddard, 7 Johns. 207.

[7] See Goodwin v. Smith, 18 Pick. 414, 29 Am. Dec. 600.

[8] Luddington v. Bell, 77 N. Y. 138, 33 Am. Rep. 601: In this case the question of the release of one partner from the entire debt was considered; but the result was the release of both partners. Maxwell v. Day, 45 Ind. 509; Allison v. Abendroth, 108 N. Y. 470, 15 N. E. 606; Waydell v. Luer, 3 Denio, 410, reversing 5 Hill, 448; Lytle v. Ault, 7 Exch. 669.

[9] Thompson v. Percival, 5 B. & Adol. 925.

[10] Luddington v. Bell, 77 N. Y. 138, 33 Am. Rep. 601.

vantages to a creditor, the foregoing is in accord with the reasons assigned in those cases when the note of one partner for the full amount, is given in satisfaction of the partnership demand.[11] Whether the note of one partner was taken in satisfaction of a partnership debt so as to discharge the other partner is a question of fact for the jury,[12] or the court if tried to the court.[13]

Sec. 63.—Payment of a less sum to a third person.—A payment of a less sum to a third person upon the request and agreement with the creditor, that such payment shall be in satisfaction of his entire demand, has been held to constitute an accord and satisfaction. "The reason of the rule," as given by the court in one case, "is that the debtor in such cases has done something more than he was originally bound to do or at least something different. It may be more or it may be less, as a matter of fact." [1] Where a daughter had agreed to pay off a mortgage for ten thousand dollars upon property owned by her mother, a payment of four thousand dollars by the daughter to the mother and its acceptance by the mother in satisfaction of the agreement was held to be an accord and satisfaction.[2]

Sec. 64. Security for a less sum—Surety—Mortgage.—If a debtor gives his note indorsed by a third person for a part of the debt, in pursuance of an agreement that it shall be in full satisfaction of the entire debt, and it is accepted by the creditor, it is a valid dis-

11 Thompson v. Percival, 5 B. & Ad. 925; Evans v. Drummond, 4 Esp. N. P. 89; Hart v. Alexander, 2 M. & W. 484; Arnold v. Camp, 12 Johns. 409; Waydell v. Luer, 3 Denio, 410; Hosock v. Rogers, 8 Paige, Ch. 229.

12 Thompson v. Percival, 5 B. & Ad. 925; Mason v. Wickersham, 4 Watts & S. (Pa.) 100.

13 Coswell v. Pure Bred Cattle Co., 126 N. W. (Iowa) 908.

1 Harper v. Graham, 20 Oh. 106. S. P. Mitchell v. Knight, 7 Oh. Cir. Ct. 204. See Schmidt v. Ludwig, 26 Minn. 85, 1 N. W. 803, where part of the less sum to be paid was the assumption by the debtor of a debt due from the creditor to a third person, and securing the payment by a mortgage.

2 Lee v. Tinken, 23 App. Div. 349.

charge of the whole debt.[1] The creditor has his benefit in the additional security. There is in such cases an element of estoppel, for to hold otherwise would be to permit the creditor to perpetrate a fraud upon the surety. Lord Ellenborough said that "if, upon the faith of such an agreement a third person be lured in to becoming surety for any part of the debt, on the ground that the party will be thereby discharged of the remainder of his debt, the agreement will be binding." [2] The indorser's means of reimbursement from the debtor would be greatly impaired.[3] So, returning to the main question, if a third person pledge his property as surety for the payment of the less sum, as where a wife joins with her husband in executing a mortgage upon his real estate, which the creditor accepts as payment of the original demand, the pledge of her inchoate right of dower furnishes the consideration necessary to support the accord and satisfaction.[4] The rule comprehends all those cases where a debtor gives any new, additional or higher security for the payment of a less sum, on condition that the creditor relinquish the remaining portion of the debt.[5] And it has been held to apply to a case where the debtor fur-

[1] Mason v. Campbell, 27 Minn. 54, 6 N. W. 405; Strauss v. Trotter, 6 Wis. Rep. 77; Keeler v. Salisbury, 33 N. Y. 648; Douglas v. White, 3 Barb. Ch. 621; Boyd v. Hitchcock, 20 Johns. 76, 11 Am. Dec. 247. (In the last case the note was payable to the third party and by him indorsed); Dolsen v. Arnold, 10 How. Pr. 528; Jenness v. Lane, 26 Me. 475; Singleton v. Thomas, 73 Ala. 205; Argall v. Cook, 43 Conn. 160; Curlewis v. Clark, 3 Exch. 375; (*Dictum*) Pearson v. Thomason, 15 Ala. 700, 50 Am. Dec. 159. In Fred v. Fred, 50 Atl. (N. J. Ch.) 776, an agreement to accept a note for a smaller sum indorsed by third persons in satisfaction of a judgment for alimony was held to be based upon a sufficient consideration.

[2] Steinman v. Magnus, 11 East, 390.

[3] Boyd v. Hitchcock, 20 Johns. 76, 11 Am. Dec. 247.

[4] Keeler v. Salisbury, 33 N. Y. 648.

[5] Schmidt v. Ludwig, 26 Minn. 85, 1 N. W. 803; Post v. Springfield Bank, 138 Ill. 559, 28 N. E. 978; Kemmerer v. Kokendifer, 65 Ill. App. 31; Colburn v. Gould, 1 N. H. 279; Day v. Gardner, 42 N. J. Eq. 199, 7 Atl. 365; Pope v. Turnstall, 2 Ark. 209; Gunn v. McAden, 37 N. C. 79; Pulliam v. Taylor, 50 Miss. 251; Howard v. Norton, 65 Barb. 161; Boyd v. Hitchcock, 20 Johns. 76; Kellogg v. Richards, 14 Wend. 114; Thatcher v. Dudley, 2 Root, 169; Phinizy

nished the security out of his own means, by giving a chattel mortgage,[6] although this doctrine seems to have been doubted in an earlier case.[7]

Sec. 65. Note of third person—Bills—Drafts—Checks—Orders on third person.—Where a creditor accepts the note of a third person for a less sum in full satisfaction of the entire debt, the delivery and acceptance of the note upon the agreement is an accord and satisfaction, and bars a recovery of that part of the debt beyond the amount of the note.[1] Accepting in satisfaction a part of certain notes held as collateral, and a sum in cash, the total of both being less than the

v. Bush, 50 S. E. (Ga.) 259. A bond with warrant of attorney is a higher security: Frisbie v. Larned, 21 Wend. 450. A judgment by confession by one partner, upon a bond given by him in satisfaction of the partnership debt extinguishes the partnership debt. *Id.* See upon the subject, Booth v. Smith, 3 Wend. 66; Pardee v. Wood, 8 Hun, 584; Brassell v. Williams, 51 Ala. 349; McIntyre v. Kennedy, 29 Pa. St. 448; Gordon v. Price, 10 Ired. 385; Glenn v. Smith, 2 Gill & J. 494; Maze v. Miller, 1 Wash. C. C. 328; Harriman v. Harriman, 78 Mass. 341; Brook v. White, 43 Mass. 283.

[6] Jaffray v. Davis, 124 N. Y. 164, 43 Abb. L. J. 205, 11 L. R. A. 710.

[7] See Platts v. Walrath, Lalor's Supp. 59, and referred to in Keeler v. Salisbury, 33 N. Y. 648. See, also, Walsh v. Curtis, 73 Minn. 259, where it is said by way of *dictum* that where a sum is due and indisputable, a pledge of a debtor's non-exempt property securing a lesser sum, is no consideration for an agreement to accept it in satisfaction of the greater sum.

[1] Kellogg v. Richards, 14 Wend. 114; Le Page v. McCrea, 1 Wend. 163, 19 Am. Dec. 469; Stafford v. Bacon, 1 Hill, 532, 37 Am. Dec. 366; Frisbie v. Larned, 21 Wend. 450; Hawley v. Foot, 19 Wend. 516; Allison v. Abendroth, 108 N. Y. 470; Boyd v. Hitchcock, 20 Johns. 76, 11 Am. Dec. 247; Conkling v. King, 10 N. Y. 440; Booth v. Smith, 3 Wend. 66; Brooks v. White, 2 Met. 283, 37 Am. Dec. 95; Laboyteaux v. Swigart, 103 Ind. 596, 3 N. E. 373; (*Dictum*) Harriman v. Harriman, 12 Gray, 341; (*Dictum*) Wipperman v. Hardy, 17 Ind. App. 46 N. E. 537; (*Dictum*) Pearson v. Thompson, 15 Ala. 700, 50 Am. Dec. 159; Brassell v. Williams, 51 Ala. 349; Bower v. Mety, 54 Iowa, 394, 6 N. W. 551; Wright v. Crockery Ware Co., 1 N. H. 281; Currie v. Kennedy, 78 N. C. 91; Gilfillan v. Farrington, 12 Ill. App. 101; Pettigrew v. Harmon, 45 Ark. 290; Hardesty v. Graham, 3 S. W. (Ky.) 909; Woolfolk v. McDowell, 9 Dana, 268; Letcher v. Bank, 1 Dana, 82; Lewis v. Jones, 4 B. & C. 506. See Sanders v. Branch Bank, 13 Ala. 353, where the debt discharged was a judgment. S. P. Jones v. Ransom, 3 Ind. 327.

entire debt, was held to be a valid contract.[2] It follows, of course, that a note of a third person for the full sum due,[3] or, a note for a greater sum, if taken in satisfaction of the debt, discharges the debt.[4] The note, however, must be valid.[5] An agreement on the part of a creditor to accept a bill of exchange,[6] draft,[7] or check,[8] of a third person for a less sum, in full satisfaction and discharge of his demand, and its acceptance, is a valid accord and satisfaction. So, the debtor's own draft upon a third person for fifty per cent. of the demand,[9] or an order,[10] on a third person for a less sum, when accepted, have been held to be a good accord and satisfaction. Where the draft or bill is accepted, the creditor derives a possibility of benefit out of the security furnished by the acceptor's name;[11] but, obviously, on principle, where the draft or order is not accepted, its acceptance in full satisfaction can only be sustained as an accord and satisfaction, on the theory that the draft or order is an assignment of the fund, giving the creditor a right of action against the third party. In one case where an order was not to constitute satisfaction until paid, and

[2] Lincoln Bank v. Allen, 82 Fed. 148, 27 C. C. A. 87; Frisbie v. Larned, 21 Wend. 450.

[3] Booth v. Smith, 3 Wend. 66. The note must be expressly received as satisfaction: Barelli v. Brown, 1 McCord, 449, 10 Am. Dec. 683; Darnell v. Morehouse, 36 How. Pr. 511; Hunter v. Moul, 98 Pa. St. 13, 42 Am. Rep. 610.

[4] Carriere v. Tichnor, 26 Ala. 571.

[5] Wentworth v. Wentworth, 5 N. H. 410: The maker of the note was an infant.

[6] In Thompson v. Percival, 5 B. & A. 925, the bill of one partner for a partnership debt was under consideration.

[7] Reid v. Hibbard, 6 Wis. 175; (*Dictum*) Bliss v. Stewart, 65 N. Y. 444.

[8] Wells v. Morrison, 91 Ind. 51; Guild v. Butler, 127 Mass. 386; Bidder v. Bridges, 37 Ch. D. 406.

[9] Stagg v. Alexander, 55 Barb. 70. See, also, Rose v. Hall, 26 Conn. 392, 68 Am. Dec. 402.

[10] Nevins v. Depierries, 1 Edm. Sel. Cas. (N. Y.) 196.

[11] Rose v. Hall, 26 Conn. 392, 68 Am. Dec. 402.

there was a refusal to accept and pay it, the court observed that the holder of the order might have proceeded against the third party if he had so elected,[12] and the rule would not be different if the draft or order was accepted as payment regardless of whether it would be accepted or not; excluding, of course, cases where the third person was to become an accommodation acceptor and refused to sign, or there was in fact no fund in his hands subject to assignment. Here there would be an absence of a consideration.

Where an order on a third person for a less sum is not to constitute payment of the original demand until accepted,[13] or until paid,[14] a refusal by the third person to accept or pay the order, is a breach of the debtor's agreement and there is merely an accord without satisfaction.[15] So, upon the same principle, if a note of a third person for a less sum is accepted upon an agreement that it shall be in full satisfaction of the entire debt if paid at maturity, there is no accord and satisfaction unless payment is made and received according to the agreement. If the note be not paid at maturity, the creditor may avail himself of the breach of the condition and recover the whole of the original indebtedness; but if he retains the note after it is due and demands and receives payment of it, he waives all claims of forfeiture for nonpayment at the time appointed, and the transaction becomes a valid accord and satisfaction.[16] The rule that the giving and acceptance in satisfaction of a larger sum, of a note, draft or check of a third person for a less sum, constitutes satisfaction of the larger sum, does not apply where the agreement is to pay cash, and the note, draft or check is merely the means of payment,[17] as where an agent of a debtor gave his own draft for the cash payment.[18]

[12] Schlitz v. Meyer, 61 Wis. 418, 21 N. W. 243.

[13] Geisher v. Kershner, 4 Gill & J. 305, 23 Am. Dec. 566.

[14] Schlitz v. Meyer, 61 Wis. 418, 21 N. W. 243.

[15] See Hawley v. Foote, 19 Wend. 516.

[16] Conkling v. King, 10 N. Y. 440.

[17] Mannakee v. McCloskey, 63 S. W. 482, 23 Ky. Law Rep. 515.

[18] Bliss v. Stewart, 65 N. Y. 444, rev'g 7 Lans. 186; 64 Barb. 215.

Sec. 66. Delivery and acceptance of property—Services.—It is a good accord and satisfaction if a creditor agrees to and accepts from his debtor any property, real [1] or personal,[2] in satisfaction of his demand. The property will be presumed to be worth as much as the parties agreed upon,[3] or of more value to the creditor than the debt;[4] but, the sufficiency in fact, of the consideration for the release of the debt will not be inquired into,[5] if the property is of any value.[6] The reason upon which the rule is founded is set forth in Pennel's Case—where it was resolved by the Judges—"that by no possibility, a lesser sum can be a satisfaction to the plaintiff for a greater sum: but the gift of a horse, hawk, or robe, etc., in satisfaction is good. For it shall be intended that a horse, hawk, or robe, etc., might be more beneficial to the plaintiff than the money in respect of some circum-

[1] Strange v. Holmes, 7 Cow. 224; Eckford v. De Kay, 26 Wend. 29; Savage v. Everman, 70 Pa. St. 315, 10 Am. Rep. 673; Smitherman v. Smith, 20 N. C. 86; Howe v. Mackay, 5 Pick. 44.

[2] Williams v. Phelps, 16 Wis. 91; Brassell v. Williams, 51 Ala. 349; Ridlon v. Davis, 51 Vt. 457; Gavin v. Annan, 2 Cal. 494; Levy v. Very, 12 Ark. 148; Martin v. White, 40 Ill. App. 281; Howard v. Norton, 65 Barb. 161; Weeks v. Zimmerman, 15 Daly, 226, 4 N. Y. Supp. 609; Gaffney v. Chapman, 4 Robt. 275; Anderson v. Highland, 16 Johnson, 86; Watkinson v. Inglesby, 5 Johns. 386; Therasson v. Peterson, 4 Abb. App. Dec. 396, s. c. 2 Keyes, 636; Murray v. Shaw, 37 Iowa, 410; McCreary v. McCreary, 5 Gill & J. 147; Bull v. Bull, 43 Conn. 455; Rose v. Hall, 26 Conn. 392, 68 Am. Dec. 402; Reed v. Bartlett, 19 Pick. 273; Brooks v. White, 2 Metc. 283, 37 Am. Dec. 95; Fisher v. May, 2 Bibb, 449; Jones v. Peet, 1 Swan (Tenn.) 293; Bartlett v. Rogers, 3 Sawy. 62; Union Bank v. Geary, 30 U. S. (5 Pet.) 99; Griffith v. Creighton, 61 Mo. App. 1; Christie v. Craig, 20 Pa. St. 430; Overton v. Connor, 50 Tex. 113. Acceptance of property agreed to be received in satisfaction of a judgment operates as an approprlation in satisfaction of the judgment: Brown v. Feeter, 7 Wend. 301. Gold being at a premium of one hundred per cent., a payment of fifty per cent. of the debt in gold was held an accord and satisfaction: Staggs v. Alexander, 55 Barb. 70.

[3] Bull v. Bull, 43 Conn. 455.

[4] Savage v. Everman, 70 Pa. St. 315.

[5] Strange v. Holmes, 7 Cow. 224; Watkinson v. Inglesby, 5 Johns. 386; Blinn v. Chester, 5 Day, 360.

[6] See Williams v. Stanton, 1 Robt. 426.

stance, or otherwise the plaintiff would not have accepted it in satisfaction." [7] The same rule was before laid down by Littleton in his Commentaries,[8] and has been followed by an unbroken current of authorities to the present day. So, a payment and acceptance of part of the debt in cash and certain personal property in satisfaction of the entire sum due, is a good accord and satisfaction.[9] The same rule applies where labor or services have been performed,[10] or board and lodging furnished,[11] or any other collateral thing is done,[12] in pursuance of an agreement that such services or thing furnished shall be in full satisfaction of the entire debt. The fact that the parties have estimated the value of the property and found that it is of less value than the debt does not prevent the transaction from operating as an accord and satisfaction, if the property be actually delivered and received in full satisfaction of the debt.[13] That it is estimated or conceded that the property is of less money value than the debt does not affect the rule, for the cardinal principle governing such contracts is that it may be more beneficial to the creditor by reason of some circumstance, of which there may be many, other than that the article is worth as much or more than the debt in money for the purposes of selling it.

But the rule does not apply where the debt is to be paid in property or other collateral thing at a valuation, for then so much property in value as will equal the debt must be delivered and accepted. In such

[7] Pinnel's Case, 5 Co. 117.

[8] "Also, in the case of feoffment in mortgage if the feoffor payeth to the feoffee a horse, or a cup of silver, or a ring of gold, or any such other thing in full satisfaction of the money, and the other receiveth it, this is good enough, and as strong as if he had received the sum of money, though the horse or the other thing were not of the twentieth part of the value of the sum of money, because that the other hath accepted it in full satisfaction." Co. Litt. Sec. 344.

[9] Neal v. Handley, 116 Ill. 418, 6 N. E. 45, 56 Am. Rep. 784.

[10] (*Dictum*) Palmer v. Yager, 20 Wis. 97.

[11] Thurber v. Sprague, 17 R. I. 634, 24 Atl. 48.

[12] Wheeler v. Essex, 42 N. J. L. 138.

[13] Hasted v. Dodge, 35 N. W. (Iowa) 462; Jones v. Bullitt, 2 Litt. (Ky.) 49.

cases the question is one of payment not of accord and satisfaction. It has been held that an agreement to accept $700 in labor and material in satisfaction of a debt for a much larger sum did not amount to an accord and satisfaction.[14] On principle, this is but paying part of the debt in property instead of money, in satisfaction of the whole, and there is no consideration for the relinquishment of the residue of the debt.[15]

Sec. 67. Accepting a less sum and surrendering note or security —Gift.—If a creditor accepts a part of his debt and voluntarily surrenders the note or security, under an agreement that the note or other obligation shall be fully paid and satisfied, such surrender of the note or security amounts to a gift, or release, and operates as a satisfaction of the residue of the debt.[1] In one case where notes were settled for less than their face value, the court said: "It was an executed accord. Nothing remained executory, and it operated as a full satisfaction. A mere promise to accept less than the full amount of a debt although the less sum promised has been paid has been held not sufficient; but where the security has been surrendered, or some act done of a like nature, there is no reason in law or morals, why the party should not be bound."[2] The judgment arrived at in the case referred to was correct, but the reason assigned for it does not harmonize with the rule requiring a new consideration to support an accord and satisfaction, for, manifestly, no benefit to which the creditor was not already entitled, accrues to him by the surrender of the evi-

[14] Morrill v. Baggott, 157 Ill. 240, 41 N. E. 639, Aff'g 57 Ill. App. 530.

[15] Howard v. Norton, 65 Barb. 161; Griffith v. Creighton, 61 Mo. App. 1; Mitchell v. Cragg, 10 M. & W. 367.

[1] Stewart v. Hidden, 13 Minn. 45; Clayton v. Clark, 74 Miss. 499, 21 So. 565, 60 Am. St. Rep. 521, 37 L. R. A. 771; Silvers v. Reynolds, 17 N. J. L. 275; Draper v. Hitt, 43 Vt. 437; Ellsworth v. Fogg, 35 Vt. 355; Kent v. Reynolds, 8 Hun, 559. If the surrender was induced by fraudulent representations it will be treated as void: Reynolds v. French, 8 Vt. 80, 30 Am. Dec. 456.

[2] Babcock v. Bonnell, 80 N. Y. 244.

dence of the debt, merely upon payment of a part of it. The principle governing the discharge of the residue of the debt, in such cases, is that applicable to cases where a creditor receiving no part of the debt, yet gratuitously delivers up the obligation which he holds against his debtor, with the intent and for the purpose of discharging the debt. Such surrender operates in law as a release, and discharge of the liability of the debtor thereon; and no consideration is required to support such a transaction where it has been fully executed.[3]

If a person accepts a part of his demand and gives the balance to his debtor, even where the gift was upon condition that a portion be first paid, the transaction does not amount to an accord and satisfaction, but merely to a gift of the residue;[4] and an action cannot be maintained to recover the balance of the demand.[5] The question may arise whether it is an accord and satisfaction or compromise, or a gift.[6] If proven to be the latter, it cannot also by any possibility be the former, for, aside from the question of want of consideration, it lacks an accord to receive a part of the debt in satisfaction of the whole debt. The question then is, is it a valid gift? "Any person, competent to transact ordinary business, may give what he owns to any other person."[7] And when a gift is executed, the whole debt, or so much thereof as is given, is satisfied and discharged.[8]

[3] Larkin v. Hardenbrook, 90 N. Y. 333, 43 Am. Rep. 176. In this case the court said there certainly could not be higher evidence of an intention to discharge and cancel a debt, than by a destruction and surrender of the instrument which created it, to a party who is liable by virtue of the same.

[4] Gray v. Barton, 55 N. Y. 68, 14 Am. Rep. 181; Stewart v. Hidden, 13 Minn. 45.

[5] McKenzie v. Harrison, 120 N. Y. 260, 17 Am. St. Rep. 638, 8 L. R. A. 257; Gray v. Barton, 55 N. Y. 68, 14 Am. Rep. 181.

[6] Gray v. Barton, 55 N. Y. 68, 14 Am. Rep. 181.

[7] 1 Par. on Cont. 234.

[8] See McKenzie v. Harrison, 120 N. Y. 260, 17 Am. St. Rep. 638, 8 L. R. A. 257, where a landlord, owing to a decrease in the tenant's business, agreed to

Sec. 68. Payment of principal without accrued interest.—Where interest is stipulated for in a contract, accrued interest is a part of the debt, and a payment of the principal without the accrued interest, under an agreement that it shall be in full satisfaction of the demand, does not constitute a valid accord and satisfaction; there being no consideration present to uphold the agreement upon the part of the creditor to relinquish that part of his debt represented by the accrued interest. In such cases, as well as in those cases where nothing is said about throwing off the interest, an action may be maintained to recover the interest.[1] But we apprehend that an agreement to accept the principal and throw off the interest, would be good, where interest accrued under the contract only after a demand; or ceased to accrue after a tender, and there was a *bona fide* dispute as to whether a demand was made, or as to the sufficiency of the tender. Where no interest is reserved by the contract, but is recoverable by way of damages, that is, where damages are recoverable *ratione detentione debiti,* a payment of the principal under an agreement that it shall be in full satisfaction of the demand is a good accord and satisfaction.[2] Independent of the agreement to accept the

accept a reduced amount as rent until times got better. Payment at the reduced rate was made and accepted until notified to pay the full rate. The court said a debt may be forgiven, and it was held that the leasor could not recover the amount of the rent thrown off.

Balancing the account by the entires—"Cr. by cash on account $1.00. Gift to balance $820.91" and giving the receipt—"Received * * * one dollar in full, to balance all book accounts up to date, of whatever name and nature" was held to be evidence of an intent to give the entire debt to the defendant. The dollar was given, not as payment, but to satisfy defendant of its validity: Gray v. Barton, 55 N. Y. 68, 14 Am. Rep. 181. Surrendering a note on payment of part, is evidence of an intent to denote the balance of the debt: Stewart v. Hidden, 13 Minn. 45; McKenzie v. Harrison, 120 N. Y. 260, 17 Am. St. Rep. 638, 8 L. R. A. 257.

[1] Fake v. Eddy, 15 Wend. 76; Devlin v. Mayor, 131 N. Y. 123; Watkins v. Morgan, 6 Car. & P. 661. The rule is applied to taxes bearing a fixed rate of interest: People v. County, 5 Cow. 331.

[2] Johnson v. Brannan, 5 Johns. 268; Westcott v. Walker, 47 Ala. 492; Tenth Nat. Bank v. New York, 4 Hun, 429. In Tuttle v. Tuttle, 121 Metc.

principal in full satisfaction of the demand, the rule is that where interest is incident to the debt and only recoverable as damages after default in the payment of the principal, the acceptance of the principal is a bar to a claim for such interest.[3] Accepting the principal and protesting against the refusal to pay interest, has been held to be of no importance, as the acceptance nullifies the protest.[4] And, this is in harmony with the rule that if a cause of action is extinguished by the acceptance of the principal, an action will not lie to recover the damages.[5]

Sec. 69. **Effect of receipt in full.**—Where a demand is liquidated and due, and the liability of the debtor is not in good faith disputed, accepting a less sum than is due in full satisfaction of the entire sum due and giving a receipt in full, specifying the amount actually received, or the amount of the debt, or a nominal amount, or containing merely an acknowledgment that the demand is paid, does not amount to an accord and satisfaction, nor discharge the

501, 46 Am. Dec. 702, the note was long past due and did not bear interest on its face. The court was of the opinion that the question whether interest could be recovered was "a question of so much doubt and uncertainty as to the issue, that the promisee of the note might deem it for his pecuniary interest to accept the payment of the principal sum in full discharge of this note, rather than incur the expense of litigation."

[3] Hamilton v. Van Rensselaer, 43 N. Y. 244; Stevens v. Barringer, 13 Wend. 639; Jacot v. Emmett, 11 Paige, 142; Tillotson v. Preston, 3 Johns. 229; Consequa v. Fanning, 3 Johns. Ch. 587; McCreery v. Day, 119 N. Y. 10, 16 Am. St. Rep. 793, 23 N. E. 198; Cutter v. Mayor, 92 N. Y. 166; Simmons v. Almy, 103 Mass. 36 (*Dictum*) Tanner v. Merrill, 108 Mich. 58, 31 L. R. A. 175, 65 N. W. 664.

[4] Cutter v. Mayor, 92 N. Y. 116.

[5] If a creditor entitled to fifty pounds and nominal damages accept the fifty pounds, he cannot afterwards sue for the nominal damages: Beaumont v. Greathead, 3 Dowl. & L. P. C. 631. In Jacot v. Emmett, 11 Paige Ch. 142, we find it stated that "The receipt of the balance of the account as stated, without any reservation of the right to claim interest afterwards, was therefore a waiver of the claim."

debtor from his obligation to pay the entire debt.[1] The recital in a receipt of the amount received, is only *prima facie* evidence of the amount paid and it may be varied or contradicted by parol evidence.[2] A mere receipt is not a contract,[3] but an acknowledgment of a fact which may or may not be true. Being but evidence of a fact, it in no way affects the legal result flowing from the payment and acceptance of the amount actually paid. This is the rule at common law, and in absence of a statute, prevails in England and America, with the exception of Connecticut, where a receipt in full is given the force and effect of a release.[4]

Receipts given upon the compromise of disputed and unliquidated demands, which embody contracts, are, in so far as the receipt is concerned, of no greater force than an ordinary receipt. Where a contractual receipt in writing is given upon an accord and satisfaction, the contract portion thereof cannot be varied, contradicted or explained by verbal evidence.[5] A receipt showing that a

[1] Twitchell v. Shaw, 10 Cush. 46, 57 Am. Dec. 80; Walan v. Kerby, 99 Mass. 3; Harriman v. Harriman, 12 Gray, 341; Chicago, etc., R. Co. v. Clark, 92 Fed. 968, 35 C. C. A. 120; Joues v. Ricketts, 7 Md. 108; St. Louis, etc., R. Co. v. Davis, 35 Kan. 464, 11 Pac. 1034; Fuller v. Kempt, 138 N. Y. 231, 20 L. R. A. 785, 33 N. E. 421; Thomas v. McDaniels, 14 Johns. 185; Jackson v. Security Mut. Ins. Co., 135 Ill. App. 86, affirmed in 84 N. E. 198, 233 Ill. 161; Riley v. Kershaw, 52 Mo. 224; Murphy v. Kastner, 50 N. J. Eq. 214, 24 Atl. 564. The creditor is not concluded from recovering the balance, although the receipt was given with full knowledge, and there was no error of fraud: Ryan v. Ward, 48 N. Y. 204.

[2] Ryan v. Ward, 48 N. Y. 204; St. Louis, etc., R. Co. v. Davis, 35 Kan. 464; Brook v. White, 2 Metc. 283, 37 Am. Dec. 95. In absence of evidence that full payment was not in fact made, it is conclusive and cannot be ignored: Wherely v. Rowe, 106 Minn. 492, 119 N. W. 222.

[3] Ryan v. Ward, 48 N. Y. 204; Martin v. Accident Ins. Co., 151 N. Y. 99.

[4] Aborn v. Rathbone, 54 Conn. 444, 8 Atl. 677.

[5] Richman v. Watson, 136 N. W. (Wis.) 979: "This is to acknowledge receipt of Wingfield Watson of $1 and other good and valuable consideration in full payment, discharge and acquittance of all charges, claims and demands against him of whatsoever kind or nature, and I do hereby acknowledge that all accounts and claims between us have been fully discussed, considered and settled and this is a full discharge and settlement thereof."

settlement by way of accord and satisfaction, or compromise was intended, as where it states that it is a settlement of all demands to date, or of all claims, contains all the elements of a contract.[6] Such a contract embodied in a receipt, however, where given upon a settlement of a liquidated and undisputed demand, is without consideration and void, for the payment of a part of a liquidated and undisputed claim is no consideration for releasing the residue of the claim or another liquidated or unliquidated claim.[7]

Sec. 70. Statutory change or modification of the rule.—The common law rule that the mere payment of a less sum in satisfaction of a greater sum liquidated and due, does not satisfy and discharge the remainder of the debt, in some states is by statute modified or entirely abrogated. In California,[1] North and South Dako-

[6] Conant v. Kimball, 95 Wis. 550, 70 N. W. 74, citing Henry v. Henry, 11 Ind. 236, 71 Am. Dec. 354; Grumley v. Webb, 44 Mo. 444, 100 Am. Dec. 504; 1 Greenl. Ev. 305; Randall v. Reynolds, 52 N. Y. Super. Ct. 147. In 95 Wis. the receipt was as follows: "Received of C. F. Kimball, ten dollars in full of all demands to date." In Donaldson v. Carmichael, 102 Ga. 40, it was held that a receipt which recites that it is in full settlement of all injuries suffered by reason of a certain accident, is, when unexplained, evidence of a satisfaction for all injuries and operates as a discharge.

[7] Chicago, etc., R. Co. v. Clark, 92 Fed. 968, 35 C. C. A. 129; *ante*, Sec. 58.

[1] Cal. Civ. Code 1899, Sec. 1524; Dobinson v. McDonald, 92 Cal. 33, 27 Pac. 1098; Rogers v. Kimball, 40 Pac. (Cal.) 719. North Dakota Code 1905, Secs. 5269–5272: "An accord is an agreement to accept in extinguishment of an obligation something different from or less than that to which the person agreeing to accept is entitled. Though the parties to an accord are bound to execute it, yet it does not extinguish the obligation until it is fully executed. Acceptance by the creditor of the consideration of an accord extinguishes the obligation and is called satisfaction. Part performance of an obligation either before or after a breach thereof, when expressly accepted by the creditor in writing is satisfaction, or rendered in pursuance of an agreement in writing for that purpose, though without any new consideration extinguishes the obligation." That part of the statute declaring that the parties are bound to execute an accord and that no new consideration is necessary if the acceptance of part performance of an obligation is in writing or performed in pursuance of a written agreement is in derogation of the common law. Under this statute an oral accord without performance

ta, there must be a writing expressly accepting part performance in satisfaction, or it must be paid or performed in pursuance of a written agreement to accept a part in satisfaction of the whole. Where the agreement or express acceptance in satisfaction is not in writing the common law rule governs as to what constitutes satisfaction. In Georgia,[2] North Carolina,[3] Maine,[4] and perhaps in

and acceptance does not constitute a defence: Arnett v. Smith, 11 N. D. 55, 88 N. W. 1037. In Webster v. McLaren, 123 N. W. 395, a computation of the amount due upon mutual accounts and an agreement that they should off-set each other, one sum being greater than the other, was held not to constitute an accord and satisfaction in absence of a showing that there was a consideration or that it was executed by satisfaction, release or payment pursuant to the agreement, or that there was a dispute. South Dakota Comp. Laws, Secs. 3483-3485, are to the same effect as the N. Dak. Statute. The decisions are to the effect that to constitute an accord and satisfaction, performance and acceptance in satisfaction must be shown: Carpenter v. Railway Co., 7 S. D. 58, 64 N. W. 1120; Troy Min. Co. v. Thomas, 15 S. D. 238, 88 N. W. 106; Troy Min. Co. v. White, 10 S. D. 475, 74 N. W. 236. Acceptance of a sum to which the creditor is clearly entitled is not an accord and satisfaction unless expressly accepted in writing as satisfaction: Chrystal v. Gerlach, 125 N. W. 633.

[2] Code, Sec. 2881; Code 1911, Sec. 4329; Tyler v. Chevalier, 56 Ga. 494 (In this case the claim was in dispute); Rogers v. Ball, 54 Ga. 15: In this case, which was under the old Code, the court held that a deduction by a creditor at the time a debt is settled of a part of a claim for usury included in it is

[3] Code 1883, Sec. 574, 575; Tiddy v. Harris (N. C.) 8 S. E. 227; Fickey v. Merriman, 79 N. C. 585; Drewry v. Davis, 66 S. E. 139. In Kerr v. Sanders, 122 N. C. 635, 29 S. E. 943, accepting a check marked, "In full for services," was held a full discharge. Although the creditor wrote over his indorsement "Accepted for one month's services." Accepting a part in cash and a new note for the balance under a compromise agreement, and surrendering the old note, was held to preclude a recovery upon the old note: Wittkowsky v. Baruch, 37 S. E. 449, reversing 126 N. C. 747, 36 S. E. 156.

[4] Rev. St. Ch. 84, Sec. 59; Rev. St. 1871, Ch. 82, Sec. 28; Phelps v. Dennett, 57 Me. 491; Fogg v. Sanborn, 48 Me. 432; Bisbee v. Ham, 47 Me. 543; Weymouth v. Babcock, 42 Me. 42. In Knowlton v. Black, 102 Me. 503, 67 Atl. 563, the statute is held to cover disputed and undisputed demands. S. P. Fuller v. Smith, 77 Atl. 706. Accepting part and giving the debtor his own time to pay the balance is not within the statute: Mayo v. Stevens, 61 Me. 562; Austin v. Smith, 39 Me. 203.

some other states,[5] the common law rule is entirely abrogated. In Alabama,[6] and Tennessee,[7] receipts and agreements in writing, with or without any new consideration, are given effect according to the intent of the parties.[8] In Texas under the statute providing

not an accord and satisfaction although the debtor agrees that the deduction is to be in satisfaction of his claim. The reason being that the borrower is still, in the eyes of the law, *in vinculis*, when such agreement is made; but that if the borrower upon an accord becomes a creditor himself by accepting the note of the lender, which agreement is afterwards executed, he could not deny the legal effect of the accord and satisfaction. See Troutman v. Lucas, 63 Ga. 466, holding that part performance is insufficient.

Under 1911 Compilation of the Georgia Code, Sec. 4328, provides that the accord and satisfaction must be of some benefit to the creditor, legal or equitable, or he will not be barred from his legal rights. Sec. 4329 provides that an agreement by a creditor to receive a less sum than his debt will not be binding unless it be actually executed by payment. As far as accepting a less sum of a debt due and undisputed is concerned, these sections cannot well be harmonized, for it cannot be of any legal or equitable benefit to a creditor to receive only a part of his debt after he has a legal right to demand all of it. It could only be convenient to him to get it.

---

[5] See Va. Code 1887, Sec. 2858.

[6] Code 1876, Sec. 3039; Smith v. Gayle, 58 Ala. 600; Cowan v. Sapp, 74 Ala. 44.

[7] Code, Sec. 3789, 3790; Miller v. Fox, 111 Tenn. 336, 76 S. W. 893; Memphis v. Brown, 1 Flipp. 188, 16 Fed. Cas. No. 9,415.

[8] After an examination of these statutes and many decisions following the common law rule, we are convinced that the latter is the most salutary rule, and is founded upon the wisdom of the ancient sages. The statutes referred to no doubt are intended to prevent litigation, but avoiding litigation is not to be desired at the expense of justice or by removing the protection afforded by a law, which, throughout many centuries, has been found to work the greatest good to the greatest number. As well might the laws of usury be repealed because they occasion litigation. It is common knowledge, gained of experience, that nine creditors out of ten, who accept less than their due in full satisfaction of a liquidated demand, are forced to do so by the debtor taking advantage of their urgent necessity for the money, or by threatening to withhold the money until the end of a law suit, or by working upon their fears of a loss of their claim by causing his means to become visibly less, or by pleading poverty; thus, obtaining something for nothing. Who is injured if a creditor afterwards insists upon his rightful dues? And, should the coercive debtor be heard to complain because he is not allowed to keep

that writings not under seal import a consideration as fully as sealed instruments, the question whether a writing acknowledging receipt of a part of a debt due and unliquidated, in satisfaction of the whole, may be attacked for want of consideration seems to be an open question.[9]

Sec. 71. Accepting a less sum and giving a release.—Accepting a less sum than the amount due upon a demand and giving a release of the whole, or of the part remaining unpaid, does not constitute an accord and satisfaction. At common law, as well as by the civil law, a release is one method of satisfying and discharging a debt or demand; and, at common law, at least, it must be under seal.[1] Where delivered in pursuance of the agreement, it discharges the obligation or demand which it is intended to cover as effectually as if actual payment in full be made in money; and its form and effect does not depend upon whether any actual consideration passed between the parties or not; wherein it differs from an accord and satisfaction. The seal imports a consideration, and, it has been said to import a full consideration. This presumption is

what in honor he should pay? Occasionally, a creditor out of compassion for a poor debtor reduces his demand, but such, unless willfully deceived, seldom trouble the courts to recover the balance. On the whole, we believe that a law, which does away with the necessity for a consideration to uphold a contract, is ill advised, and such are these statutes. As to unliquidated and disputed demands such acts add little if anything to the law as it was before.

[9] In Warren v. Gentry, 21 Tex. Civ. App. 151, 50 S. W. 1025, the answer averred that the consideration for the release was $350 cash in hand paid and "other good and valuable consideration." This the court held was good upon demurrer, even if it be conceded that the $350 alone would furnish no consideration for the discharge of the debt. Under the Statute, Art. 4863 (4488) writings not under seal import a consideration as fully as sealed instruments.

[1] "But if the obligee or feoffee doe at the day receive part, and thereof make an acquittance under his seal in full satisfaction of the whole, it is sufficient, by reason the deed amounteth to an acquittance of the whole." Co. Litt. Sec. 344.

raised as a barrier to any inquiry into the actual consideration. Solemn acts deliberately done must stand for what the law says they are intended, otherwise, fixed rules of law would be of little force and the end of controversies seldom reached. If there is in fact no consideration for the whole or that part of the debt not paid, it amounts to a gift. From the solemnity of its execution the creditor is presumed to have acted with deliberation and with full knowledge of all the facts, otherwise it is not presumed that he would throw away his property without the possibility of any benefit. A release *ex vi termini* imports a seal,[2] and the want of a seal, in those states adhering to the common law rule, is a matter of defense. It need not be averred to be under seal.[3] The subject of release is frequently met with in the field of research concerning an accord and satisfaction, because it is one method of discharging a debtor from his liability for the payment of an entire debt or demand upon the payment of a part of it, but it is governed by rules applicable solely to releases, with no relation, as such, to an accord and satisfaction. Therefore, while it would be profitable and instructive, as well as highly entertaining, to point out the many subtilities and nice distinctions pertaining to the law of release, to pursue the subject further here, would be a wide digression.

Before concluding it may not be amiss to observe that, if an instrument intended for a release fails to discharge the debt by reason of any informality in its execution, the transaction may be, nevertheless, a good accord and satisfaction, for there is present the accord or agreement to receive a part in satisfaction of the whole demand (wherein a release differs from a mere gift) provided, however, there is present a new consideration such as will uphold an accord and satisfaction. Thus, where a purported release is made upon a settlement and compromise of a contested suit, pending be-

[2] Illinois Cent. Ry. Co. v. Reed, 37 Ill. 484, 87 Am. Dec. 260.

[3] Bailey v. Cowles, 86 Ill. 335; Illinois Cent. Ry. Co. v. Reed, 37 Ill. 484, 87 Am. Dec. 260.

tween the parties,[4] or, upon a settlement of damages arising from personal injuries,[5] or upon a settlement of any other unliquidated or disputed claim and some consideration is present;[6] or where property of uncertain value, or the note of a third person for a less sum is given in satisfaction of a debt pursuant to an agreement that it shall be accepted in satisfaction, it is wholly immaterial whether the instrument delivered as a release is a valid technical release or not.

Sec. 72. By allowing cross-demand—Set-off—Recoupment.—Where two persons, having mutual unliquidated or disputed claims, or mutual pending suits, agree to cancel their respective claims or to dismiss the suits, one claim being the consideration for the satisfaction of the other, or where a part of the consideration upon one side is paid in money, and they carry out the agreement, the arrangement amounts to a mutual accord and satisfaction of their respective claims or suits.[1] So where one demand is liquidated and the other unliquidated, or disputed, whether the latter is in the nature of a recoupment, or a distinct demand, offsetting one against the other, with or without the payment of a difference in cash, under an agreement that both demands shall be extinguished, is a valid accord and satisfaction, for one or both of

[4] Benjamin v. McCormic, 4 Gilm. 536, 46 Am. Dec. 474.

[5] Illinois Cent. Ry. Co. v. Reed, 37 Ill. 484, 87 Am. Dec. 260.

[6] See cases last above cited. See, also, Smithwick v. Ward, 7 Jones Law, 64, 75 Am. Dec. 453, where the release was rejected for want of a seal. But so far as the report shows, the instrument does not disclose that the damages were released for a consideration. Whether the court had in mind the rule that a cause of action can only be discharged by something of value, in absence of a release or gift, is for conjecture.

[1] Vedder v. Vedder, 1 Denio, 257; Foster v. Trull, 12 Johns. 456; 2 Pars. Cont. 685; Jones v. Sawkins, 5 C. B. 142; Alvord v. Marsh, 12 Allen, 603. See Williams v. The London Commercial Exch. Co., 10 Exch. 569, 20 Eng. L. Eq. 429, where the mutual causes of action were referred to arbitration and the agreement carried out. See Dighton v. Whitlng, 1 Lutw. (Eng. Com. Pl.) 23; Davis v. Ockham, Style (K. B. Rep.) 245, which appear to hold to the contrary. See Bac. Abr. Accord A.

the parties receive a benefit in avoiding the trouble and expense of litigating the unliquidated demand.[2] If, however, the mutual demands are liquidated and due, off-setting one demand against the other, without more, under an agreement that both demands shall be fully paid and satisfied, does not amount to an accord and satisfaction.[3] If the demands are equal, the law applies one to the payment of the other *eo instanter,* and both are paid. If one demand exceeds the other, the law makes the same application of payment and the larger demand is satisfied *pro tanto.*[4]

At civil law, this mode of payment is termed compensation, and is defined as the extinction of debts of which two persons are reciprocally debtors, by the credits of which they are reciprocally creditors.[5] Both demands being liquidated and due, crediting the less upon the greater debt, confers upon the creditor holding the largest debt no benefit to which he is not entitled under the law,

[2] In Morehouse v. Bank, 98 N. Y. 503, 3 Nat. Bk. Cas. 631, one of the demands was a claim for usurious interest. The bank agreed to apply the interest upon the debt due the bank and satisfy the remaining indebtedness, and the debtor agreed not to sue or to permit suit to be brought.

[3] Webster v. McLaren, 123 N. W. (N. D.) 394; Nelson v. Weeks, 111 Mass. 225; Walon v. Kerby, 99 Mass. 3. In May v. King, 12 Mod. 538, the court said: "If there be two dealers, and without coming to an account, they agree to be clear against one another, it would not be well, without coming to an account."

[4] This is the rule where the agreement is that one debt shall be applied in payment of another in absence of an agreement that the larger debt shall be extinguished by the less. The question is one of payment solely. Davis v. Spencer, 24 N. Y. 386; Hunt v. Clark, 12 Johns. 304; Eaves v. Henderson, 17 Wend. 17; Hills v. Mesnard, 10 Ad. & E. (N. S.) 266; Gardiner v. Callender, 12 Pick, 374. Lord Coke in his Commentaries upon Littleton said: "If the obligor or feoffor be bound by condition to pay an hundred markes at a certain day, and at the day the parties doe account together, and for that the feoffee or obligee did owe twenty pound to the obligor or feoffor, that summe is allowed, and the residue of the hundred markes paid, this is a good satisfaction, and yet the twenty pounds was a chose in action, and no payment was made thereof, but by way of retainer or discharge." Co. Litt. Sec. 244.

[5] 1 Pothier's Ob. 587.

and the agreement to remit the balance of his demand is, therefore, without consideration. The case is not any different, than where one debtor discharges his obligation in money and receives the same sum back in satisfaction of his larger debt. The law invariably avoids idle ceremony. In order to connect one debt with another by an agreement *in præsenti* it is not necessary that there should be the vain formality of passing the money from one party to the other and returning it again to the party from whom it just came, or that a formal release or receipt be executed.[6] The courts in arriving at a decision have not always been careful to observe the distinction between payment in full, where something else is accepted as the equivalent of money, and satisfaction by way of an accord and satisfaction; consequently, there is some confusion in the two classes of cases. Although there are border line cases, yet, by keeping in mind the definition of payment, and of accord and satisfaction, and, observing the distinctions, much confusion and perplexity may be obviated.

Sec. 73. By surrender of rights—Assuming new obligation.—Any benefit under a new agreement accruing to a creditor, or a possibility of a benefit to which he was not before entitled, furnishes the consideration necessary to uphold an agreement on the part of the creditor to relinquish a part of his debt, as where a lessee in arrears, holding under an unexpired lease, pays a part of the sum due in full satisfaction of the whole and surrenders possession of the premises.[1] So, where a mortgagor entitled to hold possession, consents to an immediate sale of the premises and surrenders the

[6] Hills v. Mesnard, 10 Ad. & E. (N. S.) 266. It has been decided that to an action by three plaintiffs for a joint demand, a plea of an accord and satisfaction with one of the plaintiffs by a part payment in cash and a set-off of a debt due from one to the defendant, was good without alleging any authority from the other two plaintiffs to make the settlement: Wallace v. Kelsall, 7 M. & W. 264.

[1] Lewis v. Donohue, 58 N. Y. S. 319, 37 Misc. Rep. 514.

possession,[2] or permits the mortgagee to collect rent prior to entry,[3] the agreement on the part of the mortgagee to accept a less sum than the mortgage debt is valid. The assumption of a liability for an uncertain amount, as where a mortgagor agrees to support the mortgagee during his life, is a sufficient consideration to uphold the cancellation of the mortgage and surrender of the note.[4]

Sec. 74. By acceptance of new or substituted agreement.—A mere naked promise to render satisfaction of a debt or other obligation at a future time either in full according to the terms of the original obligation, or by the performance of something different, is, as before stated, merely substituting one cause of action for another, and is without consideration, and no bar to an action brought upon the original demand.[1] If performance at a future date is to constitute satisfaction, the accord is merely executory.[2] But the rule that a promise to do another thing is not a satisfaction of the original debt or demand, is subject to the exception that if the parties agree that the new promise shall itself constitute satisfaction of the prior debt or demand, and the new agreement is based upon a new consideration,[3] and it is accepted in satisfaction, then the acceptance of the new agreement in place of the old constitutes an accord and satisfaction and bars an action on the original demand.[4]

[2] King v. Brewer, 121 Mich. 339, 6 Det. Leg. N. 488, 80 N. W. 238.

[3] Gilson v. Nesson, 84 N. E. (Mass.) 854.

[4] McGiverin v. Keefe, 130 Iowa, 97, 106 N. W. 369.

[1] Ellis v. Betzer, 2 Ohio, 89, 15 Am. Dec. 534.

[2] Russell v. Lytle, 6 Wend. 390, 22 Am. Dec. 537; Kromer v. Heim, 75 N. Y. 574; Simmons v. Clark, 56 Ill. 96.

[3] Spann v. Baltzell, 1 Flo. 301, 46 Am. Dec. 346; Palmer v. Yager, 20 Wis. 91.

[4] Kromer v. Heim, 75 N. Y. 577, 31 Am. Rep. 491; Morehouse v. Bank, 98 N. Y. 504, 3 Nat. Bk. Cas. 631; McCreery v. Day, 119 N. Y. 9; Billings v. Vanderbeck, 23 Barb. 546; Kellogg v. Richards, 14 Wend. 116; Jaffray v. Davis, 124 N. Y. 164, 43 Alb. L. J. 205, 11 L. R. A. 710; Palmer v. Yager, 20

It is always competent for the parties by a new contract "to waive, dissolve, or annul the former agreement or in any manner to add to, subtract from or vary or qualify the terms of it," and they will be bound by it; provided, however, a new consideration is present, and it complies in other particulars to the law.[5] The same consideration necessary to uphold an accord and satisfaction where performance is to constitute satisfaction, is a necessary element of the new contract. In other words there must exist the same possibility of benefit to the creditor, when the contract is to be performed in the future, as he would receive if present performance constitute the satisfaction. The transaction comprehends the original debt or demand, the accord or agreement to substitute and its execution, and the substituted agreement. When the new agreement is accepted there is a present adjustment and satisfaction of the original obligation.[6] Thereafter the creditor's remedy is upon

Wis. 90; Good v. Cheesman, 2 B. & Ad. 328; Case v Barb, 4 T. Raym. 450; Cartwright v. Cook, 3 B. & Ad. 701; Kinsler v. Pope, 5 Strobh. (S. C.) 126; Carter v. Chicago, etc., R. Co., 119 S. W. (Mo. App.) 35; Fritz v. Fritz, 118 N. W. (Iowa) 769; Simmons v. Clark, 56 Ill. 96; Draper v. Hitt, 43 Vt. 439, 5 Am. Rep. 292; Buchanan v. Paddleford, 43 Vt. 64; Babcock v. Hawkins, 23 Vt. 561; Goodrich v. Stanley, 24 Conn. 613; Whitsett v. Clayton, 5 Colo. 476; Christie v. Craige, 20 Pa. St. 430; Hart v. Bollers, 15 S. & R. 162, 16 Am. Dec. 536 (this was a case where a new note for an equal sum was given for an old note); 2 Pars. Cont. 682–683; Foster v. Collins, 6 Heisk. (Tenn.) 1 (a note was given in this case and the court held that an allegation that the money agreed to be paid had been paid was unnecessary); Brunswick v. Clem, 80 Ga. 534, 7 S. E. 84; Smith v. Elrod, 24 So. (Ala.) 994; Pope v. Turnstall, 2 Ark. 209; Treadwell v. Himmelman, 50 Col. 9; Merry v. Allen, 39 Iowa, 235; Hall v. Smith, 10 Iowa, 45; White v. Gray, 68 Me. 579; Doyle v. Donnelly, 56 Me. 26; Field v. Aldrich, 162 Mass. 587, 39 N. E. 288; Apthorp v. Shepard, Quincy (Mass.) 298, 1 Am. Dec. 6 (which was a case of settlement by giving a note); Stults v. Newhall, 118 Mass. 98; Woodward v. Miles, 24 N. H. 289; Ranlett v. Moore, 21 N. H. 336; Curtiss v. Brown, 63 Mo. App. 431; Gulf R. Co. v. Harrlett, 80 Tex. 73, 155 S. W. 556; Bradshaw v. Davis, 12 Tex. 336; Jennings v. Ft. Worth, 7 Tex. Civ. App. 329, 26 S. W. 927; Clark v. Ring, 13 U. C. Q. B. 185; Thomas v. Mallory, 6 U. C. Q. B. 521.

[5] Spann v. Baltzell, 1 Flo. 301, 46 Am. Dec. 346.

[6] Ellis v. Betzer, 2 Ohio, 89, 15 Am. Dec. 534.

the new agreement,[7] and a failure to keep or perform the new agreement does not remit the credit to his original cause of action.[8]

Such a transaction amounts to a novation, both at common law and by the civil law. Pothier says "to render a valid novation it is necessary that the act should contain something different from the former obligation." [9] The new agreement may be to pay money where property was before due,[10] and vice versa; or, to perform services, or to render satisfaction in any thing, or in any manner consistent with the legal requirements as to a possibility of a benefit to the creditor. Thus, the unconditional agreement of an indorser to pay a note at maturity out of his own funds, changes his contingent liability to an absolute liability, and furnishes the consideration to uphold an agreement on the part of the holder of the note to accept a less sum, or bills of a particular bank in satisfaction.[11] So, the giving of the individual note of one partner for a less sum than the partnership debt,[12] or merging an unsecured debt into a secured debt for a smaller amount,[13] furnishes a consideration sufficient to uphold the creditor's agreement to accept the contract to pay the less sum in satisfaction of the original demand. The same rules apply to the acceptance of agreements substituted

[7] Palmer v. Yager, 20 Wis. 90; Babcock v. Hawkins, 23 Vt. 561; Gulf R. Co. v. Harriett, 80 Tex. 73, 15 S. W. 556; Sard v. Rhodes, 1 M. & W. 153; Apthorp v. Shepard, Quincy (Mass.) 1 Am. Dec. 6; Billings v. Vanderbeck, 23 Barb. 546; Merry v. Allen, 39 Iowa, 235; White v. Gray, 58 Me. 579.

[8] Morehouse v. Bank, 98 N. Y. 504, 3 Nat. Bk. Cas. 631; Palmer v. Yager, 20 Wis. 91; Woodward v. Miles, 24 N. H. 289; Ranlett v. Moore, 21 N. H. 336; Cartwright v. Crooke, 3 B. & Ad. 701; Goodrich v. Stanley, 24 Conn. 613; Whitney v. Cook, 53 Miss. 551; Gulf R. Co. v. Harriett, 80 Tex. 73, 15 S. W. 556. See Frost v. Johnson, 8 Ohio, 393.

[9] Pothier's Ob. 560.

[10] Palmer v. Yager, 20 Wis. 91.

[11] Spann v. Baltzell, 1 Flo. 301, 46 Am. Dec. 346.

[12] Watts v. Robinson, 32 U. C. Q. B. 332. See *ante*, Sec. 39.

[13] In re Black Diamond Copper Min. Co., 95 Pac. (Ariz.) 117.

in place of demands arising out of torts and other unliquidated demands.[14] The agreement to accept the new or substituted contract as satisfaction of the old demand may be shown either by an express agreement,[15] or in some jurisdictions, if not in all, by implication,[16] to be deduced from the circumstances of the case.[17] In any case the intent to receive the new contract as satisfaction must be clearly and satisfactorily established,[18] as it is not the acceptance alone (for it may be taken merely as collateral) but the intent to receive the new or substituted agreement as satisfaction, that operates as satisfaction of the original demand.[19] Whether the new or substituted agreement was accepted as satisfaction is a question for the jury,[20] unless there is an express agreement, clear and unambiguous, admitting of but one construction.

Sec. 75. The consideration necessary to support a compromise of unliquidated and disputed demands and of a composition.—An accord and satisfaction arising out of a compromise and settlement of an unliquidated and disputed demand, and the consideration necessary to its validity, as well as the consideration necessary to support a composition with creditors, will be treated of in subsequent portions of this work, under the titles "Compromise" and "Composition with Creditors."

[14] Ellis v. Betzer, 2 Ohio, 89, 15 Am. Dec. 534; Holcomb v. Stimpson, 8 Vt. 141.

[15] Brunswick v. Clem, 80 Ga. 534, 7 S. E. 84; Palmer v. Yager, 20 Wis. 91.

[16] Morehouse v. Bank, 98 N. Y. 504, 3 Nat. Bk. Cas. 631.

[17] Hall v. Smith, 15 Iowa, 584; Hart v. Bollers, 16 S. & R. 162, 16 Am. Dec. 536.

[18] Eastman v. Porter, 14 Wis. 39; Curtis v. Brown, 63 Mo. App. 431; Gulf R. Co. v. Gordon, 70 Tex. 80, 7 S. W. 695; Overton v. Conner, 50 Tex. 113.

[19] Hart v. Bollers, 15 Serg. & R. 162, 16 Am. Dec. 536; White v. Gray, 68 Me. 579; Simmons v. Clark, 56 Ill. 96; Goodrich v. Stanley, 24 Conn. 613; Frick v. Joseph, 2 N. Mex. 138; Curtice v. Brown, 63 Mo. App. 431; Briscoe v. Callahan, 77 Mo. 134; Yazoo R. Co. v. Fulton, 71 Miss. 385, 14 So. 271; Whitney v. Cook, 53 Miss. 551; St. Louis R. Co. v. Davis, 35 Kan. 464, 11 Pac. 421; Brunswick R. Co. v. Clem, 80 Ga. 534, 7 S. E. 84.

[20] Hart v. Bollers, 16 S. & R. 162, 16 Am. Dec. 536.

BOOK TWO

COMPROMISE

Sec. 76. Definition.

Sec. 77. A compromise a new agreement—Must be executed—Accepting an executory contract—Mutuality of remedies.

Sec. 78. Distinguished from payment—Settlement—Account stated—Accord and satisfaction.

Sec. 79. Requisites—In general—Parties—Subject matter must be uncertain.

Sec. 80. Mutuality—Offer and acceptance—Effect of unaccepted offer—Payment under protest—Acceptance of amount allowed by county, town, municipality—Withdrawal of offer.

Sec. 81. Mutuality continued—Acceptance of tender—Excluding items from an account—Acceptance of amount allowed by county, town, municipality—Part disallowed by board—Payment of costs to secure a discontinuance—Withdrawal of offer—Agreement upon a settlement how construed.

Sec. 82. Consideration—In general.

Sec. 83. Same subject—Unliquidated demand.

Sec. 84. Same subject—What are unliquidated demands.

Sec. 85. Same subject—Disputed claims—Dispute must be *bona fide*.

Sec. 86. Same subject—Doubtful claims—Must not be legally groundless.

Sec. 87. Same subject—Claim of set-off—Counter-claim.

Sec. 88. Compromise of action—Consideration—Payment of costs—Compromise after an arrest—After attachment.

Sec. 89. Compromise of actions, how taken advantage of, and how enforced.

Sec. 90. Family settlements.

Sec. 91. Form of agreement—Certainty—Oral and written compromises.

Sec. 92. Effect of a compromise—Bars an action on original demand—Extinguishes defense—Set-off and counter-claim—Bars claim for damages.

Sec. 93. Same subject—Other claims not discharged—Compromise after judgment embraces what—Installments—Splitting demand—Parties and privies concluded.

Sec. 94. Performance—Repudiation—Breach—Rights of the parties.

Sec. 95. Time of performance—Condition as to time waived when—Effect of acceptance after default.

Sec. 96. Default after part payment—Payment *pro tanto*—Stipulation for recovery of residue—When a stipulation for the payment of an additional sum on default is a stipulation for a penalty.
Sec. 97. Specific performance.
Sec. 98. Necessity for a tender before suit for specific performance—Contrary rule—A tender is necessary to bar right to specific performance.
Sec. 99. Offer of compromise inadmissible in evidence.
Sec. 100. Same subject.
Sec. 101. Same subject.
Sec. 102. Admission of independent facts as evidence.
Sec. 103. Admission by whom made—Partner—Joint obligor—Joint and several obligor—Joint tort feasor.
Sec. 104. Admissions by infants—Guardians and personal representatives.
Sec. 105. Admissions by agents or attorneys—By attorney after action brought.
Sec. 106. Pleading—Accord and satisfaction, and a compromise must be pleaded—Kind of plea—Effect.
Sec. 107. Allegations necessary.
Sec. 108. Same subject.
Sec. 109. When pleaded—Practice.
Sec. 110. Joining issue—Demurrer—Motions—Amendments.
Sec. 111. Reply to avoid the agreement—Pleading a tender.
Sec. 112. Pleading a release.
Sec. 113. Same subject—Reply.
Sec. 114. Evidence—Burden of proof—Weight.
Sec. 115. Same subject—Admissibility.
Sec. 116. Same subject—Implied agreement—When question is for the court or jury.
Sec. 117. Rescission—Election of remedies on discovery of ground for rescission—Mode—Measure of damages.
Sec. 118. Ratification—Laches—Time when rescission should be made.
Sec. 119. Tender required upon a rescission—Exceptions.
Sec. 120. Same subject—Before suit to rescind.
Sec. 121. Same subject—Where a party is entitled to retain what he received—When judgment will give a defendant all he is entitled to—Tender of release—Promissory note.
Sec. 122. Manner of making a tender—Actual offer—Ability—Actual production—Waiver of formalities—Notice of intention to rescind—Unconditional tender.
Sec. 123. Tender by whom made—To whom—Amount.
Sec. 124. Place of making a tender.
Sec. 125. Rescission by agreement—Agreement implied—Abandonment by one party.

Sec. 126. Rescission upon the ground of mistake of law.
Sec. 127. Same subject.
Sec. 128. Same subject.
Sec. 129. Same subject—Mistake as to existing legal rights.
Sec. 130. Rescission on the ground of mistake of fact—Mistake of fact defined.
Sec. 131. Same subject—Requisite to relief—Materiality of fact—Negligence.
Sec. 132. Same subject—Mutual mistake.
Sec. 133. Rescission upon the ground of fraud—Definition of fraud.
Sec. 134. Same subject—Fraud in general—Actual fraud.
Sec. 135. Same subject—Misrepresentation of the law—Of matter of opinion—Future events.
Sec. 136. Same subject—Misrepresentation by debtor as to his finances—Setting up sham claim.
Sec. 137. Same subject—Compromises effected by physicians.
Sec. 138. Same subject—Concealment and suppression of facts.
Sec. 139. No rescission for fraud after the fraud is compromised.
Sec. 140. Rescission for fraud, etc.—Evidence in general—Burden of proof.
Sec. 141. Rescission on the ground of surprise.
Sec. 142. Rescission upon the ground of duress—Duress in general.
Sec. 143. Same subject—Effect of performance of contract on right to rescind—Right affected by time—Manner of rescission—Pleading—By whom rescinded—Duress to stranger—Defense by surety—Duress of master, of servant.
Sec. 144. Same subject—Duress by whom exercised—Stranger—Rule by the civil law—At common law—Burden of showing want of knowledge of duress or fraud shifts when.
Sec. 145. Same subject—Duress of imprisonment—Lawful and unlawful arrest—In settlement of just claim.
Sec. 146. Same subject—Duress of goods—Personal and real property—Refusal to pay a debt.
Sec. 147. Same subject—Duress *per minas*—Threats of lawful and unlawful arrest—Of battery—Of injury to father or son—Duress a question of fact when.
Sec. 148. Same subject—Threats to enforce demand by legal means—Good faith of claimant—Unfounded claim.
Sec. 149. Same subject—Undue influence.
Sec. 150. Same subject—On the ground of infancy.
Sec. 151. Same subject—On the ground of insanity—Mental and physical weakness.
Sec. 152. Same subject—Persons *in vinculis*.
Sec. 153. Same subject—For illegality—Compounding a felony—Parties *in pari delicto*—Relief in equity, at law—Unequal guilt.

Sec. 154. Same subject—Gaming contract—Immoral consideration—Compromise when liability is both civil and criminal—Contracts violating the statute—By municipalities—In violation of revenue laws—Sunday contracts—Usury.
Sec. 155. Rescission for want of consideration—Failure—Inadequacy.
Sec. 156. Avoidance of compromise by a creditor.

Sec. 76. Definition.—A compromise is an agreement whereby two or more parties, upon a sufficient consideration,[1] settle a *bona fide* controversy concerning a subject of pecuniary value, with regard to which their rights, or the claims respectively set up by them, or by one of them and denied by the other, may be said to have rested in some degree of doubt or uncertainty.[2] It is variously defined in the books to be "a settlement of differences by mutual concessions." [3]

[1] Mr. Parsons, in his valuable work on contract, does not include the consideration in his definition of contract, as he does not consider it as, of itself, an essential part thereof. He bases his idea, in part at least, upon the innovation made by the Statute of Frauds which requires, in certain cases, that the agreement shall be in writing, and some note or memorandum thereof be signed by the party sought to be charged, and, that it is controverted, whether the word "agreement" so far implies a "consideration" that it also must be in writing. He does, however, treat of the "consideration" as one of the essential elements of a legal contract. Inasmuch as only legal contracts are enforceable we see no reason for making a definition so general, that it will cover all sorts of mutual agreements and leave the reader, by the mental process of supplying all the legal essentials necessary to an enforceable contract, to weed out mere mutual engagements not involving any pecuniary benefit or detriment. His definition, "A contract, in legal contemplation, is an agreement between two or more parties, for the doing or the not doing of some particular thing" (based upon the definition of Marshall, C. J., in Sturges v. Crowinshield, 4 Wheat. 197) seems to us, leaves the lawyer when reading it, to supply the essentials. The definition, "A contract is an agreement, upon sufficient consideration, to do or not to do a particular thing" (2 Bl. Com. 446), is more to our liking.

[2] See Zimmer v. Becker, 66 Wis. 527. In order to constitute a valid compromise there must be conflicting claims: Baker v. Ring, 97 Wis. 53, 72 N. W. 222; Chesire v. Des Moines, 133 N. W. (Ia.) 324; Greenlee v. Mosnat, 116 Iowa, 535, 90 N. W. 338.

[3] Cent. Dict.; Continental Bank v. McGeoch, 92 Wis. 286, 66 N. W. 606. The term compromise "implies either a mutual submission of matter in dispute to arbitrators or judges chosen by the parties, or an adjustment of such

"A mutual yielding of opposing claims; the surrender of some right or claim of right in consideration of a like surrender of some counter-claim." [4] "An agreement between two or more persons, who, to avoid a lawsuit, amicably settle their differences, on such terms as they can agree upon." [5] The term compromise agreement so often found in the books is applied to a new executory agreement accepted upon a compromise in satisfaction of the original debt or cause of action, and care should be taken not to confound it with a compromise.

Sec. 77. A compromise a new agreement—Must be executed—Accepting an executory contract—Mutuality of remedies.—A compromise is a new agreement substituted in place of a cause of action founded either upon a contract or a tort.[1] Like an accord it must be executed in order to be binding.[2] There is considerable confusion and obscurity regarding this doctrine with respect to a compromise; due, no doubt, to the frequency with which such a settlement results in an executory agreement being accepted in lieu of the original demand; and, by overlooking one of the successive steps taken to effect a set-

matters in dispute by the parties, by mutual concession." 1 Bouv. Law Dic.; 1 Burrills' Law Dic., Title Compromise. Chilton v. Willford, 2 Wis. 1.

[4] Anderson's Law Dict.; Continental Bank v. McGeoch, *ante;* Rankin v. Schofield, 70 Ark. 83, 66 S. W. 197.

[5] Bouv. L. Dict.; Collins v. Welch, 58 Iowa, 72, 12 N. W. 121, 43 Am. Rep. 111.

[1] It is a species of novation: Wadsworth v. Board, 115 N. Y. Supp. 8.

[2] Bradley v. Palen, 78 Iowa, 126, 42 N. W. 623; Ogilvie v. Hallam, 58 Iowa, 714, 12 N. W. 730. In Trenton St. R. Co. v. Lawlor, 71 Atl. (N. J.) 234, an unexecuted compromise was held no defence at law, but that it may, in a proper case, become available as an equitable defence. In Carpenter v. Chicago, etc., R. Co., 64 N. W. (S. D.) 1120, plaintiff verbally accepted an offer of a certain sum in settlement of damages for killing a cow, but next day countermanded the acceptance. Being an accord executory he could repudiate it at any time before actual acceptance of the consideration. See Kinney v. American Yoeman, 15 N. D. 21, 106 N. W. 44, where it is held that if the amount paid is not the amount agreed upon, the plaintiff may disregard the accord and either return the payment and sue for the amount of the original claim or treat the sum received as partial payment and sue for the balance.

tlement of this kind. But the application of the elementary principles of the law of contracts to the transaction will relieve the obscurity. The mere verbal or written acceptance of an offer to pay a less sum in satisfaction of an unliquidated, doubtful or disputed claim, does not constitute a binding agreement. It is at most but an unexecuted accord, which requires performance to make it binding;[3] for, it is the performance by payment of the less sum that is to constitute the satisfaction. Such a transaction is not the statement or liquidation of an unliquidated demand by a settlement and compromise, but a mere proposition or offer to pay the sum named in settlement and satisfaction of the claim, and a mere assent on the part of the creditor that, when paid, it will be accepted in satisfaction of the claim.[4] The rule that the agreement is not binding until performed is founded upon the well established principle that a promise to pay all or a part of a demand which one is already under legal obligation to pay is without consideration. The agreement, when executed, is binding, for the reason that it is the mutual intent of the parties that the payment or performance shall satisfy the demand; and the fact that the claim is unliquidated, doubtful, or disputed, and is thereby settled and compromised, furnishes the additional consideration necessary to support the executed agreement.

Where parties get together and mutually determine and fix the amount due upon an unliquidated, doubtful, or disputed demand, and the debtor thereupon enters into an agreement to pay the amount so liquidated, and the creditor accepts such new agreement in satisfaction of the old demand, the new agreement constitutes a valid contract[5] and takes away the remedy upon the original demand whether

[3] Carpenter v. Chicago, M. & St. P. Ry. Co., 64 N. W. (S. D.) 1120; Cannon River Co. v. Rogers, 46 Minn. 376, 49 N. W. 128; Bryce v. Berger, 9 N. W. (Neb.) 545; Hart v. Accident Ass'n, 105 Iowa, 717, 75 N. W. 508.

[4] A compromise, to be valid, must bind both parties: Barker v. Ring, 97 Wis. 53, 72 N. W. 222.

[5] Massillion v. Prouty, 65 Neb. 496, 91 N. W. 394; Strobridge v. Randall, 78 Mich. 195, 44 N. W. 134; Russell v. Lambert, 94 Pac. (Idaho) 54; Neibles v. Railway Co., 37 Minn. 151, 33 N. W. 332; Cunningham v. Patrick, 136 Mo. 621, 37 S. W. 817.

the new contract be performed or not.[6] If not performed the creditor's remedy is upon this contract to recover the amount agreed to be paid.[7] In this case the compromise is carried out by the making of an entire new executory contract and substituting it in place of the original demand. This executory agreement, substituted in place of the original demand in carrying out the terms of the compromise, is referred to in the books as a compromise agreement, which is the cause of much of the confusion and obscurity in relation to the rule requiring a compromise, or accord, to be executed in order to be binding. The settlement and compromise of an unliquidated, doubtful or disputed claim is a sufficient consideration to support the mutual promises of the parties to the new agreement.[8]

There must be mutuality of remedies, so that an action may be maintained by either party to enforce the contract.[9]

Sec. 78. Distinguished from payment—Settlement—Account stated—Accord and satisfaction.—Payment is the delivery and acceptance of money or an agreed equivalent in satisfaction of a debt or other demand. The term implies, besides the delivery and acceptance in satisfaction, a delivery of full value; that is a dollar for each dollar due. This is so whether it is made upon a liquidated or unliquidated demand. If less is delivered than the whole demand it

[6] It has been held that a payment of a smaller sum, with an agreement to abandon the defence and pay the costs, may be pleaded in satisfaction of a larger sum, whether liquidated or unliquidated. Cooper v. Parker, 15 C. B. 822, 3 C. L. R. 823, 1 Jur. N. S. 281, 24 L. J., C. P. 68.

[7] Hanley v. Noyes, 35 Minn. 174, 28 N. W. 189; Palmer v. Yager, 20 Wis. 90; Neibles v. Railway Co., 37 Minn. 151, 33 N. W. 332; Hill-Ingham Co. v. Neal, 117 S. W. (Ark.) 247; Illinois Ins. Co. v. Archdeacon, 82 Ill. 239; Strobridge v. Randall, 78 Mich. 195, 44 N. W. 134.

[8] Wahl v. Barnum, 116 N. Y. 87; Dunham v. Griswold, 100 N. Y. 224; Craus v. Hunter, 28 N. Y. 389; Stewart v. Ahrenfeldt, 4 Denio, 189; Richardson v. Independent District, 31 N. W. (Ia.) 871; Baumier v. Antian, 31 N. W. (Mich.) 888.

[9] Luce v. Springfield Ins. Co., 1 Flipp. (U. S.) 281, 15 Fed. Cas. No. 8,589, 5 Chic. Leg. N. 303, 2 Ins. L. J. 443, 19 Myers Fed. Dec. 636.

amounts to a payment *pro tanto.* A compromise is a method of satisfying an unliquidated, doubtful or disputed demand. It is distinguishable from payment, in that it involves the liquidation of the demand by mutual concessions and the making of an agreement whereby the liquidated sum or other thing of value agreed upon, is received in satisfaction of the demand. The word "settle" has an established legal meaning, and implies the mutual adjustment of an account or accounts between different parties and an agreement upon the balance.[1] Besides adjusting differences, it also means to close up, tc pay.[2] A promise to settle a liquidated demand is a promise that it will be paid.[3] The same promise with respect to an unliquidated demand is a promise not only to come to an agreement liquidating the demand but to close it up by payment.[4] When a debt or other demand is said to be settled, it is, in the ordinary understanding of language, an assertion that the demand is paid or discharged.[5] The term "settlement" designates the act or process of adjusting or determining; or composure of doubts or differences; pacification or liquidation of accounts, as the settlement of a controversy, of a debt, and the like.[6] It is a generic term and comprehends compromise as well as those cases where there is no dispute or controversy, as where the parties account together and strike a balance.[7] The result arrived at in this case, however, is not a compromise, but an account stated, an *insimul computassent,* and is not a contract founded upon a new consideration, but merely an agreement or acknowledgment that the balance arrived at is due. "The law implies that he against whom the balance appears has engaged to pay it to the other." [8] And on this

[1] Baxter v. State, 9 Wis. 39; Kronenberger v. Bing, 56 Mo. 121.

[2] Gandolfo v. Appleton, 40 N. Y. 533.

[3] Stillwell v. Cope, 4 Denio, 225.

[4] City of Longview v. Capps, 123 S. W. (Tex. Civ. App.) 160.

[5] Gandolfo v. Appleton, 40 N. Y. 533.

[6] Webster's Dic.

[7] Continental Ins. Co. v. Bank, 92 Wis. 286.

[8] 3 Bl. Com. 164.

implied promise an action may be brought. As distinguished from a mere admission or acknowledgment, it is a new cause of action.[9] It does not, however, create an estoppel concluding the parties, but establishes *prima facie* the accuracy of the items of the account and the amount due without further proof. It can be impeached only by alleging and proving mistake, error or fraud.[10] The admission, to constitute an account stated, must be of an indebtedness upon a past transaction between the parties, upon which an action on account would have been the appropriate remedy.[11] There must be a subsisting debt.[12] Unliquidated damages cannot be the basis of an account stated.[13] To determine whether a transaction is an account stated, or a compromise, or an accord and satisfaction, the facts upon which the promise is made must be examined.[14] Where upon an accounting together $1,125 appeared to be due, and the debtor gave his $1,000 note in settlement which was afterwards paid; there being no dispute or controversy, the transaction was held an account stated and not an accord and satisfaction.[15]

It is sometimes difficult to determine whether a particular settlement is an account stated or a compromise, and the question generally, is not free from doubt and uncertainty. For instance, which happens more often than otherwise, if two persons by an accounting arrive at a balance by rejecting certain disputed items, allowing other

[9] McKinster v. Hitchcock, 19 Neb. 100, 26 N. W. 705; Wagner v. Ladd, 56 N. W. (Neb.) 891.

[10] Leaycroft v. Dempsey, 15 Wend. 83; Wharton v. Anderson, 28 Minn. 301; Kirkpatrick v. Tipton, 114 N. W. (Ia.) 887; Tank v. Rohweder, 98 Iowa, 154, 67 N. W. 106; McKinster v. Hitchcock, 26 N. W. (Neb.) 705. A defendant without alleging fraud or mistake may defeat a recovery upon an account stated by showing the contract was usurious: Jorgensen v. Kingsley, 82 N. W. (Neb.) 104.

[11] See Mitchell v. Allen, 38 Conn. 188.

[12] Lubbock v. Tribe, 3 M. & W. 607; Tucker v. Barrow, 7 B. & Cr. 624.

[13] Vanbebber v. Plunkett, 26 Or. 562, 27 L. R. A. 811, 36 Pac. 707.

[14] Lubbock v. Tribe, 3 M. & W. 607.

[15] Stevens v. Barnes, 75 Hun (N. Y.) 388, 26 N. Y. Supp. 461.

items in part, making concessions on account of damaged goods or on account of inferior quality and the like, it cannot be denied but that the whole transaction partakes of the nature of a compromise. But we believe that, in those cases when the transaction is properly a subject for an accounting, the striking of a balance, although unliquidated and disputed items in the account are disposed of by way of compromise, constitutes an account stated, if the parties go no further than merely state the balance. But, where parties by way of settlement and compromise, liquidate and state at an agreed sum, an unliquidated and disputed claim which one asserts against the other, it constitutes a new binding contract.[16] Such settlements are sometimes referred as accounts stated,[17] but we think this is a confusion of terms, for in such cases the balance arrived at is the result of a compromise; and a new contract is substituted in place of the old demand. In the cases examined by us the new agreement was held to be supported by the consideration arising out of the liquidation and settlement of an unliquidated or disputed claim.

An accord and satisfaction does not necessarily include an element of compromise.[18] A settlement of a liquidated and undisputed demand by the substitution of a new agreement whereby a less sum with surety, or something different, was accepted in satisfaction, is an accord and satisfaction and not a compromise. But the settlement of an unliquidated demand for a less sum than was originally claimed by the creditor is both an accord and satisfaction and a compromise.

[16] Heffelfinger v. Hummel, 54 N. W. (Ia.) 872; Schoben v. Brunning, 36 N. W. (Ia.) 910; Hanley v. Noyes, 35 Minn. 174; Dunham v. Griswold, 100 N. Y. 224. Where a loss has been adjusted between an insurer and the insured, an action may be maintained to recover the balance struck, without bringing suit upon the policy: Illinois Ins. Co. v. Archdeacon, 82 Ill. 239.

[17] See Hanley v. Noyes, 35 Minn. 174, which was a compromise of a claim of $1,500 for extra work and material in constructing a house. In Dunham v. Griswold, 100 N. Y. 224, the demand settled was for the conversion of proceeds of certain securities.

[18] Goodrich v. Sanderson, 35 N. Y. App. Div. 546, 55 N. Y. Supp. 881. Accord distinguished from compromise, see Flegal v. Hoover, 156 Pa. St. 276.

Sec. 79. Requisites—In general—Parties—Subject matter must be uncertain.—Like other contracts an agreement of compromise must have the four essentials necessary to make a contract legal and binding. There must be the necessary parties; the consideration; the assent of the parties and the subject matter. With respect to a compromise, some of these, by reason of the previous situation of the parties with respect to their rights, have characteristics essentially their own. Parties between whom a controversy exists as to some matter of pecuniary interest to themselves may always settle and adjust their differences without the aid of the courts. Any man who is not a lunatic is considered competent to agree to a compromise of litigation in which he is engaged.[1] As a general rule all parties liable should join in a compromise agreement.[2] The authority of different persons acting for themselves or in a representative capacity, to effect a compromise, is no greater or less than that exercised in effecting an accord and satisfaction, and to avoid repetition the reader is referred to the sections under accord and satisfaction, treating of parties.[3]

The subject matter of contracts in general, is defined as "something which is to be done or which is to be omitted."[4] It is usually something newly proposed as a subject of agreement between the parties. The subject matter of an accord and satisfaction, or compromise, however, is always a pre-existing claim or demand. It may or may not have its foundation on a previous agreement but may rest solely on a tortious invasion of the rights of one of the parties for which the law gives compensation. The subject matter of a compromise, besides being a pre-existing claim or demand, must have another characteristic, of a somewhat dual nature, before an agreement relating thereto will constitute a valid compromise. That is, there must be a *bona fide* controversy, founded upon a reasonable doubt or uncertainty con-

[1] Mamby v. Bewicke, 3 Kay & J. 342.

[2] Clark v. Brown, 22 How. (U. S.) 270, 16 L. Ed. 337.

[3] Secs. 38–53.

[4] 1 Parson on Cont. 490.

cerning the relative rights of the parties relating to the subject matter; or there must be some uncertainty as to the amount of the liability. A compromise to be binding must be in settlement of something uncertain; for if the debt be certain and undisputed, a payment of part will not of itself, discharge the residue of the debt.[5] The uncertainty or doubt giving rise to a dispute may arise in regard to the facts, or the law, or the law and facts together. For a discussion of the subject matter relating to simple contracts and contracts under seal, the reader is referred to the sections upon that subject under accord and satisfaction.[6]

Sec. 80. Mutuality—Offer and acceptance—Effect of unaccepted offer—Payment under protest.—There must be present, the assent of the parties to the same thing and in the same sense—a meeting of the minds; a mutuality of agreement.[1] This means that there must be an actual offer of compromise, as distinguished from a mere offer to pay the demand [2] or so much thereof as the debtor concedes to be due;[3] and an actual acceptance of the offer as made.[4] There is no accord and satisfaction or compromise in those cases of disputed accounts, where the debtor, under protest, pays the amount demanded in order to get possession of property which the creditor threatens to sell if the amount is not paid, as the payment

[5] Bouv. L. Dict. Where there is no controversy of any kind a contract to pay a certain sum lacks the necessary element vital to an accord and satisfaction and does not preclude a recovery of any further sum that may be due: Hicks v. Wisconsin Cent. R. Co., 120 N. W. (Wis.) 512.

[6] Sec. 23 et seq.

[1] Southern Oil Co. v. Wilson, 22 Tex. Civ. App. 534, 56 S. W. 429; Matheney v. Eldorado, 82 Kan. 720, 109 Pac. 166.

[2] In Terry v. Taylor, 33 Mo. 323, it was held that an offer to pay the debt in property or to give a new note is not an offer of compromise.

[3] A payment of the amount conceded to be due and telling the party he can sue for the balance is not an accord and satisfaction: Jacoby v. Black, 119 N. Y. Supp. 1667.

[4] Walker v. Freeman, 94 Ill. App. 357; King v. Phillips, 94 N. C. 555; Hall v. Baker, 74 Wis. 118, 42 N. W. 104.

is made under duress of goods.[5] And the debtor may recover the amount overpaid, or damages for the wrongful sale of other property the proceeds of which were credited upon the account.

A proposition by way of compromise does not bind the party making it unless accepted.[6] Unaccepted, it operates neither as a satisfaction nor as an estoppel,[7] and leaves the rights of the parties precisely as they were before.[8] An offer by a plaintiff to accept a certain sum in settlement and compromise does not preclude him from recovering a greater sum.[9] Nor will such an offer to pay a certain sum estop the defendant from setting up any defence he may have to the claim.[10] An offer of twenty-five dollars in settlement of a demand will not take a case out of the Statute of Limitation.[11] So, it has been held that an offer to purchase land by one

[5] Stenton v. Jerome, 54 N. Y. 480; Harmony v. Bingham, 12 N. Y. 117, 62 Am. Dec. 142. Payment because of threats to file a mechanic's lien, when made without relinquishing his claim is not an accord and satisfaction: Mikolajewski v. Pugell, 114 N. Y. Supp. 1084.

[6] Winkler v. Patten, 57 Wis. 405, 15 N. W. 380; Tenney v. State, 27 Wis. 387; Clark v. Pope, 29 Fla. 238, 10 So. 586; Union Co. v. Erie R. Co., 37 N. J. L. 23; Daniel v. Wilkinson, 35 N. C. 329; Spence v. Spence, 4 Watts (Pa.) 165; Hoyt v. Cote, 67 Vt. 559, 32 Atl. 488; Collingham v. Sloper, 3 Ch. 716, 64 L. J. Ch. 149, 71 L. T. Rep. N. S. 456, 12 Rep. 87; Williams v. Price, 5 Munf. (Va.) 507; Armstrong v. O'Brien, 83 Tex. 635, 19 S. W. 268.

[7] Winkler v. Patten, 57 Wis. 405, 15 N. W. 380; Tenney v. State, 27 Wis. 387.

[8] Ward v. Munson, 105 Mich. 647, 63 N. W. 498; Jackson v. Clopton, 66 Ala. 29; Hedrick v. Wagoner, 53 N. C. 360; Poteat v. Badget, 20 N. C. 349; McCallion v. Saving Society, 70 Cal. 163, 12 Pac. 114.

[9] Brush v. Railway Co., 43 Iowa, 554; Perkins v. Hasbronck, 155 Pa. St. 494, 26 Atl. 695.

[10] Read v. McLemore, 34 Miss. 110; Cook v. Insurance Co., 70 Mo. 610, 35 Am. Rep. 438.

[11] Laurence v. Hopkins, 13 Johns. 288. A statement by a defendant that if plaintiff had a claim, either at law or in equity, he would submit it to a reference, or he would compromise it; but that, in his opinion the plaintiff had no claim at law or in equity, does not take the claim out of the Statute of Limitations: Sands v. Gelston, 15 Johns. 511. See also, Allen v. Webster, 15 Wend. 284. In Murray v. Coster, 20 Johns. 576, a distinct admission in the

after he has acquired the title by adverse possession is inadmissible as affecting his title.[12] A formal acceptance of an offer of compromise is not necessary. The acceptance may be by word of mouth, or in writing, as by a letter.[13] Such an offer and acceptance, however, must, when made, conclude a binding executory contract between the parties, otherwise it will amount to no more than an accord executory. Acceptance of the terms of the offer may be implied from the acts of the creditor in accepting and retaining without objection that which was offered on condition of it being accepted as a compromise.[14]

answer of the existence of the claim, together with an offer of payment of a certain amount, after six years, although the offer was accompanied with the statement that if it was not accepted he would rely upon the Statute of Limitation, was held to defeat the operation of the Statute. The court laid stress upon the fact that the defendant in making the offer did not deny the debt, or deny the justice of the debt, or claim it had been paid, but merely asserted that if the offer was unaccepted he would rely upon the Statute. The answer accompanying the plea recited the whole transaction and in so doing admitted the debt. Whether the offer of compromise, made with the reservation, standing alone, would have been held to defeat the Statute is matter for conjecture. In Reeves v. Hearn, 1 M. & W. 323, it was held that an agreement for an accord does not extinguish the original debt and the Statute of Limitations may be pleaded to the debt.

12 Smith v. Morrow, 5 Litt. 217.

13 Cunningham v. Patrick, 136 Mo. 621, 37 S. W. 817.

14 In Donohue v. Woodbury, 6 Cash. 148, 52 Am. Dec. 777, it was held that the acceptance of a tender is an assent *de facto*, and binding though through inattention the terms of the tender were not heard, if by ordinary care they might have been heard. Nassoiy v. Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695; Fuller v. Kemp, 138 N. Y. 321, 33 N. E. 1034, 20 L. R. A. 785; Hutchinson v. Wallace, 7 Kan. App. 612, 52 Pac. 458; Critchell v. Loftis, 100 Ill. App. 196; Petit v. Woodlief, 115 N. C. 120, 20 S. E. 208; Washington v. Johnson, 123 Pa. St. 576, 16 Atl. 799, 10 Am. St. Rep. 553. Where upon a statement being objected to as too large, a new one for a less sum is presented, paid and receipted, a settlement by way of compromise is sufficiently shown: Union Pac. R. Co. v. Anderson, 11 Colo. 293, 18 Pac. 24. See Sec. 15, Accord and Satisfaction.

Sec. 81. Mutuality continued—Acceptance of tender—Excluding items from an account—Acceptance of amount allowed by county, town, municipality—Part disallowed by board—Payment of costs to secure a discontinuance—Withdrawal of offer—Agreement a settlement how construed.—Where a tender is made of a certain sum in settlement of an unliquidated, doubtful or disputed claim, it must be accepted as made. The creditor cannot against the protests of the debtor prescribe the terms of acceptance, and no protest or declaration that it will be received as part payment only, will prevent the transaction from operating as a binding agreement, if the debtor persists in adhering to his conditions.[1] Where disputed items are merely excluded from an account and the balance paid, the settlement is of the remaining portion not questioned, and the creditor may bring his action for the balance or counter-claim it.[2] Thus, it has been held that, where, upon a settlement of mutual accounts, certain items are canvassed and disallowed without any concession by the other party, and the amount or balance due, after rejecting such items, is paid, the settlement did not amount to an accord and satisfaction or compromise.[3] So, where certain items in a demand against a county, town, or municipality are disallowed, the acceptance of the balance of the demand about which there is no dispute does not preclude the debtor from maintaining an action for the amount of the items disallowed.[4] But if the proper board, instead of striking out certain items, allows a certain percent of the whole demand, or what is the same thing allows the claim at a reduced amount, they thereby say to the claimant, in effect, that his claim as presented by him is unjust

[1] See Secs. 15, 16, Accord and Satisfaction.

[2] In Ingle v. Angell, 126 N. W. (Minn.) 400, it was held that an account stated may include such items as the parties may agree upon, leaving other items for future adjustment, and that in an action upon the account stated the excluded items may be off-set.

[3] Bright v. Coffman, 15 Ind. 371, 77 Am. Dec. 96.

[4] Wilson v. Palo Alto Co., 21 N. W. (Iowa) 175.

and disputed, but that they are willing to pay the amount allowed in settlement and compromise of it; and if, with knowledge of the action taken by the board, the claimant accepts without objection the amount allowed, he will be deemed to have accepted the terms of the compromise offered and will be concluded from maintaining an action for the part disallowed;[5] but, if, at the time of the acceptance of the amount, the claimant had no knowledge that a part of the claim had been disallowed he may bring an action to recover the residue.[6] An acceptance of the amount allowed in pursuance of the order, pending an appeal, is a waiver of the right to appeal.[7] If a party accepts from a county the proceeds of a compromise with the county board, he will not be allowed to prove that the meeting of the board was irregular.[8] So, if a party avails himself of a written contract made upon a compromise he will be bound although he fails to sign the contract.[9]

An offer of compromise should be definite, clearly indicating what the party will do; mere conversation reciting what the party might do in a certain contingency is not an offer of compromise.[10] The acceptance of a sum which a debtor claims is all that is due does not operate as a compromise in absence of an expressed condition that if accepted it must be in full settlement.[11] The payment of the

[5] Wapell Co. v. Simaman, 1 G. Greene, 413; Brick v. Plymouth Co., 19 N. W. 304; Bowman v. Ogden City, 93 Pac. (Utah) 561. An acceptance by a claimant of the State of a sum of money appropriated in payment of a demand, some portion of which was controverted and disallowed, is a bar to any further prosecution of the demand: Calkin v. The State, 13 Wis. 389; Sholes v. The State, 2 Chand. 197; Massing v. The State, 14 Wis. 502; Baxter v. The State, 9 Wis. 39; Paulson v. Ward Co., 137 N. W. (N. D.) 486.

[6] Fulton v. Monona County, 47 Iowa, 622; Board v. Durnell, 66 Pac. (Colo. App.) 1073.

[7] Pulling v. Columbia County, 3 Wis. 337.

[8] Green v. Lancaster Co., 61 Neb. 473, 85 N. W. 439.

[9] Bonner v. Beard, 43 La. Ann. 1036, 10 So. 373.

[10] See Carver v. Louthain, 38 Ind. 530.

[11] Western Union Co. v. Smith, 75 Ill. 496; Rockford R. Co. v. Rose, 72 Ill. 183; Tompkins v. Hill, 145 Mass. 379, 14 N. E. 177.

costs of an action, or any other sum to secure a discontinuance, in absence of an agreement that it shall be in full settlement of the cause of action, will not constitute a compromise and estop the plaintiff from bringing another action thereon.[12] An offer of compromise may be withdrawn at any time before acceptance and performance. If the offer is to accept an oral executory agreement in place of the original demand, performance would mean merely expressing such an assent to the offer as would constitute a binding agreement; after such assent, it is too late to revoke the offer. There need be no formal withdrawal of the offer in express terms, a refusal of a tender of performance amounts to a revocation of the offer. An offer is revoked by the commencement of an action upon the original demand.[13] Where a statute provides for the giving of a notice of acceptance within a specified time, upon a failure to give such notice the offer is deemed to be withdrawn.[14]

An agreement made upon a settlement in the nature of a compromise, is to be interpreted in one of two ways; either as absolutely substituted for the original debt, or as collateral to it; and if collateral, the debt continues until the promise has been performed. This must be determined from what was said and done. If a party to such an agreement surrenders his evidence of the original indebtedness or releases his security or satisfies a judgment, upon making the new agreement, it is very strong evidence that the new agreement is a compromise agreement and was accepted in satisfaction of the original demand.

12 Terrill v. Deavitt, 73 Vt. 188, 50 Atl. 801.

13 Peachy v. Witter, 131 Cal. 316, 63 Pac. 468.

14 Cal. Code Civ. Proc. Sec. 997; Scammon v. Denio, 72 Cal. 393, 14 Pac. 98.

Sec. 82. Consideration—In general.—A compromise, like an accord and satisfaction, must be supported by a sufficient consideration, or it will not be binding upon the parties.[1] As before observed a cause of action once vested cannot be discharged except by the payment or performance of something of legal value, and the mere fact that the demand is unliquidated, disputed or doubtful, and therefore a fit subject for a compromise and settlement, will not support an agreement to relinquish the demand without payment. There can be no accord and satisfaction or compromise of an unliquidated, disputed or doubtful claim unless something of legal value has been received in full payment thereof.[2]

It has been said that the thing of value must be something to which the creditor had no previous right,[3] but this should be taken to mean something of value to which the creditor had no certainty of right in whole or in part; for, in a compromise, the parties arrive at the amount to be paid by mutual concessions. It has been held that where a claim is unliqidated and disputed the fact that a debtor pays no more than he concedes to be due does not vitiate the compromise.[4] But here, the element of mutual concession is not entirely absent, for the sum conceded to be due is but the debtor's estimate of the amount due, made for the purpose of effecting a settlement, and it is not material whether he comes to the limit of his concession at once or arrives at it after successive offers of less sums.

[1] Boyce v. Berger, 11 Neb. 399, 9 N. W. 545; Jennings v. Jennings, 87 N. W. (Iowa) 726; Russell v. Cook, 3 Hill, 504; Bright v. Coffman, 15 Ind. 371, 77 Am. Dec. 96.

[2] Ness v. Minnesota Co., 87 Minn. 413.

[3] Ness v. Minnesota, *ante*.

[4] Treat v. Price, 47 Neb. 875, 66 N. W. 834; Garbutt L. Co. v. Wilcox, 64 S. E. (Ga. App.) 291; Bass v. Roberts, 61 S. E. (Ga. App.) 1134. A compromise with an insurance company is not without consideration because the amount of the loss was fixed at the full amount of the policy, if there was a dispute as to the liability or the amount due: Keck v. Hotel Ins. Co., 89 Iowa, 200, 56 N. W. 438.

If a demand be unliquidated, or disputed, or the right of action doubtful, the amount of the consideration accepted in satisfaction is not material.[5] And the courts, in absence of fraud, invariably refuse to inquire into the adequacy or inadequacy of the consideration.[6] In one case, the court observed—by what rule, or in what mode, is it to be determined, if we reject the judgment of the aggrieved party; is it to be presumed that any tribunal is more competent to determine the point, than the party damnified.[7] Mere inadequacy will not vitiate the agreement,[8] provided, the consideration be not so disproportionate to the demand as to amount to no consideration at all, thus rendering the contract void.[9] Nor will the fact that the consideration paid was exorbitant affect the agreement.[10]

A sufficient legal consideration required to uphold a compromise is not made up entirely of the thing of value passing between the parties, or the thing performed, or the rights sacrificed, but includes therewith as an inseparable element, the benefit to both parties derived from the settlement of the dispute,[11] and the avoidance of liti-

[5] Hinckle v. Minneapolis Ry. Co., 31 Minn. 434, 18 N. W. 275. Bull v. Bull, 43 Conn. 455.

[6] City of Longview v. Capps, 123 S. W. (Tex. Civ. App.) 160.

[7] Stockton v. Frey, 4 Gill, 406, 45 Am. Dec. 138.

[8] Schnell v. Nell, 17 Ind. 29, 79 Am. Dec. 453.

[9] Fifty dollars paid in satisfaction of damages, where the burns occasioned by the bursting of steam pipes were shown to be superficial and would probably heal in ten days without incurring any considerable expense for treatment, or occasioning any loss of time, was regarded as reasonably adequate: Kilmartin v. Chicago, etc., Ry. Co., 114 N. W. (Iowa) 522. In Copley v. Highland, 46 Minn. 205, 48 N. W. 777, it was held that an executed agreement under seal (reciting a nominal consideration of one dollar), whereby the plaintiff, to avoid a threatened contest of a will, conveyed to defendant one third of the estate acquired under the will, would not be set aside for want of consideration merely, but for fraud only.

[10] Ryan v. Halligan, 120 N. Y. Supp. 646.

[11] Demars v. Musser, 37 Minn. 418, 35 N. W. 1.

gation.[12] Something that cannot be estimated in dollars and cents but valuable to the parties nevertheless. A compromise whereby both parties yield some right or legal demand to avoid litigation is supported by a sufficient legal consideration.[13] The real consideration, however, is not the surrender of some right, but is the benefit derived from a settlement of the dispute.[14] The thing of actual value paid and the benefit derived from the settlement of the dispute are related considerations and both must be present to support a compromise.

Sec. 83. Same subject—Unliquidated demand.—The mere fact that a claim is unliquidated furnishes a new consideration sufficient to support an agreement to accept a part of the debt or demand and cancel the residue.[1] And it makes no difference whether the demand is due by contract, or is one for damages arising out of a breach of contract, or is founded in tort, so long as the amount due cannot be ascertained by arithmetical calculation, or is not fixed by operation of law. It is not necessary to the validity of a compromise that a defendant dispute his liability if it appears that the asserted

[12] Treat v. Price, 47 Neb. 875, 66 N. W. 834; Boyce v. Berger, 11 Neb. 399, 9 N. W. 545.

[13] Stoelke v. Hahn, 158 Ill. 79, 42 N. E. 150, affirming 55 Ill. App. 497; Doyle v. Donnelly, 56 Me. 26.

[14] McGlynn v. Scott, 4 N. D. 18, 58 N. W. 460; Demars v. Musser, 37 Minn. 418, 35 N. W. 1.

[1] Nassoiy v. Tomlinson, 148 N. Y. 326; Farmers', etc., Life Ass'n. v. Caine, 224 Ill. 599, 79 N. E. 956, affirming 123 Ill. App. 419; Wallner v. Chicago Traction Co., 245 Ill. 148, 91 N. E. 1053; Sovereign Camp v. Bridges, 105 Fed. 342; Freeman v. Tiffany, 113 N. Y. Supp. 64; Hinckle v. Minneapolis etc., R. Co., 31 Minn. 434, 18 N. W. 275; Root v. New Haven Trust Co., 74 Atl. (Conn.) 950; Stearns v. Johnson, 17 Minn. 142; T. M. Partridge v. Phelps, 136 N. W. (Neb.) 65; Stockton v. Fry, 4 Gill, 406, 45 Am. Dec. 138; Warren v. Skinner, 20 Conn. 559; Rising v. Patterson, 5 Whart. 316; Donnohue v. Woodbury, 6 Cush. 148, 52 Am. Dec. 777; Goodwin v. Folliet, 25 Vt. 386; Mathis v. Bryson, 4 Jones L. (N. C.) 508; Palmerton v. Huxford, 4 Den. 166; Cool v. Stone, 4 Iowa, 219; Pierce v. Pierce, 25 Barb. 243; McDaniels v. Lapham, 21 Vt. 222; Powell v. Jones, 44 Barb. 521; Tuttle v. Tuttle, 12 Met. 551; Curley v. Harris, 11 Allen, 112.

right of recovery is of an unliquidated nature.[2] It is the fact that the amount due is unascertained and uncertain; and that, by a compromise the parties avoid the trouble, work and expense which attends the liquidation of the demand, that furnishes the consideration to uphold the contract of compromise or accord and satisfaction. Mr. Parsons says: "The prevention of litigation is a valid and sufficient consideration; for the law favors the settlement of disputes. * * * On the same ground a mutual compromise is sustained."[3] The demand must be unliquidated in fact; a mere desire to avoid trouble and contention does not of itself furnish a consideration for accepting a less sum in satisfaction of a demand.[4]

Sec. 84. Same subject—What are unliquidated demands.—In general, a demand is unliquidated when the amount due cannot be ascertained by mere computation of the parties, or ascertainable by some fixed rule of law. The term excludes the idea of a mathematical certainty, and, upon the other hand, implies the element of approximation, or estimation based on comparative values. All damages, excepting those fixed by operation of law, and possibly nominal damages, are unliquidated, and furnish a fit and proper subject for mutual adjustment and compromise. The rule is the same with reference to compromises, whether the damages arise out of an injury to the person, or the property, or the relative rights of the party injured. A demand is not liquidated even if it appears that something is due;[1] and, admitting that something

[2] Neibles v. Minnesota, etc., R. Co., 37 Minn. 151, 33 N. W. 332, citing Wilkinson v. Byers, 1 Adol. & El. 106; 1 South. Dam. 430. See Garbutt L. Co. v. Wilcox, 64 S. E. (Ga. App.) 291.

[3] 1 Par. Cont. 438. Forbearance to sue on a claim against an estate is a sufficient consideration for an agreement by one in possession of the estate to pay the sum agreed upon in the settlement of the claim: Bull v. Hepworth, 124 N. W. (Mich.) 569.

[4] Fletcher v. Wurgler, 97 Ind. 223.

[1] Nassoiy v. Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695.

is due, or, even admitting that a larger amount is due than is paid will not invalidate a compromise, as long as the demand remains unliquidated by any binding agreement. Allowing an unliquidated, doubtful, or disputed demand for the full amount claimed, does not preclude an accord and satisfaction.[2] Where, by an agreement, the parties liquidated a demand and also gave the debtor a right to settle for a less sum, the compromise was held good, as the creditor could not rely upon the agreement and escape from its obligations.[3]

A claim for services rendered by a laborer, professional man,[4] or other person, in absence of a prior agreement fixing the rate of compensation, is unliquidated, as the value is a matter of estimate, and it falls within the rule that a payment and acceptance in satisfaction of a less sum than that originally demanded is binding upon the parties. The same rule applies where merchandise, or any other thing of uncertain or fluctuating value, is sold without agreeing upon the price. A mortgage debt is unliquidated within the rule, where a mortgagee in possession is liable for an accounting.[5] The rendition of a judgment upon a doubtful or disputed demand, does not make it a liquidated demand so long as it is open to assault by writ of error,[6] or appeal, and a compromise of the cause of action before the time expires in which a writ may be sued out or an appeal taken, is good.

Sec. 85. Same subject—Disputed claims—Dispute must be bona fide.—The rule that an acceptance of a part of an unascertained and uncertain claim under an agreement to cancel the entire demand, constitutes an accord and satisfaction or compromise, had its origin in cases of purely unliquidated claims where the settle-

[2] Goodrich v. Sanderson, 35 App. Div. 546, 55 N. Y. Supp

[3] Wheeler v. Baker, 132 Mich. 507, 93 N. W. 1069, 9 Det. Leg. N. 677.

[4] Danzier v. Hoyt, 120 N. Y. 190.

[5] McDaniels v. Lapham, 21 Vt. 222.

[6] Graham v. Meyer, 99 N. Y. 611.

ment was in the nature of a compromise, but it has been extended to all cases of disputes,[1] irrespective of the nature of the controversy.[2] And the books generally refer to disputed and doubtful claims, as well as unliquidated claims, as those which may be adjusted without full payment,[3] and the term unliquidated is now generally applied to disputed and doubtful claims. Therefore, the rule comprehends compromises of claims where an action to recover thereon will not liquidate the demand, but merely determine a dispute between the parties, leaving the sum due to be ascertained by calculation, as when an employer claimed the contract provided one rate of payment for the services and the employee another.[4] A demand is unliquidated within the rule that an acceptance of a part of a demand upon an agreement that it shall be taken in full satisfaction of the entire demand, constitutes an accord and satisfaction or compromise, when there is a difference of opinion as to which of two sums is due.[5] So, where the controversy is as to which of two persons, both of whom deny a liability, is liable for the debt,[6] as where a principal denied that his agent bought certain goods for him and the agent disclaimed making the purchase for himself, a compromise of the claim with one was held to be supported by a sufficient consideration.[7]

1 Hill v. Johnson, 46 Atl. (R. I.) 182.

2 Kircheval v. Doty, 31 Wis. 476; Craus v. Hunter, 28 N. Y. 389.

3 See Greenlee v. Mosnat, 116 Iowa, 535, 90 N. W. 338.

4 Nassoiy v. Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695; Greenlee v. Mosnat, 116 Iowa, 535, 90 N. W. 338.

5 Nassoiy v. Tomlinson, 148 N. Y. 326; Kemp v. Raymond, 42 App. Div. 32, 58 N. Y. Supp. 909; Bass v. Roberts, 61 S. E. (Ga. App.) 1134. See Simons v. Legion of Honor, 178 N. Y. 263, where the beneficiary claimed the amount due was the face of the policy and the company that it was less under certain by-laws.

6 Chicago, etc., Ry. Co. v. Brown, 97 N. W. 1038.

7 Wilber v. Scatcherd, 106 N. Y. S. 897: Where there is a doubt as to which of two or more persons is liable for a tort, a compromise and settlement with one extinguishes the demand as to all whether the one paying was actually liable or not. See *ante*, Sec. 42.

The controversy between the parties may arise out of the construction of the agreement as affecting their rights, obligations and liabilities,[8] and any ambiguity in the language of a contract calling for explanation, or construction, from which ordinary minds might reasonably draw different conclusions, and the parties actually differ as to its meaning, renders a claim founded upon it sufficiently doubtful to uphold a compromise of it. So, the dispute may arise out of conflicting claims under distinct instruments,[9] or over whether all the goods ordered were received,[10] or whether certain payments were made on account,[11] or over the identity of the property the vendee was to have under the contract,[12] or whether an administrator is chargeable for neglect to make interest on the trust fund, or for rent.[13] So, the debtor may deny all liability, as where it is claimed a contract of insurance was obtained through false representations,[14] or that the contract had been rescinded for something which had been done, or which happened since it was made. But, whatever the nature

8 Richardson v. Independent District, 31 N. W. (Iowa) 871; Arnold v. Railway Steel Spring Co., 126 S. W. (Mo. App.) 795.

9 Kercheval v. Doty, 31 Wis. 476.

10 Wheeler v. Meriden Cutlery Co., 23 Wis. 584.

11 The payment of a sum admitted to be due for certain admitted items of an account and excluding disputed items, on condition that it shall be received in full satisfaction of the entire demand was held to extinguish the entire demand: Chicago, etc., Ry. Co. v. Clark, 178 U. S. 353, 44 L. Ed. 1099. S. P. Bass v. Roberts, 61 S. E. (Ga. App.) 1134; Ravenswood Paper Co. v. Dix, 113 N. Y. Supp. 721. Merely giving a check for the amount conceded to be due without making its acceptance conditional on being received in full settlement does not constitute an accord and satisfaction: Hagen v. Townsend, 131 N. W. (S. D.) 512.

12 Hurst v. Taylor, 107 S. W. (Ky.) 748.

13 Andrews v. Brewster, 124 N. Y. 433.

14 Home Ins. Co. v. Bredehoff, 68 N. W. 400; Western & S. L. Ins. Co. v. Quinn, 113 S. W. (Ky.) 456. Where it is uncertain whether a creditor can avoid a compromise for fraud or misrepresentation, a note given by the debtor upon a compromise of the unpaid balance may be enforced: Crans v. Hunter, 28 N. Y. 389.

of the controversy is, if it is put forward in good faith, the compromise is binding as far as the question of consideration necessary to uphold the agreement to accept a less sum than the entire claim is concerned.[15]

There must be a controversy shown;[16] merely asserting that he would not pay all the money because it was not the "law of the company," or "they didn't settle that way," without assigning any reasons was held no evidence of a dispute.[17] Expressing a desire to settle is not sufficient to establish a dispute. In such a case the following was held to fall far short of a defence: "'Now,' says I, 'we will settle this matter up.' 'All right,' says he. I says, 'your due is just $400.' 'All right,' says he. 'Now, I will tell you just what I want you to do with me. I am hard up for money, I want you to take my note for 90 days.' 'All right,' says he. I just wrote a note and he took it. He made no claim for any further indebtedness. Nothing was said."[18] The dispute must be *bona fide*.[19] If one party has no claim and knows it, a promise to pay a sum in settlement of it is without consideration.[20] The courts in passing upon compromises of disputed claims, invariably declare that there must be honest differences between the parties.[21] It has been said that it is not even neces-

[15] See Farmers', etc., Co. v. Chesnut, 50 Ill. 111, 99 Am. Dec. 492; Heath v. Potlatch Co., 108 Pac. (Idaho) 343; Cantonwine v. Bosch, 127 N. W. (Ia.) 657.

[16] See Beach v. Schroeder, 107 Pac. (Colo.) 271.

[17] Demars v. Musser, 37 Minn. 418, 35 N. W. 1.

[18] Hooker v. Hyde, 21 N. W. (Wis.) 52.

[19] Demars v. Musser, 37 Minn. 418; Wherley v. Rowe, 106 Minn. 494; Minor v. Fike, 93 Pac. (Kan.) 264; Wahl v. Barnum, 116 N. Y. 87; Railroad Co. v. Clark, 178 U. S. 354, 20 Sup. Ct. 924, 44 L. Ed. 1099; Policastro v. Pitske, 120 N. Y. Supp. 743; Wood v. Kansas City Tel. Co., 123 S. W. (Mo.) 6; 1 Page Cont. 321.

[20] McGlynn v. Scott, 4 N. D. 18, 58 N. W. 460. See Holladay v. Beekman, 116 S. W. (Mo. App.) 436.

[21] Slade v. Elevator Co., 39 Neb. 600, 58 N. W. 191.

sary that the question in dispute should be really doubtful, if the parties *bona fide* considered it so.[22] A debtor cannot create a dispute sufficient as a consideration for a compromise, by a refusal to pay an undisputed claim. "That would be extortion, and not compromise. There must in fact be a dispute or doubt as to the rights of the parties honestly entertained."[23] Where there is no controversy between the parties, a payment upon an account, of a less sum than is actually due, will not constitute an accord and satisfaction, or compromise.[24]

Sec. 86. Same subject—Doubtful claims—Must not be legally groundless.—If a claim be doubtful, the uncertainty furnishes a good consideration to uphold a contract to accept a less sum of money or anything else of value, in satisfaction of the entire claim.[1] And, it is everywhere held that where parties whose rights are questionable and doubtful, and who have equal means of ascertaining what those rights are, come together and effect a compromise, the court will enforce the agreement which they fairly come

[22] Demars v. Musser, *ante.* S. P. Bartlett v. Cappes, 117 S. W. (Tex. Civ. App.) 485; Kelly v. Hopkins, 117 N. W. (Minn.) 396; Laughman v. Sun Pipe Line Co., 114 S. W. (Tex. Civ. App.) 451; Cornell v. Taylor, 122 N. Y. Supp. 157.

[23] Demars v. Musser, 37 Minn. 418, 35 N. W. 1; Ness v. Minnesota Co., 87 Minn. 413, 92 N. W. 333. A release not under seal cannot be made the basis of a plea of accord and satisfaction when there was no honest difference between the parties as to the amount due, the amount being fixed by the beneficiary certificate: Farmers' Ins. Ass'n. v. Caine, 224 Ill. 599. A compromise based on threats of vexatious litigation is not binding: Attorney General v. Supreme Council, 92 N. E. (Mass.) 151. "An arbitrary refusal to pay, based on the mere pretense of the debtor, made for the obvious purpose of exacting terms which are inequitable and oppressive is not such a dispute as will of itself support a compromise, resulting in a reduction of the amount of his indebtedness." Fitzgerald v. Fitzgerald, 62 N. W. (Neb.) 899.

[24] Hicks Pub. Co. v. Wisconsin Cent. R. Co., 120 N. W. (Wis.) 512.

[1] Cahoon v. Hollenback, 16 Sr. & Raw. 425, 16 Am. Dec. 587; Hoge v. Hoge, 1 Watts, 163, 26 Am. Dec. 52; Allis v. Billings, 2 Cush. 26; Easton v. Easton, 112 Mass. 443; Donohue v. Woodbury, 6 Cush. 151; Fisher v. May, 2 Bibb, 448, 5 Am. Dec. 626; Weed v. Terry, 2 Doug. 344, 45 Am. Dec. 257;

to,[2] and refuse to investigate the character or value of the demand settled,[3] or the relative merits of the claims of the respective parties.[4] The compromise will be upheld even though it afterwards appears that the defendant had a legal defence to the claim settled,[5] or that the rights of the parties were different from what they supposed them to be,[6] or that the claim was not a valid one,[7] and that the one making the claim had nothing to forego.[8]

The Supreme Court of Kentucky in considering this subject said: "There can be but one superior and equitable right. If, therefore, the solemn compromise of the parties about property of doubtful title, is made to depend on the question whether the parties have so settled the dispute as the law would have done, then it may be truly said a compromise is an unavailing, idle act, which questions even the power of the parties to bind themselves." [9] However, a

Van Dyke v. Davis, 2 Mich. 144 (and note); Pierce v. New Orleans Building Co., 9 La. 397, 29 Am. Dec. 448; Zimmer v. Becker, 66 Wis. 527, 29 N. W. 228; Calkins v. State, 13 Wis. 394.

[2] Perkins v. Tinka, 30 Minn. 241, 15 N. W. 115; Gibbons v. Caunt, 4 Ves. 840. In Lucas County v. Hunt, 5 Oh. St. 488, 67 Am. Dec. 303, a doubtful right of the county to remove a county seat without making compensation to the grantor for land conveyed to the county for the original site, was held a sufficient consideration to uphold a compromise whereby the county issued to the grantor its orders for a certain sum.

[3] Demars v. Musser, 37 Minn. 418, 35 N. W. 1.

[4] Fisher v. May, 2 Bibb, 448, 5 Am. Dec. 626; Western and S. L. Ins. Co. v. Quim, 113 S. W. (Ky.) 456. In Kercheval v. Doty, 31 Wis. 476, the court said: "If it were necessary, in order to sustain an adjustment of conflicting claims, to determine their relative validity and value, no compromise would be possible, and the uncertainty, delay, and scandal would be incurred which such arrangements are usually designed to avoid."

[5] Wahl v. Barnum, 116 N. Y. 87.

[6] Perkins v. Tinka, 30 Minn. 241, 15 N. W. 115; Hall v. Wheeler, 37 Minn. 522, 35 N. W. 377.

[7] Craus v. Hunter, 28 N. Y. 389; Carter v. Kemlin, 47 Neb. 409, 66 N. W. 536; Worcester Loom Co. v. Heald, 72 Atl. (N. J. Sup.) 421.

[8] Perkins v. Tinka, 30 Minn. 241, 15 N. W. 115.

[9] Fisher v. May, 2 Bibb, 448, 5 Am. Dec. 626. In O'Keson v. Barclay, 2 Pa. 531, a promissory note given on the settlement of a slander suit for words

claim must not be legally groundless;[10] there must be something doubtful as to the liability to form the basis of a binding compromise.[11] A dispute as to a moral obligation to pay is not enough.[12] A claim against a husband for a legacy left by the wife, where she left no property out of which to pay the bequest, is wholly without legal merit, and a compromise by the husband of such claim is not binding upon him.[13] A claim compromised must have some foundation in law or fact or the new promise will be without consideration.[14] So, a claim based upon a contract wholly void as against public policy, will not support a compromise however strenuously the parties may insist on its enforceability. A claim must be colorable at least.[15] Which means that if it be founded in contract, there must be doubt as to its enforceability,[16] as where

not actionable, was sustained. An agreement to pay damages occasioned by a collision, when ascertained, if proceedings in admiralty be withdrawn, was held binding without regard to the actual liability: Longridge v. Dorvill, 5 B. & A. 117; Russell v. Cook, 3 Hill, 504.

[10] Schnell v. Nell, 17 Ind. 29, 79 Am. Dec. 453. A verbal promise to pay in compromise and settlement of a controversy which has not assumed the form of a pending suit, is without consideration, unless there is some reasonable ground for the existence of the controversy: Allen v. Procter, 35 Ala. 169. Mere threats to contest a will on the ground that it conflicted with a right to repurchase, where the deed by which the ancestor took the land in question, in plain terms gave the right to repurchase, is no consideration for the agreement of heirs to waive their rights under the will to their interest in the property: Jennings v. Jennings, 87 N. W. (Iowa) 726. There must be reasonable ground for contesting a will to sustain a promise made in settlement of a controversy respecting its validity, when it has not been probated and there are no pending suits involving its validity: Crawford v. Engram, 47 So. (Ala.) 712. See, also, Bunnell v. Bunnell, 111 Ky. 566.

[11] Underwood v. Bockman, 4 Dana, 309, 29 Am. Dec. 407; Mulholland v. Bartlett, 74 Ill. 58.

[12] Cornell v. Taylor, 122 N. Y. Supp. 157.

[13] Schnell v. Nell, 17 Ind. 29, 79 Am. Dec. 453.

[14] Smith v. Boruff, 75 Ind. 416.

[15] See Andrews v. Brewster, 124 N. Y. 433.

[16] In Zimmer v. Becker, 66 Wis. 527, 29 N. W. 228, the question was whether the controversy compromised was of such a nature as to furnish a

the question is whether it is within the statute of frauds,[17] or whether a recovery is barred by the statute of limitations, or on the ground of the illegal character of the deal,[18] or whether it is binding by reason of some informality in its execution. So a claim may be doubtful when it appears that an officer in performing his duty has not followed the strict letter of the law. Such controversies usually arise out of forced sales of property. So, a doubt may arise as to whether a sale of corporate property was legal.[19] In fact any claim, not wholly groundless, asserted in good faith[20] as to one's legal rights, arising upon an admitted contract, oral or written, or upon an admitted state of facts, the validity of which is controverted by the other party, may be said to rest in some degree of doubt or uncertainty, and furnishes a sufficient consideration to uphold a compromise of the demand under consideration. A doubtful claim is one growing out of a controverted question as to the liability upon an admitted state of facts, while a disputed claim arises when the facts are questioned; but, inasmuch as a doubt as to the liability gives rise to a dispute, the courts very frequently use the terms "doubtful" and "disputed" interchangeably.

Sec. 87. Same subject—Claim of set-off—Counter-claim.—A demand is held to be unliquidated within the rule as to compromises, where a debtor claims a right to counter-claim or recoup damages against an admitted sum, by reason of a breach of warranty as to

valid foundation for the stipulation to release the defendant. While the court was of the opinion that such a claim, as made, could not be upheld; yet there was enough in the claim to require argument and deliberation before a court could finally adjudicate it one way or the other.

17 Cahoon v. Hollenback, 16 Ser. & Raw. 425, 16 Am. Dec. 587. See Wahl v. Barnum, 116 N. Y. 87, 22 N. E. 280, 26 N. Y. St. 457, 26 Am. St. Rep. —, 5 L. R. A. 623.

18 Continental Nat. Bank v. McGeoch, 92 Wis. 286, 66 N. W. 606.

19 Pierce v. New Orleans Build. Co., 9 La. 397, 29 Am. Dec. 448.

20 Kercheval v. Doty, 31 Wis. 476; Zimmer v. Becker, 66 Wis. 527, 29 N. W. 228.

quality,[1] or for damages to other property arising from the manner of performing certain work where it is stipulated that such damages, if any, should be deducted.[2] So the rule comprehends a claim where the amount due upon one side of an account is not disputed, but there is a controversy over a set-off arising out of a claim for commission earned in the transaction.[3] The same principle has been applied to cases of settlement where a counter-claim consisted of a distinct demand, as where, after the sum due for wages was liquidated by agreement, the debtor sent the creditor a check for the difference between the amount due for wages and fifty dollars claimed to be due him for the loss of a lease, with the condition that if accepted it must be taken as the balance due on the account,[4] and where an employer claims a right to deduct from the amount conceded to be due for wages, a certain sum advanced for car fare, which payment was denied by the employer.[5] But these cases do not seem to be entirely in harmony with the principle that the retention by a creditor of money to which he is absolutely entitled upon a liquidated demand, will not amount to an accord and satisfaction or compromise, when the debtor foregoes no part of his claim but tenders or transmits the money to his debtor in full of his demand.[6] However, in all cases where the entire claim is unliquidated, the rule is not affected by the payment of the amount admitted to be due, for, if a claim could be liquidated by piecemeal, by an admission that a part is due, no one could pay the amount he admitted to be due without being subject to an action whenever his creditor chose to claim that he was not fully

[1] Missouri Coal Co. v. Consolidated Coal Co., 105 S. W. (Mo. App.) 682.

[2] Pollman v. St. Louis, 145 Mo. 651, 47 S. W. 563.

[3] Ostrander v. Scott, 161 Ill. 339, 43 S. E. 1089.

[4] Hull v. Johnson, 46 Atl. (R. I.) 182.

[5] Tanner v. Merrill, 108 Mich. 58, 31 L. R. A. 175, 65 N. W. 664.

[6] See Duluth v. Knowlton, 42 Minn. 229. And see, Demeules v. Jewell, 103 Minn. 150, 114 N. W. 733. See, also, Marion v. Heinbach, 62 Minn. 214, 64 N. W. 386.

paid, no matter how solemn may have been the agreement to accept the sum paid in full satisfaction, so long as it fell short of a technical release.[7]

Sec. 88. Compromise of action—Consideration—Payment of costs—Compromise after an arrest—After attachment.—Where a litigant, for a valuable consideration and without fraud or imposition practised upon him, voluntarily compromises an action, he will be bound by the compromise although he shows it was not beneficial to him, or that he had the right to recover in the action in point of law.[1] An agreement terminating litigation is looked upon by the courts with favor, and the fact that both parties thus avoid further contention is of itself an element of the consideration; but there must be some consideration besides this. Where an action was to recover upon a liquidated demand for $299, a payment of $150 and costs of the action was held to satisfy the entire debt.[2] Payment of the costs of the action and giving a note for a part of the claim, is a valid accord and satisfaction, or compromise, and it will not be impaired by a failure afterwards to pay the note.[3] So, payment of a smaller sum and an agreement to abandon the defense and pay the costs, is a good satisfaction of the larger demand, whether liquidated or unliquidated.[4] The relinquishment of a right to costs is ordinarily a sufficient consideration to support an agreement to accept less than the amount due.[5] Withdrawing

[7] Tanner v. Merrill, 108 Mich. 58, 31 L. R. A. 175, 65 N. W. 664.

[1] Steele v. White, 2 Paige, Ch. 478; Baumier v. Antian, 31 N. W. (Mich.) 888. Where a defendant tendered a deed into court on condition that plaintiff pay the amount of a counter-claim, but afterwards agrees that plaintiff may have the deed without paying such sum, it was held to constitute a valid settlement: Dr. Shoop v. Schowalter, 120 Wis. 663, 98 N. W. 940.

[2] Mitchell v. Wheaton, 46 Conn. 315, 33 Am. Rep. 24.

[3] Nathan v. Smith, 24 Misc. Rep. 374.

[4] Cooper v. Parker, 15 C. B. 822, 3 C. L. R. 823, 1 Jur., N. S. 281, 24 L. J. C. P. 68.

[5] Genberling v. Spaulding, 104 Mich. 217, 62 N. W. 342.

legal proceedings whereby the plaintiff is asserting a claim to certain property, is a sufficient consideration to uphold an agreement for a division of the property.[6]

Where the time to appeal has not expired and the debtor is about to take an appeal, an agreement whereby the debtor pays a less sum in full discharge of the judgment is binding.[7] After judgment and an appeal by the surety, an agreement by the judgment creditor to look to the principal only, if the surety will abandon his appeal, is supported by a sufficient consideration.[8] A discontinuance of cross actions upon an agreement that each shall be satisfied is an accord and satisfaction.[9] Writing a letter by agreement, exculpating a slandered person, in satisfaction of the injury amounts to an accord and satisfaction.[10] In general mutual concessions, either with respect to the cause of action set out in the complaint, or as to a counter demand, or as to both, furnishes a consideration sufficient to support a compromise agreement settling the action. If a defendant is arrested by due process of law in an action, a compromise of the cause of action, made to obtain his liberty, will be binding in absence of fraud.[11] The same rule applies to a compromise of a judgment after an arrest in supplemental proceedings; and to a compromise of an action to secure the release of property attached in the action. In such cases, a payment or compromise of the cause of action by the defendant without first obtaining his discharge, or a release of the attachment, is an acquiescence in the proceedings taken, and he cannot maintain an action for damages for false imprisonment, or for wrongful attachment, on the ground that the proceedings were wrongfully taken. So, if a prosecution is terminated by the pro-

[6] Downer v. Church, 44 N. Y. 647.

[7] Clay v. Hoysradt, 8 Kan. 74.

[8] Wimberly v. Adams, 51 Ga. 423.

[9] Foster v. Trull, 12 Johns. 456.

[10] Smith v. Kerr, 1 Barb. 155.

[11] Farnur v. Walter, 2 Edw. Ch. 601.

curement of the defendant, or by a compromise, an action for malicious prosecution cannot be maintained.[12]

Sec. 89. Compromise of actions, how taken advantage of, and how enforced.—Whenever the subject matter of a pending action has been compromised and the plaintiff refuses to stand by his agreement, or denies that one was made, the defendant should set up the compromise in his answer, or by a supplemental answer, in bar of the further prosecution of the action.[1] Where the making of the agreement is denied or the terms disputed it cannot be taken advantage of by motion to dismiss.[2] Where the terms of the compromise are embodied in a stipulation and filed in the action, the court on motion will enforce the stipulation by giving judgment according to its terms.[3] But if the agreement of compromise calls for the performance of matter not within the issues of the pending action, the court will not enforce it in that action. The aggrieved party's remedy is by an independent action for specific performance.[4] Where an action at law had been compromised and by reason thereof the defendant had changed his position by discharging his witnesses and surrendering his right to go to trial at the time when ready, the plaintiff, upon repudiating the compromise

12 Wickstrom v. Swanson, 120 N. W. (Minn.) 1090.

1 Miedreich v. Rank, 82 N. E. (Ind. App.) 117; Strobridge v. Randall, 78 Mich. 195, 44 N. W. 134. See Wade v. Wade, 106 S. W. 188, where it is held that an agreement supported by a valuable consideration to dismiss a suit to set aside a deed on the ground of the fraud of the grantee, is available as a defense to the action to avoid the deed.

2 George v. Chicago, etc., Ry. Co., 52 N. W. 512.

3 Ward v. Wilson, 92 Tex. 22, 45 S. W. 8. See Cox v. Cox, 53 N. C. 487, where it is held that the court cannot strike out an entry of compromise because it has been imperfectly entered. The proper way is to amend *nunc pro tunc*, and enforce performance.

4 Waterman on Spec. Perf. Sec. 43, citing Pryer v. Tribble, L. R. 10 Ch. 534; Forsyth v. Manton, 5 Mod. 78; Wood v. Rowe, 2 Bligh, 595, 617; Asken v. Millington, 9 Hare. 65; Richardson v. Eyton, 2 DeG. M. & G. 79. See Sec. 109.

and moving the cause for trial, was enjoined from prosecuting the action upon the defendant paying the amount agreed upon into court.[5]

Sec. 90. Family settlements.—Compromises and settlements of family controversies and disputes over the division of an estate among heirs and devisees, particularly members of the same family, are looked upon with great favor, both at law and in equity, and if at all fair and reasonable are upheld by the courts with a strong hand.[1] And the current of authorities, both in England and America, is uniform, that adult heirs whose rights are doubtful and disputed and who have full knowledge of such doubts and difficulties as to their rights, may by a fair agreement divide up an estate as they see fit.[2] The agreement will be upheld, though it afterwards comes out that the right was different, or entirely on the other side.[3] Such agreements are upheld mainly upon the consideration arising out of the settlement of doubtful and disputed rights and the avoidance of litigation; and, because they tend to preserve the harmony and affection between the heirs, or preserve the honor of the family.[4] The agreement, although looked upon with especial favor, and perhaps sustained when resting on grounds

[5] Trenton St. R. Co. v. Lawlor, 71 Atl. (N. J.) 234.

[1] Trigg v. Read, 5 Hump. 529, 42 Am. Dec. 447; Farnsworth v. Dinsmore, 2 Swan. 42; Adams v. Adams, 30 N. W. (Ia.) 795; Williams v. Williams, 2 Dr. Sm. 378.

[2] Goldsmith v. Coleman, 57 Ga. 425; Ames v. Cameron, 55 Ga. 450; Ockford v. Barelli, 25 L. T., N. S. 504, 20 W. R. 116. "In doubtful questions, such as upon the construction of a will, it is extremely reasonable that the parties should determine their differences by dividing the estate between them in the proportion which may be agreed on." Per Sir John Leach, V. C. in Naylor v. Winch, 1 Sim. & St. 565.

[3] Stapleton v. Stapleton, 1 Atk. 10; Naylor v. Winch, 1 Sim. & St. 565; Smith v. Smith, 36 Ga. 184, 91 Am. Dec. 761.

[4] Westby v. Westby, 2 Dru. & W. 503; Smith v. Smith, 36 Ga. 184, 91 Am. Dec. 761; Trigg v. Read, 5 Hump. 529, 42 Am. Dec. 447; Adams v. Adams, 30 N. W. (Ia.) 795.

which would not be satisfactory if the transaction had occurred between mere strangers,[5] must, like all contracts, be fair and free from fraud. It must be supported by some consideration in order to be binding; that is, an heir legally entitled to some property right, although such right, or the amount he is entitled to receive is disputed, is not estopped from seasonably asserting such right, unless something of value passed to him under the agreement, either out of the estate, or from some one else paid in that behalf, or, unless the surrender of his interest amounted to an executed gift or is evidenced by a technical release or other instrument under seal. A consideration being present the court will not inquire into its adequacy or inadequacy. "It is enough to support the agreement that there was a doubtful question, and a compromise fairly and deliberately made upon consideration."[6]

A payment of an extra sum to an heir or legatee in consideration that he forbear to contest the will, is valid.[7] Not only must there be some consideration of value, but there must be reasonable doubts as to the rights asserted. It must be a real doubt about which well informed lawyers and judges might differ.[8] Mere threats to contest a will upon certain grounds, will not furnish a

[5] Westby v. Westby, 2 Dru. & W. 503; Smith v. Smith, 36 Ga. 184, 91 Am. Dec. 761.

[6] Smith v. Smith, 36 Ga. 184, 91 Am. Dec. 761.

[7] Markert's Est. v. Grobe, 90 N. W. 490. Where it was undisputed that under a will the property would go to two children, but after the execution of the will the testator conveyed his real property to a third child, and litigation was threatened to set aside the deed as having been obtained by undue influence, and a fourth child was called in to effect a settlement, and on a suggestion made by some one that the father had promised to leave the fourth party something, and a compromise was effected whereby each party took a fourth, the compromise was upheld on the ground that each party understood the settlement and being a family compromise it furnished the necessary consideration to uphold it. That there was no dispute that the fourth child was not legally entitled to anything under the will did not affect the compromise: Adams v. Adams, 30 N. W. (Ia.) 795.

[8] Bunnell v. Bunnell, 111 Ky. 566.

consideration sufficient to support an agreement to relinquish a part of the estate made in consideration of a promise by the one making the threats to forbear to contest, when it is clear a contest could not possibly be maintained on the grounds stated.[9] An agreement between minor children and their adult brother as to a division of their deceased father's estate, was held not void but voidable at the election of the minors on their coming of age; the adult continuing bound during the interval.[10] Where a compromise of a family dispute involves the rights of minors, the proof must satisfy the court that their rights are promoted and interests secured by the compromise, and when this is shown the compromise will be upheld and enforced.[11]

A compromise is only obligatory to the extent of the particular claim or rights had under consideration by the parties, and does not affect any rights the parties may have from any other source of which they were ignorant. It has been said by way of illustration: "If it be doubtful, in the construction of a will or deed whether the words 'heirs of the body,' 'issue,' 'children,' be words of limitation, or words of purchase, and a compromise be made, by which either a life estate or an absolute estate be granted to devisee or vendee, as the fair construction of the will or deed, this compromise shall be binding upon the parties, though the true legal construction of the instrument be different, but this compromise does not affect any rights the parties may have from any other source, and is only obligatory so far as the construction of the instrument is involved." So, as observed by the same court, "if the right compromised be doubtful in point of fact, no other fact than that upon which the doubt is supposed to rest, and which is presented for compromise, is precluded by the compromise. As if the party

[9] Jennings v. Jennings, 87 N. W. 728.

[10] Smith v. Smith, 36 Ga. 184, 91 Am. Dec. 761; Slaughter v. Cunningham, 24 Ala. 260, 60 Am. Dec. 463.

[11] Reynolds v. Brandon, 3 Heisk. (Tenn.) 606. As to compromises effected by guardians of minors the reader is referred to Sec. 43.

claims as heir at law, and it be doubtful if he be the heir at law, and in case of this doubt he compromises his right; yet if it turn out that, though not heir at law, he is devisee of the property, his right as devisee is not compromised. So if he compromises upon the mistaken apprehension that he is or is not devisee, but it turns out that he is entitled as heir at law, his right as heir at law is not compromised." [12]

Sec. 91. Form of Agreement—Certainty—Oral and written compromises.—In general a compromise, to be binding, need not be in any particular form. The word "settlement" or "compromise" need not be used; nor need the purpose of the agreement be otherwise recited.[1] A settlement by way of a compromise being accomplished, that is part of the consideration for the agreement and may be shown by parol. A compromise, being the settlement of a controversy, it should be definite and certain, so as not to lead to another controversy. It must be certain as to the subject matter.[2] The parties should be named or otherwise identified, as by referring to them as plaintiff and defendant.[3] A compromise by parol is binding,[4] unless it is in violation of the Statute of Frauds,[5] or other statutory provision.[6] A compromise of an action should be reduced to writing and signed by the parties or their attorneys, for if it be verbal and there is a dispute as to the terms of the agreement, the court will not determine the second controversy in absence of an issue in the pleadings.

[12] Trigg v. Read, 5 Hump. 529, 42 Am. Dec. 447.

[1] Antoine v. Smith, 40 La. Ann. 560, 4 So. 321.

[2] Lampkins v. Vicksburg, etc., R. Co., 42 La. Ann. 997, 8 So. 530.

[3] McLeod v. Adams, 102 Ga. 533, 27 S. E. 680.

[4] Miles v. Arp, 9 S. D. 625, 70 N. W. 1050; Boyce v. Berger, 11 Neb. 399, 9 N. W. 545; Boswell v. Gillen, 62 S. E. (Ga.) 187; Sec. 13, *ante*.

[5] See Sec. 22. Case v. Barber, 4 T. Raym. 450, was the case of a verbal guaranty by a third party. See Coe v. Hobby, 72 N. Y. 141, 28 Am. Rep. 141; Moritz v. Koenig, 1 Misc. (N. Y.) 186, 21 N. Y. Supp. 5, 48 N. Y. St. 693.

[6] (1900) La. Rev. Civ. Code, Sec. 3071, requires contracts putting an end to a law suit to be in writing. Orr v. Hamilton, 36 La. Ann. 790.

But rules of court requiring all agreements and stipulations respecting the proceedings in a cause to be in writing were held not to apply to agreements of settlement.[7] If a new executory agreement is accepted upon a settlement and compromise, the new agreement must comply in every respect to the law applicable to other contracts.[8]

Sec. 92. Effect of a compromise—Bars an action on original demand—Extinguishes defense—Set-off and counter-claim—Bars claim for damages.—A settlement by way of a compromise satisfies the original demand and is a bar to any action thereon.[1] If an action be pending a compromise of the cause of action puts an end to the action; it has the effect of a verdict.[2] It has the effect of *res adjudicata* in any action that may thereafter be brought upon the same demand.[3] If a party claiming certain compensation under a contract, settles and compromises his claim, he cannot afterwards maintain an action for damages for a breach of the contract on the part of the other party.[4] The compromise not only concludes the creditor from suing upon the original demand, or for any claim growing out of it, but, in an action to recover whatever was agreed to be paid upon the compromise, it estops the debtor from asserting any defense he may have had to the original demand.[5] It also concludes the debtor from

[7] Smith v. Bach, 81 N. Y. Supp. 1057.

[8] See Secs. 13, 74.

[1] Home Ins. Co. v. Bredehoft, 49 Neb. 152, 68 N. W. 400; Chemical Nat. Bank v. Kohner, 85 N. Y. 189; Chesire v. Des Moines, 133 N. W. (Ia.) 324; Babcock v. Farwell, 146 Ill. App. 307.

[2] Henry v. Cass Co. Mill., 42 Iowa, 33.

[3] Bouv. L. Dic. In Heaps v. Dunham, 95 Ill. 583, it was held that a settlement by a party charged with bastardy is conclusive upon the party charged in respect to the question whether the woman was pregnant or not.

[4] Parr v. Greenbush, 112 N. Y. 246, 19 N. E. 684, 20 N. Y. St. 725.

[5] Draper v. Owsley, 15 Mo. 613, 57 Am. Dec. 218; Wahl v. Barnum, 116 N. Y. 87, 22 N. E. 280, 26 N. Y. St. 459, 5 L. R. A. 623; Feeter v. Weber, 78 N. Y. 334; Speck v. Jarvis, 59 Wis. 585, 18 N. W. 478; Dyrenforth v. Palmer, 240 Ill. 25, 88 N. E. 290.

settling up any matter constituting a set-off, or counter-claim founded on or growing out of the claim settled, existing at the time of the compromise.[6] A compromise and settlement of all controversies growing out of a dispute over a deed absolute on its face, precludes the grantor from afterwards claiming that the deed was a mortgage.[7]

In determining the scope of a compromise relative to the matters included therein the language should be so construed as to give effect to the presumed intent of the parties. In general a compromise concludes the parties as to every claim and demand of which at the time they have knowledge and which is founded on or grows out of the matters settled. Where, in a general settlement, whereby a certain sum was found to be due "after allowing and deducting all credits, set-offs, or claims due * * * by reason of any and all matters growing out of the business or otherwise," it was shown that the question of a breach of contract was brought up, it was held that the compromise was a bar to any action for damages growing out of the breach of contract mentioned.[8] A claim for damages and other claims growing out of or founded on a demand compromised, is, in a legal sense, within the contemplation of the parties and is extinguished although not mentioned in the agreement.[9] A compromise will not include existing matters which the parties did not intend to settle.[10]

[6] Pabst v. Lueders, 107 Mich. 41, 64 N. W. 872; Altman v. Walker, 124 S. W. (Ky.) 329; Hill v. Parson, 110 Ill. 107; Rivers v. Blom, 163 Mo. 442, 63 S. W. 812. Where a counter-claim set up is not a proper counter-claim in the action, a settlement of the cause of action, without any reference to the counter-claim, will not discharge the counter-claim: Clancey v. Losey, 20 N. Y. Supp. 383, 48 N. Y. St. 191.

[7] Baldwin v. Davis, 63 Iowa, 231, 18 N. W. 897. Where a party upon a settlement, ratifies a transfer of lands as partnership lands, he is estopped from afterwards claiming that the lands are still partnership lands and included in a general decree disposing of the remaining partnership property: Northern Chief I. Co. v. Hosmer, 80 Wis. 77, 49 N. W. 115.

[8] Deering v. Sechler, 76 N. W. (S. D.) 311. See Secs. 29–35.

[9] See Douglas v. McClellan, 126 S. W. (Mo. App.) 994, where it is held that it bars an action for conversion.

[10] Nichols v. Scott, 12 Vt. 47; Ballard v. Beveridge, 171 N. Y. 194, 63 N. E. 960.

Sec. 93.—Same subject—Other claims not discharged—Compromise after judgment embraces what—Installments—Splitting demands—Parties and privies concluded.—A compromise of a demand which the creditor asserts is the only one he has will not discharge another independent claim.[1] A settlement and compromise after judgment applies to every thing embraced in the judgment and in the litigation and suit; and a compromise of an action pending, embraces all matters of dispute between the parties that are involved in the action.[2] Those matters not disclosed by the pleadings are not embraced in a settlement made "in full of an account and demand sued upon in this action."[3] If a party is arrested for a demand claimed to be due, or is arrested in supplemental proceedings, or his property is attached and he chooses to compromise the demand, he thereby waives all claim for damages for false imprisonment or for wrongful attachment, unless the payment was made under circumstances amounting to duress. A settlement of a claim for money embezzled will not affect the criminal liability.[4] Where several installments upon the same contract are due, they constitute an entire and indivisible cause of action, and a compromise and settlement of an action brought to recover a part of the installments due, will be given the same scope and effect as a judgment in the action, and the entire cause of action will be discharged.[5] The parties to a controversy may settle a part of their demand and leave the question of the liability for the balance to be determined later.[6] And, when such an agreement is expressly made, or can be inferred from the circumstances, the compromise will

[1] King v. Miller, 22 U. C. C. P. 450.

[2] See *dictum*, Parr v. Greenbush, 112 N. Y. 246, 19 N. E. 684, 20 N. Y. St. 725. A compromise of an action for wages whereby a certain amount is paid, is not conclusive upon the employer as to the value of services subsequently rendered: Briggs v. Smith, 4 Daly (N. Y.) 110.

[3] Bates v. Cobb, 5 Bosw. (N. Y.) 29.

[4] Guenther v. State, 118 N. W. (Wis.) 640.

[5] O'Beirne v. Lloyd, 43 N. Y. 248.

[6] Escanaba Boom Co. v. Two Rivers Co., 118 Mich. 454, 76 N. W. 980.

be no bar to that part of the demand not actually settled.[7] More upon the question of what claim and demands are discharged by an accord and satisfaction or compromise will be found in previous sections.[8]

The question of the effect of a compromise upon the liability of joint debtors, joint and several debtors[9] and joint tort feasors is considered elsewhere.[10]

The rule is universal that a compromise based upon a sufficient consideration, when fairly made, and free from fraud, misrepresentation or mistake of fact, concludes the parties thereto, and the courts will uphold it although a judicial determination might show that the rights of the parties were different, or that one of the parties really had no rights and nothing to forego.[11] It is binding on all those persons who, with notice of the compromise, claim under the parties.[12] Persons interested in the subject matter but not joining in the

[7] O'Beirne v. Lloyd, 43 N. Y. 248; Pratt v. Castle, 91 Mich. 484, 52 N. W. 52. See *ante*, Sec. 35.

[8] Sec. 29 *et seq.*

[9] Sec. 9.

[10] Sec. 42.

[11] Perkins v. Trinka, 30 Minn. 241, 15 N. W. Rep. 115; Hall v. Wheeler, 37 Minn. 522, 35 N. W. 377; Shaw v. Railway Co., 82 Iowa, 199, 47 N. W. 1004; Larned v. Dubuque, 86 Iowa, 166, 53 N. W. 105; Pratt v. Castle, 91 Mich. 484, 52 N. W. 52; Chittock v. Chittock, 101 Mich. 367, 59 N. W. 655; Lauzon v. Belleheumer, 108 Mich. 444, 66 N. W. 345; Prichard v. Sharp, 51 Mich. 432, 16 N. W. 798; Canfield v. Robertson, 8 N. D. 603, 80 N. W. 764; Vosburg v. Teator, 32 N. Y. 561. The authorities upon this point are uniform and very numerous.

[12] Northern Chief I. C. v. Hosmer, 80 Wis. 77, 49 N. W. 115. An assignee takes no better title than the assignor had and if before the assignment the debtor agrees to give a creditor certain specified property in settlement of a disputed demand and the creditor accepts it, the assignee cannot hold it as against the creditor: In re Mills, 123 N. Y. Supp. 671. See Baldwin v. Jeffries, 2 Del. Co. (Pa.) 221. Where a contract to sell land provides that it is to be void if the adverse party succeeds in the pending litigation, but the action was compromised, it was held that the compromise was as binding as a final judgment and the party was bound by the contract: State v. Superior Court, 110 Pac. (Wash.) 808.

compromise are not bound,[13] unless they adopt the agreement by accepting its benefits.[14] A compromise made by an ancestor is binding upon his personal representatives and heirs.[15]

Sec. 94. Performance—Repudiation—Breach—Rights of the parties.—A party relying upon an agreement to compromise a debt or other demand, in an action on the original demand, must allege and prove actual performance upon his part of every condition precedent by him to be performed.[1] When one party has performed his part of an accord or an agreement to compromise, it is then too late for the other party to withdraw. Partial performance, if it amounts to substantial performance by giving the party in substance every thing stipulated for, is ordinarily sufficient and the party receiving the part performance cannot abandon the contract.[2] Dismissing a

[13] Whisnand v. Small, 65 Ind. 120; Seabrook v. Brady, 47 Ga. 650. See Sec. 35, *ante*, as to the conclusiveness of a settlement upon the lien of an attorney.

[14] Wilkins v. Hukill, 115 Mich. 594, 73 N. W. 898.

[15] Bowen v. Lockwood, 26 Mich. 441. A compromise made by an injured person of the damages sustained by the injury is binding upon his personal representatives and heirs although death afterward results from the injury: Perry v. Philadelphia, etc., R. Co., 77 Atl. (Del. Super.) 775; Jones v. Tallant, 90 Cal. 386, 27 Pac. 305.

[1] Ogilvie v. Hallam, 58 Iowa, 714, 12 N. W. 730; Bradley v. Palen, 78 Iowa, 126, 42 N. W. 623; Hart v. Accident Ass'n, 105 Iowa, 717, 75 N. W. 508; Kinney v. American Yeomen, 106 N. W. (N. D.) 44; Makepeace v. Harvard, 10 Pick. 298; Dalrymple v. Craig, 70 Mo. App. 149; Gardner v. Short, 19 N. J. Eq. 341; Hunt v. Wheeler, 116 N. C. 422, 21 S. E. 915; Quarles v. Jenkins, 98 N. C. 258, 3 S. E. 395; Woolfolk v. McDowell, 9 Dana (Ky.) 268; Louisville Bank v. Wheat, 4 Ky. L. Rep. 443: In this case the agreement provided for payment by a third party; the action upon default, was held to be upon the original cause. Armstead v. Shreveport, 108 La. 171, 32 So. 456; Maurer's Est., 1 Woodw. (Pa.) 268; Thompson v. McMillan, 89 Tenn. 110, 14 S. W. 439; Brown v. Spofford, 95 U. S. 474, 24 L. Ed. 508. A creditor cannot enforce a composition agreement until the debtor is in default: Sizer v. Miller, 2 How. Pr. 44. Where a note of a third party is to be taken as satisfaction and it requires an indorsement, a tender without the indorsement is bad: Eicholtz v. Taylor, 88 Ind. 38.

[2] Love v. VanEvery, 91 Mo. 575, 4 S. W. 272.

suit according to agreement, though the stipulation to dismiss be not filed, is a sufficient performance of an agreement whereby the suit was to be dismissed and the other party was to sign a compromise agreement.[3] If a party relies upon a compromise agreement, it is sufficient to defeat an action on the original cause of action to allege and prove merely the agreement and its delivery and acceptance in satisfaction. Upon an abandonment or repudiation of an agreement given and accepted in satisfaction upon a compromise, by one party, the other party has his election, either to rescind the agreement or treat it as a nullity and be remitted to his original cause of action,[4] or disregard the repudiation and bring an action to enforce it.[5] In such cases all the willing party need show in order to recover, is that he was at all times ready, able and willing to perform.[6]

Where there is a breach arising merely from a failure of performance of the new agreement, the action should be upon the new agreement.[7] In an action on a compromise agreement, the plaintiff must

[3] Hamill v. Copeland, 26 Colo. 78, 56 Pac. 901.

[4] Benson v. Larson, 95 Minn. 438, 104 N. W. 307; Henderson v. McRea, 148 Mich. 324, 111 N. W. 1057. Conkling v. King, 10 Barb. 372; Clew v. Rielly, 6 N. Y. Supp. 640; McClung v. Lyster, 3 Greene (Ia.) 182; Citizen's Bank v. Jorda, 45 La. Ann. 184, 11 So. 876; Tomson v. Heidenheimer, 16 Tex. Civ. App. 114, 40 S. W. 425; Barkley v. Clark, 43 Kan. 43, 22 Pac. 1025; Western Bank v. Kyle, 6 Gill, 343: In this case there was an express stipulation that upon default the agreement should be void.

[5] Massillion Eng. Co. v. Prouty, 91 N. W. (Neb.) 384; Jones v. Pullen, 66 Ala. 306; Conkling v. King, 10 Barb. 372; In Schweider v. Lang, 29 Minn. 254, 13 N. W. 33, 43 Am. Rep. 202, it was held that an action lies for damages resulting from the breach. Where a judgment has been discharged by an accord and satisfaction, the creditor is liable in damages for violating his agreement by enforcing the judgment: Colburn v. Gould, 1 N. H. 279.

[6] Massillion Eng. Co. v. Prouty, 91 N. W. (Neb.) 384; Strobridge v. Randall, 78 Mich. 195, 44 N. W. 134; May v. LeClaire, 11 Wall. 217, 20 L. Ed. 50; Bantle v. Krebs, 13 N. Y. St. 353.

[7] Shaw v. Railway Co., 82 Iowa, 199, 47 N. W. 1004; Hanley v. Noyes, 35 Minn. 174, 28 N. W. 189; Strobridge v. Randall, 78 Mich. 195, 44 N. W. 134; Chemical Nat. Bank v. Kohmer, 85 N. Y. 189. In Makepeace v. Harvard College, 10 Pick. 298, the transaction appears to be a simple accord. It was

show, as in other contracts, that he has performed any condition precedent by him to be performed, or a tender of performance, or facts excusing a strict tender. If the covenants are mutual and dependent he must put the other party in default by performance or tender of performance.

Sec. 95. Time of performance—Condition as to time waived when—Effect of acceptance after default.—The rule with respect to the time for performance of a new agreement accepted in satisfaction upon a compromise, is the same as applicable to contracts in general. If not performed at the time fixed, or within a reasonable time, if no time be limited,[1] the party not in default may have his remedy thereon. If the parties merely enter into an accord, or agreement to compromise and satisfy a debt upon a certain payment being made, or within a specified time, the condition must be strictly performed.[2] If performed within the time limited, and a consideration is present, it becomes an executed accord and is binding, although the agreement before performance is unenforceable. Part payment of the less sum within the time specified in money,[3] or in property at a valuation,[4] or a delivery of a portion of certain unvalued property agreed to be received, will not validate the agreement. Until full payment is made

held that the debtor having failed to fulfill the terms of the agreement was liable for the balance after deducting the amount at which certain property conveyed, was agreed to be taken. Where there is a stipulation that a failure of performance shall render the compromise inoperative, the creditor may waive a breach and enforce the agreement: Jones v. Pullen, 66 Ala. 306.

[1] Jones v. Peet, 1 Swan (Tenn.) 293; Boswell v. Gillen, 62 S. E. (Ga.) 187. Where a party accepts an agreement to pay a less sum than his claim, satisfaction to be conditional upon its performance within a certain time, time is of the essence of the contract: Hutchinson v. Wallace, 7 Kan. App. 612.

[2] See Robertson v. Campbell, 2 Call (Va.) 421, where it is held that if a creditor agrees to remit a part of the debt upon condition that the residue be paid within a certain time, the condition must be strictly performed; but he may enlarge the time, and such consent will bind him in equity.

[3] See Kinny v. American Yeomen, 106 N. W. (N. D.) 44.

[4] Makepeace v. Harvard College, 10 Pick. 298.

and accepted in satisfaction, the accord is not binding and it is revokable at the pleasure of either party.[5]

A creditor may, of course, voluntarily waive the condition as to time;[6] and, an implied waiver may be invoked against him, where, after the time for performance he demands and received performance of a contract to which he has no right except under the agreement that its performance shall satisfy the original demand. Thus, where the note of a third party was received from a debtor upon an agreement that if paid at maturity, it should be in full satisfaction of a larger debt and not otherwise, it was held that non-payment at maturity left the original debt unaffected by the agreement to compromise it; but that the creditor may waive his right to a strict compliance as to time and if he retains the note after maturity and demands and receives payment he cannot declare a forfeiture.[7] The same rule applies where a creditor, after default, accepts unvalued property agreed to be accepted as satisfaction of a debt when delivered. But if, in an agreement to compromise a debt, a right is reserved, upon default, to recover any deficiency upon the original cause of action, receiving part payment upon notes received upon the compromise agreement after a default, is no waiver of the right to sue on the original cause of action.[8] There is no question of rescission, but merely a right conferred by contract to enforce payment of the residue.

[5] Kinney v. American Yeomen, 106 N. W. (N. D.) 44.

[6] A court will not dispense with the point as to time but the party may waive it: Western Bank v. Kyle, 6 Gill 346.

[7] Conkling v. King, 10 N. Y. 440, 10 Barb. 372.

[8] Humphreys v. Bank, 75 Fed. 852, 43 U. S. App. 698, 21 C. C. A. 538; Hagerty v. Simpson, 1 E. D. Smith, 67; Simmons v. Clark, 56 Ill. 96. The above cases involved merely the question of an accord and satisfaction; the original cause of action was not to be satisfied until payment of the notes given thereon was made.

Sec. 96. Default after part payment—Payment pro tanto—Stipulation for recovery of residue—When a stipulation for payment of an additional sum on default is a stipulation for a penalty.—In absence of a stipulation for refunding money paid upon an accord or agreement to compromise a debt, in case of a breach of the agreement by the party making such payment, the money paid cannot be recovered back, but will be held to be a payment *pro tanto* upon the original demand.[1] If the correct amount agreed upon be not paid the creditor may, if he choose, return the amount received and sue for the entire amount of the original claim.[2] Where it is agreed that certain unvalued property, if delivered at a specified time, shall satisfy a debt, and a part is delivered, upon default as to the residue the creditor may return that portion of the property received and recover the amount of the original debt, or retain the property and recover the debt less the reasonable value of the property received. The property received should be returned if either portion of it is useless or valueless without the other. If the agreement to compromise provides that the situation of the parties is to remain unchanged, if all the less sum be not paid, the creditor's remedy, in case of a failure to pay according to the terms of the agreement, is upon the original cause of action.[3] The reason being that such an agreement is but an unexecuted accord. It has been held that the creditor does not waive his right to enforce the original cause of action by failing to make a tender of certain compromise notes received, or the security given therefor.[4] In such cases there is really no question of rescission, but merely that of exercising a right given by the agreement. Where a valid compromise is effected by the

[1] Abercromble v. Skinner, 42 Ala. 633; McClung v. Lyster, 3 Greene (Ia.) 182. In Makepeace v. Harvard College, 10 Pick. 292, the transaction was merely an accord. After a default the sum paid was credited upon the original cause of action.

[2] Kinney v. American Yoemen, 106 N. W. (N. D.) 44.

[3] Louisville v. Wheat, 4 Ky. L. Rep. 443.

[4] Humphrey v. Bank, 75 Fed. 852, 43 U. S. App. 698, 21 C. C. A. 538.

substitution of a new agreement to pay a less sum, with a proviso, that in case of a default the creditor may enforce the old cause of action, he is not limited to the proviso but may maintain an action to recover the stipulated sum.[5]

Where a new agreement accepted upon a compromise provides for the payment of the balance claimed to be due upon the old demand, or for a certain sum beyond that named in the new agreement, in case the debtor becomes in default, and such agreement is in the nature of a stipulation for a penalty, the creditor cannot upon default, recover the amount stipulated for. Thus, where an agreement was to pay $1,000 in installments, in satisfaction of a $2,200 claim sued upon, and it was stipulated that in case of default, the plaintiff might enter judgment for the whole sum sued for, and the defendant having defaulted in the payment of $250, the amount of the last installment, the entry of judgment was enjoined on the ground that it not appearing that the $2,200 was indisputably due, it could not be presumed that the stipulation for judgment for $2,200, less the amount paid, was not a stipulation for a penalty.[6] In such cases if the creditor desires to recover any sum beyond that to be paid in the first instance, upon the compromise agreement, his remedy is upon the original cause of action to recover whatever sum he can prove to be due. Where a certain sum of money is indisputably owing and due and the creditor agrees with the debtor to take, in full satisfaction thereof, a less sum, to be secured and to be paid at a specified day, but that, if not so paid, then the creditor shall recover the whole of the original debt, such provision for the return of the creditor to

[5] See Smith v. Shirley, 44 L. J. Ex. 29, 32 L. T., N. S. 234, where a stipulation entered into upon a compromise of proceeding in probate, provided that in default of payment of the sums specified within the time named, the defendant should be entitled to call the case and take a verdict by cousent upon all the issues, it was held that the defendant could maintain an action to recover the stipulated sums, and that he was not limited to the proviso for taking a verdict in the probate suit.

[6] Walsh v. Curtis, 73 Minn. 254.

his original rights, is not a stipulation for a penalty, and is enforceable.[7] The general rule is that if the amount claimed to be due is unliquidated, a stipulation for the payment of any sum beyond the sum named in the compromise agreement, in case of a default, it is in the nature of a stipulation for the payment of a penalty; but if the agreement provides for the payment of the full amount due upon a liquidated demand, in case of default in the payment of a less sum, or merely reserves the right of the creditor to have full payment in case there should be a failure to pay a smaller sum, it is not a stipulation for a penalty. In the latter case the rule is the same whether the claim be liquidated or unliquidated. In such cases the creditor is merely remitted to his original cause of action.

Sec. 97. Specific performance.—A compromise agreement made upon a settlement and compromise of an unliquidated, doubtful or disputed claim, will be enforced in equity the same as other agreements.[1] A parol agreement made upon a compromise, providing for the division of land claimed under conflicting titles, will be enforced if there has been sufficient performance to take the contract out of the Statute of Frauds.[2] Family agreements for the division of property, as before observed, are favored in equity even

[7] 1 Pomeroy Eq. Jur. Sec. 438; Thompson v. Hudson, L. R. 4, H. L. 1, reversing L. R. 2 Eq. 612, L. R. 2 Ch. 255; Walsh v. Curtis, 73 Minn. 254. See Haggerty v. Simpson, 1 E. D. Smith, 67; Simmons v. Clark, 56 Ill. 96; Humphrey v. Bank, 75 Fed. Rep. 852, 43 U. S. App. 698, 21 C. C. A. 538.

[1] Hall v. Clagett, 2 Md. Ch. 151; Reynolds v. Brandon, 3 Heisk. (Tenn.) 151, 593; Stapilton v. Stapilton, 1 Atk. 2, 26 Eng. Reprint, 1; Phillips v. Berger, 8 Barb. 527; See Barton v. Landon, 2 Atl. (Vt.) 374. Settlements of boundary line disputes made in writing, will be specifically enforced, if free from fraud or mistake: Fugatt v. Robinson, 18 B. Mon. 680. As to enforcement of compromises of actions, see Secs. 89, 109.

[2] Choosing a person to make a division of land, taking part in the division and delivering the possession of the land claimed under conflicting titles, pursuant to an oral agreement compromising their claims by a division, was held sufficient performance to avoid the Statute of Frauds, although the court refused to enforce that part of the agreement providing for the release of

more than ordinary compromises,[3] and where they "have been fairly entered into, without concealment or imposition upon either side, with no suppression of what is true, or suggestion of what is false," [4] they will be upheld in equity, and the powers of equity courts will be fully and readily used to enforce them, even when resting on grounds which would not be satisfactory if the transaction had been between strangers.[5] Where a father and son compromised their differences over the title to certain lands, the father, under seal, binding himself to pay a certain sum in thirty days and the balance afterwards out of the proceeds of the sale of the land, it was held that the son was entitled to a decree of specific performance.[6] So, an agreement between minor children and their adult brother for the division of the estate of their deceased father, was specifically enforced against the adult, although it was admitted, that, until the minors arrived of age and ratified the agreement, there was no mutuality of remedies.[7] A family agreement, by parol, for the partition of land, has been enforced.[8] In another case where there had been part performance of a parol agreement by delivery of possession, improvements made and an acquiescence in the arrangement for a long period of time, the agreement was enforced.[9] An agreement between brothers and sisters for a division of an estate founded upon an assumption that all were entitled under a will, was enforced al-

dower. Weed v. Terry, Walk. (Mich.) 501, aff'm'd in 2 Doug. 344, 45 Am. Dec. 257.

[3] Sec. 90.

[4] Gordon v. Gordon, 3 Swanst. 400.

[5] Smith v. Smith, 36 Ga. 184, 91 Am. Dec. 761. See Pullen v. Ready, 2 Atk. 587; Trigg v. Read, 5 Hump. (Tenn.) 529, 42 Am. Dec. 447.

[6] Johnson v. Johnson, 40 Md. 189.

[7] Smith v. Smith, 36 Ga. 184, 91 Am. Dec. 761.

[8] Neale v. Neale, 1 Keen, 672.

[9] Stockley v. Stockley, 1 Ves. & B. 23, 12 Rev. Rep. 184; See Stapilton v. Stapilton, 1 Atk. 2, 26 Eng. Reprint, 1.

though they were mistaken, the court resting its decision upon the ground that there was a neglect on the part of those complaining to acquaint themselves with the facts and the legal consequences of them.[10] So, where the agreement was reasonable, it was enforced, although one of the parties, at the time of making the agreement, was drunk.[11] Equity will not lend its aid to the enforcement of an agreement that in any way induces disobedience to parental authority, or the repudiation of a parent's advice or authority. Thus, a contract made by children in the life time of a parent, providing for a division of his property, to avoid the consequence of a threatened disinheritance of one of them, was held not such a contract as the court would enforce, for to do so, in such cases, would be a guaranty of impunity for any disobedience or want of filial loyalty.[12]

The agreement to be enforceable in equity must be final and complete, something more than a mere plan for a future adjustment of the details.[13] If there is a dispute as to the terms of a compromise agreement, it will not be enforced unless there is a clear preponderance of testimony in favor of the agreement alleged.[14] If the agreement of compromise is such that it cannot be specifically performed, the rights of the parties under the original demand remains unchanged.[15]

With respect to specific performance of contracts in general, it is said to be not a matter of strict legal right, but rests in the sound discretion of a court of equity; hence it requires a much stronger case on the part of the plaintiff to maintain a suit than

10 Pullen v. Ready, 2 Atk. 587; See Smith v. Smith, 36 Ga. 184, 91 Am. Dec. 761.

11 Cory v. Cory, 1 Ves. Sr. 19.

12 Mercier v. Mercier, 50 Ga. 546.

13 Wister's Appeal, 80 Pa. St. 484.

14 Grove v. Beech, 53 N. W. (Ia.) 88.

15 Playford v. Playford, 4 Hare, 546, 30 Eng. Ch. 546.

it does on the part of the defendant to resist a suit.[16] "An agreement to be entitled to be carried into specific performance, ought to be certain, fair and just in all its parts. Courts will not decree a specific performance in cases of fraud or mistake, or of hard and unreasonable bargains, or where the decree would produce injustice, and generally in any case when such decree would be inequitable under all the circumstances." [17] A court of equity will closely scrutinize a compromise made by an executor or other fiduciary, and will not assist in carrying it into effect unless the plaintiff will first unfold and disclose all the circumstances of the case, so that the court may see there has been no fraud and everything is fair.[18] Equity will not enforce a compromise or otherwise support it, where the party against whom the relief is sought did not have equal knowledge or equal means of informing himself. There must be a full disclosure of all the facts and circumstances affecting the subject-matter of the compromise, within the knowledge of the several parties, which the others have no reasonable means of knowing, whether the information be asked for or not. "There must not only be good faith and honest intention, but full disclosure, and without full disclosure, honest intention is not sufficient." [19] By this, it is meant that the plaintiff's case, upon his own showing, must be in all respects fair. The appeal being to a court of conscience, the courts do not stop here, but will permit a defendant to resist a decree by evidence which would not always be sufficient to establish his case were he the plaintiff.[20]

[18] Trigg v. Read, 5 Hump. 529, 42 Am. Dec. 447.

[17] Trigg v. Read, *ante*. A compromise made through mistake of defendant's attorney will not be enforced: Swinfen v. Swinfen, 27 L. J. Ch. 35. Nor, where, at the time of the compromise, a judgment creditor was ignorant that sufficient property to satisfy the judgment had been levied upon: Cowan v. Sapp, 81 Ala. 525, 8 So. 212.

[18] Clay v. Williams, 2 Munford, 105, 5 Am. Dec. 453.

[19] Kerr on Fraud, 124.

[20] With reference to the power of a court of equity to rescind, cancel or direct a surrender of contracts, securities or deeds, or to enforce them by a

Sec. 98. Necessity for a tender before suit for specific performance—Contrary rule—A tender is necessary to bar right to specific performance.—In suits for specific performances of contracts in general, in the greater number of jurisdictions, the rule is that where the covenants are mutual and dependent it is not necessary before bringing the action for the plaintiff to put the other party in default by performance or tender of performance on his part.[1] And the rule has been applied in an action to enforce a compromise.[2] In some jurisdictions it is not even necessary to aver a willingness or make an offer of performance in the com-

specific performance, perhaps no clearer statement of the general principles can be found than that given by Mr. Story—He says: "The application to a court of equity for either of the purposes, is not, strictly speaking, a matter of absolute right, upon which the court is bound to pass a final decree, but is a matter of sound discretion to be exercised by the court, either in granting or in refusing the relief prayed according to its own notion of what is reasonable and proper under all the circumstances of the particular case. Thus for instance; a court of chancery will sometimes refuse to decree a specific performance of an agreement, which it will yet decline to order to be delivered up, canceled or rescinded. On the other hand a specific performance will be decreed upon the application of one party, when it would be denied upon the application of the other. And an agreement will be rescinded or canceled upon the application of one party, when the court would decline any interference at the instance of the other. So that we are to understand, that the interference of a court of equity is a matter of mere discretion, not, indeed, of arbitrary and capricious discretion, but of sound and reasonable discretion, *Secundum arbitrium boni judicis.*" Story's Eq. Jur. Sec. 693.

[1] Hunt on Tender, Sec. 28, citing Fall v. Hazelrig, 45 Ind. 576; Minneapolis, etc., Ry. Co. v. Chisholm, 55 Minn. 374; Stevenson v. Maxwell, 2 N. Y. 409; Vaught v. Cain, 31 W. Va. 424; Ashurst v. Peck, 14 So. (Ala.) 541; Brown v. Eaton, 21 Minn. 409; Nelson v. Nelson, 75 Iowa, 710, 38 N. W. Rep. 134; Winton v. Sherman, 20 Iowa, 295; Brooks v. Hewit, 3 Ves. 253; Hunter v. Bales, 24 Ind. 299; Irwin v. Gregory, 13 Gray, 215; Lynch v. Jennings, 43 Ind. 276; Sons of Temperance v. Brown, 9 Minn. 157; Lewis v. Prendergast, 39 Minn. 301; Sheplar v. Green, 96 Cal. 218, 31 Pac. 42, and other cases.

[2] Where the acts to be performed under the compromise agreement are mutual and dependent, as where there is to be mutual conveyances, a failure of the plaintiff to carry out his part of the agreement is no ground for refusing to enforce the contract: Mitchell v. Long, 5 Litt. 71.

plaint.[3] The court can in its decree fully protect the rights of the defendant. In such cases the failure to make a tender affects merely the costs. There is a line of authorities supporting the contrary rule; that a plaintiff must make an actual tender before bringing his suit,[4] or show that the making of a formal tender was waived by some act or declaration of the other party, which would render a tender—as long as the position taken by the latter is maintained—a vain and idle ceremony.[5]

Where the contract is such that upon a default by one party the other party may declare a forfeiture, or rescind; and, where a tender is necessary in order to work a forfeiture, a tender must be made in order to defeat the right of the other party to a specific performance. In absence of a tender, the right to specific performance continues until barred by the statute of limitation.[6]

[3] Vaught v. Cain, 31 W. Va. 424; Brooks v. Hewit, 3 Ves. 253; Coolbough v. Roemer, 32 Minn. 447. See Freeson v. Bissell, 63 N. Y. 168, and Stevens v. Maxwell, 2 N. Y. 169.

[4] Hunt on Tender, Sec. 29, citing Askew v. Carr, 81 Ga. 685; Sanford v. Bartholomew, 33 Kan. 38; Boyce v. Frances, 56 Miss. 573; Klyce v. Broyles, 37 Id. 524; Mhoon v. Wilkinson, 47 Id. 633; Robinson v. Harboar, 42 Id. 800; Kimbrough v. Curtis, 50 Id. 117; Greenup v. Strong, 1 Bibb, 590; Bearden v. Wood, 1 A. K. Marsh. 450; Young v. Daniels, 2 Iowa, 126. See foot note to Sec. 1407, Pomeroy's Eq. Jur. for a collection of cases upon this subject. The plaintiff must not himself be in default: Brooklyn Co. v. Miller, 108 Pac. (Ariz.) 471; and if he relies upon part performance it must appear clearly that what was done was done upon the compromised agreement sought to be enforced: Senior v. Anderson, 115 Cal. 496, 41 Pac. 454.

[5] White v. Dobson, 17 Gratt. (Va.) 262; Dulin v. Prince, 124 Ill. 76; McPherson v. Fargo, 74 N. W. Rep. (N. D.) 1057; Trenton St. R. Co. v. Lawlor, 73 N. J. Eq. 203, 75 Atl. 996; Brace v. Doble, 52 N. W. Rep. 586; McEleroy v. Tulane, 34 Ala. 78; Lyman v. Gedney, 114 Ill. 388, 29 N. E. 282; Smith v. Gibson, 41 N. W. Rep. (Neb.) 360.

[6] See Leaird v. Smith, 44 N. Y. 688.

Sec. 99. Offer of compromise inadmissible in evidence.—Parties between whom a controversy exist have a right to buy their peace,[1] and may with impunity attempt to buy their peace,[2] and the rule is almost, if not universal, that an unaccepted offer of compromise is not evidence against the party making it,[3] either of a general liability, or for the amount offered, or of any other fact connected with the subject of the negotiation.[4] The rule is found-

[1] Ward v. Munson, 105 Mich. 657, 63 N. W. 498.

[2] Tennant v. Dudley, 144 N. Y. 505; Murray v. Coster, 4 Cowen, 635.

[3] Melby v. Osborn, 35 Minn. 387, 29 N. W. 58; Cleveland, etc., R. Co. v. Maguire, 137 Ill. App. 31; Callen v. Rose, 47 Neb. 634, 66 N. W. 639; Edwin S. Hartwell Co. v. Bork, 138 Ill. App. 506; Hudson v. Williams, 72 Atl. (Del.) 985.

[4] Chesire v. Des Moines, 133 N. W. (Ia.) 324. "A distinction is taken between the admission of particular facts and an offer of a sum of money to buy peace. For, as Lord Mansfield observed, it must be permitted to men to buy their peace without prejudice to them, if the offer should not succeed; and such offers are made to stop litigation, without regard to the question whether anything is due or not. If, therefore, the defendant being sued for 100 pounds, should offer the plaintiff 20 pounds, this is not admissible in evidence, for it is irrelevant to the issue, it neither admits nor ascertains any debt; and is no more than saying, he would give 20 pounds to be rid of the action." 1 Greenleaf on Ev. 192. See Bull. N. P. 286. An offer of compromise is not admissible to show that the claim is or is not well founded: Taylor v. Tigerton Lumber Co., 114 N. W. 122; or that a mortgage is an existing lien: Ward v. Munson, 63 N. W. (Mich.) 418. A few of the cases on this question follow. Tennant v. Dudley, 144 N. Y. 504, 39 N. E. 644; Smith v. Satterler, 130 N. Y. 677, 29 N. E. 225; Williams v. Thorp, 8 Cow. 201; Boyce v. Palmer, 55 Neb. 389, 75 N. W. 849; Hanover Ins. Co. v. Stoddard, 52 Neb. 745, 73 N. W. 291; Bauer v. Weber, 129 S. W. (Mo. App.) 59; Moore v. Graus, 113 Mo. 98, 20 S. W. 975; Pelton v. Schmidt, 104 Mich. 345, 62 N. W. 552, 53 Am. St. Rep. 462; Donley v. Bailey, 110 Pac. (Colo.) 65; Parson v. Bowe, 79 Minn. 238, 82 N. W. 480; Houdeck v. Merchants' Ins. Co., 102 Iowa, 303, 71 N. W. 354; City of San Antonio v. Stevens, 126 S. W. (Tex. Civ. App.) 666; Home Ins. Co. v. Baltimore W. Co., 93 U. S. 527; East Tenn. R. Co. v. Davis, 91 Ala. 615, 8 So. 349; Sandlin v. Kennedy, 51 So. (Ala.) 622; Chicago R. Co. v. Roberts, 26 Colo. 329, 57 Pac. 1076; Davis v. Catlettsburg Water Co., 127 S. W. (Ky.) 479; Illinois Cent. R. Co. v. Nelson, 127 S. W. (Ky.) 520; Gulf R. Co. v. Bagby, 127 S. W. (Tex. Civ. App.) 254; Denver, etc., R. Co. v. Breunaman, 100 Pac. (Colo.) 414; New York L. Ins. Co. v. Rankin, 162 Fed. 103; Alabama S. Co. v. Dewy, 47 So. (Ala.) 55;

ed upon public policy, and "with a view of encouraging and facilitating the settlement of legal controversies by compromise, which object is supposed to be obstructed by the fear entertained by litigants that such a negotiation may be converted into a trap to inveigle the unwary into hazardous admissions." [5] "Without this protective rule," said Mr. Greenleaf, "it would often be difficult to take any steps towards an amicable compromise or adjustment." [6] The rule excludes evidence of admissions of distinct facts made expressly without prejudice, and for the sole purpose of reaching an amicable settlement, and to admissions of distinct facts which appear to have been made tentatively or hypothetically under an implied agreement that the admissions are not thereafter to be used against the party making them.[7] The rule excluding an offer of compromise as evidence, is applicable to an attempted settlement of a demand based on fraud,[8] criminal conversation,[9] damages for trespass,[10] or any wrong creating a liability, whether tortious or otherwise. The rule includes offers of compromise made by attorneys and agents.[11]

Sebree v. Smith, 2 Idaho, 329, 16 Pac. 915; Jenness v. Jones, 68 N. H. 475, 44 Atl. 607; Scheurle v. Husbands, 65 N. J. L. 40, 46 Atl. 759; Cochran v. Baker, 34 Or. 555, 56 Pac. 641; Reagan v. McKibblen, 11 S. D. 270, 76 N. W. 943; San Antonio R. Co. v. Stone, 60 S. W. (Tex. Civ. App.) 461; Groff v. Hausel, 33 Md. 161; State Bank v. Dutton, 11 Wis. 371 (389). An attempt to compromise a claim in suit does not forfeit the right of the debtor to have a default judgment against him set aside for excusable mistake, oversight or other ground preventing him defending: Farmers' Bank v. Trester, 124 N. W. (Ia.) 793.

[5] White v. Old Dominion S. S. Co., 102 N. Y. 660.

[6] 1 Greenl. Ev. Sec. 192.

[7] See White v. Old Dominion S. S. Co., 102 N. Y. 660; Mead v. Degolyer, 16 Wend. 632.

[8] Finlay v. Prost, 11 Mich. 625, 70 N. W. 137.

[9] Smith v. Meyers, 54 Neb. 1, 74 N. W. 277.

[10] Herr v. Stough, 2 Brown's Rep. 111.

[11] Roberts v. Minneapolis Thresh. Mach. Co., 8 S. D. 579, 68 N. W. 607; Mundhenk v. Central Iowa Ry. Co., 57 Iowa, 78, 11 N. W. 656.

In regard to the necessity for an offer of compromise being made with the express caution that it is confidential, or that it is without prejudice, the authorities are not entirely in harmony. Cases are to be found holding that the offer is *prima facie* proof of a liability unless when made it is expressly said to be without prejudice.[12] But without doubt the great weight of the authorities, as well as good sense, support the rule that an offer, when made in faith of a pending negotiation resulting in a settlement, is, when unaccepted, inadmissible for any purpose for or against either party,[13] whether it is expressly declared that the offer is without prejudice or not. Parties entering into a negotiation for a settlement of their differences, tacitly, if not expressly, invite mutual confidences; and good faith and fair dealing dictate the rule that neither party shall be permitted to retire and use to his advantage any offer or concession made, on the ground that the other party had neglected to say the offer, if unaccepted, shall mean nothing. No different rule applies in those cases where an offer of compromise is rejected without any mutual advances or discussion; otherwise no one would open the negotiation.[14]

Sec. 100. Same subject.—Aside from the policy of the law encouraging and inviting amicable adjustments of disputed claims and demands, by protecting the parties from the effect of confidential overtures upon the mind of jurymen;[1] most offers of compromise are inadmissible for another very obvious reason, and that is they are not admissions of any existing fact but merely a proposition to do something, made to avoid litigation, without

12 Wallace v. Small, 1 M. & M. 446; Watt v. Lawson, Id. 447, note. See Hilburn v. Phœnix Ins. Co., 124 S. W. (Mo. App.) 63.

13 Louisville R. Co. v. Wright, 115 Ind. 378; Binford v. Young, 115 Ind. 174.

14 See Hilburn v. Phœnix Ins. Co., 124 S. W. (Mo. App.) 63.

1 The error in admitting evidence of an offer of a compromise is aggravated by the fact that argument is made to the jury predicated upon the supposed effort to compromise: Edwin S. Hartwell Co. v. Bork, 138 Ill. App. 506.

regard to whether or not anything is due, and they do not, to the unbiased and trained mind, prove anything, except possibly that there is a dispute; and are, therefore, fallacious with respect to the purpose offered, irrelevant to the issue and immaterial.[2] In an English case it is said, "If A. sue B. for 100 pounds, and B. offer to pay him 20 pounds, it shall not be received in evidence, for this neither admits nor ascertains any debt, and is no more than saying he would get rid of the action."[3]

It is the effect of such evidence that the law guards against. The effect is prejudicial to the investigation of the truth, for, the inexperienced and untrained mind is very apt to reach the conclusion that an offer of compromise is evidence of weakness in the claims of the party making it, otherwise an offer would not have been made. When such evidence is before a jury, it is reversible error for the court to refuse to instruct them that the offer cannot be considered as evidence of any liability.[4] But there must be an offer upon condition, either expressed or implied, for it is the condition that no advantage shall be taken of the admission made in furtherance of an amicable settlement, upon which the rule rests excluding the admission as evidence. In absence of an express condition, the court will look into the nature of the negotiation, and if the offer be made plainly by way of a compromise, and with a view to buy peace, it will be presumed that the offer was made without prejudice, and, if unaccepted, it will be excluded as evidence.[5] Where a party is cast in suit, and he makes an offer of a certain sum in settlement, the presumption

[2] Hartford Bridge Co. v. Granger, 4 Conn. 142.

[3] Bull. N. P. 236; Chesire v. Des Moines, 133 N. W. (Ia.) 324.

[4] Pelton v. Schmidt, 62 N. W. (Mich.) 552.

[5] West v. Smith, 101 U. S. 263; Lofts v. Hudson, 2 M. & R. 481; Richards v. Noyes, 44 Wis. 609; Kassing v. Walter, 65 N. W. 832; Callen v. Rose, 47 Neb. 634, 66 N. W. 639. Upon the subject generally, see 1 Phillips Ev. 5th Am. Ed. p. 427 and Note 124; Greenleaf Ev. Sec. 192 and Note; and Tennant v. Dudley, 144 N. Y. 504 and Note to L. Ed.

seems to be stronger that it is an offer of compromise and settlement of the litigation, and made without prejudice.[6]

Sec. 101. Same subject.—An offer of compromise, however, is admissible in evidence when it is offered for the purpose of showing that a compromise was actually made of the disputed demand.[1] So, an offer may be admissible for the purpose of showing that an attempt has been made to compromise, which may be sometimes necessary in order to account for the lapse of time.[2] An offer must be made with a view to a compromise and to buy peace, otherwise the offer will be admissible for what it is worth against the party making it. Thus, in an action to recover for injuries to a horse, evidence that defendant admitted it was an accident, that he would do what was right about it, would pay the veterinary's bill and let the plaintiff have the use of another horse while the injured one was laid up, was admitted as an admission against defendant, it not appearing that it was made as an offer of compromise.[3] Upon like principle an offer by the defendant in bastardy, to the father of the prosecutrix, to contribute money to send the latter away was admitted in evidence, as it was not an offer of compromise.[4] An offer to pay a then undisputed account if the creditor will make a certain discount is not within the rule excluding an offer of compromise.[5] A letter written by plaintiff demanding a less amount than that claimed in the action, is admissible upon the question of the amount due.[6]

6 Richards v. Noyes, 44 Wis. 609, citing Jones v. Foxall, 13 Eng. Law and Eq. 140, 145; Cory v. Betton, 4 C. & P. 462; Reynold's Adm'r v. Manning, 15 Md. 510; Gerrish v. Sweetser, 4 Pick. 374.

1 Stuht v. Sweesy, 67 N. W. (Neb.) 748; Collier v. Nokes, 2 C. & K. 1012; Frognell v. Lewelyn, 8 Pr. 122.

2 See *dictum*, Jones v. Foxall, 13 Eng. Law Eq. 140, 15 Beav. 388.

3 Bassett v. Shares, 63 Conn. 39.

4 Robb v. Hewitt, 29 Neb. 217.

5 Person v. Bowe, 79 Minn. 238, 82 N. W. 480.

6 C. Aultman & Co. v. Martin, 68 Neb. 340.

Where the question arises as to the admissibility of the evidence, it is for the court to determine whether the admissions offered are within the rule excluding them.[7] In a case where a sum was tendered "as the sum due" it was held that the question whether it was intended by the offer to concede that something was due on the demand and not merely to buy peace, was a question for the jury to determine from all the circumstances.[8] So, it has been held that if there is a dispute as to whether or not the offer was made by way of a compromise, the court may properly leave it to the jury with the instruction to disregard the admission, if they find it was made by way of a compromise.[9] But, where there is no dispute as to what was said, we believe the correct rule to be that where the admissibility of an admission comes before the court upon an objection to it as evidence, on the ground that it was made by way of a compromise, it is for the court to construe the language, in connection with the other facts and circumstances.

Sec. 102. Admission of independent facts admissible in evidence.—The doctrine stated in the preceding sections is confined to the implied admission to be drawn from the mere offer of compromise, and to such admissions of distinct and independent facts as are made expressly without prejudice, and for the sole purpose of effecting a compromise, or such as appear to have been made tentatively, or hypothetically.[1] It does not exclude evidence of an unqualified admission of any independent fact made during a treaty of compromise, or in the conversation or discus-

[7] Greenfield v. Kennett, 69 N. H. 419, 45 Atl. 233; Batchelder v. Batchelder, 2 Allen, 105.

[8] Nye v. Chase, 50 Vt. 306.

[9] Greenfield v. Kennett, 69 N. H. 419, 45 Atl. 233; Webber v. Dumm, 71 Me. 330.

[1] White v. Old Dominion S. S. Co., 102 N. Y. 660.

sion leading up to an offer.[2] It is not, however, necessary that the fact admitted should be independent of the subject-matter embraced in the negotiation for a compromise, but it must be an admission of a fact relevant to the issue involved in the action, as distinguished from an offer to buy peace, or to compromise the controversy.[3] If the admission cannot be separated from the offer and still convey the intended idea it is inadmissible.[4] Mere loose expressions indicating an opinion as to a liability, or an exemption therefrom, or an assumption made as a basis of the proposed settlement, are not sufficient; the admission to be admissible in evidence must concede the existence of a fact.[5] It is admissible upon the ground, common to all admissions against interest; which presupposes the improbability of a party admitting a fact to his prejudice, unless the fact really exists. In an early case in Connecticut, the Court observed: "The law on this subject has been often misconceived; * * * It is never the intendment of the law to shut out the truth; but to repel any inference which may arise from a proposition made, not with a design to admit the existence of a fact, but merely to buy one's peace."[6] Thus, if a party at

[2] Kutcher v. Love, 19 Colo. 542; Bascom v. Danville Stove Co., 182 Pa. 427; Austin v. Long, 63 S. E. (Ga. App.) 640; Binford v. Young, 115 Ind. 174 (The defendant admitted uttering certain slanderous words); Bartlett v. Tarbox, 1 Abb. App. Div. 120; White v. Old Dominion S. S. Co., 102 N. Y. 660; Amour v. Gaffey, 30 App. Div. 121; Cumbey v. Lovett, 76 Minn. 227. A letter admitting that a certain amount is in the treasury of a railroad company subject to claim is not inadmissible as an offer of compromise: Mosley v. Missouri Pac. R. Co., 112 S. W. (Mo. App.) 1010. An unqualified acknowledgment of an indebtedness was held admissible in evidence, though made during negotiations for a settlement: Hudson v. Williams, 72 Atl. (Del.) 985.

[3] Eastman v. Amoskeag Manfg. Co., 44 N. H. 143, 82 Am. Dec. 201.

[4] Home Ins. Co. v. Baltimore W. Co., 93 U. S. 527, 23 L. Ed. 868.

[5] In Hartford v. Granger, 4 Conn. 142, the Court said: "The question to be considered is what was the view and intention of the party in making the admission, whether it was to concede a fact hypothetically in order to effect a settlement or declare a fact really to exist."

[6] Hartford Bridge Co. v. Granger, 4 Conn. 142.

the time of making an offer of compromise admits that he justly owes a certain sum, or admits a certain item of an account to be correct,[7] or any other fact as being true, it is good evidence,[8] whatever may have been the motive that prompted the admission.

It has been held that an offer to compromise made in writing, wherein certain property is described as community property, was admissible on the question whether or not the property was community property.[9] So, a statement made during negotiations for a settlement, inconsistent with the position afterwards taken by the party, is admissible to contradict him, as where he stated he would not settle if a certain street car track was removed so as to divert travel from his property, and afterwards claimed damages on account of the track being there.[10] In criminal conversation, an admission made by the defendant, pending negotiations for a compromise of the intimacy alleged, and offering to bring up one of the children, was held to be an admission of an independent fact.[11] So, in a bastardy proceeding, it was permitted to be shown that when the defendant was charged by the mother with being the father, he offered to pay her money if she would not sue him and keep it quiet.[12] Where a transaction was had with a party through an agent, an admission of the agency made by the defendant, pending a settlement was held admissible.[13] Admissions made pending a treaty of compromise are admissible

[7] Bull. N. P. 236.

[8] Murray v Coster, 4 Cow. 635. See Marvin v. Richmond, 3 Denio, 58, overruling Williams v. Thorp, 8 Cow. 201.

[9] Rose v. Rose, 112 Cal. 341.

[10] Taylor v. Bay City St. Ry. Co., 101 Mich. 140, 59 N. W. 447. S. P. Bascom v. Danville Stove Co., 182 Pa. 427.

[11] Sanborn v. Neilson, 3 N. H. 501.

[12] Fuller v. The Town, 5 Conn. 416.

[13] Church v. Steele's Heirs, 1 A. K. Marsh. (Ky.) 328.

to prove the handwriting of the party.[14] The rule excluding offers and admissions, extends to those made by both parties, thus a reply to a letter written "without prejudice" though not similarly guarded was excluded.[15] The reply must of course be of the same character as the counter proposition. On the other hand facts unqualifiedly admitted in a reply to an offer of compromise are admissible. If, upon a party being applied to for a settlement, he at once rejects the overture and gives as his reason any facts, they are admissible for they are not induced under the expectation of the protection accorded communications made pending negotiations for a settlement.[16] The admission of a distinct fact to be inadmissible must in reality be made tentatively or hypothetically, either expressly or by implication; clogging the admission with the statement that it is to be confidential is not enough.[17] If, in admitting evidence of admission of facts it be necessary to submit the whole transaction, the jury should be instructed that the offer of compromise is not to be considered as evidence.[18] If the alleged admissions are denied the question may be submitted to the jury with the instruction that if they find they were not made the testimony concerning the attempted compromise should not be permitted to influence them.[19]

The admission, to be admissible, must be of a fact,[20] and not one of law, for a party may easily be mistaken as to his legal rights.[21] Obviously, if an admission that the law imposed a lia-

14 Waldridge v. Kennison, 1 Esp. 143; Furner v. Railton, 2 Esp. 474. See Dooley v. McEwing, 8 Tex. 306.

15 Paddock v. Forrester, 3 Scott, N. R. 734.

16 See Marvin v. Richmond, 3 Denio, 58.

17 Gerrish v. Sweetser, 4 Pick. 374.

18 Eastman v. Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201, citing Bartlett v. Hoyt, 33 N. H. 151.

19 Jenness v. Jones, 68 N. H. 475.

20 Folk v. Schaeffer, 180 Pa. St. 613, 37 Atl. 104.

21 See Moore v. Hitchcock, 4 Wend. 292. See, also, Rice v. Ruddinean, 10 Mich. 145. And see as to mixed law and fact Lewis v. Harris, 31 Ala. 689.

bility, or a certain contract binds a party, was admissible, when, whether he is bound or not, is a question of construction merely, it would often result in saddling a defendant with a liability where there is none in truth. The object of rules of evidence is to facilitate ascertaining the truth, not to establish something as true which is not. Admissions against interest are not conclusive; and when they are verbal, they should be received with caution. But when it is clearly proved that they were deliberately made, with full knowledge of the facts, they are considered to be strong evidence.

Sec. 103. Admission by whom made—Partner—Joint obligor—Joint and several obligor—Joint tort feasor.—Admissions, to be admissible, must be made by the party in interest, or one duly authorized by him to make them. According to Mr. Phillips, "Admissions must, in all cases, be brought home to the party in a suit, against whom they are used, or to some person who is identified in interest with him."[1] The authorities are uniform in holding that the admissions of one partner made during the continuance of the partnership, concerning a matter of partnership business, are admissible in evidence against all the partners.[2] But the existence of the partnership at the time of declarations must first be proven, and the question whether the proof of the existence of the partnership is sufficient to warrant the declarations of one partner being received in evidence against the other partners is for the court. The proof must show that the party against whom the declaration is sought to be used, as well as the party making the declaration, were, at the time, members of the co-partnership.[3] Such declarations are admissible because of the uni-

[1] 1 Phil. Ev. 480.

[2] Walden v. Sherburne, 15 Johns. 409; Bound v. Lathrop, 4 Conn. 338; 1 Greenl. Ev. 112.

[3] Catt v. Howard, 3 Stark, 5.

ty of interest,[4] each being bound for the whole;[5] and, because of the agency of each partner for all to transact any business of the co-partnership.[6] It does not follow, however, that this agency continues for all purposes until all the partnership business is settled up. During the existence of a partnership, as to partnership contracts, the partners are more than mere joint contractors; but after a dissolution they are upon the same footing as other joint contractors, in respect to promises and admissions thereafter made by the individual partners.[7] The dissolution does not revoke the authority of one partner as agent for the other, to arrange, liquidate, settle and pay the debts of the firm.[8] Whether a partner can go further than this and make admissions affecting the interest of his former partner, is not uniformly settled. The rule in various jurisdictions conflict. The rule now recognized in New York, and some other jurisdictions, seems to be grounded upon the better reasoning. There, the rule is, that the admissions of one partner, as to the existence of an account, or any fact, made after a dissolution of the firm, is not admissible as evidence to affect other members of the firm.[9] As between the firm and

[4] See Boyce v. Watson, 3 J. J. Marsh. 498.

[5] See Corps v. Robinson, 2 Wash. C. C. 390.

[6] "By the very act of association, each one is constituted the agent of all." 1 Greenl. Ev. 112.

[7] Clement v. Clement, 69 Wis. 599, 35 N. W. 17. As to classification of partnership contracts, after dissolution, see Gates v. Fisk, 45 Mich. 522, 8 N. W. 558, and Pierce v. Toby, 5 Met. 168.

[8] Clement v. Clement, 69 Wis. 599, 35 N. W. 17, citing Pars. Partn. Sec. 390.

[9] Baker v. Stackpoole, 9 Cow. 421; Walden v. Sherburne, 15 Johns. 409; Hopkins v. Banks, 7 Cow. 650; Brisban v. Boyd, 4 Paige, 17; Gleason v. Clark, 9 Cow. 57. See, also, Conery v. Hayes, 19 La. Ann. 325; Brady v. Hill, 1 Mo. 315; Yandes v. Lefavour, 2 Blackf. 371; Shelton v. Cocke, 3 Munf. 191.

This question as to whether an admission made by one partner after a dissolution of the firm, is admissible in evidence as proof of a liability against a co-partner, has been before the courts most frequently with reference to whether such admission prevents the bar of the Statute of Limitations. In Van Keuven v. Parmelee, 2 N. Y. 523, where a partner, nine years after dis-

those having previous dealings with it, there is no dissolution until notice of that fact is brought home to them.[10] Hence, promises and admissions, made after dissolution but before notice is brought home to a creditor, may be used against all the partners to the same extent as those made before the dissolution.

Such, in general, are the general rules governing the admissibility of admissions by a member of a firm, made before and after the dissolution, from which the rule is to be drawn, though it may not obtain in all jurisdictions, that after a dissolution and notice to the person having previous dealings with the firm, an admission of an independent fact, made by a partner upon a compromise of any unsettled business of the firm, is not admissible in evidence against his co-partner, either for the purpose of fixing any old liability upon him, or creating a new one. In a case

solution and four years after action was barred, gave a new promise; Bronson, J., in a very able opinion, reviewed the English and American authorities, and held that one partner could not after dissolution, by a new promise, bind his co-partner so that the latter could not avail himself of the Statute. That after dissolution it made no difference whether the new promise or admission was made before or after the statute had run. In commenting on a certain decision which made the distinction that one partner cannot after dissolution make a new contract, but could by an acknowledgment of the debt, charge his co-partner, the court said: "No one who does not go upon the ground that the statute of limitation ought not to be enforced, can assign a solid reason for the distinction between a new contract creating a new debt against a former partner and making an acknowledgment which will charge him with that though once a debt has ceased to be so by operation of law. The court refused to inquire whether the Statute operated upon the debt or the remedy. The case overrules the former New York decision on the question. The reader is also referred to 1 Phil. Ev. 412, Cowan & Hill's Notes and 1 Greenl. Ev. 112, n. 14th ed., for extensive notes upon the question. Bronson. J., in Van Keuven v. Parmelee, *ante*, said that the contrary doctrine in whole or in part, was followed in Massachusetts, Connecticut, Maine, Vermont, North Carolina and Georgia.

[10] A partial payment of a partnership debt, made by one partner after dissolution of the firm, to a creditor who has had previous dealings with the firm and has had no notice of its dissolution, will prevent the bar of the statute of limitations as to the other partner: Davison v. Sherburne, 57 Minn. 355. Touching the same point, see Clement v. Clement, 69 Wis. 599,

where the notice of dissolution requested "all persons having any unsettled business with them * * * to call on the subscriber," one of the partners, "for an adjustment of the same," and the partner thus authorized, upon a settlement, gave a written acknowledgment that the firm owed to the other party $744.37, the court said: "This is a clear case. After a dissolution of a copartnership, the power of one party to bind the other wholly ceases. There is no reason why his acknowledgment of an account should bind his copartner any more than his giving a promissory note in the name of the firm, or any other act." [11] He may bind himself by his admissions, but as to his former partners, his agency, except for special purposes, is terminated, and his admissions are like those of strangers, and they are not bound by them.[12] One joint debtor, or joint and several debtor, holding that relation simply, has no implied power as agent or otherwise, which will enable him by any act or promise to continue or renew a debt as to his co-debtor, either before or after the statute of limitation has run as to him.[13] And by analogy, they cannot, upon a treaty of compromise of a joint debt, make any admission of

35 N. W. 17; Gates v. Fisk, 45 Mich. 522, 8 N. W. 588; Pratt v. Page, 32 Vt. 15; Buxton v. Edwards, 134 Mass. 567. As to who is entitled to notice of dissolution; the necessity for notice and what notice is sufficient, see Lansing v. Gaine, 2 Johns. 300, and note, L. Ed.

[11] Hackley v. Patrick, 3 Johns. 536. S. P. Waldon v. Sherburne, 15 Johns. 409; Baker v. Stackpoole, 9 Cow. 421; Ward v. Howell, 5 Harr. & J. 60.

"The reason why one partner, after the dissolution, cannot charge his copartner by his confessions, is, that it would be highly unjust that one man should confess away the rights of another; and if ill will should happen to exist between partners at their dissolution, one might ruin the other by his confessions; whether true or false." Gleason v. Clark, 9 Con. 57.

[12] Nichols v. White, 85 N. Y. 531, citing Walden v. Sherburne, 15 Johns. 409. In an action against one partner, the plaintiff may not prove the declarations made by the other partner after dissolution, for the purpose of showing that it is in conflict with his testimony for the defense: Nichols v. White, *ante*.

[13] Willoughby v. Irish, 35 Minn. 63, 27 N. W. 379; Rfenninger v. Kokesch, 70 N. W. (Minn.) 867; Shoemaker v. Benedict, 11 N. Y. 181; In Lewis v.

an independent fact, which will be admissible against their co-debtor. By a like analogy the rule extends to admissions of independent facts, made upon a treaty of compromise, by a joint tort feasor.[14]

Sec. 104. Admissions by infants—Guardians and personal representatives.—Admission by infants stand upon the same footing as those made by adults, except with reference to those contracts where they are entitled to the common law exemption from liability.[1] The admissions made by an adult after he is placed un-

Woodworth, 2 Comst. 512, it was held that one of two joint contractors could not be deprived of a defense by the admission of the other; that one had not power to increase or extend the liability of the other beyond the terms of the contract.

Contra. In Whitcomb v. Whitney, Doug. 652, Lord Mansfield held that part payment, within six years, by one of four joint and several makers of a promissory note, took the case out of the statute. In Wyatt v. Hudson, 8 Bing. 309, Tindal, C. J., said—that the payment of principal and interest stands on a different footing from the making of promises, which are often rash or ill interpreted, while money is not usually paid without deliberation. But Lord Mansfield made no such distinction in Douglass, 652, but said: "Payment by one is payment for all, the one acting, virtually, as agent for the rest; and, in the same manner, an admission by one, is an admission by all; and the law raises the presumption to pay, when the debt is admitted to be due." Bronson, J., in Van Keuven v. Parmelee, 2 N. Y. 523, said nothing but the great name of Lord Mansfield could have given currency to this reasoning. The doctrine of Douglass, 652, has been followed in several American decisions, but, as to joint debtors and joint and several debtors, the seemingly weight of the authorities is the other way.

[14] The declarations of one co-trespasser, whenever made, is admissible in evidence against himself. But in absence of proof of a common object or motive, as in cases of negligence, it is not admissible against any one but himself. If the declaration is a part of the *res gestæ* and the party desiring to offer it, first proves a conspiracy or common design, it is admissible against all. If the admission took place at a subsequent period, it is merely a narrative of past events and is inadmissible. 1 Greenl. Ev. 111, n. See upon this subject in general, notes 135 and 136, 1 Phil. Ev. Cowen and Hill's and Edwards' notes.

[1] See McCoon v. Smith, 3 Hill, 147; Haile v. Lillie, 3 Hill, 149, 38 Am. Dec. 623.

der guardianship respecting transactions previous to the guardianship are admissible against him; and such admissions are competent to prove a debt for necessaries contracted during the period of guardianship.[2] A *prochein ami,* or a guardian *ad litem,* have no power to compromise a demand; and therefore any admissions they make are inadmissible.[3] They are merely officers of the court specially appointed to look after the interest of the infant pending the litigation.[4] But a general guardian of a minor's property is clothed with power necessary to manage his ward's estate and he stands upon a different footing, and admissions made by him after his appointment, with reference to any business of his ward's estate transacted by him, are admissible against him when sued as guardian.[5] The admission however would not be admissible against the infant.[6]

It has been held that the admissions of a co-executor or co-administrator, cannot be received in evidence against his co-executor or co-administrator,[7] or as against the heirs and devisees, particularly so as to affect the real estate in the hands of the heirs.[8] So, it has been held that an administrator's admission is not receivable against the estate to charge it *de bonis testatoris.*[9] Where the

[2] Hoit v. Underhill, 10 N. H. 220, 34 Am. Dec. 148; McNight v. McNight, 20 Wis. 446.

[3] Cowling v. Ely, 2 Stark. 366.

[4] A guardian *ad litem* cannot admit or waive the proof of facts necessary to a recovery against an infant defendant. Litchfield v. Burwell, 5 How. Pr. 341.

[5] Mr. Greenleaf was of the opinion that it would bind the guardian personally, when he is afterwards a party *suo jure,* in another action. 1 Greenl. Ev. Sec. 179.

[6] 1 Greenl. Ev. Sec. 179.

[7] Elwood v. Deiferdorf, 5 Barb. 398; Wilmer v. Harris, 5 Harr. & John. 1.

[8] Mooers v. White, 6 John. Ch. 360, and Note L. Ed.; Osgood v. Manhattan Co., 3 Cow. 612, 15 Am. Dec. 307.

[9] Ciples v. Alexander's Adm'r., 2 Comst. Rep. 767; Grece v. Helm, 51 N. W. (Mich.) 106; White v. Ledgard, 48 Mich. 264, 12 N. W. 216; Fish v.

question was as to the running of the Statute of Limitations, the executor's admission of his testator's death was rejected.[10] But in another case the contrary doctrine was recognized.[11] But in so far as the admission affects the assets in the hands of the heirs, the great weight of the authorities, is that the admissions of an executor are inadmissible.[12] It must be admitted that the decisions are not uniform. Where an executor was plaintiff his admission was received against him.[13] Again where he was defendant his admission was received.[14] Inasmuch as the real property in the hands of the heirs may be sold to pay debts in case the personal estate proves to be insufficient, no good reason is apparent why an admission of a liability by an executor, which may render the personal estate insufficient, is admissible and an admission directly affecting the realty is not. Personal representatives are but trustees and officers of the court; and are not presumed to know whether a demand against decedent is just or unjust, and ought not to be allowed to confess away the personal estate. And, the rule ought to be, if it is not, that no admission however made by a personal representative, is admissible to affect the estate of the decedent.

Morse, 8 Mich. 34; Durfee v. Abbott, 50 Mich. 283, 15 N. W. 454. But, in Mooers v. White, 6 John. Ch. 360, by way of *dicta*, the court said: "The executor may, no doubt, charge the personal estate by confession."

10 Peck v. Botsford, 7 Conn. 172; Thompson v. Peters, 12 Wheat. 565. In Mooers v. White, 6 John. Ch. 372, it was held that an admission made by an executor, did not affect the right of the heir to plead the Statute of Limitation so as to protect the real estate. See Cases in Note L. Ed.

11 Emerson v. Thompson, 16 Mass. 429.

12 See cases in Note to Mooers v. White, 6 John. Ch. 372, L. Ed.

13 Hill v. Buckminster, 5 Pick. 391.

14 Cobb v. Lunt, 4 Greenl. 503.

Sec. 105. Admission by agent or attorney—By attorney after action brought.—It is a settled rule of evidence that the admissions of agents are admissible when the declarations are part of the *res gestæ* and made when the agent is acting within the scope of his authority, but that when they are merely narratives of past events, they are not admissible.[1] Admissions by an agent of distinct and independent facts made during a treaty of compromise cannot be other than narratives of past events whether the agent has personal knowledge of the original transaction or not. Where he has no personal knowledge, his statements are further objectionable for the reason that he is declaring that a fact which he would not be permitted to testify to if called as a witness; and, where he received information from his principal, his testimony, if he could be called as a witness, would not prove the fact but only an admission made by another. Hence, the obvious and simple rule seems to be that no admission by an agent made upon a compromise are admissible unless he is authorized to make them;[2] and, further, that authority to make unqualified admissions of distinct and independent facts, is not to be implied from the authority to settle and compromise a demand, for unqualified admission of distinct facts is not absolutely necessary to a compromise. In view of the vast number of compromises attempted to be negotiated by attorneys and agents, surprisingly little is to be found in the books upon this question. In an action to recover damages to two horses, done by one of defendant's trains, the plaintiff, for the obvious purpose of showing that the defendant deemed itself liable, proved that the road master of defendant

[1] It appears that a distinction has been made between the power of general and special agents to make admissions affecting the principal; some decisions holding that the power of general agents, while the agency continues, are upon the same footing as the power of the principal, while others hold that the power of general agents as to admissions are like those of a special agent. See Note 141, Cowan & Hill's notes, 1 Phil. Ev. 420.

[2] See Roberts v. Minneapolis Thresh. Mach. Co., 8 S. Dak. 579, 68 N. W. 607.

agreed with plaintiff upon an arbitration. On appeal the court, by way of argument, said: If the agent made any admissions they could not be deemed the admissions of the company; that the agent was not connected with the train which caused the accident, but what he said and did about it was at an entirely different time and place, and that the tort of a principal cannot be proved by evidence of the statements of an agent of such a character. Whether, a liability being conceded and the agent had been authorized to settle for the injury, his admissions as to the amount of damages sustained could have been shown as admissions of the company, was left undetermined by the court.[3]

Where an agent with whom all the transactions under consideration were had, was authorized to effect a settlement, and in doing so admitted that certain items of the account were correct, and settled upon that basis, the admission was held admissible against the assignee claiming under an assignment subsequent to the settlement. The holding was upon the ground that it was not an admission of a past transaction, but a part of the *res gestæ,* while the agent was transacting the business of the principal.[4] Here, the court, in reality, gave effect to an authorized settlement by leaving the defendant in possession of certain property which the assignor's agent, who transacted the original business, admitted, upon the settlement, belonged to the defendant. Such a transaction being executed and the admission being an inducement to the contract, it has the implied if not the express ratification of the principal to uphold it as made;[5] which, in absence of fraud upon creditors, is binding upon his assignee and others claiming under him subsequent to the settlement. Where the principal repudiates a compromise, or the negotiation in which the agent made ad-

[3] Mundhenk v. Central Iowa Ry. Co., 57 Iowa, 78, 11 N. W. 656.

[4] Cumbey v. Lovett, 76 Minn. 227.

[5] The general rule is that where a principal with a knowledge of what has been done by an agent, consents to be bound by it, the act becomes that of the principal. Keeler v. Salisbury, 33 N. Y. 648.

missions of distinct facts, was fruitless, we believe the rule is as before stated that the admissions are inadmissible unless the authority of the agent to make them be first proven.[6] Officers of corporation are merely agents of the corporation and their declarations and admissions fall within the foregoing rules.[7] Where an interpreter was the accredited agent of the parties, and the witness understood neither the questions put nor the answers, the statement of the answers by the interpreter was held admissible as being made within the scope of his authority, and in the execution of his agency.[8] If a party be present during the

[6] See Roberts v. Minneapolis Thresh. Mach. Co., 8 S. Dak. 579, 67 N. W. 607; found since writing the foregoing section. In this case the agent, in negotiations in the nature of a compromise, admitted that certain commission belonged to the plaintiff, and this was held clearly incompetent because not shown to be within the scope of his authority. The settled rule is that there must be first a *prima facie* showing of the agent's authority by evidence other than his own statements, before admissions, if otherwise competent, can be admitted: See Mechem on Agency, citing Smith v. Kron, 96 N. C. 392.

[7] See Stewart v. Bank, 11 S. & R. 267: The admission excluded, however, was not made upon a treaty of compromise. A declaration or admission made by a stock-holder or member of a corporation as to what took place at a meeting of the association is not admissible in evidence. Magill v. Kauffman, 4 S. & R. 311.

In Bank of Monroe v. Field, 2 Hill, 445, the president of the bank, who was its financial head, empowered to take charge of the settlement and collection of its demands, and to compound or discharge them in the usual course of business, called upon the defendant to settle the note in question. The defendant claimed the note was paid. The books of the bank were referred to and the president admitted payment. This admission was held admissible as made while acting in the business of his agency in respect to the very matter that had been committed to his charge. This decision is not in harmony with the general rule, that authority to make admissions is not to be implied from the authority to settle and compromise a demand; nor, with the rule that an agent's admissions are inadmissible when they are merely narratives of past events. The payment in this case was clearly a past event, although the decision went upon the point that the admission was a part of the *res gestæ*. The admission was really of a fact as to what the books of the bank then disclosed.

[8] 1 Phil. Ev. 519, citing Fabrigas v. Mostyn, 20 How. St. Tr. 122. S. P. McCornick v. Fuller, 57 Iowa, 43, 8 N. W. 800; Blazinsky v. Perkins, 77 Wis.

negotiation of a treaty of compromise and his attorney or agent make admissions of distinct facts, and the principal does not dissent, they will be deemed to be admissions of the principal and admissible.

In general, attorneys, after action brought, are considered as having implied authority to make admissions for the purpose of obviating the necessity of proving any fact, yet if the client is not present when the admission is made, such admission cannot be used against him out of the particular case.[9] But with respect to the admission of distinct facts made by an attorney upon an attempted compromise of the action, we apprehend the rule is the same after action brought as before, and that the authority of the attorney to make the admission must first be proven before such admission is receivable in evidence. A general retainer in an action, gives an attorney power only to do such things as in his judgment are necessary in conducting the litigation. A compromise of the action and making admissions are no part of his duties.[10]

Sec. 106. Pleading—Accord and satisfaction, and a compromise, must be pleaded—Kind of plea—Effect.—A plea of accord and satisfaction, or a compromise, is a plea in bar.[1] Like the plea of payment, it confesses and avoids the cause of action set up in the complaint, by admitting it and showing that it has been satisfied. It falls within the division, pleas in discharge, of pleas in confession and avoidance.[2] The effect of the plea standing

9, 45 N. W. 947; Nadan v. White R. L. Co., 76 Wis. 120, 43 N. W. 1135, 20 Am. St. Rep. 290. Where two persons agree to converse through an interpreter, he becomes the agent of both parties: Miller v. Lathrop, 50 Minn. 91, 52 N. W. 274.

9 See Harrison's Devisees v. Baker, 5 Litt. 250.

10 Sec. 43.

1 3 Chitty Pl. 924. For forms of pleading accord and satisfaction at common law, see Chitty Pl. 920, 925, 931, 1002, 1031, 1062.

2 Steph. Pl. 199.

alone, is to admit the cause of action which it meets so that the defendant will not be permitted to show that the cause of action is different, as by showing that an instrument sued upon was executed to joint creditors instead of to the plaintiff alone.[3] But when the plea of accord and satisfaction is pleaded with the general issue it is no admission of the cause of action.[4] An accord and satisfaction, or a compromise, is new matter [5] constituting a defense to the action, and now, most everywhere, is required to be affirmatively pleaded. According to Mr. Chitty; anciently, matters in discharge, which admitted that once there was a cause of action, must uniformly have been pleaded specially; that afterwards a distinction was made between express and implied assumpsit; in the former these matters were required to be pleaded, but not in the latter; that at length, however, they were allowed to be given in evidence under the general issue.[6] To this day, in those jurisdictions adhering to the common law practice, in assumpsit, accord and satisfaction (or compromise) may be given in evidence under the plea of *non assumpsit*,[7] and under other pleas falling within the class termed the general issue, as *nil debit* in debt on a simple contract,[8] and in debt for rent where the specialty is matter of inducement only,[9] and in action on the case.[10]

[3] Dickinson v. Burr, 7 Ark. 24. The plea is a waiver of all other defenses: Taylor v. Hogan, Hempst. 16, 23 Fed. Cas. No. 13,794, a.

[4] Prince v. Puckett, 12 Ala. 832.

[5] Coles v. Soulsby, 21 Cal. 47.

[6] 1 Chitty Pl. 477, citing 1 Lord Raym. 217, 566, 12 Mod. 376.

[7] 1 Chitt. Pl. 478; Chappell v. Phillips, Wright (Oh.) 372; Stewart v. Saybrook, Wright (Oh.) 374; Burge v. Dishman, 5 Blackf. 272.

[8] 1 Chit. Pl. 482; Bailey v. Cowles, 86 Ill. 333; Page v. Pentice, 7 Blackf. 322.

[9] Bailey v. Cowles, 86 Ill. 333.

[10] 1 Chit. Pl. 490; Lane v. Applegate, 1 Stark, 97; Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271; Stockton v. Frey, 4 Gill, 406, 45 Am. Dec. 138: This was an action for damages for negligence occasioning a personal injury. Citing 1 Chit. Pl. 432. See Bird v. Randall, 3 Burr. 1353. See Ellis v. Mills,

This rule permitting a party under the general issue to deny a breach, or a promise, as the case may be, and avail himself of a defense which admitted the breach, or promise alleged, and prove that the cause of action had been discharged is criticised by Mr. Chitty, as being at variance with the true object of pleading, which is to apprise the adverse party of the ground of defense, in order that he might be prepared to contest it, and might not be taken by surprise; and, also with the rule that a matter of defense which admits the facts alleged but avoids them, should be specially pleaded.[11] But under that law, in debt on a specialty,[12] on a record, but not a foreign judgment,[13] and in actions of trespass, either to the person or property,[14] and in covenant, an accord and satisfaction must be specially pleaded. Although at common law, in certain cases, as we have seen, new matter, as accord and satisfaction; payment and a release may be given in evidence under the general issue, there is, nevertheless, a special plea in which the matter may be set out affirmatively.[15]

In England, rules enacted in 1834,[16] put "an end to the misapplication and abuse of the *general issue*," (according to Mr. Chitty) and compelled a defendant in terms to deny particular parts of the declaration, and to plead specially every matter of defense, no matter what the form of the action was.[17] So that there, since

28 Tex. 584, which was an action of trespass to try title. See, also, Schwartz v. Southerland, 51 Ill. App. 175.

[11] 1 Chitty Pl. 479.

[12] 1 Chitty Pl. 485.

[13] 1 Chitty Pl. 486, citing 4 B. & C. 411; 6 D. & R. 471.

[14] 1 Chit. Pl. 506; Phillips v. Kelly, 29 Ala. 628; Longstreet v. Ketchem, 1 N. J. L. 170; Kenyon v. Southerland, 8 Ill. 99.

[15] 1 Chitty Pl. 478; Bird v. Caritat, 2 Johns. 342, 3 Am. Dec. 433; Gillfillan v. Farrington, 12 Ill. App. 101; Dunham v. Ridgel, 2 Stew. & P. (Ala.) 402; Kearslake v. Morgan, 5 T. R. 513.

[16] Hillary T. 4 W. IV.

[17] 1 Chit. Pl. 513.

and now,[18] and, in some of the United States under rules of court,[19] or by statute,[20] and in those states which have adopted the code system of pleading,[21] an accord and satisfaction, or a compromise,[22] when relied upon, must in all cases be pleaded.[23] In some states it may be proven under the general issue, if the defendant gives notice in writing that he will rely upon it as a defense.[24] An accord and satisfaction cannot be proven under an allegation setting up a set-off,[25] or under a plea of payment.[26]

[18] Alexander v. Strong, 9 M. & W. 733; Horsley v. Cox, 15 L. T. N. S. 391; See 15 & 16 Vict. Ch. 76, S. 84, accord and satisfaction may be pleaded with other pleas mentioned in the section without the leave of court.

[19] Atchinson v. Atchinson, 67 Conn. 35, 34 Atl. 76. See Cleveland v. Rothschild, 132 Mich. 625, 94 N. W. 184, where, under rules of court, it must be plainly set forth in a notice attached to the plea (general issue). Rule 7 (C.).

[20] G. S. Mass., c. 129, Sec. 20; Grinnell v. Spink, 128 Mass. 25; Ga. Code, Sec. 5051; Ingram v. Hilton, 108 Ga. 194, 33 S. E. 961; Grand Lodge v. Grand Lodge, 76 Atl. (Conn.) 533; Conn. Prac. Book, p. 250, Sec. 160.

[21] Sweet v. Burdett, 40 Cal. 97; Coles v. Soulsby, 21 Cal. 47; Ingram v. Hilton, 108 Ga. 194, 33 S. E. 961; Covell v. Carpenter, 51 Atl. (R. I.) 425; Randell v. Brodhead, 60 App. Div. 567, 70 N. Y. Supp. 43; Parker v. Lowell, 11 Gray, 353; Barnum v. Green, 15 Colo. App. 254, 57 Pac. 757. It is an affirmative defense within the rule requiring "affirmative defenses" to be pleaded: Jacobs v. Day, 5 Misc. 40, 25 N. Y. Supp. 763; Horton v. Horton, 83 Hun, 213, 31 N. Y. Supp. 588 (which was a case of a release).

[22] Barker v. Ring, 97 Wis. 53, 72 N. W. 222.

[23] People's Bank v. Stewart, 117 S. W. (Mo. App.) 99. See Gavin v. Annan, 2 Cal. 494, where it is held that where defendant's answer is a general denial, it has the same effect as a plea of the general issue at common law, and that accord and satisfaction may be given in evidence. In Bailey v. Cowles, 86 Ill. 333, it is held that an accord and satisfaction cannot be given in evidence under a plea of *non est factum*.

[24] Seaver v. Wilder, 68 Vt. 423, 35 Atl. 351; Cleveland v. Rothschild, 132 Mich. 625, 94 N. W. 184. See early cases in New York: Strange v. Holmes, 7 Cow. 224; Harrison v. Close, 2 Johns. 448, 3 Am. Dec. 444.

[25] McCreary v. McCreary, 5 Gill & J. 147.

[26] Crilly v. Ruyle, 127 N. W. (Neb.) 251; Welch v. Lynch, 7 Barb. 384; Smith v. Elrod, 122 Ala. 269, 24 So. 994; Owens v. Chandler, 16 Ark. 651; Hamilton v. Coons, 5 Dana, 317; Friermuth v. McKee, 86 Mo. App. 64; Barnum v. Green, 13 Colo. App. 254, 57 Pac. 757. See Howe v. Mackay, 5

A plea interposed to a declaration upon a liquidated demand, to the effect that the demand is paid and settled, is nothing more than a plea of payment, as the term "settle" means to pay, to liquidate. Such a plea opposed to an unliquidated demand really means the same thing, unless the pleader goes farther and sets out an agreement constituting a compromise. Where an accord and satisfaction or a compromise is not pleaded, a failure to object to evidence of it, is a waiver of the objection to a failure to specially plead it.[27] In such case the defendant may move to amend his answer to conform to the evidence; but, even without such amendment it would be considered as having been litigated by consent.[28] A defendant may rely upon an accord and satisfaction disclosed by the plaintiff's evidence.[29] A plea of accord and satisfaction may be pleaded with the general issue.[30] And, with a denial of the cause of action, in those states where a defendant by statute is permitted to set up as many defenses as he may have.[31] Even where inconsistent defenses are prohibited, a plea

Pick. 44, where it is held that under a plea of payment, the debtor may show that property was accepted, if the property was taken at a value equal to the debt under an agreement to that effect. In Hardy v. Coe, 5 Gill, 189, the court said that accord and satisfaction should not be pleaded as a payment.

[27] Berdell v. Bissell, 6 Colo. 162; Niggli v. Foehry, 64 N. Y. St. 658, 31 N. Y. Supp. 931; Brett v. Universalist Soc., 63 Barb. 610; Rivers v. Blom, 163 Mo. 442. See Smith v. Owens, 21 Cal. 11, to the contrary.

[28] In Donaldson v. Carmichael, 102 Ga. 40, 29 S. E. 135, it was held error to reject an offer of evidence to prove an accord and satisfaction which was not objected to, although the court ruled the plea could not be amended by setting up the defense. Where evidence of a release not pleaded, is admitted without objection, it is too late to raise the objection on appeal: Rivers v. Blom, 163 Mo. 442.

[29] Looby v. West Troy, 24 Hun, 78.

[30] See Wellsburg Bank v. Kimberlands, 16 W. Va. 555; Kershaw v. Robinson, 1 Brev. (S. C.) 380 (Payment, and accord and satisfaction, may both be pleaded together with *nul tiel record*, to debt on judgment); Prince v. Puckett, 12 Ala. 832. See, also, 3 Chitty Pl. (forms) 1062.

[31] Tucker v. Edwards, 7 Colo. 209, 3 Pac. 233. See Sec. 15 & 16 Vict. C. 76, S. 84.

of *nul tiel record; nil debit;* or a denial of the execution of an instrument,[32] an accord and satisfaction may be joined, as they are not necessarily inconsistent. There may in fact be no valid and binding record, no enforceable debt; or the defendant may not have executed the instrument, and yet he may have thought best to compromise the alleged liability. Where a plea of accord and satisfaction and the general issue were joined, going to trial upon one plea was held to be no waiver of an objection to a ruling upon a demurrer to the other.[33]

Sec. 107. Allegations necessary.—It is said in Peytoe's Case, that "the best and most secure form of pleading of an accord, is to plead it by way of satisfaction, and not by way of accord; for if he pleads it by way of accord, he ought to plead the specific execution thereof in the whole, and if he fails of any part thereof, his plea is insufficient; but by way of satisfaction he shall plead no more than that the defendant paid the plaintiff 6 l. 10 s. in full satisfaction of the same action, which the plaintiff received.[1] And this case has been cited with approval in later books.[2] This rule, no doubt, is well enough to follow in cases like the one given in illustration in Peytoe's case, which was that, the defendant, being sued for forgery of deeds, gave a gallon of wine in satisfaction of the action, which gallon of wine the defendant accepted in satisfaction; for, in such cases, the plea taken in connection with the declaration discloses a settlement and compromise of an unliquidated demand by the delivery and acceptance in satisfaction of something of value. But in the case of an action to recover a liquidated sum, a plea which set out no more of the transaction,

[32] Pavey v. Pavey, 30 Oh. St. 600; Nelson v. Brodhack, 44 Mo. 496; Kellogg v. Baker, 15 Abb. Pr. 286.

[33] Tucker v. Edwards, 7 Colo. 209, 3 Pac. 233.

[1] Peytoe's Case, 9 Coke, 79.

[2] Bacon's Abr. tit. Accord and Satisfaction C; Daniels v. Hallenbeck, 19 Wend. 408.

than, that the defendant paid and the plaintiff accepted a less sum in satisfaction, would be fatally defective as disclosing an agreement without a consideration to uphold it. More modern authorities, as well as the statutes in some states,[3] require that the accord and satisfaction or compromise, as the case may be, be set forth in all its essentials.[4] Accordingly, the pleader must first set forth an accord, whereby the defendant promised to pay or deliver, and plaintiff agreed to accept, something of value different from that to which the latter was entitled to receive. The plea must show a valid consideration to support the accord, otherwise it is bad. Thus, if the plaintiff seeks to recover, upon a liquidated demand, a plea of payment and acceptance of a less sum in satisfaction is insufficient because it fails to show a consideration for the agreement to accept a less sum.[5] But, if the defendant alleges that there was a *bona fide* dispute as to the amount due, or as to the liability, and that the less sum was upon a settlement and compromise paid and accepted in satisfaction, a sufficient consideration will appear by the plea.[6] So, also, in other actions to recover a liquidated demand, a consideration sufficiently appears to sustain the plea of accord and satisfaction, if it be alleged that security was given for the payment of a less sum, or that notes of third persons or property was delivered, or services were performed, and accepted in satisfaction.[7] In all such cases

[3] Barnum v. Green, 13 Colo. App. 254, 57 Pac. 757; Code S. D. Secs. 3483–3485; Carpenter v. Chicago, etc., R. Co., 64 N. W. (S. D.) 1120.

[4] Smith v. Bank, 108 Ga. 211, 33 S. E. 857; Young v. Jones, 64 Me. 563; Burnsides v. Smith, 5 T. B. Mon. 464; Simon v. Kendig, 4 Kulp (Pa.) 493; Jaques v. Denehie, 7 Blackf. 40.

[5] Dederick v. Leman, 9 Johns. 332. S. P. T. J. Scott & Sons v. Rawls, 48 So. Rep. (Ala.) 710. A plea of payment of a smaller sum of money in bar of a claim for a larger sum in *indebitatus assumpsit*, is not cured by verdict; and the plaintiff is entitled to a judgment *non obstante veredicto*: Down v. Hatcher, 2 P. & D. 292, 3 Jur. 651, 10 A. & E. 121.

[6] See Farmers', etc., Ins. Ass'n v. Caine, 224 Ill. 599, 79 N. E. 954, affirming 123 Ill. App. 419.

[7] See Secs. 54 *et seq.* on the question of consideration.

the plea must show that some new and additional consideration passed from the debtor to the creditor,[8] and that it was something of value.[9] In cases of unliquidated demands, the consideration appears from the very fact that the demand is alleged to have been settled and compromised by the delivery and acceptance in satisfaction of something of value.[10]

The pleader must not stop with alleging the essentials of the accord:[11] "it is not enough that there be a clear agreement or accord and a sufficient consideration, but the accord must be executed."[12] A plea of accord and satisfaction is bad when the performance necessary to constitute the satisfaction is not alleged.[13] An allegation of readiness to perform the accord,[14] or a

[8] Torry v. United States, 42 Fed. 207; Evans v. Powis, 1 Exch. 601; Downs v. Hatcher, 10 A. & E. 121; Williams v. Langford, 15 B. Mon. 566.

[9] Davis v. Noaks, 3 J. J. Marsh. 494; Bayley v. Holman, 3 Bing. N. C. 915.

[10] See Sec. 83. Wilson v. Northwestern Ins. Co., 103 Minn. 35, 114 N. W. 251, was an action to recover the reasonable value of services. The parties having stipulated as to the amount due, the real question left for consideration was the sufficiency of the allegations, that on a certain day "the plaintiff fully compromised and settled their said claims for services * * *; that on said date said plaintiff received from the hands of Crowell & Smith the premium notes [describing them]; and that said premium notes were accepted and received by plaintiff in full settlement, satisfaction and discharge for all services rendered by them." This was held to properly allege a settlement of the cause of action. An allegation that the defendant had a dispute and counterclaim to the demand against him, is insufficient to show a *bona fide* dispute or counterclaim as will constitute a consideration for an accord and satisfaction: Foster v. Lammers, 134 N. W. (Minn.) 105.

[11] A plea of an accord simply, is bad: Coit v. Houston, 3 Johns. Cos. 243.

[12] Hearn v. Kiehle, 38 Pa. St. 147, 80 Am. Dec. 472.

[13] Goble v. Bank, 46 Neb. 891, 65 N. W. 1062; Perdew v. Tillma, 62 Neb. 865, 88 N. W. 123; Rogers v. Spokane, 9 Wash. 168, 37 Pac. 300; 2 Pars. Cont. (6th Ed.) p. 836; Fitch v. Haight, 5 Ill. 51; Eichholtz v. Taylor, 88 Ind. 38; Holton v. Noble, 83 Cal. 7, 23 Pac. 58; West v. Carolina Ins. Co., 31 Ark. 476; Graham v. Gibson, 4 Ex. 768, 19 L. J. Ex. 204.

[14] Hearn v. Kiehl, 38 Pa. St. 147, 80 Am. Dec. 472.

tender of performance,[15] or even a part performance and a readiness to perform [16] or tender of performance of the rest,[17] will not do. If performance of a new agreement, and not the new agreement, is to constitute the satisfaction, performance according to the terms of new agreement must be alleged. Where the new agreement was to pay installment upon certain days, a plea was held bad which failed to show that the payments were made on the precise days agreed.[18] If the terms of the new agreement are departed from upon a performance, facts showing a change in the agreement, or a waiver of strict performance should be alleged. According to Pinnel's Case, it must be alleged that the money or other thing was paid or delivered in full satisfaction, for "the manner of the tender and of the payment shall be directed by him who made the tender or payment, and not by him who accepts it." [19] So, it must also be alleged that the performance of the accord was accepted in satisfaction;[20] or such facts as raise an implied acceptance in satisfaction, as may often arise upon the acceptance of a tender offered in settlement of an unliquidated or disputed demand.[21] If performance of the accord consists in en-

[15] Hearn v. Kiehl, 38 Pa. St. 147, 80 Am. Dec. 472. See Heirn v. Carron, 11 S. & M. 361, 49 Am. Dec. 65, and Tucker v. Edwards, 7 Colo. 209, 3 Pac. 233, to the contrary. But the weight of the adjudicated cases (not necessarily on pleading) from Peytoe's Case, 9 Co. 80, to the present day is as stated in the text.

[16] Hearn v. Kiehl, 38 Pa. St. 147, 80 Am. Dec. 472.

[17] See Kromer v. Heim, 75 N. Y. 574, 31 Am. Rep. 491; Noe v. Christie, 51 N. Y. 270; Gabriel v. Dresser, 15 C. B. 622, 80 E. C. L. 622.

[18] Evans v. Powis, 1 Ex. 601. Here, however, the new agreement, was to be performed in satisfaction of a composition.

[19] Pinnel's Case, 5 Co. 117.

[20] Vanhousen v. Broehl, 58 Neb. 348, 78 N. W. 624; Id., 59 Neb. 48, 80 N. W. 260; Hearn v. Kiehl, 38 Pa. St. 147, 80 Am. Dec. 472; State Bank v. Littlejohn, 18 N. C. 563; Diller v. Brukaker, 52 Pa. St. 498, 91 Am. Dec. 177; Carpenter v. Chicago, etc., R. Co., 7 S. D. 584, 64 N. W. 1120; City Council v. Shirley, 48 So. (Ala.) 679. See Bailey v. Cowles, 86 Ill. 333.

[21] See Lindsay v. Gager, 11 N. Y. App. Div. 93, 42 N. Y. Supp. 85.

tering into a new executory agreement it must be alleged that the agreement was executed and accepted in satisfaction.[22] No different rules obtain with respect to pleading where the accord and satisfaction is set out in the replication or reply.[23] The plea must go to the entire demand it is opposed to or it is bad.[24] In England it has been held that if accord and satisfaction is effected after action brought, it must be alleged and proved, that it was also a satisfaction of the costs and damages arising from the breach of contract.[25] But such a plea which did not allege that the costs were settled also, was held good after verdict.[26] These cases are opposed to the general rule in the United States, that if a creditor accepts the principal without reserving a right to damages and costs, which are but incident to the debt, he waives his right to recover the damages and costs.[27] According to American authorities, where after the commencement of the action, the cause of action is discharged by an accord and satisfaction, payment[28] or release,[29] the presumption is, unless the contrary appears, that the costs have been adjusted between the parties.

[22] Brunswick, etc., R. Co. v. Clem, 80 Ga. 534, 7 S. E. 84; Clough v. Murray, 3 Rob. (N. Y.) 7.

[23] Heath v. Doyle, 18 R. I. 252, 27 Atl. 333.

[24] Thomas v. Heathorn, 2 B. & C. 477; Hopkinson v. Tahourdin, 2 Chitt. 303.

[25] Goodwin v. Cremer, 17 Jur. 2, 22 L. J. Q. B. 30, 18 Q. B. 757; Francis v. Crywell, 5 B. & Ald. 886, 1 D. & R. 546; Ash v. Pruppeville, L. R. 3 Q. B. 86, 37 L. J. Q. B. 55, 16 W. R. 191, 8 B. & S. 825.

[26] Corbett v. Swinburn, 3 N. & P. 558, 8 A. & E. 673, 1 W., W. & H. 511.

[27] Tillotson v. Preston, 3 Johns. 229 and Note, L. Ed.

[28] Johnson v. Brannon, 5 Johns. 267; Tillotson v. Preston, 3 Johns. 229.

[29] Kimball v. Wilson, 3 N. H. 96, 14 Am. Dec. 342.

Sec. 108. Same subject.—As the acceptance of performance upon an accord works the satisfaction of the original demand, it is not apparent wherein the time of executing the accord is material, if acceptance be alleged, except, possibly, as identifying the accord upon which the payment was made.[1] In one case it was held that the time of an accord and satisfaction, as stated in the notice of special matter, was not material and may be departed from in the evidence.[2] In another, that payment at a later date than the date of the accord and satisfaction alleged, may be shown.[3] But in another case, it was decided that a failure to allege the time of the performance renders the plea bad on special demurrer.[4] If the defendant relies upon an accord and satisfaction of an agreement or other instrument under seal, he must allege that the accord and satisfaction was by an instrument of as high a nature.[5] And, the circumstance that a bond has become single by a forfeiture does not change the rule.[6] But a distinction is to be observed, however, between an accord and satisfaction in discharge of a sealed instrument itself, and one in discharge of the money due by the condition therein or of the damages for a breach. In the latter case an accord and satisfaction without deed may be pleaded in satisfaction,[7] either before or after a default. An accord is executed by payment or delivery of the thing agreed to be accepted, to a third person appointed to receive it;[8]

[1] See Sonnenberg v. Riedel, 16 Minn. 83.

[2] Strange v. Holmes, 7 Cow. 224.

[3] Sonnenberg v. Riedel, 16 Minn. 83.

[4] Pence v. Smock, 2 Blackf. 315; Evans v. Powis, 1 Ex. 601, 11 Jur. 1043, is a case of a failure to allege performance upon the precise day upon a composition agreement. See Composition, *post.*

[5] Blake's Case, 6 Coke, 43; Neal v. Sheffield, Cro. Jac. 254; Preston v. Christmas, 2 Wils. 86; Ligon v. Dunn, 28 N. C. 133; State Bank v. Littlejohn, 18 N. C. 563; Kaye v. Waghorne, 1 Taunt. 428.

[6] Anonymous, Cro. Eliz. 46.

[7] Preston v. Christmas, 2 Wils. 86; Peytoe's Case, 9 Co. 79.

[8] Anderson v. Highland, 16 Johns. 86.

but, a plea which does not allege that the third party was the plaintiff's agent for that purpose, is bad.[9] Where an accord and satisfaction was made by a stranger, ratification sufficiently appears from the fact that the defendant pleads it.[10] In England, a plea was held bad in substance, which did not show that the agreement and payments under it were intended to be made for the benefit of the defendant, and that he had adopted the acts of the stranger.[11] So, such a plea was held insufficient where it was not alleged that the payment made by a stranger were made for and on account of the debt and had been ratified by the defendant.[12]

If the accord and satisfaction was made with one joint creditor, it is not necessary to allege that he had authority to act for all.[13] A plea must show that the defendant was discharged by the accord and satisfaction, for, if an accord and satisfaction between two other parties to a transaction, does not, as a matter of law, enure to the defendant's benefit, the plea is bad.[14]

[9] Bird v. Caritat, 2 Johns. 345.

[10] Snyder v. Pharo, 25 Fed. 398.

[11] James v. Isaacs, 12 C. B. 791, 17 Jur. 69, 22 L. J. C. P. 73.

[12] Kemp v. Balls, 10 Exch. 607, 3 C. L. R. 195, 24 L. J. Ex. 47.

[13] Wallace v. Kelsall, 7 M. & A. 264, 8 D. P. C. 841, 4 Jur. 1064; Smith v. Lovell, 10 C. B. 6, 15 Jur. 250, 20 L. J. C. P. 37. See, also, Osborn v. Railway Co., 140 Mass. 549; State v. Story, 57 Miss. 738; 1 Pars. Cont. 26.

[14] In Jones v. Broadhurst, 9 C. B. 173, the action was by an indorsee against the acceptor. The latter pleaded an accord and satisfaction between the plaintiff and drawer in satisfaction of the bill. The plea was held bad for the reason that a satisfaction of a bill as between the drawer or indorser and an indorsee, whether before or after the bill falls due, does not necessarily enure as a satisfaction on behalf of the acceptor, or operate to discharge him from liability to the indorsee.

Sec. 109. When pleaded—Practice.—An accord and satisfaction or a compromise, before action brought, or after action brought, but before the time to answer expires, should be set up in the answer in bar of the action,[1] and not in bar of the further continuance of the action. If the agreement is effected after answer, and the terms are not embodied in a stipulation to be filed in the case, it should be set out by way of supplemental answer or cross bill.[2] At common law if an accord and satisfaction would have been a good defense before the plea, it may be pleaded *puis darrein continuance.*[3] In equity, new matter arising after answering, is set up by way of a cross-bill in the nature of a plea *puis darrein continuance.*[4] The plea should be pleaded as soon as the accord and satisfaction or compromise has been effected, and it has been held discretionary with the court to refuse or allow such plea after the next continuance.[5] The proper course, if the plaintiff desires to take advantage of the objection that the plea was not pleaded in season, is by motion to set it aside, and not by demurrer.[6] New matter, such as payment, accord and satisfaction, or release, when pleaded *puis darrein continuance,* is in bar of the further continuance of the action, and, the conclusion of the plea is, that the plaintiff ought not *further* to maintain his action.[7] And, the reason of the rule is said to be, that the pre-

[1] Kimball v. Wilson, 3 N. H. 96, 14 Am. Dec. 342; Southwick v. Ward, 7 Jones, L. (N. Car.) 64, 75 Am. Dec. 453, (Release).

[2] Strowbridge v. Randall, 78 Mich. 195, 44 N. W. 134; Coburn v. Cedar Valley Land Co., 138 U. S. 196; Kelsey v. Hobby, 16 Pet. 269; Southwick v. Ward, 7 Jones, L. (N. Car.) 64, 75 Am. Dec. 453, (Release).

[3] Heirn v. Carron, 11 S. & M. 361, 49 Am. Dec. 65; Watkinson v. Inglesby, 5 Johns. 386.

[4] Miller v. Fenton, 11 Paige Ch. 18, (Release).

[5] Tilton v. Morgaridge, 12 Ohio St. 98; Morgan v. Dyer, 10 Johns. 161.

[6] Morgan v. Dyer, 10 Johns. 161.

[7] 1 Chitty Pl. 660; Kenyon v. Southerland, 8 Ill. 99. See Kimball v. Wilson, 3 N. H. 96, 14 Am. Dec. 342, where a general release, pleaded before the regular plea had been entered, was held to be properly pleaded in bar of the action.

sumption is that the action was rightfully commenced, and such matter can, in its nature, be an answer only to the further prosecution of the action.[8] In those states having the code system of pleading, and perhaps some other states, the matter of bringing forward new matter arising after answering, is regulated by statute, and it may be set out by way of a supplemental answer at any time before trial, and in some of the states, if not all of them, even after judgment, an appeal and a remand, upon a new trial being granted.[9] The practice prescribed is to apply upon motion for leave to file the supplemental answer. And, granting the motion is a matter of discretion, even after the cause reaches the calendar for trial,[10] or after the trial has commenced.[11] It has been held that where the matter of a compromise is brought before the trial court upon motion, and it is claimed the agreement was obtained by fraud, or was not executed, the court will determine the matter and give judgment according to the terms of the agreement.[12] But where a compromise after action brought is denied and the other party relies upon it, the proper practice is to plead it and not present it by way of a motion to dismiss.[13]

[8] The reason for this distinction between a strict plea in bar and one in bar of the further maintenance of the action is well grounded, but the necessity for observing the distinction is no longer apparent in those jurisdictions where a general release after action brought, or an accord and satisfaction of the cause of action without reserving a right to costs and damages, discharges the costs and damages. In England where the plaintiff is permitted to continue the action to recover his cost and damages, after he discharges the principal, it may be important, for there the plea must be broad enough to cover the costs and damages, and should be pleaded to the further maintenance of the action, for if pleaded in bar of the cause of action, the plaintiff may proceed for his costs and damages.

[9] State v. District Court, 91 Minn. 161, 97 N. W. 581; Hennings v. Conner, 4 Bibb (Ky.) 298, (Release).

[10] Guliano v. Whitenack, 3 Misc. 54, 22 N. Y. Supp. 560, (Release).

[11] Seehorn v. Big Meadow, 60 Cal. 240, (Release).

[12] Washington v. Louisville, etc., R. Co., 136 Ill. 49, 26 N. E. 653.

[13] George v. Chicago, etc., R. Co., 85 Iowa, 590, 52 N. W. 512; Miller v. Fenton, 11 Paige, 18, (Release).

By taking issue without objection, upon a compromise irregularly set out, as when it is brought forward by a petition to dismiss,[14] or upon a release filed and motion,[15] the party waives the irregularity in the practice. On an appeal from a justice court, where the trial is *de novo,* an accord and satisfaction, or compromise, or other new matter which furnishes a defense, and which unless pleaded, would be unavailable, may be set out by plea *puis darrein continuance.*[16] But, when, after judgment and before an appeal, the action was compromised, but the defendant nevertheless prosecuted an appeal, it was held that an accord and satisfaction could not be set up by way of a plea *puis darrein continuance;* that the proper course was to apply to the appellate court by motion to dismiss the appeal.[17] A plea of accord and satisfaction to assignments of error on a *certiorari* has been held good on demurrer.[18] The same court, however, doubted whether such a plea could be pleaded in bar of a writ of error, notwithstanding the decision of another court holding such a plea good.[19]

The authorities are not agreed on whether an appellate court, which tries an action upon the record brought up from the lower court, will inquire into whether or not a valid compromise of the cause of action, not appearing by the return, has been made. In some jurisdictions the authority is denied,[20] while in others, evi-

[14] Coburn v. Cedar Valley Land Co., 138 U. S. 196.

[15] Kelsy v. Hobby, 16 Pet. 269.

[16] People v. Ontario, 1 Wend. 180.

[17] Schenck v. Lincoln, 17 Wend. 506.

[18] Potter v. Smith, 14 Johns. 444.

[19] Pixler v. Salmon, 2 Day, 242. In Austin v. Bainter, 40 Ill. 82, it is held that acts *in pais,* occurring either before or after the rendition of the decree, which would make it fraudulent in either party to seek a reversal of the decree, may be pleaded in bar of the writ.

[20] Parks v. Doty, 13 Bush, 727; Neal v. Cowles, 71 N. C. 266: In this case the court said, if the record of the court below is false, it cannot be corrected in this court.

dence *dehors* the record has been admitted to prove a compromise.[21] The question is one of practice. In consonance with the principle that the law favors compromises, and, that, to examine errors and reverse a judgment that has been discharged by satisfaction, is a useless proceeding, an appellate court will afford a litigant an opportunity, in some way, to present a question of a compromise of the judgment appealed from. In a case where the matter was brought before the court upon a motion to dismiss, based upon affidavits, and the fact of the compromise was not disputed, Mr. Justice Miller, answering the argument that to recognize the compromise and grant the motion was to assume original instead of appellate jurisdiction, said: "But this court is compelled, as all courts are, to receive evidence *dehors* the record affecting their proceedings in a case before them on error or appeal," and by way of illustration, among several, said: A release of errors may be filed in bar to the writ; a settlement of the controversy with an agreement to dismiss the appeal or writ of error will be enforced.[22] In another case before the same court upon a motion to dismiss, where the authority of certain city officials to compromise the judgment appealed from was denied and the compromise alleged to be fraudulent, the court, considering that the question of the authority of the mayor and council to make the compromise and the alleged fraud in making it, was too important to be settled summarily upon motion, and required the power of a court of original jurisdiction to investigate and decide thereon, continued the appeal to a subsequent term, with the condition that the appeal would be dismissed unless the party opposing should begin and prosecute without unnecessary delay, in some court of competent jurisdiction, an appropriate suit to set

[21] Dakota County v. Glidden, 113 U. S. 222, 5 S. Ct. 428, 28 L. Ed. 981; Atlantic v. Blanton, 80 Ga. 563; New Orleans v. Bank, 44 La. Ann. 698, 11 So. 146.

[22] Dakota County v. Glidden, 113 U. S. 222, 5 S. Ct. 428, 28 L. Ed. 981. s. p. Burns v. National Co., 108 Pac. (Colo.) 330.

aside the compromise. Afterwards, the compromise being upheld by the trial court, the appellate court dismissed the appeal.[23]

Sec. 110. Joining issue—Demurrer—Motions—Amendment.—A plea of accord and satisfaction must be met by a replication or reply traversing it or it will stand admitted,[1] except in those states where by statute it is denied by operation of law.[2] If met by a general denial or denied by operation of law, the defendant may give in evidence any fact done or omitted that tends to show that the alleged agreement is insufficient in law to constitute an accord and satisfaction, or a compromise, as that the thing was not accepted in satisfaction;[3] or that the alleged agreement was not in fact consummated, as where the plaintiff at the time of the alleged compromise was unconscious and delirious.[4] Here the fact of the compromise only is in issue.[5] At common law "The replication to a plea of accord and satisfaction may either deny the delivery of the chattel in satisfaction,[6] or protesting against that fact, may deny the acceptance,[7] or the plaintiff may deny both the delivery and acceptance in satisfaction."[8] If the accord

[23] Board v. Louisville, etc., R. Co., 109 U. S. 221. This case was an appeal from the decree of the Circuit Court upholding the compromise set forth in the motion to dismiss the appeal in the main action. See Sec. 89.

[1] Reichel v. Jeffrey, 9 Wash. 250, 37 Pac. 296.

[2] Stomme v. Hanford, 108 Iowa, 137, 78 N. W. 841; Higley v. Burlington Ry., 99 Iowa, 503, 68 N. W. 829; Leslie v. Keepers, 68 Wis. 123; Continental Bank v. McGeoch, 92 Wis. 286.

[3] Pottlitzer v. Wesson, 8 Ind. App. 427, 35 N. E. 1030.

[4] Moulton v. Aldrich, 28 Kan. 300.

[5] Stommer v. Hanford, 108 Iowa, 137, 78 N. W. 841.

[6] State Bank v. Littlejohn, 18 N. C. 563.

[7] O'Riley v. Wilson, 4 Or. 96; Berdell v. Bissell, 6 Colo. 162. A plaintiff may deny acceptance, although under the statute he may show that fact under a general denial: Pottlitzer v. Wesson, 8 Ind. App. 472, 35 N. E. 1030.

[8] 1 Chitty Pl. 582; Webb v. Weatherby, 1 Bing. N. C. 502, 1 Hodges, 39; Dent v. Coleman, 10 S. & M. 83. See Baldwin v. Bank, 1 Oh. St. 141.

and satisfaction, or compromise be not pleaded by way of satisfaction, but is set out, it is material, and it is sufficient if the agreement be denied or otherwise traversed without specially answering the allegations of delivery and acceptance in satisfaction.[9] The plea of accord and satisfaction or compromise is demurrable for defects in form and substance. The objection that the agreement set out does not constitute an accord and satisfaction, or a compromise, may be made on an objection to the introduction of evidence, or after trial. A plea of payment of a smaller sum of money in bar of a claim for a larger sum in *indebitatus assumpsit,* is not cured by verdict.[10] A plea setting out an unexecuted accord will be stricken out on motion as not constituting a defense.[11] So, a plea alleging that the plaintiff agreed to take a third person as paymaster for the debt is frivolous and will be stricken out.[12] A sham plea of accord and satisfaction will be stricken out as in other cases.[13] Objections based on defects in form must be urged upon special demurrer,[14] and usually at the first term after the plea is filed, otherwise they will be disregarded.[15] If a plea is sufficient in substance but the allegations are indefinite and uncertain, or wanting in completeness, it should

9 Bainbridge v. Lax, 9 Q. B. 819, 58 E. C. L. 819.

10 Down v. Hatcher, 2 P. & D. 292, 3 Jur. 651, 10 A. & E. 121. Where, to a declaration upon two counts for 10 l. each, *non assumpsit* and payment of 10 l. in satisfaction were pleaded, and the plaintiff before trial entered a *nolle prosequi* to one count, and verdict went for the defendant on the plea of payment, it was held the plaintiff was not entitled to a verdict *non obstante veredicto,* for the reason that the record will be looked at at the time of the trial and not when the plea was pleaded: Wright v. Acres, 1 N. & P. 761, 6 A. & E. 726, W. W. & D. 328.

11 Cannon River Ass'n. v. Rogers, 46 Minn. 376, 49 N. W. 128; Daniels v. Hallenbeck, 19 Wend. 410.

12 Daniels v. Hallenbeck, 19 Wend. 410.

13 Richley v. Proone, 1 B. & C. 286.

14 Wood v. Harris, 5 Blackf. 585.

15 Brantley v. Lee, 106 Ga. 313, 32 S. E. 101.

be assailed by motion for a more definite and specific statement of the matters constituting the accord and satisfaction or compromise; for when tested by an objection in the nature of a demurrer the plea will be held good.[16] A plea of accord and satisfaction may be amended in the same manner and upon like showing as other pleas.[17]

Sec. 111. **Reply to avoid the agreement—Pleading a tender.**—If the alleged agreement was made but the defendant denies that it is valid and effective by reason of fraud, duress or mistake, a replication or reply setting up such new matter is required.[1] In all or most of the code states new matter is by statute required to be set out affirmatively in the reply;[2] which is but declaratory of the common law. The facts and circumstances constituting the duress or fraud should be set out specifically,[3] and the plaintiff must allege that he was misled or that he believed in the truth of the false representations and was induced thereby to enter into

[16] In Forbes v. Petty, 37 Neb. 899, 56 N. W. 730, the answer—"* * * the defendant had a full and complete settlement, and a full and complete arbitration and settlement, of all matters * * * and more especially the matter referred to in the petition," was held sufficient upon the question of a settlement, but the court observed: "Had it been assailed by a motion for a more specific statement of the matters alleged therein, such objection would have been well taken. Schwartz v. Evans, 75 Tex. 198, 12 S. W. 863. In Stead v. Pryor, 1 C. B. 782, 50 E. C. L. 782, upon a special demurrer for ambiguity, the plea was held bad, inasmuch as it might be construed either that the agreement to accept the delivery of the goods in satisfaction took place at the same time as the delivery, or at a subsequent period.

[17] See Webster v. Wyser, 1 Stew. 184. Field v. Cappers, 81 Me. 36, 16 Atl. 328, 10 Am. St. Rep. 237, (Release).

[1] Stomme v. Hanford, 108 Iowa, 137, 78 N. W. 841; O'Brien v. Railway Co., 89 Iowa, 644, 57 N. W. 425; Hartford Ins. Co. v. Kirkpatrick, 111 Ala. 456, 20 So. 651 (where the party is in prison when the threats are made, there must be an allegation of threats to continue the imprisonment); Brainard v. Van Dyke, 71 Vt. 359, 45 Atl. 758.

[2] See Minn. Code 1905, Sec. 4134; Iowa Code, Sec. 2695.

[3] Brainard v. Van Dyke, 71 Vt. 359, 45 Atl. 758.

the agreement, and that the false representations or whatever constituted the fraudulent acts, were made or done with the intent to defraud. In Wisconsin, however, and perhaps in some other states, where by statute everything in a reply excepting a counterclaim is deemed controverted, matters in avoidance may be shown without a reply of any kind.[4]

Formerly under the old equity practice, a bill in a suit for a rescission, which did not contain a formal offer to return what had been received on the contract was demurrable, but this rule does not now obtain everywhere under that practice.[5] It has been said that under the code system, which merely requires a complaint to contain only a statement of the facts constituting the cause of action and the prayer for relief, no such averment is necessary. A willingness is sufficiently shown by a plaintiff by submitting his cause to the court which has the power to impose the proper terms of granting the relief.[6] Where a party has rescinded by his own act by returning or tendering what he received, in any proceedings, either at law or in equity, where he relies upon the rescission, he must allege a tender of that which he received upon the contract, or if a technical tender was not made an excuse for not making one.[7] Whether a formal tender in rescission is necessary in all jurisdictions, before a party may take advantage of fraud or duress in avoiding a compromise will be considered in subsequent sections.

[4] Continental Bank v. McGeoch, 92 Wis. 286; Leslie v. Keepers, 68 Wis. 183, 31 N. W. 486.

[5] Jervis v. Berridge, L. R. 8 Ch. App. 351, 21 W. R. 96.

[6] Knappen v. Freeman, 47 Minn. 491, 50 N. W. Rep. 533. In Thompson v. Hardy, 102 N. W. Rep. (S. D.) 299, the objection was raised that it was not alleged in the complaint that plaintiff had rescinded. The court said that the action was for a rescission and that an offer of restoration in the complaint was sufficient. The effect of a failure to allege a willingness to restore what was received was not commented upon.

[7] Brainard v. Van Dyke, 71 Vt. 359, 45 Atl. 758. See Knoxville, etc., R. Co. v. Acuff, 92 Tenn. 26, 20 S. W. 348, holding that a tender is waived by joining issue on the matters set up in avoidance.

Sec. 112. Pleading release.—As a release is so often given upon a settlement by way of compromise, its consideration is not inappropriate, although the subject of a distinct branch of the law. A plea of release is a plea in bar.[1] It confesses and avoids the cause of action set out in the complaint. In general, what has been said in the foregoing sections about the time, manner and necessity for pleading an accord and satisfaction, or compromise, applies with equal force to pleading matter of release. At common law, although there is a special plea by which a release may be set out affirmatively,[2] it may be given in evidence under the general issue, in assumpsit,[3] case,[4] debt,[5] and sometimes in trover,[6] although this has been doubted.[7] But in trespass, whether to the person, personal or real property,[8] in covenant,[9] and actions on a specialty,[10] or record,[11] but not on a foreign judgment, a release must be pleaded specially. It is an affirmative defense and now, in all jurisdictions excepting those adhering to the common law practice, it must be pleaded specially,[12] either under the rules of court,[13] or special statute,[14] or under the code system

[1] 3 Chitty Pl. 931.

[2] 1 Chitty Pl. 478.

[3] 1 Chitty Pl. 478; Cleveland v. Rothschild, 132 Mich. 625, 94 N. W. 184; Fulton v. Bank, 2 Wend. 486.

[4] 1 Chitty Pl. 491.

[5] 1 Chitty Pl. 481.

[6] 1 Chitty Pl. 498.

[7] Hawley v. Peacock, 2 Camp. 558.

[8] 1 Chitty Pl. 491, 506.

[9] 1 Chitty Pl. 487.

[10] 1 Chitty Pl. 485.

[11] 1 Chitty Pl. 486.

[12] Horton v. Horton, 83 Hun, 213, 31 N. Y. Supp. 588.

[13] See Cleveland v. Rothschild, 132 Mich. 625, 94 N. W. 184, where, under rules of court, it must be plainly set forth in a notice attached to the plea (general issue). Rule 7, (b).

[14] In England since the enactment of the "Hillary Rules" Hil. T. 4 W. IV, accord and satisfaction, release, etc., must be specially pleaded.

of pleading. In some states it may be proven under the general issue when the plea is accompanied with a notice that the party intends to rely upon it and plainly sets forth the release.[15] With respect to pleading a release *puis darrein continuance,* and the time generally when a release may be pleaded, and the practice; the rules are the same as obtained in pleading accord and satisfaction, and compromise, and to avoid further repetition the reader is referred to a prior section.[16] A plea of release being a plea in confession and avoidance, it admits the existence at the time of the execution of the release, of the obligation which it professes to discharge.[17] A plea of a release pleaded *puis darrein continuance* after a demurrer and joinder in demurrer, operates as a *retraxit* of the demurrer.[18]

The facts showing a valid binding release must be averred.[19]

[15] Cleveland v. Rothschild, 132 Mich. 625, 94 N. W. 184; Wisheart v. Legro, 33 N. H. 177.

[16] See Sec. 109, where cases concerning release are also cited.

[17] See Bement v. Ohio Valley B. Co., 99 Ky. 109, 59 Am. St. Rep. 445, 35 S. W. 139, 18 Ky. L. Rep. 37.

[18] Solomon v. Graham, 1 Jur. N. S. 1070, 24 L. J. Q. B. 332.

[19] Hosier v. Eliason, 14 Ind. 523. The terms should be set out so that the court can judge of its validity.

We give here Mr. Chitty's form of a plea of release at common law, which shows what facts must be pleaded: "And the said defendant by E. F. his attorney, comes and defends the wrong and injury, when, etc., and says that said plaintiff ought not to have or maintain his aforesaid action thereof against the said defendant, because he says, that after the making of the said several promises and undertakings in said declarations mentioned, and before the exhibiting of the bill of the said plaintiff against the said defendant in this behalf, to wit; on the (date) and at (venue) aforesaid, the said plaintiff, by his certain writing of release, sealed with his seal, and now shown to the said court here, the date whereof is a certain day and year therein mentioned, to wit, the day and year last aforesaid, did demise, release and forever quit claim unto the said defendant, his heirs, executors and administrators, the said several promises and undertakings in the said declarations mentioned, and each and every of them, and all sum and sums of money then due and owing, or thereafter to become due, together with all and all manner of action and actions, cause and causes of action, suits, bills,

Alleging that the plaintiff releases the defendant is a conclusion of law.[20] If the consideration is executory and is to be paid before the release takes effect, the releasee must allege that he has performed.[21] The pleader must allege that the particular demand sued upon was embraced in the release;[22] and, where the terms of a release set out, are broad and general, evidence is admissible to show that the particular demand in question was included in it.[23] In pleading a release *puis darrein continuance* it

bonds, writing obligatory, debts, dues, duties, reckonings, accounts, sum and sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages and demands whatsoever, both at law and in equity, or otherwise howsoever, which he the said plaintiff then had, or which he should or might at any time or times thereafter have, claim, allege or demand against the said defendant for or by reason or means of any matter, cause or thing whatsoever, from the beginning of the world to the day of the date of said deed or writing of release; as by the said deed or writing of release, reference being thereto had, will fully appear, and this the said defendant is ready to verify wherefore he prays judgment, if the said defendant ought to have or maintain his aforesaid action thereof against him." 3 Chitty Pl. 930.

Plea *puis darrein continuance:* "And now at this day, that is to say, on ——— the ——— day of ——— in this same Term, until which day the plea aforesaid was last continued, comes the said plaintiff by ——— his attorney, and the said defendant by his attorney aforesaid, and the said defendant saith, that the said plaintiff ought not *further* to have or maintain his aforesaid action thereof against him, because he saith that after the last continuance of this cause, that is to say, after ——— the ——— day of ——— in this same ——— Term, from which day this cause was last continued, and before this day, to wit, on (date), at (venue) the said plaintiff (here state the release, as in the foregoing form) and this the said defendant is ready to verify, wherefore he prays judgment, if the said plaintiff ought further to have or maintain his aforesaid action thereof, against him." 3 Chitty Pl. 1238.

[20] Benihan v. Wright, 125 Ind. 536, 25 N. E. 822, 21 Am. St. Rep. 249, 9 L. R. A. 514; Marshall v. Mathers, 103 Ind. 458, 3 N. E. 120; Gasscock v. Hamilton, 62 Tex. 143; Maness v. Henry, 11 So. 410.

[21] Scott v. Scott, 105 Ind. 584, 5 N. E. 397.

[22] Mandt Wagon Co. v. Fuller, 125 Wis. 258, 97 N. W. 958; Voiles v. Beard, 58 Ind. 510. See Hale v. Grogan, 99 Ky. 170, 35 S. W. 282, 18 Ky. L. Rep. 46.

[23] Mandt Wagon Co. v. Fuller, 120 Wis. 258, 97 N. W. 958.

should be alleged when the release was made and the date of the last continuance.[24] So, the time and place of executing a release should be alleged where it is set out in the regular plea.[25] It has been decided in Illinois that when the defendant pleads a release, it need not be alleged to be under seal, because a release *ex vi termini* imports a seal.[26] In Indiana the reverse has been held to be the rule,[27] and, according to Mr. Chitty's forms, a release must be alleged to be sealed.[28] The rule announced in Illinois seems to be more reasonable, in view of the well known legal definition of a technical release. Whether the release pleaded has a seal or not is matter of evidence,[29] and when a seal is necessary, the want of it is a matter of defense. A seal is not essential to a written discharge of a demand, "If it be founded upon a sufficient consideration." [30] In such cases if there be in fact no technical release, the demand would be discharged by way of an accord and satisfaction, or compromise and not by release. At common law a seal imports a consideration; in fact it obviates the necessity for any consideration whatever, and pleading a technical release at common law,[31] and in some states where, by statute written releases, unsealed, are declared of equal dignity with seal releases,[32] it is not necessary to allege a consideration. Alleging a consideration is unnecessary even when by statute the

[24] Field v. Coppers, 81 Me. 36, 16 Atl. 328, 10 Am. St. Rep. 237.

[25] 3 Chitty Pl. 930.

[26] Bailey v. Cowles, 86 Ill. 333; Illinois Cent. R. Co. v. Read, 37 Ill. 484, 87 Am. Dec. 260.

[27] Griggs v. Voorhies, 7 Blackf. 561

[28] 3 Chitt. Pl. 930.

[29] Illinois Cent. Ry. Co. v. Read, 37 Ill. 484, 87 Am. Dec. 260.

[30] Illinois Cent. Ry. Co. v. Read, 37 Ill. 484, 87 Am. Dec. 260.

[31] 3 Chitty Pl. 930.

[32] Miller v. Fox, 111 Tenn. 336, 76 S. W. 893; Williams v. Hitchings, 10 Lea (Tenn.) 326; Warren v. Gentry, 21 Tex. Civ. App. 151, 50 S. W. 1025. See Rogers v. Kimball, 49 Pac. (Cal.) 719.

seal is only presumptive evidence of a consideration.[33] In such cases want of consideration is matter of defense.[34] In those states where seals have been abolished by statute, and where unsealed releases have not been given the force and effect of sealed instruments at common law, it would seem to be necessary, in pleading a release to allege an adequate legal consideration.[35]

Sec. 113. Same subject—Reply.—Release being new matter in confession and avoidance, the plea must be met by a reply, or demurrer; otherwise it will stand admitted as alleged.[1] At common law, to a plea of release, particularly in assumpsit, debt and trespass, the plaintiff may reply *non est factum*;[2] which denies that the deed (or release) mentioned in the plea is the deed of the plaintiff. Under this allegation, the plaintiff may show at the trial that the deed was never executed in point of fact.[3] When a release is pleaded according to its supposed legal effect, *non est factum* not only puts in issue the fact of its execution, but the construction as alleged; thus, where a note was alleged to have been made by two persons,

[33] Winter v. Kansas City, etc., Co., 73 Mo. App. 173, aff'rm'd in 160 Mo. 150, 61 S. W. 606; Green v. Langdon, 28 Mich. 221. See Osborn v. Hubbard, 20 Or. 318, 25 Pac. 1021, 11 L. R. A. 833.

[34] Wabash R. Co. v. Boon, 65 Fed. 941, 13 C. C. A. 222; Winter v. Kansas City, etc., Co., 73 Mo. App. 173.

[35] Hale v. Gragan, 99 Ky. 170, 35 S. W. 282; 18 Ky. L. Rep. 46; Bank v. Severin, 124 Ind. 317, 24 N. E. 977; Cameron v. Warbritton, 9 Ind. 351; Maness v. Henry, 96 Ala. 454, 11 So. 410; Swan v. Benson, 31 Ark. 728.

[1] Cordner v. Roberts, 58 Mo. App. 440; Hoeger v. Ohio Valley, etc., Co., 36 Ind. App. 662, 76 N. E. 328. This rule is changed somewhat by statute in some of the states and local statutes should be examined. See St. Louis, etc., R. Co. v. Smith, 82 Ark. 105, 100 S. W. 884; Petersen v Taylor, 34 Pac. (Cal.) 724.

[2] 1 Chitty's Pl. 582, 584, 597; Dennison v. Mudge, 4 Barb. 243.

[3] Stephen on Pl. 159; North v. Wakefield, 13 C. B. 536, 13 Jur. 731, 18 L. J. Q. B. 214; (1908) Hammond v. Antonia, 83 N. E. (Ind. App.) 766. See Indiana U. T. Co. v. McKinney, 39 Ind. App. 86, 78 N. E. 203, for a reply denying the execution of a release.

and the defendant pleaded that the plaintiff had released his co-debtor which released him; a replication *non est factum,* put the defendant to his proof of the execution of a release susceptible of the construction alleged.[4] Under a plea *non est factum* the plaintiff cannot deny the validity of a release in point of law.[5] Any circumstance out of which the alleged illegality arises must be brought forward by a special allegation.[6] A reply denying that the effect of the release is to discharge the defendant is demurrable.[7]

A general denial under the code system of pleading, takes the place of the general issue at common law in this respect; and under it, any evidence is admissible that will tend to show that the plaintiff never released the demand; as, that he did not execute the release; that the alleged release was never delivered;[8] that the minds of the parties never met, as where the release signed was represented by the debtor to be a receipt. In such a case, the court said: "It requires something more than the mechanical act of signing one's name to a paper or writing to constitute a making or execution of a written instrument. The assent of the parties must go with the act of signing."[9] Such evidence is not brought forward for the purpose of avoiding a release which the plaintiff made and delivered, but to disprove the alleged fact that he had settled and released his demand, and that he did not make the contract or release which he apparently did make.[10] If the release is voidable and the releasor means to take advantage of that fact, he must reply admitting its execution. A hypothetical admission, as when the plaintiff alleges that if the release was executed it was obtained by fraud,

[4] North v. Wakefield, 13 C. B. 536, 13 Jur. 731, 18 L. J. Q. B. 214.

[5] Stephen Pl. 159.

[6] Stephen Pl. (6th Ed.) 147.

[7] Dennison v. Mudge, 4 Barb. 243. A reply alleging that the words do not mean what they say is bad on demurrer: Fuller v. Burrel, 2 Root, 296.

[8] Christianson v. Chicago, etc., Ry. Co., 61 Minn. 249, 63 N. W. 639.

[9] Christianson v. Chicago, etc., Ry. Co., 61 Minn. 249, 63 N. W. 639.

[10] Christianson v. Chicago, etc., Ry. Co., 61 Minn. 249, 63 N. W. 639.

is bad.[11] The facts and circumstances constituting the fraud, duress or whatever is relied upon for an avoidance of the release should be specially pleaded,[12] although cases are to be found holding good a reply alleging merely that the release was obtained by fraud.[13] There is a line of cases holding that where a plaintiff by fraud is induced to sign a release when he intended to sign something else, the fraud may be shown under the replication *non est factum*,[14] or general denial.[15] In such cases, however, the fraud is admissible to prove want of assent and that their minds never met upon the same thing. Where a general release is pleaded, which, unless limited, is a discharge of the cause of action sued upon, the plaintiff cannot reply that the particular cause of action sued on was not included, but must allege and prove mutual mistake, or fraud upon the part of the defendant and mistake on his part.[16]

Sec. 114. Evidence—Burden of proof—Weight.—The burden of proving an accord and satisfaction is upon the party alleging it.[1] The satisfaction as well as the accord must be proven;[2] and if the accord is that there is to be no satisfaction until certain notes taken

11 Heck v. Missouri Pac. R. Co., 147 Fed. 775.

12 Harris v. Bottum, 81 Vt. 346, 70 Atl. 560; Friedburg v. Knight, 14 R. I. 585. See Bean v. Western, etc., R. Co., 107 N. C. 731, 12 S. E. 600; Brussian v. The Milwaukee, etc., R. Co., 56 Wis. 333; 1 Chitty on Pl. 582.

13 See Hoitt v. Holcomb, 23 N. H. 535.

14 Shampeau v. Lumber Co., 42 Fed. 760.

15 Christianson v. Chicago, etc., Ry. Co., 61 Minn. 249, 63 N. W. 639.

16 Walbourn v. Kingstom, 86 Hun, 63, 33 N. Y. Supp. 117.

1 Simmons v. Oullahan, 75 Cal. 508, 17 Pac. 543; McKinnon v. Holden, 123 N. W. (Neb.) 439; Noe v. Christic, 51 N. Y. 270; Bahrenburg v. Conrad, 107 S. W. (Mo. App.) 440; Oil Well Co. v. Wolf, 127 Mo. 616, 30 S. W. 145; Board v. Durnell, 66 Pac. (Colo.) 1073; Dickinson v. Barr, 7 Ark. 34; Johnson v. Collins, 20 Ala. 435.

2 Arnett v. Smith, 88 N. W. (N. D.) 1037; Hoxsie v. Lumber Co., 41 Minn. 548, 43 N. W. 476; Burgess v. Denison, 79 Me. 266, 9 Atl. 726. An accord executory is no bar: Mitchell v. Hawley, 4 Denio, 414, 47 Am. Dec. 260; Bank v. De Grauw, 23 Wend. 342, 35 Am. Dec. 369; Bradley v. Palen, 78 Iowa,

upon the settlement are paid, payment of the notes must be shown.[3] It must be made to appear that the performance was accepted by the creditor as satisfaction.[4] If any thing other than money was given in payment the burden of showing that it was received by way of a compromise, as satisfaction, is upon the debtor.[5] But the thing received, as a note or new contract, need not be produced or accounted for.[6] The evidence must show a complete performance according to the terms of the accord. Proof of a readiness,[7] or attempted performance,[8] or of a tender of performance of the accord,[9] or even part performance and readiness to perform the rest,[10] is not sufficient. The rule is the same in equity as at law.[11] A party must prove the accord and satisfaction alleged; proof of another will be a fatal variance.[12] If, in an action upon the original cause of action, the plaintiff's evidence discloses an accord, he must go further and prove there was no satisfaction of the new agreement.[13]

126, 42 N. W. 623; Ogilvie v. Hallam, 58 Iowa, 714, 12 N. W. 730; Smith v. Elrod, 122 Ala. 269, 24 So. 994; Jacobs v. Marks, 183 Ill. 533, 56 N. E. 154; Anderson v. Scholey, 114 Ind. 553, 17 N. E. 125; Hermann v. Orcutt, 152 Mass. 405, 25 N. E. 735; Rogers v. Spokane, 9 Wash. 168, 37 Pac. 300; Whitney v. Richards, 17 Utah, 226, 53 Pac. 1122.

[8] Berden v. Tillma, 88 N. W. (Neb.) 123; Dickinson v. Barr, 7 Ark. 34.

[4] Perin v. Cathcart, 89 N. W. (Iowa) 12, citing Jones v. Fennimore, 1 G. Greene, 134; Wedigen v. Fabric Co., 100 Mass. 422.

[5] Eckford v. De Kay, 26 Wend. 29.

[6] A. P. Brantley v. Lee, 106 Ga. 313, 32 S. E. 101.

[7] Burgess v. Denison, 79 Me. 266, 9 Atl. 726.

[8] Francis v. Deming, 59 Conn. 108, 21 Atl. 1006.

[9] Day v. Roth, 18 N. Y. 448; Brooklyn Bank v. De Grauw, 23 Wend. 342, 35 Am. Dec. 369; Carpenter v. Chicago, etc., Ry. Co., 7 S. D. 584, 64 N. W. 1120; Bank v. Curtis, 36 S. W. (Tex.) 911. See Bradshaw v. Davis, 12 Tex. 336.

[10] Hearn v. Kiehl, 38 Pa. St. 147; Blackburn v. Ormsby, 41 Pa. St. 97.

[11] Francis v. Denning, 59 Conn. 108, 21 Atl. 1006.

[12] Smith v. Elrod, 122 Ala. 269, 24 So. 994.

[13] Browning v. Crouse, 43 Mich. 489, 5 N. W. 664: In this case an agreement of compromise at fifty cents on the dollar was indorsed on the notes sued upon.

As to the burden of proof with respect to a compromise, the rule is the same as that applicable to an accord and satisfaction, and he who relies upon a compromise must prove it. The term compromise implies an executed agreement, which means of course that the terms of the compromise agreement must be shown to have been carried out.[14] To establish a settlement and compromise of a claim for a very large sum by the payment of a very small sum, the evidence should be clear and satisfactory.[15] Like most other matters required to be proved affirmatively, a clear preponderance of evidence is necessary to support a plea of an accord and satisfaction or a compromise.[16] A compromise and settlement between two parties is *prima facie* evidence of a settlement of all existing demands between the parties then due, but it is not conclusive.[17] If an accord and satisfaction or compromise is admitted, or proven, nothing short of clear and satisfactory evidence of fraud or mistake will avoid it.[18]

[14] If the evidence justifies a finding that a compromise has been executed, the judgment of the trial court will not be reversed: Slade v. Swedeburg, 39 Neb. 600, 58 N. W. 191. As elsewhere stated a compromise is very often carried out by the acceptance of a new executory agreement in satisfaction of the old demand, and this new agreement is, more often than otherwise, referred to as a compromise agreement, and the latter being unexecuted, some confusion may arise in mind as to the doctrine requiring an agreement of compromise to be executed. But by keeping in mind that the acceptance of a new executory agreement in satisfaction is but the execution of a prior agreement to accept the new one the perplexity if any will be resolved.

[15] Home Ins. Co. v. Western Transp. Co., 51 N. Y. 93.

[16] Grove v. Bush, 86 Iowa, 94, 53 N. W. 88; Bruce v. Bruce, 4 Dana, 530; Cheeves v. Donielly, 74 Ga. 712.

[17] Nichols v. Scott, 12 Vt. 47. As to what demands are included, see Sec. 31–35, 92, 93.

[18] Kohn v. Metz, 114 S. W. (Ark.) 91. A compromise will be presumed to have been made in good faith and with full knowledge of the facts, in absence of a finding that it had been obtained by fraud, mistake, or undue influence: Craigo v. Craigo, 118 N. W. (S. D.) 712.

Sec. 115. Same subject—Admissibility.—To attempt to give in detail the evidence necessary to prove an accord and satisfaction, or a compromise, would result in much repetition, as the agreement must be proven as made, and each case depends largely on its peculiar facts. As to what transactions constitute a valid accord and satisfaction or a compromise, the reader is referred to prior sections. The same rules of evidence as to admissibility obtain in sustaining a plea of this kind as apply to other contracts requiring affirmative proof. Where an accord and satisfaction, or a compromise is denied, whether the one alleged is expressed or implied, all the facts and circumstances surrounding the transaction, in any way tending to disclose the intent of the parties, are admissible; as the delivery of a receipt in full,[1] or the acceptance of a check containing the words "in full settlement of account to date," [2] or a promissory note for a less sum with surety, or other security,[3] or the note of a third person,[4] or the delivery of property; [5] payment of a less sum at a different place,[6] or at an earlier date; [7] the dismissal of a former action for the same cause on the payment of costs; [8] entry of judgment by agreement and the like. So the admissions [9] and conduct of the creditor with respect

[1] Thompson v. Maxwell, 38 N. W. (Io.) 125; Wherley v. Rowe, 106 Minn. 494, 119 N. W. 222; Jordan v. Great N. Ry. Co., 80 Minn. 405, 83 N. W. 391; Robinson v. Detroit, etc., R. Co., 84 Mich. 658, 48 N. W. 205; Grumley v. Webb, 48 Mo. 562.

[2] Pike v. Buzzell, 76 Atl. (N. H.) 642.

[3] See Secs. 63, 64, 65.

[4] Frisbie v. Larned, 21 Wend. 450: In this case it was shown that the note was received as payment.

[5] Sec. 66.

[6] Sec. 60.

[7] Sec. 60.

[8] Dana v. Taylor, 150 Mass. 25, 22 N. E. 65. A discontinuance and payment of costs by defendant is not sufficient, standing alone, to prove an accord and satisfaction. Carter v. Wilson, 19 N. C. 276.

[9] Smith v. Atwood, 14 Ga. 402.

to the subject matter since the alleged settlement, are admissible in support of the allegation of an accord and satisfaction, or a compromise. The delivery of the debtor's own note,[10] or due bill,[11] to his creditor, is *prima facie* evidence of a settlement of all demands between the parties up to date, and that the payor is indebted to the payee upon such settlement to the amount of the note or due bill,[12] whether under the law a negotiable promissory note is presumed to constitute payment or not. But in Illinois, it has been held that the giving of a note is not evidence of a settlement of all demands, but that it is an admissible circumstance, to be considered in connection with the other surrounding facts and circumstances.[13]

The papers used by the parties upon the negotiation of the treaty of compromise are admissible;[14] and where a statement or abstract of an account and not the books is used as a basis of a settlement, the creditor's testimony that the statement is correct is admissible.[15] A refusal to sign a receipt is admissible on the question whether an accord and satisfaction, or compromise was made.[16] The lapse of twenty years after suffering damages

[10] Lake v. Tysen, 6 N. Y. 461; De Freest v. Bloomingdale, 5 Denio, 304; Maynard v. Johnson, 4 Ala. 116; Gaskin v. Wells, 15 Ind. 253; Rowe v. Collier, 25 Tex. Supp. 252; Smith v. Bissell, 2 Greene (Io.) 379; Grimmell v. Warner, 21 Iowa, 12. Giving a bill of sale or mortgage to secure an indebtedness raises a presumption of payment. Allen v. Bryson, 67 Iowa, 591, 25 N. W. 820.

[11] Gue v. Kline, 13 Pa. St. 60; Spencer v. Chrisman, 15 Ind. 215; Boffandick v. Raleigh, 11 Ind. 136.

[12] Lake v. Tysen, 6 N. Y. 461.

[13] Rosencrantz v. Mason, 85 Ill. 262; Crabtree v. Rowand, 33 Ill. 423; Heffron v. Chapin, 35 Ill. App. 565.

[14] Jefferson v. Burham, 85 Fed. 924. Letters previous to the date of settlement tending to show that there was a dispute are relevant upon the question whether a check for a part of the claim was an accord and satisfaction: Barham v. Bank, 126 S. W. (Ark.) 394.

[15] McLendon v. Wilson, 57 Ga. 438.

[16] Sicotte v. Barber, 83 Wis. 431, 53 N. W. 677.

from the breach of a covenant against encumbrances, has been said to raise a presumption, which, if not rebutted, will sustain a plea of accord and satisfaction.[17] But, that the lapse of twenty years from the time of making a contract to be performed *in futuro* was held insufficient to establish an accord and satisfaction of the original agreement.[18] We apprehend the correct rule is, that lapse of time is a mere circumstance in corroboration of a party's evidence of an accord and satisfaction, or compromise.[19] A judgment entered for a particular amount, or for certain relief, is admissible in evidence as tending to prove the alleged settlement.[20] So, a party may show the satisfaction of a judgment in support of his allegation that it was satisfied upon a compromise in a particular way.[21] Evidence of a good faith dispute between the parties as to their respective rights in the subject matter, is admissible as tending to prove that a settlement of the particular matter was made as alleged.[22] So, on the other hand, evidence tending to prove that there was no reasonable ground of controversy is admissible.[23] A subsequent and different agreement covering the same subject matter is admissible in support of an allegation of the compromise and settlement of the original contract.[24] If a compromise, or an accord and satisfaction, be reduced to writing, the writing is the best evidence, and if not pro-

[17] Jenkins v. Hopkins, 9 Pick. 343.

[18] Siboni v. Kirkman, 1 M. & W. 418. See Abb. Tr. Bief. 51.

[19] Abbott v. Wilmot, 22 Vt. 437; Ketchem v. Gulick, 20 Atl. (N. J) 487; Austin v. Moore, 7 Met. 116.

[20] Orr v. Hamilton, 36 La. Ann. 750.

[21] Boswell v. Willimas, 86 Ind. 375.

[22] City Ry. Co. v. Floyd, 115 Ga. 655, 42 S. E. 45.

[23] Allen v. Procter, 35 Ala. 169. Overstreet v. Dunlap, 56 Ill. App. 486: A person charged with stealing hogs who is compelled to sign a note under fear of imprisonment, may give evidence tending to show the falsity of the charge, as bearing on the question whether the payee had a claim.

[24] McAllester v. Sexton, 4 E. D. Smith, 41; Hunt v. Ogden, 125 S. W. (Tex. Civ. App.) 386; Murphy v. Lever, 147 Ill. App. 460.

duced its absence must be sufficiently accounted for to let in secondary evidence.[25] If an instrument importing a settlement of all differences "of whatever nature," is complete in itself, oral evidence is not admissible to show only a partial settlement.[26] So, where the instrument is complete, oral evidence is not admissible to show the intention of a party, or the legal effect of the instrument.[27] But, if it appears on the face of the written instrument that it is manifestly incomplete as an agreement settling the demand, and was not intended by the parties to be a complete statement of the terms of the compromise, oral evidence is admissible to show the basis of the settlement,[28] but not to vary or contradict the terms expressed in the instrument. A receipt in full is admissible as tending to show an alleged settlement and compromise alleged. As to what claims and demands are included in a settlement and compromise more is said elsewhere.[29] If the time of executing an accord and satisfaction is not of the essence of the contract; it is immaterial and may be proved to have been executed at a different time than that alleged.[30] Payment at a later day than the date of the accord is an immaterial variance.[31]

Sec. 116. Same subject—Implied agreement—When question is for the court or jury.—It is not essential to an accord and satisfaction, or a compromise, more than in other contracts, that the agreement be expressed. It may be implied from facts and circumstances

25 American v. Rimpert, 75 Ill. 228.

26 Freeman v. Freeman, 68 Mich. 28, 35 N. W. 897. S. P. Pratt v. Castle, 91 Mich. 484, 52 N. W. 52.

27 Puge v. Akins, 112 Cal. 401, 44 Pac. 666.

28 Southwick v. Herring, 82 Minn. 302, 84 N. W. 1013; Selser's Est., 7 Pa. Co. Ct. 417.

29 Secs. 26 to 34.

30 Strange v. Holmes, 7 Cow. 224.

31 Sonnenberg v. Riedel, 16 Minn. 83.

clearly indicating the intention of the parties; as where a person having a cause of action for an unliquidated amount for personal injuries, demands and receives from the wrong-doer a stated sum of money on account of the injury,[1] or accepts a conditional tender or other conditional offer.[2] Where the facts in respect to the accord and satisfaction, or compromise alleged, have been ascertained, and the only question is as to their effect, or, in other words whether or not a valid binding contract has been entered into, the question is one of law, and is not one of fact for the jury.[3] In a case where all the negotiations were in writing, it was held that whether or not what passed between the parties constituted an accord and satisfaction, was for the court to determine.[4]

In absence of evidence of an explicit agreement that the thing delivered is received and accepted in full satisfaction, the question whether a settlement, otherwise sufficient, constitutes an accord and satisfaction or a compromise, as the case may be, depends on the intent of the parties with reference to whether or not the thing delivered and accepted was in satisfaction of the old demand, and is to be drawn from the facts and circumstances of the case.[5] And the rule in this respect is the same whether the argument be oral or written.[6] In such cases, to make it a question of law for the court, the presumption of giving and receiving the thing in satisfaction of the old demand, must be so absolute that it cannot be rebutted: "*præsumptiones juris et de jure.*"[7] Not all undisputed facts make a case

[1] Hinkle v. Minneapolis, etc., Ry. Co., 31 Minn. 434, 18 N. W. 275.

[2] Secs. 15, 19.

[3] Washburn v. Winslow, 16 Minn. 33; Hinkle v. Minneapolis, etc., Ry. Co., 31 Minn. 434, 18 N. W. 275; Vedder v. Vedder, 1 Denio, 257; Logan v. Davidson, 18 N. Y. App. Div. 353, 45 N. Y. Supp. 961; Gibbs v. Wall, 10 Cal. 153, 14 Pac. 216.

[4] Sanford v. Abrams, 24 Fla. 181, 2 So. 373.

[5] Hinkle v. Minneapolis, etc., Ry. Co., 31 Minn. 434.

[6] (1907) Southerlin v. Bloomer, 93 P. (Or.) 139.

[7] See Jones v. Johnson, 3 Watts & S. 276, 38 Am. Dec. 760, where the question was as to whether there was a merger of an account into a note

for the court. If they are undisputed, but are such as reasonable men might draw different conclusions from them as to the intent of the parties, the question whether an accord and satisfaction, or a compromise, as the case may be, was entered into, is for the jury.[8] When the evidence conflicts as to any material fact necessary to constitute a settlement by way of an accord and satisfaction, or a compromise, the question is properly one of fact for the jury.[9] A party alleging a settlement and compromise should take a special finding upon that question, otherwise a failure to find for him is equivalent to a finding against him upon that question.[10]

given by a stranger and some of the original debtors, or the original debt was extinguished. The court left it to the jury to determine as a matter of fact, the intent of the parties.

In an action to recover damages for a personal injury, where the uncontradicted evidence of the plaintiff was: "The company agreed to pay me my doctor's bill, $16, and one half time, $76.25, I made no claim against the company on account of said accident, at or before the time my wife received the said $91.25; than for said doctor's bill and one half time." The court held that these facts being undisputed, unexplained and unqualified and susceptible of but one reasonable construction, the presumption was that the payment was intended as a full recompence for the injury, and that it was a question for the court." Hinkle v. Minneapolis, etc., Ry. Co., 31 Minn. 434, 18 N. W. 275.

[8] Perin v. Cathcart, 89 N. W. (Io.) 12.

[9] Perin v. Cathcart, 89 N. W. (Io.) 12; Armstrong v. Lonon, 63 S. E. (N. C.) 101; Schuller v. Robinson, 123 N. Y. Supp. 881; (1907) Wilson v. Insurance Co., 114 N. W. (Minn.) 251; (1908) Carlston v. Ryan, 114 N. W. (Mich.) 852, 14 Det. Leg. N. 844; Murdock v. Williams, 76 Mich. 568, 43 N. W. 592; Oil Well Co. v. Wolf, 127 Mo. 616, 30 S. W. 145; Madden v. Blain, 66 Ga. 49; Robinson v. Detroit, etc., R. Co., 84 Mich. 658, 48 N. W. 205; Schulz v. Schulz, 113 Mich. 502, 71 N. W. 854. On a *plea puis darrein continuance*, of settlement after action brought, it is a question for the jury whether the sum received was accepted in satisfaction of the debt and costs: Henderson v. Hayter, 2 F. & F. 128.

[10] Reddick v. Keesling, 128 Ind. 128, 28 N. E. 316.

Sec. 117. Rescission—Election of remedies on discovery of grounds for rescission—Mode—Measure of damages.—As before often observed the law encourages and favors settlements and compromises of disputed and doubtful claims, and when parties enter into a compromise of such matters, the law will approve of it by presuming that the parties consulted their own interests in making the arrangement, and a settlement by way of a compromise will not be interfered with in absence of a showing of fraud, mistake, or other ground warranting a rescission.[1] Whenever a party to a compromise discovers fraud warranting a rescission, he is immediately put to an election. He may affirm the contract by keeping what he received under it, and bring an action for the damages he has sustained by reason of the fraud.[2] He cannot bring assumpsit for the balance of the demand, for if he retains what he received he thereby affirms the compromise [3] and the original obligation is extinguished. The remedy, at common law, is an action on the case for damages for fraud.[4] This is the practicable remedy to persue where time, or circumstances, has made impossible a restoration of the parties to their original position; as where the defrauded party has disposed of the property received upon the compromise,[5] or the other party has so mixed up the matter that a complete restoration is impossible, or highly improbable. The measure of damages which he is entitled to recover, is the amount he would have received had no fraud been practiced upon him, less the amount received upon the compromise.[6]

[1] Hanley v. Noyes, 28 N. W. (Mich.) 831; Booth v. Alpena, 135 N. W. (Mich.) 1063.

[2] Corse v. Minnesota Grain Co., 94 Minn. 331, 102 N. W. 728; Gould v. Cayuga Bank, 99 N. Y. 333.

[3] Hanley v. Noyes, 28 N. W. (Mich.) 831.

[4] Walsh v. Sisson, 13 N. W. (Mich.) 802; Jewett v. Pettitt, 4 Mich. 508.

[5] Gould v. Cayuga Bank, 99 N. Y. 333.

[6] Walsh v. Sisson, 13 N. W. (Mich.) 802, citing Page v. Wells, 37 Mich. 421; Warren v. Cole, 15 Mich. 274; Bowman v. Parker, 40 Vt. 413; Foster v. Kennedy's Adm'r., 38 Ala. 359; Moberly v. Alexander, 19 Iowa, 164; Reynolds v. Cox, 11 Ind. 266.

This is the extent of the fraud practiced upon him. The fact that the demand was doubtful or disputed, and that to settle the dispute by litigation would have required an expenditure of an uncertain amount; or that the success of collecting depended upon the solvency of the debtor, which ordinarily rates a claim of this character less than its face value, is not to be taken into consideration further than as fixing the character of the claim. The rule is stated by Finch, J., with singular clearness; he said: "There is a compromise, and it must stand as a compromise, and the problem is only to make it an honest compromise. How much additional money will it take to do that? Assuming that the parties meant to avoid litigation and compromise their dispute, and that nothing but facts were disclosed, how much more would the creditor have demanded and the debtor reasonably allowed as a final compromise above and beyond the sum paid?" Answering the questions, he said: "It is the excess of that value upon the true state of facts as known or honestly believed over the value fixed upon a false state of facts, fraudulently asserted, which constitutes the plaintiff's actual loss from the fraud." [7] If a party performs an executory agreement received in satisfaction upon a compromise, after he has discovered fraud warranting a rescission, he thereby waives the fraud and he cannot recover damages suffered on account of the fraud.[8] But if there has been a part performance before the discovery of the fraud, and the balance is performed under protest and upon the promise of the other party to make good any damages on account of any misrepresentation, and the amount or extent of the damage on account of the fraud cannot be determined in

[7] Gould v. Cayuga Bank, 99 N. Y. 333.

Evidence.—Where the demand compromised was for negligently causing death the plaintiff need only prove that an accident occurred, that the death resulted, and that the claim for liability was made. He need not show that it was a valid claim: Urtz v. New York Cent. R. Co., 121 N. Y. Supp. 879.

[8] This is the rule applicable to contracts in general. See Thompson v. Libby, 36 Minn. 287; Bartleson v. Vanderhoff, 96 Minn. 184.

advance of the completion of the contract, there is no waiver of the damages.[9]

If a judgment for damages would be of doubtful value, or for other reasons damages would not suit his purpose or convenience, or complications have arisen requiring an equitable adjustment of the matters between the parties, the defrauded party may sue in equity for a rescission of the contract by the court, and recover what he parted with, upon such conditions as the court may deem to be equitable.[10] When the aggrieved party sues in equity to rescind, it is not necessary, as we shall presently see, that he should have previously attempted a rescission. If the defrauded party does not choose to adopt either of the foregoing courses, he may rescind by his own act, and bring an action at law to recover what he parted with by reason of the fraud.[11] At common law, if a release or a compromise was obtained by fraud the injured party can sue upon the original cause of action and if met with a plea of release or compromise, he may reply that the release or compromise was obtained by fraud.[12] In proceedings at law rescission is recognized as an accomplished fact. The right to bring replevin, or other action at law to recover what was parted with under a fraudulent contract, only exists while the situation of the parties remains such that they can be placed substantially in *statu quo*.[13] If this cannot be done some other remedy must be resorted to. It has been held that in the Federal Courts, the only fraud that can be availed of in an action at law, to avoid a formally executed release of the claim sued on (whether the release is under

[9] See Haven v. Neal, 43 Minn. 315.

[10] Corse v. Minnesota Grain Co., 94 Minn. 331, 102 N. W. 728; Gould v. Cayuga Bank, 99 N. Y. 333.

[11] Corse v. Minnesota Grain Co., 94 Minn. 331, 102 N. W. 728; Gould v. Cayuga Bank, 99 N. Y. 333.

[12] Bussian v. The Milwaukee, etc., R. Co., 56 Wis. 333; 1 Chitty Pl. 582; Hanley v. Noyes, 28 N. W. (Mich.) 831; Nelson v. Nelson, 126 N. W. (Minn.) 731, citing Christianson v. Railway Co., 61 Minn. 249, 63 N. W. 640; Peterson v. Railway Co., 36 Minn. 399, 31 N. W. 515.

[13] Home Ins. Co. v. Howard, 111 Ind. 546, 1 L. R. A. 202.

seal or not), is misrepresentation, deceit or trickery practiced to induce the execution of a release upon which the minds of the parties never met, and does not include misrepresentations of fact which may have induced the claimant to agree to the release as actually made.[14] But in such cases the law of rescission has no application, the defense being that the contract is void, it not being the contract containing the terms agreed upon.[15] A party who seeks to rescind a contract because of fraud committed by the other party, must return or tender what he received under it. He cannot enjoy the fruits of the agreement and repudiate it. Nor will he be permitted to affirm a compromise in part and repudiate it in part.[16] "He cannot hold on to such part of the contract as may be desirable on his part, and avoid the residue, but must rescind *in toto* if at all."[17]

Electing to affirm a compromise and sue for damages, or to be reinstated in the position he was before the contract was made, are not concurrent remedies but inconsistent. The adoption of one necessarily excludes the other, and when a party has made an election he must abide by it.[18] If the fraud is not discovered until after an action is brought by the other party to enforce a new agreement executed upon the compromise, the defrauded party may rescind then,[19]

[14] Pacific Mut. L. I. Co. v. Webb, 157 Fed. 155. In Jessup v. Chicago, etc., Ry. Co., 68 N. W. (Io.) 673, the action was to recover for a breach of an oral contract to furnish permanent employment made in settlement of a claim for personal injuries. The oral contract was denied and a written release was set out. Plaintiff set up fraudulent representations in obtaining the release. It was held that a recovery could not be had on the oral agreement until the written agreement was set aside or reformed in a proper proceeding for that purpose.

[15] See Aultman v. Olson, 34 Minn. 450.

[16] Reid v. Hibbard, 6 Wis. 175; Van Trott v. Wiese, 36 Wis. 439.

[17] Masson v. Bovet, 1 Denio, 74, 43 Am. Dec. 651; s. p. Nichols v. Pinner, 18 N. Y. 312; Wood v. Kansas City Tel. Co., 123 S. W. (Mo.) 6. A release cannot be affirmed in part and repudiated in part: Skilbeck v. Hilton, L. R. 2 Eq. 387; Pritt v. Clay, 6 Beav. 503.

[18] Strong v. Strong, 102 N. Y. 69; Schiffer v. Deitz, 83 N. Y. 311.

[19] See Pawnee Coal Co. v. Royce, 184 Ill. 402, 56 N. E. 621.

and plead the rescission and defeat the action altogether; or plead the rescission and seek a recovery upon the original demand; or, in those states where law and equity are administered in the same action, he may set out the fraud and ask for a rescission by the court; or, when the old equity practice prevails, he may bring a separate suit for a rescission, and have the action upon the new agreement enjoined. The party perpetrating the fraud has no choice in the matter. All he is entitled to, whatever course the other party may adopt, is substantial justice.

Sec. 118. Ratification—Laches—Time when rescission should be made.—Fraud vitiates all contracts, but the contract is not absolutely void but voidable, at the election of the injured party. And, it is everywhere held, that, if, after learning of fraud warranting a rescission of a compromise, the party keeps what he has received upon the agreement,[1] or accepts benefits under it, it is an election to abide by the contract.[2] Whether a plaintiff knew of the fraud at the time of accepting the money paid upon a settlement, and thus ratified the contract, is, when disputed, a question for the jury.[3] The right to rescind must be exercised immediately, and a continued employment, use and occupation of the property received under the contract, will be deemed an election to affirm it.[4] The right may be lost by laches; as when the party waits an unnecessary length of time after discovering the fraud before moving in the matter.[5] The

[1] Hanley v. Noyes, 28 N. W. (Mich.) 831.

[2] Peterson v. Chicago etc. Ry. Co., 36 Minn. 399, 31 N. W. 515: The false representation was that no action had been commenced to recover on the contract. After learning that this was false, plaintiff accepted the balance agreed to be paid. See upon same subject, Ham v. Potter, 101 Minn. 437, 112 N. W. 1015.

[3] Marple v. Minneapolis & St. L. R. Co., 132 N. W. (Minn.) 333.

[4] Strong v. Strong, 102 N. Y. 69; Schiffer v. Deitz, 83 N. Y. 300.

[5] In Burton v. Stewart, 3 Wend. 236, 20 Am. Dec. 692, where the question of fraud in the sale of chattels was under consideration, the court said it was the defendant's duty, when he discovered the fraud, to have returned the property. "When prosecuted on the note, and the case brought to trial,

right to elect to rescind a fraudulent compromise may be lost by the intervention of rights of a third party,[6] or by other change in the position of the parties making a restoration in specie an impossibility; as where the property received has been sold,[7] consumed, or otherwise destroyed. But the rule that any act in affirmance, or laches, after discovery of the fraud, defeats the right of rescission, has no application to an action for damages founded upon the fraud;[8] and, an action to recover damages may be brought at any time before the action is barred by the statute of limitation.[9]

When must the rescission and repudiation of a fraudulent compromise be made to enable the defrauded party to recover what he has parted with? Obviously justice demands that it be made promptly upon the discovery of the fraud. The policy of the law requires that one party to a fraudulent contract shall not by delay, or otherwise, unnecessarily increase the burden of the other, although the latter be guilty of fraud. This principle is fundamental to all contracts and transactions. In many cases necessity requires immediate action, for so long as the contract remains unrescinded it binds both parties and the party guilty of the fraud is at liberty to, and may change his position with respect to the property; thus making the placing of the parties in *statu quo* an impossibility. The decisions uniformly hold that the rescission must be made with reasonable diligence after the discovery of the fraud or other ground for rescission.[10] This is true whether the act of rescission requires

it was too late to repudiate the contract." Whether an election to rescind is within a reasonable time has been said to be a question for the jury: Marple v. Minneapolis & St. L. R. Co., 132 N. W. (Minn.) 333. A party who delays two years before seeking to avoid an agreement on the ground of duress will be denied relief: Wood v. Kansas City Tel. Co., 123 S. W. (Mo.) 6.

[6] Booth v. Alpena, 135 N. W. (Mich.) 1063.

[7] See Schiffer v. Deitz, 83 N. Y. 300.

[8] New York Land Co. v. Chapman, 118 N. Y. 295.

[9] Neibuhr v. Gage, 99 Minn. 149, 108 N. W. 884.

[10] Masson v. Bovet, 1 Denio, 69, 43 Am. Dec. 651; Sweetman v. Prince, 26 N. Y. 227; Getty v. Devlin, 54 N. Y. 533; Morris v. Great Nor. R. Co., 67

a tender or offer, or a mere notice of the intent to rescind and a demand. The rescission may be made after an action is brought to enforce a new agreement entered into upon a compromise, where the fraud is not discovered until after the action is commenced;[11] but, where the fraud is discovered before the commencement of an action, and the party delays unnecessarily until after the action is brought upon the new agreement, before taking any steps to rescind, it will be too late.[12] But lapse of time alone, unaffected by other circumstances, will not bar the right to rescind a voidable transaction, since it is not for the wrong doer to impose extreme vigilance and promptitude as conditions to the exercise of the rights of the injured party.[13] Obviously time is only important when one or the other parties must be placed in *statu quo*.[14] And when by unnecessary delay after discovery of the fraud this cannot be done, the party is said to be guilty of laches. If there is nothing to do but bring an action to recover money paid on account of the fraud or damages, the party only has to look out for the statute of limitations.

Minn. 74, 69 N. W. 628; Pawnee Coal Co. v. Royce, 184 Ill. 402, 56 N. E. 621; Kelly v. Louisville, etc. R. Co., 154 Ala. 573, 45 So. 906; Roberts v. Central Lead Co., 95 Mo. App. 581, 69 S. W. 630; St. Louis etc. R. Co. v. Smith, 82 Ark. 105, 100 S. W. 884.

[11] See Pawnee Coal Co. v. Royce, 184 Ill. 402, 56 N. E. 621.

[12] Gould v. Cayuga Bank, 86 N. Y. 75; Burton v. Stewart, 3 Wend. 236, 20 Am. Dec. 692.

[13] Fitzgerald v. Fitzgerald, 62 N. W. (Neb.) 899, citing Pol. Cont. 546; Pence v. Langdon, 99 U. S. 581; Montgomery v. Pickering, 116 Mass. 227; Tarkington v. Purvis, 128 Ind. 187, 25 N. E. 879; Moxon v. Payne, 8 Ch. App. 881; Foley v. Holtry, 41 Neb. 563, 59 N. W. 781.

[14] In Galveston etc., R. R. Co. v. Cade, 93 S. W. (Tex. Civ. App.) 124, the court said: Where there is no question of rights of third parties, or the defendant being prejudiced, it is not necessary that the defendant signify his repudiation immediately or at any time short of the period fixed by the statute of limitation. The action was to recover for personal injuries where no tender of the amount received upon a compromise induced by fraud had been made.

Sec. 119. Tender required upon a rescission—Exceptions.—In order to rescind a compromise or other contract on the ground of fraud, duress, or mistake, the aggrieved party, as soon as he discovers the ground therefor, should return or tender back what he received under the contract so as to place the other party as near as possible in *statu quo*.[1] This rule is elementary where the party seeks to rescind by his own act, and where, but for the fraud, du-

[1] Strong v. Strong, 102 N. Y. 69, 5 N. E. 799; Burton v. Stewart, 3 Wend. 236, 20 Am. Dec. 692 (which was a sale); Niederhauser v. Detroit St. Ry., 91 N. W. (Mich.) 1028; Valley v. Boston etc. R. Co., 68 Atl. (Me.) 635; Galvin v. O'Brien, 56 N. W. (Mich.) 85; Hanley v. Noyes, 28 N. W. (Mich.) 831; T. B. Redmond v. Atlanta etc. R. Co., 58 S. E. (Ga.) 874; Alleson v. Abendroth, 108 N. Y. 470; Graham v. Meyer, 99 N. Y. 611; Del Campo v. Camarillo, 98 Pac. (Cal.) 1049; Cook v. Fidelity & Co., 167 Fed. 95; Western & S. L. Ins. Co. v. Quinn, 113 S. W. (Ky.) 456; Booth v. Alpena, 135 N. W. (Mich.) 1063; Hill v. Nor. Pacific R. Co., 113 Fed. 914, 51 C. C. A. 544, affirming 104 Fed. 754; Grymes v. Sanders, 95 U. S. 55; Louisville etc. R. Co. v. McElroy, 37 S. W. 844, 18 Ky. L. Rep. 730; Austin v. Piedmont Mfg. Co., (S. Car.) 45 S. E. 135 (In this case a nonsuit was granted on the ground that the money received upon the settlement was not repaid or tendered. Nonsuit was held not the appropriate remedy); Estabrook v. Sweet, 116 Mass. 303; Drohan v. Lake Shore etc. R. Co., 102 Mass. 435, 38 N. E. 1116; Kelly v. Louisville etc. R. Co., 154 Ala. 573, 45 So. 906; Och v. Missouri etc. R. Co., 130 Mo. 27, 31 S. W. 962, 36 L. R. A. 442 (A void contract may be disregarded, but it is otherwise as to contracts merely voidable); Brainard v. Van Dyke, 71 Vt. 359, 45 Atl. 758; Lane v. Dayton Coal Co., 101 Tenn. 581, 48 S. W. 1094; Fritz v. Fritz, 118 N. W. (Io.) 769; Rose v. Eggers, 127 N. W. (Io.) 196; Fitzgerald v. Palsley, 119 N. W. (Io.) 166; Doohan v. Lake Shore etc. R. Co., 162 Mass. 435, 38 N. E. 1116; Chicago etc. R. Co. v. Doyle, 18 Kan. 58; Missouri Pac. R. Co. v. Goodholm, 61 Kan. 758.

Insanity.—In Morris v. Great Nor. R. Co., 67 Minn. 74, 69 N. W. 628, the releasee claimed that at the time of the compromise he was insane. His failure on regaining his normal condition to elect promptly to rescind and return or tender back what he had received was held fatal to his right to recover. S. P. Kelly v. Louisville etc. R. Co., 154 Ala. 573, 45 So. 906; *Contra*, St. Louis etc. R. Co. v. Brown, 73 Ark. 42, 83 S. W. 332; In Illinois, the courts hold that a release procured by intended fraud and circumvention is void and that it is unnecessary to return or tender back what has been received: Indiana etc. R. Co. v. Fowler, 201 Ill. 152, 66 N. E. 394, 94 Am. St. Rep. 158, aff'g 103 Ill. App. 565, and earlier cases. Pawnee Coal Co. v. Royce, 184 Ill. 402, 56 N. E. 621, citing Chicago etc. Ry. Co. v. Lewis, 109 Ill. 120.

ress, mistake, or insanity, the compromise is admittedly valid and effects a discharge of the demand. Where the action was to recover certain items alleged to have been fraudulently concealed or suppressed upon a compromise, the court said; if a sum be paid expressly as a compromise and not because so much is conceded to be due, the party receiving the payment cannot maintain an action to recover the balance claimed to be due and retain what he has received. The parties should first be placed in *statu quo*.[2] So, in assumpsit upon a contract of insurance, where a compromise of the liability was alleged to have been brought about by deceit and fraudulent practices, but the plaintiff before bringing the action, did not tender back or pay to the defendant the money received of the company upon the compromise, it was held the plaintiff could not recover.[3] The same rule was applied by the same court in an action to recover damages for personal injuries, where a compromise was alleged to have been obtained by false representations and concealments.[4] One very obvious and sufficient reason for the rule is that a defrauded party has no cause of action for the consideration parted with or released upon the compromise until the contract is rescinded; and, as repayment or tender is a part of the act of rescission, unless that be done he has no cause of action when his action is commenced.[5] Again, in all cases where the liability of the party is a disputed, or doubtful question, to permit the plaintiff to repudiate the settlement and compromise, and maintain his action upon the original demand without returning or tendering what he has received, would

[2] McMichael v. Kilmer, 76 N. Y. 36; Gould v. Cayuga Bank, 86 N. Y. 75; Bisbee v. Ham, 47 Me. 543.

[3] Pangborn v. Continental Ins. Co., 67 Mich. 683, 35 N. W. 814; Brown v. Insurance Co., 117 Mass. 479.

[4] Neiderhauser v. Detroit S. Ry. Co., 91 N. W. (Mich.) 1028; S. P. Railway Co. v. Hayes, 83 Ga. 558, 10 S. E. 350; Harley v. Riverside Mills, 129 Ga. 214, 58 S. E. 711.

[5] See Gould v. Cayuga Bank, 86 N. Y. 75. Plaintiff's right of action must be perfect at the time of commencing his action: Rose v. Eggers, 127 N. W. (Io.) 196.

be to allow him to take his chances of recovery without running the risk of losing what he has received, in case he is defeated.[6]

While the rule is elementary that a defrauded party must place the other party in *statu quo* as near as practicable, by a return or tender of what he received under the contract, where he seeks by his own act to rescind the contract upon the ground of fraud, yet there is an apparent lack of harmony in the decisions as to whether, in all cases, a strict and rigid tender should be made. It has been said: "Some of the earlier cases answer the question in the affirmative, and enforced the rule with much strictness, which resulted in many cases in shielding the party guilty of the fraud. The trend of later cases is in favor of a more reasonable and equitable application of the rule. The party guilty of the fraud is not entitled to anything more than substantial justice, and a fair opportunity to receive what he parted with. Nor is he in a position to defeat the ends of justice by insisting upon a strict, but useless tender, as a condition precedent to the exercise by the defrauded party of his right to rescind." [7] And, following this reasoning, it has been held that it is only necessary for the defrauded party to make a fair offer to return what he parted with, and, if his offer is refused, it is sufficient if he makes proof thereof at the trial, and restoration in such practicable way as the court may direct.[8] Upon principle, however,

[6] Morris v. Great Nor. R. Co., 67 Minn. 74, 69 N. W. 426, citing Vanderrelden v. Chicago, etc., R. Co., 61 Red. 54. Upon the same point, see Gould v. Cayuga Bank, 86 N. Y. 75.

[7] Corse v. Minnesota Grain Co., 102 N. W. (Minn.) 728.

[8] Corse v. Minnesota Grain Co., 102 N. W. (Minn.) 728, citing Potter v. Taggart, 54 Wis. 395, 11 N. W. 678; Bell v. Anderson, 74 Wis. 638, 43 N. W. 666; Bostwick v. Insurance Co., 116 Wis. 392, 89 N. W. 538, 92 N. W. 246; Sisson v. Hill, 18 R. I. 212, 23 Atl. 196, 21 L. R. A. 206. S. P. Maple v. Minneapolis, etc., R. Co., 132 N. W. (Minn.) 333. In Rase v. M. & St. P. & S. S. M. Ry. Co., 137 N. W. 176, the Supreme Court of Minnesota, in a case involving the settlement of a claim for personal injuries, held that where a party had spent a large part of the money received upon the settlement before he discovered the fraud, it was error to require him to restore more than he had the ability to do before the trial of the action. The court on account

these cases do not modify the rule requiring a tender, but merely adopt a more liberal rule as to the facts necessary to establish a waiver of a formal tender. The general rule is that the law does not require the performance of a vain and idle ceremony. Any conduct or declaration on the part of the tenderee which goes to show that if a strict tender had been made it would have been rejected, will be deemed a waiver of a formal tender.[9] Where a release given

of the aggravating circumstances pushed the doctrine beyond all former decisions; but it must be admitted that in the particular case justice was done.

[9] In Corse v. Minnesota Grain Co., *ante*, the plaintiff alleged and proved an offer by letter to return the securities received and a demand for a return of the money paid, which was ignored. The court said it would have been an idle ceremony to have followed the offer with any other or further tender. The plaintiff elected to proceed at law to recover the consideration, as upon rescission. In Potter v. Taggart (cited in the Corse case), where the plaintiff went to the respondent for the purpose of rescinding, but the defendant refused to return the money, the court said "The right of the vendor to have the property formally tendered is waived by his refusal to accept in advance." The action was to recover the money paid on the contract on the ground of fraud. Bell v. Anderson, is the same kind of a case.

In Rose v. Eggers, 127 N. W. (Io.) 196, it is held that a formal tender in rescission is waived by forbidding the party to return the property, on his being informed of an election to rescind. In Knoxville, etc., R. Co. v. Acuff, 92 Tenn. 26, 20 S. W. 348, taking issue on the alleged fraud set up as a defense to a plea of release, was held a waiver of the objection that a tender was not made. In Hendrickson v. Hendrickson, 51 Iowa, 68, 50 N. W. 287, the court recognized the general rule that a tender in rescission must be made, but said that where the thing was obtained by fraud it constituted an exception to the rule. Citing 2 Pars. Cont. 780. But Mr. Parsons does not lay down any such rule. There he refers generally to the rule that a party exercising the right of rescission must restore the other party to the same condition that he would have been in if the contract had not been made; and says—"But when the right to rescind springs from discovered fraud, there is an exception to the rule: the defrauded party does not lose his right to rescind because the contract has been partly executed, and the parties cannot be fully restored to their former position; but he must rescind as soon as circumstances permit and must not go on with the contract after discovery of the fraud." It will be seen that the exception stated is to the rule requiring a complete restoration, not that there should be no placing in *statu quo* as far as practicable. This case was later explained as not declar-

was made to cover matters not contemplated by the parties a tender was held to be unnecessary,[10] and, in like cases, where a release is obtained under false or fraudulent representations that it is something else; as, for example, a receipt for money paid as a gratuity. There is nothing to rescind and the party may retain the

ing any such rule but as merely referring to the rule stated in Parsons on Contracts, without approving or disproving it, as the defendant was satisfied with the rule, and was entitled thereto. Citizen's Bank v. Barnes, 70 Iowa, 412, 30 N. W. 859. The case was again referred to as establishing an exception to the rule without noticing Citizen's Bank v. Barnes. National Imp. Co. v. Maken, 103 Iowa, 118, 72 N. W. 431. In Rose v. Eggers, 127 N. W. (Io.) 196, the Iowa Court review the former cases and adhere to the rule announced in the text.

It is not to be denied but that there are cases that disturb the rule with reference to the necessity for a tender. See O'Brien v. Chicago, etc., Ry. Co., 57 N. W. (Iowa) 425; Railway Co. v. Lewis, 109 Ill. 120; Mullen v. Railway Co., 127 Mass. 86; Malmstrom v. Railway Co., 55 Fed. 38; Jones v. Gulf C. & S. F. R. Co., 32 Tex. Civ. App. 198.

In Weiser v. Welch, 70 N. W. (Mich.) 438, where, pending an action, a settlement was obtained under duress and afterwards repudiated, it was held that the plaintiff acted with sufficient diligence in tendering back the money before a plea was put in in which the plea of no tender could have been made. See, also, Hedlun v. Holy Terror Min. Co., 16 S. D. 261, 92 N. W. 31, citing Chicago, etc., Ry. Co. v. Doyle, 18 Kan. 58; Sanford v. Insurance Co., 40 Pac. (Wash.) 609; Bliss v. Railway Co., 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504. And see Galveston, etc., R. Co. v. Cade, 93 S. W. (Tex. Civ. App.) 124; Missouri Pac. R. Co. v. Goodholm, 61 Kan. 758, 60 Pac. 1066; Hayes v. Atlanta, etc., R. Co., 143 N. C. 125, 55 S. E. 437 (where the defence is that by reason of fraud it is not his deed, a tender before action is not necessary); s. p. Jones v. Alabama, etc., R. Co., 72 Miss. 22, 16 So. 379.

[10] Louisville, etc., R. Co. v. McEllory, 100 Ky. 153, 37 S. W. 844. See Crippen v. Hope, 38 Mich. 344. See, also, O'Donnell v. Clinton, 145 Mass. 461, 14 N. E. 747; Bliss v. New York Cent. R. Co., 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504.

In Lee v. Lancashire, etc., R. Co., L. R. 6 Ch. 527, 25 L. T. Rep. N. S. 77, 19 Wkly. Rep. 729, a bill to restrain the defendant from relying upon a receipt for a certain sum in full satisfaction, on the ground that it was not to bar a further recovery if the injury proves to be more serious, was dismissed; the court observing that the statement in the receipt could be rebutted and the whole matter could be tried at law.

gift and sue for his damages.[11] A tender is unnecessary before bringing an action to recover on the original demand, where the alleged fraudulent compromise was made and the money paid by a third person upon a distinct obligation, although the liability is based upon the same injury.[12] So, where the consideration moved to a third party and is not under the control of the party rescinding, a return or tender of the sum paid is unnecessary.[13] An infant may disaffirm a compromise, or release of a claim,[14] without returning or tendering any property received by him by virtue of the compromise or release, except that portion of the property remaining under his control after he has attained his majority.[15]

[11] See Morris v. Great Nor. R. Co., 67 Minn. 74, 69 N. W. 628. In Sobieski v. St. Paul, etc., R. Co., 41 Minn. 169, 42 N. W. 863, the release was represented to be for wages only. The question of a return or tender was not raised.

[12] In O'Neil v. Lake Superior Co., 30 N. W. (Mich.) 688, the money received by plaintiff was from the defendant as trustee of a fund collected for the benefit of injured employees. The action being against the defendant individually to recover damages for the injury suffered, and settlement not being binding on plaintiff by reason of fraud and mistake, the court said it could see no obligation resting upon plaintiff to repay the benefit fund before bringing the action against defendant for the injury inflicted by its negligence. See Maine v. Chicago, etc., R. Co., 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315; and see, also, Louisville, etc., Co. v. Clemonts, 109 S. W. 308, 33 Ky. L. Rep. 106.

[13] Averill v. Wood, 78 Mich. 342, 44 N. W. 381.

[14] Young v. West Va., etc., Co., 42 W. Va. 112, 24 S. E. 615; St. Louis, etc., R. Co. v. Higgins, 44 Ark. 293; Haws v. Burlington, etc., Ry. Co., 64 Iowa, 315, 20 N. W. 717; Jenkins v. Jenkins, 12 Iowa, 195.

[15] See Kane v. Kane, 13 App. Div. 544, 43 N. Y. Supp. 662; St. Louis, etc., R. Co. v. Higgins, 44 Ark. 293.

In Iowa a statute requiring a return or tender of all money or property received by an infant and remaining within his control on attaining his majority, was held to mean the identical money or property: Haws v. Burlington, etc., Ry. Co., 64 Iowa, 315, 20 N. W. 717; Jenkins v. Jenkins, 12 Iowa, 195. In Price v. Freeman, 27 Vt. 268, 65 Am. Dec. 194, the court said—"If the property is not in his hand nor under his control, that obligation ceases."

Sec. 120. Same subject—Before suit to rescind.—A tender of the thing received upon a contract is not a prerequisite to the right to apply to a court of equity for relief, and a bill to rescind a compromise may be maintained without a previous offer to restore what has been received.[1] A suit in equity to rescind on the ground of fraud is founded upon the fraud, and does not proceed upon a rescission, but for a rescission.[2] It is the fraud that gives the right to relief in equity and all that is necessary to justify a rescission by the court is, that the contract is one that a court of equity will cancel or rescind on the ground alleged; that such ground of rescission exists, and that the party seeking the relief has not lost the right by affirmance, laches, or otherwise.[3] What the party ought to do and must do, as a condition of the rescission, is a question which the court will determine.[4] Ordinarily this rule is the only practicable one, as the fraud is not usually discovered until after the parties have changed their position. In such cases the amount to be returned will depend upon

s. p. Lane v. Dayton, 101 Tenn. 581, 48 S. W. 1094. A firm, one member of which is a minor, cannot rescind a settlement without first restoring or tendering what has been received upon the settlement, although the partner who made the settlement was a minor: Brown v. Hartford Ins. Co., 117 Mass. 479.

[1] Berry v. American Cent. Ins. Co., 132 N. Y. 49. See as to contracts generally, Knappen v. Freeman, 47 Minn. 491; Thompson v. Hardy, 102 N. W. (S. D.) 299; Kiefer v. Rodgers, 19 Minn. 32.

[2] See Thompson v. Hardy, 102 N. W. (S. D.) 299; Gould v. Cayuga Bank, 86 N. Y. 75. In the last case, the court said: "The difference between an action to rescind a contract and one brought, not to rescind it, but based upon the theory that it has already been rescinded, is as broad as a gulf. They depend upon different principles and require different judgments;" and, answering an argument that the distinction between legal and equitable actions had been wiped out by the modern practice, it said: "The distinction between legal and equitable actions is as fundamental as between actions *ex contractu* and *ex delicto*, and no legislative fiat can wipe it out."

[3] Knappen v. Freeman, 47 Minn. 491, 50 N. W. 533.

[4] Corse v. Minnesota Grain Co., 102 N. W. (Minn.) 728; Knappen v. Freeman, 47 Minn. 491, 50 N. W. 533.

a variety of circumstances; whether there has been a loss or deterioration of the property through the fault of one of the parties; whether he should be charged with the value of the use and occupation, etc.[5] Whether a tender or offer to make restitution should be alleged in the complaint, is considered under pleading.[6]

While, as we have seen, in equity a tender of what has been received upon a compromise is unnecessary before bringing an action to rescind; yet, if the plaintiff by the same action seeks also to recover upon the original demand, as he may do under the code system, he ought to be required, in cases of doubtful or disputed liability, upon motion therefor, to pay the sum received upon the compromise into court, for the defendant in case the compromise is rescinded and nothing is proven to be due upon the original demand. Otherwise, equity would entrench the plaintiff in a very secure position; and an offer to do equity would be of little significance, if the plaintiff should happen to be unwilling or unable to respond when called upon to make restitution after a rescission and after being defeated with respect to the original demand.[7] We are not unmindful of the line of decisions holding, in general terms, that it is sufficient to offer in the complaint to return what has been received, and that the court may decree a rescission on the condition that the plaintiff shall place the other party in *statu quo*;[8] but such doctrine should be,

[5] Saxton v. Felberling, 48 O. St. 554; Weitzel v. Leyson, 121 N. W. (S. D.) 868.

[6] Sec. 111. In Rose v. Eggers, 127 N. W. (Io.) 197, in replevin, where a rescission of an exchange of personal property was under consideration, the court said; had the suit been in equity a tender of the return of the property in the petition would have been timely; but, that at law, an offer to restore the property, unless waived, was essential as a condition precedent to the maintenance of the action.

[7] In Duff v. Hutchinson, 57 Hun, 152, 10 N. Y. Suppl. 857; it was held that the action could not be maintained when the complaint made no offer to return the money and the evidence disclosed an inability to do so.

[8] See Jenkins v. Ins. Co., 79 Mo. App. 55.

if it is not, confined strictly to equitable actions, where a rescission merely is sought.

Sec. 121. Same subject—Where a party is entitled to retain what he received—When judgment will give a defendant all he is entitled to—Tender of release—Promissory note.—In rescinding a contract on the ground of fraud, the aggrieved party is not required to restore that which in any event he would be entitled to retain, either by virtue of the contract sought to be set aside, or of the original liability.[1] Thus, if a creditor is induced by fraudulent representations to accept in full satisfaction a per cent. on a claim, the amount of which is not in dispute, it is not necessary as preliminary to right to recover the balance due that he repay or tender the per cent. received.[2] So, a tender of the amount received upon a compromise of a claim against an insurance company is not a condition precedent to a suit in equity to rescind the compromise upon the ground of fraud, if a recovery upon the policy is also sought. In equity full and complete relief can be given in the one action and the amount received by plaintiff may be credited upon the amount due him under the policy.[3] A tender by a plaintiff of the amount received on a settlement with an agent or broker, is unnecessary to enable the plaintiff to recover the amount of an overcharge, or other item wrongfully included in the account.[4]

[1] Kley v. Healy, 127 N. Y. 555; Garner v. Mangum, 93 N. Y. 642; Martin v. Ash, 20 Mich. 106; Rose v. Eggers, 127 N. W. (Iowa) 196; Howard v. McMillen, 101 Iowa, 453, 70 N. W. 623; Dillon v. Lee, 110 Iowa, 156, 81 N. W. 245. In O'Brien v. Railway Co., 89 Iowa, 644, 57 N. W. 425, which was an action to recover damages for personal injuries, the same rule was applied.

[2] Pierce v. Wood, 23 N. H. (3 Foster) 519; Howard v. McMillan, 70 N. W. 623; Gould v. Cayuga Bank, 86 N. Y. 75.

[3] Reynolds v. Westchester Fire Ins. Co., 8 App. Div. 193, s. c. 40 N. Y. Supp. 336. See Hartford Fire Ins. Co. v. Kirkpatrick, 20 So. (Ala.) 651.

[4] Henderson v. Brand, 31 S. E. Rep. 551; Ballard v. Beveridge, 171 N. Y. 194.

Where an accord and satisfaction pleaded as a defense, is shown to have been fraudulently obtained, the action is not defeated because the plaintiff retains the money received under the accord, where the defendant admits that the sum paid is due.[5] If a compromise of all demands, or a general release, is sought to be confined to certain demands contrary to the express wording of the instrument, upon the ground of mutual mistake of the parties, or what is its equivalent, a mistake on the part of the aggrieved party and fraud on the part of his adversary, it is not necessary to return what has been received or to tender restoration, as the party is not seeking to disaffirm the agreement actually made, but merely objecting to the application of the written evidence of it to a subject which the parties did not intend to include in it.[6] Where there is no binding accord and satisfaction of a liquidated claim, as where a debtor pays a part in satisfaction of the whole, the creditor may recover the balance due without returning or tendering the part received.[7] So, when an accord is only partially executed, the plaintiff may treat the sum received as a partial payment and sue for the balance.[8] It is a general rule that if what one has received upon a fraudulent contract is of no value whatever, he need not return it before rescinding.[9] Thus, it is not necessary to tender a release received before commencing a suit to set aside a settlement, for upon a rescission the release becomes of no effect.[10] A promissory note, as between the parties, is not property but a mere promise, and

[5] Leslie v. Keepers, 68 Wis. 183, 31 N. W. 486.

[6] Kirchner v. New Home Sewing Mach. Co., 135 N. Y. 182; Welles v. Yates, 44 N. Y. 531.

[7] Leeson v. Anderson, 58 N. W. (Mich.) 72.

[8] Kinney v. American Yeomen, 15 S. D. 21, 106 N. W. 44; Henderson v. McRea, 148 Mich. 324, 111 N. W. 1057.

[9] Perley v. Balch, 23 Pick. 283, 34 Am. Dec. 56; Rabitte v. Alabama R. Co., 47 So. (Ala.) 573. See Gould v. Cayuga Bank, 86 N. Y. 75.

[10] Morse v. Woodworth, 29 N. E. Rep. 525.

upon a rescission for fraud, of the contract upon which it was given, it becomes of no effect and a tender of the note in advance of an action to recover the thing delivered is unnecessary. It is sufficient if it be delivered up at the trial.[11] In such cases, if the plaintiff fails in his action for a rescission, the compromise stands and he is entitled to retain the note or draft,[12] or money received upon the settlement; and, if successful, the rights of the parties are then regulated and protected in the judgment.[13]

Sec. 122. Manner of making a tender—Actual offer—Ability—Actual production—Waiver of formalities—Notice of intention to rescind—Unconditional tender.—Where a party seeks to rescind by his own act and the other party is entitled to receive what he parted with upon the contract, the party rescinding in making a tender, must make an actual offer to restore the property.[1] A bare proposition to pay the money,[2] or return the property, is not a tender. A mere announcement of an intention of making a tender is not sufficient.[3] Sending a written communication demanding the cancellation of a contract, and expressing a willingness to return the money re-

11 Nichols v. Michael, 23 N. Y. 265, 80 Am. Dec. 259; Royce v. Watrous, 7 Daly, 87; Thurston v. Blanchard, 22 Pick. 18, 33 Am. Dec. 700; Foss v. Hildreth, 10 Allen, 76; Snow v. Alley, 144 Mass. 546; Berry v. Am. Ins. Co., 132 N. Y. 49; White v. Dodds, 42 Barb. 561; Gould v. Cayuga Bank, 86 N. Y. 75; Sheldon v. Scofield, 84 Mich. 177, 48 N. W. 511. See Manning v. Albee, 11 Allen, 520; Fraschieris v. Henriques, 36 Barb. 276.

12 Berry v. American Cent. Ins. Co., 132 N. Y. 49, 30 N. E. 254, 28 Am. St. Rep. 548.

13 In Iowa, the supreme court, in an action to recover damages for personal injuries, where the defendant pleaded a compromise and the defendant sought to avoid it for fraud, followed the same line of reasoning; observing that even if plaintiff was defeated in the action he would be entitled to retain the $250 received, by virtue of what the defendant contends is a valid transaction. O'Brien v. Chicago, etc., R. Co., 89 Iowa, 664, 57 N. W. 425.

1 See Hunt on Tender, Ch. V., on the manner of making a tender.

2 Eastman v. District Township, 21 Iowa, 590.

3 Stone v. Billing, 167 Ill. 170; affirmed, 63 Ill. App. 37, s. c. 47 N. E. 372.

ceived upon the contract, where an antecedent tender is necessary, is not a substitute for a tender, and when not actually declined, is not even an excuse for not making it.[4] It is essentially requisite to a valid tender, in addition to an actual offer, that the party rescinding, have, at the time, the actual ability to restore the property and be actually ready to do so. The money or property must be in his immediate control ready for delivery.[5] A refusal does "not dispense with the existing ability to make the payment, that is, the actual possession of the money, or having it within convenient reach."[6]

At common law, in addition to the foregoing requisites, in order to make a valid tender of either money or chattels, the thing must be actually produced and offered to the party entitled thereto.[7] A person is not bound to say whether or not he will accept the money or thing till it is produced.[8] It is universally held that a mere verbal offer to pay is not a tender.[9] But the formalities of a tender, or a formal tender, as it is often expressed, may be waived if the party is ready and willing to deliver the money or property, but is prevented by the party to whom it is due merely declaring he will not receive it.[10] As before stated, any conduct or declaration on the part of the tenderee which goes to show that if a strict tender had been made it would have been rejected, will be deemed a waiver of

[4] Adams v. Friedlander, 37 La. Ann. 350.

[5] Niederhauser v. Detroit, 91 N. W. (Mich.) 1028.

[6] Wynkoop v. Cowing, 21 Ill. 570.

[7] 9 Bacon's Abr. Tit. Tender (B); Holt v. Brown, 63 Iowa, 319, 19 N. W. 235; Brown v. Gilmore, 8 Greenl. 107, 22 Am. Dec. 223; Deering Har. Co. v. Hamilton, 83 N. W. (Minn.) 44.

[8] Bakeman v. Pooler, 15 Wend. 637.

[9] Bakeman v. Pooler, 15 Wend. 637; Liebbrandt v. Myron Lodge, 51 Ill. 81; Schrader v. Noeflin, 21 Ind. 338; Bacon v. Smith, 2 La. Ann. 441.

[10] Odum v. Rutledge, 94 Ala. 488; Thorn v. Mosher, 20 N. J. Eq. 257; Appleton v. Donalson, 3 Pa. St. 381; Farnsworth v. Howard, 1 Coldw. 215; Pinney v. Jorgenson, 27 Minn. 26; Stephenson v. Kirkpatrick, 65 S. W. (Mo.) 773; Champion Machine Co. v. Mann, 42 Kan. 372.

a formal tender.[11] A party in rescinding a contract must at the time of making a tender give notice of his intention to rescind. In case of an attempt to rescind a sale of a horse, it was held that merely leaving the horse in the vendor's yard without any notice of his intention to rescind, was no tender and did not amount to a rescission.[12] The tender must be unconditional.[13]

Sec. 123. Tender by whom made—To whom—Amount.—A tender in rescission must be made by the party defrauded or his duly authorized agents. A fraudulent compromise may be avoided by an assignee in insolvency; a trustee or other person authorized to collect the assets of the defrauded party for the creditors, where such compromise, if allowed to stand, would be fraudulent as to the creditors. Parties and privies cannot set up their own fraud for the purpose of avoiding a contract and an administrator cannot avoid a settlement for fraud of the settler.[1] A fraudulent compromise made with a testator may be avoided by the executor providing the testator had no knowledge of the fraud and did not ratify the fraudulent contract. So, a fraudulent compromise made by a former administrator or by any person assuming to act for the estate, may be avoided by an administrator in favor of those persons entitled to the due administration of the estate.[2] Where a creditor stood by and without protest, or demanding the proceeds, allowed a claim upon a revivor of the action, to be settled by the special administrator and the proceeds paid to the widow, it was held he could not afterwards, on being appointed administrator, contend that the settlement was fraudulent.[3] A guardian of an infant or *non compos* may avoid a

11 Sec. 119.

12 Thayer v. Turner, 8 Met. 553.

13 Gould v. Cayuga Bank, 86 N. Y. 75; Hunt on Tender, Sec. 239.

1 Lewis v. Insurance Co., 7 Mo. App. 112.

2 Upton v. Dennis, 94 N. W. 728, 10 Detroit Leg. N. 132. See Grece v. Helin, 51 N. W. (Mich.) 1106.

3 Greene v. Helm, 51 N. W. (Mich.) 1106.

fraudulent compromise made with the ward, and may make a tender of whatever is required to be restored by the infant or insane person.

A tender of money or property in rescission of a compromise should be made to the other party personally. An ordinary agent, particularly when he did not negotiate the compromise, has no authority to agree to a rescission. Such authority is not implied from the authority to make contracts. But in the case of large corporations, such as railway companies, insurance companies, and the like, whose business is carried on almost exclusively through agents, and whose officers may be at a great distance or in another state, a tender in rescission to a general agent or agent in charge of the company's principal office will be sufficient.[4] If the money is received from an insurance company, or relief society, upon the settlement of a liability of a third person for damages, the money should be tendered to the society paying the money.[5] It is a general rule that where a party receives money or property of another by mistake, or comes into possession of it through the fraud of the other party, as upon a fraudulent compromise, he is not answerable for interest, or for the depreciation of the property, and may rescind by returning or tendering to the other party the same amount of money, or the same property, as the case may be. On the other hand, where a party guilty of fraud has received money or chattels upon a contract, upon a rescission by the other party he is chargeable with interest on the money from the time of obtaining it;[6] or in case of chattels, he is chargeable with their value at the date of the contract and interest thereon, or the property and the value of its use.

[4] Louisville, etc., R. Co. v. Helm, 121 Ky. 645, 89 S. W. 709, 28 Ky. L. Rep. 603; Louisville Veneer Mills Co. v. Clemonts, 109 S. W. 308, 33 Ky. L. Rep. 106.

[5] See Maine v. Chicago, etc., R. Co., 109 Iowa, 260, 70 N. W. 630.

[6] Corse v. Minnesota Grain Co., 102 N. W. (Minn.) 728. See 3 Par. on Cont. 102; 1 Sutherland on Damages, 621.

Sec. 124. Place of making a tender.—If a person desires to rescind a contract by returning money received thereon, or a deed, mortgage, note or other instrument, he should seek the other party and make a tender to him personally, if he can be found, otherwise the tender should be made at the latter's residence or place of business, and as soon as possible, give notice of such rescission. If the articles to be returned are specific articles, it is sufficient to return them at the place where received,[1] and if the manner or place of delivery be not such as to apprise the other party of the rescission, notice of such rescission and of the return of the property should be given as soon as practicable.[2] Leaving a horse in the yard of the vendor without any notice of an intent to rescind the contract has been held not a rescission.[3] Where a person to whom it is desired to restore property, has since removed from the state, or is a transient, having no known place of abode within the state, and the articles are such as naturally belong to a warehouse, they may be left at a warehouse, subject to the other person's order, and the latter notified where they are,[4] or, they may be kept by the vendee ready for the vendor, whenever he may call for them; and notice given to him of the rescission, and a request made to take them away, or which is the same thing, that the goods are held subject to his order. The rule with respect to both money and specific articles is, that a party is not bound to go out of the state in which the contract was made to make a tender. Nor can a party be required to go out of the state to receive a tender upon a domestic contract, and if a party residing outside of the state where the money or property was received, desires to rescind a compromise, he must make a tender at

1 Paulson v. Osborn, 27 N. W. Rep. (Minn.) 203, s. c. 37 Minn. 19. See McCormick Har. Machine Co. v. Knoll, 78 N. W. Rep. (Neb.) 394, and cases cited.

2 See Buchanan v. Harvey, 12 Ill. 338.

3 Thayer v. Turner, 8 Met. 553.

4 Angell v. Lomis, 55 N. W. Rep. (Mich.) 1008.

the place where it was received,[5] except when the thing to be restored is money, in which case a personal tender to the party entitled to it, at any reasonable time and place, is good.

Sec. 125. Rescission by agreement—Agreement implied—Abandonment by one party.—An accord and satisfaction, or a compromise, may be by mutual consent of the parties rescinded or abandoned, and such act restores the debt, or the cause of action to its original status, and restores the parties to the position they were in before the accord and satisfaction or compromise was entered into.[1] The consent to a rescission will be inferred from the subsequent payment or satisfaction of the original demand, or from a failure to object to the enforcement of the original cause of action. If one party repudiates or abandons an accord and satisfaction, or a compromise, as where he sues upon the original cause of action, or refuses or resists performance of the compromise agreement, the other party need not object but may acquiesce, and the effect upon the original cause of action will be the same as if the accord and satisfaction, or compromise, had been rescinded by mutual consent.[2] More is said elsewhere upon the rights of the parties with respect to a repudiation or abandonment of a compromise agreement.[3]

[5] In National Imp. Co. v. Makin, 103 Iowa, 118, 72 N. W. 431, it was held that a tender of money in rescission of a compromise made in Iowa, could not be made by depositing the money at a place in Chicago, subject to the order of the other party. That the money must be returned or tendered at the place where received in Iowa, unless, possibly, some one authorized to receive the money was present in Chicago.

[1] Heavenrich v. Steele, 57 Minn. 221, 58 N. W. 982; Flegel v. Hoover, 156 Pa. St. 276, 27 Atl. 161; Perry v. Railway Co., 44 Ark. 382.

[2] See Robinson v. O'Brien, 22 Ky. Law Rep. 769, 58 S. W. 820.

[3] Sec. 94.

Sec. 126. Rescission upon the ground of mistake of law.—The general principle applicable to contracts in general is, that contracts entered into in good faith under ignorance and mistake of law, are valid and binding upon the parties. The ancient maxim *ignorantia juris non excusat* has its foundation in the danger to the tranquillity of society, should men be permitted to repudiate their solemn contracts and create or prolong litigation merely upon their assertion that they did not know the law of the land. The difficulty of disapproving such an assertion is obvious,[1] and every contract could be overthrown if ignorance of the law was ground for a rescission. Hence, the necessity for the rule that mistake and ignorance of the law excuses no man; otherwise, as observed by Mr. Pomeroy, there would be no security in legal rights, no certainty in judicial investigation, no finality in litigation.[2] And, it may be said that the rule is well settled that ignorance or mistake of law, pure and simple, with respect to one's legal rights is not ground for relief either at law or in equity.[3] The subject, however, is involved and there is an apparent, if not a real lack of harmony in the decisions.

[1] It is said that ignorance of the law, unless we are permitted to dive into the secret recesses of the heart, is incapable of proof; but that mistake of law presumes to know when it does not, and supplies palpable evidence of its existence: Hall v. Reed, 2 Barb. Ch. 505; Champlin v. Laytin, 18 Wend. 425. While this distinction is clear from the standpoint of proof, yet a mistake of law is ignorance of the law arising out of not knowing the true rule, which carries us again to the secret recesses of the heart.

[2] The expression, of very common occurrence in the books, that every one is presumed to know the law, does not seem to fit the case. It is common knowledge that a great mass of men know only a very few of the plainest principles of law; some do not understand scarcely any, while it is safe to say no one knows all the law. The better expression, used less frequently, is, that every person must at his peril know the law.

[3] A mistake in a matter of law is no ground for rescinding an agreement of compromise, though the mistake has prevailed generally with respect to the law affecting whole classes of the community, and the compromise has

Sec. 127. Same subject.—It has often been declared that where a compromise is effected of a doubtful claim, and the parties have knowledge of the facts, the courts will not, as a general rule, investigate the relative merits of the claims of the parties for the purpose of determining their legal rights, and overhauling or setting aside the compromise [1] upon a plea of ignorance or mistake of law.[2] It will be observed that in the foregoing statement there is implied a qualification or exception to the strict rule that any mistake based on a misconception of a clear rule of law, or a supposition of a legal duty where none exists, will not be relieved against. The uncertainty and perplexity in which we find the subject involved has arisen mainly out of the diffi-

been made, founded on such mistake: Trigg v. Lavallee, 9 Jur. N. S. 261, 11 W. R. 404, 8 L. T., N. S. 154, 15 Moore P. C. 271.

Mr. Pomeroy says, with respect to contracts in general: "The rule is well settled that a simple mistake by a party as to the legal effect of an agreement which he executes, or as to the legal result of an act which he performs, is no ground for either defensive or affirmative relief. If there were no elements of fraud, concealment, misrepresentation, undue influence, violation of confidence reposed, or of other inequitable conduct in the transaction, the party who knew or had an opportunity to know, the contents of an agreement or other instrument, cannot defeat its performance, or obtain its cancellation or reformation, because he mistook the legal meaning and effect of the whole or of any of its provisions." 2 Pomeroy, Eq. 843.

[1] See Fisher v. May, 2 Bibb, 448, 5 Am. Dec. 626.

[2] Fidelity Co. v. Gillette, 92 Minn. 274, 99 N. W. 1123; Hall v. Wheeler, 37 Minn. 522, 35 N. W. 377; Perkins v. Frinks, 30 Minn. 241, 15 N. W. 115; State v. Reigart, 1 Gill, 1, 39 Am. Dec. 628; Fisher v. May, 2 Bibb, 448, 5 Am. Dec. 626.

Money paid under a mistake of law cannot be recovered back where the transaction is unaffected by any fraud, trust, confidence or the like, and both parties knew all the facts. Erkens v. Nicolin, 39 Minn. 461. In Hall v. Wheeler, 37 Minn. 522, 35 N. W. 377, the mistake was as to the law regulating the right to redeem from a tax sale; both parties believing the time to redeem had expired, when in fact it had not. There being no fraud, nor mistake of fact, the court refused to set aside a compromise by which each quitclaimed to the other party a portion of the land. The consideration moving to plaintiff was in securing part of the land without redeeming, whether he knew he had the right or not.

culty in determining whether the mistake or ignorance complained of was of law or fact; and from the failure of the courts to qualify the strict rule by referring to the facts, other than simple mistake of law, controlling their decision. Mr. Story in his work on equity, in adverting to the guarded and qualified manner in which the rule was so often stated, said: "Whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their character, and to involve other elements of decision." [3] And the same eminent author, in considering the class of cases most generally relied upon as an exception to the rule; that is, where a party, knowing all the facts, has acted upon a mistake of the law applicable to his title to property respecting which some agreement has been made, said: Upon a close survey, many, though not all of the cases relied upon as exceptions to the rule, will be found to have turned, not upon the consideration of a mere mistake of law, stripped of all other circumstances, but upon an admixture of other ingredients, going to establish misrepresentation, imposition, undue confidence, undue influence, mental imbecility, or that sort of surprise, which equity uniformly regards as a just foundation for relief.[4]

[3] Story's Eq. Sec. 116.

[4] 1 Story's Eq. Sec. 120. A compromise made under a mistake of law may be set aside if there is undue influence: Wheeler v. Smith, 9 How. 55. In Underwood v. Bockman, 2 Dana, 309, 29 Am. Dec. 407, the court said: "But when it can be made perfectly evident, that the only consideration of a contract was a mistake as to the legal rights or obligations of the parties, and where there has been no fair compromise of *bona fide* and doubtful claims, we do not doubt that the agreement might be avoided on the ground of a clear mistake of law, and a total want, therefore, of consideration or mutuality." Numerous equitable reasons for setting aside the contract were present, aside from the question of a pure mistake of law.

Sec. 128. Same subject.—It is a settled rule that compromises effected by parties, about whose rights, doubts and uncertainties have arisen, will not be set aside for mistake either of law or of fact; for the parties purposely enter into the agreement settling and compromising such doubts. Such contracts are made, primarily, for the very purpose of avoiding the hazards of a judicial investigation of doubtful and disputed questions; sometimes of law; sometimes of fact, or of both law and fact. Compromises are in their nature speculative contracts, and where parties instead of ascertaining and insisting upon their rights, enter into a compromise they are supposed to assume some risk, and any error in their calculation of their chances will not furnish any ground for relief in absence of want of consideration, or bad faith, concealment, breach of confidence, misrepresentation or other like conduct, amounting to actual or constructive fraud.[1] Where a party is ignorant in point of fact of any title or of a larger share in certain property, and is induced to surrender the same under the name of a compromise, a court of equity will afford him relief.[2] This is said to be a mistake or ignorance of fact.

In England it has been held as unquestionable doctrine that if a party acting in ignorance of a plain and settled principle of law is induced to give up a portion of his property under the name of a compromise, equity will relieve him from the effect of his mistake.[3] But in the United States the courts have, gen-

[1] See 2 Pomeroy's Eq. Sec. 849, 855; 1 Story's Eq. Sec. 137; Miller v. Chippewa Co., 58 Wis. 630, 17 N. W. 535; Fidelity Co. v. Gillette, 92 Minn. 274, 99 N. W. 1123; Dalpine v. Lume, 122 S. W. (Mo. App.) 776; Pickering v. Pickering, 2 Beav. 31. A settlement will not be set aside upon the ground that one of the parties did not understand it: Lauzon v. Belleheumer, 108 Mich. 444, 66 N. W. 345.

[2] Trigg v. Read, 5 Hump. (Tenn.) 529, 42 Am. Dec. 447. In this case the point of ignorance of title was emphasized, although the court seemed to lay some stress upon the fact that the other party concealed the fact of title from the owner. See 1 Story's Eq. Sec. 120, 121, 122.

[3] Naylor v. Winch, 1 Sim. & Stu. 555.

erally, adhered to the principle that in contemplation of law, all its rules and principles are deemed certain, and the rule seems to be settled, that an ignorance of the law, however plain and settled the principles may be, and a consequent mistake as to title founded upon such ignorance, furnishes no ground to rescind agreements, or set aside solemn acts of the parties, when they have been made with a full knowledge of the facts.[4] Mr. Story, in summing up this doctrine, after examining numerous cases, said: "And hitherto the exceptions to it, (if any), will be found not to rest upon the mere foundation of a naked mistake of law, however plain and settled the principle may be, nor upon mere ignorance of title, founded upon such mistake."[5]

Sec. 129. Same subject—Mistake as to existing legal rights.—It very often happens, particularly in family settlements and compromises, that a party knowing all the facts, is ignorant or mistaken as to his existing legal rights in a portion or all of the property, and, knowing its import, executes an agreement on the assumption of a clear legal title in the other party. What kind of a mistake is it and will equity grant any relief? In an English case, where a person knowing his relationship to the deceased, upon an agreement for a division of the personal estate, released a mortgage to another person on the assumption that the latter was the heir at law, when in fact he, as heir, was entitled to the mortgage, the Lord Chancellor relieved the plaintiff.[1] The case was reported without any statement of the grounds of the decision, and Mr. Story, in commenting

[4] Trigg v. Read, 5 Hump. 529, 42 Am. Dec. 447; Hunt v. Rousmanier's Adm'r., 1 Pet. 15; The Bank of the United States v. Daniel, 12 Pet. 32; 1 Story's Eq. Sec. 126.

[5] 1 Story's Eq. Sec. 137.

[1] Turner v. Turner, 2 Ch. R. 81. In Bradley v. Oliver, 1 D. P. C. 598, 1 C. & M. 219, it was held that where two parties come to an agreement and one is ignorant of his rights, the agreement is not in general binding upon him.

thereon, said: "There may have been surprise, or imposition, or undue influence, or a suppression of the knowledge of plaintiff's rights by the defendant. If it proceeded upon the naked ground of a mistake of law, it is not easily reconcilable with other cases. But, if it proceeded upon the ground, that the plaintiff had no knowledge of his title to the mortgage, and therefore did not intend to release any title to it, the release might well be relieved against, as going beyond the intention of the parties, upon a mutual mistake of the law. It was certainly a plain mistake of the settled law; and, if both parties acted under a mutual misconception of their actual rights, they could not justly be said to have intended what they did."[2] Mr. Story, in other sections of his great work on Equity, expresses the same views as to such mistakes.[3] And, Mr. Pomeroy, writing about a half century later, formulated the rule that mistakes as to one's existing legal rights are treated in equity as analogous to, if not identical with a mistake of fact.[4] Both authors,

[2] 1 Story's Eq. Sec. 123.

[3] Story's Eq. Sec. 122. "Indeed, when the party acts upon the misapprehension, that he has no title at all in the property, it seems to involve in some measure a mistake of fact, that is, of the fact of ownership, arising from a mistake of law. A party can hardly be said to intend to part with a right or title, of whose existence he is wholly ignorant; and if he does not so intend, a court of equity will in ordinary cases relieve him from the legal effect of instruments, which surrender such unsuspected right or title." Sec. 130.—"There may be a solid ground for a distinction between cases, where a party acts or agrees in ignorance of any title in him, or upon the supposition of a clear title in another, and cases, where there is a doubt or controversy or litigation between the parties as to their respective rights. In the former cases (as has already been suggested) the party seems to labor in some sort under a mistake of fact, as well as of law."

[4] "Wherever a person is ignorant or mistaken with respect to his own antecedent and existing legal rights, interests, estates, duties, liabilities or other relation, either of property, or contract, or personal status, and enters into some transaction the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact."

however, recognized that the rule would be inapplicable to an intentional settlement of controverted rights. It must be conceded that the question, whether a mistake is of law or of fact, is of no importance, where, as stated in a former paragraph, the facts are known but doubts have arisen, or the rights *bona fide* controverted, and the parties have compromised their matters.[5]

A compromise always involves some element of doubt and uncertainty as to the relative rights of the parties or as to the subject matter, otherwise with this element lacking, to call a contract a compromise would be a misnomer. With this in mind it is not easy to conceive of a compromise where ignorance or mistake as to one's existing legal rights would be ground for relief, except, perhaps, where, upon a compromise comprehending several matters, some one of them was included in the agreement upon the assumption of a clear legal title in the other party; for if the compromise was of the rights to one piece of property, there must of necessity be doubts and disputes between the parties affecting to some extent their rights to the property in question. Upon an examination of this subject the conclusion is forced that the true rule is, that relief will not be granted upon a bare mistake or ignorance of the law, but only upon an admixture with some other ground warranting equitable relief. Relief will not be granted to a party who makes a settlement of a pending action under a misapprehension as to the effect the settlement would have upon another suit pending.[6]

2 Pomeroy's Eq. Sec. 849. See Underwood v. Brockman, 4 Dana, 309, 29 Am. Dec. 407; Belt v. Insurance Co. (N. Y.) 43 N. E. 64; Rawen v. Prudential Ins. Co., 106 N. W. (Io.) 198.

[5] In Conn v. Conn, 1 P. Wms. 726, it was decided by Lord Macclesfield, "That where two parties are contending, and one releases his pretentions to the other, there can be no color to set this release aside, because the man that made it had the right; for by the same reason there can be no such thing as compromising a suit nor room for any accommodation." "The whole doctrine of the validity of compromises of doubtful rights rests on this foundation." 1 Story's Eq. Sec. 131.

[6] Booth v. Alpena, 135 N. W. (Mich.) 1063.

Sec. 130. Rescission on the ground of mistake of fact—Mistake of fact defined.—Mistake of fact and ignorance of fact, while not, strictly speaking, equivalent expressions, are in law, commonly used as convertible terms, their effect being identical.[1] In law the term mistake is confined to those cases where the effect complained of is attributed to it alone. Where mistake coincides with fraud, or is the result of negligence, the result is attributable to the whole transaction and it is not treated under the head of mistake. Mistake of fact which will furnish the ground for relief, either at law or in equity, is defined by Mr. Pomeroy as "an erroneous mental condition, conception or conviction, induced by ignorance, misapprehension or misunderstanding of the truth, but without negligence, and resulting in some act or omission done or suffered erroneously by one or both parties to a transaction, but without its erroneous character being intended or known at the time." [2] If it consists of an unconsciousness, an ignorance, or a forgetfulness of an existing or of a past fact, it is said to be a passive mental condition; if the mistake is the result of a belief that a certain thing exists which really does not, or that it did exist at a past time when it really did not, it is an active mental condition. Mistakes of fact may occur in numerous forms, but they all fall under the above conditions.[3]

Mistake of fact, so far as it furnishes a ground for rescission, may occur with respect to the subject matter, as where the parties fully understand the agreement but there is error as to the identity, title, amount, value and the like; or it may relate to the terms of the agreement, "one or both parties misconceiving, misunderstanding, or even being entirely ignorant of some term or provision; so that although they appear to have made an agreement, yet in fact

[1] 1Story's Eq. 140, N. 2; Rapalje & L. Law Dic.

[2] 2 Pomeroy's Eq. 839.

[3] See Pomeroy's Eq. Sec. 839, 854, for an illuminating discussion of this subject.

their minds never met upon the same matter."[4] Mistake as to one's existing legal rights, or mistake of law, or of mixed law and fact, are adverted to in a former paragraph. An error or ignorance of the law of a foreign country or of another state is regarded as an error or ignorance of a fact,[5] as no duty is laid upon a person to know the law of a foreign country. Ignorance of facts, of which the party is aware, is not a mistake of facts, and an acceptance of a certain sum in full settlement of a demand with full consciousness of the want of information as to the amount due is binding.[6]

Sec. 131. Same subject—Requisites to relief—Materiality of fact—Negligence.—The general rule is that a contract made under ignorance or mistake of a material fact, is voidable and equity will afford affirmative or defensive relief. The fact must be material to the contract, that is essential to its character, for if the ignorance or mistake is of an unimportant and immaterial fact, it cannot be said to have influenced the parties in making the contract, and relief will be denied.[1] The burden is upon the party complaining to show that his conduct was determined by the mistake or ignorance. But this could be shown only in connection with proof of a mistake or ignorance of a material fact. While relief will be granted for ignorance as well as mistake of fact, yet the principles upon which relief is granted in these cases are different. This is due to the fundamental differences in the two cases. Ignorance is not mistake; mistake of fact is an error of opinion. Where a party is ignorant of facts merely, relief will be denied where actual knowledge could have been obtained by the exercise of due diligence and enquiry.[2] It has been

[4] 2 Pomeroy's Eq. 853.

[5] 2 Pomeroy's Eq. 854, citing McCormick v. Garnett, 5 De G. M. & G. 278; Leslie v. Baillie, 2 Y. & C. 91; Haven v. Fester, 9 Pick. 111; Bank v. Dodge, 8 Barb. 233; Merchants' B'k. v. Spaulding, 12 Barb. 302; Patterson v. Bloomer, 35 Conn. 57.

[6] McDaniels v. Bank, 29 Vt. 230, 70 Am. Dec. 406.

[1] 1 Story's Eq. Sec. 141; 2 Pomeroy's Eq. Sec. 856.

[2] McDaniels v. Bank, 29 Vt. 230, 70 Am. Dec. 406.

said "no person can be presumed to be acquainted with all matters of fact; neither is it possible, by any degree of diligence, in all cases to acquire that knowledge; and, therefore an ignorance of facts does not import culpable negligence." [3] A person must not, however, close his eyes when means of acquiring information are open to him, and in order to obtain relief, the fact of which the party claims to have been ignorant of, must be one which he could not by reasonable diligence have acquired knowledge of.[4] Mr. Pomeroy states the rule thus: "Where the mistake is wholly caused by the want of that care and diligence in the transaction which should be used by every person of reasonable prudence, and absence of which would be a violation of legal duty, a court of equity will not interpose its relief;" and he observed further, that the conclusion from the best authorities seemed to be, that the neglect must amount to the violation of a positive legal duty. The highest possible care is not demanded.[5] If means of information is open to a party it is his duty to inform himself, and the general rule applicable to all contracts is, that where the facts and the source of information are equally open to both, each party is bound to avail himself of such information; and where the fact is unknown to both, and the parties have had equal means of information, if they have acted in good faith, equity will not interfere.[6]

When an insurance company compromises a loss at a less sum than that claimed to be due by the insured, it cannot avail itself of an ignorance of a breach of warranty in the policy to defeat a recovery upon the agreement to pay the loss, made after the company had had ample opportunity to investigate the facts and circumstances affecting the fairness of the loss, without any interference or fraud practiced by the insured at the time of the investigation.[7] If a party

[3] 1 Story's Eq. 140; Jenks v. Fritz, 7 W. & S. 201.

[4] McDaniels v. Bank, 29 Vt. 230, 70 Am. Dec. 406.

[5] 2 Pomeroy's Eq. 856.

[6] Belt v. Mehew, 2 Calf. 159, 56 Am. Dec. 329.

[7] Stache v. Insurance Co., 49 Wis. 96; Smith v. Insurance Co., 62 N. Y. 85; National Life Ins. Co. v. Minch, 53 N. Y. 144.

signs a release or a contract without reading it, he is presumed to be guilty of gross negligence,[8] and relief will be denied him, unless he overcomes the presumption by showing that he was induced to sign it through false representations as to what it contains and signed it reposing confidence in the other party.[9] The burden is upon the party complaining to show that he had been deceived, misled or overreached.[10] Inability to read English or understand the contents of a release is not sufficient to avoid the compromise.[11] Before signing the release the party should obtain the assistance of some one capable of correctly informing him of its contents. Relief has been granted in cases when no actual fraud was shown, on the ground of excusable neglect, or mistake, as where a person, suffering from an injury which impairs his faculties, or is in that mental state which naturally accompanies a serious injury, signs a release, or other contract, which includes a claim not intended by him to be released,[12] or it is inequitable to him, as where he releases a valid claim for a large sum upon payment of a much smaller sum.[13] Such decisions, however, upon a careful analysis, are found to be based upon the whole transaction, the chief element of which warranting relief is, that the releasor at the time was incapable of caring for his own interests.

[8] Albrecht v. Milwaukee Ry., 58 N. W. (Wis.) 72; Upton v. Tribilcock, 91 U. S. 50.

[9] McNamara v. Boston El. Ry. Co., 83 N. E. (Mass.) 878.

[10] Sheanon v. Insurance Co., 83 Wis. 527, 53 N. W. 878; Home Ins. Co. v. Bredehoft, 68 N. W. (Neb.) 400.

[11] Home Ins. Co. v. Bredehoft, 68 N. W. (Neb.) 400; Albrecht v. Milwaukee Ry., 58 N. W. (Wis.) 72.

[12] In Lusted v. Chicago Ry. Co., 71 Wis. 391, 36 N. W. 857, where an injured person was sick in bed from an injury which affected his sight, signed a sealed release of his claim for loss of property and for personal injuries sustained; it was held that this did not constitute such negligence as to prevent him from showing he was ignorant of the fact that he was releasing his claim for the personal injuries, although no actual fraud was shown.

[13] Sheanon v. Pacific Mut. Life Ins. Co., 83 Wis. 527, 53 N. W. 878.

Sec. 132. Same subject—Mutual mistake.—It is a general rule that if a party compromise a doubtful title, he will be bound, though ignorant of the extent of his rights.[1] This brings us again to the fundamental doctrine of a compromise. Admitting a doubt is an admission of ignorance of the extent of the right, and if the party chooses to compromise, rather than investigate his rights and reduce them to a certainty, he will not be heard to complain. But a compromise will be confined to the doubts raised between the parties which were the inducement to the contract. Where doubts have arisen respecting the title or rights of the parties to property and a compromise effected, the doubt will be confined to the particular right or title in dispute; for if it turns out that the party has title through another source of which he was at the time ignorant, he will be relieved from the effect of the compromise. There must be mutual mistake to authorize the interference of the powers of the court.[2] The rule is founded upon the principle that mutual error disappoints the intention of the parties and that neither entered into the contract which he intended to. But equity does not always grant relief in case of mutual error. Usually it is denied in cases where both parties have acted in good faith and have had equal means of information, but have neglected to inform themselves. The fact that the other party was equally ignorant, does not excuse the negligence of the party complaining. A more strict rule applies to compromises in the nature of family settlement, and they will be upheld, if fairly and honestly made although all the parties may have been mistaken or ignorant as to what their rights actually were.[3]

Where one party only was in error and the other party correctly understood the agreement and honestly believed that the other cor-

[1] Hoge v. Hoge, 1 Watts, 163, 26 Am. Dec. 52.

[2] Welles v. Yates, 44 N. Y. 529; Nabours v. Cooke, 24 Miss. 44; Alexander v. Owen County, 124 S. W. (Ky.) 386; Booth v. Alpena, 135 N. W. (Mich.) 1063.

[3] Stockley v. Stockley, 1 V. & B. 23; Westby v. Westby, 2 Dr. & War. 502; Persse v. Persse, 7 Cl. & Fin. 279.

rectly understood it, relief as a general rule will be denied, but, if there is an admixture of mistake and fraud, as where one party is in error and the other party knowing this, and without correcting the error, takes advantage of it, intending to reap the benefits, or what is worse the error is induced by affirmative representations by the other party, relief will be granted to the innocent party.[4] In such cases, however, the unconscientious advantage taken is the principal ground upon which the relief is granted.

Sec. 133. Rescission upon the ground of fraud—Definition of fraud.—The term fraud, according to the Civil law, is applied to every artifice made use of by one person for the purpose of deceiving another.[1] This definition comprehends only those cases where there is an intention to commit a cheat or deceit.[2] The rule at common law is much more comprehensive, and embraces also implied or constructive fraud; cases where actual intent to deceive may be entirely lacking. Mr. Pomeroy, speaking with respect to equitable jurisdiction, after declaring that the elements of fraud are so various, so different under different circumstances, so destitute of any common bond of unity, that they cannot be brought within any general formula, gave what he considered as complete and accurate definition as could be given: He said: Fraud in equity includes all willful or intentional acts, omissions and concealments which involve a breach of either legal or equitable duty, trust or confidence and are injurious to another, or by which an undue or unconscientious advantage over another is obtained.[3] At law this definition is, perhaps, too broad, for it is a general rule that courts of law will not give relief to one over whom an undue advantage is obtained, when the other party is within the strict rule of law and did not do anything contrary to conscience or good faith. So, in some

[4] Kirchner v. New Home Co., 135 N. Y. 182.

[1] 1Pothier's Ob. 28.

[2] 1 Story's Eq. 187.

[3] 2 Pomeroy's Eq. 873.

cases the law courts will not interfere, even though the other party commits some act of bad faith and has obtained an undue advantage, where the contract is within the law. In other words courts of equity will afford relief in some cases where courts of law will not, where one party, though within the letter of the law, has obtained an advantage which is undue and inequitable.

Sec. 134. Same subject—Fraud in general—Actual fraud.—Fraud with respect to vitiating a compromise is determined by the application of the rules applicable to contracts in general. Fraud in equity is classified under four general heads, only three of which have any bearing upon rescission of compromise. They are: (1) Frauds which are actual, arising from facts and circumstances of imposition; (2) Frauds apparent from the intrinsic nature and subject of the bargain itself; (3) Frauds presumed from the circumstances and condition of the parties.[1] The last two comprehend constructive frauds and the first actual fraud. Actual fraud may be reduced to two general forms, false representation and fraudulent concealment. Actual fraud is perpetrated in as numerous ways as the ingenuity of shrewd and dishonest men can devise, but whatever manner may be adopted, in order to constitute legal fraud, it must result in deceiving the other party and cause him a pecuniary loss; for in such cases a man cannot be defrauded without being in some manner deceived; and, the courts will not take cognizance of any deviation from moral rectitude in business affairs unless some damage result.[2] It is essential that the injured party believed and relied upon the false representation, or if material facts were concealed, that he was ignorant of those facts and relied wholly upon the statements as made; and that the misrepresentations made or facts concealed are such that if they had not been made or concealed, the party

[1] Sec. 2 Pomeroy's Eq. 874.

[2] See Currie v. Steele, 2 Sandf. 542, where it is held that concealment will not invalidate a compromise unless a loss has been occasioned thereby.

would not, in all probability, have executed the agreement.[3] From the foregoing it is seen that not every misrepresentation or concealment will vitiate a contract. If a party knows the representations to be false or that certain facts are being concealed, he is not deceived, and it cannot be said that the false statements or concealment influenced his action in making the contract.[4] So, if the misrepresentation or concealment are of trivial and unimportant matters not affecting the value or character of the subject matter, so that if the truth had been known the party would not, in all probability, have been deterred from executing the contract, they are not deemed material, and neither law nor equity will interfere. As before observed there must be some pecuniary loss shown to have resulted from the fraud, and for the purpose of affording relief by way of rescission the court will not enquire into the extent of the injury. If the amount is appreciable, the fraud furnishes the ground for relief.

Where some of the representations made during the course of a treaty are true and some are false but all are of such character as naturally induce the contract, the court will not attempt to separate the different statements and say that the false statement was not the one that induced the contract, but will consider the whole contract as having been obtained by fraud. In actual fraud, the misrepresentation or concealment must be of a fact, and one material to the transaction and not of some independent and collateral matter. The representations or concealment of a fact must be made or done with the intent and purpose of inducing

[3] Whether the fraudulent representations were relied upon and induced the settlement is, when disputed, a question for the jury: Marple v. Minneapolis & St. L. R. Co., 132 N. W. (Minn.) 333.

[4] Van Trott v. Wiese, 36 Wis. 447; Adams v. Sage, 28 N. Y. 103; Webb v. Harris, 1 Tex. App. Civ. Cas. Sec. 1289. If a party executes a contract knowing the representations to be false, or his suspicions are so aroused that he places no reliance in the statements of the other party, his action, if any, would be for a breach of warranty, if the representations were of that character, and not one for deceit or rescission.

the other party to enter into the contract, and in point of time, it of necessity precedes the conclusion of the agreement. In most cases it takes place during the negotiation of the treaty. The intent to induce the other party to enter into the agreement will be presumed from the result which naturally flows from the making of such statements, if they are of such character as would naturally induce an ordinary person to act thereon. A desire to injure need not necessarily be present. The term false means untrue and it necessarily follows that the statements to constitute misrepresentations must be untrue in fact. The most important feature in actual fraud is the immoral element—the guilty knowledge of the falsity of the representations and the consequent intent to deceive. This knowledge is technically called the *scienter*. No misrepresentation is fraudulent at law, unless it is made with knowledge of its falsity, or under such circumstances that the law must necessarily impute such knowledge.[5] The rule is the same at law and in equity, except that in equity the actual intent to deceive is not always essential to relief.

It appears from an examination of the authorities and text books that the law is settled that fraudulent misrepresentation may arise in three ways.[6] Without elaboration, they are—(1) By a statement of a fact the falsity of which the party at the time has positive knowledge. (2) By making an untrue statement, of the truth of which the party at the time has no knowledge and which he does not believe to be true. (3) By making an untrue statement, having at the time no knowledge as to its truth or falsity, and no reasonable grounds to believe it to be true. In the latter case by claiming that he believed it to be true does not change its fraudulent character. If a man makes an untrue representation of a material fact as of his own knowledge, not knowing whether it is true or false, it is a fraud. An unqualified af-

[5] 2 Pomeroy's Eq. 884.

[6] See Humphrey v. Merriam, 32 Minn. 187, 20 N. W. 138; 2 Pomeroy's Eq. Sec. 886.

firmation amounts to an affirmation of one's own knowledge, and whether made innocently or knowingly it operates as a fraud.[7] Such, in brief, are the essential elements of actual fraud, sufficiently concise, we hope, for the purposes of a treatise of this character. For a more extended discussion and elaboration of the general subject other treatises must be examined.[8]

Sec. 135. Same subject—Misrepresentation of the law—Of matter of opinion—Future events.—A misrepresentation of the law is not generally considered as amounting to fraud, the reason being that all persons at their peril, are required to know the law. Where the misrepresentation is given as a matter of opinion merely and in good faith, it must be conceded that this rule applies, but such cannot be the rule where the party making the misrepresentation has superior knowledge of the subject, as a lawyer or even a layman, and makes the misrepresentation not as an opinion merely but as an affirmation of a fact, or give it out as an opinion knowing it to be false, or without any knowledge as to its truth or falsity, and it is made for the purpose of affecting the conduct of the other party and to secure a favorable compromise. Ignorance of the law is, of itself, no ground for relief, but if that ignorance is encouraged and made more dense by the willful misrepresentations of one party, so that the other is deceived and led into a mistaken conception of his legal rights, the party guilty of the deception will not be permitted to shield himself behind the general rule.[1]

[7] Bullett v. Farriar, 42 Minn. 8; Converse v. Blumrich, 14 Mich. 109, 90 Am. Dec. 230; Mahler v. Corder, 73 Iowa, 582, 35 N. W. 647; Henderson v. San Antonio etc. R. R. Co., 17 Tex. 560, 67 Am. Dec. 675.

[8] See 2 Pomeroy's Eq., Sec. 872, et seq.; Story on Eq. Sec. 184, et seq. and Works on Fraud.

[1] Titus v. Insurance Co., 97 Ky. 567, 17 Ky. L. Rep. 389, 31 S. W. 127, 53 Am. St. Rep. 426, 28 L. R. A. 478; Cook v. Nathan, 16 Barb. 342; Berry v. Insurance Co., 132 N. Y. 49, 30 N. E. 254, 28 Am. St. Rep. 548.

The general rule is that a fraudulent misrepresentation must be of a fact and cannot be the mere expression of an opinion. The reason is that one person is assumed to be equally able to form his own opinion and come to a correct judgment in respect to the matter under consideration, as the other party.[2] But it has been held, that the false assertion of an opinion will amount to fraud when given by one who has or assumes to have knowledge of a subject of which the other is ignorant, and it is given for the purpose of inducing the contract.[3] According to Mr. Pomeroy, "Whenever a party states a matter, which might otherwise be only an opinion, and does not state it as a mere expression of his own opinion, but affirms it as an existing fact material to the transaction, so that the other party may reasonably treat it as a fact, and rely upon it as such, then the statement clearly becomes an affirmation of a fact within the meaning of the general rule, and may be a fraudulent misrepresentation."[4] The decisions are in conflict with reference to statements concerning value being matter of opinion, or statement of fact, but Mr. Pomeroy classes them according to the rule above quoted. Statements of value are sometimes nothing more than an expression of opinion and on the other hand they may be an affirmation of a specific material fact. Thus where a person having full knowledge of the value of certain property, represents to the owner that it is worth not more than a certain sum which is much less than the true value and thereby obtains the property at his valuation; the contract will be avoided for fraudulent misrepresentation.[5] A family settlement obtained by misrepresentation as to the value of the property was held invalid.[6] It has been held that false representa-

[2] 2 Pomeroy's Eq. 878. See Bowers v. Good, 100 Pac. (Wash.) 848.

[3] Heden v. Minneapolis, etc. Inst., 62 Minn. 146, 64 N. W. 158.

[4] 2 Pomeroy's Eq. 878.

[5] Haggarth v. Wearing, L. R. 12 Eq. 320. See Jordan v. Volkenning, 72 N. Y. 300.

[6] Hewett v. Crane, 6 N. J. Eq. 159.

tions as to a future event will vitiate a contract, where those events depend upon the acts of the party making the representations and form the inducement for the contract.[7]

Sec. 136. Same subject—Misrepresentation by debtor as to his finances—Setting up sham claims.—It is a settled rule that an accord and satisfaction or compromise, obtained through fraudulent misrepresentations of the debtor as to the state of his financial affairs is voidable.[1] A court of equity will set aside a discharge given under such circumstances, and revive a security procured to be given up or cancelled.[2] And where promissory notes have been surrendered, courts of law will permit a recovery. In such a case, which was in assumpsit, the court observed that a recovery may be had upon a note after it has been voluntarily given up to the maker, "And it seems immaterial in such cases, whether the plaintiff count specially on the note, or generally in *indebitatus assumpsit*." [3] If a claim set up by one of the parties is a mere sham, or without color of right, and asserted with the design of securing favorable terms upon a compromise, it constitutes such fraud as will prevent the compromise thus obtained from being a bar.[4] Where a person who has suffered a loss by a fire which accidentally originated on his neighbor's premises, obtained from

[7] Henderson v. San Antonio etc. R. R. Co., 17 Tex. 560, 67 Am. Dec. 675.

[1] Dolsen v. Arnold, 10 How. Pr., 351; Stafford v. Bacon, 1 Hill, 532, 37 Am. Dec. 366; Ross v. Seaver, 52 S. W. (Tenn.) 903.

[2] Richards v. Hunt, 6 Vt. 251, 27 Am. Dec. 545 (which is a case of a composition); Rhettiplace v. Sayles, 4 Mason, 312; Irving v. Humphry, 1 Hopk. 284.

[3] Reynolds v. French, 8 Vt. 85, 30 Am. Dec. 456. In this case the debtor represented that after disposing of his property in payment of his debts he had left only a certain sum less than the notes of plaintiff, which plaintiff believed, and thereupon accepted the less sum and surrendered the notes; whereas the defendant, in order to effectuate the settlement, had previously conveyed away property which afterwards was reconveyed to him.

[4] Headley v. Hackley, 50 Mich. 43, 14 N. W. 693; Kercheval v. Doty, 31 Wis. 476.

the neighbor a note in settlement of the loss, under the false representation that he had investigated the fire and that he, the neighbor, was the cause of the fire and liable for the loss, whereas he had made no such investigation, and had no ground for the claim; in an action on the note the plaintiff was not permitted to recover.[5]

Sec. 137. Same subject—Compromises effected by physician.—Compromises and releases obtained by physicians, acting in the dual capacity of physician and claim agent, are viewed by the courts with extreme suspicion.[6] The law is well settled that from the time the relation of physician and patient is created until it ceases to exist, the physician is inhibited from taking any advantage of the confidence growing out of the relation, reposed in him by his patient, and, if, by misrepresentation or other unfair means, or by the exercise of undue influence, he induces his patient to convey, release or otherwise dispose of property to himself, or to other parties whom he may represent, for an inadequate consideration, the contract may be avoided.[1] The relation of physician and patient must exist,[2] and, that relation is created, whenever the physician undertakes to advise and treat an injured party, even though he is in the pay of the party liable for the injury and performs the services at his request. The authorities are numerous to the effect that a release of damages for personal injuries procured by the physician in the employ of the one liable, from the injured party while he is treating and advising him professionally, will be no bar to an action for damages for the injury, where the statements of the physician are untrue and the

[5] Knotts v. Preble, 50 Ill. 226, 99 Am. Dec. 514.

[6] Nelson v. Chicago & N. W. Ry. Co., 111 Minn. 193, 126 N. W. 902.

[1] Viallet v. Consolidated R. & P. Co., 30 Utah, 260, 5 L. R. A. (N. S.) 663, 84 Pac. 496, and see note to 5 L. R. A.

[2] Eccles v. Union P. R. Co., 7 Utah, 335, 26 Pac. 924; Nelson v. Minneapolis St. R. Co., 61 Minn. 167, 63 N. W. 486; Houston v. McCarty, 94 Tex. 298, 53 L. R. A. 507, 86 Am. St. Rep. 854, 60 S. W. 429.

patient relied upon them.[3] If the statements are untrue in fact, it makes no difference if they be honestly made, if made for the purpose of inducing the party to make the contract. A physician's authority must be to effect a settlement or to assist in bringing it about, otherwise his misstatement will have no more effect on the transaction than that of any other person acting without authority. Where, pending negotiations for a settlement for personal injuries, a physician is sent merely to ascertain the extent of the injury and report the result to the defendant, any misstatement by him as to the extent of the injury volunteered, or made in response to inquiries by the injured party, will not vitiate a compromise and release of the claim, made in reliance upon such statements; such statements being wholly outside the scope of the physician's agency.[4] So, it has been held that statements of the extent and duration of an injury made by a physician of a railroad company, although untrue, do not constitute ground for a rescission of a release given upon a compromise, even though the physician's duties are to render professional services to its injured employees and to advise them concerning the nature and duration of their injuries and the probability of their recovery, and to give information on the subject to the claim department of the company, if the physician has no other connection with the claim department and had nothing to do with obtaining the release or in conducting the negotiations therefor.[5]

Representations of an agent not shown to have any connection with a compromise cannot be used to defeat it. If a physician or other person without authority to act, obtains a release upon a

[3] Galveston etc. R. Co. v. Cade, 93 S. W. (Tex. Civ. App.) 124; Meyer v. Haas, 126 Cal. 560, 58 Pac. 1042; International etc. R. Co. v. Shuford, 36 Tex. Civ. App. 251, 81 S. W. 1189.

[4] Nelson v. Minneapolis St. R. Co., 61 Minn. 168, 63 N. W. 486. See also Doty v. Chicago etc. R. Co., 52 N. W. (Minn.) 135.

[5] Gulf, C. & S. F. R. Co. v. Huyett, 5 L. R. A. (N. S.) 669, 92 S. W. (Tex.) 454. See also Louisville R. Co. v. Carter, 66 S. W. 508, 23 Ky. L. Rep. 2017.

compromise and the party liable afterwards seeks to avail himself of it as a defense, any fraud practiced by the agent in obtaining the contract would be imputed to the principal. In cases where a physician in the pay of a party liable for personal injuries has nothing to do with negotiating for a settlement, but he knows that the negotiations will be based upon his opinion as to the extent of the injury, and that the injured party will rely upon his opinion, it is his duty to give an honest opinion, and if he gives a wrongful opinion as to the extent of the injury, or omits mentioning certain injuries, the compromise and release will be voidable.[6] This, upon the ground that it does not make any difference who makes the misrepresentations as long as they are adopted and put forward as an inducement for the action of the other party. If it can be shown that a party liable for damages for personal injuries or his claim agent used a physician as an instrument to deceive the injured party as to his condition in order that an advantageous settlement might be obtained, or that the claim agent and physician acted together in so procuring a release, as where the physician accompanies the claim agent and makes the fraudulent representations pending the negotiations,[7] the contract would be affected by the physician's representations as fully as if he had been the only agent employed in the transaction.[8] So, if it be shown that a claim agent, in effecting a settlement, knew and took advantage of the state of the injured party's mind caused by the deception practiced by the physician of the principal, the compromise will be avoided[9] upon the well

[6] Lumley v. Wabash R. Co., 22 C. C. A. 60, 43 U. S. App. 476, 76 Fed. 66.

[7] Missouri P. R. Co. v. Goodolm, 61 Kan. 758, 60 Pac. 1066; Eagle Packet Co. v. Defries, 94 Ill. 598, 34 Am. Rep. 245; Jones v. Gulf, C. & S. F. R. Co., 32 Tex. Civ. App. 198, 73 S. W. 1082; Bussian v. Milwaukee etc. R. Co., 56 Wis. 325, 14 N. W. 452.

[8] Gulf, C. & S. F. R. Co. v. Huyett, 5 L. R. A. 669, 92 S. W. (Tex.) 454, citing International etc. R. Co. v. Shuford, 36 Tex. Civ. App. 251, 81 S. W. 1189.

[9] See Gulf, C. & S. F. R. Co. v. Huyett, 5 L. R. A. 669, 92 S. W. (Tex.) 454.

known rule that if a party knows another to be in error, and without correcting the error takes advantage of it to effect a compromise for an inadequate consideration, it is a fraud. The rule is that it is not necessary, in order to avoid a compromise or other contract negotiated by a physician with his patient, to show that the patient had an unquestionable and positive belief in the correctness of the representation. It is sufficient if the party so far relied upon them that they were the inducing cause of the execution of the agreement.[10]

If a statement is made as a mere matter of opinion, or conjecture, it is not actionable if given in good faith, but a false assertion of an opinion will amount to a fraud when given by one who has or assumes to have knowledge upon a subject of which the other is ignorant. In one case the court observed that where parties possess special learning or knowledge on a subject, their opinions are capable of approximating the truth. And for a false statement of them when deception is designed and injury has followed from a reliance upon the opinion, relief will be granted. If he cannot speak with certainty, let him express a doubt.[11] An opinion of a railroad surgeon given at or about the time of the making of a settlement of a claim for personal injuries, where given merely as an opinion, and in good faith, does not, when erroneous, constitute ground for a rescission, even when the settlement is made in reliance upon the opinion.[12] Where an injured

[10] Peterson v. Chicago etc. Ry. Co., 38 Minn. 511, 39 N. W. 485; Viallet v. Consolidated R. & P. Co., 5 L. R. A. 663, 84 Pac. (Utah) 496.

[11] Heden v. Minneapolis etc. Inst., 62 Minn. 146, 64 N. W. 158 (an action for deceit), citing Gordon v. Butler, 105 U. S. 553; Robbins v. Barton, 50 Kan. 120, 31 Pac. 686; Eaton v. Winnie, 20 Mich. 156; Hicks v. Stevens, 121 Ill. 186, 11 N. E. 241.

[12] In Doty v. Chicago etc. R. Co., 49 Minn. 499, 52 N. W. 135, the plaintiff called at the defendant's offices and submitted to an examination by its physician, who stated that the injuries were slight and could easily be cured. A settlement was then agreed upon and a release given. A verdict for defendant was sustained on the ground that the statements were mere matter of opinion given in good faith. In Kilmartin v. Chicago etc. R. Co., 114

party has equal means of ascertaining the extent of the injury, as where he has his own physician and consults him, a release will not be set aside for a misstatement as to the character and extent of an injury, made by the physician of the one liable for the injury; particularly where the plaintiff's physician agrees with the physician of the defendant as to the duration and extent of the injury.[18]

Sec. 138. Same subject—Concealment and suppression of facts.—If either party to a compromise conceals some fact which is material, which is within his own knowledge and which it is his duty to disclose, such concealment will amount to actual fraud. A person may under some circumstances, by passive conduct or silence, knowingly deceive and mislead another and thus perpetrate a fraud.[1] Where mere silence or passive conduct will be misleading, a duty to speak may arise. It is a general rule that the facts must be known to the party and by him intentionally concealed.[2] If the suppression of facts consists in a denial of the existence of the facts, or a disclaimer of any knowledge of the existence of any such facts, when in fact he has knowledge, it will amount to fraudulent representation and, if they are material,

N. W. (Io.) 522, the physician thought that certain burns would heal within ten days, and the fact that they were not healed in ten days was held to be no evidence that the statement was fraudulent. Quebe v. Gulf etc. R. Co., 98 Tex. 6, 66 L. R. A. 734, 81 S. W. 20; Atchison R. Co. v. Bennett, 63 Kan. 781, 66 Pac. 1018; Alabama R. Co. v. Turnbull, 71 Miss. 1029, 16 So. 346; Chicago etc. R. Co. v. Wilcox, 54 C. C. A. 147, 116 Fed. 913.

[18] Homuth v. Metropolitan St. R. Co., 129 Mo. 629, 31 S. W. 903.

[1] Howard v. McMillan, 101 Iowa, 453, 70 N. W. 623.

[2] Where a beneficiary in negotiating a settlement, renounces all confidence in the trustee and acted exclusively upon the advice of her advisors, selected by her to make an investigation, a failure of the trustee to disclose facts which he might have obtained knowledge of by diligent search, where he acted in good faith during the investigation, was held insufficient to set aside the compromise entered into. Calton v. Stanford, 82 Cal. 351, 23 Pac. 316, 16 Am. St. Rep. 137.

will vitiate a compromise, where perhaps mere silence, where nothing is done to mislead the other party, would not be sufficient. A compromise is so favored at law that evidence of the fact that there is a valid defense to the claim is not admissible to set it aside, but where the facts out of which a defense arises are known to the party making the claim and fraudulently concealed by him, and such facts are unknown to the other party at the time of effecting the compromise, such fraud may be shown in avoidance.[3] It is the duty of a debtor who asks for a discharge on part payment, not to willfully misrepresent or suppress any fact in the statement of his affairs, and if he does the accord and satisfaction, compromise, or release will be set aside.[4] But, if a debtor, at the time of making a compromise, is not questioned in regard to his financial condition, and he does nothing to mislead his creditor, he is not bound to make any disclosures, and the compromise cannot be avoided on the ground of concealment.[5] The misrepresentation or suppression of facts in order to vitiate a compromise need not necessarily be made or done when the compromise is negotiated; nor need it all be made direct to the creditor. Avoiding payment of a judgment by concealment of property; allowing an execution to be returned unsatisfied, and denying to the assessor and others that he has any property, and so conducting his affairs as to cause his creditor to believe him insolvent, was held, in connection with a failure to disclose to the creditor that he had concealed a large amount of property, to be sufficient to avoid a settlement of the judgment for less than the amount due.[6]

Whether suppression of facts by silence will amount to fraud depends upon whether there is a duty to speak. As a general rule no such duty exists where the parties occupy towards each other no position of trust or confidence, and are dealing with each

[3] Feeber v. Weber, 78 N. Y. 334.

[4] Stafford v. Bacon, 1 Hill, 532, 37 Am. Dec. 366.

[5] Graham v. Meyer, 99 N. Y. 611.

[6] Howard v. McMillan, 101 Iowa, 453, 70 N. W. 623.

other at arm's length. Where the compromise is in the nature of a family settlement, it is the duty of the several parties to disclose to the others every fact which might possibly have any influence on the decision of the others.[7] But where the parties are at outs and are really dealing at arm's length, no such rule obtains.[8] Concealment of facts which a party is not bound to disclose is not ground for avoiding a compromise. Where parties to a controversy concerning land are dealing with each other at arm's length, one party is not bound to disclose to his adversary weaknesses and defects in his own title.[9] In effecting a settlement of an action a party is not bound to state the defect in his claim or defense.[10] When a party is presented with an account and immediate suit is threatened unless settled, after a compromise and settlement, the debtor is not liable for fraud because he omitted to call attention to errors in the account. Upon such compromises a party is not bound to insist on swelling the account against himself.[11] A party to an action is bound by the record and is charged with notice of the disposition of the action, and a failure of a party upon a compromise of the matters involved, to inform the other that the action had been terminated in his favor is not sufficient to avoid the compromise.[12] The general rule is that when there is no relation of trust or confidence existing, which imposes on one a duty to give full information, and no artifice is employed to lull the other to repose, the latter cannot omit all in-

[7] Pickering v. Pickering, 2 Beav. 31, 3 Jur. 743. See Dunnage v. White, 1 La. 137.

[8] Irvine v. Kirkpatrick, 7 Bell's Sc. App. Cas. 186, 209.

[9] Mills' Heirs v. Lee, 6 T. B. Min. 91, 17 Am. Dec. 118. See Livingston v. Penu Iron Co., 2 Paige Ch. 390.

[10] In Shank v. Shoemaker, 18 N. Y. 489, a settlement was effected by the plaintiff remitting the penalty recovered, on defendant paying the costs. It was held no objection to the settlement that the plaintiff did not disclose that the statute awarding a penalty had been repealed.

[11] McMichael v. Kilmer, 76 N. Y. 36.

[12] Multnomah v. Dekum, 93 Pac. (Or.) 821.

vestigation and then complain that the other party did not volunteer information, which, if disclosed would have prevented the settlement.[13] If before entering into a compromise one party asks his adversary for a full disclosure, or for information concerning a particular fact which he suspects exists, but is refused all information, and he makes no other investigation before executing the contract, his ignorance of the facts or fact will be treated as willful ignorance and not improper concealment by his adversary.[14] In such cases it is clear the party intended to waive all inquiry into the facts.

Sec. 139. No rescission for fraud after the fraud is compromised.—Where a party alleges certain fraudulent representations as ground for relief, a subsequent compromise of the action made with reference to the fraud alleged is binding unless some new element of fraud intervenes.[1] That is fraud concerning a distinct matter subsequently discovered, and not merely that the loss occasioned by the fraud within the scope of the original allegations, is larger than anticipated. It has been held that, where, after an accounting or other settlement, fraud is discovered warranting a rescission, and the parties thereupon compromise the fraud, a subsequent discovery of a new incident in the fraud does not confer a new right to rescind as the latter discovery merely confirms the previous knowledge of fraud.[2]

[13] Multnomah Co. v. Dekum, 93 Pac. (Or.) 821; Cleveland v. Richardson, 132 U. S. 318, 10 S. Ct. 100, 33 L. Ed. 384.

[14] Bainbridge v. Moss, 3 Jur. N. S. 58.

[1] Van Trott v. Wiese, 36 Wis. 439.

[2] Woodford v. Marshall, 39 N. W. (Io.) 376. In this case the defendant, in an action for the purchase price, counter-claimed for a shortage which was fraudulently concealed. He had before, on discovery of the fraud, compromised the shortage, and it was held that a subsequent discovery that the shortage was greater than he at first supposed was no new element of fraud. This principle is applicable to sales. See Grannis v. Hooker, 31 Wis. 474.

Sec. 140. Rescission for fraud, etc.—Evidence in general—Burden of proof.—Whether a compromise will be avoided on the ground of mistake, fraud, undue influence or duress, depends on the facts of each particular case. The ways in which a mistake may occur, or fraud perpetrated or undue influence or duress exercised, are so various that to detail the facts of all the published decisions would not exhaust the evidence.[1] All the surrounding facts and circumstances, including the mental and educational condition of the parties, their relations to each other, the results of the contract and many other things are proper to be considered and weighed in determining whether a compromise will be avoided or impeached.[2] Where the

[1] Cases where the evidence was held sufficient to prove fraud. Kelly v. Chicago, etc., R. Co., 114 N. W. (Io.) 536; Bussian v. Milwaukee, etc., R. Co., 56 Wis. 325, 14 N. W. 452; Ross v. Seaver, 52 S. W. (Tenn.) 903; Southern Ry. Co. v. Brewer, 105 S. W. (Ky.) 160. A statement by a claim agent of defendant that plaintiff's physician said plaintiff would be well and able to work in three weeks, where false was held sufficient for rescinding the compromise: Marple v. Minneapolis, etc., R. Co., 132 N. W. (Minn.) 333. A settlement is not conclusive when the creditor misrepresents the amount of his claim and promises to make it right, if found incorrect: Groom v. Wray, 135 N. W. (Io.) 418. In Rase v. M., St. P. & S. S. M. Ry. Co., 137 N. W. (Minn.) 176, the facts upon which the court set aside the settlement were as follows: A detective familiar with the Norwegian language, employed by defendant, ingratiated himself with plaintiff, a fellow countryman, by representing that he was employed by plaintiff's attorney, and induced plaintiff to take up his residence with him, and by plying him with liquor and representing that the plaintiff's lawyer was crooked and intended to settle and cheat him, obtained a settlement of the case behind the lawyer's back for a grossly inadequate sum. Evidence held insufficient: Boatright v. Eneword, 49 Neb. 254, 68 N. W. 472; Gladish v. Pennsylvania R. Co., 107 Fed. 61; Bennett v. Walker, 100 Ill. 525; Johnson v. Chicago, etc., R. Co., 107 Iowa, 1, 77 N. W. 476; Pacific Mut. Ins. Co. v. Webb, 157 Fed. 155. Assurances that a party has no cause of action has been held not to vitiate a settlement: Valley v. Boston & M. R. Co., 68 Atl. (Me.) 635. Representations that others had signed the release, was held not a misrepresentation of a fact, when others had in fact signed a similar release: McNamara v. Boston El. R. Co., 83 N. E. (Mass.) 878.

[2] See McAllister v. Engle, 52 Mich. 56, 17 N. W. 694. Proof of necessitous circumstances, as that the party was hard up and hungry, and that he

evidence is conflicting the question is one of fact for the court[3] or jury[4] as the case may be. It is the duty of the court to explain to the jury what will constitute fraud warranting a rescission and what facts in the case under consideration they may consider.[5]

The burden is upon the party attacking an accord and satisfaction, or compromise for mistake, fraud, undue influence or duress, to show the fraud or other ground.[6] A compromise being admitted or proven, it will be presumed to be fair.[7] And the ground alleged to avoid it must be established by clear and unequivocal evidence,[8] and by a clear preponderance of evidence. Slight evidence of fraud, however, where the parties to a compromise occupy confidential relations is sufficient to warrant the submission of the issue of fraud to a jury.[9] The fraud must be proven by evidence consistent with proven circumstances.[10] While the court looks with favor upon compromises,

thought he was signing a simple receipt, is not evidence of fraud: Williams v. Wilson, 75 N. Y. St. 451, 40 N. Y. Supp. 1132.

[3] In a decision by the court facts of fraud must be directly found and not a recital of facts relied upon as tending to prove fraud. Sheldon v. Dutcher, 35 Mich. 10.

[4] Illinois Steel Co. v. Ferguson, 129 Ill. App. 396; Abrans v. Los Angeles Co., 124 Cal. 411, 57 Pac. 216.

[5] Lewless v. Detroit R. Co., 65 Mich. 392, 32 N. W. 70; In Stearns v. Johnson, 17 Minn. 142, it was said that where the evidence was insufficient to sustain a verdict setting aside a compromise on the ground of fraud, but there was some evidence which might mislead the jury, the defendant, out of an abundance of caution, was entitled to have the court instruct the jury either that there was no fraud sufficient to avoid the compromise or explain to them what fraud is necessary to avoid a compromise.

[6] Ball v. McGeoch, 81 Wis. 160, 51 N. W. 443; Helling v. United Order, 29 Mo. App. 309; Wood v. Kansas City Tel. Co., 123 S. W. (Mo.) 6; Kilmartin v. Chicago, etc., R. Co., 114 N. W. 522; Home Ins. Co. v. Bredehoft, 49 Neb. 152, 68 N. W. 400; Hale v. Owensby, 66 S. E. (Ga.) 781; Smith v. Ogilva, 127 N. Y. 143; Chubbuck v. Varnam, 42 N. Y. 432.

[7] Brewster v. Gelston, 11 John. 390; Sewell v. Mead, 52 N. W. 227.

[8] Chicago R. Co. v. Green, 114 Fed. 676.

[9] Williamson v. Nor. Pac. L. Co., 70 Pac. 387.

[10] Valley v. Boston & M. R. Co., 68 Atl. (Me.) 635.

we do not find that any greater weight of evidence is required to establish mistake, fraud or other grounds set up in avoidance of a compromise, than is necessary to prove such a defense to other contracts. When a compromise has been reduced to writing a greater weight of evidence is required to impeach it than a like oral agreement, owing to the deliberation attending its execution. "There is a strong presumption that the written instrument, which the parties have deliberately executed, express their intention, and if the written contract is to go for nothing, and one party may oppose his oath to that of the other as to fraud, written contracts would amount to very little." [11] Where the cause of action or defense is based upon fraudulent representations, it is necessary to prove that the party believed and relied upon them.[12] Intentional misrepresentation must be shown.[13] Actual intent to deceive must be proven or facts from which the intent will be presumed. An intent to deceive will be presumed from proof of a statement, made as of the party's own knowledge, which is false, provided it is susceptible of actual knowledge and is not merely a matter of opinion, estimate or judgment.[14] A tender in rescission, when one is necessary, or an excuse for not making a strict tender, must be shown.[15]

Sec. 141. Rescission on the ground of surprise.—It has been said that "A man is surprised in every rash and indiscrete action, or whatsoever is not done with so much judgment as it ought to be. But I suppose the gentlemen, who use the word in this case, mean such surprise, as is attended and accompanied with fraud and circumvention." [1] This is the sense in which the term surprise is used

[11] Cummings v. Baars, 31 N. W. (Minn.) 449, citing Sloan v. Becker, 26 N. W. 730.

[12] Humphry v. Merriam, 32 Minn. 197, 20 N. W. 138.

[13] Kelly v. Pioneer Press Co., 94 Minn. 448, 103 N. W. 330.

[14] Bullett v. Farrar, 42 Minn. 8; Heden v. Minneapolis, M. & S. Institute, 62 Minn. 146, 64 N. W. 158.

[15] See *Ante*, Secs. 119–124.

[1] Earl of Bath & Montague's Case, 3 Ch. Cas. 56.

in equity. And it is applied to cases where a person by importunity and apparent necessity for quick action, is suddenly drawn into an inequitable agreement without opportunity for due deliberation. No clearer statement of the law of surprise can be found than that given by Mr. Story. He said: "The surprise * * * must be accompanied with fraud and circumvention; or at least by such circumstances, as demonstrate, that the party had no opportunity to use suitable deliberation; or that there was some influence or management to mislead him. If proper time is not allowed to a party, and he acts improvidently; if he is importunately pressed; if those in whom he places confidence, make use of strong persuasions; if he is not fully aware of the consequences, but is suddenly drawn in to act; if he is not permitted to consult disinterested friends, or counsel, before he is called upon to act, in circumstances of sudden emergency, or unexpected right or acquisition; in these and many like cases, if there has been great inequality in the bargain, courts of equity will assist the party, upon the ground of fraud, imposition or unconscionable advantage." [2] This rule applies to compromises as well as to contracts in general.

Sec. 142. Rescission upon the ground of duress—Duress in general.—It is a cardinal principal of contracts that, in order to make a valid agreement, there must be a free exercise of the will of both parties in assenting to the agreement, and it is everywhere held that a contract entered into under duress may be avoided by the party thus imposed upon. Such a contract is founded upon a wrong and is voidable for that reason. It is extortion and a fraud upon the injured party of the most reprehensible kind. The law abhors force and fraud, and the tendency of the courts now, more than formerly, is to overthrow everything which is built on violence and fraud.[1] In nearly all the states, if a party to a contract was not, at the time of its execution, a free agent and not equal to protecting himself, and assents to the contract under compulsion, he will be afforded re-

[2] 1 Story's Eq. 251.

[1] Foshay v. Ferguson, 5 Hill, 154.

lief at law as well as in equity.[2] According to the principles of the Roman law, the violence which vitiates a contract ought to be such as is capable of making an impression upon a person of courage. Pothier regards this rule as too rigid and not to be literally followed, and says that, "upon this subject, regard should be had to the age, sex and condition of the parties; and a fear which would not be deemed sufficient to have influenced the mind of a man in the prime of life and of military character, nor consequently to rescind his contract, might be judged sufficient in respect of a woman, or a man in the decline of life." [3]

The old common law rule while not going to the extent of the Roman law was more harsh than the principles promulgated by the great majority of the courts in the modern decisions. These are in accord with the principles of the civil law. And the doctrine which now prevails most everywhere is, that "Whenever from natural weakness of intellect or from fear—whether reasonably entertained or not,—either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of a stronger intellect and more robust courage yielding to a more serious danger." [4] It is said du-

[2] Fitzgerald v. Fitzgerald, 62 N. W. (Neb.) 899; Farmer v. Walter, 2 Edw. Ch. 600; Thompson v. Lockwood, 15 Johns. 259; Bussian v. Milwaukee R. Co., 56 Wis. 325, 14 N. W. 452; Dyer v. Tymewell, 2 Vern. 122. In New Jersey, undue influence and like grounds for relief seem to be matter of purely equitable cognizance; Wright v. Remington, 41 N. J. L. 48; Remington v. Wright, 43 N. J. L. 451. Perhaps in some of the other states maintaining separate equity courts, or courts with an equity side, the rule is the same.

By the civil law "the person whose consent is extorted, or his heirs, may procure its annulment by letters of rescission." 1 Pothier's Ob. 21. In England, according to a note to the above, it is not necessary for the person whose consent is obtained by violence to initiate any process analogous to the letter of rescission above mentioned; the force may be used as a defense in any suit founded upon the contract.

[3] 1 Pothier's Ob. [26] 118.

[4] Parmentier v. Pater, 13 Or. 121; Scott v. Sebright, 12 P. D. 21; Jordan v. Elliott, 12 W. N. C. 56, 15 Cent. L. J. 232. In Cribbs v. Sowle, 87 Mich.

ress exists when one by the unlawful act of another is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will.[5] Duress which will vitiate a contract may consist of actual or threatened violence or restraint, either to and concerning the person of the other contracting party, or to such person concerning a near relative; and it must be unlawful and such as actually compels his assent to the contract or other matter between them. A person's assent to a contract may be compelled by unlawful duress of goods.[6]

Sec. 143. Same subject—Effect of performance of contract on right to rescind—Right affected by time—Manner of rescission—Pleading—By whom rescinded—Duress to stranger—Defence by surety—Duress of master, of servant.—A contract made under duress, although often termed void, really subsists. It is only voidable, and it may be ratified or affirmed. If the party performs the contract within so short a time that it would be presumed he is still under the unlawful influence by which the contract was obtained, such performance will not be deemed an affirmance of the contract. But if the party performs the contract after a considerable length of time the burden is on him, in an action to recover the money paid thereon, to show that he paid the money

348, 49 N. W. 587, the court, after reviewing a few American cases which seemed not to have any regard for the condition of the mind of the person acted upon by the threats, or to take into consideration the age, disposition or intellect of the person so threatened [Buchanan v. Sahlein, 9 Mo. App. 533; Higgins v. Boom, 78 Me. 473, 5 Atl. 269; Town Council v. Burnett, 34 Ala. 400; Knapp v. Hyde, 60 Barb. 80; Preston v. Boston, 12 Pick. 12] said, that it was not the true policy of the law to make an arbitrary and unyielding rule in such cases to apply to all alike, without regard to age, sex or condition of mind. Weak and cowardly people and old and ignorant persons are the ones that need the protection of the courts.

[5] Hackley v. Headley, 45 Mich. 569, 8 N. W. 511; First Nat. Bank v. Sargent, 65 Neb. 594, 91 N. W. 595.

[6] Fuller v. Roberts, 17 So. (Fla.) 359.

under duress,[1] or under pressure of the original transaction, or the original necessity, or of the delusive opinion that the contract is valid and binding upon him.[2] But time alone, unaffected by other circumstances will not bar the right to rescind a voidable transaction, since it is not for the wrong doer to impose extreme vigilance and promptitude as conditions to the exercise of the rights of the injured party.[3] The injured party if he desires to annul the contract must, as in rescission upon other grounds, give timely notice of his intention; and, if the other party is entitled to restitution, return or tender the thing received by him. But if nothing is to be returned, as where a note is given in settlement, the party may set up the duress as a defense when sued upon the note.[4]

If property is obtained upon a settlement and compromise procured under duress, it may be recovered back without any previous demand.[5] A party who executes a deed under duress, cannot plead *non est factum,* for it is his deed; he must plead the special

[1] In Schultz v. Culbertson, 46 Wis. 313, 1 N. W. 19, it was held that a plaintiff of whom a note due in one year was obtained under duress, must show, in an action to recover the money paid on the note at maturity, that he paid the note under duress.

Where a note for a less sum was given upon threats to enforce an order for merchandise for a larger sum fraudulently obtained, and it was proven that securing the note was a part of the fraudulent scheme, it was held that executing the note in compromise of the sum claimed under the order. was not a waiver of the right to set up fraud as a defense against the obligation represented by the note: Kirby v. Bergum, 15 S. D. 444, 90 N. W. 856.

[2] In Meech v. Lee, 46 N. W. (Mich.) 383, where a woman gave a second mortgage, it was held that she gave it under the same influence by which the first mortgage was obtained.

"If the party is still acting under pressure of the original transaction or the original necessity, or if he is still under influence of the original transaction and of the delusive opinion that it is valid and binding upon him, then, and under such circumstances, courts of equity will hold him not barred from relief by any such confirmation." 1 Story's Eq. 345.

[3] *Ante,* Sec. 118.

[4] See Kirby v. Berguin, 15 S. D. 444, 90 N. W. 856.

[5] Foshay v. Fergeson, 5 Hill, 154.

manner of the duress; by imprisonment, threats of imprisonment, or menace to the person, or in whatever manner it was accomplished.[6] The contract may be avoided by the person whose consent was extorted or by his personal representatives or heirs. In England a person may not avoid his obligation by reason of duress to a stranger.[7] And this rule has been recognized in this country.[8] The authorities are not agreed whether duress of the principal alone is a defense available to the surety. Some hold that it is no defense,[9] others hold, and it seems with better reason, that it is a complete defense,[10] otherwise, the surety on payment could recover over, and the principal thereby deprived of his defense.[11] But the rule is well settled that when the surety signs under duress, as where a note is extorted from a father and son in settlement of a claim made against the son, and to obtain the son's liberty, the defense of duress is available to the father as well as the son.[12] So, upon like principle, the husband may avoid a deed made by duress to his wife.[13] But, under the old common

[6] 3 Bac. Abr. Duress, D.

[7] In England under the old law, if A. and B. enter into an obligation, by reason of duress done to A., B. shall not avoid the obligation, though A. may, because he shall not avoid it by duress to a stranger. In Huscombe v. Standing, Cro. Jac. 187, it was adjudged that the bond should stand as to one and be avoided as to the other, where it was joint and several: 3 Bac. Ab. Duress, B.

[8] Thompson v. Lockwood, 15 Johns. 256.

[9] Oak v. Dustin, 79 Me. 23; Thompson v. Backhannon, 2 J. J. Marsh. 416; Simms v. Barefoot, 2 Haywood (N. C.) 606.

[10] Haws v. Marchant, 1 Curtis, 136; Fisher v. Shattuck, 17 Pick. 252.

[11] Owen v. Mynatt, 1 Heisk. (Tenn.) 675.

[12] Osborn v. Robbins, 36 N. Y. 365; McClintick v. Cummins, 3 McLean, 158; Ingersoll v. Roe, 65 Barb. 346. "But a son shall avoid his deed by duress to his father; so shall the father his deed, by reason of duress to his son." 3 Bac. Obr. Duress, B.

[13] 3 Bac. Ab. Duress, B. The rule that the duress of a near relative is ground for avoiding a payment by the relative for another does not include a brother-in-law: Solinger v. Earl, 82 N. Y. 360, 60 How. Pr. 116.

law, a servant could not avoid a deed made by duress to his master and *vice versa*. But if the servant or master stands in the relation of a surety, according to some of the modern decisions, as we have seen, either one could avoid a contract made under duress to the other.

Sec. 144. Same subject—Duress by whom exercised—Stranger—Rule by the civil law—At common law—Burden of showing want of knowledge of duress or fraud shifts when.—According to Pothier, "When the violence is exercised against me by a third person, without the participation of him with whom the contract is made, the civil law does not on that account withhold that assistance from me; it rescinds all obligations contracted by violence, from whomsoever the violence may proceed." [1] Under the old common law duress by a stranger, by procurement of the party that shall have the benefit is a good cause to avoid a contract; [2] and this is the rule at this day. But, by that law, duress by a stranger without making the obligee a party thereto is no cause to avoid the agreement; [3] which also appears to be the rule at the present time.[4] The same rule is applied to analogous cases, where a husband by duress of the wife obtains her note and transfers it to a third person, if the latter is ignorant of the duress.[5] Some slight consideration, however, though very

[1] 1 Pothier's Ob. 23.

[2] 43 E. 3, 6; Ro. Abr. 688; 3 Bac. Abr. Duress B.

[3] 3 Bac. Abr. Duress, B.

[4] In Michigan, in a case where a woman claimed she compromised under duress, her cause of action against a saloon keeper for illegally selling liquor to her husband, evidence that third persons came to her and told her that the defendant had threatened to have her arrested as a common prostitute unless she made the settlement, was held inadmissible to prove duress, without proof that defendant authorized or ratified such statement. Boydan v. Haberstumpf, 129 Mich. 137, 88 N. W. 386.

[5] Fairbanks v. Snow, 145 Mass. 153. See Wright v. Remington, 41 N. J. 48, when the husband was induced by one of the payees to make threats to the wife that if she did not sign the note he would poison himself, it was held to be no defence.

slight, is shown an obligor of a contract obtained by fraud and duress, in the hands of a third party, by the rule shifting the burden of proof. Thus, when the maker of a negotiable note shows that it was obtained from him by fraud or duress, the burden is upon a subsequent transferee to show that he is a *bona fide* holder.[6] It has been held that the *bona fide* purchaser of a chose in action (non negotiable) obtained from the owner by undue influence and coercion, acquires no title.[7]

Sec. 145. Same subject—Duress of imprisonment—Lawful and unlawful arrest—In settlement of just claim.—Contracts made by persons while under imprisonment, are watched by the courts with extreme jealousy, and if a party is illegally imprisoned or restrained of his liberty, and he enters into a compromise or other contract with the party causing the restraint, by reason of such restraint, or to obtain his liberty, the contract is voidable.[1] So, if a man is arrested by due process of law and a wrong use is made of the arrest, such as requiring him to do an act foreign to the purpose for which he was arrested, as where the arrest is upon a criminal charge and he is required to settle and compromise a civil demand, upon condition of receiving his discharge;[2] or, if, while in custody, he is put under unlawful deprivation or restraint, or subjected to unnecessary pain or danger, and he is thereby induced to assent to a contract, the original arrest will be construed to be unlawful, and the contract will be voidable for fraud and duress.[3] Where an arrest is for a just cause and under lawful authority, but for an unlawful purpose,[4] or an ar-

[6] Vosburg v. Diefendorg, 119 N. Y. 357, 23 N. E. 801, 16 Am. St. Rep. 836; Kirby v. Berguin, 15 S. D. 444, 90 N. W. 856; Knowlton v. Schultz, 6 N. D. 417, 71 N. W. 550.

[7] Barry v. Equitable Life, 59 N. Y. 587.

[1] Farmer v. Walter, 2 Edw. Ch. 600; Thompson v. Lockwood, 15 Johns, 256; 1 Story's Eq. Sec. 23; 1 Pars. Cont. 392.

[2] Such a contract is also void as against public policy and may amount to compounding a felony.

[3] Farmer v. Walter, 2 Edw. Ch. 600; 1 Pars. Cont. 392.

[4] Severance v. Kimball, 8 N. H. 386; Richardson v. Duncan, 3 N. H. 508.

rest is for a just cause but without lawful authority, as well as when an arrest is for an improper purpose without just cause; and, the party pays money or enters into a compromise or other agreement to obtain his liberty, the contract thus obtained will be considered as having been obtained by duress of imprisonment.[5] But if a party is arrested by due process of law for a debt or demand claimed to be due, or is arrested in proceedings supplementary to judgment and held pending his examination in such proceedings, and he chooses to compromise by giving a note or bond or other security, or surrenders property under an agreement that it shall be in satisfaction of the demand, there is no duress but such as the law allows, and the compromise cannot be avoided.[6] So, if a party is under lawful arrest in bastardy proceedings, and give his note in compromise of the proceedings in order to obtain his discharge, the note is enforceable.[7] But it is otherwise if the warrant and other proceedings are not according to the statute.[8]

If a party is assaulted and pounded and put in fear and terror for his further safety, and thereby is coerced into assenting to a compromise or other contract, it is voidable for duress. Any restraint of the person such as in law amounts to an unlawful arrest or false imprisonment, if it coerces the party into assenting to a contract, will constitute duress of imprisonment, and avoid the contract. While a person is under arrest charged with a crime, the occasion is inappropriate for the settlement of a private claim between the accused and

[5] Richardson v. Duncan, 3 N. H. 508; Rollins v. Lashus, 74 Me. 218. Where a party causes the arrest of another or attaches his property, knowing he has no just claim against him, money paid or a contract entered into by the latter to release himself or his goods, is done under duress, and the money may be recovered back or the contract avoided: Chandler v. Sanger, 114 Mass. 364.

[6] Farmer v. Walter, 2 Edw. Ch. 600. In Clark v. Turnhall, 47 N. J. L. 265, where the party was held under legal process, a note executed in order to obtain the maker's discharge, was held good, although there was in fact no cause of action.

[7] See Heaps v. Dunham, 95 Ill. 583.

[8] Fisher v. Shattuck, 17 Pick. 252.

the prosecuting witness. The party who exacts a contract or security from one whom he wrongfully restrains of his liberty, can derive no aid from the fact that the claim which he enforced by illegal means was just. In all such cases the court will condemn the contract; and the parties are thus remitted to their antecedent rights.[9] A statement by the attorney for the prosecutor, or by the latter, to the party under arrest that in compromising and settling the civil demand, he is not to consider there is any agreement not to press the prosecution, does not alter the character of the transaction, if the party benefited by the settlement really meant to forego the prosecution and the other executed the agreement under that belief and expectation.[10]

Sec. 146. Same subject—Duress of goods—Personal and real property—Refusal to pay a debt.—A payment or concession exacted upon a compromise is compulsory when made or allowed through necessity in order to obtain possession of property illegally withheld, when the detention is fraught with great immediate hardship or irreparable injury.[1] As where an owner has effected the sale of certain property, and in order to give possession and to save himself from great loss, is compelled to compromise and settle a claim with one who wrongfully withholds the property and who refuses to surrender it until such settlement is made. So, where a broker without a lien, threatens to sell certain stock belonging to his client unless a certain claim is settled up, a settlement under such circumstances is made un-

[9] Osborn v. Robbins, 36 N. Y. 365.

[10] Osborn v. Robbins, 36 N. Y. 365.

[1] Fitzgerald v. Fitzgerald, 62 N. W. (Neb.) 899. In Ashley v. Reynolds, 2 Strange, 915, referred to as a leading case upon this question, the court said: "This is a payment by compulsion, the plaintiff might have such an immediate want of his goods that an action of trover would not do his business; where the rule *volenti non fit injuria* is applied, it must be when the party had his freedom of exercising his will, which this man had not; we take it he paid his money relying on his legal remedy to get it back again."

der duress of goods.[2] In such a case the court said, a party has a right to rescue his property from the perils that seemed impending, even by the payment of a sum wrongfully exacted. So, where a party in financial difficulties, is compelled to settle and compromise a claim in order to obtain his goods unlawfully held under an attachment, or otherwise wrongfully withheld, and relieve his distress, the settlement may be avoided for duress of goods. There may be duress with respect to real property, as well as personal, so as to render a payment on account of it involuntary. Where a person in necessitous circumstances, who had arranged to borrow money on a mortgage to relieve his distress, was prevented from obtaining the money by the filing of an unfounded lien claim, which the claimant would not discharge until paid; and he settled the claim in order to clear the title, it was held that the money paid on the settlement could be recovered back.[3] The same rule was applied where the owner of certain real estate, who was in embarrassed circumstances and who had arranged a sale of the premises to relieve his embarrassment, was prevented from consummating the sale by a bank assuming to be the real owner under a deed absolute in form, but in reality a mortgage, and refusing to consent to the sale or release of their interest until the mortgagor paid a large sum in excess of the sum actually due.[4] In all such cases a man's necessities may be so great that the ordinary process of law will not afford him relief, or "do his business" as it is sometimes expressed. In most cases it would plunge him deeper into his difficulties. While the courts, in declaring the general rule, have generally laid consid-

[2] Stenton v. Jerome, 54 N. Y. 480. See Scholey v. Munford, 60 N. Y. 498, where certain bonds were withheld until certain commissions were paid, the claim being unfounded, the payment was held not voluntary and could be recovered back.

[3] Joannin v. Ogilvie, 49 Minn. 546, 52 N. W. 217, 16 L. R. A. 376, 32 Am. St. Rep. 581. In this case the court said: "He was so situated that he could neither go backward nor forward." He had no choice but to submit. That the legal remedies available in such cases would not do defendant's business.

[4] First Nat. Bank v. Sargent, 65 Neb. 594, 91 N. W. 595.

erable stress upon the immediate hardship or irreparable injury occasioned, yet upon a review of the cases holding money paid under duress of goods may be recovered back, it appears that granting relief has not been made to depend upon the extent or degree of the hardship or injury; and further that the necessitous condition of the owner, in cases of hardship, is not the controlling circumstance upon which the right to rescind depends, but is the unlawful interference with his property.

It is well settled that the mere refusal of a party to pay a debt or perform a contract is not duress, so as to avoid a contract procured by means of such refusal, although the other party was influenced in entering into it by his financial necessities.[5] In a case where a defendant, being indebted to the plaintiff in a large sum and taking advantage of the latter's financial embarrassment, refused to pay him unless he would receive in full settlement a sum less than he claimed; and the creditor being in pressing need of money, accepted the sum offered and gave his receipt, the court said that it would be a most dangerous, as well as unequal doctrine, if a contract which would be valid if made with a man easy in his circumstances, becomes invalid when the contracting party is pressed with the necessity of immediately meeting his bank paper. That no one could well know when he would be safe in dealing on ordinary terms of negotiation with a party who professed to be in great need.[6] But, if a debtor, in order to force a favorable compromise with a creditor in financial straits, withholds moneys lawfully due him, and goes further and induces other debtors to withhold payments due from them, or in any other way wrongfully stop such payments, and the creditor consents to a settlement only in order to get the money and save himself from financial ruin or distress, the compromise may be avoided for duress of goods.[7]

[5] Joannin v. Ogilvie, 49 Minn. 564, 16 L. R. A. 376, 32 Am. St. Rep. 581, 52 N. W. 217; Stillmann v. U. S., 101 U. S. 465.

[6] Hackley v. Headley, 45 Mich. 569, 8 N. W. 511.

[7] Vyne v. Glenn, 41 Mich. 112.

Sec. 147. Same subject—Duress per minas—Threats of lawful and unlawful arrest—Of battery—Of injury to father or son—Duress a question of fact when.—A person may be deprived of the free exercise of his will by threats merely without any direct restraint. To constitute duress by threats "it is sufficient to in fact compel the person threatened to do an act which otherwise he would not have done." [1] It is recognized as duress where a mother is induced by threats to settle and compromise a claim in order to save her son from criminal prosecution.[2] So terrifying a woman by threats of prosecuting her husband for an alleged embezzlement will avoid a transfer of her separate property.[3] If a note, mortgage or other security is obtained from a father by a threat that if not given, his son who is charged with embezzlement,[4] or with forgery,[5] or other crime,[6] will be arrested and sent to states prison, he may avoid the transaction. It makes no difference whether the threats are of lawful or unlawful prosecution, if resorted to for the purpose of intimidating or terrifying the party and to compel his assent, it amounts to duress by threats and will avoid a contract thereby obtained.[7] The question whether a father who claims to have executed a contract under duress by threats of imprisonment of his son, did or did not believe his son guilty of the crime charged is to be considered only upon the question of whether there was duress.[8] A person charged with a crime and threatened with arrest, though in-

[1] Parmentier v. Pater, 13 Or. 121; Cribbs v. Sowle, 87 Mich. 340, 49 N. W. 587.

[2] Weiser v. Welch, 70 N. W. 438; Meech v. Lee, 82 Mich. 274, 46 N. W. 383; McCormick v. Hamilton, 73 Wis. 486, 41 N. W. 727.

[3] Eadie v. Slimmon, 26 N. Y. 9.

[4] Schoener v. Lissaner, 36 Hun, 102.

[5] Harris v. Carmody, 131 Mass. 51, 41 Am. Rep. 188.

[6] Schultz v. Culbertson, 46 Wis. 313, 1 N. W. 19.

[7] Adams v. Irving Bank, 116 N. Y. 606, 15 Am. St. Rep. 447.

[8] See Schultz v. Culbertson, 46 Wis. 313, 1 N. W. 19; Osborn v. Robbins, 36 N. Y. 365.

nocent, may yield to threats and execute an agreement to avoid the disgrace and scandal attending a criminal prosecution; and likewise a parent, husband or wife, may do so firmly believing in the innocence of person charged.

According to the old common law menacing to commit a battery, or to burn his house, or spoil his goods, is not sufficient to avoid a contract; for if he should suffer what he is threatened, he may sue and recover damages in proportion to the injury done him.[9] Lord Coke says, that for menace, in four instances, a man may avoid his own act. 1st—For fear of loss of life. 2dly—Of loss of member. 3dly—Of mayhem. 4thly—Of imprisonment.[10] But since the days of that great commentator, the law has progressed, and now, to constitute duress *per minas,* it is not essential that the party be threatened with loss of life or limb, or with mayhem. In an early case in New York, the court said: "I entertain no doubt that a contract procured by threats and the fear of battery, or the destruction of property, may be avoided on the ground of duress."[11] When threatened with bodily injury if a party will not pay moneys, execute an agreement, furnish security, or surrender property, he is not bound to incur any danger, and if the danger is real or apparent, he may yield. It has been said: "Any threats even of slight injury will invalidate the contract. Persons of a weak or cowardly nature are the very ones that need protection. The courageous can usually protect themselves. Capricious and timid persons are generally the ones that are influenced by threats, and it would be great injustice to permit them to be robbed by the unscrupulous, because they are so unfortunately constituted."[12] So, "if a man menace me that he will imprison or hurt in body my father or my child, except I make unto him an obligation, I shall avoid this duress as well as if the duress

[9] 3 Bac. Abr. Duress A.

[10] 2 Inst. 483, 3 Bac. Abr. Duress, A.

[11] Foshay v. Ferguson, 5 Hill, 154.

[12] Parmentier v. Pater, 13 Ore. 121.

had been to mine own person."[13] Menace, under the statute of some of the states, may consist of threats of injury to the character of a person;[14] and we see no reason why, in absence of a statute, such threats would not constitute duress, if they induced the contract, for a man's character is often more easily destroyed by slander, than by a criminal prosecution, where his sides of the case receive equal publicity. Where there is no arrest, no imprisonment, no actual force used and it is claimed that the compromise was obtained by duress *per minas,* the question whether the contract was obtained by duress is usually one of fact, and not one of law;[15] unless the evidence is all one way and so conclusive that no other reasonable ground for the action of the party is apparent; in which case the court should decide it as a matter of law.[16] It is not enough to show merely that the threats were uttered, but it must also be shown that they constrained the will and induced the promise.[17]

It is not always necessary in order to constitute duress that direct threats be made.[18] A pressure may be brought to bear by other means fully as efficacious. Thus, where three men, who were accompanied by a fourth who played the part of a mysterious stranger, went to the home of a mother and informed her that her son had committed a serious offense and was liable to a criminal prosecution, and presented to her the prospect of her son's disgrace, and the danger of his being taken from home, and at the same time urging her to settle up the loss occasioned by the son's wrongful act, and by thus working upon her fears she was induced to settle and compromise the loss, the agreement was held to have been

[13] Bac. Max. 18. See McCormick v. Hamilton, 73 Wis. 486, 41 N. W. 727.

[14] N. Y. Civil Code Sec. 755; Cal. Civil Code Sec. 1570; See 2 Pomeroy's Eq. Sec. 951, Note.

[15] Dunham v. Griswold, 100 N. Y. 224; Barrett v. Weber, 125 N. Y. 18, 24 Am. St. Rep. 172.

[16] See McCormick v. Hamilton, 73 Wis. 486, 41 N. W. 727.

[17] Dunham v. Griswold, 100 N. Y. 224; Barrett v. Weber, 125 N. Y. 18.

[18] See Foley v. Green, 14 R. I. 618.

obtained by duress.[19] So, in a case where the holder of forged bills worked on the fears of a father for the safety of his son, who had forged them, but without any distinct threats, obtained from him a security for the amount of the bills, the transaction was avoided.[20] It would be impossible or at least impracticable, if possible, in a work of this character to attempt to detail the evidence required to establish duress. From the nature of the subject the courts have not gone beyond the statement of the general principles and attempted to lay down any definite and exact rules. The conditions under which threats are made are so diverse that each case must necessarily stand on its own peculiar facts. The age, sex, mental and physical, and perhaps moral condition of the party menaced, must be considered, together with the character of the threats, in determining the ultimate fact whether the party had his freedom of exercising his will.

Sec. 148. Same subject—Threats to enforce demand by legal means—Good faith of claimant—Unfounded claim.—Threats to use towards a debtor or his property only such means as the law allows in the enforcement of a claim, however harsh they may be, do not constitute duress so as to avoid a compromise induced by such threats. Where, therefore, a creditor threatens to sue the debtor, or to arrest him in such suit, if an arrest may lawfully be made, or to attach his property, or levy upon it by virtue of an execution which could be issued upon a judgment obtained in the action,[1] there is no duress, as the threats are to do only what the creditor has a legal right to do.[2] In all such cases the party

19 Meech v. Lee, 46 N. W. (Mich.) 383.

20 Williams v. Bagley, 4 Giff. 638, s. c. L. R. 1 App. Cas. 200. See also Kerr on Fr. 184.

1 Dunham v. Griswold, 105 N. Y. 224; Wilcox v. Howland, 23 Pick. 167.

2 Day v. Studebacker, 13 Misc. R. 320; Skeate v. Beal, 11 Ad. & El. 983; Kiler v. Wohletz, 101 Pac. (Kan.) 474; Walla Walla F. Ins. Co. v. Spencer, 100 Pac. (Wash.) 741; Preston v. Boston, 12 Pick. 14.

may defend himself against such action or proceedings. Dilating upon the inconvenience, trouble and loss such proceedings will occasion the debtor, does not change the rule. Threats to enforce at law a right claimed in good faith will not constitute duress even though the party in fact has no right.[3] But where a party assented to a compromise and gave his note for a smaller sum, through threats to enforce a fraudulent claim for a larger sum, it was held he was not estopped to set up fraud in defense in an action on the note.[4] Threats to employ legal authority to compel payment of a wholly unfounded claim known to be such, is such duress as will support an action to recover back what is paid under it.[5]

Sec. 149. Same subject—Undue influence.—Undue influence, as distinguished from duress, does not occur between the parties to a compromise where they are actually dealing with each other at arms length and upon terms of equality. Here, the situation of the parties indicate an alertness of mind and freedom of the will. But where the parties are on terms of intimate and close relation, as father and son, guardian and his ward just arrived of age, and the like, or are not on an equal footing by reason of mental or physical weakness, or necessitous circumstances, or by reason of ignorance or lack of advice, such an influence may be exerted by one party to a compromise to the detriment of the other. Where antecedent fiduciary relation exists, a court of equity will

[3] Wilson v. Curry, 126 Ind. 161; State v. Harvey, 57 Miss. 863; Heysham v. Dettre, 89 Pa. 506.

[4] Kirby v. Berguin, 15 S. D. 444, 90 N. W. 856. In this case the threat was to transfer to an innocent purchaser, an order for a lightning rod, claimed to be negotiable, and thus compel the signor to pay the whole demand, if he did not settle by giving his note for a less sum.

[5] Adams v. Reeves, 68 N. C. 134; Briggs v. Lewiston, 29 Me. 472; Grim v. School District, 57 Pa. St. 433; First Nat. Bank v. Watkins, 21 Mich. 483; Hackley v. Headley, (Mich.) 8 N. W. 511; Beckwith v. Frisbie, 32 Vt. 559.

presume confidence placed and influence exerted. In such cases no mental weakness, old age, ignorance, pecuniary distress and the like is assumed as an element of the transaction, and is not essential.[1] On the other hand if no fiduciary relation exists the confidence placed and the undue influence must be proved by satisfactory evidence, and when established as a fact, a contract will be set aside without indulging in any presumption.[2] In either case the contract must be inequitable and an undue advantage obtained. The question of undue influence, with respect to compromises, arises very frequently in settlements by guardians with their wards just arrived of age; between trustees and benficiaries. But the principles are applied to every possible case "in which there is confidence reposed on one side, and the resulting superiority and influence on the other. The relation and the duties involved in it need not be legal; it may be moral, social, domestic or merely personal."[3] It has been said that no general rule can be laid down as to what shall constitute undue influence and that the question is one which must in each case stand on its own peculiar circumstances.[4]

Persuasion and other such conduct by the one benefited is always looked upon with suspicion. Pressure of whatever character, whether acting on the fears or the hopes, if so exerted as

[1] 2 Pomeroy's Eq. Sec. 951. The burden is upon the party against whom the presumption is raised to show that no undue influence was exerted and that the contract was fair and equitable.

[2] 2 Pomeroy's Eq. Sec. 955.

[3] 2 Pomeroy's Eq. 956. See Kerr on Fr. 193, for a long list of persons whose associations gave an opportunity to exercise undue influence; such as a medical man and patient; minister and parishioner under his influence; spiritualist and an old lady; husband and wife; person engaged to be married; brother and sister; elder and younger brother; two sisters; uncle and nephew; a young man just come of age and a person who had acquired an influence over him during his minority; a man and a woman with whom he lived; unmarried woman and brother-in-law; old lady and woman living with her, and other cases.

[4] Kerr on Fr. 183.

to over-power the volition without convincing the judgment; importunity such as the party has not the courage to resist; moral command asserted and yielded for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, if carried to a degree in which the free play of the party's judgment, discretion or wishes are overborne, will constitute undue influence, though no force is either used or threatened.[5] The fear of displeasing a father, or mother, or other person to whom we owe regard, is not such a fear as vitiates a contract made under the pressure of it.[6]

Sec. 150. Same subject—On the ground of infancy.—An infant may disaffirm a release of a claim,[1] or rescind a contract,[2] or an illegal sale of his real estate without making a tender of any property received by him by virtue of the contract or proceeding, except that portion of the property remaining under his control after he has attained his majority,[3] or that portion under his control at the time he seeks to rescind, if the contract be such as he may disaffirm before his majority.[4] In Vermont, in

[5] Farrent v. Blanchford, 1 D. J. & S. 121, cited in Kerr on Fr. 185.

[6] 1 Pothier's Ob. 26.

[1] Young v. West Virginia etc. Co., 42 W. Va. 112, s. c. 24 S. E. 615.

[2] Haws v. Burlington etc. Ry., 64 Iowa, 315, s. c. 20 N. W. Rep. 717; Jenkins v. Jenkins, 12 Iowa, 195.

[3] See Kane v. Kane, 13 App. Div. 544, s. c. 43 N. Y. Supp. 662.

[4] See Schouler's Domestic Relations, 446. Making a tender is not a condition precedent to the institution of a suit against a tutor or guardian to annul an account or settlement, made in error and while the infant was ignorant of his rights under undisclosed and concealed facts, or to set aside purchases of his property by an administrator or guardian. In such case there exists no contractual relations between the parties: Rist v. Hartner, 44 La. Ann. 430; Wood v. Nicholis, 33 La. Ann. 744; Heirs of Burney v. Ludeling, 41 La. Ann. 632. In annulling a final account it is sufficient for him to account for the property received which he would be entitled to have in any event, or to offer to return the property if it is not something in specie belonging to the estate.

some of the early cases, it was stated in general terms that an infant would not be permitted to rescind his contract and recover the articles parted with without first restoring the property or consideration received.[5] The same rule has been stated in the same general terms in New Hampshire.[6] But in Vermont in a later case it was held that the general rule was subject to an important qualification. The court in that case said: "A distinction is to be observed between the cases of an infant in possession of such property after age, and when he has lost, sold or destroyed the property during his minority, * * * * the property is to be restored if it be in his possession and control. If the property is not in his hand nor under his control, that obligation ceases." [7] This is undoubtedly the prevailing rule almost, if not everywhere, and it is certainly supported by the policy of the law in protecting infants in their property rights until they have arrived at that age when the law declares them to be of sufficient discretion to manage their prudential affairs. No better reason for the rule exists than that given by the Vermont court. It said: "To say that an infant cannot recover back his property, which he has parted with under such circumstances, because by his indiscretion he has spent, consumed or injured that which he received, would be making his want of discretion the means of binding him to all his improvident contracts, and deprive him of that protection which the law designed to secure to him." [8]

As to the time when a contract may be disaffirmed on the ground of infancy, the rule generally accepted, in case of transfers

[5] Farr v. Sumner, 12 Vt. 28, s. c. 36 Am. Dec. 327; Taft v. Pike, 14 Vt. 405, s. c. 39 Am. Dec. 228.

[6] Carr v. Clough, 26 N. H. 280, s. c. 59 Am. Dec. 345.

[7] Price v. Furman, 27 Vt. 268, s. c. 65 Am. Dec. 194; citing Fitts v. Hall, 9 N. H. 441; Robbins v. Eaton, 10 N. H. 562; Boody v. McKenny, 23 Me. 517, 525, 526; Tucker v. Moreland, 1 Am. Lead. Cas. 260. s. p. Chandler v. Simmons, 97 Mass. 508.

[8] Price v. Furman, 27 Vt. 268.

of land, is that it cannot be conclusively avoided till he is of age.[9] Compromises or other contracts which relate to personal property or to the person may be avoided at any time during the minority of the infant, or within a reasonable time after attaining his majority. After arriving of age he may ratify the contract.[10] The right to avoid a compromise or other contract is a privilege personal to the infant, which no one while he is living can exercise for him excepting his guardian.[11] After his death, it may be exercised by his personal representatives,[12] or, with due limitations of time and circumstances, by privies in blood entitled to his estate.[13] The other contracting party remains bound.

[9] To protect an infant from loss that might occur by reason of the occupancy of the land by the purchaser during such minority, if the purchaser has not gone into possession, the minor or his guardian may resist an entry, or if the possession has been taken by the purchaser, the minor may enter and take and hold the profits. Bool v. Mix, 17 Wend. 119, s. c. 31 Am. Dec. 285; Carr v. Clough, 26 N. H. 280, s. c. 59 Am. Dec. 345; Stafford v. Roof, 9 Cow. 626; Price v. Furman, 27 Vt. 268, s. c. 65 Am. Dec. 194; Zouch v. Parson, 3 Burr, 1794; Lynde v. Budd, 2 Paige's Ch. 191, s. c. 21 Am. Dec. 84. See Schouler's Domestic Relations, Sec. 409. But where personal property, chattels or money has passed to the possession of another under a contract of sale with an infant, and the contract is not for necessaries, the infant may disaffirm the contract before arriving of age; and, that the infant may not be exposed to loss by the consumption or other disposition of the chattels by the purchaser, or loss of the money by reason of the subsequent insolvency of the seller, the infant, or his guardian for him, may bring the appropriate action at once to recover that which the infant parted with under the contract: Carr v. Clough, 26 N. H. 280, s. c. 65 Am. Dec. 345; Bool v. Mix, 17 Wend. 119, s. c. 31 Am. Dec. 285; Price v. Furman, 27 Vt. 268, s. c. 65 Am. Dec. 194.

[10] Upon the question of ratification, see 2 Parsons on Cont. 323 and extensive note.

[11] See Schouler's Dom. R. Sec. 402; 2 Parsons on Cont. 330.

[12] Parsons v. Hill, 8 Mo. 135; Turpin v. Turpin, 16 Oh. St. 270, was a case where the infant would not have been permitted to rescind an arrangment made by his guardian and relatives, being beneficial to him, and it was held his administrator could not.

[13] Schouler's Dom. R. Sec. 402, citing Dominick v. Michael, 4 Sandf. 374; Illinois Land Co. v. Bonner, 75 Ill. 315, and other cases.

Sec. 151. Same subject—On the ground of insanity—Mental or physical weakness.—Insane persons, with regard to the voidable character of their contracts, receive substantially the same consideration under the law as do infants, with the exception, however, that if a person deals fairly with a person of unsound mind, though apparently of sound mind, without knowledge of such unsoundness, he is entitled to be placed in *statu quo* upon the avoidance of the contract.[1] The supreme court of Indiana in considering such a contract, said: "It has not, to our knowledge, been decided in this state or any other state that, where the contract has been entered into with knowledge of the insanity, and an unconscionable advantage has been taken of the insane person, it is a necessary prerequisite to avoidance that a tender of that which has been received by such insane person shall be made. If the rule requiring the parties to be placed in *statu quo* includes, as a necessary element, the requirement that the party dealing with the *non compos* shall be ignorant of the incapacity, and shall not deal unfairly, it would seem to follow as an indispensable result that the presence of such knowledge and of an unfair advantage would discharge the rule; otherwise such elements of the rule are mere empty phrases. * * * * If he may so deal with the possibility of retaining that so illy gotten, and with no possibility of losing that with which he parted, he is not restrained from attempting the advantage as opportunity offers."[2] As in the case of the avoidance of contracts by infants, whatever remains in the possession of the insane person in specie at the time of the rescission must be restored,[3] but with the distinction that it need not

[1] Boyer v. Berryman, 123 Ind. 451; Fay v. Burditt, 81 Ind. 433; Copenrath v. Kienly, 83 Ind. 18; Musselman v. Cravens, 47 Ind. 1.

[2] Thrash v. Starbuck, 44 N. E. Rep. (Ind.) 543, citing Gibson v. Soper, 6 Gray, 288; Eaton v. Eaton, 37 N. J. L. 109; Crawford v. Scovelle, 94 Pa. St. 48; Halley v. Troester, 72 Mo. 73. See Meyer v. Fishburn, 91 N. W. Rep. (Neb.) 534.

[3] Jefferson v. Rust, 128 N. W. (Io.) 954; Hale v. Kobbert, 109 Iowa, 128, 80 N. W. 308. See N. W. Co. v. Blankership, 94 Ind. 535, 48 Am. Rep. 185.

be tendered as a prerequisite to a suit to rescind. If the consideration passed to another no tender is necessary.[4] The degree of unsoundness of mind or mental weakness which incapacitates a person from making a contract, is a question of no little difficulty. There must be insanity, idiocy or mental weakness which disables the party from understanding the nature and effect of the contract, and which renders him incompetent to transact business.[5] Insane persons will be afforded protection at law as well as in equity.[6] A contract entered into with an insane person may be avoided by him on regaining his reason, or by his heirs or personal representatives if he dies while *non compos.*[7] If insanity is established and a guardian appointed the latter may avoid a contract made with the ward while he was insane.[8] The other contracting party cannot avoid the agreement. A contract made with a person temporarily insane, as by intoxication, may be avoided by him, notwithstanding the condition was produced by his own act. If he does not repudiate the contract as soon as he learns of it, when sober, he will be held to have ratified it. A contract made by an insane person may be ratified on regaining his right mind, and it is binding even if made during a lucid interval.[9] A contract made during a lucid interval is binding,[10] but if the person alleges insanity to defeat the contract, the burden of proving a restoration to reason is upon the plaintiff.[11] A contract made with a monomaniac is good when his monamania does not have anything to do with the transaction, and it has

[4] Jefferson v. Rust, 128 N. W. (Io.) 954.

[5] 2 Pars. Cont. 383.

[6] 2 Pars. Cont. 387.

[7] See Lazell v. Pinnick, 1 Tyler, 247.

[8] See Jefferson v. Rust, 128 N. W. (Io.) 954.

[9] See Blakeley v. Blockley, 6 Stew. 502.

[10] McCormick v. Littler, 85 Ill. 62.

[11] Elston v. Jasper, 45 Tex. 409.

not affected his business judgment.[12] No degree of mental or physical weakness, or inferiority of intellect, as long as it leaves the party legally competent to act, is of itself sufficient to avoid a compromise with him.[13]

Ill health and depression of spirits of a party to a compromise, is no ground for avoiding the agreement.[14] Nor is ignorance alone sufficient to avoid an agreement.[15] But if a compromise or release is obtained from one, who, by reason of ignorance, inexperience, lack of independent counsel and advice, or weakness of body or mind, is not in a condition to deal on equal terms with the other party, it will be scrutinized with jealous care, and if by misrepresentation, imposition, undue influence, or circumvention or cunning, advantage is taken of the weakness, the compromise or release thus obtained will be avoided.[16]

[12] See Burgess v. Pollock, 53 Io. 273.

[13] Comyn on Cont. 50; Mitchell v. Long, 5 Litt. (Ky.) 71; Farnam v. Brooks, 9 Pick. 212; Paris v. Dexter, 15 Vt. 379.

[14] Billingslea v. Ware, 32 Ala. 415.

[15] Mitchell v. Long, 5 Litt. (Ky.) 71; Manby v. Bewick, 3 Kay & J. 342.

[16] Where a release was obtained from a very ignorant man, whose mind was affected by injuries and while he was still confined to his bed, where he had been for over a month under the care of agents and servants of the defendant, without opportunity of seeing any one else; upon payment of a grossly inadequate sum, a finding that it was not voluntarily given was not disturbed. Christianson v. Chicago etc. R. Co., 67 Minn. 94, 69 N. W. 640. A woman living on a farm and inexperienced in traveling, is not incompetent to settle a claim for injuries received by her, or incapable of understanding her rights: Kilmartin v. Railroad Co., 114 N. W. (Iowa) 522. McNamara v. Boston El. R. Co., 83 N. E. (Mass.) 878; Texas R. Co. v. Crow, 3 Tex. Civ. App. 260, 22 S. W. 928; Shurte v. Fletcher, 69 N. W. (Mich.) 233; Kelly v. Chicago etc. R. Co., 114 N. W. (Iowa) 536, citing the following cases as emphasizing the rule that a compromise or release of a right of action obtained by misrepresentation, undue influence, fraud, or by taking advantage of weakness of body or mind, will be set aside, which we give without any attempt to classify. Coles v. Railroad Co., 124 Iowa, 48, 99 N. W. 108; Rauen v. Insurance Co., 129 Iowa, 725, 106 N. W. 198; Bassian v. Railway Co., 56 Wis. 325, 14 N. W. 452; Bliss v. Railroad Co., 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504; Railroad Co. v. Lewis, 109

Sec. 152. Same subject—Persons in vinculis.—Mr. Pomeroy gives as an illustration the condition of the mind brought about by pecuniary or other necessity and distress, as analogous to the condition of mental weakness, for which contracts will be avoided. He says: "Whenever one person is in the power of another, so that a free exercise of his judgment and will would be impossible, or even difficult, and whenever a person is in pecuniary necessity and distress, so that he would be likely to make any undue sacrifice; and advantage is taken of such condition to obtain from him a conveyance or contract which is unfair, made upon an inadequate consideration, and the like, even though there be no actual duress or threats, equity may relieve defensively or affirmatively."[1] In such cases the party does not exercise a free will, but stands *in vinculis*.[2] With respect to compromises the discussion

Ill. 120; Mullen v. Railroad Co., 127 Mass. 86, 34 Am. Rep. 349; Eagle Packet Co. v. De Friez, 94 Ill. 598, 34 Am. Rep. 245; Peterson v. Railroad Co., 38 Minn. 511, 39 N. W. 485; Stone v. Railroad Co., 66 Mich. 76, 33 N. W. 24; McLean v. Insurance Co., 100 Ind. 127, 50 Am. Rep. 779; Lusted v. Railroad Co., 71 Wis. 391, 36 N. W. 857; Schultz v. Railroad Co., 44 Wis. 638; Watkins v. Brant, 46 Wis. 419, 1 N. W. 82; Railroad Co. v. Doyle, 18 Kan. 58; Sheanon v. Insurance Co., 83 Wis. 507, 53 N. W. 878; Flummerfelt v. Flummerfelt, 51 N. J. Eq. 432, 26 Atl. 857; Troxall v. Silverthorn, 45 N. J. Eq. 320, 12 Atl. 614; Lord v. Association, 89 Wis. 19, 61 N. W. 293, 26 L. R. A. 741, 46 Am. St. Rep. 815; Railroad Co. v. Fowler, 201 Ill. 152, 66 N. E. 394, 94 Am. St. Rep. 158; Girard v. Car Wheel Co., 123 Mo. 358, 27 S. W. 648, 25 L. R. A. 515, 45 Am. St. Rep. 556; Railroad Co. v. Harris, 65 S. W. (Tex. Civ. App.) 885; Railroad Co. v. Brown, 69 S. W. (Tex. Civ. App.) 651; Light Co. v. Rombold, 68 Neb. 54, 93 N. W. 966; Railroad v. Green, 114 Fed. (C. C.) 676; Davenport v. Lumber Co., 112 La. 943, 36 S. 812; Clayton v. Traction Co., 204 Pa. 536, 54 Atl. 322; Railroad Co. v. Harris, 12 C. C. A. 598, 63 Fed. 800; Railroad Co. v. Phillips, 13 C. C. A. 315, 66 Fed. 35; Butler v. Railroad Co., 88 Ga. 504, 15 S. E. 668; Albrecht v. Railroad Co., 94 Wis. 403, 69 N. W. 63; Railroad Co. v. Harris, 158 U. S. 326, 15 Sup. Ct. 843, 39 L. Ed. 1003; Vantrain v. Railroad Co., 8 Mo. App. 538; Railroad Co. v. Uhter, 212 Ill. 174, 72 N. E. 195; Coal Co. v. Buzis, 213 Ill. 341, 72 N. E. 1060.

[1] 2 Pomeroy's Eq. 948.

[2] See 1 Story's Eq. 239. "Circumstances of extreme necessity and distress of the party, although not accompanied by any direct restraint or duress,

is necessarily narrowed to transactions between persons in the relation of debtor and creditor. The bare refusal to pay a debt due a person known to be in financial embarrassment, as we have seen, is insufficient to avoid a compromise; but cases have arisen and will arise where a person's finances are so involved and he is wholly in the power and at the mercy of his debtor, that he will sacrifice most any thing to extricate himself. So, cases arise where a debtor is driven in desperation to sacrifice every thing to obtain the bare necessaries of life for himself and those dependent on him. In such cases, while the court will proceed with caution, if it be shown that the debtor took advantage of the distress of the creditor, or *vice versa*, and drove a harsh and inequitable bargain, using any undue pressure, equity will interpose its relief.

Sec. 153. Same subject—For illegality—Compounding a felony—Parties in pari delicto—Relief in equity, at law—Unequal guilt.—A compromise or other contract obtained from a person charged with a crime, or from another person for him, upon the agreement not to prosecute such person for such crime, is illegal and void on the ground that it interferes with the course of public justice, therefore against public policy.[1] You shall not make a trade of felony, is the principle of the law, and it is dictated by the highest consideration.[2] The contract is illegal whether the party is guilty or not, or whether a third party making the contract believed him innocent or guilty. At law money voluntarily paid in consideration of such an agreement cannot be recovered

may in like manner, so entirely overcome his free agency, as to justify the court in setting aside a contract, made by him on account of some oppression, or fraudulent advantage or imposition, attending it."

[1] Schultz v. Culberson, 46 Wis. 313, 1 N. W. 19. See Barrett v. Weber, 125 N. Y. 18.

[2] "If men were permitted to trade upon the knowledge of a crime, and to convert their privity to that crime into an action of advantage, no doubt a great legal and a great moral offense would be committed." Williams v. Bayley, L. R. 1 H. L. p. 200, per Lord Westbury; Heap v. Dunham, 95 Ill. 583.

back.[3] And a party may resist the enforcement of an agreement so made. The parties being *"in pari delicto"* the court leaves them where it finds them.[4] According to Mr. Story, in cases "where the agreements or other transactions are repudiated on account of their being against public policy, the circumstance, that the relief is asked by a party, who is *particeps criminis,* is not in equity material. The reason is that the public interest requires, that relief should be given, and is given to the public through the party."[5] And relief will be granted not only by setting aside the agreement or other transaction or cancelling security thus obtained;[6] but also, in many cases, by ordering a repayment of any money paid under it. The controlling motives for the interference of equity are those of public policy. Upon the same principle, if the contract is executory, it cannot be enforced by any kind of an action.

The foregoing rule is applicable where both parties are equally guilty. Mr. Story in a subsequent section says: "Where both parties are *in delicto,* concerning an illegal act, it does not always follow, that they stand *in pari delicto,* for there may be, and often are, very different degrees in their guilt. One party may act under circumstances of oppression, imposition, hardship, undue influence or great inequality of condition or age; so that his guilt may be far less in degree than that of his associates in the offense."[7] For illustrations of cases falling under this rule, reference is made to a former section treating of rescission for duress—cases where a party under arrest and charged with a crime, or threatened with arrest, settles and compromises a civil demand in order to obtain his liberty or to avoid the shame and disgrace

[3] Schultz v. Culberson, 46 Wis. 313, 1 N. W. 19.

[4] See 2 Pomeroy's Eq. 939.

[5] 1 Story Eq. 298. See also 2 Pomeroy's Eq. 941; Meech v. Lee, 46 N. W. (Mich.) 383.

[6] Meech v. Lee, 46 N. W. (Mich.) 383.

[7] 1 Story's Eq. 300. See also 2 Pomeroy's Eq. 942.

of an arrest and criminal trial; and, like cases where a father is coerced into paying money or otherwise settling a civil demand in order to save his son from a threatened prosecution upon an alleged criminal charge.[8] In such cases by reason of the duress the parties to the contract do not stand upon an equal footing; the party coerced is not a willing wrongdoer, but is wrongfully oppressed, a sufferer rather than a wrongdoer, and he may have his appropriate relief both in equity and at law; and whether the contract is executed or executory. To avoid a contract on the ground that it was given to compound a felony, it is necessary to show that there was an agreement or promise to forebear, or stifle the prosecution, or to suppress evidence necessary to prove it.[9] Accepting the costs and discontinuing a *qui tam* action, without any agreement not to bring a fresh action, is not unlawful. The voluntary discontinuance of a popular action is no offense.[10]

Sec. 154. Same subject—Gaming contract—Immoral consideration—Compromise when liability is both civil and criminal—Contracts violating the statute—By municipalities—In violation of revenue laws—Sunday contracts—Usury.—A compromise agreement of a betting or gaming contract cannot be enforced.[1] Contracts entered into with a view to future cohabitation and prostitution are illegal and void, but a settlement by way of reparation for past seduction and cohabitation is valid; for this is no more than a man ought, in honor and conscience, to do.[2] Past cohabitation alone is not sufficient to sustain a contract. It must be shown

[8] *Ante* Sec. 145, 147. See Barrett v. Weber, 125 N. Y. 18; Meech v. Lee, 46 N. W. (Mich.) 383.

[9] Barrett v. Weber, 125 N. Y. 18.

[10] Haskins v. Newcomb, 2 Johns. 405.

[1] Everingham v. Meighan, 55 Wis. 354 (Grain gaming contract).

[2] Comyn, on Cont. 60, citing Armandale v. Harris, 2 P. Wms. 432; Cray v. Rooke, Forrest, 153; Turner v. Vaughan, 2 Wils. 339; Gibson v. Dickie, 3 M. & S. 463.

that the promisor was the seducer.[3] Otherwise the parties are in *pari delicto*.[4] Prostitution being against morals and decency, an action cannot be maintained to enforce a contract leasing premises for that purpose; or for the board and lodging of a woman of the town, where the keeper of the house received part of the gains of the women in the house,[5] nor can any compromise of such claims be enforced. Where an offense is of such nature that the person injured may obtain either a civil or a criminal remedy, there is nothing unlawful in a compromise of criminal proceedings taken against the offender.[6] A compromise of an action for criminal conversation,[7] is not founded on an immoral consideration. A settlement of the damages arising from criminal libel is not objectionable, even though the complainant agrees not to prosecute, or to drop the prosecution.

Courts will not enforce contracts prohibited by statute, or declared illegal and void, or made contrary to a power expressly denied by law, and when the public interest demands it such contracts may be set aside, or the money paid thereon recovered. Thus where the officers of a municipality or other political subdivision, use public money in settling and compromising a supposed liability arising out of a contract or transaction expressly prohibit-

[3] Comyn on Cont. 60, citing 4 B. & A. 650.

[4] It has been held that equity would not enforce a verbal promise of a single man to settle an annuity on a married woman, with whom he had cohabited while she was separated from her husband. Comyn on Cont. 60, citing 1 Mod. R. 558.

[5] Comyn on Cont. 61.

[6] Where a party who is prosecuted criminally for an offense for which damages may be recovered, signs a letter of apology and authorizes the complainant to make such use of it as he might think necessary and the latter then allows a verdict of not guilty to be entered, it was held that the agreement giving the apology was not void as made under duress; that the compromise of the criminal proceedings was not unlawful, and that the complainant would not be restrained from publishing the apology. Fisher v. Appollinaris Co., 32 L. T., N. S. 628, 23 W. R. 460, 44 L. J. Ch. 500, 10 L. R. Ch. 297.

[7] Phillips v. Pullen, 50 N. J. L. 439, 14 Atl. 222.

ed, the money may be recovered back by the municipality.[8] A party dealing with a municipality is charged with notice of the extent of its powers, or that of its officers, and a payment to a person with knowledge in such cases does not amount to a voluntary payment; nor is there any ground for a compromise, or implied power to compromise, springing from necessity.[9] Such a contract is also void for the reason that a promise to pay for a past consideration, for which there is not and never has been any legal liability on the part of the promisor, does not make a binding contract at law.[10] A recovery cannot be had upon a compromise, or on an account stated, for liquor sold without a license.[11] The contract cannot be validated either by an express or implied promise. But where goods are sold on a Sunday in violation of a statute, a subsequent promise to pay for the goods, made on any day other than Sunday, is valid.[12] A compromise agreement together with any note or security given thereon, in settlement of a contract tainted with usury, is also infected with usury and is voidable or absolutely void according to the *lex loci contracti*,[13] and the debtor may resist performance of the agreement either at law or in equity. If only the interest or the illegal interest is forfeited, the defense will only go to that extent. In equity, as at law, if the usurer comes seeking to enforce the contract, the court will refuse any assistance and repudiate the contract, and, on the other hand, whether the contract is void or voidable, the general rule in equity is that relief will be afforded the debtor only upon payment of the sum *bona fide* due, deducting

[8] See Wadsworth v. Board, 115 N. Y. Supp. 8.

[9] Village v. Fish, 156 N. Y. 363, 86 Hun, 548.

[10] Frey v. Fond du Lac, 24 Wis. 204; Hooker v. Knab, 26 Wis. 511.

[11] Melchoir v. McCarthy, 31 Wis. 252.

[12] Melchoir v. McCarthy, 31 Wis. 252.

[13] See Jordan v. Humphrey, 31 Minn. 495, 18 N. W. 450; Osborn v. Fridrich, 114 S. W. (Mo. App.) 1014; Exley v. Berryhill, 31 Minn. 182, 33 N. W. 567; Cobe v. Gyer, 237 Ill. 568, 86 N. E. 1088.

the usurious interest.[14] But where the statute, as in New York, Minnesota and perhaps other states, requires courts of chancery to give affirmative relief, by a cancellation of the note or security and the like, it is not necessary for the debtor, either as plaintiff or as a defendant, as a condition of obtaining relief to pay any part of the loan.[15] Where the law declares a contract tainted with usury, or any contract based on the usurious contract, to be void, a mortgage given to secure a sum of money, consisting of one loan made prior thereto, which is usurious, and another which is free from usury, is void,[16] and under such circumstances for the same reason a compromise would be void. But that part of the debt not usurious would not be destroyed,[17] and a law requiring relief to be granted the debtor without paying any part of an usurious loan, will not prevent a court of equity from decreeing the payment of the loan not usurious as a condition of obtaining a cancellation of the security.[18] As a general rule after an usurious contract is executed, the transaction will not be opened up by a court of equity.[19] All other compromises or other contracts, whether the subject matter or the cause inducing the contract is *mala prohibita* or *mala in se,* are resolved by foregoing principles.

Sec. 155. Rescission for want of consideration—Failure—Inadequacy.—Want of consideration is a ground for avoiding a compromise. According to Pothier,[1] if upon the false supposition that I owe you a thousand pounds, left you by the will of my father which has been revoked by a codicil, whereof I am not apprised, I engage to give you a certain estate in discharge of the legacy,

[14] 1 Story's Eq. 301; 2 Pomeroy's Eq. 937.

[15] Williams v. Fitzhugh, 37 N. Y. 445; Scott v. Austin, 36 Minn. 460, 32 N. W. 864.

[16] Jackson v. Packard, 6 Wend. 415.

[17] Hammond v. Hopping, 13 Wend. 505.

[18] Williams v. Fitzhugh, 37 N. Y. 444.

[19] Adams v. McKenzie, 18 Ala. 698.

[1] Pothier's Ob. 42.

the contract is null, because the cause of the engagement, which was the acquittance of the debt, is false. The rule at common law is the same.[2] So a note or other contract given in compromise of the damages claimed for a breach of a contract void by the Statute of Frauds,[3] or void as against the law, or morality, or public policy, cannot be enforced. If the contract sought to be compromised is in law a mere nullity it can furnish no consideration for a new one. A compromise or release may be avoided for a failure of consideration.[4] Mere inadequacy of consideration is no ground for a rescission.[5]

By the civil law an inequality amounting to more than a moiety of a just price in ordinary contracts, and more than one fourth, in partition between co-heirs or co-proprietors, is sufficient ground for restitution, but at common law there are no fixed rules governing this. With respect to compromises the principles of the civil law are the same as at common law. Pothier says: "There are certain agreements, in which persons of full age are not entitled to restitution, be the inadequacy ever so considerable. Such are compromises according to the edict of Francis II, April 1560. These are agreements respecting pretensions upon which there are impending or expected litigation."[6] While at common law mere inadequacy of consideration is not admitted as a primary

[2] 1 Story's Eq. 245. See Knotts v. Preble, 50 Ill. 226, 99 Am. Dec. 514.

[3] Hooker v. Knob, 26 Wis. 511. The surrender, forbearance or assignment of a claim having no legal validity is not a sufficient consideration for a promise: Kidder v. Blake, 45 N. H. 530.

[4] In Peterson v. Reeves, 132 N. W. (Minn.) 204, upon a promise to fix a machine if the purchaser would release the seller from his liability for a breach of warranty, a release was executed reciting a consideration of one dollar; the machine was never fixed. It was held that the consideration failed. A debtor who assumes the payment of an insurance premium in settlement of his debt, is liable for the unearned premium returned to him upon a cancellation. To that extent he fails to pay: Stepheson v. Allison, 51 So. (Ala.) 622.

[5] 2 Pomeroy's Eq. Sec. 926; Lewis v. Donohue, 58 N. Y. S. 319, 27 Misc. R. 514; Schnell v. Nell, 17 Ind. 29, 79 Am. Dec. 453.

[6] 1 Pothier's Ob. 33.

objection to a contract, yet inadequacy may be very material evidence to taint a contract with fraud or oppression.[7] It has been said with respect to contracts in general that where the inadequacy is so gross that it shocks the conscience, and furnishes satisfactory and decisive evidence of fraud, it will be sufficient ground for canceling a contract whether executed or executory, but in such cases fraud, and not inadequacy of the consideration, is the true and only cause for granting equitable relief.[8]

Sec. 156. Avoidance of compromise by a creditor.—At common law a debtor may lawfully prefer one creditor over another, and a *bona fide* payment or compromise of a debt due one creditor is not a fraud upon other creditors, for the reason that it is not unlawful to pay debts. If not a *bona fide* transaction a creditor after he has obtained a judgment on his claim may ignore the payment by a levy on the property, or bring a bill in equity for relief, as the facts may warrant. If the debtor is a bankrupt and such settlement amounts to an unlawful preference and voidable under some bankrupt system, then the payment or compromise may be avoided in proceedings in bankruptcy or insolvency for the benefit of all the creditors.

[7] See Christianson v. Railway Co., 67 Minn. 94, 63 N. W. 640.

[8] 2 Pomeroy's Eq. 927. Lord Thurlow observed, that to set aside a conveyance there must be an inequality so strong, gross, and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it: Cwynne v. Heaton, 1 Bro. Ch. 9.

"But though courts of equity will not relieve against agreements merely on the ground of the consideration being inadequate, yet if there be such inadequacy as to show that the person did not understand the bargain he made, or was so oppressed that he was glad to make it, knowing its inadequacy, it will show a command over him which may amount to fraud: Heathcote v. Paignow, 2 Bro. Ch. 175, A." Where a woman who was sick, and her children were sick and her husband absent, and who needed money to buy medicine, was induced to settle a claim for personal injuries for a grossly inadequate sum, upon the misrepresentation that she would be brought "into disgrace and would get nothing in the end," it was held no bar to an action for the injury where she repudiated the agreement next day and returned the consideration: Stone v. Chicago, etc., Ry. Co., 33 N. W. (Mich.) 24.

BOOK THREE

COMPOSITION AT COMMON LAW

Sec. 157. Definition—Distinguished from payment, accord and satisfaction and compromise.

Sec. 158. Kinds of composition agreements—Assignments—Agreement for payment of *pro rata*—Letter of license—Deed of inspectorship.

Sec. 159. Form of the agreement—Writing under seal—By parole—Oral—Agreements affected by statute of frauds—Form of letter of license.

Sec. 160. Consideration—Mutual promises of creditors—Surrender of property.

Sec. 161. Other essentials to validity of agreement—Equality among creditors.

Sec. 162. Fraud and estoppel as ground for sustaining the contract.

Sec. 163. The agreement—Mutuality between debtor and creditors.

Sec. 164. Same subject—Mutuality between creditors.

Sec. 165. Same subject—Agreement, how executed—What amounts to an acceptance.

Sec. 166. Same subject—Stipulations.

Sec. 167. Same subject—The release.

Sec. 168. Same subject—Construction.

Sec. 169. Withdrawal from agreement by creditor.

Sec. 170. Parties—Necessary parties—Debtor—Stranger in debtor's behalf.

Sec. 171. Same subject—Creditors—Preferring a creditor—Failure to come in as a party within the time limited—Relief in equity.

Sec. 172. Same subject—Stipulation requiring certain creditors to join—Oral evidence inadmissible to vary stipulation—Effect of a failure to sign—Surety not bound if all do not sign.

Sec. 173. Same subject—Time when creditors may come in—Objection that some have not joined available to whom—Compelling lagging creditors to elect to come in or renounce.

Sec. 174. Same subject—Construction of stipulation as to who shall sign—Waiver of condition.

Sec. 175. Same subject—Partners as debtors, as creditors—Joint and several debtors—Joint creditors.

Sec. 176. Same subject—Negotiating composition through agent or attorney—Guardian—Personal representatives.

Sec. 177. Performance—Agreement must be strictly complied with.
Sec. 178. Same subject—Immaterial and unimportant variations—Mistake.
Sec. 179. Same subject—Tender of performance.
Sec. 180. Same subject—Formal tender excused—Waiver of formalities.
Sec. 181. Same subject—Strict performance excused—Waiver.
Sec. 182. Breach by debtor—Effect—Rights of the parties—Retaining partial payments—Remedies—Statute of limitation.
Sec. 183. Breach by creditor—Right of debtor—Of other creditors.
Sec. 184. Specific performance—Restraining threatened violation.
Sec. 185. Subsequent promise to pay residue of debt discharged by a composition.
Sec. 186. Composition effected by assignment.
Sec. 187. Duties of assignee—Rights of creditors.
Sec. 188. Same subject.
Sec. 189. Title to what property vests in assignee—Exempt property—Partnership property—After acquired property—Salary of public official—Title of assignee subject to equities.
Sec. 190. When non-assenting creditors may avoid the assignment.
Sec. 191. Same subject.
Sec. 192. Operation and effect of a composition—Binds parties and privies—Effect of composition with surety or indorser—Mistake as to liability—Recovery of overpayment—Effect on the rights of non-assenting creditors.
Sec. 193. Effect upon the liability of joint debtor.
Sec. 194. Effect upon the creditor's security; upon liability of a surety, indorser, drawer, guarantor.
Sec. 195. Same subject—Reserving right to hold security—Right of surety not affected—When discharged notwithstanding reservation by creditor.
Sec. 196. Effect upon debts.
Sec. 197. Debts included—Construction of agreement—Bill in equity to determine what claims are included—Parol evidence as to claims included or excluded inadmissible when.
Sec. 198. Same subject—Demands not due—Secured and unsecured claims—Judgment debts—Existing debts—Contingent liability—Demand of partner against firm—Debts subsequently contracted—Counter-claims.
Sec. 199. Same subject—Splitting demands—Withholding demands—Transferring demands after signing agreement.
Sec. 200. Surety for composition—Rights and liabilities.
Sec. 201. Fraudulent representations by debtor as to his affairs avoids the composition—Creditor as a decoy—Mistake of fact as ground for rescission—Equitable relief—Release vacated—Security reinstated.

Sec. 202. Secret preference fraudulent—Agreement unenforceable—An affirmative defence—When *res adjudicata.*
Sec. 203. Recovery of fraudulent preference by debtor, near relative, stranger—Recovery when agreement is not executed—When debtor is in default—When not recoverable—Relief in equity.
Sec. 204. Fraudulent preference—Illustrations—Evidence—Question for the jury.
Sec. 205. Effect of fraudulent preference upon liability of surety—Remedy at law, in equity.
Sec. 206. Fraudulent preference—Avoidance of composition by innocent creditor—Preference paid by stranger—Waiver of the fraud—Avoidance optional—Remedies—Rescission.
Sec. 207. Fraudulent preference—Creditor *particeps fraudis* cannot avoid the composition for fraud—Cannot enforce composition agreement nor recovery on original demand.
Sec. 208. Pleading a composition.
Sec. 209. Evidence.

Sec. 157. Definition—Distinguished from payment, accord and satisfaction, and compromise.—A composition at common law is an agreement between a debtor who is either insolvent and unable to pay all his debts in full, or is embarrassed so that he cannot meet his obligations according to agreement,[1] and two or more creditors, whereby the debtor agrees to pay or deliver to each contracting creditor, and they agree with him and among themselves, to accept in full satisfaction of their respective demands, a less sum determined upon a percentage basis or specified arbitrarily, or other thing different in quality or terms of performance from that required to be paid or delivered upon the original contract or by law. The definitions given in many of the books are inaccurate as applied to a composition at common law with creditors. To compound a debt is to abate a part, on receiving the residue,[2] or to discharge it upon different terms from those which were

1 Jolly v. Wallis (1801) 3 Esp. 228. Lord Kenyon: "It was not an assignment of all the parties' effects, which was an act of bankruptcy, it (the composition) was an arrangement which a man might enter into from the temporary pressure of his affairs, but would not make him a bankrupt."

2 Haskins v. Newcomb, 2 Johns. 405.

stipulated.[3] And a composition in its broadest sense, is a mutual agreement to terms or conditions for the settlement of a difference, or controversy; the adjustment of a debt, or avoidance of an obligation, by some form of compensation agreed on between the parties.[4] Hence, in this broad sense, it is a generic term, as it includes also an accord and satisfaction, and a compromise. The vice of the older definitions, as applied to the modern common law composition, lay in adopting the comprehensive meaning applicable strictly to the words "compound" and "composition."[5] The term composition with creditors is understood by the profession, in brief, to mean solely an agreement between an embarrassed debtor and two or more of his creditors, made for the purpose of securing to the creditors a part or all of the debtor's property or property furnished by another, and applying it *pro rata,* or otherwise as agreed, in discharge of their entire demands. Compositions have been termed private bankruptcies. They are entered into to avoid the necessity of resorting to the bankruptcy and insolvency laws for a discharge, and to effect a speedy and less expensive distribution of the failing debtor's property.[6]

The discharge arises from the execution of a new agreement, or its performance as may be agreed, and is distinguishable from

[3] Webster Dic.

[4] Webster Dic.

[5] Thus the definition: "A composition is an agreement between a creditor and debtor, that the creditor shall accept part of his debt in satisfaction of the whole debt," given by Mr. Montague, (Montague on Comp.) is not anything more than a definition of an accord. Mr. Bump's definition, "A strict composition agreement is an agreement whereby the creditors agree to accept a certain sum of money, or some other thing, at a certain time or times in full satisfaction and discharge of their respective debts" (Bump on Comp.) is much better; but it leaves some essentials to be supplied mentally. For other definitions, see Bouvier L. Dic.; Rapalje & L. L. Dic.; Continental Bank v. McGouch, 92 Wis. 286, 66 N. W. 607 (quoting from Black L. Dic.); Bayley v. Boyd, 75 Ind. 125; Wilson v. Samuels, 100 Cal. 514, 35 Pac. 148; Shinkle v. Sherman, 7 Ind. App. 399, 34 N. E. 838.

[6] See 2 Kent's Com. 390, N.

payment, in that the latter is a discharge under an original agreement, in whole or in part according to the amount paid. A composition is distinguishable from both an accord and satisfaction and a compromise, in this, that in the latter modes of discharging a demand, only one creditor or claimant is necessary, and in both, some new and additional consideration must pass and both must be executed in order to be binding; and with respect to a compromise, the demand must be unliquidated, doubtful or disputed, while a composition must have at least two contracting creditors between whom a separate express or implied agreement exists to accept what is offered and forego the pursuit of the debtor; and, as between the debtor and the creditors, no new consideration is essential, nor need the agreement be fully performed to be binding; and, unlike a compromise, the demand or demands are always for money due upon contract, or upon other demands liquidated or to be liquidated by some process. Like an accord and satisfaction a composition is a new agreement. It is a novation of the old contracts either when fully executed, or when performed as may be agreed.[7]

A composition is sometimes referred to as an accord and satisfaction, but a strict composition is never an accord and satisfaction for the reason among others that such an agreement always requires three parties. The validity of such an agreement does not depend upon the technical and strict rules which govern an accord and satisfaction, but upon principles of equity, which treat the violation of, or failure to execute such an agreement as a fraud, not only upon the debtor, but more especially upon the other creditors who have been lured into the agreement to relinquish their further demands, upon the supposition that the debtor

[7] Good v. Cheesman, 2 B. & A. 328: Lord Tenderden, C. J., said: "This is, in fact, a new agreement substituted in place of the original contract with the debtor, the consideration to each creditor being the engagement of the others not to press their individual claims." Brown v. Farnham, 48 Minn. 317, 51 N. W. 377; Chemical Bank v. Kohner, 85 N. Y. 189; Baxter v. Bell, 86 N. Y. 195.

would thereby be discharged of the remainder of his debts.[8] But, aside from the number of parties necessary to the validity of a composition agreement, as between the debtor and each creditor, it may have all the elements necessary to an accord and satisfaction, as where a debtor assigns his property to a trustee,[9] or gives security for a part of his debts, under an agreement with his creditors that it shall be received in full satisfaction of the entire demands. When performed, its effect upon the debts and the liability of the debtor, is equivalent to that of an accord and satisfaction.[10] A general or common agreement with several creditors whereby they agree to accept the proceeds of certain property in satisfaction of their demands is not necessarily a composition; if it has the elements of a compromise, as where it is made to avoid litigation and in settlement and adjustment of disputed or doubtful claims and provides for the liquidation of them, it is a compromise.[11] The common agreement is nothing more than an individual agreement with each creditor. If the agreement as to one creditor, has all the elements of a compromise, it will be as to him, upheld as a compromise.[12]

Sec. 158. Kinds of composition agreements—Assignments—Agreement for payment of a pro rata—Letter of license—Deed of inspectorship.—There are several methods by which a composition or amicable arrangement between an embarrassed debtor and his creditors is arrived at and the debtor released without resorting to the bankruptcy or insolvency statutes.[1] The two meth-

[8] Mellen v. Goldsmith, 47 Wis. 573.

[9] Watkinson v. Ingoldsby, 5 Johns. 386.

[10] Therasson v. Peterson, 2 Keyes, 636, 4 Abb. Dec. 396.

[11] Continental Bank v. McGeoch, 92 Wis. 286, 66 N. W. 606.

[12] Graham v. Mayer, 99 N. Y. 611.

[1] For form of composition agreements see: Appendix: also Melhop v. Tathwell, 74 Iowa, 571, 38 N. W. 420; Boothby v. Sowden, 3 Camp. 175; Steinman v. Magnus, 11 East, 390.

ods most commonly used are: First: By an assignment by a debtor of his property and effects to an assignee, usually one of the creditors, or other person selected by the creditors, or agreeable to them, in trust to be disposed of and the proceeds, after deducting the expenses of the trusteeship, distributed *pro rata* among all the creditors who originally agreed to the arrangement or who afterwards agreed or accepted the benefits.[2] The agreement may provide for the payment of a certain per cent. on the dollar and the residue returned to the debtor.[3] In such cases the debtor is usually immediately discharged from his liability from the residue of the debts. Second: By an agreement whereby the creditors agree to receive from the debtor, or from another person in his behalf, in discharge of their demands, a certain equal percentage of all their demands, or an unequal percentage,[4] or sums otherwise mutually determined upon, payable either at once or at a future time, in a lump sum or by installments, and with or without security. If the payments are postponed, the agreement may provide for an immediate discharge of the debtor, or defer it until performance.[5] Another and less fre-

[2] Whitmore v. Turquard, 3 De G., F. & J. 107, 30 L. J., Ch. 335, 7 Jur., N. S. 377, 9 W. R. 488, 4 L. T., N. S. 38; Lanes v. Squyres, 45 Tex. 382; Dauchy v. Goodrich, 20 Vt. 127.

[3] (1788) Cockshott v. Bennett, 2 T. R. 763; (1794) Frize v. Randall, 1 Esp. 224; (1794) Butler v. Rhodes, 1 Esp. 236; Grundy v. Johnston, 28 Ont. 147.

[4] See Eastabrook v. Scott, 3 Ves. 456.

[5] Stock v. Mawson, 1798, 1 Bos. & Pull. (o. s.) 286; Jolly v. Wallis, 1801, 3 Esp. 228; Leicester v. Rose, 1803, 4 East, 372; Ex parte Sadler, 1808, 15 Ves. 52.

In Steinman v. Magnus, 1809, 11 East, 390, the discharge was postponed until performance. The agreement is as follows: "We the undersigned, being respectively creditors of Moses Magnus, do hereby agree for ourselves respectively to take and accept 20 l. per cent. in full payment and satisfaction for our several and respective debts due at the date hereof; and upon payment of the said 20 l. per cent. we hereby release and forever discharge the said M. Magnus forever as to the remaining 80 l. And it is hereby agreed to receive the said 20 l. per cent. in manner following; viz. 10 l. per cent. within one month after the execution of these presents; 5 l. per cent. secured

quently used method to avoid bankruptcy proceedings, is by letter of license; which is an agreement between creditors and their debtor, whereby the creditors agree to suspend or not press their claims for a specified time and during which he may carry on his business at his own discretion.[6] The agreement itself postpones payment until the expiration of the term by taking away the remedy on the original cause of action. It is a new agreement based upon a valuable consideration and may be pleaded in bar.[7] In some cases the agreement provides for partial payments, with a proviso that a default in payment of any installment shall work an avoidance. It has been held that a mere agreement between creditors and with their debtor to forbear enforcing their respective demands for a limited time, whereby they are to be paid the whole of their demands at the end of the period is but a covenant not to sue for a limited time and unenforceable.[8] The distinction between a letter of license standing alone and an ordinary covenant not to sue for a limited time, entered into jointly by creditors

by the acceptance of Mr. Garland, payable in five months; and the remaining 5 l. per cent. on the like acceptance, payable in nine months. Dated this 11th of November, 1806."

[6] Bump on Comp. 1; Bouvier L. Dict.; Rapalje & L. L. Dict.; Mooney v. Bossom, 2 Nova Scotia, 254; Field v. Donoughmore, 1 Dr. & War. 227; Gibbons v. Vouillion, 8 C. B. 487, 7 D. & L. 266, 14 Jur. 66. Agreements to forbear, see Pitts v. Commercial Bank, 121 Ill. 582, 13 N. E. 156; Henry v. Patterson, 57 Pa. St. 346.

[7] (1812) Boothby v. Sowden, 3 Camp. 175; Good v. Cheesman, 2 Barn. & Ad. 328.

[8] See Pitts v. Commercial Bank, 121 Ill. 582, 13 N. E. 156; Henry v. Patterson, 57 Pa. St. 346. See Garnier v. Papin, 30 Mo. 243, when it is held that such an agreement was but a covenant not to sue for a time and was not a bar to an action on the original demand. In O'Brien v. Osborn, 10 Hare, 92, 16 Jur. 960, it was held that such an agreement did not discharge the original debt nor release the debtor's estate. In this case the license was granted in consideration of certain property being assigned for the benefit of creditors. See Pitts v. Commercial Bank, 121 Ill. 582, 13 N. E. 156. In Montgomery Bank v. Buggy Co., 100 Ala. 626, such an agreement was held binding.

with their debtor, is not clear, if, indeed, there is any. However, a letter of license ought to be under seal and contain a clause that if a creditor during the continuance of the license, molest or interfere with debtor or his property the deed may be pleaded in bar.[9]

Still another method of effecting a composition, apparently no more frequently used than a letter of license, is by deed of inspectorship. It is nothing more, in effect, than a letter of license with a proviso that the business shall be carried on under the inspection and control of persons nominated by the creditors, who are called "inspectors," [10] and whose duty is to see that the business is managed and the property disposed of to the best interest of the creditors. This method differs from an assignment for the benefit of creditors, in that the debtor continues his business, but under a supervisory control by the inspector or inspectors, who usually though not necessarily, receives and pays out the funds, but has no power to take the management of the business out of the debtor's hands.[11] This agreement is usually resorted to where the debtor has ample property and is merely temporarily embarrassed. Payment in full is contemplated, though the creditors may agree to accept less.[12] It is a new agreement and may be pleaded in bar of an action on the old demand brought in violation of the agreement.[13] A provision is

[9] Gibbons v. Vouillion, 8 C. B. 483, 7 D. & L. 266, 14 Jur. 66, 19 L. J., C. P. 74; Walker v. Nevill, 3 H. & C. 403; Henry v. Patterson, 57 Pa. St. 346.

An agreement for an extension of time based upon a new consideration, as where the debtor abandons bankruptcy proceedings in consideration of being granted an indulgence as to time, is not a composition, but merely the substitution of a new contract based in part on a new consideration passing from the debtor to the creditors: See Loomis v. Wainwright, 21 Vt. 520; Town v. Rublee, 51 Vt. 62.

[10] Rapalje L. Dict.

[11] See Redpath v. Wigg, 35 L. J., Exch. 211, 1 L. R., Exch. 335, 14 W. R. 866, 14 L. T., N. S. 764; Steel v. Low, 2 F. & F. 772.

[12] For a form of a deed of inspectorship, see Appendix.

[13] Gibbons v. Vouillion, 8 C. B. 483, 7 D. & L. 266, 14 Jr. 66, 19 L. J., C. P. 74.

sometimes inserted that creditors violating the license by suing on their claims, or levying on the property shall forfeit their debts. But a mere agreement not to sue on their debts, and that, if they do, the agreement may be pleaded in bar of the action or other proceedings, does not work a forfeiture of the debt of a creditor who sues, nor affect their right to the dividends.[14]

Sec. 159. Form of agreement—Writing under seal—By parol—Oral—Agreement affected by statute of frauds—Form of letter of license.—Formerly a composition was by deed and valid only in equity;[1] that is the residue of the debt was still recoverable at law, and the debtor was compelled to resort to the chancery court to restrain a creditor from proceeding at law to collect it contrary to his agreement. But as early as 1788, or perhaps earlier, the debtor was permitted to have the benefit of a composition as a defence in an action at law;[2] but it was still required to be by deed or other writing under seal. The old doctrine was gradually changed so that now it is firmly established that no particular form is essential, and when otherwise valid, it need not necessarily be in writing under seal, but may be by parol, or oral.[3] All that is required to make it binding is the mutuality of contract between the creditors, and the debtor and

[14] Ellis v. McHenry, 6 L. R., C. P. 228, 40 L. J., C. P. 109, 19 W. R. 203, 23 L. T., N. S. 861.

[1] See 2 Kent's Com. 380, N.

[2] Cockshott v. Bennett, 2 T. R. 763. Lord Kenyon, C. J., said: "In determining this case, I wish to disclaim founding my opinion upon the grounds of equity as distinguished from grounds at law."

[3] Fellows v. Stevens, 24 Wend. 294; Steinman v. Magnus, 11 East, 390, 2 Camp. 124; Boothby v. Sowden, 3 Camp. 175; Bradley v. Gregory, 2 Camp. 383; Norman v. Thompson, 4 Exch. 755 (oral); Anstey v. Marden, 1 Bos. & Pul. 124 (oral); Gardner v. Lewis, 7 Gill, 377 (oral); Wittkowsky v. Baruch, 126 N. C. 747, 36 S. E. 156; Mullen v. Goldsmith, 47 Wis. 573, 3 N. W. 592, 32 Am. Rep 781 (oral); Continental Bank v. McGeoch, 92 Wis. 286, 66 N. W. 606; Johnson v. Parker, 34 Wis. 598; Pierce v. Jones, 8 S. C. 273, 28 Am. Rep. 288; Tutt v. Price, 7 Mo. App. 194; Paddleford v. Thatcher, 48 Vt. 574; *Contra*—Acker v. Phœnix, 4 Paige, 305.

creditors, and a concession be made to an embarrassed debtor.[4] The agreement is sometimes based upon a simple meeting and resolution of the creditors.[5] Cowen, J., although not deciding it, said that to affect debts due by specialty, the composition agreement would perhaps require a seal, on the principle *eodem modo quo oritur, eodem modo dissolvitur*.[6] But in a later case it was observed by the court, though not necessary to the decision, that a composition in such case was operative without a seal.[7] And we think the latter, upon principle, is the better and the true rule, as a composition is founded upon a valuable consideration. It would be upheld on the ground of estoppel, for a creditor who had agreed orally with several other creditors to accept a composition, would not be permitted to ignore the agreement and obtain an advantage, solely on the ground that his demand was evidenced by a sealed instrument. If by the composition agreement an interest in land is to pass to a trustee,[8] or a surety undertakes to guarantee the payment of the composition money, the agreement must be in writing;[9] for such contracts are within the statute of frauds. So, if the agreement concerns the doing of any other thing which by the statute of frauds must be in writing, it must be in writing and signed by the party to be bound.[10] A verbal agreement by a third party with creditors, to pay them a certain per cent., in satisfaction of their debts and take an assignment of them, is not within the statute, not being a collateral

4 Crawford v. Kruèger, 201 Pa. St. 348, 50 Atl. 391.

5 Boothby v. Sowden, 3 Camp. 175; Cranley v. Hillary, 2 Maule & S. 120; Fellows v. Stevens, 24 Wend. 294.

6 (1840) Fellows v. Stevens, 24 Wend. 294.

7 Van Bokkelen v. Taylor, 62 N. Y. 105. See Lowe v. Eginton, 7 Price, 604.

8 Alchin v. Hopkins, 1 Bing. N. S. 99, 4 M. & S. 615.

9 Bump on Comp. 14, citing Emmet v. Dewhirst, 3 Mac. & G. 587, 15 Jur. 1115, 21 L. J. Ch. 497; Williams v. Mostyn, 33 L. J. Ch. 54.

10 See Brunskill v. Metcalf, 2 W. C. P. 431.

promise to pay the debt of another, but an original contract to purchase the debts.[11]

The authorities do not seem to be entirely in harmony as to the form of a letter of license to make it binding, on account of the analogy to a gratuitous promise of a single creditor to his debtor to extend the time of payment. When they first came in vogue and before the courts established the doctrine that the mutual promises of the creditors was a sufficient consideration to uphold a composition they were required to be by deed or other writing under seal. And it has been held by a few comparatively modern authorities that a letter of license not under seal nor supported by any new consideration was nothing more than an extension of time and not binding on the creditors.[12] These authorities cannot be reconciled with the rule as to the mutual agreements of the creditors constituting a valid consideration. Such an agreement lying in parol has been upheld.[13] In a case where negotiations were set on foot for a composition by a debtor calling a meeting of his creditors, and when they were assembled they mutually agreed orally that no legal proceedings should be instituted against the debtor for five days, and one creditor forthwith violated the agreement by a seizure of property, it was held to be a fraud upon both the debtor and creditors.[14] Whatever

[11] Anstey v. Marden, 1 Bos. & P. N. R. 124, 2 Smith, 426.

[12] See Henry v. Patterson, 57 Pa. St. 346; Pitts v. Commercial Bank, 121 Ill. 582, 13 N. E. 156. In this case the question arose upon a demurrer to the plea. The agreement set out, in terms and object sought, cannot be distinguished from an ordinary letter of license, except that it does not appear to have been under seal. See, also, Garnier v. Papin, 30 Mo. 243.

[13] Boothby v. Sowden, 3 Campb. 175: "We, the undersigned creditors of Robert Sowden of Exeter, do hereby agree to grant him three, six, nine, and twelve months on the amount of our respective demands, and to take his notes payable in London for the said amounts, provided the rest of the creditors will do the same, 14 Feb. 1811." Lord Ellenborough said: "There was a sufficient consideration for each of the creditors entering into this agreement, that it was subscribed by all the others."

[14] Gardner v. Lewis, 7 Gill, 377.

method is adopted in effecting a composition, it ought to be in writing. Owing to the numerous conditions and reservations usual to such agreements, prudence and sound business principles dictate that everything be set down in certainty. To do the whole by parol, as has been observed, would be exceedingly loose, and often unavailing for want of adequate proof.

Sec. 160. Consideration—Mutual promises of creditors—Surrender of property.—It is a settled rule that a payment of a part of a liquidated and ascertained debt is no satisfaction of the whole debt, for the reason that as respects the part not paid, the agreement of the creditor to receive the partial payment in satisfaction of the whole debt is without consideration and therefore a *nudum pactum*. It has been often stated in general terms that there is an exception to this rule, where the partial payment is made in compliance with an agreement between the debtor and his creditors for a composition.[1] This would be true only if the contractual relations of the debtor and creditors be considered. But to stop there is to base an exception on the same facts upholding the rule. A debtor being already under obligation to each creditor to discharge his debt in full, a new promise to all to pay to each a part in full satisfaction of their debts respectively, and its performance and acceptance as satisfaction, standing alone confers no new benefits on the creditors either severally or collectively. The mutual promise, therefore, between the debtor and each creditor or creditors, though essential to a composition furnishes no consideration. Nor does the payment of a part of the debt. Aside from the advantage to each creditor in stopping the pursuit by all the other creditors of the debtor, and the abandonment by the debtor of his right to prefer one creditor over another, there must be an actual pecuniary benefit pass to

[1] Sage v. Valentine, 23 Minn. 102; Newell v. Higgins, 55 Minn. 82, 56 N. W. 577; Baxter v. Bell, 86 N. Y. 195; White v. Kuntz, 107 N. Y. 518, 1 Am. St. Rep. 886, 14 N. E. 423. See Wheeler v. Wheeler, 11 Vt. 60.

the creditors. Although a payment of a part of a debt, like the mutual promise referred to, furnishes no consideration to uphold a composition, yet it is absolutely essential that something be paid, for to abandon the whole cannot, in any grammatical or common use of the word, be said or considered to be a composition with a debtor.[2] The benefit may consist in a distributive share of the debtor's entire estate, or of certain specified property, or a definite sum in money, or a new promise to pay a certain sum, secured or unsecured.[3] It is not essential to a composition agreement that the creditors receive less than their full debts. A concession may be made in other ways, as where they consent to an assignment of the debtor's property for their benefit. In such cases the creditors assume a risk. They may receive all that is due them and they may realize considerably less.[4] So, a composition is valid if it provides for payment in full, as where it is made payable in installments.[5]

A composition agreement is upheld by a consideration peculiar to itself. On principle and authority, even of the cases in which it is declared that a composition is an exception to the rule that a part payment will not discharge the whole debt, the real consideration for the relinquishment of the residue of their debts is a new and additional consideration, and is to be found in the mutual agreement between the creditors, whereby each in consideration of the promise of the others binds himself not to molest the debtor, and the benefits or possibility of benefits thereunder. Such an agreement, and the question of the consideration necessary to support it, seems first to have engaged the attention of the courts

[2] Haskins v. Newcomb, 2 Johns. 405. See Wilson v. Samuels, 100 Cal. 514, 35 Pac. 148.

[3] See Henry v. Patterson, 57 Pa. St. 346.

[4] Union Bank v. Rogan, 13 New South Wales, 285. See The Queen v. Cooban, 18 Q. B. D. 269.

[5] Boothby v. Sowden, 3 Camp. 175; Abel v. Allemannia Bank, 79 Minn. 419, 82 N. W. 680.

in England, in 1787; and it arose in an action on the original demand, on a demurrer to a plea setting out a composition by parol; the demurrer was sustained mainly on the ground that the plea did not show that a fund had been provided for the payment, and that the creditors had agreed to forbear.[6] So the doctrine was left unsettled. Before this period, compositions, as appears from an examination of Blackstone's Commentories and the works of other early writers, seems to have been a matter regulated exclusively under the bankruptcy acts. After 1787 conventional compositions by deed were recognized as binding agreements,[7] but the consideration for the release of the residue of the debts was that implied from the deed being under seal and containing

[6] Heathcote v. Crookshanks, 2 T. R. 24 (1787) is said by Bump to be the first case in which the question arose. It is the first case, and oldest cited by Montague in his small volume on this subject, published in London in 1823. The question arose upon a demurrer to a plea setting up a composition agreement, in an action on the original claim. Buller, J., said: "The question in this case is, whether there is any consideration for the promise as stated in the plea. It has been said by defendant's counsel, that in effect by this agreement the debt was ascertained, a fund was provided for the payment of it, and all the creditors were bound to forbear. If the fact had been so, that might have been a good plea; but the reverse appears by defendant's plea. For first the debt is not ascertained by the agreement; it is only averred that it amounts to so much, nor is any time specified for the payment of it. Secondly, no fund is appropriated for the payment of the debt. Thirdly, it was said, that all the creditors were bound by this agreement to forbear: but that is not stated by the plea. It is only alleged that they agreed to take a certain proportion; but that is a *nudum pactum* unless they had afterwards accepted it." Judgment went for plaintiff.

[7] (1788) Cockshott v. Bennett, 2 T. R. 763; (1794) Butler v. Rhodes, 1 Esp. 236. In Cooling v. Noyes (1795) 6 T. R. 263, such an agreement was before the court, but Lord Kenyon refused to discuss the case of Heathcote v. Crookshanks, because the case under consideration was distinguishable, as the payment had been made under the agreement. The agreement was held not binding on the plaintiff on the ground that he was induced to sign the agreement by representations that all the creditors would sign, which was untrue. The court said: "It was his intention to make the defendant a free man by the composition: that was his inducement to agree to accept a part instead of the whole of his debt; but his purpose is not answered, if other demands still remain unsatisfied." This was an executed agreement. The court made

a relinquishment or technical release.[8] In New York as late as 1834, it was held that a composition to be valid must be in writing, and also under seal which imports a consideration.[9] In England, it appears that as early as 1812, parol compositions were upheld.[10] But the law has progressed, so that now, everywhere, it is held that the mutual engagement of the creditors to accept a composition on their debts, is the consideration for the giving up, by each, of his claim for the residue.[11] It is a valuable consider-

no mention of the fact that the composition was by deed. See Easterbrook v. Scott (1797) 3 Ves. 456, where the question was whether a party who had withheld a part of his claim could afterwards recover the part withheld. The trust not being fully executed the defendant was restrained temporarily from enforcing the judgment obtained at law for the balance. The court reserved the question, whether, after it was shown there was sufficient to pay the composition, the creditor could recover. (1801) Jolly v. Wallis, 3 Esp. 228; (a party accepting the payment without signing the deed, held bound); (1002) Ex parte Gifford, 6 Ves. 805; (1803) Leicester v. Rose, 4 East, 372.

[8] (1798) Stock v. Mawson, 1 Bos. & Pull. (O. S.) 286. Eyre Ch. J., said: "The creditor has thought fit to accept 8s. in the pound in lieu of 20s., and though this could not be pleaded on a parol agreement, yet on a deed it may, and the discharge is as effectual as if 20s. in money had been paid." Buller, J., in the same case said he did not know if such an agreement by parol could be pleaded or not, but admitted that there may be circumstances under which such an agreement might not only be fair but advantageous. See, also, Fitch v. Sutton, (1804) 5 East, 230. Co. Litt. 212. But if the obligee or feoffee doe at the day receive part, and thereof make an acquittance under his seal, in full satisfaction of the whole, it is sufficient, by reason the deed amounteth to an acquittance of the whole.

[9] Acker v. Phœnix, 4 Paige Ch. 305.

[10] Boothby v. Sowdan, (1812) 3 Camp. 175. See Steinman v. Magnus, (1809) 11 East, 390, when the agreement was upheld on the ground that by the agreement a surety was lured in.

[11] Sage v. Valentine, 23 Minn. 102; Brown v. Farnham, 48 Minn. 317, 51 N. W. 377; Murchie v. McIntyre, 40 Minn. 331, 42 N. W. 348; Newell v. Higgins, 55 Minn. 82, 56 N. W. 577; Hearn v. Kiehl, 38 Pa. St. 147, 80 Am. Dec. 472; Laird v. Campbell, 92 Pa. St. 470; Montgomery Bank v. Buggy Co., 100 Ala. 626, 13 So. 621; National T. R. Co. v. Feypel, 93 Ill. App. 170; Robert v. Barnum, 80 Ky. 28; Stewart v. Langston, 103 Ga. 290, 30 S. E. 35; Mullin v. Martin, 23 Mo. App. 537; White v. Kuntz, 107 N. Y. 518, 12 N. Y. St.

ation; "Each creditor has a right to be paid in full when his debt matures, and a chance of being paid more than the others if he presses the debtor." [12]

The mutual agreement not to press their individual claims and to accept a *pro rata* distribution of their debtor's property, or such a division as may be agreed upon, saves the expense and trouble incident to a race of diligence by them to gain advantages; places each creditor on an equality by extinguishing their cause of action on the original claim, and deprives the debtor of the right to prefer one creditor over another. Each exchanges a right to pursue their individual remedies for the recovery of an uncertain amount from the failing debtor's property, for the certainty of receiving a definite amount or at least an equal amount *pro rata* with other creditors. Where a less sum in money, merely, is paid by the debtor to each of his creditors, it cannot be said that the debtor furnishes any consideration whatever, unless possibly the surrender of a right to prefer one creditor over another is a surrender of a valuable right; but, however, it is said that the debtor is entitled to avail himself of the consideration passing between the creditors,[13] and enforce the agreement. If this were not so, there would be a lack of mutuality and the creditors' arrangement between themselves would be of no benefit. If there is a *cessio bonorum,* "a surrender of effects," as where a debtor under an

297, 1 Am. St. Rep. 886, 14 N. E. 423; Baxter v. Bell, 86 N. Y. 195; Farrington v. Hodgdon, 119 Mass. 453; Perkins v. Lockwood, 100 Mass. 249, 1 Am. Rep. 103; Pierson v. McCahill, 21 Cal. 122; Wilson v. Samuels, 100 Cal. 514, 35 Pac. 148; Schroeder v. Pissis, 128 Cal. 209, 60 Pac. 758; Devon v. Ham, 17 Ind. 472; Bartlett v. Woodworth Co., 69 N. H. 316, 41 Atl. 264; Daniels v. Hatch, 21 N. J. L. 391, 47 Am. Dec. 169; Paddeford v. Thatcher, 48 Vt. 574; Zell Co. v. Emry, 13 N. C. 85, 18 S. E. 89; Continental Bank v. McGeoch, 92 Wis. 286, 66 N. W. 606; Hawley v. Beverly, 6 M. & G. 221, 46 E. C. L. 221; Good v. Cheesman, 2 B. & Ad. 328, 22 E. C. L. 142, 4 C. & P. 513; Boothbey v. Sowden, 3 Campb. 175; Norman v. Thompson, 4 Exch. 755; Bump on Comp. 2. Montague on Comp. 8. Bishop on Insol. 591.

[12] Bump on Comp. 2.

[13] Brown v. Farnham, 48 Minn. 317.

agreement with his creditors assigns his goods and chattels, or any property other than money, there is an extrinsic consideration, passing from the debtor, for he does something which he was not under obligation to do.[14] The mutual promises of the creditors furnish the consideration to uphold a letter of license or agreements among creditors and their debtor to give him additional time,[15] and deeds of inspectorship.

Sec. 161. Other essentials to the validity of the agreement—Equality among creditors.—To constitute a binding composition agreement, the debtor must be either insolvent or in embarrassed circumstances.[1] A debtor is embarrassed when his debts are due and he has not the money with which to pay them as agreed, although his property upon a forced sale might be sufficient to liquidate them in full. So, if his debts be not due, but it is reasonably certain that he cannot meet them as they mature without forcing a sale of his property at a sacrifice or winding up his business, he has a right to ease his financial condition and save what he can by compounding with his creditors. The business affairs of men are so various and intricate that each case must of necessity be governed by the surrounding facts and circumstances. No hard and fast rule can be formulated that would be applicable to all the cases. The embarrassment need not be real. It is sufficient if it be threatened and the debtor honestly believes he cannot extricate himself, and he does not conceal his true condition from his creditors. Any concealment or misrepresentation by the debtor of his resources or condition, by means of which the cred-

[14] Where a composition deed contained no release, or stipulation that the dividend was to be taken in full satisfaction, the court held that the satisfaction ought to be inferred, for the deed constituted a *cessio bonorum* ["a surrender of effects"]. Whitmore v. Turquand, 3 De G. F. & J. 107, 30 L. J., Ch. 335, 7 Jur., N. S. 377, 9 W. R. 488, 4 L. T., N. S. 38.

[15] Boothby v. Sowden, (1812) 3 Comp. 175.

[1] Crawford v. Krueger, 201 Pa. St. 348, 50 Atl. 931; Cutter v. Reynolds, 8 B. Mon. 596: Such embarrassment must be pleaded.

itors are induced to accept a composition, is a fraud upon the creditors and will avoid the agreement.[2] A composition agreement will be binding if the creditors, fearing a greater loss, negotiate an agreement for the payment of a specific sum less than their whole debt, even though their fears prove to have been groundless.[3]

One of the essentials to a valid composition agreement, is, that there shall be a rigid and strict equality among the creditors; not only with respect to a *pro rata* distribution of the composition fund, but with respect to security given, or any other advantage offered. Any deviation from the equality implied by the agreement vitiates the contract.[4] But a debtor may bring any or all of his creditors into the agreement upon different terms, so long as he negotiates the terms openly and all consent to abide the agreement.[5] The questions of the necessity of an actual benefit passing to the creditors;[6] of the mutuality between the debtor and the creditors,[7] and between the creditors,[8] and that of the good faith of the debtor,[9] are considered elsewhere.

[2] Sec. 201, *post.*

[3] Castleton v. Fanshaw, Pree. Ch. 99, 24 Eng. Rep. 48.

[4] Higgins v. Newell, 55 Minn. 82, 56 N. W. 577; Solinger v. Earl, 82 N. Y. 393, 60 Hon. Pr. 116; Babcock v. Dill, 43 Barb. 577; Danglish v. Tennent, 8 B. & S. 1, 36 L. J., Q. B. 10, 2 L. R., Q. B. 49, 15 W. R. 196; Knight v. Hunt, 5 Bing. 432; O'Shea v. Collier, 42 Mo. 397, 97 Am. Dec. 332; Hefter v. Cahn, 73 Ill. 296.

[5] Le Changeur v. Gravier, 2 Mart. N. S. (La.) 545.

[6] Sec. 160, *Ante.*

[7] Sec. 163.

[8] Sec. 164.

[9] Sec. 201.

Sec. 162. Fraud and estoppel as ground for sustaining contract.—Composition agreements are sustained on the ground of fraud and estoppel.[1] Each creditor enters into the arrangement, relying somewhat upon the judgment of the others, and forbears to institute suit relying upon the promise of the others to accept the composition and release their unfortunate debtor, otherwise a creditor with an advantage could be lured into the arrangement and shorn of the fruits of his diligence by an unscrupulous creditor. When they canvass the situation and agree to place themselves upon an equality and thus abandon their individual rights for the benefit of all, and relinquish their further demands, each has a right to expect and to demand good faith and fair dealing from all. Manifestly the balance of the creditors would sustain an injury if one was afterwards permitted to absorb the debtor's property by executions, or by independent negotiations with the debtor, and thus, perhaps, take away the means for the payment of any portion of the remaining debts. Such conduct is a fraud upon the common arrangement and for that reason each creditor to a composition agreement is estopped from asserting his individual claims.[2] The validity of such an agreement does not depend upon the technical and strict rules which govern accord and satisfaction, release and discharge, but upon principles of equity.[3]

[1] Daniels v. Hatch, 1 Zabriskie, 394, 47 Am. Dec. 169, citing Greenwood v. Lidbetter, 12 Price, 183; Wood v. Roberts, 2 Stark. 417; Cockshott v. Bennett, 2 T. R. 763; Steinman v. Magnus, 11 East, 390.

In Wood v. Roberts, 2 Stark. 417, where one creditor agreed to accept half of his debt in satisfaction of the whole if the plaintiff would accept the residue of the debtor's property and discharge him. The court said: "If the plaintiff had, by his undertaking to discharge the defendant, induced any other creditor to accept a composition and discharge the defendant from further liability, he could not afterwards enforce his claim, since it would be a fraud upon that creditor."

[2] Fellows v. Stevens, 24 Wend. 294; Wood v. Roberts, 2 Starkie R. 417; Bump on Comp. 6.

[3] Mellen v. Goldsmith, 47 Wis. 573, 3 N. W. 592.

The estoppel may be invoked by any creditor, a party to the arrangement, or by the debtor who is in privity with each.[4]

The doctrine of fraud and estoppel applies with greater force, in those cases where a debtor on faith of the agreement has surrendered his property, as it places him in a very awkward position;[5] and cases where a third person has been lured in to become a surety for any part of the debt, on the ground that the debtor will be thereby discharged of the residue of his debts.[6]

Sec. 163. The agreement—Mutuality between debtor and creditors.—There must be mutuality of agreement and of remedies between the debtor and the creditors, in order to constitute a binding composition. If the agreement be unilateral, purporting to bind only the debtor, it is not binding on either the debtor or the creditors, for the reason that to compound a debt upon a composition there must be a binding promise on the part of each creditor to forgive the residue of his debt on receiving a part, or to accept something different in satisfaction of the whole debt. Thus it has been held that a deed of assignment of property in trust, to sell for the payment of creditors, no creditors being parties, was not a composition deed, even though some creditors were paid under it.[1] There must be a proposition by the debtor which when accepted or acted upon by the creditors binds them and releases their debts, either *in præsenti* or presently upon performance. On the other hand an agreement among the creditors alone, to accept

[4] Bump on Comp. 6. See Brown v. Farnham, 48 Minn. 317, when it is said the debtor has a right to avail himself of the consideration passing between the creditors.

[5] Butler v. Rhodes, 1 Esp. 236, Peake, 238; Butleman v. Douglas, 1 Cranch C. Ct. 450.

[6] Steinman v. Magnus, 11 East, 390, 2 Camp. 124; Anstey v. Marden, 1 Bos. & P. N. R. 124; Clark v. Upton, 3 Man. & R. 89; Brown v. Stackpole, 9 N. H. 478.

[1] In re Waley, 3 Drew. 165, 3 Eq. R. 380, 1 Jur., N. S. 388, 24 L. J. Ch. 499; Gerrard v. Lauderdale, 2 Russ. & Mylne, 451.

something different or a less sum in satisfaction of their respective demands is not enforceable by the debtor.[2]

Such an arrangement, in order to become a composition, must be made with the intent that the debtor will accept it and he must actually become a party to it, otherwise it will lack the mutuality necessary to a composition. Where parties are dealing with a fresh subject matter, one may, for a consideration, bind himself by a unilateral contract, but owing to the existing obligations with respect to pre-existing debts, no arrangement by a debtor, or creditor, short of a full reciprocal agreement will constitute a composition. An agreement in the nature of a letter of license, which does not contain a covenant on the part of creditors that it may be pleaded in bar of an action brought by a creditor contrary to its terms, lacks mutuality of remedies, and cannot be pleaded in bar by the debtor, but the creditors among themselves, upon equitable grounds, are estopped from denying its validity, and may restrain one of their number from violating its terms.

Sec. 164. Same subject—Mutuality between creditors.—In addition to the reciprocal agreement between the debtor and his creditors, there must be a concert of action among the creditors.[1] The engagement of the other creditors to accept a composition on their debts is the consideration for the giving up, by each of his claim for the residue.[2] "Mutuality between the creditors, as respects the consideration, is, therefore, essential to the validity of an agreement for a composition. The creditors must 'join together.' They must stipulate one with another."[3] A promise

[2] Such agreements are sometimes expressed in terms "We the undersigned" creditors agree to accept fifty per cent. (or whatever may be agreed upon) in satisfaction of the amount due us: Webb v. Stewart, 59 Me. 356; Gilford v. Ware, 95 Me. 388, 50 Atl. 24.

[1] Bump on Comp. 9.

[2] Sec. 160.

[3] Sage v. Valentine, 23 Minn. 102; s. p. Newell v. Higgins, 55 Minn. 82, 56 N. W. 577; Brown v. Farnham, 55 Minn. 27, 56 N. W. 352; Perkins v.

to the debtor, alone, which is not acted upon by other creditors is without any valuable consideration and not binding.[4] The arrangement may be for the benefit of a certain class of creditors, or a certain number in names or amount,[5] and the burden is upon the one asserting it to prove that all the creditors for whose benefit the agreement was made, have mutually agreed one with the other.[6] It does not necessarily follow from the fact that the debtor has compounded his debts with all his creditors, that the arrangement is a binding composition. The debtor may think he can obtain better terms by negotiating separately and each creditor may prefer to rely upon his own judgment and efforts to secure favorable terms. If the debtor settles with each creditor separately there is a want of mutuality between the creditors, and to obtain his discharge from the residue of each of his debts the debtor must obtain a release, or furnish a consideration necessary to a valid accord and satisfaction.[7]

Lockwood, 100 Mass. 249, 1 Am. Rep. 103; Argall v. Cook, 43 Conn. 100; Gulford v. Ware, 95 Me. 388, 50 Atl. 24.

[4] Bump on Comp. 11, citing Lowe v. Eginton, 7 Price, 604. The question arose upon a demurrer to the plea—"He proposed to plaintiff and the rest of his creditors to execute a deed of composition, which was afterwards prepared and executed by the other creditors of the defendant; that it was *understood, arranged and agreed* between the defendant and the plaintiff that the plaintiff, as one of the creditors of the defendant, should, and would, execute the deed in common with the other creditors, and that defendant, confiding in such agreement, executed the deed, as did all the other creditors." The demurrer was sustained.

[5] See Fellows v. Stevens, 24 Wend. 294.

[6] Sage v. Valentine, 23 Minn. 102. In Fitch v. Sutton, 5 East, 230, the debtor had compounded with all the creditors, but merely took a receipt from each for the composition in full for the debt. There was no evidence in the case that they acted in concert. The receipt was held to be no defense to an action for the original debt.

[7] Bump on Comp. 9, citing Perkins v. Lockwood, 100 Mass. 249; Williams v. Carrington, 1 Hilt. 515; Cutter v. Reynolds, 8 B. Mon. 596; Daniels v. Hatch, 21 N. J. 391; Greenwood v. Lidbetter, 12 Price, 183; Sage v. Valentine, 23 Minn. 102.

In Lanes v. Squires, 45 Texas, 382, the debtor effected a composition at fifty per cent. The court said that it was not alleged the plaintiff agreed to accept

Sec. 165. Same subject—Agreement, how executed—What amounts to an acceptance.—The debtor sometimes calls a meeting of his creditors for the purpose of effecting a composition, but it is not essential that there be a meeting of the creditors or any number of them, or that a formal promise should be made by each to all to abide by the settlement.[1] A creditor,[2] or any one commissioned by any of them or by the debtor, or the debtor himself, may communicate the proposition to each creditor through the mail,[3] or go from one creditor to another and make an oral proposition for a compromise, and secure the promise of each to come into the arrangement;[4] or an agreement may be taken around to each for their signature.[5] In either case the creditors

the settlement offered, with the understanding that all the other creditors were to accept a like sum in discharge of their debts; that this is not proved by the allegation and proof that a like settlement was made with all the other creditors.

In Bliss v. Schwartz, 65 N. Y. 444, the plaintiff refused to join in the composition agreement and negotiated independently (and openly) for a settlement. The defendant was held liable for the balance of the original debt on the ground that there was no consideration to support the agreement to relinquish the residue. See Fitch v. Sutton, 5 East, 230.

[1] Johnson v. Parker, 34 Wis. 596; Cullingworth v. Lloyd, 2 Beavan, 385.

[2] Chemical Bank v. Kohner, 85 N. Y. 189. Where, after a debtor had conveyed his stock to a creditor on condition that the transferee pay other creditors their *pro rata* share of the property, a creditor's subsequent agreement made with the transferee, that after all other creditors had been paid fifty per cent., he would accept a similar amount, was held to be based upon the composition, and was, therefore, sustained by a sufficient consideration: Williams v. Gotzian, 130 Iowa, 710, 107 N. W. 807.

[3] Chemical Bank v. Kohner, 85 N. Y. 189.

[4] Where a creditor indorsed the amount of the composition on the debtor's note held by him, having stated to the debtor that he could exhibit the note to the other creditors, and thus induce them to believe it had been settled, and the debtor did represent that all were ready to accept the composition and induced other creditors to give up their notes, it was held that the creditor was bound by the agreement. Fawcett v. Gee, 3 Anst. 910.

[5] Johnson v. Parker. 34 Wis. 596; Leicester v. Rose, 4 East, 372; Bean v. Amsinck, 10 Blatchf. 361; Cullingworth v. Lloyd, 2 Beav. 385; Fawcett v. Gee, 3 Anst. 910.

act through the debtor[6] or the one commissioned to interview the creditors, as a sort of middle-man. From the nature of the transaction and the custom of dealing in such matters, each creditor from the first one to the last, who joins in such an agreement, is presumed to make the debtor, or other go-between, their agent and intend that he will communicate the terms of the arrangement and their promise to the others. A concert of action and common purpose among the creditors who are to become parties is all that is essential and it does not matter in what way it is brought about, so long as the same proposition is communicated to all and there is no fraud.[7] Some one of the creditors must of necessity be the first to give his assent to the arrangement and he does so on the faith that the others will join with him in the agreement. It is often said that he is bound because others act upon the faith of his agreement or signature. This, in a measure, is true as to each creditor excepting the last one to come in. But under the law the binding force of the obligation arises from the fact that each creditor, at the time he signs the agreement or otherwise gives his assent, enters into a contract with all those who have previously joined, and holds himself out as willing to enter into the same contract with those who may thereafter come in.[8] A creditor who is the last to sign cannot, therefore, escape from the obligation on the ground that no other creditor signed the agreement on the faith of his signature. The legal effect of separate and successive signing is the same as if all the parties were convened and the execution contemporaneous.[9]

Excepting when the Statute of Frauds requires it, it is not necessary that the agreement be in writing. If in writing it need not be in one instrument. Each creditor may execute a separate instrument. If by parol, each creditor may make a separate parol

[6] Johnson v. Parker, 34 Wis. 596.

[7] Leicester v. Rose, 4 East, 372.

[8] Bump on Comp. 12.

[9] Hall v. Merrill, 5 Bosw. 266, 9 Abb. 116.

agreement for the purpose of carrying into effect the compromise.[10] Where the instrument is in writing and it is intended that it shall be signed by all or a certain number of creditors, it is not binding on any until all those intended have signed. But this is true only where those holding out have not by a previous promise agreed to come in, or in any way lured other creditors into the agreement under the belief that they will accept of the composition; and then those signing are only bound by a sort of estoppel until it is demonstrated that the required number cannot be induced to sign. A subsequent promise by a creditor to sign a deed of assignment is without consideration, when the deed was executed for the benefit of all those creditors who should sign it within a certain time, although the promise was made within the time.[11] But if a creditor, among others, consents to accept a composition and assignment, and in consequence thereof the debtor and other creditors execute the deed, the creditor is bound by his agreement, although he refuses to execute the deed.[12] So, where the agreement

[10] Chemical Bank v. Kohner, 85 N. Y. 189.

[11] Battle v. Fobes, 2 Metc. 93, (21 Pick. 239). In Daniels v. Hatch, 1 Zabriskie, 391, 47 Am. Dec. 169, the court said it was not shown that the plaintiff became a party to the arrangement, but, if anything, only a promise to do so; that there was no pretense that any other creditor was induced to accept the compromise in consequence of the plaintiff's promise and that it was highly probable that both composition deed and the assignment were fully executed before the alleged promise.

[12] Butler v. Rhodes, 1 Esp. 236; Mellen v. Goldsmith, 47 Wis. 573, 3 N. W. 592, 32 Am. Rep. 781; Mansfield v. Rutland, 52 Vt. 444; Anstey v. Marden, 1 Bos. & Pul. 124; Norman v. Thompson, 4 Exch. 775.

In Bradley v. Gregory, 2 Campb. 383, the plaintiff attended a meeting of creditors where it was agreed by all present that if the debtor's statement was correct, they would accept of a composition and give him a release. A committee was appointed to inspect the debtor's books, and the meeting adjourned until next day. The plaintiff did not assist at the following meeting; but from the report then made by the committee, all creditors present consented to take a certain composition. Before the deed was drawn defendant's attorney waited upon the plaintiff to know if he would come in under arrangement. He promised to accept of the composition and execute the deed, but he afterwards refused a tender of the composition and to execute

expressly provides that it shall be void if not signed by certain creditors within a specified time, it will, nevertheless, be binding if those who were to sign it acted under it by accepting the composition money or notes.[13] A deed of assignment by a debtor of his effects to a trustee or trustees, even when it is to be executed by the creditors and trustees within a specified time, is binding on all assenting creditors although executed by only a part of the trustees within the time.[14] If a creditor approves of a trustee or trustees acting under the deed, as where the trustees take possession of the debtor's property with his approbation, he is bound by the agreement even though he, or any of the trustees, have executed the deed.[15] An agent or attorney cannot compound the debts of his principal without his authority,[16] but the assent of the principal may be duly given to a composition through an agent or attorney duly authorized. One partner may give the assent of the firm to a composition.[17] If the debtor is released *in præsenti,* without any obligation to be performed by him at some future time, he need not sign the agreement,[18] unless an interest in land is sought to be transferred.[19] If it contains a stipulation to be performed at some subsequent time, the debtor should sign it.[20] But this is not necessary unless required by the statute of frauds.

the deed. The action was on the original demand and the plaintiff was nonsuited.

13 Jolly v. Wallis, 3 Esp. 228; Fellows v. Stevens, 24 Wend. 294; Spottswood v. Stockdale, Geo. Coop. 102; Back v. Gooch, 4 Campb. 232. "As to the allegation, that some creditors had not signed the agreement, if a creditor acts upon the agreement, he is bound as much as if he had signed it." Ex parte Sadler, 15 Ves. 52.

14 Small v. Marwood, 4 M. & R. 181, 9 B. & C. 300.

15 Back v. Gooch, 4 Campb. 232.

16 Perrot v. Wells, 2 Vern. 127.

17 Sec. 175.

18 Townsend v. Newell, 22 How. Pr. 164; Eaton v. Lincoln, 13 Mass. 424.

19 Alchin v. Hopkins, 1 Bing. N. C. 99.

20 Le Page v. McCrea, 1 Wend. 164. An assignment for the benefit of creditors by a firm consisting of two partners, contained a proviso that it shall

Sec. 166. Same subject—Stipulations.—A creditor as a condition of his executing a composition agreement may insert therein any stipulation he may deem proper for his protection and if assented to by the debtor and the other creditors it becomes a part of the contract and performance must be according to its terms or the creditor will not be bound.[1] A creditor may reserve a right to retain any security he may have;[2] or his remedy against a surety, indorser,[3] or any joint debtor.[4] The fact that a stipulation with one creditor destroys the equality among the creditors does not affect the validity of the agreement, if the special terms are negotiated openly, and knowledge of the preference is brought home to the other creditors.[5] A proposed agreement may contain a requirement that it shall not take effect until all the creditors sign the agreement; or two thirds of the total business creditors,[6] or any number, or any particular class of creditors, or that each creditor must give his written assent, or that the creditors shall sign the agreement within a specified time, and the like, and the

inure to the benefit of such creditors as shall agree to look to each of the partners for only a moiety of such balance as shall remain unpaid after receiving the dividend, followed by a covenant to that effect by the creditors, was held not to have the effect of a severance of the partnership debt without the instrument being executed by the partners.

[1] Richardson v. Pierce, 119 Mass. 165; Garnier v. Papin, 30 Mo. 243; Magee v. Kast, 49 Cal. 141; Lewis v. Jones, 4 Barn. & Cress. 506, 6 D. & R. 567.

[2] Powles v. Hargreaves, 3 De G., M. & G. 430, 17 Jur. 1083, 23 L. J. Ch. 1; Stevens v. Stevens, 5 Exch. 366; Cullingworth v. Lloyd, 2 Beav. 385; North v. Wakefield, 13 Q. B. 536, 13 Jur. 731, 18 L. J. Q. B. 214.

[3] Close v. Close, 4 De G., M. & G. 176; Kearseley v. Cole, 16 M. & W. 128, 16 L. J. Exch. 115; Nichols v. Norris, 3 B. & Ad. 41; Richardson v. Pierce, 119 Mass. 165; Rockville Bank v. Holt, 58 Conn. 526, 20 Atl. 669, 18 Am. St. Rep. 293; Boatman's Bank v. Johnson, 24 Mo. App. 316; Wakefield v. Georgetown Bank, 19 Ky. L. Rep. 426, 40 S. W. 921.

[4] North v. Wakefield, 13 Q. B. 536, 13 Jur. 731, 18 L. J., Q. B. 214.

[5] Cullingworth v. Lloyd, 2 Beav. 385.

[6] Fellows v. Stevens, 24 Wend. 294.

agreement will not become effective until the stipulation is complied with.[7] But where the stipulation that all the creditors or all of a certain class of creditors shall sign the composition deed is solely a part of the debtor's covenant and not the creditors, it will be binding on all those creditors who sign.[8] A condition requiring certain creditors, or all the creditors to sign the agreement before it shall become effective, should be expressly declared, or clearly deducible from the terms used.[9]

If a creditor signs a composition agreement which does not contain a stipulation that it will be void if all the creditors do not sign, he will be bound by it, although at the time he is told that it will be void unless all sign it; for such a statement is merely a representation of the legal effect of the instrument.[10] The agreement may contain a stipulation that it shall be void unless the debtor continues to deal with the creditors for a limited time.[11] Any requirement of this nature is of course modified by the implied qualification that the goods furnished shall be marketable, and that the debtor shall receive the same treatment with respect to the price as is accorded other customers. The amount of the debts may be set out in the composition agreement or in an attached schedule, and leaving blank spaces for the amounts due will not affect the validity of the agreement.[12] The agreement

[7] See Sec. 172 as to what creditors shall sign and when.

[8] Chittenden v. Woodbury, 52 Vt. 562.

[9] In Renard v. Tuller, 4 Bosw. 107, the words "the undersigned, creditors of A. B." were held not to imply that all the creditors were to sign. Where the agreement contained the proviso "the whole of the creditors receiving not exceeding a like sum in discharge of their debts," it was held to apply to creditors who became parties and not to require all creditors to join: Carey v. Barrett, 4 C. P. D. 379. The words "the creditors of" were held to mean all creditors: Chase v. Bailey, 49 Vt. 71.

[10] Lewis v. Jones, 4 Barn. & Cress. 506.

[11] Thornton v. Scheratt, 8 Taunt. 523. In this case the time limited was twelve years.

[12] Wilson v. Samuels, 100 Cal. 514, 35 Pac. 148; Daniel v. Saunders, 2 Chit. 564; Hudson v. Revell, 5 Bing. 368, 2 M. & P. 663.

may provide for an investigation and allowance of the claims by a committee of creditors, or that the creditors present them in writing. It may also provide for a place of payment, or that all the money be paid to one creditor or any person for the others, or, where notes are to be given, that the creditors shall apply to the debtor for them.[18]

Sec. 167. Same subject—The release.—An agreement to constitute a composition with creditors must of necessity release and discharge the debtor from his liability to pay the residue, or, from the whole of the original claim, if something other than a part in money be paid. An acceptance by the creditors of a less sum than the original debt without an agreement to discharge the debtor, merely constitutes a payment *pro tanto*. A composition is one mode of discharging debts. The agreement, therefore, whether oral or in writing, must be conditioned that the money or other thing shall be received in satisfaction of the debts. It has been held that when the agreement was in writing, in absence of a provision for a discharge parol evidence is not admissible to vary its legal effect.[1] But a stipulation for a discharge need not necessarily be set out in express terms; it may be implied from the nature of the arrangement. Thus, where the creditors agreed to accept a certain per cent. of their debts, to be paid in a specified manner, it was held that the amount specified was to be received in full discharge of their debts.[2] A composition agreement need not contain a technical release, for the agreement itself, when its terms are complied with, operates to discharge the debts.[3] Since a creditor is bound by a verbal agreement to accept a composition

[18] Solomon v. Laverick, 17 L. T., N. S. 545.

[1] Pierson v. Cahil, 21 Cal. 122: If the release is omitted by mistake, there must be distinct allegations of the mistake for the purpose of a reformation; or separate proceedings for that purpose.

[2] Farrington v. Hodgdon, 119 Mass. 453.

[3] In Fellows v. Stevens, 24 Wend. 295, the court said: "The effect as a discharge is based not so much upon the sort of instruments or other acts

and discharge the debtor, although he may afterwards refuse to execute the deed;[4] a provision for the subsequent execution of a release is surplusage. The composition agreement will discharge the debts presently upon its performance, whether the performance is to be immediately or at a future time. Where the debtor pays over the amount agreed, or where there is "a surrender of effects,"[5] under an agreement merely that the debtor will assign his effects to a trustee, the proceeds of which are to be distributed among the creditors,[6] or when the debtor furnishes the note of a third party, or security, where the note or security is to be taken as payment there is an immediate discharge of the debts. If the discharge is not to take place until the composition notes are paid, or the debtor or his trustee accounts for his estate,[7] or performs a certain act,[8] or until a certain per cent. is realized from the property assigned,[9] there is not, of course, complete performance until the notes are paid or other thing done or the per cent. realized, and the release is conditional upon performance.[10]

What is to operate as a satisfaction of the debts, depends upon

by which they are effected, as upon there being an agreement upon sufficient consideration among the several parties, the debtor on the one side, his creditors on the other, and these latter among themselves."

[4] Butler v. Rhodes, 1 Esp. 236, Peak. 238.

[5] Whitmore v. Turquand, 3 De G., F. & J. 107, 30 L. J., Ch. 335, 7 Jur., N. S. 377, 9 W. R. 488, 4 L. T., N. S. 38.

[6] An agreement that the creditors will receive the dividends in satisfaction of their demands, and "will forever release" the debtor from all further claims, was construed as a present release: Tuckerman v. Newhall, 17 Mass. 581.

[7] Kesterton v. Sabery, 2 Chit. 541.

[8] Deacon v. Stodhart, 9 Car. & P. 685. In this case a deed was to be executed.

[9] Wiglesworth v. White, 1 Stark. 218.

[10] Ex parte Vere, 1 Rose, 281; Ex parte Richardson, 14 Ves. 86. An agreement to accept installments "in full satisfaction and payment of the several debts" was held not a present release: Leak v. Waller, 5 El. & Bl. 955.

the terms of the composition agreement.[11] The distinction between the execution of the composition agreement and its performance must be kept in mind. It is competent for the parties to discharge a debt presently by the mere execution of the agreement. The rule is that "an acceptance, in discharge of a debt, of an agreement, with mutual promises on which the creditor has a legal remedy for its non-performance, is a satisfaction of the debt, although such promises are not performed."[12] If, by the agreement, the debtor covenants to pay the composition money by installments, and the creditors release without any proviso that it shall be void if the installments are not paid, the original debts are discharged upon the execution of the agreement and the creditor's remedy in case of a breach is upon the new agreement.[13]

Sec. 168. Same subject—Construction.—Creditors have a several right to enforce their claims to the full amount, by any of the remedies provided by law. They have the sole right, on an appeal being made to them, to modify the original contract; and a composition, therefore, is purely an act of favor on their part and its provisions are strictly construed.[1] But every reasonable

[11] Stafford v. Bacon, 1 Hill, 533, 25 Wend. 584.

[12] Brown v. Farnham, 55 Minn. 27, 56 N. W. 352. In this case the debtors were to execute an assignment of certain property at a future time. The parties treated it as a discharge *in præsenti*. The court said it was competent for the parties to make such an agreement. S. P. Goodrich v. Stanley, 24 Conn. 613; Billings v. Vanderbeck, 23 Barb. 546; Good v. Cheesman, 2 Barn. & Ad. 328; Evans v. Powis, 1 Ex. 601.

[13] Ex parte Clark, 19 L. T., N. S. 327; Solomon v. Laverick, 17 L. T., N. S. 545; Lay v. Mottram, 19 C. B., N. S. 479. Ex parte Goodair, 1 Montagu's B. L. 222: A deed for the payment of a composition of 15 s. in the pound in three installments, contained a release. Before all the installments were paid a commission in bankruptcy was issued against the debtor. The creditor was not permitted to prove the balance due on the original debt, on the ground that the original debt was extinguished. In Ex parte Vere, Rose, 281, the release was contingent upon payment, and the creditors were allowed to prove the balance of their original debts, in insolvency proceedings.

[1] Smythe v. Graydon, 29 How. Pr. 11; Hill v. Wertheimer, 150 Mo. 483, 51 S. W. 702.

intendment will be indulged in by a court to carry out the intention of the parties. Conditions and terms will not be implied for the purpose of defeating the agreement where the agreement is valid without the conditions, and they cannot reasonably be inferred from the language used or object sought to be accomplished. The difficulty of effecting a composition agreement if all the creditors are to join in it, is so obvious that the agreement will not be construed as requiring all the creditors to become parties to it, unless it is expressly stipulated or clearly deducible from its terms; a composition with any number more than two being good. The words "the undersigned, creditors of A. B." were held not to imply that all the creditors were to sign the agreement.[2] A deed of composition made between the debtor and the persons who subscribed the schedule thereto, "on behalf of themselves and all and every other the creditors" of the debtor, shows that all the creditors are parties.[3] The term "creditors" in absence of any provision in a composition agreement indicating that only certain creditors are meant is generally construed to mean all creditors whether secured or unsecured.[4] A condition "in consideration of other creditors accepting a like percentage" was construed to mean all other creditors.[5]

Where all the joining creditors were designated as "general creditors," and those having secured claims put down only their unsecured claims, it was held that "general creditors" meant "unsecured creditors" and that by joining in the agreement the parties did not release their secured claims.[6] And where the agreement was merely signed by creditors, each setting down the amount

[2] Renard v. Tuller, 4 Bosw. 107: The court said the words "all the creditors," nor "the creditors" were not used.

[3] M'Laven v. Baxter, 36 L. J., C. P. 247, 15 W. R. 1017.

[4] Cobleigh v. Pierce, 32 Vt. 788; Artman v. Truby, 130 Pa. St. 619, 18 Atl. 1065.

[5] M. A. Seed v. Wunderlich, 69 Minn. 288, 72 N. W. 122.

[6] Noyes v. Chapman, 60 Minn. 88, 61 N. W. 901.

due him, oral evidence was held admissible to show that the amount set down by a creditor was his unsecured claim and that the agreement was not to apply to a secured claim held by him.[7] Business creditors, are creditors whose claims arose out of transactions with the debtor in his particular calling,[8] and does not include those persons who have furnished board, clothing or other necessaries to the debtor or his family. The term "All his principal creditors" is vague and indefinite and ought not to be used, but if creditors accept composition money under such an agreement they are concluded from saying that all the principal creditors have not signed.[9]

Sec. 169. Withdrawal from agreement by creditor.—A creditor who has signified his assent to a composition agreement cannot withdraw therefrom. The authorites are unanimous in holding that when a creditor has by his assent lured others into the agreement,[1] or in consequence thereof the debtor has assigned his property,[2] he cannot recede from his undertaking and evade the effect of the composition by afterwards refusing to execute the deed or other agreement.[3] One creditor is not the only person concerned in such agreements, and if a dissatisfied creditor was permitted to withdraw and recover upon the original cause of action, it

[7] Hartford v. Hartford, 46 Conn. 569.

[8] See Fellows v. Stevens, 24 Wend. 294. A stipulation requiring all "merchandise indebtedness" to join means creditors who sold the debtor merchandise: Farrington v. Hodgdon, 119 Mass. 453. A provision respecting the amount to be paid each creditor, as follows: "The whole of the creditors receiving not exceeding a like sum in discharge of the debts" was held not to require all creditors to join but to apply to creditors who became parties: Carey v. Barrett, 4 C. P. D. 379.

[9] In re Decker, 8 Ben. (U. S.) 81.

[1] Wood v. Roberts, 2 Starkie, 417; Norman v. Thompson, 4 Exch. 755.

[2] Butler v. Rhodes, 1 Esp. 236, Peake 238; Brady v. Sheil, 1 Camp. 147; Chemical National Bank v. Kohmer, 85 N. Y. 187.

[3] Bradley v. Gregory, 2 Campb. 383; Anstey v. Marden, 1 Bos. & Pul. 124; Mellen v. Goldsmith, 47 Wis. 573.

would be a gross fraud on the other creditors.[4] Where the agreement is fully executed, the debtor cannot as against the protest of any creditor, release a creditor, nor can all the creditors release one of their number without the consent of the debtor. In a case arising in New York, where a creditor before all the creditors had executed the agreement, became dissatisfied and with the consent of the debtor withdrew from the agreement, Cowan, J., observed that he had met with no case which denies to a creditor an open withdrawal of his name with the consent of the debtor, as was practiced here.[5]

In cases where a specified number of creditors must become parties to make a composition binding and those signing first were the means of inducing other creditors to sign and abandon their pursuit of the debtor, or the deed of assignment is to be void if not signed before a given day by all the creditors, or by all those designated, those signing first may be held to the agreement by the other creditors, or by the debtor, until it is demonstrated that the required number will not execute the agreement or otherwise come into the arrangement.[6] It would be inequitable to say the least for those creditors who were the means of inducing others to join, to recede from their agreement and perhaps gain an advantage which was not theirs when the proposal for a settlement was made. A promise to sign a composition deed already executed by the debtor and some of the creditors, will not bind the party making the promise where the promise is not made to a creditor who subsequently signed; nor will a refusal to sign until a certain other creditor signs, or even a promise to sign the deed if his signature is obtained, bind the creditor even though the signature mentioned is obtained, unless it be shown that he author-

[4] Anstey v. Marden, 1 Bos. & Pul. 124; Wood v. Roberts, 2 Starkie, 417.

[5] Fellows v. Stevens, 24 Wend. 294. In this case the agreement was not to be binding until creditors to the amount of two thirds of his business debts accepted the proposal.

[6] Tatlock v. Smith, 6 Bing. 339, 3 M. & P. 676.

ized the debtor or whoever is taking the instrument around, to represent to the other creditor that if he signs it he (the first creditor) will also sign.[7] If a debtor and the trustee dispute a creditor's demand and refuse to allow him to come in under the deed, he may sue the debtor for the original debt, although he attended the creditors' meeting, and concurred in a resolution for the execution of a release to the debtor on his executing a deed of assignment of his property.[8]

Sec. 170. Parties—Necessary parties—Debtor—Stranger in debtor's behalf.—Unlike other contracts a composition agreement must have at least three parties to make it binding; a debtor, or some one in his behalf, and at least two creditors. To constitute a valid composition something of value must either pass to the creditors *in præsenti*, or agreed to be paid, in satisfaction of their respective demands, and to insure its retention or recovery, there must be mutuality of remedies. Hence, when dealing direct with his creditors, the debtor is a necessary party. An agreement which binds only the creditors cannot be enforced by the debtor, unless he in some way becomes a party to it and creates a mutuality of remedies. Thus, the agreement—"We the undersigned," or "We the undersigned creditors," agree to accept fifty per cent. in full of our claims, without more, is unenforceable [1] by the debtor or against him, although the creditors as between themselves where there is a specific fund in which they are to share, may hold each other to the agreement.[2]

It is competent for a third person in behalf of the debtor to effect a composition agreement with the creditors.[3] And the pay-

[7] Boyd v. Hind, 1 H. & N. 938, 3 Jur., N. S. 566, 26 L. J., Exch. 164.

[8] Garrard v. Woolner, 1 M. & S. 327, 8 Bing. 258.

[1] Webb v. Stewart, 59 Me. 356; Gilford Bank v. Ware, 95 Me. 388, 50 Atl. 24.

[2] See Henry v. Patterson, 57 Pa. St. 346, where this question is left open.

[3] Williams v. Mostyn, 33 L. J., Ch. 54, 12 W. R. 69, 9 L. T., N. S. 476; Emmet v. Dewhirst, 3 Mac. & G. 587, 15 Jur. 1115, 21 L. J. Ch. 497; Cobb v. Fogg, 166 Mass. 466, 44 N. E. 534.

ment of the composition-money and its acceptance by a creditor discharges the debtor from the entire demand.[4] In such cases the debtor is not a party to the agreement. The debt of each creditor who joined in the agreement is discharged whether the stranger effected the composition at the request of the debtor or did so as a mere volunteer; unless the debtor repudiates the payment. Whether the third party can recover from the debtor the amount paid by him depends upon whether he effected the composition at the request of the debtor, or was a mere volunteer. If the latter, he cannot recover over if the payment was intended as a gratuity; and, if he expected to be reimbursed, he cannot recover without proving a subsequent promise by the debtor to repay him. Whether pleading the payment as a defense in an action on the original demand, is sufficient to raise an implied promise on the part of the debtor to reimburse the stranger, is a question not free from doubt.[5]

Sec. 171. Same subject—Creditors—Preferring a creditor—Failure to come in as a party within the time limited—Relief in equity.—The consideration necessary to support a composition being the mutual promises of the creditors (a part payment of the debt without more is not enough), there of necessity must be two or more creditors mutually agreeing each with the other and with the debtor. One creditor cannot make a composition.[1] If one creditor negotiates independently with his debtor and compound his demand on his own terms, the agreement must stand upon the rules governing an accord and satisfaction.[2] With

4 Babcock v. Dill, 43 Barb. 577.

5 See upon this question Secs. 50–53 Accord and Satisfaction.

1 Minneapolis Bank v. Steele, 58 Minn. 126, 59 N. W. 959. (In this case the question whether the agreement was a composition or an agreement between the debtor and one creditor was left to the jury); Pierson v. McCahill, 21 Cal. 122; Continental Bank v. McGeoch, 92 Wis. 286, 66 N. W. 606; Reay v. Richardson, 2 C., M. & R. 422, 1 Gale, 219, 59 Tyr. 931.

2 Bliss v. Stewart, 65 N. Y. 444.

this limitation, any number of creditors may enter into an agreement with their debtor and with each other to accept a composition of their demands and release the debtor, and it will be binding upon those who enter into the agreement.[3] Where the evidence is conflicting, the question whether the agreement is between creditors and their debtor so as to make it a composition, or is between the debtor and one creditor alone, is one of fact for the court or jury.[4] A debtor has a common law right to prefer one creditor to another, and a composition being a conventional arrangement, he may insert a stipulation that only unsecured creditors may come in,[5] or any particular creditors, as business creditors,[6] or those signing the deed,[7] or those signing within a specified time,[8] and only those designated can take benefits under the composition agreement.[9]

[3] Murchie v. McIntire, 40 Minn. 331, 42 N. W. 348; Johnson v. Parker, 34 Wis. 576; Continental Bank v. McGeoch, 92 Wis. 286, 66 N. W. 606; Crawford v. Krueger, 201 Pa. St. 348, 50 Atl. 931; Lard v. Campbell, 92 Pa. St. 470; Devon v. Ham, 17 Ind. 472; Renard v. Fuller, 4 Bosw. 107; Van Bokkelen v. Taylor, 62 N. Y. 105; Beard v. Boylan, 59 Conn. 181, 22 Atl. 152; Pierson v. McCahill, 21 Cal. 122; Schroeder v. Pissis, 128 Cal. 209, 60 Pac. 758; Gilfillan v. Farrington, 12 Ill. App. 101; Goodrich v. Lincoln, 93 Ill. 359; Condict v. Flower, 106 Ill. 105; Hill v. Wertheimer, 150 Mo. 483, 51 S. W. 702; Cheveront v. Textor, 53 Md. 295; Chittenden v. Woodbury, 52 Vt. 562; Norman v. Thompson, 4 Exch. 755, 19 L. J., Exch. 193; Field v. Donoughmore, 1 Dr. & War. 227; Good v. Cheesman, 2 B. & A. 324; Constantein v. Blache, 1 Cox, 287; Reay v. Richardson, 2 C., M. & R. 422.

[4] First Nat. Bank v. Steele, 58 Minn. 126, 59 N. W. 959.

[5] Zeobisch v. Van Minden, 120 N. Y. 406, 24 N. E. 795, 31 N. Y. St. 499; Phœnix Bank v. Sullivan, 9 Pick. 410; Battles v. Forbes, 2 Metc. 93; Carey v. Barrett, 4 C. P. D. 379; Field v. Donoughmore, 1 Dr. & War. 227.

[6] Fellows v. Stevens, 24 Wend. 294.

[7] Rayworth v. Parker, 2 Kay & J. 163, 25 L. J., Ch. 117.

[8] Williams v. Mostyn, 33 L. J., Ch. 54, 12 W. R. 69, 9 L. T., N. S. 476; Gould v. Robertson, 4 De G. & S. 509.

[9] Phœnix Bank v. Sullivan, 9 Pick. 410; Battles v. Forbes, 2 Metc. 93, 38 Mass. 239; Field v. Donoughmore, 1 Dr. & War. 227. If the retention of security by a creditor is inconsistent with the terms of the composition

But where a creditor is prevented by accident from signing a composition deed within the time specified and becoming a party thereto, equity will afford him relief, but not when he delayed coming in and set up title adversely to the deed.[10] Where a trustee under a composition deed had the power to extend the time in which creditors may join, and a creditor was absent from the country, it was held that upon application within the time for which the trustee might have extended the time, the creditor was entitled to come in, as, under the circumstances, it was the duty of the trustee to enlarge the time and allow the creditor to come in.[11] If a creditor acts under the agreement, but is ignorant of the provision that he must sign within a specified time, he will be allowed to come in,[12] even though the debtor is dead and cannot derive any benefits from its execution. But equity will not aid a creditor who actually refused to come in, and who did not actually retract such refusal within the time;[13] nor will equity aid a creditor, who, during the time he may come in, merely stands by and takes no part in the matter.[14] A creditor will not be afterwards allowed to come in as a party on the ground of mistake and misapprehension, where he stood out relying upon his judgment as being paramount to the composition deed, where the judgment afterwards turned out to be invalid.[15] It has been held, where a creditor successfully contested the validity of the composition deed, that he was not afterwards precluded from com-

deed, the creditor cannot come in without surrendering the security: Bush v. Shipman, 14 Sim. 239.

10 Watson v. Knight, 19 Beav. 369.

11 Rayworth v. Parker, 2 Kay & J. 163, 25 L. J., Ch. 117.

12 In re Barber, 40 L. J. Ch. 144, 18 W. R. 1131.

13 Johnson v. Kershaw, 1 De G. & S. 260, 11 Jur. 553, 795. Taking steps inconsistent with a deed bars a creditor from coming in: Field v. Donoughmore, 1 Dr. & War. 227.

14 Biron v. Mount, 24 Beav. 642, 4 Jur., N. S. 43, 27 L. J., Ch. 191.

15 Brandling v. Plummer, 27 L. J., Ch. 188; In re Meredith, 29 Ch. D. 745 (Lien).

ing in under the deed, and taking the benefits under it.[16] An agreement by a third party to guarantee a composition to all creditors who sign before a certain day, is a contract only with those who actually sign the agreement, and will not be enforced in favor of a creditor, who, through mistake and misapprehension of his rights, failed to sign.[17] Where by a voluntary covenant, a third party is to raise by mortgage the money sufficient to discharge the composition money due those who should execute the agreement within a specified time; time is of the essence of the contract, and those who have failed to execute the agreement within the time limited will not be relieved.[18]

Sec. 172. Same subject—Stipulation requiring certain creditors to join—Oral evidence inadmissible to vary stipulation—Effect of failure to sign—Surety not bound if all do not sign.—Where it is provided in a composition agreement that all the creditors are to sign it, or all unsecured creditors,[o] or all creditors having demands exceeding one hundred dollars,[1] and like cases,[2] it is not binding upon any creditor signing, unless all of the creditors, or all of the class designated, as the case may be, join in the agreement.[3] If

[16] Latter v. White, 5 L. R., H. L. Cas. 578, L. J., Q. B. 342, aff'm'g 6 L. R., Q. B. 474, 40 L. J., Q. B. 162, 25 L. T., N. S. 158, 19 W. R. 1149; and reversing 5 L. R., Q. B. 622, 40 L. J., Q. B. 9, 23 L. T., N. S. 242, 19 W. R. 63.

[17] Emmet v. Dewhlrst, 3 Mac. & G. 587, 15 Jur. 1115, 21 L. J., Ch. 497.

[18] Williams v. Mostyn, 33 L. J. Ch. 54, 12 W. R. 69, 9 L. T., N. S. 476.

[o] Walker v. Mayo, 143 Mass. 42, 8 N. E. 873.

[1] Raudenbush v. Bushong, 43 Leg. Int. (Pa.) 366.

[2] Artman v. Truby, 130 Pa. St. 619, 18 Atl. 1065 (all creditors were to sign except certain lien holders. It was held that other lien holders must sign).

[3] Trunkey v. Crosby, 33 Minn. 464, 23 N. W. 846; Abel v. Allemannia Bank, 79 Minn. 419, 82 N. W. 680; Turner v. Comer, 72 Mass. 530; Day v. Jones, 150 Mass. 231, 22 N. E. 898; Bissenger v. Guiterman, 6 Heisk. 277; Magee v. Kast, 49 Cal. 141; Falconbury v. Kendall, 76 Ind. 260; Evans v. Gallantine, 57 Ind. 367; Paulin v. Kaigh, 27 N. J. L. 503; Greer v. Shiver, 53 Pa. St. 259; Laird v. Campbell, 100 Pa. St. 159; Kinsing v. Bartholew, 1

such an agreement is set up as a defense in an action on the original claim, it is necessary to allege and prove that all the creditors have signed,[4] or have come in and acted under it.[5] If the condition requires all creditors to sign before it is binding, all creditors whether secured or unsecured,[6] or whether their claims are large or small, must sign. But it has been held that the creditors could not take advantage of the failure to join in the agreement, of a creditor whose debt was only two dollars and fifty cents.[7] So, in an action to recover a fraudulent preference, where ninety eight per cent. in value signed, the agreement was not allowed to be avoided on the ground that the remaining creditors had not joined.[8] The provision that all must sign is not complied with by settling with those not joining, on the best terms possible,[9] or by paying them in full.[10]

If a composition deed contains a provision that certain demands are to be paid in full, and also a proviso that it shall be void if all creditors having claims over a certain amount should not execute the deed, the agreement is not void by reason of a failure to sign the deed, by the creditors who are to be paid in full, though their claims respectively exceed the amount specified.[11] Where

Dill. 155; Spooner v. Whiston, 8 Moore, 850; Chase v. Bailey, 49 Vt. 71; Cobleigh v. Pierce, 32 Vt. 788; Reay v. Richardson, 2 C., M. & R. 422, 1 Gale, 219, 4 L. J., Ex. 236, 5 Tyr. 931; Cooling v. Noyes, 6 T. R. 263; Brown v. Dakeyne, 11 Jur. 39; Doughty v. Savage, 28 Conn. 146; Durgin v. Ireland, 14 N. Y. 322.

4 Reay v. Richardson, 2 C., M. & R. 422, 1 Gale, 219, 5 Tyr. 931.

5 In Mathews v. Taylor, 2 M. & G. 667, 3 Scott, N. R. 52, 5 Jur. 321, it was held not necessary to aver the following proviso: "The agreement was to be void, unless the creditors, whose names and descriptions were stated on the other side of the agreement, should concur in the arrangement."

6 Cobleigh v. Pierce, 32 Vt. 788; Kinsing v. Bartholew, 1 Dill. 155.

7 Fahey v. Clarke, 80 Ky. 613.

8 Bean v. Brookmore, 2 Dill. (U. S.) 108.

9 Spooner v. Whiston, 8 Moore, 850; Turner v. Comer, 72 Mass. 530.

10 See M. A. Seed v. Wunderlich, 69 Minn. 288, 72 N. W. 122.

11 Wells v. Greenhill, 1 D. & R. 493, 5 B. & A. 869.

the composition agreement contained a proviso that if any of the creditors should refuse to sign or otherwise consent to the deed within six months, it was held that mere non-execution by some within the time did not avoid the deed.[12] A refusal to sign or consent to the agreement must be shown. If it is stated in a composition deed that it shall not be binding on any of the creditors signing it, unless all the creditors of the debtor sign it, oral evidence is not admissible to show that a certain class of creditors were not to sign it.[13] Where it is not stated in terms in a composition deed, or necessarily implied therefrom, that all the creditors must join in the agreement, it will be binding on all who assent to it.[14] In such cases parol evidence is not admissible to show that it was in fact agreed that all the creditors should join before it would be binding.[15] A third party standing in the relation of a surety, is not bound unless the required number join in the agreement.[16] Thus, where it was agreed in the presence of a surety for the payment of the composition money, that the agreement should be void unless all the creditors executed it and subsequently the composition deed was signed by the creditors pres-

[12] Holmes v. Love, 5 D. & R. 56, 3 B. & C. 242, Russ. & M. 38.

[13] Acker v. Phœnix, 4 Paige, 305.

[14] Murchie v. McIntire, 40 Minn. 331, 42 N. W. 348; Johnson v. Parker, 34 Wis. 596; Van Bokkelen v. Taylor, 62 N. Y. 108; Crosser v. Radford, 1 De G., J. & S. 858, 66 Eng. Ch. 454. Where the agreement specified "We the undersigned creditors of William Laird," etc., it was held that the agreement was binding although all the creditors were not included, and that it should be specified in express terms, if it was not to be binding unless all the creditors came in: Laird v. Campbell, 92 Pa. 470. Where all are not required to sign, the debtor may settle with those not required to sign without releasing those signing: Renard v. Tuller, 4 Bosw. 107.

[15] Van Bakkelen v. Taylor, 62 N. Y. 105, 9 N. Y. Super. Ct. 158; Beard v. Boylan, 59 Conn. 181, 22 Atl. 152; Strickland v. Harger, 81 N. Y. 623, aff'ing 16 Hun, 465 (see 16 Hun, for opinion).

[16] Emmet v. Dewhirst, 3 Mac. & G. 587, 15 Jur. 1115, 21 L. J., Ch. 497; Enderby v. Corder, 2 C. & P. 203, 12 E. C. L. 520; Dougherty v. Savage, 28 Conn. 146; Falconbury v. Kendall, 76 Ind. 260; Williams v. Mostyn, 33 L. J., Ch. 54, 9 L. T. R. N. S. 476, 12 W. R. 69.

ent, and delivered to one of them who was to get it executed by the rest, it was held to be nothing more than a delivery in escrow, and not having been executed by all it was not binding on the surety.[17]

Sec. 173. Same subject—Time when creditors may come in—Objection that some have not joined available to whom—Compelling lagging creditors to elect to come in or renounce.—Where the time in which the creditors may join in a composition deed is limited by the deed, a creditor who does not join in the agreement within the time, as we have seen, cannot take any benefits thereunder,[1] unless, for good cause shown, a court of equity relieves him from his default.[2] Such a limitation is valid,[3] but a clause in a composition deed, providing that creditors who do not join, or who do any thing contrary to the deed, shall forfeit their debts is void.[4] The objection that other creditors have not signed within the time limited by the agreement, is available to any creditor who has signed.[5] So, it seems that a surety for the payment of the composition money may object,[6] if for any reason his burden or risk might be increased. Where no time is limited for creditors to come in and become parties to the agreement, they may come in at any time before the fund provided for payment is distributed. If a creditor comes in after a partial payment has been made under the agreement, or a dividend has been distributed under a deed of assignment,[7] he cannot disturb the payment, but must take his *pro rata*

17 Johnson v. Barker, 4 B. & A. 440.

1 Phœnix Bank v. Sullivan, 9 Pick. 410.

2 See In re Baker, L. R. 10 Eq. 554, 40 L. J. Ch. 144.

3 Raworth v. Parker, 2 Kay & J. 163, 25 L. J., Ch. 117; Battles v. Fobes, 2 Metc. 93 (21 Pick. 239); Magee v. Kast, 49 Cal. 141; Evans v. Gallantine, 57 Ind. 367; Johnson v. Kershaw, 1 De G. & S. 260, 11 Jur. 553, 795.

4 Thompson v. Gunthorp, 11 L. T. R. N. S. 708.

5 Williams v. Mostyn, 33 L. J., Ch. 54, 12 W. R. 69, 9 L. T., N. S. 476.

6 Falconbury v. Kendall, 76 Ind. 260.

7 Field v. Cook, 23 Beav. 600; Broadbent v. Thornton, 4 De G. & Em. 65.

of the residue of the fund. Even where the time for joining was limited, a creditor who forbore to sue, was, after fifteen years, allowed to come in and enforce the trust, where the fund provided for payment was still in the hands of the trustee.[8] But where the debtor can derive no benefit from the creditor joining, as when he delays moving in the matter until long after the debtor's death, he will not be permitted to join in the agreement.[9] If no time be specified within which the creditors must join in a composition agreement, those who have joined may bring a suit to compel the remaining creditors to come in or renounce, or what is the same thing, be debarred from participating in the composition-fund.[10]

Sec. 174. Same subject—Construction of stipulation as to who shall sign—Waiver of condition.—Where the agreement is in consideration of other creditors accepting a like percentage; "other creditors" means all other creditors.[1] So if one creditor agrees to accept a composition if "the creditors" of the debtor will release their claim,[2] or accept their *pro rata*[3] of a certain fund in full satisfaction of their claims, all the creditors must become a party to the arrangement. The words "The creditors" cannot by any effort at construction be interpreted to mean a part or practically anything less than the whole.[4] So, where the object of the composition cannot be accomplished or could be defeated if all the creditors do not join, and it is not expressly restricted to any class of creditors, all the creditors must become parties to the

[8] See Nicholson v. Tutin, 2 Kay & J. 18, 1 Jur., N. S. 1201.

[9] Lane v. Husband, 9 Jur. 1001, 14 Sim. 656, 37 Eng. Ch. 656 (here was a delay of seven years).

[10] Dunch v. Kent, 1 Vern. 260.

[1] M. A. Seed v. Wunderlich, 69 Minn. 288, 72 N. W. 122.

[2] M. E. Church v. Robbins, 81 Pa. St. 361, 592; Falconbury v. Kendall, 76 Ind. 260.

[3] Chase v. Bailey, 49 Vt. 71.

[4] Abel v. Allemannia Bank, 79 Minn. 419, 82 N. W. 680.

arrangement to make it binding. Thus, where the purpose is to effect a reorganization of an insolvent bank, an agreement stating "We, the undersigned depositors and creditors" agree to accept in payment, certain certificates of deposit (describing them), it was held that it was to be a joint action of all the creditors, otherwise it would leave a number of creditors to obtain preference as to terms of settlement, or sue for their whole claim.[5] But in absence of an express stipulation that all the creditors shall join, or it cannot be clearly inferred from the object of the agreement and its terms, it will be construed to be binding on all who join in the agreement, without the concurrence of the remaining creditors. The terms used in a composition agreement will be given their true meaning. Thus, "We, the subscribers, creditors," etc.,[6] "We who have hereto subscribed our names,"[7] the undersigned "their several creditors,"[8] and similar expressions,[9] are construed as meaning that it is an agreement between all who sign, or otherwise join in the agreement, and it is limited to those creditors. A creditor or the remaining creditors who are parties may waive the condition that all of the creditors, or all of a certain class, must join as parties.[10] But an acceptance of payment under the agreement, without more, is not a waiver,[11] particularly, if some of the creditors did not join and were paid in full.[12]

[5] Abel v. Allemannia Bank, 79 Minn. 419, 82 N. W. 680.

[6] Lambert v. Shetler, 71 Iowa, 463, 32 N. W. 424; Carey v. Barrett, 4 C. P. D. 379.

[7] Continental Bank v. Koehler, 4 N. Y. St. 482.

[8] Strickland v. Harger, 16 Hun, 465.

[9] Laird v. Campbell, 92 Pa. 470.

[10] Kinsing v. Barholew, 1 Dill. (U. S.) 155; Condict v. Flower, 106 Ill. 105; Dauchy v. Goodrich, 20 Vt. 127.

[11] Greer v. Shriver, 53 Pa. St. 259.

[12] See M. A. Seed v. Wunderlich, 69 Minn. 288, 72 N. W. 122.

Sec. 175. Same subject—Partners as debtors, as creditors—Joint and several debtors—Joint creditors.—Partners, being agreed, may join in a composition deed as a creditor or as a debtor, to the same extent as an individual.[1] The partnership liability may be severed by such an agreement;[2] each to pay a moiety, or one released and the other remain bound.[3] One member of a firm may sign in the firm name a composition deed and release a debt due the firm and bind all the partners, although the deed is under seal.[4] And one partner may authorize a third person by an instrument under seal to discharge a debt due the firm.[5] If a member of a firm executes a composition deed in his own name it will not release a debt due the firm if the partner has an individual claim against the debtor.[6] In absence of authority we are inclined to the opinion that if the signing partner held no individual claim, such signing would release the partnership debt. One partner may, in his own name, make a composition with the creditors of the firm, by paying a *pro rata* in cash, or by giving his individu-

[1] Bowen v. Marquand, 17 Johns. 58.

[2] Le Page v. McCrea, 1 Wend. 164, 17 Am. Dec. 469.

[3] Hosack v. Rogers, 25 Wend. 313.

[4] Bowen v. Marquand, 17 Johns. 58; Beach v. Allendorf, 1 Hilt. 41; Harbeck v. Pupin, 123 N. Y. 115, 25 N. E. 311, 33 N. Y. St. 220 (release under the statute considered); Smith v. Stone, 4 Gill & J. 310; Halsey v. Whitney, 4 Mason (U. S.) 206; Allen v. Cheever, 61 N. H. 32; Teede v. Johnson, 11 Ex. 840. When one partner signed the deed of composition in the firm name and set his seal thereto, it was held that only the one signing could maintain an action of the covenant to recover an installment due on the firm debt, the other partner not being a party to the deed could not join: Metcalf v. Rycroft, 6 M. & S. 75. It has been held in an action for a partnership debt, that a covenant not to sue entered into by only one of the partners cannot be set up as a release: Walmesley v. Cooper, 3 P. & D. 149, 11 A. & E. 216. In Hawkshaw v. Parkins, (1818) 2 Swan. 540, it was doubted that a deed amounting to a mere acceptance of terms of a composition, executed by one partner, would be binding on the rest, although a release so executed binds all.

[5] Wells v. Evans, 20 Wend. 251.

[6] Bain v. Cooper, 9 M. & W. 701, 11 L. J. Ex. 325.

al notes or other thing agreed upon, in full satisfaction of the debts owing by the firm, and such agreement, at common law, will release all the partners.[7] The paying partner may recover of the other members of the firm their proportion of the amount paid, for the reason that the law permits a partner to appropriate his individual property, as well as that of the firm, in payment of partnership debts.[8] Under the statute in many states, one partner (or other joint debtor) may compound his individual liability for the firm debts, and the creditors may recover from the remaining partners, their equitable portion of the debt.[9] But in absence of statutory authority one partner cannot compound or otherwise obtain his release from his liability for the whole debt, or for the part he would equitably be bound to pay as between himself and his co-partner, and leave the remaining partner bound.[10] Payment by one partner of a part of the partnership debt, in consideration of a covenant on the part of the creditors never to sue him for the residue does not constitute a composition, for the reason that a composition like an accord and satisfaction discharges the whole of the debts.[11] A composition of firm debts will not release the partners from their individual debts, even though the individual debt was originally the firm debt.[12] Nor will a partner be released from a debt he owes the firm.[13] A partner who has retired

[7] See Sec. 62 Accord and Satisfaction.

[8] See Baxter v. Bell, 86 N. Y. 195; Kirby v. Schoonmaker, 3 Barb. Ch. 46; co-partners may assign their individual property, as well as their partnership property, to pay the joint debts of the firm, thereby giving the creditors of the firm a preference over the separate creditors. S. P. Cook v. Reindskopf, 105 N. Y. 482.

[9] See Sec. 38 Accord and Satisfaction.

[10] In Ex parte Slater, 6 Ves. 146, it is held that a composition with one partner released both. See, also, Clement v. Brush, 3 Johns. Cas. 180.

[11] See Sec. 9, 39 Accord and Satisfaction. See, also, Bates on Part. Sec. 385.

[12] Clement v. Brush, 3 Johns. Cas. 180.

[13] MacLean v. Stewart, Judicial Committee P. C. Rev'g 25 Can. Sup. Ct. 225.

cannot upon a composition of the firm debts for which he is liable, join as a party creditor for the amount agreed to be paid him upon retiring, and a composition note given him for such amount will be void.[14] But, if, after retiring, the successor of the old firm becomes involved and compounds its debts with its creditors, the old member is a proper party to the composition agreement, as a creditor, for any sum due him from the new firm for the purchase price of his interest in the old firm's assets.[15] During the continuance of a co-partnership one partner, in the name of the firm and without the consent of his co-partner, may enter into a composition agreement with the firm creditors, and for that purpose may make an assignment of all the partnership effects or so much thereof as may be necessary, direct to one or more of its creditors, although the effect of such an agreement is to give a preference to those creditors with whom the agreement is made.[16] But in order to transfer firm real estate, all the partners must either join in the deed of assignment,[17] or consent to it.[18]

The distinction between a deed of assignment for the benefit of creditor, made by one partner without the consent of the other, and a composition deed executed in like manner, which includes or is accompanied by a deed of assignment, though apparently technical, is well founded. A general assignment in insolvency amounts to a dissolution of the firm, and cannot be said to be within the scope of the partnership agency; while a composition deed which includes a deed of assignment to convey the considera-

[14] Stephen v. Gavaza, 16 Nova Scotia, 514.

[15] Baxter v. Bell, 86 N. Y. 195.

[16] Mabbett v. White, 12 N. Y. 442. See Egberts v. Wood, 3 Paige Ch. 517, L. Ed. and extensive note, and also Havens v. Hassey, 5 Paige Ch. 30 L. Ed. and note.

[17] See Anderson v. Tompkins, 1 Brock. 463; Wilson v. Soper, 13 B. Mon. 411.

[18] See Rumsey v. McCulloch, 54 Wis. 565, where it is held that with the consent of his partner, one partner may by an assignment under seal transfer the real estate of the firm.

tion, is clearly within the scope of the authority of one partner to settle the partnership debts. A composition deed does not necessarily dissolve the partnership, and the fact that one partner in paying or otherwise discharging the partnership debts may exhaust all the partnership assets so that the business cannot go on, is merely incidental and does not affect the principle; nor will the fact that the partner compounding gives a preference, by settling with a part of the creditors only, affect the rule, for a debtor may lawfully prefer one creditor over another.[19] The agency of a partner to collect the assets and liquidate and settle the debts of the firm continues after the death of a member,[20] as to all debts created before the death of his copartner, and this power to settle and wind up the partnership affairs necessarily includes the power to enter into a composition agreement as debtor [21] or as a creditor. If the executor of the deceased partner joins with the surviving partner in the agreement, he is bound personally and not in a representative capacity, although he signs the agreement as executor.[22] The right of a joint creditor and a creditor jointly and severally liable, to join in a composition agreement and the effect of a satisfaction by one upon the rights of the

19 The question whether one partner, without the consent of his co-partner, can make an assignment of all the property of the firm to a trustee to pay the partnership debts, is not by any means settled. Some authorities hold that such power exists. Anderson v. Tompkins, 1 Brock. 456. See 1 Pars. Cont. 178, (8th Ed.), and extensive note for cases *pro* and *con*. Others are against the power. Stein v. La Dow, 13 Minn. 412; Wells v. March, 30 N. Y. 344; Hunter v. Waynick, 67 Iowa, 555; Havens v. Hassey, 5 Paige Ch. 30. Other authorities, while recognizing the rule that the scope of the partnership agency does not include such power, yet recognize as binding an assignment free from fraud, made while the other partner is absent from the county and cannot be consulted, as where he absconds or abandons the business and moves away. See Rumery v. McCulloch, 54 Wis. 565, for a review of the cases.

20 See Egberts v. Wood, 3 Paige Ch. 517.

21 See Brown v. Farnham, 55 Minn. 27, 56 N. W. 352.

22 Brown v. Farnham, 55 Minn. 27, 56 N. W. 352.

remaining co-debtor, is the same as in cases of an accord and satisfaction.[28]

Sec. 176. Same subject—Negotiating composition through agent or attorney—Guardians—Personal representatives.—A debtor may authorize his agent to negotiate a composition agreement, and when made according to instructions he will be bound by it.[1] Where the agreement is not required to be under seal, an agent may bind his principal, even when the instrument is under seal and the agent is not empowered to act by a sealed instrument.[2] A principal ratifies an unauthorized composition by his agent by accepting from him the proceeds received thereon with knowledge of the agreement.[3] A principal is bound by the statements and acts of his agent in negotiating a composition agreement, and any false representations by an agent, of facts of which the debtor was aware, although innocently made by the agent and without the knowledge of the debtor;[4] or any false representations intentionally made, with or without the knowledge of the debtor, upon which the other parties relied; or any secret preference given by the agent to induce a creditor to join in the composition,[5] will avoid the agreement. An unauthorized representation by an agent to a creditor, that the agreement is not to be binding unless all the creditors sign, renders the composition void as to the creditor who signed relying upon that statement.[6] Agents are held to a strict fidelity, and if an agent employed to effect a composition at fifty cents on the dollar, purchases notes of the debtor

[28] See Sec. 9 Accord and Satisfaction.

[1] Crawford v. Kreeger, 201 Pa. St. 348, 50 Atl. 931.

[2] Hawley v. Beverly, 6 Scott, N. R. 837, 6 M. & G. 221, 46 E. C. L. 221.

[3] Warshawsky v. Bonewur, 114 N. Y. S. 665.

[4] Elfelt v. Snow, 2 Sawy. (U. S.) 94, 6 Nat. Bank'y Reg. 57; Hefter v. Cahn, 73 Ill. 296.

[5] Bank of Commerce v. Hoeber, 88 Mo. 37, 57 Am. Rep. 359.

[6] Laird v. Campbell, 100 Pa. St. 159.

at a discount and sells them after their maturity, the purchaser will not be permitted to recover any more than fifty per cent. upon the amount of such notes.[7] If the agent sells the notes before maturity he is liable in damages to the extent of the amount which his principal is compelled to pay over the fifty per cent. In negotiating a composition agreement the agent of the debtor cannot also be the agent of a creditor;[8] although after the agreement is made a creditor may authorize the agent who negotiated the agreement for the debtor, to receive the money due thereon. A creditor may be represented by an agent in effecting a composition with his debtor.[9] But the agent must keep within the limits of his authority. An agent authorized by a creditor to join in a voluntary composition upon certain terms, is not authorized, upon the arrangement falling through, to enter into a statutory composition.[10] It has been held that an agent authorized to negotiate a composition may bind his principal to answer for liquidated damages, or a penalty, in case of a breach.[11] An agent or attorney has no authority to waive a default in the payment of the composition money, without the consent of the principal, but if the creditor accepts the money from the agent with knowledge of the default, he ratifies the act of the agent.[12] The law of agency governs the conduct of officers of corporations, and the power to compound debts due to the corporation must be derived from the articles of incorporation,[13] by-laws, or resolution of the board of directors. The authority of a cashier or other active manager of a bank, to join in a composition agreement, where it is shown that compositions and compromises were of common occurrence

7 Reed v. Warner, 5 Paige Ch. 650.

8 Hinckley v. Arey, 27 Me. 362.

9 Gardner v. Lewis, 7 Gill (Md.) 377.

10 Abel v. Allemannia Bank, 79 Minn. 419, 82 N. W. 680.

11 Hill v. Wertheimer, 150 Mo. 483, 51 S. W. 702.

12 Penniman v. Elliott, 27 Barb. 315.

13 In re Melbourn Locomotive Works, 21 Vict. L. R. 442.

in the bank, will be presumed until the contrary appears.[14] A corporation, like an individual, may ratify the acts of an officer by accepting and attempting to collect composition-notes received by its president or other officer.[15]

At common law, executors and administrators have power to compromise or compound debts due the estate, and, in absence of collusion or fraud, an acceptance of composition-money by an executor or administrator will bind the estate, but they do not have power to bind the estate by a composition agreement giving a long time of payment.[16] So personal representatives have power to compound debts owing by the decedent and may as such enter into a composition with all of the creditors of the decedent,[17] but as the law gives each creditor a ratable proportion of the estate, a personal representative cannot enter into a composition with only a few of the creditors which would give those few more than their share of the estate. An administrator or an executor, as a general rule, has no general power to make any new contract that will bind the estate and cannot enter into a composition agreement that would render the estate liable in damages,[18] and any composition made by them must be no more than an agreement merely to pay to each creditor a portion of his debt out of the assets of the estate.[19] A devisee may enter into a composition with a creditor of his testator.[20] The authority to settle partnership affairs, after the dissolution of the firm by the death of one

[14] Chemical Nat. Bank v. Kohner, 85 N. Y. 189.

[15] Continental Bank v. Koehler, 4 N. Y. St. 482.

[16] Matter of Loper, 2 Redf. Surr. 545.

[17] Brady v. Sheil, 1 Campb. 147.

[18] See Brown v. Farnham, 55 Minn. 27, 56 N. W. 352.

[19] In Brady v. Sheil, 1 Campb. 147, it appears that there was only enough property for a ratable distribution to the creditors, a composition agreement whereby the executor assigned all the assets that came into his hands for the benefit of the creditors was held binding on the creditors.

[20] Only v. Walker, 3 Atk. 407, 26 Eng. Repr. 1035.

partner, is vested in the surviving partner, and an executor of a deceased partner cannot join with the surviving partner in a composition agreement with the firm creditors, so as to bind the deceased partner's estate. If he joins in the agreement he binds himself personally.[21]

Sec. 177. Performance—Agreement must be strictly complied with.—Where by a composition agreement the release of the debtor is conditional upon performance, to enable the debtor to avail himself of it, he must pay or tender the composition money,[1] or deliver the notes, if notes are to be taken,[2] or other thing (as when he is to make an assignment of certain property to a trustee), punctually at the time agreed,[3] or the creditor will be remitted to his original rights.[4] The very thing agreed upon must be delivered, and the death of a proposed surety before the execution of the note agreed to be delivered, avoids the agreement for a composition.[5] If security by way of an insurance policy for a certain amount is to be given, a policy for that amount must be taken out, although it exceeds the sum agreed to be paid.[6] An

21 Brown v. Farnham, 55 Minn. 27, 56 N. W. 352.

1 Zoebisch v. Von Minden, 120 N. Y. 412, 24 N. E. 795, 31 N. Y. St. 499; Hadley Falls Bank v. May, 99 N. Y. 671, 29 Hun, 404; Penniman v. Elliott, 27 Barb. 315; Dalson v. Arnold, 10 How. Pr. 528; Melhop v. Tathwell, 74 Iowa, 571, 38 N. W. 420; Brown v. Farnham, 55 Minn. 27, 56 N. W. 352; Harrison v. Gamble, 69 Mich. 96, 36 N. W. 682; Flack v. Garland, 8 Md. 188; Clark v. White, 12 Pet. 178.

2 Warbury v. Wilcox, 2 Hilt. 121; Cranley v. Hillary, 2 Moo. & S. 120; Oughton v. Trotter, 2 Nev. & M. 71, 2 L. J., K. B. 185; Zoebisch v. Von Minden, 120 N. Y. 412, 24 N. E. 795. See Boothby v. Sowden, 3 Campb. 175. See Matthewson v. Henderson, 13 U. C. C. P. 96.

3 Where payment was to be made within a specified time after date, but only the month was mentioned, it was held that the time began to run from the last day of the month. Vogt v. Fasola, 41 N. Y. App. Div. 467, 58 N. Y. Supp. 982.

4 Harrison v. Gamble, 36 N. W. (Mich.) 682.

5 Danzig v. Gumersell, 27 Fed. 185.

6 Hyde v. Watts, 12 Mee. & W. 254, 1 Dow. & L. 479.

agreement to deliver notes with approved security is complied with if the security offered is such as ought to be approved.[7] If accepted bills are to be given, the debtor is not bound to deliver blank acceptances, but may draw the bills for the proper amount, accept them and require the creditor to affix his signature as drawer at the time of their delivery.[8] Default in the payment of any installment, where the composition money is to be paid in that manner, has the same effect as a default in the payment of the whole.[9] The original debt upon a default is revived even though the payments are secured by the indorsement of another,[10] or by the bill or note of a third person.[11] If under the agreement, payment of a note and not its delivery is to constitute performance, the note must be paid when due,[12] or promptly upon a demand,[13] where they are not drawn payable at a bank or some specific place. It has been held that notice by the debtor that a note will not be paid, will not excuse the creditor from demanding payment at the place specified for payment, and if the debtor has the money there on the day, there is no default notwithstanding the notice.[14] If a creditor, upon the maturity of a composition note received as conditional payment, accepts a fresh note upon an express or implied condition that its payment shall constitute satisfaction, and the second note is dishonored, the creditor is remitted to his original course of action.[15] Where a note for a part or all

[7] Lower v. Clement, 25 Penn. 63.

[8] Ex parte Sullivan, 15 L. T., N. S. 434.

[9] Evans v. Powis, 1 Exch. 601; Walker v. Seaborn, 1 Taunt. 526.

[10] Leake v. Young, 5 El. & Bl. 955.

[11] Constable v. Andrews, 2 C. & W. 298, 4 Tyrw. 206.

[12] Dolsen v. Arnold, 10 How. Pr. 528; Constable v. Andrews, 2 C. & W. 298, 4 Tyrw. 206.

[13] Soward v. Palmer, 2 Moore, 274; Salomonson v. Blyth, 3 L. J., Ch. O. S. 169.

[14] Green v. McArthur, 34 Barb. 450.

[15] Nevill v. Boyle, 2 D., N. S. 749, 11 M. & W. 26, 7 Jur. 132, 12 L. J., Exch. 220.

of the sum due upon a composition is taken as payment, a failure to pay the note does not revive the debt.[16] Whether the note of the debtor, or of a third party, is taken as payment, depends upon the wording of the composition agreement,[17] or in absence of an express stipulation, upon the *lex contractu*.[18]

If the debtor, in part payment of the composition money, gives to a creditor a note or bill of exchange, on which he is indorser, he is liable as an indorser unless there is an express agreement that he shall not be bound by his indorsement.[19] If a note or bill of a third person is to be taken as payment of the composition money and it is indorsed by the debtor merely to transfer the title, as between him and the creditor, oral evidence is admissible to show the terms of the antecedent agreement, and the indorser cannot be held.[20] If the thing to be accepted in satisfaction is to be delivered upon demand, as when the creditors are to apply to the debtor for what is coming to them, there can be no default until after a demand is made.[21] Where a creditor joins in the agreement after the time stipulated for payment is passed, the money is payable instantly on demand, or within a reasonable time.[22] If no time is specified for the payment of the composition

16 Swartz v. Brown, 119 N. Y. S. 1024.

17 See Lewis v. Jones, 6 D. & R. 567, 4 B. & C. 506, where the agreement was to accept a certain percentage in full of his demand, on having a joint note from the debtor and his father, the receipt of the note was held a satisfaction of the original debt. See, also, Constable v. Andrews, 2 C. & W. 298, 4 Tyrw. 206, where the agreement was to pay 15 *s.* to the pound, and certain bills indorsed by defendant were to be considered in part payment of the 15 *s.*, a default in the payment of one of the bills was held not to release the debtor from a liability upon his indorsement.

18 See Pupke v. Churchill, 16 Mo. App. 334, affirmed in 91 Mo. 83, 3 S. W. 829, where it is held that the delivery of composition notes does not constitute payment.

19 Constable v. Andrews, 2 C. & M. 298, 4 Tyr. 206.

20 See First Nat. Bank v. National Bank, 20 Minn. 63.

21 Solomon v. Laverick, 18 L. T. R., N. S. 545.

22 Bowen v. Holly, 38 Vt. 574; Milligan v. Salmon, 18 L. T., N. S. 887 See Harvey v. Hunt, 119 Mass. 279.

money, or the delivery of the notes, the law allows a reasonable time.[23] Where the debtor is to perform forthwith, or within a specified time after the execution of the agreement, time does not commence to run until the agreement is fully executed, and where the law requires the composition deed to be recorded, it has been held that the time for performance ran from the recording of the deed.[24] Where the discharge of the debtor is conditional upon performance, the risk of default is upon the debtor and his surety, or any one assisting him. Holding the debtor to a strict compliance with a composition agreement, and remitting the creditors upon default to their original cause of action, either under an agreement which provides for a discharge upon performance, or under an express proviso that the original debts shall be revived, is not a proviso in the nature of a penalty,[25] and a court of equity will not restrain a creditor from enforcing immediate payment of the whole sum remaining due.[26] The debtor's default gives the creditor nothing in addition to his original claim, nor does it subject the debtor to the payment of anything beyond the debt he justly owes. It remains to be observed that where a new executory agreement is to constitute satisfaction, performance is complete upon the execution of the new agreement.

Sec. 178. Same subject—Immaterial and unimportant variations—Mistake.—Although a debtor is held to a strict performance, yet immaterial and unimportant variations will be disregarded. As the date of maturity of notes to be given upon a composition is the material thing, notes tendered a month in advance of the day fixed for delivery of the notes, but for the right amount and payable at

[23] Hall v. Merrill, 5 Bosw. 266; Bowen v. Holly, 38 Vt. 574; Chapman v. Dennison, 77 Me. 205.

[24] In re Sullivan, 36 L. J., B. 1, 15 L. T., N. S. 434.

[25] Thompson v. Hudson, 4 L. R., H. L. Cas. 1, 38 L. J., Ch. 431.

[26] Sterne v. Beck, 1 De G., J. & S. 595; Leigh v. Berry, 3 Atk. 583; Magee v. Kast, 49 Cal. 141.

the proper time, was held sufficient.[1] Payment by an assignee instead of by the assignor, if out of the funds intended, has been held sufficient.[2] Where notes agreed to be accepted were not delivered, but the full amount due under the composition was tendered in cash before an action was commenced for a breach of the agreement, the tender was held good.[3] Here, however, the composition was treated as still subsisting, though broken. Where a default arose through the mistake of the debtor as to the amount due and the creditor accepted the sum paid without objection at the time, a tender of the right amount after a discovery of the mistake and before any change in the situation of the parties had taken place, was held to be sufficient.[4] So, the same rule was applied when the debtor made a mistake as to the day on which the payment was to be made.[5] A failure to pay composition notes promptly when due is sometimes held not to avoid the agreement when an avoidance would be inequitable to other creditors.[6]

Sec. 179. Same subject—Tender of performance.—A tender upon an accord and its refusal is no bar, for the reason that there is no consideration to support the new agreement until performance, and the agreement being without consideration before performance the tender may be rightfully refused; but with respect to a composition a new and independent consideration arises out of the agreement itself, and is to be found in the mutual promises of the creditors. The executory agreement being valid, a tender of performance may be made, and if refused, the debtor has done all

1 Renard v. Tuller, 4 Bosw. 107.

2 Matter of Leslie, 10 Daly, 76.

3 Thurston v. Vian, 32 L. C. Jur. 244.

4 Clark v. White, 12 Pet. 178: A mistake of one dollar and forty cents on seventy per cent. of a ten thousand dollar claim, was held a mistake too trivial to deserve notice.

5 Newington v. Levy, L. R. 6 C. P. C. 180.

6 Mackenzie v. Mackenzie, 16 Ves. Jr. 372.

that lay within his power, and his rights are preserved.[1] The rule is the same whether the composition agreement or performance constitute satisfaction. The tender must be in accordance with the terms of the agreement.[2] But it seems, if notes or bills payable at a future time are to be delivered, cash may be tendered.[3] The exact amount agreed upon must be tendered at the stipulated time.[4] A tender after the time is not good.[5] The tender must be at the place specified or at the place fixed by law.[6] The general rule is that in absence of a stipulated place for payment, the debtor must seek the creditor if within the realm and tender the money to him.[7] By this is meant that the debtor is bound to seek his creditor at his residence or place of business. The debtor is not bound to go out of the realm to find the creditor. In the United States he is not bound to go out of the state in which the contract was made.[8] But where the composition is of a debt due on a foreign contract and the creditor resided abroad when the composition agreement was made, the debtor must seek him and tender the composition money notwithstanding he resides abroad.[9] The debtor must be ready and able at

[1] Fellows v. Stevens, 24 Wend. 294; Chemical Bank v. Kohner, 85 N. Y. 189; Warbury v. Wilcox, 2 Hilt. 121; Schroeder v. Pissis, 128 Cal. 209, 60 Pac. 758; Wilson v. Samuels, 100 Cal. 514, 35 Pac. 148; Melhop v. Tathwell, 74 Iowa, 571, 38 N. W. 420; Harrison v. Gamble, 69 Mich. 96, 36 N. W. 682; Stewart v. Langston, 103 Ga. 209, 30 S. E. 35; Bradley v. Gregory, 2 Comp. 385; Evans v. Powes, 1 Exch. 601; Sullivan, In re, 36 L. J., B. 1, 15 L. T. N. S. 434.

[2] Evans v. Powes, 1 Exch. 601.

[3] See Thurston v. Vian, 32 L. C. Jur. 244.

[4] Hunt on Tender, Sec. 281.

[5] Sewell v. Musson, 1 Vern. 210. See Thurston v. Vian, 22 L. C. Jur. 244, where the debtor failed to tender certain bills within the time, but tendered money instead, but before suit.

[6] Hunt on Tender, Sec. 310 *et seq.*

[7] Co. Litt. Sec. 340.

[8] Houbie v. Volkening, 49 How. Pr. 169; Gili v. Bradley, 21 Minn. 15.

[9] Fessard v. Muynier, 18 C. B., N. S. 286, 11 Jur., N. S. 283, 34 L. J., C. P. 125, 11 L. T., N. S. 635.

the time and place to make the payment; a mere willingness is not sufficient.[10] He must make an actual tender of payment[11] by a production of the money and offer of it to the creditor;[12] unless the actual production is dispensed with[13] by some act or declaration showing that the money or thing will not be received if produced.[14] Depositing the composition money in a bank and notifying the creditor or his attorney that it will be paid over on a receipt being deposited with the bank, is no tender.[15] If a note,[16] deed or other instrument is to be delivered, it must be drawn up and ready for delivery at the time of the offer of performance.[17] The money tendered must be legal tender. However, a tender of other forms of money passing current, will be good if not objected to on the ground that it is not a legal tender.[18] A tender of a bank check for the proper amount, if not objected to, is good. If the debtor intends to give a bank check for the amount due, he must have it drawn at the time of offering to pay, and that fact made known to the creditor. An offer to draw a check is not a tender,[19] and the creditor will waive nothing if the check be not actually drawn.

The tender must be made to the creditor personally, if he can be found at the place specified for payment, or at the place fixed by law, if no place be specified; or it may be made at the place, to an agent or other person authorized to receive it. If no one be at the

10 Myers v. Byington, 34 Iowa, 205; Hunt on Tender, Sec. 223.

11 Rosling v. Muggeridge, 16 Mee. & W. 181, 4 Dow. & L. 298, 16 L. J., Exch. 38; Hazard v. Mare, 6 H. & N. 435; Fessard v. Mugnier, 18 C. B., N. S. 286.

12 Hunt on Tender, Sec. 234.

13 Bowen v. Holly, 38 Vt. 574.

14 Hunt on Tender, Sec. 236.

15 Melhop v. Tathwell, 74 Iowa, 571, 38 N. W. 420.

16 Warbury v. Wilcox, 2 Hilt. 118.

17 Hunt on Tender, Sec. 224.

18 See Hunt on Tender, Ch. 11. "Medium."

19 Durham v. Jackson, 6 Wend. 22.

place of payment to receive the money, being there with the money or other thing to be delivered at the uttermost hour of the day before sunset, or if a place of business, as a bank, be specified for payment, at the hour of closing, if it be the custom to close at an earlier hour before sunset, will be sufficient. A tender to a mere workman or a servant will not suffice.[20] A tender to the agent or attorney who negotiated the composition on the part of a creditor will be good in absence of notice that the attorney's or agent's authority has been withdrawn.[21] The tender must not be conditional on receiving a receipt,[22] nor clogged with any other condition not specified in the agreement. The general rule is that a failure to keep a tender good is an abandonment of the tender, but it has been held that where a creditor repudiated a compromise and refused a tender of certain notes agreed to be delivered, a destruction of the notes by the debtor did not destroy the composition agreement. That the debtor could only be put in default by a subsequent demand for the notes.[23]

Sec. 180. Formal tender excused—Waiver of formalities.—Where an installment of the composition money has been refused, the debtor is excused from making an actual tender of subsequent installments [1] until such time as the creditor gives notice that he will accept the payments. So a formal tender is not necessary if the person to whom the money is due be out of the state and has no place of residence therein.[2] The actual production of the money at the time of making the verbal offer of it may be dispensed with by some positive act or declaration of the party to whom the money is due, as by refusing to remain until the money is counted,

20 Hoadley v. Jenkins, 16 L. T. N. S. 389.

21 See Melhop v. Tathwell, 74 Iowa, 571, 38 N. W. 420.

22 Melhop v. Tathwell, 74 Iowa, 571, 38 N. W. 420.

23 Chemical Nat. Bank v. Kohner, 85 N. Y. 189.

1 In re Sullivan, 36 L. J., B. 1, 15 L. T., N. S. 434.

2 Co. Litt. Sec. 340; Emlen v. Lehigh, 47 Pa. St. 76, 86 Am. Dec. 518.

or until it is produced.[3] It is dispensed with if the creditor orders the debtor away or repulses him when he announces that he has come to pay.[4] So, if one to whom the offer is made denies the existence of the contract, or repudiates it,[5] as where he refuses the amount of the composition and demands his whole debt,[6] claiming that the debtor came too late,[7] the creditor cannot claim a default for a failure to make a formal tender. The exception to the rule requiring the actual production of the money, is founded upon the well-known rule that the law does not require that to be done which manifestly would be a vain and idle ceremony. The party relying upon a waiver must himself have been ready and able at the time to perform.[8] The actual production of the money is not dispensed with by a bare refusal to receive the sum proposed, and demanding more.[9]

Sec. 181. Same subject—Strict performance excused—Waiver. —A creditor may waive a default in the performance of a composition.[1] But a waiver will not be implied from acts of the creditor if it be shown that at the time he did not have knowledge of the facts upon which the default rests.[2] If, knowing of the default, he recognizes the agreement as subsisting by carrying it out in whole or in part, as by accepting the composition money or other thing to be delivered, he waives his right to avoid the agreement

3 Sands v. Lyons, 18 Conn. 18.

4 Mesorole v. Archer, 3 Bosw. 376.

5 Abrams v. Suttle, Bush L. 99; Cooper v. Phillips, 1 C., M. & R. 649; Ilderton v. Castrique, 13 L. T., N. S. 506; Bamford v. Clews, L. R. 3 Q. B. 729.

6 Reay v. White, 1 C. & M. 748, 3 Tyr. 597.

7 Ex parte Danks, 2 DeG., M. & G. 936, 22 L. J., B. 73.

8 Hunt on Tender, Sec. 236.

9 Kinkinfore v. Shee, 4 Esp. N. P. 68; Krause v. Arnold, 7 Moors, 59; Dunham v. Jackson, 6 Wend. 22.

1 Penniman v. Elliott, 27 Barb. 315.

2 Cobleigh v. Pierce, 32 Vt. 788.

on account of the default.[3] The most common act held to be a waiver of a default, is where the creditor received the money after the day of payment is past.[4] Allowing the debtor to go on after a default and comply with other terms of the agreement;[5] or continue to negotiate with him on the basis that there has been no default,[6] is a waiver of the default. Mere silence or neglect to answer the debtor's letter asking to be allowed to substitute another indorser in place of the one agreed upon (who died without signing), is not a waiver of a default arising from a failure to tender notes indorsed as agreed.[7] A creditor before the time for performance may dispense with a condition. If he gives the debtor additional time, he cannot claim a default until he expressly withdraws his consent.[8] If a creditor joins in a composition agreement after the day for performance is past, he cannot object to it upon that ground. By coming in he adopts all other provisions.[9] In such case the money is payable *instanter,* and it has been held that a delay of several weeks rendered inoperative, a release with a proviso that if the money be not paid when due the release should be absolutely void.[10]

A secret agreement with a creditor giving him a preference is fraudulent, and if the failure to pay the composition money is in pursuance of such agreement, the creditor will not be permitted

[3] Browning v. Crouse, 43 Mich. 489, 5 N. W. 664; Bissener v. Guitman, 6 Heisk. (Tenn.) 277; Dauchy v. Goodrich, 20 Vt. 127; Mackenzie v. Mackenzie, 16 Ves. 372.

[4] Shipton v. Casson, 5 Barn. & Cress. 378; Harvey v. Hunt, 119 Mass. 279; Penniman v. Elliott, 27 Barb. 315.

[5] Watts v. Hyde, 17 L. J., Ch. 409, 10 Jur. 127.

[6] Ex parte John B. Cross, 4 DeG. & Sm. 364.

[7] Danzig v. Gummersell, 27 Fed. 185.

[8] Ex parte King, L. R. 17 Eq. 332.

[9] Harvey v. Hunt, 19 Mass. 279; Milligan v. Salmon, 18 L. T., N. S. 887; Bowen v. Holly, 38 Vt. 574.

[10] Milligan v. Salmon, 18 L. T., N. S. 887.

to take any advantage of the default.[11] After a waiver, the default is not available to the creditor for any purpose.[12] Where a creditor with two or more notes joins in a composition and afterwards parts with some of the notes, he cannot require a tender of the composition-money upon those remaining in his possession, as the agreement is entire and he cannot apportion his claim by his own act so as to require performance when he himself is unable to perform.[13] Where a certain fund is to be assigned to a trustee of the creditor's nomination, for the payment of a composition, and they neglect to nominate, the debtor being willing to perform, a creditor, a party to the agreement, cannot maintain an action on his original demand.[14] A creditor after waiving one default may take advantage of any subsequent default.[15] An objection to a tender of the composition money upon one ground has been held to be no waiver of any existing default.[16] An agent or attorney without the consent of the principal cannot waive a default in the payment of the money due on a composition agreement, but if the principal receives the payment with knowledge of the default, he ratifies the act of the agent or attorney and waives the default.[17]

Sec. 182. Breach by debtor—Effect—Rights of the parties—Retaining partial payments—Remedies—Statute of limitations.—Where the performance of a composition agreement is to constitute the satisfaction of the original claims, whether it contains an express stipulation that a failure to perform shall avoid the

11 See Townsend v. Newell, 22 How. Pr. 164; Bean v. Amsinck, 10 Blatchf. 361.

12 Dauchy v. Goodrich, 20 Vt. 127; Cobleigh v. Pierce, 32 Vt. 788.

13 Farrington v. Hodgdon, 119 Mass. 453.

14 Good v. Cheesman, 2 B. & Ad. 328, 4 C. & P. 513.

15 Hyde v. Watts, 12 Mee. & W. 254, 1 Dow. & L. 479, 13 L. J., Ex. 41.

16 Lower v. Clement, 25 Pa. St. 63.

17 Penniman v. Elliott, 27 Barb. 315.

agreement or not, a failure to pay or tender the money or other thing according to the agreement remits the creditor to his original rights,[o] and he may prove his claim in bankruptcy,[1] or come in under an assignment for the benefit of creditors, or bring an action on the original demand, to recover whatever remains unpaid,[2] without giving any notice of an election to treat it as void. Bringing an action on the original agreement is an election.[3] It is not necessary to return any partial payments received upon the compromise. The effect of such payments is to discharge the original debt *pro tanto*.[4] The fact that the money was paid by a surety does not require it to be returned, as the surety assumes the risk of a default by the debtor and is charged with knowledge that the law applies the payment, as a discharge *pro tanto,* in case the creditor elects to be remitted to his original cause of action.[5] However, if the money is paid by a third party on condition that

o Melhop v. Tathwell, 74 Iowa, 571, 38 N. W. 420; Whitmore v. Stephens, 48 Mich. 578, 12 N. W. 858; Harrison v. Gamble, 69 Mich. 96, 36 N. W. 682; McMannomy v. Railway Co., 167 Ill. 497, 47 N. E. 712.

1 Ex parte Wood, 2 Deac. & C. 508; Ex parte Bennet, 2 Atk. 527; Ex parte Gilbey, 8 Ch. D. 248, 47 L. J. B. 49, 38 L. T. R., N. S. 728; In re Decker, 8 Ben. (U. S.) 81; Ex parte Reay, 4 Deac. & C. 525, 2 Mont. & A. 33. See Ex parte Minton, 3 Deac. & Chit. 688, where a debtor to induce a creditor to sign a composition deed paid him in full, and then contracted a fresh debt with the creditor, upon the debtor becoming bankrupt the creditor was not permitted to prove the fresh debt without first deducting the unlawful preference.

2 Pupke v. Churchill, 91 Mo. 81, 3 S. W. 829; Zeobisch v. Van Minden, 120 N. Y. 412, 24 N. E. 795, 31 N. Y. St. 499; Penniman v. Elliott, 27 Barb. 315; Hadley Bank v. May, 99 N. Y. 671, 29 Hun, 404; National Bank v. Porter, 122 Mass. 308; Bailey v. Boyd, 75 Ind. 125; Zell v. Emry, 113 N. C. 85, 18 S. E. 89; Montgomery Bank v. Ohio Co., 110 Ala. 360, 18 So. 273; Taylor v. Farmer, 81 Ky. 458; Danzig v. Gumersell, 27 Fed. 185; Cranley v. Hilliary, 2 M. & S. 120; Leigh v. Barry, 3 Atk. 583, 26 Eng. Reprint, 1136; Constable v. Andrews, 2 C. & M. 298, 4 Tyr. 206.

3 Hyde v. Walls, 12 Mee. & W. 254, 1 Dow. & L. 479.

4 Durgin v. Ireland, 14 N. Y. 322; Greer v. Shriver, 53 Penn. 259; Ex parte Wood, 2 D. & C. 508; Ex parte Reay, 4 D. & C. 525, 2 M. & A. 33.

5 Ex parte Gilbey, L. R. 8 Ch. Div. 248.

all the creditors become parties to the agreement. The stipulation is for the protection of the surety or third party, and cannot be avoided without returning to the surety the money received.[6] By electing to avoid a composition, the debtor, as between him and the creditor so electing, except as to the money paid by him, and possibly as to the running of the Statute of Limitations, is remitted to his original rights, and an action cannot be maintained against him, or a surety on the composition notes.[7] It has been said that a creditor, who, as between himself and the debtor has successfully contested a composition agreement on the ground that it is void, is not precluded from coming in under the agreement and obtaining the benefit which he would only be entitled to on the footing that the agreement was valid.[8] But by doing so, he would be bound by the agreement. The agreement, upon a breach, is not absolutely void, but voidable at the election of the creditors,[9] otherwise the debtor could defeat the composition against the wishes of the creditors and absolve himself and his sureties, if any, from all liability.[10] A creditor may elect to stand on the agreement and bring an action to recover his damages occasioned by the breach,[11] or to recover the money due thereon,[12]

[6] Babcock v. Dill, 43 Barb. 577. See also Crandall v. Cochran, 3 T. & C. (N. Y.) 203.

[7] See Latter v. White, L. R. 5 Q. B. 622, L. R. 6 Q. B. 474, L. R. 5 H. L. 578, where notes were deposited with a trustee. After obtaining judgment against the defendant on the original claim on the ground that the composition deed was void, he sought to recover on the composition notes, and in detinue against the surety. He was not allowed to recover but the case went off on technicalities. But see Ex parte Reay, 4 D. & C. 525, 2 M. & A. 33, where a composition was to fall to the ground upon default in the payment of any installment, it was held that the creditor could prove in the insolvency proceedings against the debtor, the balance of his original debt, and also retain a bond given to secure the composition notes.

[8] Latter v. White, L. R. 5 H. L. 578, *per* Lord Cairns.

[9] Hyde v. Watts, 12 Mee. & W. 254, 1 Dow. & L. 479.

[10] Bump on Comp. 53.

[11] Brown v. Farnham, 55 Minn. 27, 56 N. W. 352.

[12] Bailey v. Boyd, 75 Ind. 125.

or for specific performance, if the facts will warrant such an action. A breach may be as to one creditor, as where the debtor fails to pay one, or it may be a breach as to all the creditors, as where the debtor fails to assign his property to a trustee agreed upon.[13] The right to avoid a composition for a breach thereof is several, and available to any creditor who has suffered by the breach.[14] If avoided by one creditor for a breach of performance it may be avoided by all the creditors, although the composition money is paid to the others, for when void as to one it is void as to all,[15] unless the deed releases the claim of all creditors who receive their *pro rata* and restores those as to whom default is made, to their original cause of action. If the agreement was not voidable by all upon a default in the payment of the composition-money to one and an avoidance by him, a debtor could easily arrange with one creditor, as an inducement to him to come into the agreement, to make a default as to him and pay him in full. The other creditors may elect to stand by the agreement. A surety cannot compel a creditor to elect.[16]

If a debtor after executing a composition agreement permits his property to be taken upon execution, or writ of attachment by a creditor not a party to the agreement,[17] or by a party to the agreement before the time for performance is past, and he fails to take any steps to set aside the execution or arrest the sale and

[13] Brown v. Farnham, 55 Minn. 27, 56 N. W. 352.

[14] See Brown v. Farnham, 55 Minn. 27, 56 N. W. 352, where the action was for damages for a breach. A default in payment to one creditor is not available to another who has been paid, although the agreement provides that it shall be void as to the creditors respectively, if the money be not paid at the day named: Hart v. Smith, L. R. 4 Q. B. 61.

[15] Evans v. Gallatine, 59 Ind. 367: The agreement provided a time limit and concluded with the words "otherwise void."

[16] Ex parte Gilbey, 8 Ch. D. 248, 46 L. J. B. 49, 38 L. T. R., N. S. 728, 26 W. R. 768.

[17] See Hill v. Wertheimer, 150 Mo. 483, 51 S. W. 702.

allows the execution creditor to acquire title to the property,[18] the creditors will be released from the agreement. But where it is not within the power of the debtor to stop legal proceedings against him, the agreement is not avoided by a seizure of property by a creditor not a party to the agreement; nor is it avoided by a voluntary payment of the hostile debtor's claim without waiting for the issuance of an execution.[19] The seizure of property, however, which the debtor was to assign to the creditors, would put an end to the agreement. Any transfer of his property in fraud of the signing creditor,[20] or committing an act of bankruptcy, as by making a general assignment of his property for the benefit of creditors not signing as well as those signing;[21] will constitute a breach of the agreement, particularly if the property is the source from which the composition money was to be realized.[22] Where the agreement provides that it is in consideration of other creditors accepting a like percentage, a voluntary payment to some of them of their claims in full is a breach of the agreement.[23] If the creditors are to release their claim in the event that a certain sum is realized out of the property assigned, the creditors may sue for their original debt if the sum realized falls short of the

18 See Henry v. Patterson, 57 Penn. 346.

19 Carey v. Barrett, 4 C. P. D. 379.

20 Hill v. Wertheimer, 150 Mo. 483, 51 S. W. 702.

21 Ex parte Bennet, 2 Atk. 527, 26 Eng. Reprint, 716.

22 Under an English Statute (24 & 25 Vict. C. 134, s. 151) providing for proving debts payable in installments, it was held, where the composition deed contained a release with a proviso, that in case the composition should not be paid, the release should be null and void; that becoming a bankrupt before a default in the payment of the composition money did not remit the creditors to their original claims, but the creditors must prove only the amount remaining unpaid on the composition: Ex parte Peele, 1 Rose, 435; Ex parte Vere, 1 Rose, 281.

23 Seed v. Wunderlich, 69 Minn. 288; Montgomery Bank v. Ohio Buggy Co., 110 Ala. 360, 18 So. 273. In re Sturges, 8 Biss. (U. S.) 79: This case lays down the same general rule, but the facts disclosed a voluntary payment after the discharge.

sum specified.[24] So a stipulation for a release if the trustee fairly accounts for the property, will not become operative if the trustee refuses to account.[25] A refusal by a trustee to allow a creditor to sign a composition deed on the ground that he had discovered after the assignment was agreed on, that his claim was usurious, was held to remit the creditor to his original cause of action.[26] The burden of proof is upon a defendant when sued upon the original contract, to establish a composition and its performance, or a sufficient excuse for non-performance. If time remains in which to perform, he need only prove the agreement.[27] Where a plaintiff's proof shows a compromise, as when the agreement is indorsed on the note sued upon, the burden is upon him to get rid of it by showing the particulars of the default.[28]

If the composition agreement constitutes satisfaction, as where it contains an absolute discharge or unconditional release, there is a novation immediately upon the execution of the agreement, and the remedy of the creditor is upon the new agreement.[29] If any independent contract, as a note or other evidence of the composition debt is accepted upon such an agreement, the remedy of the creditors is to enforce collection of the notes.[30] If the agreement provides for the assignment of certain property,[31] or contains a covenant to do any other thing, the action is for damages for non-performances. The measure of damages is the amount

[24] Wigglesworth v. White, 1 Stark. 218, 2 E. C. L. 89.

[25] Kesterson v. Sabery, 2 Chit. 581, 18 E. C. L. 777.

[26] Garrard v. Woolner, 4 C. & P. 471, 1 M. & Scott, 327, 8 Bing. 258.

[27] Harrison v. Gamble, 69 Mich. 96, 36 N. W. 682.

[28] Browning v. Crouse, 43 Mich. 489, 5 N. W. 664.

[29] Chapman v. Dennison, 77 Me. 205; Evans v. Powis, 1 Ex. R. 601; Soloman v. Laverick, 18 L. T., N. S. 545.

[30] Bartlett v. Woodworth, 69 N. H. 316, 41 Atl. 264; Mullin v. Martin, 23 Mo. App. 537; Lanes v. Squgres, 45 Tex. 382.

[31] Brown v. Farnham, 55 Minn. 27, 56 N. W. 352.

of the composition debt less what has been paid; or if property was to be assigned the proceeds of which was to be *pro rated* among the signing creditors, then the value of the property which the debtor failed to turn over.[32] If an action is brought either upon the original claim, or upon the composition agreement before a default, it will be abated as premature.[33] The statute of limitations begins to run on a cause of action upon the composition agreement, from the time of a default, and if upon a default, the creditor is remitted to his original cause of action, the law implies a new promise, and the statute of limitations begins to run from the time of the default.[34] Where one partner authorized another to make a separate composition with their creditors in his own behalf, agreeing to settle the residue of the debts himself, it was held that payments upon the composition agreement by the contracting partner, did not prevent the statute from running on the original demand in favor of the remaining partner.[35]

Sec. 183. Breach by creditor—Right of debtor—Of other creditors.—If a creditor repudiates the agreement, all the debtor need do is to make the proper tender of performance, unless a formal tender is waived; and, if he desires to save interest and cost, keep the tender good by keeping the money, notes or other thing ready

[32] See Brown v. Farnham, 55 Minn. 27, 56 N. W. 352.

[33] Smythe v. Graydon, 29 How. Pr. 224; Mansfield v. Rutland, 52 Vt. 444.

[34] In re Stock, 66 L. J., Q. B. 146, 75 L. T. Rep., N. S. 422, 3 Monson, 324, 45 W. R. 480; Irving v. Vitch, 3 M. & W. 90; Ex parte Bateson, 1 Mont., D. & D. 289: In this case there was a default upon the composition agreement. A subsequent payment was held to have been made upon the original debt. A receipt was given, which by its terms was held to be an acknowledgment of the debt. Including a debt in the schedule attached to a deed of inspectorship was held not such an acknowledgment of the debt as to take it out of the statute of limitations, it being an acknowledgment only that the debt was due *modo et forma* as therein stated. See Ex parte Topping, 34 L. J. Bank. 44, 13 W. R. 1025, 12 L. T., N. S. 787.

[35] Sigler v. Platt, 16 Mich. 206.

for the creditor.[1] A breach of a stipulation requiring the debtor to continue to deal with a creditor will not avoid the agreement, if they do not furnish him with good and marketable articles.[2] If the facts permit he may bring a suit for specific performance.[3] Where the debtor is to assign certain property to a trustee to be nominated by the creditors, but no nomination is made, it is sufficient if he be ready and willing to make the assignment as agreed.[4] If a debtor is compelled to pay to a *bona fide* holder, the amount of a negotiable instrument included by the payee in a composition agreement, he may recover of the payee the amount he was required to pay the holder and interest, if he has paid over the composition money,[5] if not then the difference between the amount paid and the amount due upon the composition agreement. Creditors to a composition agreement, as between themselves, are held to the exercise of the utmost good faith, and a creditor will not be permitted to gain any advantage while the contract is subsisting. If he attaches property before the expiration of the time for performance by the debtor, and compels the debtor to transfer property to him in settlement of his claim, the transfer is fraudulent and void, and the property or its value may be recovered by a trustee in insolvency.[6] So, the other creditors may recover of the creditor guilty of the breach such damages as they may have sustained thereby.[7] The rights and remedies of creditors against their co-creditors, in cases of fraudulent preferences, is considered elsewhere.

[1] A creditor who repudiates a composition and refuses to accept a tender, cannot plead non-performance for the purpose of depriving the debtor of his defence: Chemical Bank v. Kohner, 85 N. Y. 189.

[2] Thornton v. Sheratt, 8 Taunt. 523.

[3] Only v. Walker, 3 Atk. 407.

[4] Good v. Cheeseman, 2 B. & Ad. 328, 4 C. & P. 513.

[5] Hawley v. Beverly, 6 Scott, N. R. 837.

[6] Gardner v. Lewis, 7 Gill, 377.

[7] Hill v. Wertheimer, 150 Mo. 483, 51 S. W. 702.

Sec. 184. Specific performance—Restraining threatened violation.—A composition agreement may be specifically enforced in equity, at the instance of the debtor,[1] or a creditor,[2] or one in privity of contract with the debtor, as where property which is subject to a lien for the payment of the composition money, is transferred to a third party who assumes the debt,[3] or one in privity of contract with a creditor, as an assignee of the particular debt or a general assignee of the creditor's property, or an heir, or devisee, or a personal representative of either the debtor [4] or a creditor. A composition agreement must contain all the elements necessary in equity to the enforcement of any contract. It will not be enforced if it contains any element of fraud on the part of the one applying, as where the debtor has given a secret preference to any creditor,[5] or the agreement is void under the statute of frauds,[6] or where the agreement is not fully executed, as where its validity is made to depend upon certain creditors signing it, and a part of them have not executed it.[7] So, ordinarily, there must be no adequate remedy at law. If a creditor, a party to the agreement, issues an execution on his judgment and threatens to or does levy upon the property of the debtor, or in any other manner seeks to gain an advantage contrary to his agreement, the debtor or any creditor may bring an action to enjoin him.[8] Likewise a debtor will be restrained from

[1] Only v. Walker, 3 Atk. 407.

[2] Synnot v. Simpson, 5 H. L. Cas. 121; Lobdell v. Nauvoo Bank, 180 Ill. 56, 54 N. E. 157; Bartleman v. Douglas, 1 Cranch C. C. 450.

[3] See Clark v. White, 12 Pet. 178, 9 L. Ed. 1046.

[4] Pollen v. Huband, 1 P. Wms. 751, 24 Eng. Repr. 598; In Matter of Leslie, 10 Daly, 76.

[5] Child v. Dandridge, 2 Vern. 71.

[6] Emmet v. Dewhirst, 15 Jur. 1115, 21 L. J. Ch. 497, 49 Eng. Ch. 453.

[7] Acker v. Phœnix, 4 Paige, 305.

[8] Blodget v. Hogan, 10 La. Ann. 18; MacKenzie v. MacKenzie, 16 Ves. Jr. 372; Gibbon v. Bellas, 2 Phila. 390 (a *bona fide* assignee of a judgment note was restrained by injunction from collecting it); Fawcett v. Gee, 3 Anstr.

any interference contrary to his agreement, with the property set apart for the payment of the composition money, whereby the same might be diminished in value, or totally lost to the creditors.

Sec. 185. Subsequent promise to pay residue of a debt discharged by a composition.—After a debt is discharged by an accord and satisfaction or composition, a subsequent agreement not under seal,[1] to pay the residue of the original debt is without consideration and void.[2] Such a discharge is conventional and being freely given upon the part of the creditor for a consideration, all obligation, legal and moral is discharged.[3] The rule is different when the discharge is by act of law; and, an unconditional promise by a person to pay a debt from which he has been discharged in bankruptcy, or proceedings in insolvency, is binding, and an action may be maintained thereon.[4] The debt of an insolvent though dis-

910; Spurret v. Spiller, 1 Atk. 105, 26 Eng. Pepr. 69; Jackman v. Mitchell, 13 Ves. Jr. 581.

[1] A bond given for the residue of a debt discharged by a composition may be enforced: Tuck v. Tooke, 9 Barn. & Cress. 437.

[2] Watts v. Hyde, 10 Jur. 127, 17 L. J., Ch. 409; Higgins v. Dale, 28 Minn. 127, 9 N. W. 583; Warren v. Whitney, 24 Me. 561, 41 Am. Dec. 406; Stafford v. Bacon, 1 Hill, 532, 37 Am. Dec. 366 (Accord and Satisfaction). A nominal consideration of one dollar is not sufficient to support a contract not under seal: Shepard v. Rhodes, 7 R. I. 470, 84 Am. Dec. 573; Way v. Langley, 15 Oh. St. 392; Zoebisch v. Von Minden, 120 N. Y. 406, 24 N. E. 795, 31 N. Y. St. 499; Rasmussen v. State Bank, 11 Colo. 301, 18 Pac. 28; Callahan v. Ackley, 9 Phila. (Pa.) 99; Evans v. Bell, 15 Lea (Tenn.) 569; Montgomery v. Lampton, 3 Metc. (Ky.) 519. A subsequent promise to all the creditors to pay them more than the amount received in the composition is equally without consideration: Coon v. Stoker, 2 N. Y. St. 626. The surrender of a security which has been released by a discharge of the debt by a composition, furnishes no consideration for a promise to pay the residue of the debt beyond the amount of the composition: Cowper v. Green, 7 M. & M. 638, 10 L. J. Exch. 343. See Sec. 10 Accord and Satisfaction.

[3] See Stafford v. Bacon, 1 Hill, 532, 37 Am. Dec. 366.

[4] Earnest v. Parks, 4 Rawl. 452, 27 Am. Dec. 288; Thomas v. Hodgson, 4 Whart. 498.

charged, is in conscience due and the debtor may, therefore, renew the old debt by a new promise, and the old debt will constitute a sufficient consideration.[5]

Sec. 186. Composition effected by assignment.—An assignment for the benefit of creditors made voluntarily to a trustee of the debtor's own choosing, is not a composition, and does not bar an action for the residue of a debt remaining after deducting a dividend received from the trustee, although the deed of assignment contains a proviso that no creditor shall receive anything unless he should fully acquit and discharge the debtor from all demands up to the date of the assignment. The agreement to accept a part of a debt in satisfaction of the whole is a *nudum pactum,* and the intervention of a trustee, who manages the property and pays out the proceeds under conditions prescribed by the debtor, does not change the rule from that applied to such payment by the debtor in person.[1] In England, a voluntary assignment when not assented to by creditors amounts to no more than a license or as a power to the trustee, which is revocable by the debtor.[2] But it has been said that if the trustee communicate the fact of the trust to the creditors the power to revoke is lost.[3] So, it has been held that where the trustee takes a beneficial interest, as where the assignee is a creditor and assents to act as trustee, the deed is not revocable by the debtor.[4]

[5] Scouton v. Eislord, 7 Johns. 76. The promises to pay a debt discharged in bankruptcy, is the substantive cause of action, the old debt, is merely the consideration: Dusenberry v. Hoyt, 14 Abb. N. S. 134, 45 Hun, 148, 36 N. Y. Sup. Ct. 97. In some states the new promise to be valid must be in writing.

[1] Allen v. Roosevelt, 14 Wend. 100; Garrard v. Lauderdale, 2 Russ. & M. 451, 11 Eng. Ch. 451; In re Waley, 3 Drew. 165, 3 Eq. R. 380, 1 Jur., N. S. 338, 24 L. J. Ch. 499. A *cessio bonorum* in favor of creditors without condition is not a composition: The Queen v. Cooban, 18 Q. B. D. 269. See Loney v. Bailey, 43 Md. 19.

[2] Smith v. Keating, 6 C. B. 136; Acton v. Woodgate, 2 Mylne & K. 492.

[3] Acton v. Woodgate, 2 Mylne & K. 492.

[4] Siggers v. Evans, 1 Jur. N. S. 851, 24 L. J. Q. B. 305, 5 El. & Bl. 367, 3 C. L. R. 1209.

In the United States the rule in almost all, if not all the states, is that an assignment, not fraudulent, to a stranger for the benefit of creditors transfers the title to the trustee without the consent of creditors.[5] But such a transfer will not become effective without the knowledge and privity of the trustee;[6] and until the trust is accepted, the property is subject to levy.[7] If the assignment is made direct to the creditors their assent is necessary to give it validity for the reason that it requires the agreement of two parties to make a contract.[8] After the title to the property has vested the debtor cannot revoke the assignment. But, in any such case, to constitute a composition, the assent of two or more of the creditors to the assignment for the purpose of compounding their debts must be had;

[5] Cunningham v. Freeborn, 11 Wend. 240; Weston v. Barker, 12 Johns. 281; Nicoll v. Mumford, 4 Johns. Ch. 522; Rankin v. Duryer, 21 Ala. 392; Smith v. Leavitt, 10 Ala. 93; Brooks v. Marbury, 11 Wheat. 78; Gray v. Hill, 10 Serg. & R. 436; New England Bank v. Lewis, 8 Pick. 113: Creditors are entitled to benefits under an assignment for their benefit without becoming parties to it or assenting, where the instrument does not require any signature or assent.

[6] Cunningham v. Freeborn, 11 Wend. 240. If he takes possession of the property he will be bound to execute the trust although he does not sign the deed.

[7] If a trustee does not accept immediately but takes the matter under consideration, a levy upon the property covered by the deed of assignment before be accepts, will give the judgment creditor a lien upon the property: Crosby v. Hillyer, 24 Wend. 280.

Before the time limited for creditors to come in and execute a deed of assignment, a creditor who had refused to become a party, may take the property in the possession of the assignee by execution and sell the same in satisfaction of his debt: Austin v. Bell, 20 Johns. 442.

Where an assignment is made to a trustee for the benefit of creditors who execute the deed or assent to it and the trustee takes possession of the property and notified three creditors who assented to the arrangement, the title was held to pass to the trustee as against an execution creditor who did not know of the deed although no creditor signed the deed: Harland v. Binks, 15 Q. B. 713, 14 Jur. 979, 20 L. J., Q. B. 126, s. p. Evans v. Jones, 3 H. & C. 423, 11 L. J. N. S. 636.

[8] Nicoll v. Mumford, 4 John. Ch. 522; Cunningham v. Freeborn, 11 Wend. 240.

and the title to the property must pass absolutely to the trustee and the property must be placed beyond the control of the debtor. If an assignment is made in pursuance of an agreement with creditors that the property assigned, or the proceeds realized therefrom, will be accepted in satisfaction of their demands, such assignment is a good accord and satisfaction or composition.[9] Previous assent of the creditors is not necessary; if they afterwards consent to the arrangement the composition will be binding.[10] The distinction between the two cases of assignment is, that the first is a mere voluntary trust for the payment of debts, to which the creditors are not parties, nor assenting; while the latter is a deed to a trustee as the second party, in favor of such creditors as may become the third parties thereto by signing or otherwise assenting.[11]

Sec. 187. Duties of assignee—Rights of creditors.—The assignee of a fund transferred for the purpose of carrying out a composition is governed by the same rules with respect to the performance of his trust as other trustees. As soon as the assignee accepts the deed he becomes a trustee for the creditors and they may compel the execution of the trust, even when the trust was created without their knowledge.[1] The acceptance of the trust may be in express terms, or by implication as where the trustee takes possession of the property assigned. In such cases a failure to sign the trust deed does not affect the validity of the assignment. If a trustee who is a creditor, executes a trust deed containing a release, his debt is extinguished and he will not be heard to say that he signed the deed

9 Watkinson v. Inglesby, 5 Johns. 386; Bartlett v. Rogers, 3 Sawy. (U. S.) 62.

10 Robbins v. Magee, 76 Ind. 381.

11 See Tennant v. Stoney, 1 Rich. Eq. 222, 44 Am. Dec. 213, where the court reviews the decisions and clears up an apparent conflict between some of them. See, also, Robbins v. Magee, 76 Ind. 381.

1 Shepherd v. McEvers, 4 Johns. Ch. 136; New England Bank v. Lewis, 8 Pick. 113.

only as trustee.[2] The trustee cannot divest himself of the trust without the consent of the *cestui que trust,* or an order of a court of chancery.[3] A court of equity has power to remove a trustee for misfeasance or nonfeasance;[4] or it may enjoin him, or any of the parties from making any threatened misapplication of the funds. All the creditors may join in a suit against the trustee to remove him, or to enforce the trust; or the suit may be maintained by one in behalf of all others who may come in and join him. A failure of the trustee to act does not give creditors a right to enforce their claims against the debtor. Thus, where a deed provided that upon default in any payment by the debtor the trustee may declare the deed void, it was held that the creditor's course was to institute proceedings to compel the trustee to give the notice.[5] The trustee is not the agent of the debtor, and any instruction given by him to the trustee before the assignment, or at any time, will not affect the terms of the deed.[6]

The trustee cannot complete a building contract, or other contract ordinarily entered into in reliance upon the skill or judgment of the debtor, unless the contract provides that the debtor's assigns may carry it out.[7] A trustee cannot buy in any of the trust property, but he may afterwards buy from a purchaser any property *bona fide* sold by him.[8] A trustee is responsible to the creditors for the management of the trust property; he is bound to manage the property with the care and diligence of a provident owner,—with the same care that an ordinarily prudent and diligent person would use for himself,—and is liable for a loss resulting from his negligence, mistake, or

[2] Teede v. Johnson, 11 Ex. 840.

[3] Shepherd v. McEvers, 4 Johns. Ch. 136, n. Ly. ed.

[4] Clark v. Wilson, 77 Ind. 176.

[5] In re Clement, 3 Morr. Bankruptcy Cas. 153.

[6] Robbins v. Magee, 76 Ind. 381.

[7] Knight v. Burgess, 10 Jur., N. S. 166, 33 L. J. Ch. 727, 10 L. T., N. S. 90.

[8] Dover v. Buck, 5 Giff. 57.

want of caution.[9] He must inform the creditors upon every reasonable application of the condition of the trust estate; and if he refuses or fails to do so, he must pay the costs of any proceeding taken to obtain such information.[10] A refusal to account for the trust property will render inoperative as a release, a covenant not to sue if the trustee fairly account.[11]

Sec. 188. Same subject.—A trustee must observe the conditions of the deed. The owner of property may give such directions as to its disposition as he may see fit, or enter into any agreement with his creditors with respect to its distribution among them as he may be able to negotiate; and, so long as no one interferes and avoids it by law, the assignee must be governed by the powers given by the deed. If all creditors are to share equally,[1] or preferences are made,[2] or a certain class of debts, or certain specified debts are to be paid,[3] the trustee must pay them in the manner directed. In absence of any specific directions, the intention must be drawn from the object and the scope of the entire deed. An assignment to pay debts generally without any specific directions, implies a power to sell[4] the property conveyed by the deed; but a deed conveying land in trust to pay debts out of the income, conveys no power to sell the land. An assignee must collect the assets transferred by the deed, and for that purpose may bring an action against the debtor or anyone detaining any portion of it. If the conveyance be direct to the trustee under a purely conventional arrangement, he may sue in any court having jurisdiction over the parties or subject matter. A trustee under

9 Litchfield v. White, 3 Sandf. 545, 7 N. Y. 438.

10 Ex parte White, 13 L. T. Rep., N. S. 24.

11 Kesterton v. Sabery, 2 Chit. 541. See Small v. Marwood, 4 M. & R. 181.

1 Child v. Stevens, 1 Vern. 102.

2 Douglass v. Allen, 2 Dr. & War. 213.

3 Pratt v. Adams, 7 Paige, 615.

4 Goodrich v. Proctor, 1 Gray, 567; Willlams v. Otey, 8 Humph. 563.

a common law assignment need not, as in case of bankruptcy, obtain the sanction of a court to justify them in commencing an action against a debtor to the estate. A trustee cannot allow a creditor who has repudiated the deed and sued the debtor, to come in and sign the deed, and if he does, the creditors may cause it to be set aside.[5] If a trustee allows a creditor to sign a deed for a specified sum, he cannot afterwards contest the debt, unless there is gross fraud.[6] If the deed provides that the trustee shall examine the claims, a creditor to obtain the benefits under the deed, must submit his claim to the trustee.[7] If the debts to be paid are not scheduled but the assignment is for the benefit of all creditors who may come in and join in the deed, it is the duty of the trustee to examine and pass upon the claims presented, to the end that *bona fide* creditors may receive as large a per cent. as is possible. A trustee is not authorized by a general power to pay a fictitious debt;[8] or one barred at the time of the assignment by the statute of limitation;[9] or a debt *ex turpi causa*;[10] or a debt founded upon an usurious consideration;[11] but where an usurious claim is directed by the deed to be paid, the trustee, nor a creditor who is claiming benefits under the deed, cannot object to the payment of the ratable portion of the actual money loaned with legal interest.[12]

[5] Field v. Donoughmore, 1 Dr. & War. 227.

[6] Lancaster v. Elce, 31 Beav. 335; 2 Perry on Trust, Sec. 600.

[7] Wain v. Egmont, 3 Myl. & K. 445; Nunn v. Wilsmore, 8 T. R. 521.

[8] Irwin v. Keen, 3 Whart. 347; Hardcastle v. Fisher, 24 Mo. 70.

[9] Pickett v. King, 34 Barb. 193; Pratt v. Adams, 7 Paige, 615.

[10] Pratt v. Adams, 7 Paige, 615.

[11] In Beach v. Fulton Bank (1829) 3 Wend. 584, the court said that perhaps the trustee would not be bound to set up the defense of usury but that he would be justified in doing so. In Pratt v. Adams, (1839) 7 Paige, 615, it was said that a general assignment to pay debts does not include debts founded upon an usurious consideration.

[12] Pratt v. Adams, 7 Paige, 615; Murray v. Judson, 9 N. Y. 73; Green v. Morris, 4 Barb. 332.

Good faith is all that is required of the trustee and in absence of suspicious circumstances he may accept the statement of the debtor and creditor as to the indebtedness. The recital of a debt in a trust deed, or in an attached schedule, raises a presumption of its existence but it may be rebutted.[13] If a creditor disputes the debt of another, or if the debtor denies the debt, the trustee would be bound to withhold payment until the parties interested had in some way settled the controversy; which may be by a bill in equity by the creditor whose claim is contested, asking to be allowed to share in the composition fund; or by an action against the debtor to determine the amount due; or by a bill in equity by the objecting creditors, or by one for all to set aside such debt as illegal or fraudulent.[14] It would seem from the foregoing, that when a dispute arises over the existence of a debt, or its legality, a trustee under a composition deed, in absence of express authority contained in the deed, cannot, without the consent of all parties interested, compromise a claim against the trust fund,[15] although he may compromise claims due the estate. If there is any surplus after paying all the debts as directed, the trustee must account for it to the assignor.[16] If the compensation of the trustee be not agreed upon, he is entitled to a reasonable amount for his time and trouble and for the risk assumed, together with all reasonable and necessary expenses paid by him in the management of the fund, including necessary attorney fees paid by him;[17] and these are first paid before the creditors receive anything.[18] The subject of the duties and liabilities of trustees and

[13] Graham v. Anderson, 42 Ill. 514.

[14] Morse v. Crofoot, 4 Comst. 114.

[15] Ireland v. Potter, 16 Abb. Pr. 218, 25 Hon. Pr. 175.

[16] Stevens v. Earles, 25 Mich. 41; Rahn v. McElrath, 6 Watts, 151.

[17] Rouse v. Hughes, 1 Ky. L. Rep. 320.

[18] Where the debtor's business is to be carried on by a trustee for the benefit of creditors, the expenses incurred in the business are paid first. Karn v. Blackford, 20 S. E. (Va.) 149.

the rights of *cestui que trusts,* is one upon which several volumes may be written, and the reader is referred to works upon that subject for any further information desired.[19]

Sec. 189. Title to what property vests in the assignee—Exempt property—Partnership property—After acquired property—Salary of public office—Title of assignee subject to equities.—An assignment for the purpose of paying a composition is not unlike other assignments at common law with respect to the property conveyed by the deed.[1] According to Mr. Perry, every kind of valuable property, both real and personal, and every kind of vested right which the law recognizes as valuable may be transferred in trust, as a receipt for a medicine,[2] the copyright of a book,[3] a patent right,[4] a trade secret,[5] or growing crops.[6] Where a composition agreed upon is to be carried out by an assignment of the debtor's property, all his property should be assigned unless the agreement designates particular property.[7] An assignment by a trader and farmer of his effects, stock, books, and book debts, conveys the cattle on the farm.[8] All personal estate and effects whatsoever, includes mortgages.[9] So the same general terms in a deed of as-

19 See Perry on Trusts.

1 A trustee under such a deed will acquire no right to avoid a transfer by the debtor, which is only declared fraudulent as to creditors under some bankrupt system.

2 Green v. Folgham, 1 Sim. & St. 398.

3 Sims v. Marryal, 17 Q. B. 281.

4 Russell's Patent, 2 De G. & J. 130.

5 Morrison v. Moat, 6 Eng. L. & Eq. 14, 9 Hare, 241.

6 Robinson v. Maulden, 11 Ala. 908; McCarty v. Belvin, 5 Yerg. 195; Petch v. Tutin, 15 M. & W. 110; Grantham v. Hawley, Hob. 132. 1 Perry on Trusts, Sec. 67, citing the foregoing cases.

7 See Gordon v. Cannon, 18 Gratt. 387.

8 Lewis v. Rogers, 1 C., M. & R. 48, 4 Tyr. 872.

9 West v. Steward, 14 M. & W. 47.

signment have been held to transfer a life insurance policy.[10] Where a deed of assignment conveyed all the debtor's stock in trade, books, and other debts, goods, securities, chattels and effects whatsoever, except the wearing apparel of himself and family, it was held that a contingent interest in a residuary estate of a testator held by the debtor passed.[11] Where a debtor at common law assigns all his property for the benefit of creditors generally, or to pay a composition, all the personal property which the debtor might have claimed as exempt passes to the assignee, unless the deed expressly reserves the exempt property. But with respect to the homestead, the general rule is that the homestead can only be conveyed by the joint deed of the husband and wife.[12] A conveyance purporting to convey the homestead must comply with the statute,[13] and a conveyance by the husband alone is a nullity.[14] A trust deed purporting to convey all the debtor's property both real and personal, vest only the interest of the husband in the land, unless the wife joins in the deed. An unsealed instrument purporting to convey land, or one not executed according to the law governing the conveyance of real estate can only be enforced by the trustee in equity.

A composition by one partner of his individual debts and an assignment by him of his property to pay the composition, will not give the trustee a right to interfere with the partnership property. In such case if the individual property is not sufficient to

10 Watson v. McLean, El., Bl. & Bl. 75. In this case the debtor having died, it was held in an action against the executor, that the proper measure of damages under the circumstances was the amount obtained by him on the policy.

11 Irison v. Steward, 3 De G., Mac. & G. 958.

12 Hait v. Haule, 19 Wis. 472; Riehl v. Bingenheimer, 28 Wis. 84; Lawver v. Slingerland, 11 Minn. 447; Burnside v. Terry, 45 Ga. 621; Horn v. Tuft, 39 N. H. 478; Greenough v. Tumer, 11 Gray, 332.

13 Young v. Benthuysen, 30 Tex. 763.

14 The statutes with respect to alienation of homesteads vary somewhat and local statutes should be examined.

pay the composition agreed upon, or the proceeds of all the debtor's property is to be accepted in satisfaction, the trustee might, perhaps, become a tenant in common with the solvent partner in the joint property, as in cases where one partner is adjudicated a bankrupt;[15] but he will be entitled to receive only the residue of the assignor's interest after the partnership debts are paid. Not a few cases hold that an assignment by one partner, of all his interest in a partnership is *ipso facto* a dissolution.[16] An assignment by a firm of its assets to carry out a composition agreement conveys only the partnership property, unless the individual property of the members is specifically included. Property acquired after the execution of the deed of assignment will not pass by the deed; as a gift, a pension, or salary earned, or property acquired by any new venture.[17] Some rights, although expressly mentioned, will not pass by the deed because it is against public policy, such as the right to the unearned salary of a public official.[18] If a public official could by a general assignment for the benefit of creditors, deprive himself of the right to draw his salary from time to time as it is earned, the service due the state might be greatly impaired. An assignee stands in no better position than the assignor and takes all property subject to equities, and any matter may be set off in an action brought by the assignee which might have been

15 Wilkins v. Davis, 15 N. B. R. 60; McNutt v. King, 59 Ala. 597; Hasley v. Norton, 45 Miss. 703.

16 Marquard v. New York Mfg. Co., 17 Johns. 525; Ketcham v. Clark, 6 Johns. 144; Edens v. Williams, 36 Ill. 252 (a sale was by one partner to another); Horton's Appeal, 13 Pa. St. 67; Cochran v. Perry, 8 Watts & S. 262.

17 See Price v. Murray, 10 Bosw. 243.

18 Arbuthnot v. Norton, 5 Moore, P. C. C. 219. In this case the assignment was of a vested contingent interest and was held good. The rule laid down in the text was recognized. In State Bank v. Hastings, 15 Wis. 83, it was held that a judge could assign his salary, but the question of public policy was not raised or discussed; nor was it a case of an assignment to pay creditors. We believe it is the policy of the government not to recognize an assignment of a soldier's pension.

set off had the action been brought by the assignor.[19] An assignee of debts secured by collateral acquires the right to hold the collateral.[20]

Sec. 190. When non-assenting creditors may avoid an assignment.—At common law an embarrassed or insolvent debtor has a right to transfer any or all of his property to a creditor,[1] or any number of his creditors, in satisfaction of debts due them to the exclusion of the remaining creditors,[2] for the reason that it is not unlawful for a debtor to pay his debts. A creditor may lawfully obtain a preference by resorting to the remedies provided by law for the collection of debts and a debtor may do what the law permits his creditors to do. He may therefore make an assignment of his property giving a preference to one creditor, or a number of creditors, or a certain class of creditors,[3] or all who execute the deed or assent to it,[4] and the assignment is valid and cannot be set aside by any creditor left out of the arrangement, or by one who refuses to accept the deed.[5] But to have this effect the debtor must place the property beyond his control by conveying the absolute title to the property to the trustee for the use and benefit of the creditors intended.[6] Except when in violation of a statute,[7] an assignment is

19 Chance v. Isaacs, 5 Paige, 592; Moss v. Goodman, 2 Hilt. 275; F. P. Gluck Co. v. Therme, 134 N. W. (Io.) 438.

20 Parmelee v. Dunn, 23 Barb. 461.

1 Foster v. Latham, 21 Ill. App. 165; Cooper v. Whitney, 5 Hill, 95.

2 See Cunningham v. Freeborn, 11 Wend. 241.

3 Murray v. Riggs, 15 Johns. 571; Marbury v. Brooks, 7 Wheat. 556, 11 Wheat. 78; Tompkins v. Wheeler, 16 Pet. 103; Nunn v. Wilsmore, 8 T. R. 528; Estwick v. Cailland, 5 T. R. 452.

4 Hatch v. Smith, 5 Mass. 42.

5 Evans v. Jones, 3 H. & C. 423, 11 L. J., N. S. 636.

6 Riches v. Evans, 9 C. & P. 640.

7 Beard v. Kimball, 11 N. H. 471.

valid whether it be a general assignment of all the debtor's property, or a partial assignment for a particular purpose,[8] and whether the deed directs the debts to be paid in full, or *pro rata,* without distinction, leaving the residue of the debts unpaid, or directs that a certain composition be paid.[9] At common law, and even under those statutes which do not prohibit preferences, the assignment is good even though it is made with the intent to defeat the claim of a particular creditor, if there be an adequate consideration.[10] A deed which the debtor may revoke, or under which he or any one appointed by him may direct the future disposition of the property, is fraudulent and void as to creditors, as it is merely a pretext or shield to delay and defraud the creditors; and any dissatisfied creditor may by levy or attachment of the property inquire into the validity of the assignment, although the deed on its face purports to be for the benefit of all the creditors.[11]

[8] Henshaw v. Sumner, 23 Pick. 446; Baker v. Hall, 13 N. H. 298; McWhorter v. Wright, 5 Ga. 555.

[9] See Wells v. Greenhill, 1 D. & R. 493, 5 B. & A. 869.

[10] Pickstock v. Lyster, 3 M. & S. 371; Holbird v. Anderson, 5 T. R. 235. A voluntary assignment for the benefit of creditors does not depend upon any statute; Beck v. Parker, 65 Pa. St. 262.

[11] Riches v. Evans, 9 C. & P. 640. In this case whether the deed was *bona fide* meant to convey the goods to the trustee, or a pretext only, and the goods were really to belong to the assignor, was held to be a question of fact and not one of law.

It has been held that a trust deed which attempts to coerce the creditors by requiring them to release, and which provides that the share of the non-releasing creditors shall be distributed among the creditors whom the assignor should appoint: Hyslop v. Clark, 14 Johns. 458; or the shares of the non-releasing creditors shall revert to the assignor: Austin v. Bell, 20 Johns. 442; is a legal fraud and void, being an attempt on the part of the debtor to place his property beyond the reach of creditors and at the same time to direct the future disposition of it.

Sec. 191. Same subject.—The principle, therefore, is well settled, both in England and America, that a debtor in failing circumstances may prefer one creditor, or one set of creditors to another; and, except when fraudulent in its inception, as where a transfer is not *bona fide,* but is made to hinder and delay creditors, an assignment cannot be assailed, unless it is made in violation of some bankrupt system.[1] In many of the states preferences are prohibited, and all parties to the assignment must share equally, and a clause giving a preference is void, while in other states an assignment giving a preference is fraudulent and voidable. The question of the validity of an assignment will not often arise under a state statute while the Federal bankrupt law is in force, but when it does the local statute must be examined.[2] Under the bankrupt law of the United States a transfer by a debtor, while insolvent, of any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors;[3] or a general assignment for the benefit of creditors,[4] is an act of bankruptcy, and when made within four months prior to the filing of a petition in bankruptcy on such grounds,[5] it may be avoided. A debtor is deemed insolvent under this law when his property exclusive of the property transferred with intent to defraud, hinder or delay his creditors, at a fair cash valuation at the time of the transfer, is insufficient in amount to pay his debts;[6] but an assignment for the benefit of creditors is an act

1 Murray v. Riggs, 15 Johns. 571.

2 The state laws are superseded by the Federal law, only when they constitute bankruptcy or insolvency laws within the purview of the Federal Act, and only as to persons named in the act who have been adjudicated bankrupt thereunder (State Nat. Bank v. Syndicate Co., 173 Fed. 359); and transactions covered thereby (In re Standard Oak Veneer Co., 173 Fed. 103); as to which the proper proceeding in the Federal Court are instituted within the time limited (Louisville Dry Goods Co. v. Lanman, 121 S. W. [Ky.] 1042).

3 Act July 1st, 1898, Sec. 3 (2).

4 Id. Sec. 3 (4).

5 United Surety Co. v. Iowa Mfg. Co., 179 Fed. 55.

6 Id. Sec. 1 (15).

of bankruptcy though the assignor is solvent.[7] A preference given firm creditors by a transfer of firm assets when the firm is insolvent, is not an act of bankruptcy as to the individual partners, as there is no surplus in which individual creditors can share.[8] In determining what is a fraudulent conveyance within the Federal bankruptcy law, the same principles are applied as are applicable to fraudulent conveyances in general, and a transfer fraudulent at common law is fraudulent within the meaning of that act.[9]

Under the Federal Law, a composition deed made by a debtor who was merely temporarily embarrassed but not insolvent, can not be set aside unless it amounts to a general assignment for the benefit of creditors; and then, only by the trustee in bankruptcy proceedings instituted within four months after the transfer. If an assignment is fraudulent and void at common law, as where it is not a *bona fide* transfer, or is absolutely void under a statute, a dissenting creditor may disregard it and by execution or other process seize the property in the hands of the assignee, and when his action is questioned he may assail the assignment.[10] But this method of attacking transfers of property does not apply where the assignment is only considered fraudulent by construction of law, as being against the policy or provision of some particular statute. Such deeds are capable of confirmation,[11] and a general assignment or a partial assignment, either with or without a composition agreement therewith, is good as between the parties who have become parties thereto;[12] or even as to a creditor who merely stands by and

[7] In re Farrell, 176 Fed. 505.

[8] In re Perlhefter, 177 Fed. 299.

[9] Belding v. Mercer, 175 Fed. 335.

[10] At common law "A deed founded in actual and positive fraud, as being made under the influence of corrupt motives, and with the intention to cheat creditors, may be considered void *ab initio*, and never to have had any lawful existence." Murray v. Riggs, 15 Johns. 571.

[11] Murray v. Riggs, 15 Johns. 571.

[12] Small v. Marwood, 9 B. & C. 300.

without objection allows the trustee to act under the trust.[13] Such an assignment can only be assailed after proceedings are instituted in bankruptcy or insolvency, and then only by the trustee, if in the Federal Courts; or by a receiver or other officer under the appropriate proceedings in a state court; or by a creditor in equity only after he has obtained a judgment on his claim.[14] Non-assenting creditors may reach any surplus in the hands of an assignee by garnishment, or like process.[15]

Sec. 192. Operation and effect of a composition—Binds parties and privies—Effect of a composition with surety or indorser—Mistake as to liability—Recovery of over-payment—Effect upon the rights of non-assenting creditors.—When a composition agreement is executed or assented to by a sufficient number of creditors it cannot be revoked by the debtor; nor can the assenting creditors withdraw therefrom.[1] As stated elsewhere it is not necessary, in order that the agreement be binding on a creditor, that he sign the composition deed.[2] If he promises to join his assent will be presumed, if, in reliance thereon the debtor and other creditors are induced to make the agreement.[3] Ordinarily accepting benefits under a composition agreement at common law, is an assent to its terms.[4] But where an assignment for the benefit of creditors is not made pursuant to a composition agreement, either previously made or the agreement is not a part of the deed of assignment, an acceptance of a dividend under the assignment does not preclude the

13 Condict v. Flower, 106 Ill. 105.

14 Neustadt v. Joel, 2 Duer, 532.

15 Hastings v. Baldwin, 17 Mass. 558; Vernon v. Morton, 8 Dana, 247.

1 Town v. Rublee, 51 Vt. 62. Sec. 169, *ante*. A creditor cannot repay the composition money and claim the benefit of a security: Pfleger v. Brown, 28 Beav. 391.

2 Sec. 165, *ante*.

3 Sec. 165, *ante*.

4 Sec. 165, *ante*.

creditor from recovering the residue of his demand, although there is a condition in the deed that it is for the benefit of those creditors only who will accept their *pro rata* of the fund in full satisfaction of their respective debts.[5] A surety, indorser and other persons secondarily liable for the payment of a debt may always purchase their release upon such terms as they may make with the holder of the demand, and a composition with a creditor of their liability will not discharge the debtor;[6] nor will a composition with one co-surety discharge the other surety where the right against the latter is reserved.[7] But a co-surety not released cannot be held for any more than the sum he would have been compelled to contribute had his co-surety discharged the entire debt.[8]

The debtor cannot recover any part of the composition money on the ground that he was mistaken as to his liability,[9] but if a creditor by reason of an overcharge has been paid more than is his due, a court of equity will entertain a bill to open the account, although the debtor entered the creditor for the amount settled.[10] If by mistake he pays more than the proper percentage of any debt he may re-

[5] Sec. 186, *ante*. It has been held that if an assignment is made for the purpose of paying a certain per cent. to each creditor, with a proviso that such payment shall be in full discharge of the debts, it binds only those who accept the terms of the agreement; and not those who accept the per centage and not the terms: Chadwick v. Barrows, 42 Hun, 39. In such cases the assenting creditors can only claim title through the trustee to their per cent.; and since a dissenting creditor may garnishee or otherwise levy upon the surplus and still recover any balance from the debtor, there is no reason why he should be held to relinquish the balance of his demand merely because his *pro rata* of the fund is handed over to him in face of his refusal to be bound.

[6] Commercial Bank v. Cunningham, 24 Pick. (Mass.) 270, 25 Am. Dec. 322; Auburn Bank v. Marshall, 73 Me. 79.

[7] Thompson v. Lack, 3 C. B. 540, 16 L. J., C. P. 75.

[8] Ex parte Gifford, 6 Ves. Jr. 805.

[9] Jones v. Wright, 71 Ill. 61.

[10] Pike v. Dickinson, 41 L. J., Ch. 171, 7 L. R., Ch. 61, 25 L. T., N. S. 579, 20 W. R. 81.

cover the excess.[11] All parties in privity with either the debtor or a creditor whose rights attached subsequent to the execution of the agreement, excepting *bona fide* holders of negotiable instruments,[12] are bound by the agreement.[13] All rights of a creditor under the agreement pass to his personal representatives.[14] Where a composition is effected by an assignment of property to pay a certain per cent. the personal representatives of the debtor will take only the residue, if any, after paying the composition. A creditor who does not sign or otherwise assent to a composition agreement is not bound by it, for the reason there is no mutuality of agreement between a dissenting creditor and the debtor, and he may sue the debtor for the whole debt or proceed in bankruptcy. But a stranger to a composition agreement may be estopped from enforcing a demand against a debtor. Thus, if a party who has a right of action against a debtor states that he will not sue on the demand and permits a composition to be negotiated upon the basis of such waiver, he is bound by the composition in so far as it bars an action on that particular claim although he does not join in the composition.[15]

[11] Tracy v. Jefts, 149 Mass. 211, 21 N. E. 360.

[12] Margetson v. Aitken, 3 C. & P. 338.

[13] A composition between a drawee and payee of a check will not release the drawer, where before making the composition it had passed by indorsement to an innocent holder for value: Robertson v. Flower, 136 Ill. App. 320. An indorsee, of a note included in a composition agreement, who acquired it after maturity, cannot enforce it against the debtor: Karn v. Blackford, 20 S. E. (Va.) 149; Bartlett v. Rogers, 3 Sawy. (U. S.) 62.

[14] Matter of Leslie, 10 Daly, 76.

[15] Where a person, having a right of action for a breach of contract, pending negotiation for a composition of the debts of the party liable upon the contract, refused to return the deposit money, stating that he would never take any steps to enforce the contract; and the composition proceeded upon that footing, it was held that the debtor could not recover the deposit for the reason that it would be a fraud upon the creditors; and, a fraud upon the debtor to permit the other person to enforce the contract: Clark v. Upton, 3 M. & P. 89. If a creditor represents his debt as belonging to or due to a third person and the debtor compounds with the latter the debt is discharged although the statement is untrue: Blair v. Wait, 6 Hun, 477.

Sec. 193. Effect upon the liability of joint debtors.—At common law a composition with a joint or joint and several debtor of the debt, discharges the remaining joint debtors.[1] But where one member of a firm joined in a composition whereby the two remaining members, naming them, were released, and the one not named covenanted to pay the residue out of a specified fund, it was held, though by a divided court, that only the two partners named were released.[2] Where a creditor in a composition agreement reserves his right against others jointly liable for the debt they are not released.[3] The rights of joint debtors as between themselves are not affected. More upon this subject will be found in previous sections.[4]

Sec. 194. Effect upon the creditor's security; upon the liability of a surety, indorser, drawer, guarantor.—A creditor can have but one satisfaction, and if he enters into a composition agreement which operates as a release of the debtor, in absence of a reservation, he cannot retain any security held for the payment of the debt,[1] and a surety,[2] drawer,[3] indorser,[4] accommodation maker, or

[1] Hosack v. Rodgers, 25 Wend. 313; Merritt v. Bucknam, 90 Me. 146, 37 Atl. 885; Tuckerman v. Newhall, 17 Mass. 581; Molson v. Connelly, 17 L. C. Jur. 189; Nicholson v. Revell, 6 N. & M. 192, 4 A. & E. 675, 1 H. & W. 756. A creditor cannot keep a partnership debt alive so as to authorize a partner who had paid it by compromise to enforce it by an action against the other partner: Le Page v. McCrea, 1 Wend. 164.

[2] Hosack v. Rodgers, 25 Wend. 313.

[3] Merritt v. Bucknam, 90 Me. 146, 37 Atl. 885; North v. Wakefield, 13 Q. B. 536, 13 Jur. 731, 66 E. C. L. 536.

[4] Sec. 40, 41. See Sec. 42. Effect of a covenant not to sue one joint debtor.

[1] Cowper v. Green, 7 M. & W. 638; Baxter v. Bell, 86 N. Y. 195; Perry v. Armstrong, 39 N. H. 583; Paddleford v. Thatcher, 48 Vt. 574. A judgment creditor cannot enforce his judgment: Crawford v. Kruger, 201 Pa.

---

[2] See note 2 on following page. [3] See note 3 on following page.

[4] See note 4 on following page.

guarantor,[5] as the case may be, is released. The reason upon which the rule is founded is that if a surety or other person entitled to be reimbursed upon payment of the debt by him be not released by the composition, the intent of the parties to discharge the debtor would be defeated, for if the creditor could collect the residue from the surety, the latter would have his remedy over against the debtor and he would thus have the whole to pay notwithstanding the composition. No other effect can be given to a composition and carry out the intent of the parties. The same rule applies to collateral or other security furnished by a third person which stands in the relation of a surety. With respect to security furnished by the debtor himself out of his own means, the same is discharged for the reason that to permit a creditor to retain his security, is to give him a preference and thereby defeat another object of the composition, which is to place all creditors upon an equality. A release by an indorsee of a prior indorser, operates as a release of a subsequent indorser,[6] unless the

St. 348, 50 Atl. 931. A creditor who accepts the composition money cannot claim the proceeds of the debtor's life insurance policy under an agreement that the debtor was to keep up the premiums for the ultimate payment of the remainder of the debt: Pfleger v. Browne, 28 Beav. 391. A creditor cannot hold collateral security against his former debtor after the debt is discharged by a composition: Swartz v. Brown, 119 N. Y. Supp. 1024.

[2] J. M. Robinson v. Meyers, 105 S. W. (Ky.) 428; McLendon Bros. v. Finch, 58 S. E. (Ga. App.) 690.

[3] Ex parte Webster, 1 De Gex. 414, 11 Jur. 175; Lysaght v. Phillips, 5 Duer, 106; Ex parte Wilson, 11 Ves. 410. A composition between a drawee and payee of a check will not release the drawer, where before the making of the composition it had been passed by indorsement to a *bona fide* holder for value: Robertson v. Flower, 136 Ill. App. 320.

[4] Lewis v. Jones, 6 D. & R. 567, 4 B. & C. 506; Commercial Bank v. Cunningham, 24 Pick. 270, 35 Am. Dec. 322; Pontious v. Durflinger, 59 Ind. 27.

[5] Nicolai v. Lyon, 6 Or. 457, 8 Or. 56.

[6] Where several partners were indorsees, and one partner by a composition discharged a prior indorser, it was held to operate as a release of a subsequent indorser: Ellison v. Dezell, 1 Selw. N. P. 272.

holder secures the latter's consent.[7] A party secondarily liable is released by a composition although the agreement is executed through mistake.[8] A release of the maker of a note is a release of the surety or indorser by construction only, and if it can be gathered from the instrument that the indorser's liability is to remain unimpaired, he will not be discharged, as where he joins with the holder of a note in a composition releasing the principal debtor and designates his claim as that of an indorser.[9]

A reservation of a security must clearly appear to be a part of the agreement,[10] and it cannot be by parol if the composition be by deed. If the reservation of a security is alleged to have been omitted from the composition agreement by mistake, the burden is upon the creditor to show by convincing evidence that the surety was not to be released,[11] and that it was so understood by all the creditors. In an action against a surety, where the composition deed released the debts, it was held no answer to the plea setting out the release, that the plaintiff signed the deed only as trustee and not with the intent of releasing the debt guaranteed; and that if the deed operated to release the debt, it was executed by mistake and in ignorance that such would be the legal effect.[12] A composition agreement which has not become effective because the required number of creditors have not signed it, does not dis-

[7] In re Smith, 3 Bro. C. C. 1. If a guarantor consents to the composition he will not be released: Davidson v. McGregor, 11 L. J., Exch. 164, 8 M. & W. 755; Union Bank v. Rogan, 13 N. S. Wales, 285.

[8] Lewis v. Jones, 4 B. & C. 506, 8 D. & R. 567.

[9] Bruen v. Marquand, 17 Johns. 58. Becoming a party to the composition or assenting to it has been held sufficient to hold a party secondarily liable: Cooper v. Smith, 4 M. & W. 519; Gloucester Bank v. Worcester, 10 Pick. 528; Union Bank v. Rogan, 13 N. S. Wales, 285. In the last case the contract of guaranty provided for a composition without affecting the guarantor's liability.

[10] Boultbee v. Stubbs, 18 Ves. Jr. 20.

[11] J. M. Robinson v. Meyers, 105 S. W. (Ky.) 428.

[12] Teede v. Johnson, 25 L. J., Exch. 110.

charge a surety although the deed was signed by the principal.[13] If a surety prior to the release of the debtor has paid the debt, or has paid a part and secured the balance, he will not be released [14] for the reason that his liability as surety is extinguished by payment. It has been held that where a composition agreement does not have the effect of extinguishing the original debt *in præsenti,* and the agreement does not contain any stipulation for giving up securities, a creditor joining in the agreement may retain his security.[15]

Sec. 195. Same subject—Reserving right to hold security—Right of surety not affected—When surety discharged notwithstanding reservation by creditor.—A creditor as a condition of his joining in a composition agreement may insist on a stipulation being inserted reserving his security, or remedy against a surety or indorser, and such a stipulation will prevent the composition from operating as a release of the security or surety.[1] It is a rule of law that a creditor may suspend his right forever against a debtor and yet preserve his right against the surety.[2] A debtor

[13] Day v. Jones, 150 Mass. 231, 22 N. E. 898.

[14] Hall v. Hutchons, 3 L. J., Ch. 45, 3 Myl. & K. 426.

[15] Thomas v. Courtney, 1 B. & A. 1. In this case the agreement was not under seal. This rule would not conflict with the rule requiring all the creditors to be placed upon an equality, if the security was to be held only until the composition agreement was performed.

[1] Stevens v. Stevens, 5 Exch. 306; Bruen v. Marquand, 17 Johns. 58; Boatman Bank v. Johnson, 20 Mo. App. 316; Auburn Bank v. Marshall, 73 Me. 79; Nichols v. Norris, 3 B. & A. 41; North v. Wakefield, 13 Q. B. 535, 13 Jur. 731; Gloucester Bank v. Worcester, 10 Pick. 528; Toby v. Ellis, 114 Mass. 120. Granting an indulgence to a debtor under a composition deed whereby the creditors agree to accept their debts by installments, was held not to release an accommodation maker of a note indorsed to the creditor as security for the payment of the debt, where the agreement provided that the creditor should not be prevented by the arrangment from suing on any security which he holds, and that on default in paying the installments the deed should be void: Nichols v. Norris, 3 B. & Ad. 41.

[2] In Green v. Wynn, 17 W. R. 385, 4 L. R., Ch. 204, 38 L. J., Ch. 220, 20 L. T., N. S. 131, a release of the principal with a reservation of the right

by executing an agreement wherein a creditor reserves a right against the surety, consents to remain liable to the surety or other person secondarily liable for the payment of the debt. There must be a distinct and unqualified expression of an intent to reserve a right against a surety,[3] and the reservation must be part of the common agreement; a creditor who desires to retain his security must either hold himself entirely aloof from the other creditors, or communicate with them on the subject if he acts in common with them.[4] In case of a controversy the burden of proving that at the time of executing the agreement the other creditors knew of the preference, is upon the party receiving it.[5] The security reserved is only available as security for the payment of the residue, where the creditor has received his *pro rata* out of the composition fund,[6] or has accepted composition notes as payment, or has joined in an assignment of property and released the debtor. If a creditor realizes his debt out of the security or is paid by the surety or other person secondarily liable thereon before the composition money is paid, he cannot take any thing under the agreement, and if he is paid by a person secondarily liable the latter is entitled to receive the *pro rata* due the creditor under the agreement without any diminution of his rights.

against the surety was held merely a covenant not to sue the debtor and that the surety was not discharged.

[3] See Overend v. Oriental Financial Co., 7 L. R., H. L. Cas. 348, 31 L. T., N. S. 322.

[4] Cullingworth v. Lloyd, 2 Beav. 385. S. P. Jackman v. Mitchell, 13 Ves. 581; Pfleger v. Browne, 28 Beav. 391; O'Shea v. Collier, 42 Mo. 397, 97 Am. Dec. 332. The words "without prejudice to any securities whatever that I hold," after the signature of the first signer is a reservation of his security: Duffy v. Orr, 5 Bligh, N. S. 620. A composition agreement which stated that it shall not destroy any mortgage, pledge, lien, or other specific security which any creditor has, was held, upon a construction of the whole instrument, not to release a judgment lien of a party signing, although the releasing clause mentioned judgments, actions, suits, etc.: Squire v. Ford, 9 Hare, 47, 15 Jur. 619, 20 L. J., Ch. 308.

[5] Ex parte Sadler, 15 Ves. 52; Mawson v. Stock, 6 Ves. 301.

[6] Sohier v. Loring, 6 Cush. 537, 60 Mass. 537.

If a creditor in a composition agreement reserves his remedy against a surety, it necessarily follows that the right of the surety is not impaired,[7] and he may pay the residue of the debt and compel the debtor to indemnify him.[8] A contract to abandon the right to be indemnified must be proven.[9] A reservation by a creditor of his rights against a surety may not always be effective in holding the surety, and since the surety's rights are not impaired by a composition with the principal, he may defend on the ground that he is discharged notwithstanding the reservation.[10] It is a general rule that if the time of payment is extended for a definite time by a binding agreement between the creditor and principal, the surety is discharged. Therefore, if a composition agreement gives additional time to the debtor to pay the composition money without giving him an immediate discharge, the surety is released although the deed contains a reservation of all rights against the surety.[11] In order to discharge a surety it is not necessary that there be an express agreement to extend the time. It is sufficient if that is the necessary effect of an agreement entered into. Thus, where, by a composition agreement a creditor in common with other creditors agrees to accept a composition and upon its payment to release the debtor and all securities, and to rebate the interest for nine months unless the money is sooner paid, and property is assigned out of which the composition money is to be made, the creditor thereby ties his hands so he cannot avail himself of the ordinary processes for the collection of the debt for at least nine months.[12] In all cases the surety is discharged unless

7 Price v. Baker, 4 El. & Bl. 760, 1 Jur., N. S. 775, 24 L. J., Q. B. 130; Thompson v. Lack, 3 C. B. 540, 16 L. J., C. P. 75; Lysaght v. Phillips, 5 Duer, 166; Kearsley v. Cole, 16 M. & W. 128, 16 L. J. Exch. 115.

8 Price v. Baker, 4 El. & Bl. 760, 1 Jur., N. S. 775, 24 L. J., Q. B. 130.

9 Close v. Close, 4 DeG., Mac. & G. 176.

10 Lambert v. Shitter, 62 Iowa, 463, 17 N. W. 187.

11 The drawer is discharged if the holder gives time to the acceptor: Ex parte Wilson, 11 Ves. 410.

12 Lambert v. Shitter, 62 Iowa, 463, 17 N. W. 187.

he consents to the extension, and proof of mere knowledge of such extension without more, will not overcome the defence by the surety.[18]

Sec. 196. Effect upon debts.—A composition agreement will discharge the debts presently upon performance whether the performance is to be immediately or at a future time.[1] If the agreement provides for performance at some future time and that performance and not the execution of the composition agreement shall satisfy the debts, the remedy on the debts is merely suspended and performance on the day discharges the debts and a breach revives them.[2] If the parties agree to accept in satisfaction of the debts a new and substituted executory agreement, the composition agreement is in reality performed by the execution of the new agreement, and this latter agreement is a final and valid settlement of the claims of the creditors, and suspends the cause of action thereon. Thereafter the rights and remedies of the parties are determined by the new agreement[3] and a breach of the new agreement does not revive the old debts.

Sec. 197. Debts included—Construction of agreement—Bill in equity to determine what claims are included—Parol evidence as to what claims included or excluded inadmissible when.—A composition agreement is usually drawn without taking into consideration the situation of the several debts but rather with the object of carrying out the intent of the parties to discharge the debtor from his liability for all his debts; but it may be drawn covering

[18] Lambert v. Shetler, 71 Iowa 463, 32 N. W. 422.

[1] See Sec. 167, *ante.*

[2] See Sec. 182, *ante.*

[3] Brown v. Farnham, 48 Minn. 317, 51 N. W. 377; Goodrich v. Stanley, 24 Conn. 613; Billings v. Vanderbeck, 23 Barb. 546; Good v. Cheesman, 2 B. & A. 328, 22 E. C. L. 142. See Sec. 167, *ante.*

particular debts or class of debts.[1] The agreement may be drawn so as to discharge the debtor from his contingent liability as indorser.[2] Whether a debt is included or excluded is a matter of construction to be ascertained from the agreement itself, or the schedule accompanying it, and the intent of the parties as gathered from the entire instrument governs. General words, though broad and comprehensive, are limited to a particular demand where it manifestly appears from the recital, the consideration, and the nature and circumstances of the several demands, that the agreement was limited by the parties to those demands.[3] General words will be held to include a particular demand when a reasonable construction of the whole agreement shows that it was intended to be included.[4]

The law forbidding secret preferences and placing all the creditors upon an equality in absence of a plain stipulation to the contrary, has an influence in construing composition agreements, and a creditor who exacts special terms for himself must see to it that they are expressed in unambiguous terms and made known to all the creditors who join. A creditor may bring a bill in equity to determine what debts are entitled to participate in the composition fund, and whether any particular debt is entitled to a preferential

[1] A composition deed may provide for the payment in full of the costs, charges and expenses of a previous inspectorship, as well as the costs incurred by an execution creditor, in consideration of the execution being withdrawn: Fitzpatrick v. Bourne, 9 B. & S. 157, 3 L. R., Q. B. 233, 37 L. J., Q. B. 265, 16 W. R. 766; aff'm'd 3 L. R., Q. B. 44. A creditor may sign for the judgment and reserve the costs: Robbins v. Alexander, 11 How. Pr. 100.

[2] In Bowns v. Stewart, 59 N. Y. Supp. 721, the creditor, after setting down debts due, added "contingent as indorser A. D. Coe note, 367.50."

[3] Bump on Comp. p. 29, citing Gloucester v. Worcester, 35 Mass. 322; Lipman v. Lowitz, 78 Ill. 252. Where the composition was only of the several debts and sums of money set opposite the respective names in the annexed schedule, it was held that no debts other than those scheduled were discharged: Rice v. Wood, 21 Pick. 30; Averill v. Lyman, 35 Mass. 346. But this could be true only in absence of concealment.

[4] See Sec. 36. Construction of release.

payment on account of an equitable lien upon any property falling into the trustee's hands.[5] Parol evidence is not competent to prove that the parties intended to include,[6] or exclude [7] a particular debt contrary to the plain letter of the composition deed. But parol evidence of the nature of the demands is competent, as the instrument must be construed with reference to the subject on which the agreement is intended to operate.[8]

Sec. 198. Same subject—Demands not due—Secured and unsecured claims—Judgment debts—Contingent liability—Demand of partner against firm—Debts subsequently contracted—Counterclaim.—A claim scheduled will be discharged although at the time it is not due,[1] but where a debt not due is not scheduled, or mentioned in the composition agreement, it will not be discharged.[2] A general composition in absence of any reservations discharges all debts whether secured or unsecured. Where a party, having both a secured and an unsecured claim, joined with other creditors in a composition agreement, in which all the creditors were designated as "general creditors" and he set down only his unsecured claim, it was held that "general creditors" meant unsecured creditors, and that as to the secured claim he was a secured creditor.[3]

[5] Powles v. Hargreaves, 3 DeG., Mac. & G. 430, 17 Jur. 1083.

[6] Rice v. Wood, 38 Mass. 30.

[7] Van Brunt v. Van Brunt, 3 Edw. Ch. 14; Perry v. Armstrong, 39 N. H. 583.

[8] Bump on Comp. 29, citing Rice v. Wood, 38 Mass. 30.

[1] Brown v. Stewart, 59 N. Y. Supp. 721.

[2] Lipman v. Lowitz, 78 Ill. 252; Preston v. Etter, 140 Mass. 465, 5 N. E. 168. A release of all actions and causes of action, given to the acceptor of a bill, on a composition with creditors, does not embrace money afterwards paid as indorser, when the bill had been negotiated before due, and, at the date of the release, was *bona fide* held by a third party: Crawford v. Swearingen, 15 Oh. 264. It has been held that an acceptor's liability on a bill not due is a subsisting demand and a release of all demands discharges the acceptor of his liability on the bill: Holmer v. Viner, 1 Esp. 131.

[3] Noyes v. Chapman, 60 Minn. 88, 61 N. W. 901. See M. A. Seed v. Wunderlich, 92 N. W. 122; Joebisch v. Von Minden, 120 N. Y. 406, 24 N. E. 795.

Judgment debts are discharged by a general composition.[4] If a party signs a composition deed and leaves the amount of his debt in blank he binds himself as to all his existing debts.[6] A composition agreement which releases "all claims, demands, action or actions, cause or causes of actions whatsoever" discharges only the demands then in existence, and a creditor may recover of the debtor the amount of a bill or note which he was compelled to take up as an indorser but which at the time lay undishonored in the hands of the indorsee.[6] But as elsewhere stated the agreement and release may by apt terms discharge a contingent liability.[7]

A partner who has retired cannot come in as a creditor for the amount agreed to be paid him for his interest on retiring, under a composition of the firm debts for which he was liable.[8] But if a new firm is formed which obligates itself to pay him for his interest in the old firm, he may come in as a creditor for the sum due him, under a composition by the new firm of its debts.[9] A partner who has advanced money to a partnership may, as a creditor, join in a composition agreement of the firm debts.[10] The claim of a party for money advanced to pay the composition money will not be discharged.[11] Inserting the amount of a debt in a blank left for that purpose in a deed of assignment, after its execution does not invalidate the deed.[12] But the right to fill in

4 Evans v. Jones, 3 H. & C. 423, 11 Jur., N. S. 784, 34 L. J., Exch. 25; Crawford v. Kruger, 201 Pa. St. 348, 50 Atl. 931; Chicago Land Co. v. Peck, 112 Ill. 408.

5 Harrhy v. Wall, 1 B. & A. 101, 2 Stark. 195.

6 Margetson v. Aitken, 3 C. & P. 338; Crawford v. Swearingen, 15 Oh. 264. If a note is passed to a *bona fide* holder before the payee releases the payor of all demands, the payee may recover of the payor if he is compelled to take up the note: Lipman v. Lowitz, 78 Ill. 252.

7 Coe v. Hutton, 1 Serg. & R. 398; Mallalien v. Hodgson, 16 Q. B. 689.

8 Stephen v. Gavaza, 16 Nova Scotia, 514.

9 Baxter v. Bell, 86 N. Y. 195.

10 Duffy v. Orr, 1 C. & F. 253, 5 Bligh, N. S. 620.

11 Holton v. Bent, 122 Mass. 278.

12 Hudson v. Revet, 5 Bing. 368, 2 M. & P. 663.

the amount of the debt does not authorize inserting the total of a debt due at the time of the execution of the deed and a debt subsequently contracted; and if inserted without the creditor's consent he may sue for the new debt,[13] and if inserted with the creditor's consent the new debt may be excluded by the other creditors as its inclusion is a fraud upon them. According to Mr. Bump, if a debt is discharged by a composition, a counter-claim (or recoupment) held by the debtor is also discharged, for the debt, in common parlance, is the sum that is due upon a settlement of the accounts. "Any other construction would compel the creditor to pay the whole of his debt, while he only receives a portion of his claim against the debtor." [14]

Sec. 199. Same subject—Splitting demands—Withholding demands—Transferring demands after signing agreement.—A creditor cannot split up his demand, and if he signs a composition agreement and sets down his demand at a certain sum it will be discharged although the claim is much larger.[1] Nor can a creditor withhold any of his claims, and if he signs a composition deed containing a general release wherein he states the amount of his demand in the schedule, the release discharges all the claims he may have that are due [2]

[13] Fazakerly v. McKnight, 6 El. & Bl. 795, 2 Jur., N. S. 1020.

[14] Bump on Comp. 33.

[1] Margetson v. Aitken, 3 C. & P. 338, 14 E. C. L. 597; Cecil v. Plaistow, 1 Anst. 202; Estabrook v. Scott, 3 Ves. 456. A lien creditor who joins in an agreement cannot realize on his lien and come in under the composition for any unpaid balance: Buck v. Shippam, 10 Jur. 581, 15 L. J., Ch. 356; Baxter v. Bell, 86 N. Y. 195.

[2] Bissett v. Burgess, 23 Beav. 278, 2 Jur., N. S. 1221; Teede v. Johnson, 11 Exch. 840; Britten v. Hughes, 15 C. L. R. 488, 5 Bing. 460; Knight v. Hunt, 3 C. L. R. 310; Graham v. Askroyd, 10 Hare, 192, 17 Jur. 657; Evans v. Cross, 15 L. C. Rep. 86; Holmer v. Viner, 1 Esp. 131; Noyes v. Chapman, 60 Minn. 88, 61 N. W. 901; Almon v. Hamilton, 100 N. Y. 527, 3 N. E. 580; Meyers v. McKee, 19 Ill. App. 109.

If a creditor joins in a composition deed containing a clause of release and designates himself as a creditor for a certain sum, bills for a larger sum

whether scheduled or not. The ground is, that upon the face of the composition deed, the creditor assumes to compound for the whole of his demand, or all of them, and the other creditors, therefore, have a right to believe that the sum set opposite his name is all of the demand, or all that he has, and to take this fact, with others, into consideration in forming their judgment as to the advisability of entering into the arrangement; and, to allow him subsequently to set up a debt concealed, and in contradiction to the face of the deed, would be a violation of good faith and a fraud upon the other creditors,[3] and an oppression upon the debtor who had given up his property to constitute a fund for their benefit, as well as defeat the object of the composition which was to discharge the unfortunate debtor from his debts.[4] However the rule does not apply, if a creditor, by a proper reservation in the deed made known to and assented to by the other creditors, compounds only a part of his demand or a specific demand excluding others.[5] If a creditor at the time of executing the agreement does not have knowledge of the fraud on which a demand is founded, it will not be discharged by accepting composition money on another demand included.[6] A composition is no defence to a bill which has been transferred subsequent to the agreement and in the hands of an innocent third party.[7] When a creditor signs for a debt which he had transferred to an-

upon which the debtor is indorser, which then lay dishonored in his hands are also discharged: Margetson v. Aitken, 3 C. & P. 338, 14 E. C. L. 597. A note payable on demand is discharged: Bartlett v. Rogers, 3 Sawy. (U. S.) 62. An agreement releasing all demands discharges a cause of action for a breach of a covenant in discharging a judgment which the debtor had assigned to the creditor, where the cause of action accrued previous to the release: Russell v. Rogers, 10 Wend. 473, 25 Am. Dec. 574.

[3] Russell v. Rogers, 10 Wend. 473, 25 Am. Dec. 578.

[4] Holmes v. Viner, 1 Esp. 131.

[5] Coddington v. Davis, 3 Denio, 16, aff'm'd 1 N. Y. 186; Lanyon v. Davey, 12 L. J., Exch. 200, 11 M. & W. 218; Garnier v. Papin, 30 Mo. 243.

[6] *Quære*, Russell v. Rogers, 10 Wend. 473, 25 Am. Dec. 574, 15 Wend. 351.

[7] Margetson v. Aitken, 3 C. & P. 338.

other, he impliedly undertakes to protect the debtor against such demand,[8] and in this case, as well as where a negotiable note or bill is transferred subsequently, the creditor is liable to the debtor for the amount he is required to pay over the amount of the composition.[9] It is immaterial in such cases whether the creditor releases the debt upon a merely nominal consideration, or receives the *pro rata* payment upon the composition;[10] for the object of the law is to prevent a creditor from secretly transferring negotiable paper just before signing but after agreeing to the composition.[11]

Sec. 200. Surety for a composition—Rights and liabilities.—If a third party, either alone, or merely as a surety, undertakes to pay or guarantee the payment of the composition money for a debtor, the agreement must be in writing for such a contract is clearly within the statute of frauds.[1] If, however, property of a third person is delivered to the creditors or to a trustee, as security for the performance of the composition agreement, such pledging need not be in writing, although the property stands in the relation of a surety. A condition in a composition agreement, that it shall be void unless signed by all the creditors within a certain time, may be waived by the creditors accepting performance after the time, but such a waiver will not bind the surety, for under the statute of frauds the whole contract in order to be binding must be in writing.[2] A surety, as such, is not a creditor under the composition,[3] and his claim for money paid on account thereof is not discharged by

[8] Harloe v. Foster, 53 N. Y. 385, citing Hawley v. Beverly, 6 Scott, 837, 6 Man. & Gr. 221.

[9] See Farrington v. Hodgdon, 119 Mass. 453.

[10] Harloe v. Foster, 53 N. Y. 385.

[11] Bump on Comp. 39.

[1] Emmett v. Dewhurst, 3 Mac. & G. 587; Williams v. Mostyn, 33 L. J., Ch. 54.

[2] Bump on Comp. 44, citing Emmett v. Dewhurst, 3 Mac. & G. 587; Williams v. Mostyn, 33 L. J., Ch. 54.

[3] Holton v. Bent, 122 Mass. 278.

the agreement and he may recover of the debtor the amount he has paid, or in case the debtor is thrown into bankruptcy he may prove his claim there.[4] A debtor may give security upon any or all of his property to a person who guarantees the payment of the composition money, and if not disclosed to the creditors it will not vitiate the agreement.[5] A surety is not bound until the composition agreement is executed by all those who were to become parties to it in order to make it binding, and a creditor who receives a composition note with knowledge that the necessary parties have not joined, cannot enforce it against a surety who has not waived the benefit of the provision.[6] But a surety may waive the condition that all should sign; and it is his duty to ascertain whether or not all the creditors have signed the agreement, and a creditor without knowledge that all have not signed, upon the composition note being presented to him by the surety or his agent may assume that the agreement has been duly signed and may hold the surety upon his contract.[7] If a surety is induced to indorse composition notes upon the false statement of the debtor that all the creditors have joined in the agreement, he is liable to all creditors who did not know of the fraud prior to receiving their note.[8] This is but a case of misplaced confidence between a surety and the principal.

[4] Ex parte Gilbey, 8 Ch. D. 248.

[5] Leake v. Young, 5 El. & Bl. 955.

[6] Enderber v. Corder, 2 Car. & P. 203; Johnson v. Baker, 4 Barn. & Ald. 440. Where a composition agreement contains a condition that it shall not be binding unless signed by all the creditors, and notes signed by a surety were delivered to a creditor when the agreement had not been signed by all the creditors, which fact was unknown to the surety, it was held that the composition agreement and contract of suretyship were a part of one transaction and the surety was not liable upon the note: Doughty v. Savage, 28 Conn. 146.

[7] Whittemore v. Obear, 58 Mo. 280: This case goes further and holds that even if the creditor was aware of such failure or fraud and chose to waive the objection, it did not lie in the mouth of the surety to set it up as a defense.

[8] See Whittemore v. Obear, 58 Mo. 280.

There must be an actual delivery of the instrument. A surety may prove by parol that at the time he signed the agreement and authorized it to be taken around for the signatures of the other creditors, it was agreed that the deed should be void unless signed by all the creditors.[9] A stipulation in a composition agreement to which a surety is a party, that it shall be void unless all the creditors sign it, is for the protection of the surety, and an acceptance and retention of the money by one creditor, discharges his entire demand although the agreement is voidable on the ground that other creditors had received a larger proportion, or had received a compensation to induce them to sign. If a creditor elects to avoid the agreement he must return to the surety the money received.[10] A surety assumes the risk of a default by the debtor, and is charged with knowledge that in case of a default, the law applies a partial payment upon a composition as a discharge *pro tanto* of the original cause of action, and the surety cannot have his money back.[11] In case of a breach which only a creditor can take advantage of, the surety cannot compel the creditor to elect to accept or reject the composition.[12] Where a creditor induces a third person to guarantee a certain amount, on the representation that he is accepting a composition from his debtor when in fact he is paid in full, the guarantor cannot be held.[13] If a person having a demand assures a third party that he will never sue the debtor on it, and the third party thereupon becomes a surety for the payment of a composition, the creditor cannot afterwards maintain an action on the demand as it would be a fraud upon the surety.[14] The effect of a secret preference upon the liability of the surety is considered elsewhere.[15]

[9] Johnson v. Baker, 4 Barn. & Ald. 440: It was held that the delivery of the deed to be taken around for signatures amounted merely to a delivery in escrow.

[10] Babcock v. Dill, 43 Barb. 577; Crandall v. Cochran, 3 T. & C. 203.

[11] Ex parte Gilbey, L. R. 8 Ch. Div. 248.

[12] Ex parte Gilbey, 2 Q. B. Div. 6, 26 W. R. 768.

[13] Clark v. Ritchie, 11 Grant's Ch. R. 499: Pendleberg v. Walker, 4 Young & Coll. (Ex.) 224.

[14] Clark v. Upton, 3 Man. & R. 89.

[15] Sec. 205.

Sec. 201. Fraudulent representations by the debtor as to his affairs avoids the composition—A creditor as a decoy—Mistake of fact as a ground for rescission—Equitable relief—Release vacated—Security reinstated.—Where a debtor in embarrassed circumstances appeals to his creditors for a composition of his debts the law holds him to the utmost good faith in effecting the composition, and any misrepresentation as to the condition of his affairs,[1] or as to the amount of his debts, or misrepresentation or concealment as to the kind, condition or amount of his property,[2] or as to the number of creditors who will join,[3] will enable an injured creditor, at his option, to avoid the agreement.[4] If avoided by one it may be avoided by all; otherwise the one withdrawing from the agreement might recover on his claim and exhaust the very funds out of which the composition money was to be paid. The rescinding creditor could not, however, against the wishes of the remaining creditors, interfere with their *pro rata* of the composition funds in the hands of a trustee under a valid assignment. If one partner misrepresents the affairs of the firm,[5] or of his individual debts or resources, it will invalidate a composition with the firm. The debtor is bound by the misrepresentations of his agent,[6] even though the agent believed the statements to be true and made them without the principal's knowledge.[7] If the creditors do not interrogate the debtor as to his finan-

[1] Stafford v. Bacon, 1 Hill, 532, 37 Am. Dec. 363.

[2] Armstrong v. Mechanics' Bank, 6 Bliss (U. S.) 520.

[3] Cooling v. Noyes, 6 T. R. 263.

[4] Ball v. McGeoch, 81 Wis. 160, 51 N. W. 443; Enneking v. Stahl, 9 Mo. App. 390; Hefter v. Cohn, 73 Ill. 296; Seving v. Gale, 28 Ind. 486; Grabenheimer v. Blum, 63 Tex. 369; Woodruff v. Saul, 70 Ga. 271; Almon v. Hamilton, 100 N. W. 527, 3 N. E. 580: In this case the debtor stated that he was only a special partner, whereas he was a general partner and liable for all the debts of the firm.

[5] Smith v. Salomon, 7 Daly (N. Y.) 216.

[6] Cobb v. Fogg, 166 Mass. 466, 44 N. E. 534; Laird v. Campbell, 100 Pa. St. 159.

[7] Elfelt v. Snow, 2 Sawyer (U. S.) 94.

cial condition, he need not generally make any disclosure; but he must of necessity make some representations as to his embarrassment on making the appeal to them, and if it be in general terms and they do not choose to enquire of him as to his affairs, they cannot avoid the agreement on the ground that he failed to make a disclosure,[8] but only on the ground that the debtor knew at the time he was not embarrassed. If the debtor by words or acts leaves a creditor under a false impression as to his assets, the creditor may avoid the agreement and sue for the residue.[9] If he is called upon for a statement of his affairs, or the circumstances cast the duty to make one upon him, he must make a full and true statement in order to bind the creditors.[10] The creditors are not bound to look to any other source for information. If the creditors do not call for a statement, but accept the mere opinion of the debtor as to his financial condition, they cannot avoid the agreement on the ground that the opinion was not in accordance with the true situation,[11] unless they show the opinion was fraudulently given, or so far from the truth that knowledge of its falsity would be imputed to the debtor as a matter of law.[12] Fraudulent representations made to one creditor is no ground for an avoidance of the agreement by other creditors not affected by the fraud.[13]

[8] Graham v. Mayer, 99 N. Y. 611, 1 N. E. 143; Cleveland v. Richardson, 132 U. S. 318, 10 S. Ct. 100, 33 L. Ed. 384.

[9] Vine v. Mitchell, 1 M. & Rob. 337.

[10] Irving v. Humphry, 1 Hopk. Ch. (N. Y.) 284; Hefter v. Cohn, 73 Ill. 296.

[11] National Bank v. McGeoch, 92 Wis. 286, 66 N. W. 606: In this case the receiver of the defendant gave his opinion as to the condition of the debtor's affairs. Denny v. Gilman, 26 Me. 149.

[12] An opinion or representation that, after paying forty five cents on the dollar, he would have "some means" left, was held not to be understood by the creditors as meaning that he would have more by half left than he was paying them: Elfelt v. Snow, 2 Sawyer (U. S.) 94, 6, Nat. Bankr. Reg. 57.

[13] Cheveront v. Textor, 53 Md. 295; Clark v. White, 12 Pet. (U. S.) 178, 9 L. Ed. 1046.

A composition agreement being an entirety among all the creditors and made with the understanding that all shall share alike, if a creditor who was induced to come in by the fraud of the debtor, repudiates it, the remaining creditors may elect to consider the agreement at an end.[14] A creditor cannot avoid a composition agreement on the ground of fraud unless it be made to appear that he believed the false statements to be true and relied upon them, and was deceived and misled thereby.[15] If he has full knowledge of the facts and acts upon his own judgment he will be held to the agreement.[16] A creditor receiving or reserving a benefit not common to all, must not act as a decoy to bring others into a composition agreement. If a creditor induces others to join in such an agreement by false representations as to the amount or number of his claims, he cannot recover of the debtor the amount not included in the composition.[17] The creditor who was deceived cannot avoid the composition unless the debtor was a party to the fraud. If a creditor by a promise of a secret preference induces others to join with him in the agreement, he cannot recover the composition money;[18] but the agreement may be avoided by the other creditors. The rule that a contract may be avoided or rescinded on the ground of a mistake of fact material thereto, has no application to cases where several creditors have agreed with their debtor to accept a composition of their debts, where each agrees to compromise upon consideration of a like agreement of the others, and no one of them can avoid or rescind the agreement upon his part on the ground that it was made through

[14] It has been held that a recovery by the defrauded debtor of his entire claim will not invalidate the composition as to the other creditors: Cheveront v. Textor, 53 Md. 295. But this doctrine would tie the other creditor's hands, while the one to whom the fraudulent representations were made, exhausted the debtor's estate.

[15] Nicolai v. Lyon, 8 Oreg. 56; Irving v. Humphry, 1 Hopk. Ch. (N. Y.) 284.

[16] Clark v. White, 12 Pet. (U. S.) 178, 9 L. Ed. 1046.

[17] Blackstone v. Wilson, 26 L. J., Exch. 229.

[18] Frost v. Gage, 85 Mass. 560.

mistake, forgetfulness or ignorance as to the amount of his claim, or that it was secured. The right to rescind for mistake of fact applies only where the rights of innocent third parties will not be prejudiced.[19] A creditor who has been induced to join in a composition by the misrepresentations of the debtor; or where an unlawful preference has been given to another creditor, may bring an action in equity to set aside the composition agreement, or a release,[20] or for a redelivery of the original note or other evidence of the debt surrendered by him.[21] A court of equity may reinstate any security surrendered by the creditor.

Sec. 202. Secret preference fraudulent—Agreement unenforceable—An affirmative defence—When res adjudicata.—The cardinal principle upholding a composition agreement is equality among the creditors. Where creditors prompted by compassion for their unfortunate debtor agree among themselves to forego any advantage to be derived from individual efforts at collecting their several debts, and to suffer an equal loss by accepting a *pro rata* distribution of the property offered by the debtor in satisfaction, the parties of necessity must repose special trust and confidence in each other; and, the nature of the transaction and the previous situation of the parties call for the utmost good faith upon the part of all the parties. This the law demands and exacts. A debtor must not, therefore, pretend to deal with all alike when the facts are otherwise, and a creditor must not hold himself out as acting conjointly when he is acting in-

[19] Johnson v. Parker, 34 Wis. 596.

[20] Martin v. Adams, 81 Hun, 9, 31 N. Y. Supp. 523, 62 N. Y. St. 404; Smith v. Salomon, 7 Daly (N. Y.) 216; Richards v Hunt, 6 Vt. 251, 27 Am. Dec. 545; Phittiplace v. Sayles, 4 Mason (U. S.) 312; Jackson v. Hodges, 24 Md. 468; Stafford v. Bacon, 1 Hill, 532, 37 Am. Dec. 263 (Accord and satisfaction). In Irving v. Humphry, 1 Hopk. Ch. 284, it was held that the court was not bound to vacate the release, but may hold the defendant to a liabillty to the extent that his property had not been applied to that purpose.

[21] Cobb v. Fogg, 166 Mass. 466, 44 N. E. 434.

dependently. Therefore, if a creditor, without the knowledge of the other creditors or any one of them, bargains for and receives from the debtor, as a condition for his joining in the composition agreement, any present advantage, or promise, which gives him a preference or the possibility of a preference over the other creditors, he violates the confidence reposed in him by the other creditors and perpetrates a fraud upon them, and his entire agreement with the debtor, not only for the secret preference but for the composition as well, is fraudulent and void.[1] And any independent contract, note, security, or any obligation, obtained upon such fraudulent agreement, is absolutely void and unenforceable, whether executed before, at or after the time of executing the composition agreement.[2]

So, if the contract for the payment of the secret preference is a part of the contract for the payment of the composition money, as where he takes a note for the entire sum agreed to be paid, he cannot enforce it.[3] The rule applies alike to contracts made by the debtor in person and those made by third persons for his benefit,[4] whether made with or without the debtor's knowledge.[5] If a ne-

1 Bowers v. Mety, 54 Iowa, 394, 6 N. W. 551.

2 Ramsdell v. Edgarton, 8 Met. 227, 41 Am. Dec. 503; Doughty v. Savage, 28 Conn. 166; Newell v. Higgins, 55 Minn. 82, 56 N. W. 577; Powers v. Harlin, 62 Minn. 193, 71 N. W. 16; Yeomans v. Chatterton, 9 Johns. 295, 6 Am. Dec. 277; Bradley v. Lally, 51 N. Y. St. Rep. 1152; Cockshott v. Bennett, 2 T. R. 763; Spurret v. Spiller, 1 Atk. 105, 26 Eng. Reprint, 69; Lewis v. Jones, 4 Barn. & C. 506, 8 Dowl. & R. 567; Fay v. Fay, 121 Mass. 561; Lathrop v. King, 8 Cush. 382; Harvey v. Hunt, 119 Mass. 279; O'Shea v. Collier, 42 Mo. 397, 97 Am. Dec. 332; Goodwin v. Blake, 3 T. B. Mon. 106, 16 Am. Dec. 87; Townsend v. Newell, 22 How. Pr. 164; Bliss v. Mattson, 45 N. Y. 22; Lawrence v. Clark, 36 N. Y. 128; Wheelwright v. Jackson, 3 Taunt. 109; Fawcett v. Gee, 3 Anst. 910; Cullingworth v. Lloyd, 2 Beav. 165; Jackson v. Mitchell, 13 Ves. Jr. 581.

3 Townsend v. Newell, 22 How. Pr. 164; Eldridge v. Strong, 34 N. Y. Super. Ct. 491; Sternburg v. Bowman, 103 Mass. 325.

4 Solinger v. Earl, 82 N. Y. 393, 60 How. Pr. 116; White v. Kuntz, 107 N. Y. 518, 1 Am. St. Rep. 886.

5 Pulsford v. Richards, 17 Beav. 87, 17 Jur. 865, 22 L. J., Ch. 559; Bradshaw v. Bradshaw, 9 M. & W. 29; Bank v. Hoeber, 11 Mo. App. 475, aff'ing

gotiable note, given as a fraudulent preference, falls into the hands of a *bona fide* holder, the debtor is liable thereon; but an indorsee who takes such note for a pre-existing debt without surrendering any security or right in respect to it, is not a *bona fide* holder of the same.[6] A non-negotiable security in the hands of an innocent third party for value, is subject to the defence that it is a fraudulent preference. If sued on a note given for a fraudulent preference, the debtor or whoever is liable thereon, must set up the fraud as a defence or it will be waived.[7] But if there are two notes, a failure to plead the fraud as a defence to one note will not prevent the debtor from interposing the defence of fraud when sued on the other note.[8] On the other hand, if two notes were given as a secret preference, and a judgment goes in favor of the debtor in an action upon one note, upon the question of fraud, it amounts to a *res adjudicata* upon that question in an action between the same parties upon the other note.[9]

Sec. 203. Recovery of secret preference by debtor—By near relative—Stranger—When composition agreement is not executed—When debtor is in default—When not recoverable—Relief in equity.—While both the debtor who gives a secret preference, and the creditor who receives it are guilty of fraud upon the creditors, yet they are not in *pari delictu,* for they are not upon an equal footing. Lord Ellenborough said: "This is not a case of *par delictum;* it is oppression on the one side and submission on the other; it never can be predicated as *par delictum* where one holds the rod and the

88 Mo. 37, 67 Am. Rep. 359; Luehrmann v. St. Louis Fur. Co., 21 Mo. App. 499. *Contra* Martin v. Adams, 81 Hun, 9, 30 N. Y. Supp. 523, 62 N. Y. St. 404. See also Babcock v. Dill, 43 Barb. 577.

6 Lawrence v. Clark, 36 N. Y. 128.

7 Wilson v. Ray, 10 Ad. & E. 82; Smith v. Evans, 21 Cal. 11. The burden of proving a frauduient preference is upon the party alleging it: National Bank v. McGeoch, 92 Wis. 286.

8 Hughes v. Alexander, 5 Duer, 488.

9 Higgins v. Mayer, 10 How. Pr. 363.

other bows to it." [1] The law assumes this from the situation of the parties and does not stop to enquire into it; but even if it should appear that there were no threats or pressure used by the creditor, and that the preference was merely volunteered to be given by the debtor, the creditor in receiving it would nevertheless be guilty of duplicity towards the other creditors, and relief would be granted the debtor, not so much for his sake but upon the ground of public policy, in order to punish the dishonest creditor and thereby suppress fraud. Therefore the money paid by a debtor to a creditor at the time he signs a composition agreement, as a secret preference, to induce him to join in the agreement, is considered as having been paid under duress and may be recovered by the debtor,[2] or by his assignee,[3] or personal representatives.[4] So, if a note was given for such preference and the debtor afterwards was compelled to pay it to a *bona fide* holder, he may recover the amount paid from the creditor.[5] If a near relative out of compassion for the debtor pays the money he may recover it from the creditor.[6] But the rule

[1] Smith v. Cuff, 6 M. & S. 160.

[2] Ramsdell v. Edgarton, 8 Met. 227, 41 Am. Dec. 503; Gilmore v. Thompson, 49 How. Pr. 198; Bean v. Arnsinck, 10 Blatchf. 361; Atkinson v. Denby, 6 H. & N. 778, 7 H. & M. 934; Bean v. Brookmire, 2 Dill. 108; Turner v. Hoole, Dow. & Ry. N. P. 27; Alsager v. Spalding, 4 Bing. N. C. 407, 6 Scott, 204, 1 Arn. 181; Bradshaw v. Bradshaw, 9 Mees. & W. 29; Esterbrook v. Scott, 3 Ves. Jr. 456; Mare v. Warner, 3 Giff. 190, 7 Jur. N. S. 1228; Jackman v. Mitchell, 13 Ves. Jr. 581; (*Dictum*) Newell v. Higgins, 55 Minn. 82, 56 N. W. 577. See Crossley v. Moore, 40 N. J. L. 27.

[3] Bean v. Arnsinck, 10 Blatchf. 361; Bean v Brookmire, 2 Dill. 108; Alsager v. Spalding, 6 Scott, 204, 4 Bing. N. C. 407.

[4] See Pfleger v. Brown, 28 Beav. 391.

[5] Smith v. Cuff, 6 Man. & Sel. 160; Bradshaw v. Bradshaw, 9 Mee. & W. 29; Horton v. Riley, 11 Mee. & W. 499; Gilmore v. Thompson, 49 How. Pr. 198.

[6] Smith v. Bromley, 6 Douglas, 696: "If any near relative is induced to pay money for the bankrupt, it is taking an unfair advantage and torturing the compassion of his family." *Per* Lord Mansfield.

does not extend to a stranger,[7] such as a brother-in-law.[8] The secret preference may be recovered although all the creditors do not sign, where that is necessary; or the debtor is in default in not paying the composition money,[9] for as to the guilty creditor, the composition extinguishes his debt and the fraud gives him no right to recover the composition money, therefore as to him there can be no default.[10] If, however, the debtor gives his note for the preference and afterwards pays it to the creditor, he cannot recover, for the payment is voluntary.[11] Nor can such a payment be set up as a counterclaim.[12] A surety or a guarantor, who knowingly pays a creditor an unlawful preference to induce him to join in the composition agreement, cannot recover it from the debtor although the latter has given his note or accepted a bill drawn on him for the money.[13]

If the composition money, with or without an additional sum as a preference, is paid in advance of signing the agreement, when the payment of the money to the creditors under the agreement is deferred, the prior payment is itself a fraudulent preference and may be recovered back; or the creditors, if they do not choose to avoid the agreement, may compel it to be returned to the debtor, or they may recover it for his benefit under the agreement. But if the compo-

[7] See Bradshaw v. Bradshaw, 9 Mee. & W. 29.

[8] Solinger v. Earle, 82 N. Y. 393, 60 How. Pr. 116.

[9] Bean v. Arnsinck, 10 Blatchf. 361; Bean v. Brookmire, 2 Dill. 108. See Wheelwright v. Jackson, 5 Taunt. 1093, where the composition agreement was not signed by all the parties and the arrangement fell through; Lord Mansfield, with great reluctance held that the assignee of the debtor could not recover the illegal preference. See Ward v. Bird, 2 Chitty, 582, where it was held he could not recover the difference between the composition and the full payment without showing the composition notes had been paid.

[10] Ex parte Oliver, 4 De G. & F. 354. See Townsend v. Newell, 22 How. Pr. 363.

[11] Wilson v. Ray, 10 Ad. & E. 82; Bradshaw v. Bradshaw, 9 Mee. & W. 29.

[12] Smith v. Zeigler, 17 N. Y. Supp. 338.

[13] Bryant v. Christie, 1 Stark. 329, 2 E. C. L. 129.

sition money was to be paid down on the execution of the agreement, and a fraudulent preference was also exacted, while the whole agreement is tainted with fraud and unenforceable if executory, only the fraudulent preference can be recovered as it is the preference that affects the creditors. In order to defeat a note given for a fraudulent preference, it is not necessary to prove the signature of all the creditors to the composition agreement when the agreement is offered in evidence, for the reason that a fraud on any one creditor, renders the note void.[14] It appears that if the debtor has been guilty of any independent fraud, as where he obtained the composition by concealing a part of his assets,[15] the law will not lend its assistance to recover a secret preference. Although a debtor is guilty of fraud in giving a secret preference, and his hands are not clean, yet a court of equity, on the ground of public policy, will afford him relief by requiring a note or other security given as a secret preference to be surrendered [16] or cancelled, or will restrain the creditor from transferring a negotiable note of security, or enjoin him from enforcing the note or security.[17]

Sec. 204. Secret preference—Illustrations—Evidence—Question for the jury.—Any agreement secretly made by a debtor, or by some one for him, with one or more of his creditors less than all, before making a composition agreement or at the time of its execution, as an inducement to join in the agreement, giving him or them presently or upon performance at a future time, something different from that which the other creditors are to receive under the composition agreement, constitutes a secret preference and is a fraud upon the innocent creditors. It is the policy of the law, particularly with respect to composition agreements where the temptation is great for a cred-

[14] Beach v. Ollendorf, 1 Hilt. 41.

[15] Armstrong v. Mechanics' Bank, 6 Biss. 520.

[16] Jackman v. Mitchell, 13 Ves. Jr. 581.

[17] A judgment entered by confession for the secret preference will be vacated, or its enforcement enjoined: Blodget v. Hagan, 10 La. Ann. 18.

itor to save himself from loss by circumventing the other creditors, to discourage fraudulent practices and bad business morals, and in doing this, the law never stops to enquire whether the benefit sought to be obtained is great or small, or is of any benefit whatever; nor, in this case, whether the secret benefit bargained for is detrimental to the other creditors or not.[1] With respect to enforcing a rule of public policy that is merely a collateral issue and immaterial. If, by the agreement, creditors are to be paid at a future time, and one creditor secretly bargains for an immediate payment, even though he discounts the amount to be paid under the composition,[2] or for a note due before the time fixed,[3] or for the payment of the balance of the original debt,[4] it is a fraudulent preference. Requiring a debtor to assume a debt for which he is not liable, and including it with a demand due the creditor from the debtor in the composition agreement, amounts to a fraudulent preference.[5] Any secret security given for the payment of the composition money or any part of it, is such a preference as will avoid the composition agreement.[6] A se-

[1] A secret preference is void although no one is deceived by the fraud: Fawcett v. Gee, 3 Anst. 910.

[2] Bean v. Arnsinck, 10 Blatchf. (U. S.) 361. s. p. Zell Co. v. Emry, 18 S. E. 89.

[3] Smith v. Owen, 21 Cal. 11.

[4] Cockshott v. Bennett, 2 T. R. 763: A note was given for the balance.

[5] Doughty v. Savage, 28 Conn. 146.

[6] Leicester v. Rose, 4 East, 372, 1 Smith, 41; Pinneo v. Higgins, 12 Abb. Pr. 334. Where a creditor obtained a guaranty for the payment of a debt in full pending negotiations for a composition, and then signed the deed, and some of the creditors signing did not know of the guaranty, it was held that the guaranty was a fraud upon the creditors, and void: Coleman v. Waller, 3 Younge & Jer. 212. Demanding and receiving any additional security not held by the other creditors, is a fraudulent preference: Leicester v. Rose, 4 East, 280. Agreeing with a creditor that he may retain his original claim until the composition notes are paid, is a preference: Zell Co. v. Emry, 18 S. E. 89. Secretly assigning an insurance policy to one creditor (Alsager v. Spalding, 1 Arn. 181, 4 Bing. N. C. 407); or agreeing to keep up the premiums on a life policy for the creditor's benefit, is a fraudulent preference: Pfleger v. Brown, 20 Beav. 391.

cret agreement by a third party with a creditor, to pay $10,000 for composition notes for $6,000,[7] made to induce him to join in the composition agreement, is a fraudulent preference. A promise by a debtor, or a third party interested in securing property subject to the lien of certain debts, to one of the lien holders, to pay his lien in full or to give him any other advantage over the other creditors, made as an inducement to him to use his influence to induce the other creditors to accept the composition offered, is a secret preference.[8]

A note given to a third party to induce a creditor to sign,[9] or to refrain from interfering with a composition,[10] is void, if not on the ground that it is a fraudulent preference, at least on the ground that it is a premium on the use of undue influence or perhaps false representations; or as imposing silence when a person ought to speak, as the case may be. Where a creditor holding a claim against an individual member of a firm and one against the firm, took collateral from the partner to secure the individual claim, it was held not to invalidate a composition entered into by the firm with its creditors.[11] Any property taken in exchange for the composition notes or security obtained therefor after the composition, will not affect it unless the agreement therefor was prior to or a part of the composition agreement.[12] A promise to pay the residue of a debt discharged by a composition, made after the discharge is not fraudulent, if uncon-

7 White v. Kuntz, 107 N. Y. 518, 1 Am. St. Rep. 886.

8 Where a corporation is compounding its debts by way of a composition, a secret agreement by the person seeking to reorganize the company, with a director, that if he will use his influence to get certain bondholders to come into the proposed arrangement, the new company will pay the director the amount of certain bonds held by him, which was more than other bondholders were to receive, was held a fraudulent preference: Bliss v. Mattson, 45 N. Y. 22.

9 Winn v. Thomas, 55 N. H. 294.

10 Bullene v. Blain, 6 Biss. 22.

11 Continental Bank v. McGeoch, 92 Wis. 286, 66 N. W. 606.

12 Hagen's App. 11 W. N. C. 86.

nected with the previous agreement, but in order to be enforceable it must be founded upon a new consideration or under seal. Parol evidence is admissible to prove a fraudulent preference.[13] A secret preference being alleged, evidence that the creditor's claim was paid in full, is admissible as tending to establish such allegation.[14] If the evidence is conflicting as to whether a note was given as a secret preference or for some other purpose, it is a question for the jury.[15]

Sec. 205. Effect of a fraudulent preference upon the liability of surety—Remedy at law, in equity.—The object of a surety guaranteeing the payment of a composition is to relieve the debtor from his entire liability for the debts compounded by the payment of a part, and a secret preference by a payment to a creditor of any sum beyond the composition agreed upon, or a secret promise which leaves the debtor bound for any further sum, or a secret security given, not only defeats the object of the composition and the intent of the surety, but impairs the ability of the debtor to reimburse the surety and therefore is a fraud upon him. It is also a fraud upon the creditors. What then is the effect upon the liability of the surety? Where the surety at the time of entering into the agreement is ignorant of the fraudulent preference and is afterwards sued by the party receiving such unlawful preference, the decisions are uniform in holding that the surety, indorser, or guarantor, is not bound by his agreement.[1] But if the surety is a party to the fraud, as where

[13] Ramsdell v. Edgarton, 8 Metc. 227, 41 Am. Dec. 503.

[14] Musgat v. Wybro, 33 Wis. 515. See Frieberg v. Treitschke, 55 N. W. (Neb.) 273, where a note was given for the residue.

[15] First National Bank v. Steel, 58 Minn. 126, 59 N. W. 959.

[1] Newell v. Higgins, 55 Minn. 82 (indorser); Powers v. Harlin, 68 Minn. 193, 71 N. W. 16; Clark v. Richey, 11 Grant Ch. (U. C.) 499; Eldridge v. Strong, 34 N. Y. Super. 491; Pendleburg v. Walker, 4 You. & Col. 424; Pinneo v. Higgins, 12 Abb. Pr. 334; Doughty v. Savage, 28 Conn. 146; Bailey v. Boyd, 75 Ind. 125. Requiring a debtor to assume a debt due a creditor from another person for which the debtor is not liable, and including it with another claim in the composition agreement without the knowledge of the surety, is a fraud upon the surety and releases him: Doughty

he, with knowledge of the terms of the composition agreement, indorses a note given for the fraudulent preference as well as the composition notes, he might well be held on his indorsement of the composition notes by the innocent creditors, upon the same principle that a creditor guilty of taking a fraudulent preference is not permitted to avoid the composition. In a New York case, where an indorser upon a composition note, when sued upon the note defended on the ground that the plaintiff without the knowledge of the creditors had received a fraudulent preference in obtaining her indorsement upon two other composition notes; the court, after an exhaustive analysis of the decisions, while holding that the agreement for and the giving of the illegal security was unlawful and void, held the plaintiff entitled to recover on the ground that such agreement falls within the rule which permits a severance of the illegal from the legal part of the agreement.[2] The point whether the surety had knowledge of the terms of the composition agreement and was a party to the fraud was not adverted to. The decision was based squarely upon the rule announced that a fraudulent preference did not avoid the composition agreement, but only the agreement giving the fraudulent preference was void; a principle which finds little support outside the decisions of the New York courts.[3]

v. Savage, 28 Conn. 146. This was an action by the party receiving the preference.

[2] Hanover v. Blake, 142 N. Y. 404, 27 L. R. A. 33. See note to L. R. A. for a collection of authorities. See Clark v. Richey, 11 Grant Ch. (U. C.) 499.

[3] The decision in Hanover v. Blake, 142 N. Y. 404, 27 L. R. A. 33, was given by a divided court; and Gray, J., in commenting upon White v. Kuntz, 107 N. Y. 518, 1 Am. St. Rep. 886, silently ignored the utterances of Earl, J., in the latter case, to the effect that the composition agreement was absolutely void as to innocent creditors on account of the fraudulent preference. See Page v. Carter, 16 N. H. 254, 41 Am. Dec. 726. And see Bartlett v. Blain, 83 Ill. 25, where the court overlooked its previous declaration in Hefter v. Cahn, 73 Ill. 246, that it could not consider an innocent creditor bound by a composition where there was a secret preference given to another.

The rule that an innocent creditor may avoid the composition agreement on the ground of a fraudulent preference is supported by the decided weight of authorities,[4] and an innocent surety, whose interests are more carefully guarded, may do likewise,[5] even when sued by a creditor not a party to the fraud. A surety who has paid the composition money, may, on discovering that a fraudulent preference had been given, recover the payment made by him; but if paid after having knowledge of the fraud, it amounts to a voluntary payment and cannot be recovered, unless paid upon a negotiable instrument in the hands of a *bona fide* holder for value. So, a surety or guarantor, may sue in equity to have any security given by him delivered up, set aside or canceled,[6] or to enjoin the creditor from enforcing the same.[7]

Sec. 206. Fraudulent preferences—Avoidance of composition by innocent creditors—Preference paid by stranger—Waiver of the fraud—Avoidance optional—Remedies—Rescission.—While there are decisions to the contrary, it is clear that the weight of authority is, that where one creditor has secretly obtained an undue advantage by a fraudulent preference, the composition agreement is absolutely void as to all the innocent creditors, and they are left with the right to enforce their original claims as if they had never signed the agreement.[1] If an innocent creditor has received the com-

[4] Sec. 206.

[5] See Powers v. Harlin, 68 Minn. 193, 71 N. W. 16, where the court reviews the authorities and analyzes the subject.

[6] Jackman v. Mitchell, 13 Ves. Jr. 581; Pendleberg v. Walker, 4 Y. & C. Exch. 424; Wood v. Barker, 11 Jur. N. S. 905; Cobb v. Fogg, 166 Mass. 466, 44 N. E. 534.

[7] Almon v. Hamilton, 100 N. Y. 527, 3 N. E. 580 (Affirming 30 Hun, 88); Jackman v. Mitchell, 13 Ves. Jr. 581; Spurret v. Spiller, 1 Atk. 105, 26 Eng. Reprint, 69.

[1] Powers v. Harlin, 62 Minn. 193, 71 N. W. 16; White v. Kuntz, 107 N. Y. 518, 1 Am. St. Rep. 886; Cobb v. Tirrell, 137 Mass. 143; Partridge v. Messer, 14 Gray, 180; Ramsdell v. Edgarton, 8 Met. 227, 41 Am. Dec. 503; Kahn v. Gumberts, 9 Ind. 430; Hefter v. Cahn, 73 Ill. 296; Saul v. Buck,

position money he may recover the balance due on the original claim.[2] The fact that the preference was paid by the debtor's agent or attorney,[3] or by a third party, does not affect the rule.[4] Nor will the payment of a preference by a third party without the connivance of the debtor affect the rule.[5] The question seems to turn on the fraud of the creditor.[6] A creditor by his conduct may waive the fraud; thus, where a creditor, after learning of the secret preference, accepted the composition notes indorsed by a surety, which the latter afterwards paid, it was held that the creditor could not recover the balance due on the original demand. Good faith towards the surety required that the creditor repudiate the agreement at once.[7] So, it is waived as to those creditors who knew of the preference at the time they signed the agreement;[8] although it might be more proper to

70 Ga. 254; Woodruff v. Saul, 70 Ga. 271; Crossley v. Moore, 40 N. J. L. 27; Kullman v. Greenbaum, 92 Cal. 403; Zell v. Emry, 113 N. C. 85, 18 S. E. 89; Danglish v. Tennant, L. R. 2 Q. B. 49; Crandall v. Cochran, 3 Thomp. & C. 203; Spooner v. Whiston, 8 J. B. Moore, 580; Bank v. Hoeber, 8 Mo. 37; Musgut v. Wybro, 33 Wis. 516. *Contra* Page v. Carter, 16 N. H. 254, 41 Am. Dec. 726; Hanover v. Blake, 142 N. Y. 404, 27 L. R. A. 33. See Bartlett v. Blain, 83 Ill. 25, 25 Am. St. Rep. 346, where the court overlooked its previous declaration in Hefter v. Cahn, 73 Ill. 296, to the contrary.

2 Cobleigh v. Pierce, 32 Vt. 788; Brownville v. Lockwood, 3 McCrary, 608; Greer v. Shriver, 53 Pa. 257.

3 Bank v. Hoeber, 11 Mo. App. 475, 88 Mo. 37, 57 Am. Rep. 359.

4 Knight v. Hunt, 5 Bing. 432; Ex parte Milner, L. R. 15 Q. B. Div. 605, 54 L. J., Q. B. 425, 33 W. R. 867; Solinger v. Earle, 82 N. Y. 393, 60 How. Pr. 116.

5 Luehrmann v. St. Louis F. Co., 21 Mo. App. 499; Bradshaw v. Bradshaw, 9 Mee. & W. 29. *Contra* Martin v. Adams, 81 Hun, 9. See Babcock v. Dill, 43 Barb. 577.

6 See Kullman v. Greenbaum, 92 Cal. 403, 28 Pac. 674, 27 Am. St. Rep. 150.

7 Bower v. May, 54 Iowa, 394, 6 N. W. 551; Continental Bank v. McGeoch, 92 Wis. 286, 66 N. W. 606; Cobleigh v. Pierce, 32 Vt. 788.

8 Jackman v. Mitchell, 13 Ves. 581; O'Shea v. Collier, 42 Mo. 397, 97 Am. Dec. 332.

say that, as to them, it was a part of the composition agreement at the time they executed it.

While an innocent creditor may recover on his original cause of action where a fraudulent preference has been given, he is not obliged to do so but may elect to hold the debtor to the composition agreement and the debtor cannot set up his own fraud to defeat it. But the agreement may be avoided by any one of the innocent creditors; and where the composition money is to be made out of the sale of property and a willing creditor cannot have his *pro rata* at once in money, an avoidance by one necessarily works an avoidance as to all. Where a composition agreement is voidable on the ground of fraud, and there has been no performance, or if the agreement has been performed by paying money only, the creditor need do no more than sue for the amount of the original claim, or the balance due after deducting the amount received upon the composition agreement. No formal rescission is necessary.[9] If he has surrendered notes representing the indebtedness he may nevertheless sue upon them.[10] If, however, the money paid upon a composition was advanced by a surety it must be restored to him, if the creditor desires to avoid the agreement.[11] So, if there has been an assignment of the debtor's property out of which the composition money was to be made, or something other than money was received in satisfaction and the property has not been disposed of, the creditors should rescind by returning the property to the debtor. If the property has been disposed of pursuant to the composition agreement and the proceeds distributed among the creditors, their remedy is for

[9] Smith v. Salomon, 7 Daly (N. Y.) 216; Ennekin v. Stahl, 9 Mo. App. 390; Pierce v. Wood, 23 N. H. 519. If the debtor has committed an act of bankruptcy the creditor may proceed in bankruptcy: Ex parte Cowen, L. R. 2 Ch. 563. A judgment creditor may issue an execution: Ex parte Milner, 15 Q. B. Div. 605, 33 W. R. 867.

[10] Blodgett v. Webster, 24 N. H. 91; Bank v. Hoeber, 8 Mo. App. 191; Stewart v. Blum, 28 Pa. St. 225.

[11] Lewis v. Jones, 4 B. & C. 506, 10 E. C. L. 679. See Sec. 200. See also Bower v. Metz, 54 Iowa, 394, 6 N. W. 551.

damages suffered on account of the fraud.[12] In such cases the amount of the recovery will be limited to the difference between what had been received and what the debtor could have paid,[13] taking all his property into consideration. Losses of the debtor subsequent to the date of the agreement cannot be deducted.[14]

Sec. 207. Fraudulent preference—Creditor particeps fraudis cannot avoid the composition for fraud—Cannot enforce composition agreement, nor recover on original demand.—The authorities are not in accord on the question whether a creditor who is guilty of fraud in receiving a secret preference, can avoid the composition on the ground of the fraud of the debtor, whether the fraud consists in giving a secret preference to another, or concealing his assets, or false representations. Where a creditor in his reply alleged that the composition agreement had been obtained by covin and fraud, and the proof disclosed that the debtor had obtained his signature to the agreement by falsely representing that he had not given a secret preference to any other creditor, judgment went against him on the ground that he was *particeps fraudis*.[1] On the contrary, in at least two cases, a creditor who had received a secret preference was allowed to recover on the original cause of action, on the ground that the debtor had misrepresented the condition of his affairs.[2] The former is the better doctrine, and is upheld by the greater number of decisions. We agree with Mr. Bump, that, in such cases, the creditor's hands are not clean. That "when he

12 Grabenheimer v. Blum, 63 Tex. 369.

13 Whiteside v. Hyman, 10 Hun, 218; Page v. Wells, 37 Mich. 421.

14 Grabenheimer v. Blum, 63 Tex. 369.

1 Mallalieu v. Hodgson, 16 A. & E. (N. S.) 690, 16 Q. B. 689. S. P. White v. Kuntz, 107 N. Y. 518, 1 Am. St. Rep. 886; Baldwin v. Rosenman, 49 Conn. 105; O'Brien v. Greenbaum, 92 Cal. 104; Watts v. Hyde, 10 Jur. 127, 17 L. J., Ch. 409. A creditor for the purpose of escaping from the agreement, cannot complain that he received an unlawful preference through his agent: Blair v. Wait, 69 N. Y. 113.

2 Stewart v. Blum, 28 Penn. 225; Elfet v. Snow, 2 Sawyer, 94. In one of

seeks to overreach others, he has no cause to complain if he himself is overreached." [3] However, if a creditor puts his debt down for a less sum with the intent to forgive the residue, it is not such a fraud as will prevent the creditor from avoiding the composition on the ground that the debtor had concealed a portion of his assets.[4]

It is a general rule of law as well as equity, that no part of a contract tainted with fraud will be permitted to stand for the benefit of the party responsible for the fraud. Therefore, where a creditor exacts from his unfortunate debtor, a secret preference as a condition of his joining in the composition agreement, he makes one entire contract, and a part being fraudulent, the whole is fraudulent and he cannot recover the composition money.[5] While there are a number of decisions holding that the fraudulent transaction may be severed, and the creditor guilty of the fraud may recover the composition money,[6] they are decidedly in the minority, and are contrary to all principles of law and equity, and a sound public policy. If such a doctrine be indorsed, a creditor could, by bearing down on his helpless debtor, secure an undue advantage, and if successful, thus shamelessly trick and defraud the other creditors with impunity, for if detected he would still share equally with the honest creditors. The

these cases (Stewart v. Blum) the question of the fraud of the creditor was not raised; in the other, the decisions holding the creditor could not recover were not brought to the attention of the court. This doctrine has been recognized by way of *obiter dicta* in other cases: Huntington v. Clark, 39 Conn. 540; Armstrong v. Mechanics' Bank, 6 Biss. 520.

[3] Bump on Comp. 63.

[4] Huntington v. Clark, 39 Conn. 540.

[5] Howden v. Haigh, 11 Ad. & E. 1033, 3 Per. & Dav. 661; Mallalieu v. Hodgson, 16 Q. B. 689, 15 Jur. 817, 71 E. C. L. 689; Higgins v. Pitts, 4 Exch. 312, 18 L. J., Exch. 488; Huckins v. Hunt, 138 Mass. 366; Frost v. Gage, 3 Allen, 560, 85 Mass. 560; Doughty v. Savage, 28 Conn. 146; Huntington v. Clark, 39 Conn. 540; Powers v. Harlin, 68 Minn. 193, 71 N. W. 16; Bannantine v. Cantwell, 27 Mo. App. 658; Clark v. Ritchey, 11 Grant Ch. (U. C.) 499.

[6] Hanover v. Blake, 142 N. Y. 404, 27 L. R. A. 33, 37 N. E. 519, 40 Am. St. Rep. 607; White v. Kuntz, 107 N. Y. 518, 1 Am. St. Rep. 886; Page v.

policy of the law is to suppress fraud; which would be of no force in this instance if there be no penalty. Moreover, a creditor guilty of taking a fraudulent preference not only loses the benefit of the composition agreement but he loses his entire demand: He cannot either go forward or backward, but is enmeshed in his own dishonest scheme, where the law leaves him. He cannot recover upon the original demand,[7] for that would be to remit him to his original cause of action and enable him thus to harass the debtor, and gain an advantage over the other creditors which the law denies him under his fraudulent agreement. Especially would this be so should the remaining creditors elect to abide their agreement with the debtor; and, if they avoid the agreement on account of his fraud, he would be reinstated to his original cause of action and thus by fraud deprive the willing creditors of a beneficial contract. Such bad business morals are discouraged. Therefore, the composition agreement is operative against the creditor guilty of the fraud and extinguishes his original debt, and not being operative for him, he is left without a remedy. If a composition never becomes effective, as where it is not to be binding unless all the creditors sign it, the remedy of the creditor who secretly bargains for a preference, on the original cause of action is not affected if all the creditors did not sign.[8] He is not, however, when the agreement is executed, in a position to claim that a default in the payment of the composition money revives the remedy on the original cause of action;[9] for as to him there can be no default.

Carter, 16 N. H. 524, 41 Am. Dec. 726; Lobdell v. Nauvoo, 180 Ill. 56, 54 N. E. 157.

[7] Clark v. Ritchey, 11 Grant, Ch. (U. C.) 499. A creditor who has received a secret preference cannot take advantage of a default by the debtor in paying the composition money: Ex parte Oliver, 4 De G. & S. 354.

[8] Bookmire v. Bean, 3 Dill. 136; Mooney v. Bassom, 2 Nova Scotia, 254.

[9] Ex parte Oliver, 4 De G. & S. 354.

Sec. 208. Pleading a composition.—A composition, like an accord and satisfaction, is an affirmative defence, and excepting when it may be given in evidence under the general issue or general denial, it must be specially pleaded. A composition at common law need not be pleaded in assumpsit,[1] but may be given in evidence under the general issue. Under the code system of pleading and under special statutes in some states, it cannot be given in evidence as a defence in an action on the original demand, unless pleaded.[2] A common law composition with creditors is not admissible under a plea of an accord and satisfaction,[3] compromise, or payment; nor under a plea of release, unless the instrument itself contains a technical and absolute release.[4] With respect to the time when a composition should be pleaded; joining issue thereon; and pleading in avoidance, the rules are the same as apply to pleading an accord and satisfaction, and compromise, and to avoid repetition the reader is referred to prior sections.[5] The agreement may be set out *verbatim* in the plea, or its terms set out according to its legal construction. If the correct construction be not set forth, the plaintiff may reply that he never executed the agreement, which puts in issue the execution of the agreement as well as the construction;[6] or the plaintiff may crave *oyer* of the deed and when that is set out, raise the objection by demurrer that the plea is inconsistent in itself.[7] The execution of the composition agreement according to its terms should be set out.

1 Bartleman v. Douglas, 1 Cranch C. Ct. 450; Brown v. Stackpole, 9 N. H. 480.

2 Smith v. Owen, 21 Cal. 11. After judgment has gone for the plaintiff in an action on the original cause of action, where the composition constitutes satisfaction, it cannot afterwards be availed of for any purpose: Whitmore v. Wakerley, 3 H. & C. 538, 11 Jur. N. S. 182, 13 W. R. 350; Ellis v. McHenry, L. R. 6 C. P., 228, 19 W. R. 503.

3 Smith v. Owen, 21 Cal. 11.

4 Hart v. Smith, L. R. 4 Q. B. 61, 17 W. R. 158.

5 Secs. 109, 110, 111.

6 Bump on Comp. 73, citing North v. Wakefield, 13 Q. B. 535.

7 Bump on Comp. 73, citing North v. Wakefield, 13 Q. B. 535.

If all the creditors were to sign it,[8] or only certain creditors,[9] or that it was to be executed within a certain time[10] and the like, before it was to become effective; those conditions must be alleged to have been complied with.[11] So, it must be alleged that the creditors agreed mutually each with the other and with the debtor, to accept the composition,[12] for a several agreement between the debtor and each creditor is insufficient. If the composition agreement does not of itself discharge the debt, as in case of a letter of license, it cannot be pleaded in bar to an action on the debt unless a covenant is inserted that if the debtor is molested by a creditor the agreement may be pleaded in bar.[13]

If the agreement itself, was accepted in satisfaction, it is sufficient to plead the agreement and its acceptance as satisfaction;[14] but if performance alone is to constitute satisfaction, not only the agreement but performance according to its terms must be alleged,[15] as where the debtor was to transfer property to a trustee.[16] However, if the time for performance has not run, it may nevertheless be pleaded in bar of the action as prematurely brought.[17] But, if a

[8] Lower v. Clement, 25 Pa. St. 63.

[9] Brown v. Dakeyne, 11 Jur. 39; Norman v. Thompson, 4 Exch. 455; Reay v. Richardson, 2 C. M. & R. 422.

[10] Evans v. Gallantine, 57 Ind. 367.

[11] If the agreement was to be binding only in case other creditors accepted it, it must be alleged that the other creditors accepted: Cutter v. Reynolds, 8 B. Mon. 596.

[12] Cooper v. Phillips, 1 C. M. & R. 647; Tuck v. Took, 9 B. & C. 437, 17 E. C. L. 200; Cutter v. Reynolds, 8 B. Mon. 596; Lanes v. Squires, 45 Tex. 382.

[13] Gibbons v. Voullion, 8 C. B. 483, 7 D. & L. 266, 14 Jur. 66, 19 L. J., C. P. 74. See Sec. 158, *ante*.

[14] Evan v. Powis, 1 Exch. 601.

[15] In re Hatton, L. R. 7 Ch. 723; Evan v. Powis, 1 Exch. 601; Dolson v. Arnold, 10 How. Pr. 528.

[16] Tuckerman v. Newhall, 17 Mass. 581; Watkinson v. Inglesby, 5 Johns. 386.

[17] Slater v. Jones, 8 Exch. 186; Smith v. Graydon, 29 How. Pr. 224.

default has occurred subsequent to the filing or serving the plea, the plaintiff may set out the default in his reply.[18] And this should be done, for if judgment goes for the plaintiff upon a plea of composition, it precludes the creditor from afterwards setting up in a subsequent action, a default which should have been brought forward in the replication, or by plea *puis darrein continuance,* or by motion in arrest of judgment.[19] But a default occurring subsequent to the judgment may be set up in a subsequent suit.[20] If the agreement contains an absolute release, with a condition that it shall be void if the covenants are not performed by the debtor, it is sufficient to plead the release leaving a creditor to plead a breach of the covenants.[21] If there has been a default in performance and a waiver of the default, facts showing a waiver must be alleged,[22] and performance or tender of performance. Unlike an accord and satisfaction acceptance of performance is not necessary to a binding composition, and it is not therefore necessary to allege that the performance was accepted by the creditor.[23] But if the debtor alleges an agreement to accept a composition, the pleader must go further and allege that performance was afterwards accepted, and that the acceptance was in satisfaction of the debt.[24] So, unlike an accord and satisfaction, a composition with tender of performance is sufficient, and a tender of performance must be alleged.[25] In pleading a tender

[18] Newington v. Levy, L. R. 5 C. P. 607, L. R. 6 C. P. 180.

[19] See Newington v. Levy, L. R. 5 C. P. 607, L. R. 6 C. P. 180.

[20] Hall v. Levy, L. R. 10 C. P. 154; Bump on Comp. 74.

[21] Hart v. Smith, L. R. 4 Q. B. 61, 17 W. R. 158.

[22] Nevill v. Boyle, 11 Mee. & W. 26.

[23] Therasson v. Peterson, 4 Abb. Pr. 396. See Eaton v. Lincoln, 13 Mass. 424; Bartlett v. Rogers, 3 Sawyer, 62; Bartleman v. Douglas, 1 Cranch C. C. 450.

[24] Hall v. Flockton, 16 Q. B. 1039, 71 E. C. L. 1039.

[25] Garrord v. Simpson, 3 H. & C. 395, 43 W. R. 858; Bradley v. Gregory, 2 Camp. 385; Fellows v. Stevens, 24 Wend. 294; Whittemore v. Stephens, 48 Mich. 573, 12 N. W. 858; Lowe v. Eginton, 7 Price, 604.

all the rules with respect to pleading such a defence in other cases must be observed.[26] If a strict tender was waived, facts showing such waiver must be alleged.[27] A plea of readiness and willingness to perform is not sufficient,[28] as there must be actual performance, or a tender of performance, or a waiver of a strict tender shown. The money or notes should be brought into court under a plea of *profert in curia*.[29]

Sec. 209. Evidence.—If the composition agreement is in writing, the instrument is the best evidence, and must be produced in support of the plea, or its absence accounted for by showing its loss or destruction; in which case oral evidence of its contents is admissible. If the agreement be oral and it is denied or its terms as alleged are disputed, all the facts relied upon as constituting the composition must be proved, and all the surrounding facts and circumstances tending to prove the agreement are admissible. Where the agreement is denied, the mutuality of the promises between the creditors and between the creditors and the debtor, must be established by proof. Performance, or a tender of performance, or a waiver of a strict tender, must be shown, unless performance is by the agreement deferred beyond the date of the plea, in which case it is sufficient to prove the agreement. If the agreement proven is a complete and valid composition, acceptance in satisfaction need not be shown if performance is proven; but if the defendant relies upon a preliminary agreement for a composition and subsequent performance, performance and acceptance in satisfaction must be proven. All the issuable facts relied upon to prove the defence, or to avoid the agreement, must be proven.

[26] See Hunt on Tender, Ch. Pleading.

[27] Ilderton v. Castrique, 13 L. T., N. S. 506. See Bamford v. Cleves, L. R. 3 Q. B. 729.

[28] Rosling v Muggeridge, 16 Mee. & W. 181; Fessard v. Mugnier, 18 C. B., N. S. 286; Hazard v. Mare, 6 H. & N. 434.

[29] Hunt on Tender, Ch. Pleading; Cooper v. Phillips, 1 C. M. & R. 649.

The defence of a composition does not differ in this respect from other affirmative defences. The evidence must establish the composition alleged or the defence will fail;[1] proof of a different agreement will not do.[2]

[1] Brown v. Dakeyne, 11 Jur. 39.

[2] Whiteside v. Hyman, 10 Hun, 218.

APPENDIX

FORMS FOR USE IN COMPOSITION PROCEEDINGS

NOTE.—The following forms are taken from the late Orlando F. Bump's treatise on Composition at Common Law Used by permission of Sarah E. Bump.

(1) [COMPOSITION WITH CREDITORS.]

To all to whom these presents shall come, we, who have hereunto subscribed our names and affixed our seals, creditors of Y. Z., of ....., in the State of ....., send greeting:

WHEREAS, the said Y. Z. does justly owe and is indebted unto us, his said several creditors, in divers sums of money, but by reason of losses, disappointments, and other damages happened unto the said Y. Z., he is become unable to pay and satisfy us for our full debts and just claims and demands; and therefore we, the said creditors, have resolved and agreed to undergo a certain loss, and to accept of ..... cents for every dollar owing by the said Y. Z. to us, the several and respective creditors aforesaid, to be paid in full satisfaction and discharge of our several and respective debts.

NOW KNOW YE, that we, the said creditors of the said Y. Z., do, for ourselves, severally and respectively, and for our several and respective executors and administrators, partners and assigns, covenant, promise, compound, and agree, to and with the said Y. Z., his [heirs] executors and administrators, by these presents, that we, the said several and respective creditors, our executors, administrators, partners, and assigns, shall and will accept, receive, and take of and from the said Y. Z., his [heirs] executors and administrators, for each and every dollar that the said Y. Z. does owe and is indebted to us, the several and respective creditors, the sum of ..... cents, in full discharge and satisfaction of the several debts and sums of money that the said Y. Z. owes and is indebted unto us; to be paid unto us, the several and respective creditors, our several and respective executors, admin-

istrators, partners, and assigns, within ..... months next after the date of these presents.

AND WE, the said several and respective creditors, do severally and respectively, for ourselves, our several and respective executors, administrators, partners, and assigns, and not jointly for each other, or the representatives, etc., of each other, covenant, promise, and agree to and with the said Y. Z., his executors and administrators, that the said Y. Z., his executors, administrators, and assigns, shall and may, from time to time, at all times within the said term of ..... months next ensuing the date hereof, assign, sell, or otherwise dispose of his property, at his and their own free will and pleasure, for and towards the payment and satisfaction of the said ..... cents for every dollar the said Y. Z. owes and is indebted as aforesaid unto us, the said respective creditors; and that neither we, the said several and respective creditors, or any of us, nor the executors, administrators, partners, or assigns of us, or any of us, shall or will at any time or times hereafter, sue, arrest, attach, or prosecute the said Y. Z., or his property and chattels, for any debt or other thing now due and owing to us, or any of us, his respective creditors aforesaid, so as the said Y. Z., his executors or administrators, do well and truly pay, or cause to be paid, unto us, his said several and respective creditors, the said sum of ..... cents for every dollar he owes and is indebted unto us, respectively, within the said space of ..... months next ensuing the date hereof.

IN WITNESS WHEREOF, we have hereunto set our hands and seals, the day first above written.

In presence of .....

---

(2) [BRIEF FORM OF COMPOSITION.]

To all to whom these presents shall come: We, whose names are hereunder subscribed and seals affixed, creditors of A. B. & Company, composed of A. B. and C. D., send greeting:

WHEREAS, the said A. B. & Company are justly indebted unto us, their several creditors, in divers sums of money, which by losses and misfortune they are unable to pay in full; and therefore we, the said creditors, have resolved to undergo a certain loss, and to accept of forty cents for every dollar by them owing to us, to be paid, the one-half in one, and the other half in two years; or thirty cents for every dollar by them owing to us, to be paid in six months, to be in full satisfaction and discharge of our several and respective debts:

NOW KNOW YE, that we, the said several and respective creditors of the said A. B. & Company, for ourselves and our respective legal representatives, do hereby covenant, promise, compound, and agree to and with the said A.

B. and C. D., by these presents, that we will, severally and respectively, accept, receive, and take of and from the said A. B. and C. D., for each and every dollar they owe us, the sum of forty cents, to be paid, one-half in one year and the other half in two years, without interest, in full discharge and satisfaction of our respective debts; we to designate opposite our names which sum we elect to take.

IN WITNESS WHEREOF, we have hereunto set our hands and seals, this ..... day of ....., 18.....

---

(3) [ANOTHER FORM OF COMPOSITION.]

Know all men by these presents, that we, the subscribers, creditors of A. B., of....., in the County of ....., and State of ....., finding that the said A. B. is, by losses and otherwise, disabled to pay us our full debts, do severally and respectively agree and bind ourselves, our heirs, executors, and administrators, to the said A. B., his heirs, executors, and administrators, to accept and receive of him, or them, for each and every dollar that he, the said A. B., doth owe and stand indebted to us, the sum of ten cents, in full discharge and satisfaction of all such debts and sums of money as the said A. B. doth owe and stand indebted to us, respectively, so that the said sum of ten cents, to be paid for each and every dollar that the said A. B. doth owe and stand indebted to us, the said creditors, respectively, be paid unto us, our several and respective executors, administrators, or assigns, within the space of twelve months next after the date of these presents.

IN WITNESS WHEREOF, we have hereunto set our hands and seals, this ..... day of ....., 18.....

Signed, sealed, and delivered in presence of }
..... }

---

(4) [COMPOSITION WITH INDORSER.]

WE, the undersigned, creditors of ....., of ....., do hereby agree to accept fifty cents (50) per dollar in full satisfaction and settlement of our respective claims against them, such settlement to be made in two notes, of twenty-five (25) per cent. each, dated ....., 18...., and due, respectively, three and six months from date, and to be signed by said ....., and indorsed by .....

....., ..., 18.....

(5) [COMPOSITION WITH SURETY.]

AGREEMENT made this ..... day of ....., 18...., between A. B., of ....., in the County of ....., and State of ....., of the one part, and others, the undersigned, of the other part, witnesseth:

That the said A. B. agrees to and with the undersigned parties of the second part, severally and respectively, that he will, within six months from the date hereof, pay to the undersigned, respectively, forty cents on a dollar of the indebtedness of Y. Z., of ....., aforesaid, to them, that is, the indebtedness of the said Y. Z. individually, or jointly with another or others, or as a partner with another or others; such payments to be made to parties of the second part, respectively, or by deposit in the ..... Bank, at ....., at the election of the said A. B.

The said party of the second part severally agree to and with the said A. B., that, on receiving such payment as aforesaid from the said A. B., they will cancel and discharge such indebtedness of the said Y. Z. to them, respectively, to the full amount of such indebtedness.

---

(6) [RESERVATION OF RIGHTS AGAINST INDORSERS.]

PROVIDED ALWAYS, and it is hereby expressly agreed and declared, that it shall be lawful for the said bill-holders, parties hereto of the second part, to execute these presents without prejudice to their rights and remedies upon the said bills mentioned in the second schedule hereunder written, respectively, or upon collateral or other securities for the same, respectively, against any person or persons whomsoever, other than the said ....., and ....., or either of them, their, or either of their heirs, executors, and administrators; and that, notwithstanding these presents, or anything herein contained, they, the said bill-holders, respectively, and their respective executors, administrators, and assigns, shall be at liberty to enforce and adopt all and any of such rights or remedies against any such other person or persons, in the same manner as if these presents had not been executed.

---

(7) [RELEASE FROM NOTES HELD BY OTHERS.]

WE, and each of us, do hereby absolutely release the said Y. Z. from all, and all manner of action and actions, suit and suits, cause and causes of action, and suit, controversies, damages, claims, and demands whatsoever, which we, or any, or either of us, either alone or jointly, with our respective

partner or partners, now have, or at any time or times hereafter can, shall, or may have or be entitled to from, upon, or against the said Y. Z., his heirs, executors, or administrators, by reason or on account of any debts, sums of money, bills, notes, securities for money, contracts, promises, agreements, reckonings, accounts, dealings, or transactions of what nature or kind soever, owing from, or made, given, or entered into by the said Y. Z., to or with us, respectively, or any of us, from the beginning of the world to the day of the date hereof.

---

(8) [CONDITION MAKING RELEASE VOID.]

PROVIDED, that in case default shall be made, contrary to the covenant in that behalf hereinbefore contained, in payment of the said composition, or any instalment thereof, to the undersigned creditors, respectively, then the release herein contained shall be thenceforth at an end, and the creditors shall thenceforth be at liberty to sue for, or prove for, the full amount of their respective debts, less the amount which may have been received by them on account thereof, under these presents or otherwise.

---

(9) [LETTER OF LICENSE.]

To all to whom these presents shall come, the several persons whose names and seals are hereunto subscribed and affixed, by themselves or their respective partners, agents, or attorneys, being, respectively, creditors of A. B., late of, etc., but now of, etc., severally send greeting:

WHEREAS, the said A. B. is indebted to the several persons aforesaid, respectively, in several sums of money, which he is not at present able to pay, but which he expects he may be able to pay at the end of two years from the date of these presents:

NOW THESE PRESENTS WITNESS, that in consideration of the premises, they, the several persons whose names and seals are hereunto subscribed and affixed, as aforesaid, do, and each of them doth, by these presents, give and grant unto the said A. B. full, free, and perfect license and liberty to come and go, pass and repass, from place to place within the United States, where and as his business and occasion shall serve and require, for the term of two years from the day of the date of these presents, without being sued, molested, arrested, charged, or troubled, in his person or otherwise, for or concerning, or on account of any debt, sum or sums of money, or other matter or thing whatsoever, whereby or wherewith he is or may be in anywise charged or chargeable, or indebted to them, the said several persons aforesaid, or any of them, or their, or any of their respective partners.

AND each of them, the said several persons, whose names and seals are hereunto subscribed and affixed, so far as relates to the acts and deeds of himself and his copartners, and his and their heirs, executors, and administrators, doth hereby, for himself, his heirs, executors, and administrators, covenant with the said A. B., his executors and administrators, that they, the said several persons whose names and seals are hereunto subscribed and affixed, as aforesaid, or their respective executors or administrators, partner or partners, or the executors or administrators of any such partner or partners, or any other person or persons whosoever, by, with, or through their, or any of their order, consent, direction, privity, or contrivance, shall not, nor will at any time hereafter, during the said term of two years from the date of these presents, sue, arrest, attach, extend, molest, implead, or trouble the said A. B., his heirs, executors, or administrators, or his or their bodies, goods, or estates, for or on account of any debts, dues, or sums of money which he now owes or is indebted to the several persons aforesaid, respectively, or their respective partners, either solely by himself, or jointly with or for any other person or persons whomsoever, by bond, bill, or covenant, simple contract, or otherwise howsoever, or for or on account of any other cause, matter, or thing whatsoever, wherewith he or they now is, or shall, or may be charged or chargeable.

AND THAT these presents shall and may be pleaded and allowed in any court of law or equity as a bar and in discharge of all and every action or actions, suit or suits, or other proceedings, judgments, and executions which shall or may be brought, commenced, sued, prosecuted, or taken against him, the said A. B., his heirs, executors, or administrators, or his or their goods or estates, by the said several persons whose names and seals are hereto subscribed and affixed, as aforesaid, or any of them, their, or any of their heirs, executors, or administrators, partner or partners, or the executors or administrators of any such partner or partners, or any other person or persons whomsoever, by, through, or with their, or any of their acts, means, privity, order, consent, or procurement, contrary to the true intent and meaning of these presents.

IN WITNESS WHEREOF, the several persons, parties to these presents, have hereunto set their hands and seals, this ..... day of ....., in the year, etc.

---

(10) [PROVISO RENDERING VOID UNLESS ALL SIGN.]

PROVIDED ALWAYS, nevertheless, and it is the true intent and meaning of these presents, and of the said parties hereunto, that if all the said parties above named as creditors [*or*, if two-thirds in amount of the said parties above named as creditors, *or otherwise, as may be agreed*] shall not subscribe and seal these presents, then, and in such case, the liberty and license

hereby given and granted, and every clause, covenant, matter, and thing herein contained shall cease and be utterly void, to all intents and purposes; anything hereinbefore contained to the contrary thereof, in anywise, notwithstanding.

---

(11) [CONDITION THAT DEBTOR PAY THE INSTALMENTS.]

PROVIDED ALWAYS, and under this condition, that if the said Y. Z., his executors, administrators, or assigns, do not well and truly pay unto us, the said creditors hereunto subscribed, our respective executors, administrators, and assigns, the sums of money to us by him owing, in manner following, that is to say: on the ..... day of ..... next ensuing the date hereof, one just ..... part of our said debts, between us to be divided according to the proportions of our several debts by him owing, and on the ..... day of ....., which will be in the year 18...., one other ..... part of the present amount of our said debts, to be divided as aforesaid, and on the ..... day of ....., which will be in the year 18...., the residue of our said several debts, to be divided as aforesaid; that then, and from and after any default in any of such payments, this our present letter of license shall be utterly void and of none effect towards him and them of us to whom any such default of payment shall happen to be made; anything above written to the contrary notwithstanding.

---

(12) [COMPOSITION DEED, ALLOWING DEBTOR TO CARRY ON BUSINESS UNDER INSPECTION OF A COMMITTEE OF THE CREDITORS.]

THIS INDENTURE, made this ..... day of ....., 18...., between the several creditors of Y. Z., whose names and seals are hereunto subscribed and affixed, parties of the first part [*or, if it is intended that all shall sign in order to make the composition effectual, name them thus:* between A. B., of ....., C. D. and E. F., composing the firm of C. D. & Co., of ....., and G. H., of ....., creditors of Y. Z., parties of the first part], and the said Y. Z., merchant, party of the second part,

WITNESSETH: whereas, the said Y. Z. is indebted to the several persons of the first part in the several sums of money placed opposite to their respective names in the schedule hereunto affixed; and whereas, at a meeting of the creditors of the said Y. Z., held on the ..... day of ....., 18...., at ....., it was made to appear to them that by reason of losses and obstacles in trade he was unable to pay the several demands upon him immediately, but that his stock in trade and his other estate and effects were

sufficient for that purpose, whereupon it was mutually agreed by and between the parties hereto that the term of ..... years should be given to the said Y. Z. to collect in and dispose of his said estate and effects, and that in the meantime he should be permitted to manage and improve the same, under the inspection of the parties of the first part, by a committee of their number, to be by them chosen, and by them, their executors, administrators, and assigns, renewed from time to time for that purpose, under and subject, nevertheless, to the conditions, stipulations, and agreements hereinafter contained respecting the same: Now, in consideration thereof, and of the covenants and agreements hereinafter contained, on the part of the said Y. Z. to be performed, the said parties hereto of the first part, and each of them, for themselves, respectively, and their respective partners, and his and their several and respective executors, administrators, and assigns, but not any one of them for any other of them, nor for the executors, administrators, partners, or assigns of any other or others of them, do:

I. Give and grant unto the said Y. Z. free liberty and license to carry on, conduct, and manage his said trade or business of ....., and all other affairs and concerns, and collect, get in, and sell and dispose of, convey and assign all or any part of his estate, debts, and effects, under the inspection and subject to the approbation and control of the said parties of the first part, by their committee as aforesaid, from henceforth until the ..... day of ....., 18...., if he, the said debtor, shall so long live, and continue to observe and perform the several covenants and agreements hereinafter contained, on his part or behalf to be observed or performed; and they agree with him and with each other that they, the said parties of the first part, creditors as aforesaid, or any or either of them, shall not, nor will, during the time or period and observance and performance aforesaid [for any cause or consideration now existing], sue, arrest, attach, or prosecute him, the said Y. Z., or his property, or in any way impede or molest him in the carrying on or management of his said business or concerns, or the sale or disposition of his estate or effects, under such control and inspection as aforesaid, nor seize or possess themselves of, or in anywise attach or intermeddle with his goods, estates, property, or effects in anywise whatsoever. [*If desired to add a clause that creditors violating the license shall forfeit their debts, then:* and that if any hurt, damage, or hindrance be done unto the said Y. Z., either in body or property, within the aforesaid term of ....., next ensuing the date hereof, by us, or any of us, the said creditors, or by any person or persons, by or through the procurement or consent of us, or any of us, contrary to the true intent and meaning of these presents, then the said Y. Z., his heirs, executors, and administrators, by virtue hereof, shall be discharged and acquitted forever against such of us, the said creditors, his and their executors, administrators, partners, or assigns, by whose will, means, or procurement he shall be arrested, attached, prosecuted, grieved, or damaged of all actions, suits, damages, debts, charges, claims, and demands whatsoever.]

II. And for the purpose aforesaid, the said party of the second part hereby covenants and agrees with the parties of the first part to make or deliver to them, or their committee, within a reasonable time, a full and true account of all the creditors of the said Y. Z., showing the place of residence of each creditor, if known; and if not known, the fact to be stated; the sum owing to each creditor, and the nature of each debt or demand, whether on written security, account, or otherwise; the true cause and consideration of indebtedness in each case, and the place where it accrued; and a full and true inventory of all the estate, both real and personal, in law and equity, of the said Y. Z.; of the encumbrances existing thereon, and of all the books, vouchers, and securities, relating thereto.

III. And he further covenants and agrees, as aforesaid, to manage and collect his assets, and to carry on his said business faithfully and diligently for the purpose of these presents, under the direction and control of the parties of the first part, as they may by their said committee, or otherwise, direct, according to the true intent and purpose of these presents.

IV. And he further covenants and agrees, as aforesaid, that after payment of just and necessary legal expenses, and the expenses of conducting said business [including a commission of ..... per cent. upon the net proceeds, as a compensation for the committee, as hereinafter provided for], and also after reserving to said Y. Z. so much as may be necessary for his reasonable support, which is not to exceed the rate of ..... dollars per month, nor to exceed the sum of ..... dollars in any one month, he will, subject as aforesaid, pay over and distribute the proceeds of said assets and business for and towards payment and satisfaction of the sums the said Y. Z. owes, as aforesaid, unto us, the said respective creditors, *pro rata* [specific liens, however, already secured by any creditors, to be first discharged out of the property which is bound by such liens].

V. And the party of the second part hereby further covenants and agrees, as aforesaid, that he will not, during such time, make any assignment or transfer of any of his property, with any preference for any creditor; that he will keep just and true accounts of all his transactions, subject at all times to the inspection of the parties of the first part and their said committee, and will render to the said committee, once in each ....., a statement of his accounts, showing [*here specify what is desired*], which accounts, as well as the one hereinbefore provided for, shall be verified by him on oath, if so required.

VI. And he further covenants and agrees, as aforesaid, that he will not, during the period contemplated by these presents, indorse, or accept for accommodation, or become surety in anywise, for any person, or voluntarily incur any liability, except in the course of his said business, and will not enter upon or undertake any other business or other enterprise whatever.

VII. And the said party of the second part further covenants and agrees, as aforesaid, that he, the said Y. Z., his heirs, executors, and administrators, shall and will well and truly pay, or cause to be paid, unto all and every,

the said creditors, parties hereto, their respective executors, administrators, partners, or assigns, or other person or persons by them, respectively, authorized to receive the same, their full and whole debts and demands, at or before the expiration of the said term of ..... years, in the manner hereinbefore appointed for the payment thereof, according to the true intent and meaning of these presents.

VIII. And, for the purposes aforesaid, the said parties of the first part have appointed, and do hereby appoint, A. B. and C. D. their committee, as their agents and attorneys, to act until otherwise ordered, or until others are appointed in their place, by the parties of the first part, and with full power and authority to do, direct, and assent to all and any acts, matters, and things whatsoever, relative to the matters or things aforesaid, as they, in their discretion, shall at any time, and from time to time, hereafter think fit and expedient as fully as the parties of the first part might do if personally present.

IX. And such committee are also empowered to nominate and appoint one or more clerks, or other persons, to assist the said Y. Z. in the management of his said trade or business, at such salary or wages as they shall think fit; and are also empowered to give bail, or cause it to be given, if the said Y. Z., or his property, shall be arrested, attached, or taken under process of law by any of his creditors, or persons claiming so to be; and the said committee may contest, or otherwise act, concerning the debt or debts of any such creditor or claimants, at the expense of the estate and effects of the said Y. Z., as they shall think fit and necessary for the purposes aforesaid.

X. And it is hereby further covenanted and agreed, by and between the parties hereto, that if, by reason of any unforeseen cause, not willfully occasioned by the said Y. Z., any delay shall take place in the final settlement of his affairs, during his lifetime, so as to prevent the several creditors, parties hereto, from receiving the full amount of their respective debts at or before the expiration of the said term of ..... years, hereby limited for winding up the concerns of the said Y. Z., and for the payment of his creditors in manner aforesaid, then, and in such case, it shall be lawful for the said committee, and they are hereby fully authorized and empowered, if they shall think proper, without any further consent of the said creditors than is hereby given, to prolong or extend the said term for a period not exceeding ..... months, to be computed from the expiration of the said term, by an indorsement under the hands of the said committee being made upon these presents to that effect; and that thereupon all and every, the said creditors, parties hereto, their executors, administrators, partners, and assigns, and the said party of the second part, and his heirs, executors, and administrators, shall continue to be bound by the covenants and agreements herein contained in the same manner, for such further period, to all intents and purposes, as if the whole term had been originally limited for that purpose.

XI. PROVIDED ALWAYS, nevertheless, and these presents are upon this express condition, that if the said Y. Z. shall die within the period aforesaid,

or if he shall make default in performance of either of the covenants or agreements hereinbefore contained, on his part to be performed, or in case any of the creditors of the said Y. Z., whose debts, respectively, exceed the sum of ..... dollars (except only such of them as, having other securities, shall choose to rely thereon), shall not duly execute, or otherwise accede to these presents [*or, if all the intended parties are named in the caption, say:* or in case any of the hereinbefore named parties of the first part shall fail to execute these presents] within ..... months next after the date hereof, then, and in either of the said cases, this indenture, and everything herein contained, so far as the same, respectively, tends to restrain the said creditors from suing for and recovering his, her, or their respective debts within the time aforesaid, shall be absolutely void.

IN WITNESS WHEREOF, the said parties to these presents have hereunto set their hands and seals on this ..... day of ....., in the year one thousand eight hundred and .....

---

(13) [CLAUSES IN COMPOSITION DEED.]

PROVIDED ALWAYS, and it is hereby agreed and declared, that these presents, or any clause, matter, or thing herein contained, shall not extend, or be construed to extend, to invalidate, prejudice, or in any manner affect any mortgages, charges, or other specific securities or liens which any of the creditors, parties hereto, of the said [*debtors*], may have upon any of the real or personal estates of or belonging to them, or any of them, or any security for or in respect of all or any of the debts due and owing to such last-mentioned creditors, respectively, or any bonds, notes, or other securities given or payable by any other persons, by way of security, for the same debts, or any of them. But that all such several mortgages, charges, securities, liens, and also all such bonds, bills, notes, and other securities from third persons, as aforesaid, shall be and continue as available, both at law and in equity, in the hands of the several creditors, parties hereto, holding the same, to all intents and purposes as if these presents had never been made or executed; so, nevertheless, that the same creditors do, respectively, deliver true and particular accounts, in writing, signed by themselves, to the trustees, or trustee for the time being, of or under these presents, or to their or his solicitor, some time before the first dividend to be made of the said money and funds shall become distributable between all the creditors, parties hereto, under the trusts aforesaid, of all and singular mortgages, charges, liens, bonds, bills, notes, or other securities, or by them, respectively, holden for the several debts last-mentioned.

PROVIDED, ALSO, and it is hereby further agreed and declared, that upon every distribution of the moneys and funds which shall from time to time become divisible, as aforesaid, the creditors, parties hereto, of the said

[*debtors*], holding any such mortgages, charges, liens, bonds, bills, notes, or other securities as last mentioned, shall receive a dividend upon, or in respect of, so much only of their several debts as shall not be conveyed or secured thereby, respectively, unless such creditors, or any of them, shall so relinquish such of their respective mortgages, charges, liens, bonds, bills, notes, and other securities, for the general benefit of the creditors, parties hereto, of the said [*debtors*], in which case the same mortgages, or other securities before specified, shall be actually delivered up or assigned, as aforesaid, to the trustees, or trustee for the time being, of or under these presents, to be by them or him holden and applied upon the same trusts as hereinbefore declared, of and concerning the trust moneys and funds herein comprised, and the creditors so delivering up or assigning the same shall be entitled to dividends upon the whole of their respective debts.

PROVIDED ALWAYS, and it is hereby further agreed and declared, that it shall be lawful for the said trustees, or trustee for the time being, if they or he shall so think proper, by and out of the aforesaid trust-moneys and funds, at any time hereafter, to pay off or discharge the whole of the debt or debts due or owing from the said [*debtors*] to any of their creditors, parties hereto, holding any such mortgages, charges, liens, bonds, bills, notes, or other securities, or any of them, as lastly hereinbefore are mentioned, and that either with or without interest, and thereupon to cause the same mortgages, charges, liens, bonds, bills, notes, or other securities, or any of them, to be delivered up or assigned to the same trustees or trustee, to be by them or him holden and applied upon the same trusts as are hereinbefore declared of and concerning the trust-moneys and funds herein comprised.

PROVIDED ALWAYS, and it is hereby further agreed and declared, that no debt owing by the said [*debtors*], or any of them, respectively (except any mortgage debt or debts), to any of the several creditors, parties hereto, shall carry interest, nor shall any creditor whose debt carries interest (except any mortgage creditor or creditors) demand or be entitled to any interest for the same, or to any allowance in respect of interest accrued after the date of these presents.

PROVIDED, ALSO, and it is hereby further agreed and declared, that in case these presents shall not be executed on or before the ..... day of ....., 18...., next ensuing, by all and every the creditors of the said [*debtors*], and of every of them, either by themselves, or some person or persons duly authorized by them, respectively, in that behalf, whose debts shall amount to the sum of ..... apiece, or upwards, then, and in such case, these presents, and every clause, matter, and thing herein contained shall cease, determine, and be void, and the said [*trustee*], or the survivor of them, his heirs, executors, or administrators, respectively, shall reconvey, resurrender, reassure, or otherwise assure, all and singular, the real and personal estates herein comprised, or intended so to be, unto and to the use of the said [*debtors*], respectively, their respective heirs, executors, administrators, and assigns, respectively, according to the aforesaid several tenures or legal quali-

ties thereof, and to their several rights and interests therein at the time of the execution of these presents, in as full and ample a manner as if these presents had not been made and executed; and that freed and discharged of and from all encumbrances whatsoever to be made, done, committed, or suffered by the said [*trustees*], or any of them, their, or any of their executors, administrators, or assigns, respectively, in the meantime; and thereupon, all and every, the said several creditors who shall have executed these presents shall be in the same state and condition with respect to their several debts, and have the like liberty and same remedies to sue for and recover their respective debts, as they would have been in, or had, in case these presents had never been made, anything herein contained to the contrary thereof notwithstanding.

PROVIDED, ALSO, that in the meantime, and until the ..... day of ..... next, it shall be lawful for the said [*trustees*], and the survivor of them, his heirs, executors, or administrators, from and after the execution of these presents, to proceed to act in the trusts hereby reposed in them, as aforesaid, for the benefit of all the said creditors of the said [*debtors*] (except as aforesaid), in case the said several creditors shall execute these presents on or before the said ..... day of ..... next. But if all the said creditors (except as aforesaid) shall not execute these presents within the time hereinbefore limited for that purpose, whereby the same shall become void, then in trust (after deduction and allowance of all costs, charges, and expenses on account thereof) for the said [*debtors*], their executors, administrators, and assigns, respectively, according to their several rights and interests therein at the time of the execution of these presents.

PROVIDED, ALSO, and it is hereby further agreed and declared, that the said [*debtors*], and each of them, shall, within ..... days next after the execution of these presents, by them deliver in to the said trustees, or the survivor of them, or to the heirs, executors, or administrators of such survivor, their or his assigns, a full and true schedule or inventory, signed by each of them, the said [*debtors*], of all and singular their, and each of their, real and personal estates and effects, rights and credits whatsoever, both present and expectant, or contingent, and shall verify the same by a solemn declaration before a magistrate, or master in chancery; and that if any such estates, effects, rights, or credits to the amount or value of ..... dollars, or upwards, shall be suppressed or concealed by them, or either of them, then, and in such case, such suppression or concealment shall, as to the party making the same, forthwith, and of itself, revoke and make void the letter of license hereinafter given to the said [*debtors*], and also the covenant herein contained on the parts of the said several creditors, parties hereto of the second and third parts, respectively, to acquit and release them, in the events hereinafter expressed, of and from the several debts due and owing to them from the said [*debtors*], or either of them; but without prejudice to the trusts hereinbefore contained for the benefit of such creditors. And the same creditors, in the event of any such suppression or concealment as aforesaid, after the full per-

formance and execution of such trusts, shall have and be entitled, respectively, to such and the like rights of action and other powers and remedies against them, the said [*debtors*], or such of them as shall so suppress or conceal such estates, effects, rights, or credits, as aforesaid, for the payment of so much and such parts of their several debts as shall not be satisfied by means of such trusts, as they would have had if these presents had not been made or executed.

AND IT IS HEREBY FURTHER AGREED and declared that a meeting shall take place of the several creditors of the said [*debtors*], parties hereto as aforesaid, either in person or by their respective agents, on the ..... day of ..... now next ensuing, at the hour of ..... in the morning, at ....., where this present indenture, and a separate schedule containing an account or list in writing of the several debts, claims, and demands owing from and made upon the said [*debtors*], to and by such creditors, respectively, shall be produced and shown for inspection. And thereupon all such of the same debts, claims, or demands as shall not be objected to at such meeting shall be entered opposite the respective names of the creditors, parties hereto, of the said [*debtors*], who shall severally claim the same in the said schedule to these presents; and if at such meeting, or within twenty-one days then next ensuing any debt, claim, or demand contained in such previous schedule shall be objected to, either in the whole or in part, by any one or more of the creditors of the said [*debtors*] then present, or their or his agent or agents, or by the said [*trustees*], or any of them, or by the said [*debtors*], or any of them, the parties or party making such objection shall, at or within twenty-one days next after such meeting, deliver in writing unto the solicitor for the time being to the present trust, a memorandum or note of the objection to such debt, claim, or demand, and also the name of some person whom he shall approve as an arbitrator or referee of and concerning the validity of such debt, claim, or demand, or any part thereof so objected to; and the party or parties whose debt, claim, or demand shall be so objected to, if then present, shall forthwith, respectively, have received notice from the said [*solicitor of the trust*], or other, the solicitor for the time being, as aforesaid, name some person as an arbitrator on his, her, or their part, or respective parts, for the purposes aforesaid; and whatever award or determination such arbitrators, to be chosen as aforesaid, or in case of difference between them, then the umpire to be by them appointed, in writing, shall make respecting the matters referred to them, or him, shall be binding, final, and conclusive upon all parties making such reference (so that such award or umpirage be made within fourteen days next after such reference shall be as aforesaid by the parties in difference, or their arbitrators, as the case may be); and the party, or respective parties, whose debts or demands shall be objected to shall, in case the whole thereof shall not be thereby awarded, be entitled to receive only such part or parts of such disputed debts or demands as the said arbitrators, or their umpire, shall adjudge or award to be due and owing to the said party or parties.

AND IT IS HEREBY ALSO AGREED and declared that if any creditor or creditors of the said [*debtors*], whose debts or demands, or respective debts and demands, shall be objected to at the time and place aforesaid, and being present when such objection is made, shall refuse or neglect, for the space of four days, to be computed from the said ..... day of ....., 18..., on which the said meeting is to be held, or, if absent, shall refuse or neglect for the space of seven days after he, she, or they shall have, respectively, received notice of such objection to his, her, or their demand or debt, or respective debts or demands, to submit or refer the same to arbitration in the manner aforesaid, such creditor or creditors so refusing or neglecting shall, from thenceforth, be wholly excluded from all benefits and advantages whatsoever which he, she, or they might otherwise have had and claimed, under and by virtue of these presents.

AND IT IS HEREBY FURTHER AGREED and declared that after the said ..... day of ..... next, no objection shall be admitted or allowed to be made to any of the debts contained in such previous schedule, as aforesaid, but the same several debts, and every of them, shall from thenceforth be adjudged to be fair and just debts and demands, and shall accordingly be satisfied, either wholly or in part, by and out of the moneys arising under the several trusts of these presents.

AND THIS INDENTURE ALSO WITNESSETH, that in consideration of the premises, and upon condition that, and during such time only as the said [*debtors*] shall and do in all things well and truly perform, observe, and keep all and every the articles, covenants, and agreements in these presents contained, on their part and behalf to be performed, observed, and kept, each of them, the several persons, parties hereto of the ..... parts, respectively, creditors as hereinbefore mentioned, doth hereby, for himself and herself, respectively, and for his and her several and respective heirs, executors, and administrators, so far as relates to his and her own acts, debts, and demands, covenant with the said [*debtors*], their executors, and administrators, in manner following (that is to say), that they, the said several creditors, parties hereto, or any of them, their, or any of their, several copartners, executors, or administrators, shall not, nor will, at any time or times hereafter, unless and until default shall be made in performance of the covenants hereinbefore on their, or some of their, part contained, or some of such covenants, sue, arrest, prosecute, or molest, or do or cause to be done any act, matter, or thing whereby, or by means whereof the said [*debtors*], or any of them, their, or any of the heirs, executors, or administrators, their, or any of their goods, chattels, lands, or tenements, shall or may be any way seized, arrested, prosecuted, detained, or molested at law, or in equity, or otherwise however, for or in respect of any debt or debts whatsoever, now due or owing unto them, or any of them, from the said [*debtors*].

AND ALSO that they, the said [*debtors*], and every of them, shall, and may from time to time, and at all times hereafter, unless and until they shall make such default as aforesaid, have and be entitled to full and free liberty, license,

power, and authority to go, pass, and repass to and from such place and places, and in such manner as they shall think proper, for any purpose whatsoever, without any control, or interruption of or by them, the said creditors, parties hereto, of the ..... parts, respectively, or any of them, their, or any of their copartners, executors, or administrators, or any person or persons, by or with their, or any of their order, direction, or consent.

AND FURTHER, that in case the said creditors, parties hereto of the ..... parts, respectively, or any of them, their, or any of their partners, executors, or administrators, shall sue or prosecute, at law or in equity, or do or cause to be done any act, matter, or thing whatsoever, whereby, or by means whereof, the said [*debtors*], or any of them, their, or any of their heirs, executors, or administrators, shall or may be sued, prosecuted, or molested for any such debt or debts, now due as aforesaid, contrary to the foregoing covenant and the true intent of these presents, then, and in every such case, he or they shall or may plead these presents in bar of any action or actions, suits or suit, that shall or may be commenced or prosecuted against him or them, and these presents shall operate as, and are hereby declared and agreed to be, an effectual and absolute discharge of the same.

AND, MOREOVER, that they, the said creditors, parties hereto, their partners, executors, and administrators, respectively, shall and will, upon full payment of their respective debts, at the requests, costs, and charges of the said [*debtors*], or any of them, their, or any of their heirs, executors, or administrators, make, give, sign, and execute unto them or him good and sufficient releases, acquittances, and discharges for the several debts now due and owing to them, the said several creditors, respectively, from the said [*debtors*], as aforesaid, and of and from all actions, claims, and demands whatsoever, in respect thereof.

PROVIDED ALWAYS, and it is hereby agreed and declared, that in case any one or more of them, the said [*debtors*], shall have failed in the due observance and performance of, all and singular, the covenants and agreements hereinbefore on his or their part or parts contained, then, and in such case, the release and acquittance to which the other or others of them, their or his executors, or administrators, shall be entitled by virtue of the covenants hereinbefore for that purpose contained, shall in nowise operate to exonerate and discharge such one or more of them, the said [*debtors*], as shall make default, as aforesaid, of or from the several debts or sums of money set forth in the schedule hereto annexed, or any of them, due and owing from such one or more of them, either alone or jointly with the other or others of them, to the several creditors, parties hereto of the second and third parts, or any of them, respectively. But they, or he, shall thenceforth be wholly subject and liable to the same debts, or sums of money, or such parts thereof, respectively, as shall then remain unsatisfied, in such and the same manner as if the same had been solely controlled by him or them.

AND IT IS HEREBY AGREED AND DECLARED that all and every, the creditors of the said [*debtors*], who shall agree to take the benefit of these presents,

shall subscribe a declaration that they, and every of them, will accept their proportion of the moneys to arise by the means aforesaid in full of their respective debts, and the interest thereof when the same may carry interest, to be prepared and left at the office of ....., in ....., on or before the ..... day of ..... next; and that such creditors so signing such declaration shall grant and execute to the said [*debtors*] a letter of license, enabling them, respectively, to go, pass, and repass to and from such place or places, and in such manner as they or he shall think proper, for any purpose whatsoever, without any control or interruption of or by them, the said several creditors, or any of them, pending the execution of the trusts of these presents.

AND THIS INDENTURE ALSO WITNESSETH, that in consideration of the premises, they, the several persons, parties hereto of the ..... and ..... parts, respectively, creditors as hereinbefore is mentioned, in respect of their several debts, claims, and demands, do, and each of them doth, by these presents, remise, release, and forever quitclaim unto the said [*debtors*], their heirs, executors, and administrators, and every of them, all actions, suits, bills, bonds, and writings obligatory, debts, dues, duties, accounts, sums of money, extents, executions, claims, and demands whatsoever, both at law and in equity, or otherwise howsoever, which they, respectively, or their respective executors or administrators, now have, or hereafter shall or may have, or otherwise could or might have, challenge, claim, or demand against the said [*debtors*], or any of them, their or any of their heirs, executors, or administrators, or their or any of their estates or effects, for or by reason, or on account of the debts, claims, and demands of them, the said creditors, respectively, due or owing from the said [*debtors*], and set forth in the schedule hereto annexed, and all interest and arrears of interest for and in respect of the same several debts, sums of money, and premises, or any of them, or for or by reason of any other matter, cause, or thing whatsoever relating thereto, other than and except the security affected, or intended to be affected, by means of these presents, and the trust thereby declared as aforesaid.

PROVIDED ALWAYS, and it is hereby further agreed, that it shall not be incumbent on the said [*trustees*], or the survivor of them, his executors or administrators, to sue for or take any steps for the recovery of the said premises hereinbefore assigned, or expressed, or intended so to be, unless he or they shall think proper so to do, and that it shall be lawful for him or them to discontinue any proceedings which shall have been undertaken, whenever he or they shall think fit. And that no laches or responsibility shall be imputable to, or shall attach upon him, or them, for any act or deed whatsoever which shall be done, executed, or directed by him or them in the exercise and execution of the trusts, powers, and authorities of these presents, or for omitting to exercise and carry into execution the same trusts, powers, and authorities, or any of them.

PROVIDED ALWAYS, and it is always agreed and declared, that if at any time or times hereafter, during the continuance of the trusts of these pres-

ents, and while the said indenture, or letter of license, of even date herewith, shall remain in force, the said [*debtors*], or any of them, shall be arrested, or taken in execution, or other process shall be put in force against their, or any of their bodies, lands, or goods, by any one or more of them, or any of their present creditors, who shall refuse to come in and execute these presents, and the said indenture of even date herewith; then, and in every such case, it shall be lawful for the said trustees hereby appointed, or the survivor of them, his executors or administrators, or other the trustees or trustee for the time being of these presents. and they and he are and is hereby directed to put in special or common bail, or enter an appearance for them, the said [*debtors*], or any of them, in every or any such action or suit, or actions or suits, at their or his discretion, or else to submit to the same. And further, to defray and satisfy out of the trust-moneys arising by virtue of these presents all costs, damages, and expenses attending the defending any actions or suits now pending, or to be instituted as aforesaid. And likewise, all moneys for which the bodies, lands, or goods of the said [*debtors*], or any of them, may be taken in execution as aforesaid, and all other costs, damages, or expenses incurred or to be awarded in any action or suit, or actions or suits, at law or in equity, either pending, or for which any cause subsists, or may be alleged against them, the said [*debtors*], or any of them, at the time of the execution of these presents.

---

(14) [PLEA THAT PLAINTIFF AND DEFENDANT'S OTHER CREDITORS AGREED TO TAKE A COMPOSITION ON DEFENDANT'S DEBTS.]

THAT the defendant was indebted to the plaintiff as in the declaration alleged, and to divers other persons, respectively, and was in embarrassed circumstances, and unable to pay or satisfy the plaintiff and the said other creditors of the defendant, respectively, their debts in full; and thereupon the defendant then offered and agreed to and with the plaintiff and his, the defendant's, other creditors, to pay, and the plaintiff and the said other creditors of the defendant then mutually agreed with each other, and with the defendant, to accept of him a certain composition, to wit, at the rate of ..... cents in the dollar, upon and in full satisfaction and discharge of their respective debts;* and the defendant further says that he afterwards paid to the plaintiff, and the plaintiff then accepted and received from him the amount of such composition upon the said debt of the plaintiff, in pursuance of said agreement.

(15) [PLEA, A COMPOSITION PAYABLE BY INSTALMENTS, THAT PLAINTIFF DISCHARGED DEFENDANT FROM TENDERING IT AT THE STIPULATED TIMES, AND TENDER THEREOF BEFORE ACTION.]

[*As in last form to the asterisk, and then proceed:*] such composition of ..... cents in the dollar to be paid by the defendant to the plaintiff, and the said other creditors of the defendant, respectively, as follows, to wit: half thereof down, and the remainder in six months then following; and the plaintiff and the said other creditors of the defendant then mutually agree with the defendant, and with each other, not to proceed against the defendant for the recovery of the residue of the said respective debts and demands, unless default should be made in the payment of such composition; and the defendant further says that the composition, or sum of ..... cents in the dollar, on the said debt amounts to the sum of ..... dollars and ..... cents, and that he, the defendant, at the time of making the said agreement in this plea mentioned, was, and always from thence hitherto hath been, and still is, ready and willing to pay the plaintiff the said composition on the said debt, but to receive the same, or any part thereof, from the defendant, he, the plaintiff, hath always wholly refused, and the plaintiff then discharged the defendant from tendering or paying to him, the plaintiff, the said composition at the times for payment thereof; and the defendant further says that after the making of the said agreement, and before the commencement of this suit, he, the defendant, was willing and ready, and then tendered and offered to pay to the plaintiff the said sum of ..... dollars and ..... cents, to receive which of the defendant the plaintiff then wholly refused; and the defendant now brings here into court the said sum of ..... dollars and ..... cents, ready to be paid to the plaintiff.

---

(16) [PLEA OF FRAUDULENT PREFERENCE IN AN ACTION ON COMPOSITION NOTES.]

AND the defendants, by A. B., their attorney, as to the said three first counts of the said declaration, say that before the making of the said promissory notes therein mentioned, to wit, on the ..... day of ....., A. D. 18..., the defendants were indebted to the plaintiff, and to divers other persons, in divers sums of money, which they were then unable to pay without making sale of their estate and effects, to the great prejudice of the trade of them, the defendants; and thereupon, for the satisfaction of the plaintiffs, and the said other creditors of the said defendants, they, the defendants, then proposed to the plaintiffs and the said other creditors, in manner and at the times hereinafter mentioned, provided they would permit the defendants to pursue

their said trade or business without molestation, that is to say: the sum of ..... cents in the dollar to be paid on the execution of the proper articles of agreement between the defendants and the plaintiffs and the said other creditors, to be prepared for the purpose of carrying out the said proposition into effect, by promissory notes, at two months, with a satisfactory security for the due payment thereof, and the further remaining sum of ..... cents in the dollar, to be paid by the defendants' own notes, by three equal instalments, at six, nine, and twelve months from the date thereof; which said proposition of the defendants the plaintiffs and the said other creditors of the defendants then agreed to, and then the plaintiffs and the said other creditors, mutually and at each other's request, agreed with each other and with the defendants, in consideration of the premises and of such mutual agreement as aforesaid, and to execute proper articles of agreement between the defendants and the plaintiffs and the said other creditors, to be prepared within a reasonable time, for the purpose of carrying the said proposition into effect. And the defendants further say, that afterwards, and within a reasonable time, to wit, on the same day and year, in pursuance of the said proposition and agreement, and in order to carry the said proposition into effect, certain articles of agreement between the defendants and the plaintiffs and the said other creditors were duly prepared, bearing date, to wit, on the ..... day of ....., in the year aforesaid, and were duly sealed, delivered, and executed by the plaintiffs and the said other creditors, then relying on the said mutual agreement, which said articles, sealed with the seals of the plaintiffs and the said other persons, the defendants now bring into court; whereby, after reciting the proposition, the plaintiffs and the said other creditors did agree to accept of their respective debts, to be paid in manner aforesaid, and in consideration thereof, and severally and respectively gave and granted to the defendants full liberty and license to attend to and manage the said trade or business, and to transact any affairs, matters, or things whatsoever, at any place or places within the United States, at their free will and pleasure, and without any let, suit, action, arrest, imprisonment, or other impediment or molestation to be offered or done unto them, their goods, chattels, moneys, or other effects whatsoever, by the plaintiffs or the said other creditors, or any of them, for and during the space of twelve calendar months next after the day of the date thereof, if the defendants should so long live as by the said articles, reference being thereunto had, will, amongst other things, more fully and at large appear; and the defendants further say, that before and at the time of making the said proposal and agreement to and with and between the plaintiffs and the said other creditors, it was unlawfully and fraudulently agreed, to wit, on the said day and year in the first count mentioned, between the plaintiffs and the defendants, without the knowledge or consent of the said other creditors, or any of them, and in fraud thereof, that the defendants should indorse a certain bill of exchange to the plaintiffs, to wit, a bill drawn by the defendants upon and accepted by certain persons carrying on trade

under the name or firm of C. and D., for the payment of ..... dollars, in fraud of the said other creditors, in order to give the plaintiffs a fraudulent preference beyond the said other creditors, and to induce them to execute the said articles of agreement, and become a party to the same and to the agreement. And the defendants further say, that afterwards, to wit, on the same day and year aforesaid, the defendants did, in pursuance of the said fraudulent agreement between the plaintiffs and the defendants, and in fraud of the said other creditors, and for the purpose last aforesaid, indorse the said last-mentioned bill of exchange, and deliver the same, and also make and deliver the said three promissory notes in the said three first counts mentioned, the sum mentioned in the said notes amounting together to the amount of the sum in which the defendants were indebted to the plaintiffs as aforesaid, in the proportion thereof of ..... cents in the dollar; and this the defendants are ready to verify, etc.

---

(17) [REPLICATION ALLEGING FRAUDULENT PREFERENCES.]

THAT the plaintiffs executed the deed of composition in the defendant's plea mentioned, on the faith of the several provisions therein contained, but that it was never executed by any of the other plaintiffs, and that the defendant agreed with certain of the creditors of the defendant referred to in the plea, being other than the plaintiffs, or any of them, to pay, give, or secure to such creditors, in consideration of their executing the deed, certain pecuniary and valuable benefits and preferences over the others of the creditors, and thereby induced such preferred creditors to execute the deed, which agreement was so made, and such execution by such preferred creditors procured, in manner aforesaid, without the knowledge, consent, or authority of the plaintiffs or of the creditors of the defendant, other than the preferred creditors, and contrary to and in fraud of the deed and the plaintiffs and the other unpreferred creditors; and the defendant procured the deed to be executed by such majority as is in the plea mentioned, by and through the fraudulent agreement and premises aforesaid, whereby the deed never released or discharged the defendant from the claim sued for in this action.

*

INDEX

A

ACCEPTANCE. Section

upon accord necessary to constitute accord and satisfaction..... 8
of part no consideration for relinquishing residue..... 8
of condition by retaining check..... 22
in satisfaction a question for the jury..... 8
must be shown in action on original demand..... 8
bar rest on agreement to accept and not on..... 8
agreement to accept may be implied..... 8

ACCORD.

defined..... 1
unenforceable, mutuality absent..... 3
either party may repudiate.....3, 95
a contract without a consideration..... 3
how executed..... 6
part performance..... 4
tender of performance no bar..... 5
executory until entirely performed..... 3
executory when satisfaction depends upon performance..... 3
performance and acceptance good.....3, 95
cannot be specifically enforced..... 7
remedy upon original demand..... 7

ACCORD AND SATISFACTION.

defined..... 1
distinguished from payment, release..... 1
from a compromise..... 157
when not a compromise..... 72
when accounting an account stated and not an..... 78
agreement may be implied.....15, 116
acceptance of conditional tender..... 16
arising from acceptance of check in full..... 21
accepting part of claim allowed by county..... 81
need not be in writing..... 13
certainty required.....2, 13
requisites—new agreement must differ from old..... 2
must be two debts or debt and non-contract demand..... 2
mutuality necessary..... 2

ACCORD AND SATISFACTION—Continued. Section
legal consideration necessary....2, 14
must be executed....3, 26
readiness to perform accord not enough.... 3
consideration not present until performance.... 3
unenforceable when executory.... 3
acceptance of performance in satisfaction required.... 8
acceptance of less sum by mistake no.... 14
settlement of joint liability no.... 40
accepting wages after injury.... 13
making arbitrary deduction from wages.... 13
resale of property to seller when an.... 34
accepting part of property.... 13
accepting new executory agreement in satisfaction.... 2
discontinuance of mutual actions.... 26
by executors and administrators at common law.... 45
by partner as debtor, as creditor.... 39
consideration.
necessary to validity of a. & s.... 2
must be new, valuable and legal.... 2
need not be adequate.... 2
not present until performance.... 3
unfound claim no.... 14
executory contract received, must be valid.... 14
forged securities no.... 14
contract to do the impossible, no.... 14
threatened or impending breach of bond with penalty sufficient.. 25
in general....54–68
mutual promises no.... 54
payment of a less sum no....55, 56
a payment *pro tanto*.... 55
recovery of residue.... 55
rescission unnecessary.... 55
acceptance of less than amount fixed by law.... 57
payment of less sum by third party.... 61
payment of debtor's money by third party.... 61
less sum furnished by joint debtor....61, 62
payment of half by one partner.... 55
payment of less sum in property at a valuation.... 66
payment of less where debtor relinquishes an election of mode of payment.... 56
less sum paid to a third party.... 63
where cash is to be paid, check or draft given.... 65
payment of principal without interest.... 68
payment of less sum before maturity.... 60
payment of a less sum at a different place.... 60

ACCORD AND SATISFACTION—Continued. Section
performance of services ... 66
delivery of property, real or personal ... 66
part in property and part in money ... 66
part in cash and collateral note ... 65
accepting a less sum and surrendering note or security ... 67
security for a less sum ... 64
security out of debtor's means ... 64
note of one partner for less sum ... 62
debtor's note for a less sum ... 62
debtor's note and part cash ... 62
when mutual demands, set-off, and recoupment constitute ... 72
surrender of rights ... 73
accepting new and substituted agreement ... 74
assuming new obligation ... 73
new promise of indorser to pay a less sum at maturity ... 74
payment of undisputed demand no consideration for releasing another claim ... 58
acceptance of salary earned up to date of illegal removal ... 56
when acceptance of dividend no ... 56
insolvency of debtor no ... 59
when debtor abandons bankruptcy proceedings ... 59
payment of a less sum out of exempt property ... 59
payment of less sum after discharge in bankruptcy ... 59
sufficiency of, not inquired into, when ... 66
may show failure of, when ... 10 n.
subject matter of an ... 23–28
what claims and demands discharged ... 29–35
release of all demands discharges what ... 30
governed by same principles as release ... 29
claims, quarrels, actions, causes ... 30
appeals, writs of error ... 30
demands *in præsenti* ... 31
demands under consideration ... 33
future liability ... 32
contingent liability—contingent demand ... 32
mutual demands settled when ... 32, 33
counter-claims, set-off ... 32
accrued damages, future and consequential damages ... 34
continuing nuisance ... 34
undiscovered injury ... 34
all matters connected with transaction ... 32
entire debt must be satisfied ... 4
parts of demands—splitting causes ... 35
effect, bars action on original demand ... 3, 9
must discharge old demand absolutely ... 13

ACCORD AND SATISFACTION—Continued. Section
equivalent to payment or release ... 9
discharge of principle discharges indorser, surety ... 9
effect upon joint liability when a. & s. is with one ... 40
statutes governing settlements with joint debtor ... 41
partner discharged when ... 9
of damages, binding on personal representatives ... 34
a defense in an action for an accounting ... 38
once admitted can only be avoided for fraud or mistake ... 114
must be pleaded ... 106
burden of proving upon party alleging ... 114

ACCOUNTS.
accord and satisfaction extinguishes mutual ... 32

ACCOUNT STATED.
defined ... 78
executor cannot bind estate by ... 46

ACTION.
may be settled by a. & s ... 26
accord and sat. set out by supplemental pleading ... 26
compromise by payment of part and costs ... 88
compromise of, how taken advantage of ... 89

ADMINISTRATOR. See Executors and Administrators, Personal Representatives.
authority at common law to compromise ... 45
statutory authority to compromise ... 45
settlement by one prematurely appointed ... 45 n.
by one whose appointment is voidable ... 46
settlement by administrator *de son tort* ... 45
subsequent appointment validates, when ... 45
cannot compromise for wrongful death, when ... 45
may avoid compromise for fraud of predecessor ... 123
cannot avoid compromise for fraud of decedent ... 123
admissions by co-administrator ... 104

AGREEMENT.
to forbear unenforceable ... 158

AGENT.
composition effected through ... 176
must have specific authority to compound ... 165
may bind principal to answer for liquidated damages ... 176
power to effect composition where instrument is under seal ... 176
acts ratified by accepting proceeds of composition ... 176
principal bound by false representation of ... 176, 201
taking fraudulent preference binds principal ... 207

AGENT—Continued. Section
paying secret preference..... 206
debtor must have notice that authority is revoked..... 43
principal estopped to deny authority of, when..... 43
cannot waive default in composition, when.....176, 181
tender to, when good..... 179
has no general authority to agree to rescission..... 123
when tender to, in rescission is sufficient..... 123
for debtor cannot represent creditor..... 176
for debtor may afterwards receive composition money for creditor.. 176
an interpreter agent for both parties.....105 n.
strict fidelity required, cannot purchase debtors' notes..... 176
liability of, for purchasing and selling debtors' notes..... 176
admissions by..... 105
when admissible in evidence..... 102
admissions by, in presence of principal..... 105
statements of interpreter used as admissions..... 105

ALABAMA.
statute regulating effect of receipts and agreements..... 70

APPEAL.
compromise after, how taken advantage of..... 109
when joint tort feasor cannot release..... 40
pleading an a. & s. after an appeal..... 109

ARREST.
compromise of claim after, bars action for false imprisonment..... 88

ASSAULT.
damages for, discharged by a. & s..... 28

ASSIGNEE.
powers and duties.....187, 188
under private assignment, power to compromise..... 49
power to compromise good and bad debts void..... 49
must give creditors information..... 187
what debts he may pay..... 188
may sue without leave of court..... 188
must account to debtor for residue..... 188
may avoid compromise, when..... 123
cannot complete contract let in reliance upon skill..... 187
cannot buy trust property..... 187
must examine claims, when..... 188
may rely upon recital of debt in schedule..... 188
good faith only required in passing on claims..... 188

ASSIGNEE—Continued. Section
duty where debt is denied by debtor or creditor..... 188
under composition deed cannot compromise where debt is denied.... 188
may compromise debt owing estate..... 188
failure to act gives no right to enforce original contract..... 187
cannot divest himself of trust..... 187
power of court of equity over..... 187
parties necessary in suit to remove..... 187
title to what property rests in..... 189
all property, when..... 189
future salary of public official..... 189
after acquired property..... 189
wife's interest..... 189
exempt property..... 189
requirements as to transfer of homestead..... 189
partnership property, individual property of partners..... 189
trustee takes no better title than assignor had..... 93
takes property subject to equities..... 189
not agent of debtor..... 187
appointed by court cannot compromise, when..... 49
of claim cannot be ignored on a. & s..... 38
of money due on claim, have no power to compromise..... 38
compensation of..... 188
expense of carrying on business.....188 n.

ASSIGNMENT.
composition effected by.....158, 186, 191
distinction between general assignment and one made upon a composition 175, 186
to constitute composition creditors must assent..... 163
becomes effective as composition, when..... 186
previous assent unnecessary..... 186
to whom made upon a composition..... 158
to creditors or trustee agreeable to them..... 186
when revocable by debtor..... 186
binds creditors though not executed by all trustees..... 165
debtor cannot retain any control..... 190
at common law preference may be given by..... 190
preference prohibited by some statutes..... 191
when an act of bankruptcy under Federal Bankrupt Act..... 191
constructively fraudulent only, good between the parties..... 191
avoidance by non-assenting creditor..... 190
how assailed when constructively fraudulent..... 191
when absolutely void creditor may ignore it..... 191
property subject to levy after, when..... 186

ASSIGNMENT—Continued. Section
after breach of composition, creditor may come in under general.... 182
recovery of residue of debt after accepting dividends..... 192
of goods an extrinsic consideration for composition..... 160
composition by, may provide for immediate discharge..... 158
attorney for client cannot make..... 43

ATTACHMENT.
when compromise bars action for wrongful.....88, 93

ATTORNEY.
power to effect a. & s. or compromise..... 43
parties bound to take notice of extent of authority..... 43
power under general retainer..... 43
cannot delegate authority to another..... 43
delegation of power to effect an a. & s. to three..... 43
power not increased where fee is contingent..... 43
cannot assign client's property..... 43
can receive cash only..... 43
must follow instructions..... 43
power to compromise pending suit..... 43
notice of withdrawal of authority required..... 43
client estopped to deny authority of, when..... 43
client may settle regardless of..... 38
notwithstanding contingent fee..... 43
agreement with client restricting right to settle champertous..... 38
effect of a. & s. on compromise by client upon lien..... 38
method of enforcing lien where client settles..... 38
compromise without knowledge of, viewed with suspicion..... 38
measure of recovery under lien where client settles..... 38
has no lien at common law.....38 n.
liable to client for unauthorized settlement..... 44
measure of damages..... 44
accepting proceeds of unauthorized settlement..... 44
remedy of principal after accepting proceeds..... 44
recovery of proceeds by summary process..... 44
composition through..... 176
must have express authority..... 165
authority where instrument is under seal..... 176
tender to, when good..... 179
cannot waive default in composition, when.....176, 181
client bound by false representations of..... 176
paying secret preference..... 206
admissions by, before and after action..... 105

B

BANK. Section
authority of cashier or acting manager to compound debts.....43, 176
president of, when not authorized..... 43

BANK CHECK.
sending check for less sum..... 17
for balance as per statement..... 21
effect of accepting check "in full"..... 21
creditor erasing words "in full"..... 22
accepting check for sum admitted to be due no a. & s., when.....85 n.
of third person for a less sum, when a consideration for an a. & s... 65
tender of check good, when..... 179
must be drawn at time of tender..... 179

BANKRUPTCY.
creditor may prove claim in, after breach of composition..... 182
when creditor can prove only for installment due under composition .....167 n.
Federal act supersedes state law, when..... 191

BASTARDY.
right of settlement for, when in parent.....47 n.
settlement may be made with complainant..... 28
with complainant no settlement with state..... 28
compromise in, conclusive on defendant.....92 n.
offer to pay complainant when admissible in evidence..... 102
note given by accused to obtain his liberty not voidable for duress.. 145

BILL OF EXCHANGE.
of third person for less sum a consideration for an a. & s..... 65

BOND.
discharged by bringing amount due into court..... 25
of indemnity not discharged by release of all demands..... 32
with penalty dischargable by a. & s. before or after default..... 25
reason supporting discharge of bond with penalty..... 25

BREACH.
revival of debt upon a, not a penalty..... 177
of original contract excused by an a. & s..... 25

BRINGING MONEY INTO COURT.
parol a. & s. of bond good where liability may be discharged by.... 25
upon plea of tender..... 208

C

CALIFORNIA. Section
statute regulating effect of part performance..... 70

CAUSE OF ACTION.
discharged by something of value.....3, 14
by technical release..... 14
by executed gift..... 14
splitting 35

CERTIORARI.
pleading a. & s. to assignments of error on..... 109

CHAMPERTY.
contract that client may not settle..... 38

CIVIL LAW.
an accord and satisfaction a novation..... 1
rule as to inadequacy of consideration warranting restitution..... 155
compromise by a stranger..... 51
off-setting demands called compensation..... 72
definition of fraud..... 133

COMMON LAW.
sealed instrument after default discharged by a. & s..... 24
sealed instrument before breach how dissolved..... 25
rule confined to obligations conferring benefit in certainty..... 25
judgment not discharged by a. & s..... 26
freehold not barred by acceptance of collateral satisfaction..... 27
contracts made on a Sunday..... 11
compromise by executors and administrators..... 45
of debts due the estate..... 176
limitations upon the power..... 176
of debts owing by decedent..... 176
loss resulting from compromise by administrator, waste at..... 46
statutory authority of executors and administrators to compromise not restrictive of power at..... 45
power of guardian to compromise..... 47
rule as to receipt..... 69
rule as to payment of a less sum..... 70
attorney has no lien at.....38 n.
pleading an a. & s. *puis darrien continuance*..... 109
definition of fraud..... 133
rule as to right of action without a formal rescission..... 117
remedy where defrauded party does not rescind..... 117

COMMON LAW—Continued. Section
debtor may give preference at....171, 190
what assignments fraudulent.... 191
fraudulent conveyance at, fraudulent under Federal Bankrupt Act.. 191

COMPOSITION.
definition of.... 157
termed private bankruptcies.... 157
erroneously referred to as a. & s.... 157
distinguished from payment.... 157
distinguished from compromise.... 157
distinguished from a. & s.... 157
three kinds of.... 158
forms of.... 159
writing under seal.... 159
parol and oral.... 159
may be based on resolution of creditors.... 159
no particular form of composition essential.... 159
of letter of license.... 159
compromise must conform to statute of frauds.... 91
use of word "settlement" or "compromise" unnecessary.... 91
effected by assignment....186, 191
when to trustee of debtor's choosing.... 186
when first allowed as a defence at law.... 159
originally regulated by bankruptcy acts.... 160
common agreement with single creditor no....157, 164
compounding with all creditors not necessarily a.... 164
agreement among creditors alone no.... 163
agreement expressed "we the undersigned," when no.... 163
when agreement enforced as between creditors.... 163
negotiated by creditors binding though fear of loss proves groundless 161
stipulations which may be inserted.... 166
may provide for *pro rata* payment in discharge.... 158
for *pro rata* payment and return of residue.... 158
may be for benefit of certain creditors.... 164
construction of agreement.... 168
not construed as requiring all to sign, when.... 168
when creditor may come in after successfully contesting the.... 182
validity depends upon principles of equity.... 157
mutuality necessary.... 159
of agreement and of remedies required.... 163
embarrassment of debtor essential to.... 161
need not necessarily be real, when.... 161
consideration necessary to support.... 160

COMPOSITION—Continued. Section
a pecuniary benefit necessary to..... 160
not necessary that creditors receive less than their debts... 160
mutual promises between creditors a consideration.....160, 164, 171
letter of license supported by mutual promises of creditors..... 160
agreement by single creditor and debtor no consideration..... 164
assignment of goods by debtor an extrinsic consideration..... 160
promise subsequent to execution of composition is without consideration 165
operation and effect.....192, 196
upon debts..... 196
binds parties and privies..... 192
composition with surety, indorser, no of principal..... 192
debtor cannot recover any part of composition money on ground of mistake..... 192
upon liability of surety, drawer, indorser or guarantor..... 194
when composition is executed by mistake..... 194
upon creditors' security.....194, 195
security not released unless required number sign..... 194
upon security where original debt is not extinguished *in præsenti* 194
upon liability of joint debtor..... 193
where creditor reserves right against one joint debtor..... 193
of release of prior upon liability of subsequent indorser..... 194
non-assenting creditors may sue for whole debt..... 192
when a release..... 167
need not contain a technical release..... 167
provision for executing a formal release surplusage..... 167
release of debts may be conditional upon performance..... 167
when discharge effected by..... 158
when performed the effect upon debts same as an accord and satisfaction 157
subsequent promise to pay residue without consideration..... 185
creditor cannot withdraw from..... 169
debtor cannot release a creditor from..... 169
may be avoided for fraud..... 201
secret preference a fraud..... 202
may be avoided for fraud of agent or attorney..... 176
avoidance by one creditor avoids it as to all..... 182
remedy upon breach of executory agreement received upon..... 167

COMPROMISE.
definition 76
a new agreement.. 77
distinguished from payment..... 78
distinguished from composition..... 157

COMPROMISE—Continued. Section
an accord and satisfaction ... 78
no particular form required ... 91
requisites, in general ... 79
mutuality of agreement ... 79, 80
parties ... 79
must be in settlement of something uncertain ... 79
a controversy necessary ... 79
must be performed ... 77
performed by accepting new agreement, when ... 77
a legal consideration necessary ... 14
subject matter ... 79
subject matter defined ... 79
consideration, in general ... 82
something of value must pass ... 82
amount of immaterial ... 82
need not be adequate ... 82
court will not inquire into adequacy ... 90
compromise not vitiated by an exorbitant consideration ... 82
not composed solely of thing of value ... 82
arising out of settlement of unliquidated demand ... 77, 78, 83
what are unliquidated demands ... 84
claim unliquidated when right to counterclaim is asserted ... 87
claim is unliquidated when dispute is over off-set ... 87
denial of liability unnecessary if claim is unliquidated ... 83
arising out of settlement of doubtful claim ... 86
must not be legally groundless ... 86
must be colorable ... 86
dispute as to a moral obligation not enough ... 86
dispute whether contract is within statute of frauds ... 86
dispute whether demand is barred by statute of limitations ... 86
subsequent discovery of legal defense does not affect compromise ... 86
family settlements as a consideration ... 90
relinquishing a right to costs ... 88
discontinuing cross actions ... 88
settlement terminating litigation ... 88
must be reasonable doubt as to rights asserted ... 90
mere desire to avoid litigation no consideration ... 83
arising out of settlement of disputed claim ... 82, 83, 85
dispute may arise out of what ... 85
dispute must be *bona fide* ... 85
threats of vexatious litigation ... 85 n.
asserting false claim ... 85
evidence establishing dispute ... 85

COMPROMISE—Continued. Section
failure of, as ground for rescinding compromise..... 155
mere inadequacy of, no ground for rescission..... 155
rule at civil law as to inadequacy of, warranting restitution.... 155
payment under protest no..... 80
unaccepted proposal no..... 80
acceptance of proposal must constitute a new agreement..... 80
formal acceptance unnecessary..... 80
acceptance of sum tendered without condition no..... 81
payment of balance after excluding certain items no..... 81
when acceptance of amount allowed on claim a..... 81
when payment of costs and a discontinuance no..... 81
payment before a controversy arises no.....32 n.
offer of compromise must be definite..... 81
may be effected through agent or attorney..... 43
effected by physicians..... 137
assignee of money due or to become due on a contract cannot compromise 38
statutes governing settlements with joint debtor..... 41
of dispute over land conveys no title, when..... 31
presumed to include whole subject matter..... 32
of particular demand does not affect title derived from another source 90, 132
must be pleaded as a defense..... 106
burden of proving upon party alleging..... 114
are favored by the courts..... 23
presumed to be fair..... 140
relative merits of opposing claims not investigated..... 23
enforced notwithstanding stipulation remitting creditor to original rights upon default..... 96
once admitted, avoided only for fraud or mistake..... 114
void when made on a Sunday..... 154
void when in violation of a statute..... 154
tainted with usury void or voidable under statute..... 154
when illegal..... 153
compromise of gaming contracts..... 154
based on illegal consideration..... 154
illegal when in violation of revenue laws..... 154
effect of compromise.....92, 93
bars action on original demand..... 92
cannot assert defense to original demand in action on compromise agreement..... 92
extinguishes set-off, counter-claim, when..... 92
upon installments due..... 93
damages for wrongful attachment discharged, when..... 93

COMPROMISE—Continued. Section
damages for false imprisonment discharged, when..... 93
matters not intended to be settled not affected..... 92
privies concluded..... 93
persons not joining not bound, when..... 93
compromise after judgment discharges all matters involved in action 93
independent claims not affected..... 93
settlement of money embezzled no discharge of criminal liability 93
parties may split demand, balance not discharged..... 93

COMPROMISE AGREEMENT.
definition 76
mutuality of remedies necessary..... 77
pleading performance of..... 107
specific performance of..... 97

CONSIDERATION. See Accord and Satisfaction, Compromise and Composition.
note given for residue of debt after a. & s. without..... 10

CONSPIRACY.
damages arising from, discharged by an a. & s..... 28

CONTINGENT LIABILITY.
not discharged by release of all demands..... 32
may be released..... 32
may be discharged by composition..... 197

CONVERSION.
damages arising from, discharged by an a. & s..... 28

CORPORATIONS.
officers' acts governed by rules of agency..... 176
authority to compromise derived from where..... 176
officers' acts ratified by accepting proceeds of composition..... 176

COUNTERCLAIM.
discharged by composition, when.....92, 198
asserting, renders demand unliquidated..... 87

COUNTY.
may effect compromise through proper board..... 48
right to compromise confined to what claims..... 48
must receive something of value..... 48
cannot compromise by paying a larger sum than allowed by law..... 48
debtor cannot question regularity of board meeting, when..... 48, 81
acceptance of part of demand allowed by, a compromise, when..... 81

COURT.
duty of, to explain to jury what facts warrant a rescission..... 140

COVENANT.
Section
when discharged by release or a. & s..... 31
when discharge of all actions does not discharge..... 31
for repairs not broken not discharged by release of all demands... 32
never to sue when treated as a release..... 9

CREDITOR—CREDITORS. See Joint Creditors.
must reject or accept tender as made..... 16
accord and satisfaction by one joint..... 40
when release of one joint creditor releases all..... 38
avoiding compromise at common law..... 156
mutual promises, a consideration for a composition..... 160
number necessary to a composition.....170, 171
agreement of one with debtor no composition..... 164
separate agreement with each no composition..... 164
want of mutuality between, fatal to composition..... 164
agreement among themselves no composition..... 163
all not required to join, when..... 174
only those designated may take benefits..... 171
first to sign held to agreement before full execution..... 169
last to sign composition bound..... 165
signing relying upon representation that composition will be void unless all sign..... 166
may waive requirement as to all joining..... 174
cannot come in after time limited, when.....171, 173
may be compelled to come in or renounce..... 173
cannot release one of their number..... 169
meaning of term "the creditors"..... 174
general creditors..... 168
includes secured and unsecured, when..... 168
meaning of the term "other creditors"..... 168
cannot withdraw from composition 169
when bound by estoppel 162
one creditor luring others in bound when..... 165
joining after time for payment, money is payable on demand..... 177
joining after passing of dividend takes what..... 173
good faith of, required 162
may accept statement of debtor as to his affairs..... 201
equality required among 161
what creditors may avoid composition upon a breach..... 182
fraud upon, avoids composition..... 161
secret preference a fraud upon..... 205
accepting composition notes after knowledge of preference a waiver of fraud 206
accepting secret preference loses all..... 203

CREDITOR—CREDITORS—Continued. Section
may reserve security upon joining..... 166
debtor mutual agent of 165
may require debtor to continue to deal with them..... 166
CRIMINAL CONVERSATION.
compromise of action for, binding..... 154

D

DAMAGES.
may be settled at any time..... 11
for breach of accord..... 5
a. & s. discharges only accrued..... 34
future and consequential, discharged by a. & s..... 34
occasioned by nuisance discharged by a. & s..... 34
unknown, not discharged by a. & s., when..... 34
for undiscovered injury discharged by a. & s., when..... 34
DEBTOR. See Joint Debtors.
not necessary to composition agreement, when..... 170
at common law may give a preference..... 171
may avail himself of consideration passing between creditors..... 160
when required to sign composition agreement and when not..... 165
cannot release a creditor from composition..... 169
concealment of resources or condition a fraud..... 161
must be involved or embarrassed..... 161
when embarrassed..... 161
embarrassment need not be real..... 161
good faith as to embarrassment required..... 161
cannot avoid composition for own breach..... 182
need make no disclosure of condition unless requested..... 201
giving secret preference not in *pari delicto*..... 203
must persist in his conditional tender..... 16
DEBTS AND DEMANDS.
effect of composition on..... 196
parol evidence inadmissible to prove exclusion or inclusion of, when.. 196
included in composition..... 197
what debts included a matter of construction..... 197
when general words held to include particular demand..... 197
existing demands..... 198
demands not due..... 198
secured and unsecured claims..... 198
judgment debts..... 198
counter-claim discharged when..... 198
inserting amount in blank in composition agreement..... 198
when creditor signs and leaves amount blank..... 198
splitting demands..... 199

DEBTS AND DEMANDS—Continued. Section
withholding demands..... 199
transferring demand after signing composition..... 199
bills dishonored upon which creditor is indorser..... 199
bills included, but in hands of *bona fide* holder..... 199
creditor liable to debtor for transferring claim..... 199
claim when fraud was unknown at time of signing..... 199
partnership debts..... 198
held by partner against firm..... 198
for money advanced to pay composition not discharged..... 198
demands *in præsenti* discharged by a. & s., when..... 31

DEED.
must be executed at time of tender..... 179
required to transfer interest in land..... 27

DEED OF INSPECTORSHIP.
one method of effecting a composition..... 158
when resorted to..... 158
may be pleaded in bar..... 158
provision for forfeiture of debt of creditor suing..... 158

DEFAULT.
effect of, in composition..... 177
in payment of note received upon composition..... 177
authority of agent or attorney to waive..... 176
no default until demand..... 177

DEFINITION.
accord 1
accord and satisfaction..... 1
payment 1
compromise 76
compromise agreement..... 76
settlement 78
composition 157

DEVISEE.
may compound claims against estate, when.....45, 176

DRAFT.
for a less sum accepted by third party a consideration for an a. & s. 65

DRAWER.
released by composition, when..... 194

DURESS.
definition 142
distinction between the Roman, Civil and Common law..... 142

DURESS—Continued. Section
by whom exercised ... 144
rule at civil law ... 144
rule at common law ... 144
renders compromise voidable ... 142
subsequent performance of compromise obtained by ... 143
a question of fact, when ... 147
of surety ... 143
per minas ... 147
direct threats unnecessary ... 147
threats of lawful or unlawful arrest immaterial ... 147
threats to parent to arrest child ... 147
to wife to arrest husband ... 147
belief in guilt or innocence immaterial ... 147
threats to enforce demand by legal means ... 148
threats to enforce fraudulent claim ... 148
to enforce wholly unfounded claim ... 149
threats to spoil goods ... 147
threats must have constrained the will ... 147
menace may be to character or person ... 147
menace to commit a battery ... 147
of goods, what constitutes ... 146
refusal to pay debt no ... 146
inducing others to withhold payment ... 146
of personal property, real property ... 146
just claim enforced by unlawful means ... 145
by imprisonment ... 145
by lawful or unlawful arrest ... 145

E

EFFECT. See Accord and Satisfaction, Compromise and Composition.

EMBEZZLEMENT.
criminal liability not discharged by compromise of claim ... 93

EQUALITY.
among creditors cardinal principal of composition ... 202
object of composition ... 194
not necessary if preference is openly given ... 166

EQUITY.
classification of fraud in ... 132
rule as to acceptance of conditional tender same as at law ... 17
rule as to a. & s. of sealed instrument ... 25
composition upheld by principles of ... 157, 162

EQUITY—Continued. Section
formally enforceable only in..... 159
will enforce composition agreement..... 184
aid refused creditor who refused to join..... 171
may relieve default of creditor in not joining, when..... 173
will determine what debts are included..... 197
relief afforded creditor whose debt is denied..... 188
will afford relief where creditor has been paid more than is due 192
may relieve debtor who gave secret preference though hands unclean 203
relief granted where fraudulent preference has been given..... 201
may reinstate security..... 201
cancellation of security given by surety or enjoin enforcement of it..... 205

ESTOPPEL.
none where municipality pays a less sum than salary fixed by law.. 57
unaccepted offer no ground for..... 80
when creditor accepts less sum with surety..... 64
account stated creates no..... 78
supports composition.....159, 162
invoked by debtor, by creditor, upon a composition..... 162
invoked with greater force when debtor has made an assignment or procured a surety upon a composition..... 162

EVIDENCE.
must be clear that condition of tender was insisted upon..... 17
silence after notice that conditional tender will not be accepted.... 17
the a. & s. alleged must be proved..... 114
satisfaction as well as accord must be shown..... 114
of complete performance of a. & s. or compromise..... 114
part performance, readiness or tender insufficient..... 114
of payment of note accepted on compromise necessary, when..... 114
compromise presumed to be fair..... 140
burden of proof upon party alleging a. & s..... 114
composition agreement..... 182
of mutuality of agreement between all creditors on whom.. 164
of knowledge by other creditors of preference on recipient.. 195
where plaintiff's evidence shows a compromise he must get rid of it..... 182
weight of evidence required to establish an a. & s. or compromise.. 114
when case made is for the court or jury..... 116
not all cases of undisputed facts for the court..... 116
of number of parties to composition, when for the court or jury..... 171
admissibility of, in proof of an a. & s. or compromise..... 115

EVIDENCE—Continued. Section
written instrument the best ... 115
receipt in full ... 115
satisfaction of judgment ... 115
proof of *bona fide* dispute ... 115
proof of no dispute ... 115
entry of judgment for a particular amount ... 115
lapse of time ... 115
dismissal and payment of costs ... 115
due bill *prima facie* evidence of settlement ... 115
facts showing implied agreement ... 116
admissions: offer of compromise inadmissible ... 99
admissibility of offer is for the court, when ... 101
offer to pay complainant in bastardy to keep quiet admissible ... 102
when statement made during negotiation of compromise admissible ... 102
loose expressions not admissions of independent facts ... 102
of law inadmissible ... 102
of independent facts by whom made ... 103, 104
by agent, when admissible ... 102, 105
by attorney ... 104
by attorney after action brought ... 104
by infant ... 104
by executor ... 104
by co-administrator ... 104
by partner ... 103
by partner after dissolution ... 103
parol evidence admissible to show compromise ... 91
oral evidence admissible to explain indorsement ... 177
oral evidence inadmissible to vary written compromise ... 115
cannot show by parol that the agreement required all creditors to join in composition ... 172
oral evidence when admissible to show what claims are included in composition ... 168
when intent to include or exclude claim in composition cannot be proven by parol ... 197
claim discharged by an a. & s. ... 42
of composition ... 209
of composition inadmissible under plea of payment, compromise or release ... 208
to defeat an a. & s. ... 110
of fraud warranting a rescission ... 140
burden of proof on party attacking a compromise for fraud ... 140

EVIDENCE—Continued. Section
greater weight required to impeach written compromises..... 140
to impeach compromise must be clear and unequivocal..... 140
clear preponderance required..... 140
payment in full admissible under plea of secret preference..... 204

EXECUTION OF COMPOSITION AGREEMENT.
by calling meeting of creditors..... 165
a debtor or creditor may obtain consent through the mail..... 165
may carry instrument around to each creditor..... 165
need not be in writing..... 165
may be in separate instruments..... 165
all creditors required to sign, when..... 165
creditors not signing bound when..... 165
accepting benefits binds creditor without signing..... 165
creditor bound by promise, though not signing..... 165
must show refusal to execute, when..... 172

EXECUTORS AND ADMINISTRATORS.
compromises by..... 45
for wrongful death..... 45
for life insurance..... 45
power of, at common law..... 45
power of, as residuary legatee..... 46
statutes authorizing compromises by..... 45
statutes vesting the power direct in administrator..... 45
statutes not restrictive of common law power..... 45
order of court for protection of..... 45
no order of court required..... 45
good faith required upon compromise.....45, 46
must show necessity for compromise..... 45
burden on, to show that it was prudent..... 45
liable for fraudulent compromise..... 46
order of court no protection..... 46
who may complain of compromise by..... 46
co-executor answerable for act of other, when..... 45
cannot compromise claims against estate, when..... 46
of deceased partner cannot join with survivor in composition and bind the estate..... 176
bound individually, when..... 176
cannot compound debts by giving a few more than their share.. 176
power to compound debts owing to and by decedent..... 176
assignment of all assets to creditors.....176 n.
admissions by..... 104

F

FALSE IMPRISONMENT. Section
dismissal of mutual actions an a. & s.....26, 28
compromise after arrest bars action for.....88, 93

FAMILY SETTLEMENTS.
a consideration for a compromise..... 90

FEDERAL BANKRUPT ACT.
when composition may be avoided under..... 191

FEES.
acceptance of less no a. & s..... 57
agreement before services rendered to accept less..... 57

FORMS.....Appendix (1)–(17)
composition with creditors.....158 n. (1)
composition with creditors, brief form..... (2)
composition with creditors, another form..... (3)
composition with creditors, with indorser..... (4)
composition with creditors, with surety..... (5)
composition with creditors, reserving rights against indorsers..... (6)
composition with creditors, protecting against note..... (7)
making release void for default..... (8)
letter of license..... (9)
proviso rendering void unless all sign..... (10)
condition that debtor pay in installments..... (11)
deed of inspectorship..... (12)
clauses of composition deed..... (13)
plea of composition..... (14)
plea of discharge by tender..... (15)
plea of fraudulent preference..... (16)
replication of fraudulent preference..... (17)
plea of release.....112 n.
puis darrein continuance.....112 n.

FRAUD.
composition supported by doctrine of..... 162
oral letter of license upheld by doctrine of..... 159
creditor may avoid composition for..... 201
debtor cannot avoid composition for his own..... 206
by partner avoids firm composition..... 201
of agent or attorney binds principal..... 176
by creditor where debtor is innocent..... 201
fraudulent conveyance..... 190
secret preference a.....201, 202

FRAUD—Continued. Section
violation of agreement by creditor a..... 159
misrepresentation by one creditor to another..... 201
independent fraud by debtor precludes recovery of preference.. 203
signing agreement after knowledge a waiver of..... 206
accepting notes after knowledge, a waiver of..... 206
creditor must have believed false statement to be true..... 201
remedies available where compromise was obtained by..... 117
election of remedy irrevocable..... 117
action for damages may be brought when..... 118
right barred only by statute of limitation..... 118
measure of damages for fraudulent compromise..... 117
waived by performance of executory contract..... 117
settlement includes all incidents of..... 32
inadequate consideration as evidence of..... 155
must be pleaded to avoid a. & s. or compromise..... 111
intent to defraud must be alleged..... 111
equity will not enforce agreements tainted with..... 97
demands based on, indivisible..... 35
defined at civil law, at common law..... 133

FRAUDULENT CONVEYANCE.
under Federal Bankrupt Act..... 191
principles applied in determining what is a..... 191

FRAUDULENT PREFERENCE. See Secret Preference.
rule in New York as to avoiding composition for..... 205

G

GARNISHMENT.
non-assenting creditor may reach surplus in hand of assignee by... 191

GEORGIA.
statute regulating effect of part performance..... 70

GIFT
execution necessary to discharge demand..... 14
of residue of debt good, when..... 67

GOOD FAITH.
unenforceable demand asserted in..... 23
required of administrator in effecting compromise..... 45
trustee in passing upon claim held to..... 188

GUARANTOR.
statutory provision governing release of..... 41 n.
effect upon liability of, by composition with principal..... 194
creditor cannot afterwards join in composition where money is to be paid by..... 171

GUARANTY. Section
contract of, not discharged by release of all demands..... 32

GUARDIAN.
power to compromise at common law..... 47
has burden of showing compromise was fair..... 47
court may authorize compromise by..... 47
by nature, compromise by..... 47
ad litem has no power to compromise..... 47
cannot make binding admissions..... 104
admissions by, binds him..... 104
may avoid compromise made with ward.....123, 150

I

INDORSER.
discharged by an a. & s. with principal..... 9
reserving right against..... 9
contingent liability of, released by express contract..... 32
when covenant not to sue discharges..... 32
agreement by, before maturity, to pay a less sum a consideration for a. & s..... 74
oral evidence admissible to explain liability of, when..... 177
debtor liable as, upon note given upon composition, when..... 177
released by composition agreement, when..... 194
released by construction only..... 194
held by becoming a party or assenting to composition.....194 n.
effect of release of prior upon liability of subsequent..... 194
may compound his liability..... 192
fraudulent preference releases..... 205

INFANT.
cannot make an a. & s..... 42
admissions by..... 104
rescission on ground of infancy..... 150
guardian of, may rescind..... 150
privies in blood may rescind..... 150
may avoid composition..... 150
time when he may rescind.....90, 150
tender required by, upon a rescission.....119, 150
notice to, of application by guardian to compromise..... 47
compromise must promote their interest..... 90
adult contracting with, remains bound, when..... 90

INJUNCTION.
will lie to restrain threatened violation of composition..... 184

INSANE PERSON. Section
compromise by, may be rescinded..... 151
compromise with monomaniac good, when..... 151
INSOLVENCY.
of debtor no consideration to uphold an a. & s. or compromise..... 59
proving balance of claim in, upon breach of composition.....182 n.
INSPECTOR.
appointed by deed of inspectorship..... 158
duties of..... 158
INSURANCE.
receiving part of, from wrong-doer no bar to recovery from insurer 38
insurer's right against wrong-doer not barred by release given by insured 38

J

JOINT CREDITORS.
as parties to composition agreement..... 175
JOINT DEBTORS.
may make an accord and satisfaction..... 40
accord and satisfaction of joint debt by one..... 9
note for less sum by one, no a. & s..... 62
payment of share of one by the other no a. & s..... 61
covenant never to sue one no discharge of the other..... 9
covenant treated as a release, when.....9, 40
statutes regulating effect of a. & s. or compromise with one.....9, 41
right of contribution not affected by a. & s. with one..... 40
as parties to a composition..... 175
effect of composition upon liability of one..... 193
reservation by creditor of remedy against one..... 193
admissions by one not binding on co-debtor..... 103
payment of part by one, no consideration for releasing residue.....55 n.
JOINT TORT FEASOR.
a. & s. and compromise by one..... 42
payment by one a part payment, when..... 42
payment by one discharges all, when..... 42
part payment by one and covenant never to sue..... 42
all discharged notwithstanding reservation against one..... 42
surrender of benefits received from one does not affect right of other 42
when one may contradict release by parol..... 42
gratuity paid by one no a. & s..... 42
a. & s. by one with infant..... 42
damages not apportioned between..... 42
no right of contribution..... 42

JUDGMENT. Section
as subject matter of a. & s. ... 26
not discharged by a. & s. at common law ... 26

JURY.
whether offer is by way of compromise a question for ... 101
whether tender was accepted subject to condition for ... 17

L

LEASE.
when surrender cannot be by a. & s. ... 25
acts constituting surrender ... 25 n.

LETTER OF LICENSE.
one method of effecting a composition ... 158
distinction between agreement to forbear and ... 158
should contain clause that it may be pleaded in bar ... 158
formerly by deed ... 159
by parol have been upheld ... 159
violation of oral agreement a fraud ... 159
mutual promises of creditors a consideration for ... 160

LIEN.
ignoring holder of, in a. & s. ... 38

LIBEL.
plea of a. & s. good in action for ... 28
publication of mutual apologies an a. & s. ... 28

LIMITATION. See Statute of.

LOUISIANA.
discharge under code of obligation by stranger ... 52

M

MAINE.
statute regulating effect of part performance ... 70

MAYHEM.
damages arising from, discharged by a. & s. ... 28

MINOR. See Infant.

MUNICIPAL CORPORATION.
presumption arising from receiving part of claim from ... 34
may effect a compromise through the proper board ... 48
right to compromise, confined to what claim ... 48
when a. & s. or compromise of salary is binding ... 57
acceptance of part of claim allowed by, a compromise, when ... 81

MUNICIPAL CORPORATION—Continued. Section
no estoppel in favor of, upon acceptance of a less sum as salary or fees 57
compromise by, in violation of statute void..... 154

MUTUALITY.
necessary to validity of a. & s.....2, 13
absent in an accord..... 3
of agreement..... 80
of remedies..... 77
arising from acceptance..... 80
acceptance of conditional tender..... 81
between creditors necessary to a composition..... 159
between creditors and debtor..... 159

MUTUAL ACCOUNTS. See Accounts.

N

NEXT FRIEND. See *Prochein Ami.*

NEXT OF KIN.
Settlement may be made with, when..... 45

NEW YORK.
statute authorizing compromises does not include composition, when 45
release necessary to discharge joint debtor..... 41
rule in, as to fraudulent preference avoiding a composition..... 205

NORTH CAROLINA.
statute regulating effect of part performance..... 70

NORTH DAKOTA.
statute regulating effect of part performance..... 70
defining accord.....1 n., 70 n.

NOTE.
when taken as payment..... 177
demand for payment of, required when..... 177
demand after notice of intent not to pay..... 177
must be paid before original debt discharged when..... 177
effect of failure to pay new note given before maturity of old..... 177
debtor liable on indorsement on note given for composition, when... 177
must be executed at time of tender..... 179
given for secret preference void..... 202
in hands of *bona fide* holder good..... 202
non-negotiable, subject to defense of fraud..... 202
failure to plead fraud to one of two notes..... 202

NOTE—Continued. Section
judgment upon plea of fraud to one note *res adjudicata* in action on the other 202
creditor may sue on though surrendered 206
constitutes satisfaction of accord, when 3
creditor may return before payment 3
given for residue of debt after a. & s. void 10
in settlement of unfounded claim unenforceable 14
of debtor of less sum no consideration for an a. & s. 62
of third person for less sum a consideration 65

NOVATION.
an a. & s. a 1
composition agreement when a 157, 182

NUISANCE.
damages arising from, after an a. & s. when not discharged 34

O

OFFER OF COMPROMISE.
inadmissible in evidence 99
to be inadmisslble in evidence must be upon condition expressed or implied 100
what offer is not a 101
when competent evidence 101
admission of independent facts admissible when 102
mere loose expressions not independent facts 102
by whom the admission of facts must be made 103

OFFICER.
public, not authorized to compromise 48
of private corporation governed by rules of agency 43
as to admissions 105

OFF-SET.
of less against a greater demand no a. & s. when 72

P

PARENT.
compromise of claim for damage to child 47

PARTIES.
to an a. & s. 38–53
what person may make an a. & s. 38
to a compromise 79
naming the parties 91

PARTIES—Continued. Section
to a composition....170–176
number necessary....157, 170
evidence as of number when for court or jury.... 171
stipulation requiring certain creditors to join.... 172
not bound until all intended have signed.... 165
condition requiring all creditors to join includes who.... 172
what creditors required determined by object of composition.. 174
stipulation as to who shall join, how construed.... 168
"the creditors" includes who.... 174
"other creditors" includes who.... 174
creditors to be paid in full not necessary.... 172
all assenting creditors bound, when.... 172
non-execution of composition within the time limited not fatal, when 172
when necessary to show refusal to become a party.... 172
objection that some creditors have not joined available to whom 173

PARTNERS.
power to compromise as debtor, as creditor.... 39
cannot make an a. & s. of individual liability.... 39
a. & s. of joint debt by one.... 9
a. & s. between.... 38
may give individual note upon compromise.... 39
can only receive money on an a. & s.... 39
cannot off-set individual debt against firm debt.... 39
accepting half of debt from one no consideration for a. & s.... 55
power to compromise after dissolution.... 39
effect of covenant not to sue one.... 39
statutes regulating discharge of one.... 41
note by one for a less sum a consideration for an a. & s.... 74
admissions by one, when binding on firm.... 103
by one after dissolution.... 103
as parties to a composition, as debtors, as creditors.... 175
composition of firm debts does not affect individual debts.... 175
payment by one and covenant not to sue no composition.... 175
one cannot compound individual liability.... 175
statutes authorizing compounding of individual liability.... 175
firm not dissolved by composition and assignment by one.... 175
assignment of all assets by one.... 175
transfer of firm real estate by one.... 175
effect of composition of firm debts upon debts due from partner to.. 175
composition by survivor.... 175
executor of deceased partner joining in composition personally bound 175
after retiring from firm cannot join as creditor, when.... 175

PARTNERS—Continued. Section
execution of composition in individual name no release of firm debts, when 175
may enforce contribution on paying firm debts..... 175
one may authorize third party to discharge firm debts..... 175
assent to composition given by one..... 165
liability not severed unless they sign the composition deed.....165 n.
assignment to pay firm debts does not include individual property.. 189
status of firm property where one partner compounds individual debts 189
transfer of firm property not an act of bankruptcy as to individual partner 191

PAYMENT.
defined 1
distinguished from a. & s..... 1
distinguished from compromise..... 78
of part no a. & s. without agreement to release residue..... 13
of less sum when merely a payment *pro tanto*..... 167
of part upon a compromise, a payment *pro tanto* upon original demand, when..... 182

PAYMENT INTO COURT. See Bringing Money into Court.

PENALTY.
revival of debt upon default of compromise agreement not a..... 177
when stipulation for the recovery of residue upon default is a stipulation for a..... 96

PERFORMANCE.
of a. & s. must be full and complete..... 6
of part insufficient..... 4
entire debt must be satisfied by..... 4
of part and readiness to perform balance..... 4
of part and promise to pay balance in future..... 4
tender of, upon an accord of no effect..... 5
of accord good when accepted..... 3
creditor may repudiate an accord before..... 6
of an uncertain accord..... 13
of accord by executing new agreement..... 6
remedy upon breach of substituted agreement..... 74
by expending money for creditor's benefit..... 6
order on third person insufficient.....6, 26
by relinquishing right to goods in creditor's hands..... 6
by symbolical delivery..... 6
by delivery of precise thing..... 6
by delivery to third person..... 6
by delivery at place designated..... 6
creditor may waive condition as to..... 6

PERFORMANCE—Continued. Section
of compositions by accepting new agreement.....167, 182, 196
by accepting new note..... 177
creditor's remedy is upon new agreement..... 182
by delivery of accepted bills..... 177
by delivery of note with approved security..... 177
tender of.....177, 179
strict performance required..... 177
immaterial variations..... 178
mistake in..... 178
time for..... 177
where creditor joins after day fixed for..... 181
strict performance waived..... 181
breach by debtor, effect of..... 182
creditor may prove claim in bankruptcy..... 182
notice by creditor of election unnecessary..... 182
avoidance of composition bars action against surety..... 182
composition avoidable at election of creditors..... 182
right to avoidance upon a breach is several..... 182
may be as to one creditor..... 182
when default as to one creditor not available to another 182 n.
other creditors may elect to stand on agreement notwithstanding a breach as to one..... 182
in what a breach may consist..... 182
arising from death of proposed surety..... 177
by transfer by debtor..... 182
by allowing property to be levied upon..... 182
arising from a failure to realize a certain sum from the property assigned..... 182
by a refusal of trustee to account..... 182
by failing to pay installment..... 177
return of partial payment upon a breach..... 182
remedy upon a breach..... 182
effect of a default..... 177
breach by creditor.....181, 183
remedy of debtor where creditor transfers note after signing 183
by failure to designate a trustee..... 183
debtor need only make a tender where breach is by creditor 183
remedy of creditors on breach by one..... 183
what amounts to a waiver of breach..... 181
giving additional time..... 181
by objecting to tender upon another ground..... 181
no waiver without knowledge of facts..... 181
after a waiver, creditor may take advantage of subsequent default 181

PERFORMANCE—Continued. Section
rights based upon breach after waiver of default..... 181
creditor in default cannot require a tender, when..... 181
of compromise necessary to be valid..... 77
by executing new agreement..... 77
of compromise agreement.....94, 95
time for..... 95
condition as to time waived, when..... 95
where partial performance is sufficient..... 94
by one party deprives the other of right to withdraw..... 94
effect of breach of compromise agreement..... 94
upon breach remedy is upon the new agreement..... 94
the willing party upon a refusal to perform may rescind..... 94
partial performance deprives the other of right to withdraw, when 94
remedy upon default by failure to deliver a part of property... 96
when part payment a payment *pro tanto* on original demand... 96
upon default the original cause is revived, when..... 96
remedy upon default when original rights are to remain unimpaired 96
reserving a right upon default to recover residue of demand.... 95
stipulation for recovery of residue upon default a stipulation for a penalty, when..... 96
breach of, by refusal of third person to accept draft..... 65
must be alleged and proven..... 94
effect of performance after discovery of fraud..... 117
of part performance before discovery of fraud..... 117

PERSONAL INJURIES.
damages from, discharged by a. & s..... 28

PERSONAL REPRESENTATIVES. See Executors and Administrators.
of debtor takes residue after paying composition..... 192
rights of creditors pass to..... 192
concluded by compromise, when..... 93
a. & s. with injured person binding on his.....28, 34
of infant may rescind..... 150
may avoid contract for duress..... 143
may avoid contract for fraud on decedent, when..... 123

PHYSICIANS.
compromise effected by..... 137

PLACE.
payment at a different place, when a consideration..... 60

PLEADING.
a compromise agreement..... 107
waiver of performance of compromise agreement..... 107

PLEADING—Continued. Section
accord and satisfaction and a compromise....106–113
a. & s. or compromise must be pleaded....91, 106
a. & s. or compromise a plea in bar.... 106
an affirmative plea.... 106
allegations necessary.... 107
allegation of performance necessary....94, 107
a. & s. by way of satisfaction.... 107
acceptance in satisfaction.... 107
must allege that money was paid in satisfaction....25 n.
that third party was authorized to accept payment.... 108
when payment was by joint debtor.... 108
when payment was by stranger.... 108
time of performance of an a. & s.... 108
tender of performance.... 107
time when pleaded.... 107
after action brought....107, 109
plea *puis darrein continuance*.... 107
by supplemental answer.... 109
compromise of action.... 89
a. & s. of instrument under seal.... 108
a. & s. with general issue.... 106
when given in evidence under the general issue.... 106
when given in evidence under plea of *non assumpsit*.... 106
cannot be given in evidence under a plea of payment.... 106
effect of a plea of a. & s. or compromise.... 106
demurrer lies as in other cases.... 110
motion to strike out plea of accord.... 110
plea of a. & s. must be met by reply, when.... 110
a rescission of a compromise.... 111
reply to avoid an a. & s. or compromise.... 111
facts constituting fraud must be alleged.... 111
intent to defraud.... 111
belief in truth of fraudulent statements.... 111
offer or tender in pleading.... 120
allegations to avoid contract for duress.... 143
cannot plead *non est factum* to avoid deed obtained by duress 143
a release.... 112
a plea in bar.... 112
a plea in confession and avoidance.... 112
facts alleged.... 112
that release is under seal unnecessary....71, 112
terms should be set out.... 112
in assumpsit, case, debt.... 112
pleaded specially, when.... 112

PLEADING—Continued. Section
where limited to a particular claim ... 113
consideration for ... 112
that plaintiff released defendant a conclusion ... 112
puis darrein continuance ... 112
form of plea of release ... 112 n.
reply to plea of release necessary ... 113
what evidence admissible under general denial of ... 113
facts in avoidance of, must be pleaded ... 113
failure to plead, when waived ... 106 n.
a composition must be pleaded ... 208
sufficiency of plea ... 164 n.
where agreement contains an absolute release ... 208
acceptance of performance unnecessary ... 208
when performance must be alleged ... 208
alleging tender of performance ... 208
allegation of mutuality between creditors ... 208
allegation of acceptance of performance ... 164 n.
compliance with conditions ... 208
waiver of default must be alleged ... 208
setting out agreement merely ... 208
time, same as applies to a. & s. ... 208
profert in curia necessary when ... 208

PLEDGEE.
no power to compromise note pledged ... 38
not bound to accept an a. & s. ... 38
not bound to notify pledgor of offer ... 38
accepting part in money and note for balance ... 38
surrendering note and accepting another, payment presumed ... 38
liability for unauthorized settlement ... 38

PRINCIPAL.
acceptance of proceeds of unauthorized settlement by agent ... 44
tender upon a repudiation of settlement ... 44
when entitled to retain proceeds of settlement ... 44

PROBATE COURT.
statutory authority to authorize compromise ... 45
without previous agreement ... 45
when debtor is insolvent ... 45

PROCHEIN AMI.
no power to compromise ... 47

PROMISSORY NOTE. See Note.

PROOF. See Evidence.

PUBLIC POLICY. Section
contract against, no consideration for an a. & s.....14, 23
compromise of claims against, not binding..... 86
compounding a felony against..... 153
secret preference void on ground of..... 203
assignment of future salary of public official against..... 189
rule excluding offer of compromise as evidence founded on..... 99

Q

QUARRELS.
when discharged by a. & s..... 30
includes what..... 30
synonymous with what..... 30

QUI TAM ACTIONS.
accepting costs and discontinuing not unlawful..... 153

R

REAL PROPERTY.
transfer by one partner of firm..... 175

RECOUPMENT.
discharged by composition..... 198

RECEIPT.
defined 37
in full, effect of.....37, 69
statutes regulating effect of, in Alabama, Tennessee, Texas..... 70
when not conclusive..... 37
prima facie evidence of demand settled..... 37
in full of all demands restricted to what..... 37
giving a receipt in full and protesting..... 16
construction of.....36, 37
including contracts, how construed..... 37
parol evidence admissible to identify demand..... 37
when not varied by parol..... 29

RECEIVER.
cannot effect a compromise when..... 49

RELEASE.
one method of discharging a debt..... 71
distinguished from a. & s.....1, 71
consideration not necessary to validity..... 1
imports a consideration..... 14
effect of accepting a less sum and giving a..... 71

RELEASE—Continued. Section
when transaction may be an a. & s. 71
imports a seal 71
surrender of security operates as a 67
of joint debtor, effect 40 n.
necessary to discharge joint debtor in New York 41
by composition, when *in præsenti* 167 n.
construction of 36
when general 30
general words following a particular recital 36
rule of construction same as applies to agreements of compromise 36
operation determined by construction 29
taken most strongly against releasor 29
when construed as covenant not to sue 42
demands discharged by 29–35
general, discharges what 34
unknown demands 30
subject previously considered does not limit 30
effect on future liability 32
demands *in præsenti* 31
rents not due, money not due 31
rights which are to take effect *in futuro* discharged 31
writ of error not included when 30
of suits includes what 30
of demands more beneficial than what 30
extrinsic evidence to show particular demand not discharged 29
equity may set aside 201
avoided for fraud or duress 30
when unavoided is only competent evidence of agreement 29
pleading a 112
failure to plead waived, when 106 n.
need not be alleged to be under seal 112
when proven under general issue 112
form of plea of 112 n.

RENT.
not due not discharged by release 31

RES JUDICATA.
judgment on question of fraud on one of two notes conclusive as to the other 202

RESCISSION.
of accord and satisfaction 12
restores debt 12
of an a. & s. on a Sunday 12

RESCISSION—Continued. Section
by parol of contract under seal when not within statute of frauds... 25
recovery of residue upon default under an agreement no..... 95
by agreement..... 125
when implied..... 125
election of remedies upon discovery of ground for..... 117
election cannot be retracted..... 117
ignorance no ground for..... 151
on ground of surprise..... 141
of compromise for fraud.....133–140
defined at civil law, at common law..... 133
fraud classified in equity..... 134
unnecessary at common law, when..... 117
rule in Federal courts..... 117
of physician..... 137
setting up sham claim..... 136
misrepresentation by debtor of his finances..... 136
misrepresentation of the law..... 135
concealment and suppression of facts..... 138
matters of opinion..... 135
misrepresentation as to value..... 135
suppression of facts where no duty exists to speak..... 138
compromise of fraud bars action to, for same fraud..... 139
party defrauded not liable for interest..... 123
after action brought to enforce new agreement.....117, 118
when to be made..... 118
right to, how lost..... 118
by laches..... 118
by rights of third parties intervening..... 118
evidence 140
of composition for fraud..... 201
for giving secret preference..... 201
misrepresentation of debtor as to his affairs..... 201
by agent..... 201
belief of agent immaterial..... 201
misrepresentation by partner..... 201
when one creditor makes misrepresentations to another..... 201
by one creditor, all may consider contract at an end..... 201
creditor must have believed statement to be true..... 201
for failure of consideration..... 155
for want of consideration..... 155
for mistake of law.....126, 127, 128
mistake as to title..... 128
mistake of legal rights..... 129
for mistake of fact..... 130

RESCISSION—Continued. Section
mistake of fact defined ... 130
ignorance of foreign law an ignorance of fact ... 130
for mutual mistake ... 132
must be of a material fact ... 131
diligence required to discover facts ... 131
relief denied when party is negligent ... 131
mere inability to read insufficient to avoid compromise ... 131
signing release without reading is negligence ... 131
of composition for mistake of fact where third party is affected ... 201
upon ground of insanity ... 119 n., 151
by guardian of insane person ... 151
by personal representatives ... 151
upon regaining reason ... 151
tender required upon ... 151
for undue influence ... 149
distinguished from duress ... 149
by persons *in vinculis* ... 152
on ground of infancy ... 150
tender required ... 119
for duress ... 142–148
duress defined ... 142
distinction between the Roman, civil and common law ... 142
of master or servant ... 143
of brother-in-law ... 143 n.
of father or son ... 143
to a stranger ... 143
by whom exercised ... 144
by stranger ... 143
by surety ... 143
by surety when duress is to principal ... 143
per minas ... 147
for duress of goods ... 146
effect of performance of contract obtained by ... 143
when tender unnecessary ... 143
recovery of property without previous demand ... 143
when creditor to a composition may recover residue without ... 206
notice of, required ... 124
tender required upon a rescission of compromise ... 119
before suit to rescind ... 120
when unnecessary ... 12
where release was represented to be something else ... 119
where release covers matters not intended ... 119
when party is entitled to retain the thing received ... 121
where the judgment will give the party all he is entitled to 121

RESCISSION—Continued. Section
where thing received is of no value 121
when thing received is a release, note 121
where consideration moved to third party 111
pleading a tender 111

RULES OF COURT.
requiring stipulations respecting proceedings does not apply to compromises 91

S

SALARY.
acceptance of less than amount fixed by law no a. & s. 28
where law fixing amount is of doubtful construction 57

SECRET PREFERENCE.
frauduient 202–207
amount or kind immaterial 204
what is a 203
bargain for earlier payment of composition money 204
agreement by third party to take composition notes at a larger sum 204
forcing debtor to assume debt of another 204
any secret security a 204
partner securing individual debt when firm compounds 204
putting debt down for less and forgiving the balance no 207
paid by agent or attorney 206
furnished by third person 202
by third person without debtor's knowledge 202
releases surety 205
guilty creditor loses all 207
composition must be fully executed to affect right of creditor 207
creditor giving, cannot recover original debt or composition money 203
non-negotiable security subject to defense of 202
ground for avoiding composition 202
avoidance by innocent creditor 206
guilty creditor cannot 207
creditor receiving cannot claim a default 181
contract given for, void 202
may be recovered by debtor 203
by personal representative 203
by assignee 203
by near relative paying 203
no recovery by stranger 203
no recovery after subsequent voluntary payment of 203
after paying to *bona fide* holder of note 203

SECRET PREFERENCE—Continued. Section
surety paying, cannot recover of debtor..... 203
composition money cannot be recovered back..... 203

SECURITY.
discharged by a composition..... 194
reserving right to hold..... 195
reservation of, must clearly appear..... 194
burden upon favored creditor to show reservation..... 194
given for a secret preference void..... 202

SEDUCTION.
damages arising from, discharged by a. & s..... 28

SET-OFF.
extinguished by composition, when..... 92
by settlement, when..... 32
controversy over, renders claim unliquidated..... 87
of mutual demands an a. & s..... 72

SETTLEMENT.
defined 78
includes compromise..... 78

SLANDER.
a. & s. a good plea in action for..... 28
writing letter of exculpation an a. & s. or compromise of..... 88

SOUTH DAKOTA.
statute regulating effect of part performance..... 70

SPECIFIC PERFORMANCE.
accord cannot be..... 7
of compromise agreement..... 97
made by executors or administrator..... 46
agreement must be final and complete..... 97
of family agreements..... 97
where a minor is a party to..... 97
denied where contract is against parental authority..... 97
in case of fraud or mistake..... 97
necessity for a tender before suit for..... 98
tender necessary to bar right to..... 98
of composition agreement..... 184
by debtor..... 183
by creditor..... 182
agreement must be fully executed..... 184
must be free from fraud..... 184
not enforced when void under statute of frauds..... 184

SPLITTING CAUSES. Section
in general 35
demands based on fraud cannot be divided 35

STATED ACCOUNT.
distinguished from compromise 78
when recovery may be had as upon 17

STATUTE OF FRAUDS.
substitute oral agreement must not be within, when 25
parol modification of contract under seal not within, when 25
a. & s. concerning realty must not be within 27
meaning of word surrender "by operation of law" 27
compromise within, must be in writing 91
when parol agreement enforceable notwithstanding 97
compromise valid when dispute is as to whether contract is within 86
when composition must be in writing 159
undertaking by surety must be in writing 159
verbal agreement by third party to take assignment of claims not within 159

STATUTE OF LIMITATIONS.
debt barred by, cannot be paid by assignee 188
bars right to sue for damages for fraud, when 118
commences to run upon composition agreement, when 182
upon default of, law implies a new promise to pay old cause 182
offer of compromise will not stop the running of 80

STIPULATIONS.
settling on action, how enforced 89
inserted in composition agreements 166
providing for investigation of claims by committee 166
for examination by trustee 188
as to who shall sign 166, 168
must be clear 166
requiring certain creditors to join 172
not complied with by separate settlement 172
limiting time when creditors may join 173
providing for forfeiture of debts of creditors not joining 173
requiring debtor to deal with creditors 166
reserving right to retain security 166
regulating when deed shall take effect 166
for discharge of debtor need not be in express terms 167
for execution of release subsequently, surplusage 167
construction of 174
meaning of term "the creditors" 174
"we who have subscribed" 174

STIPULATIONS—Continued. Section
"their several creditors" ... 174
"other creditors" ... 174

STRANGER.
compromise made by ... 50
ratification by debtor ... 50, 51
effect of debtor pleading compromise ... 51
intent of, to discharge the obligation ... 52
burden upon debtor to show intent ... 52
repudiation by creditor of payment by ... 52
acceptance in satisfaction necessary ... 52
cannot reclaim payment ... 52
discharge by, available to whom ... 52
acting under belief that be is bound ... 53
liability of debtor to ... 53
agreement to reimburse implied, when ... 53
reimbursement depends on express or implied contract ... 53
subsequent promise to pay ... 53
consideration for subsequent promise ... 53
paying, entitled to subrogation, when ... 53
cannot recover as assignee ... 53
discharge of debt by, under La. Code ... 52
administrator or guardian, not considered ... 53
brother-in-law a ... 203
as a party to composition ... 170
may recover composition money from debtor when ... 170
paying secret preference cannot recover ... 203
effect of paying secret preference by, without debtor's knowledge ... 206

SUBJECT MATTER.
accord and satisfaction of damages ... 24
breach of covenant to repair house ... 24
right of action *ex contractu* ... 24
simple contracts ... 24
contracts under seal ... 24
claims without foundation ... 23
unenforceable demands ... 23
must not be illegal ... 23
must be existing demands ... 23
right of action *ex delicto* ... 28
deed discharged only by instrument under seal ... 24
a. & s. of right of action concerning realty ... 27
of leasehold estates for more than one year ... 25
actions discharged by a. & s. ... 26, 30

SUBJECT MATTER—Continued. Section
action of debt for breach of covenant discharged by a. & s..... 24
bond with penalty discharged by a. & s. before or after default....24, 25
sealed instrument without certain advantages discharged by parol a. & s. before default..... 25
may be modified by parol a. & s. after breach..... 25
must not violate statute of frauds..... 25
writ of error may be, of a. & s..... 26
action of debt on guardian's bond discharged by a. & s..... 24
of compromise..... 79
must be uncertain..... 79
of composition must be liquidated demands..... 157

SUBSEQUENT PROMISE.
to pay residue of debt discharged by a. & s..... 10
without consideration, reason of rule..... 10
under seal..... 10
to pay residue of debt discharged by composition..... 185
agreement under seal..... 185
relinquishing a security no consideration.....185 n.
consideration necessary to uphold promise..... 204
not fraudulent..... 204
to pay residue where discharge is not conventional..... 10

SUNDAY.
contracts made on..... 11
illegal not void..... 11
statutes regulating contracts made on..... 11
rescission on..... 12

SURETY.
discharge of principal by a. & s. discharges..... 9
reserving right against..... 9
abandonment of appeal by, consideration for release of..... 88
acceptance of dividends no defense to liability of..... 56
amount of contribution from co-surety..... 38
liability of, released by express contract.....32, 192
defense by, of duress of principal..... 143
for composition..... 200
composition must be in writing to bind.....159, 200
not bound when all creditors do not sign.....172, 173, 200
condition as to signing cannot be waived by creditors and hold.. 200
surety may waive condition..... 200
not a creditor under the composition..... 200
may take security on all of debtor's property..... 200
entitled to return of money on avoidance of composition by creditor 200

SURETY—Continued. Section
cannot compel creditor to take advantage of default..... 200
not bound where guaranty is obtained by fraud of creditor..... 200
released by avoidance of composition..... 182
risk of default of debtor upon..... 177
not entitled to return of partial payment upon a breach of composition 182
where surety signs conditional upon all joining..... 182
fraudulent preference releases..... 205
may recover composition money for fraudulent preference..... 205
paying unlawful preference cannot recover of debtor..... 203
estoppel invoked in favor of surety..... 162
effect of composition with principal on liability of..... 194
released by construction only..... 194
not released until required number sign..... 194
right against, reserved..... 195
reservation must be part of common agreement..... 195
reservation of right against, not always effective..... 195
intent to reserve right against, must be clear..... 195
debtor consents to remain bound to, where creditor reserves right against..... 195
effect of compounding with co-surety..... 192
debtor not released by surety compounding his liability..... 192

SURPRISE.
defined 141
as ground for rescission..... 141

T

TENDER.
upon an accord no bar..... 5
rule in Mississippi..... 5
may be made upon composition..... 179
necessary to bar right to specific performance..... 98
upon rescission necessary when.....117, 119
when unnecessary..... 12
where the thing is of no value..... 121
where thing received is a release or note..... 121
where party is entitled to retain the thing received..... 121
when the judgment will give the party all he is entitled to 121
formal tender excused, when..... 180
manner of making..... 122
actual offer necessary..... 122
actual production required.....122, 179

TENDER—Continued. Section
strict tender upon a rescission waived, when..... 119
waiver of formalities.....122, 180
of production of the money..... 179
acts amounting to a waiver of formalities..... 180
must be unconditional.....122, 179
condition must be clear..... 18
condition may be implied..... 18
what does not amount to a condition..... 18
what amounts to a condition..... 19
excluding inference that more is due no..... 18
tender and condition cannot be dissevered..... 17
whether conditional not necessarily a question of law..... 20
effect of acceptance of conditional tender of check..... 22
protest unavailing upon acceptance of conditional tender, when 16
whether acceptance was subject to condition a question for the jury..... 17
acceptance of condition may be implied..... 17
acceptance without words of assent..... 17
rule as to acceptance of condition same at law and equity.. 17
a willingness to make a tender insufficient..... 179
depositing money in bank no tender..... 179
debtor must be ready and able..... 179
amount to be tendered upon a rescission..... 123
exact amount must be tendered, when..... 179
time when made..... 179
before suit to rescind..... 120
before suit for specific performance..... 98
place of making a.....124, 179
upon domestic contract, by party residing abroad..... 124
where creditor resides abroad..... 179
to whom made.....123, 179
agent or attorney, when good..... 179
workman or servant, not good..... 179
by whom made..... 123
principal upon repudiation of unauthorized settlement..... 44
money must be legal tender..... 179
cash instead of note..... 179
demands discharged by acceptance of conditional tender..... 16
acceptance of, an a. & s., when..... 16
compromise arising from acceptance of conditional tender..... 81

TENNESSEE.
statute regulating effect of receipts and agreements..... 70

TIME. Section
when an a. & s. may be made 11
when of the essence of the contract ..... 95 n. 1
unnecessary to prove execution of a. & s. at time alleged 115
when creditors may join in composition 173
creditors may join in composition before distribution of assets, when 173
creditors coming in after passing of a dividend takes what 173
strict performance of composition at, required 177
for performance commences to run, when 177
when payment is to be made within a reasonable time 177

TEXAS.
statute regulating effect of receipts and agreements 70

TORT.
damages arising from, may be settled at any time 11

TRESPASS.
damages arising from, discharged by a. & s. 28

TRUSTEE. See Assignee.
trust must be accepted by 187
taking possession of property without executing deed 165
failing to account a breach of composition agreement 182
may compromise a debt due the estate 49
may avoid compromise when 123
required to pass upon claim, when 188

U

UNILATERAL CONTRACTS.
with creditor unenforceable 163
with debtor unenforceable 163

USURY.
compromise of contracts tainted with 154
assignee cannot pay debt tainted with 188
debtor by deed may direct assignee to pay debt tainted with 188
abatement of part of claim for, no a. & s. ..... 55 n.

W

WASTE.
damages from, discharged by an a. & s. 28

WILL.
to uphold settlement, reasonable ground for contest required ..... 86 n.
mere threat to contest not enough 90

WILL—Continued. Section
payment of extra sum to forbear contest..... 90
compromise by devisee no bar to claim as heir..... 90

WISCONSIN.
unnecessary to plead matter in avoidance of compromise in..... 111

WRIT OF ERROR.
not discharged by general release..... 30
discharged by release under name of action, when..... 30
may be subject matter of a. & s..... 26
when joint tort feasor cannot release..... 40
pleading a. & s. in bar of..... 109

WRONGFUL DEATH.
damages arising from, discharged by a. & s..... 28

[END OF VOLUME]