HOUSE OF LORDS

Date: 16 May 1884

Between:

JOHN WESTON FOAKES	**APPELLANT**
- v -	
JULIA BEER	**RESPONDENT**

The House took time for consideration.

May 16.

EARL OF SELBORNE L.C.:-

My Lords, upon the construction of the agreement of the 21st of December 1876, I cannot differ from the conclusion in which both the Courts below were agreed. If the operative part could properly be controlled by the recitals, I think there would be much reason to say that the only thing contemplated by the recitals was giving time for payment, without any relinquishment, on the part of the judgment creditor, of any portion of the amount recoverable (whether for principal or for interest) under the judgment. But the agreement of the judgment creditor, which follows the recitals, is that she "will not take any proceedings whatever on the judgment," if a certain condition is fulfilled. What is that condition? Payment of the sum of £150 in every half year, "until the whole of the said sum of £2090 19 *s.* " (the aggregate amount of the principal debt and costs, for which judgment had been entered) "shall have been fully paid and satisfied." A particular "sum" is here mentioned, which does not include the interest then due, or future interest. Whatever was meant to be payable at all, under this agreement, was clearly to be payable by half-yearly instalments of £150 each; any other construction must necessarily make the conditional promise nugatory. But to say that the half-yearly payments were to continue till the whole sum of £2090 19 *s.* , "and interest thereon," should have been fully paid and satisfied, would be to introduce very important words into the agreement, which are not there, and of which I cannot say that they are necessarily implied. Although, therefore, I may (as indeed I do) very much doubt whether the effect of the agreement, as a conditional waiver of the interest to which she was by law entitled under the judgment, was really present to the mind of the judgment creditor, still I cannot deny that it might have that effect, if capable of being legally enforced.

But the question remains, whether the agreement is capable of being legally enforced. Not being under seal, it cannot be legally enforced against the respondent, unless she received consideration for it from the appellant, or unless, though without consideration, it operates by way of accord and satisfaction, so as to extinguish the claim for interest. What is the consideration? On the face of the agreement none is expressed, except a present payment of £500, on account and in part of the larger debt then due and payable by law under the judgment. The appellant did not contract to pay the future instalments of £150 each, at the times therein mentioned; much less did he give any new security, in the shape of negotiable paper, or in any other form. The promise de futuro was only that

of the respondent, that if the half-yearly payments of £150 each were regularly paid, she would "take no proceedings whatever on the judgment." No doubt if the appellant had been under no antecedent obligation to pay the whole debt, his fulfilment of the condition might have imported some consideration on his part for that promise. But he was under that antecedent obligation; and payment at those deferred dates, by the forbearance and indulgence of the creditor, of the residue of the principal debt and costs, could not (in my opinion) be a consideration for the relinquishment of interest and discharge of the judgment, unless the payment of the £500, at the time of signing the agreement, was such a consideration. As to accord and satisfaction, in point of fact there could be no complete satisfaction, so long as any future instalment remained payable; and I do not see how any mere payments on account could operate in law as a satisfaction ad interim, conditionally upon other payments being afterwards duly made, unless there was a consideration sufficient to support the agreement while still unexecuted. Nor was anything, in fact, done by the respondent in this case, on the receipt of the last payment, which could be tantamount to an acquittance, if the agreement did not previously bind her.

The question, therefore, is nakedly raised by this appeal, whether your Lordships are now prepared, not only to overrule, as contrary to law, the doctrine stated by Sir Edward Coke to have been laid down by all the judges of the Common Pleas in Pinnel's Case(1) in 1602, and repeated in his note to Littleton, sect. 344(2), but to treat a prospective agreement, not under seal, for satisfaction of a debt, by a series of payments on account to a total amount less than the whole debt, as binding in law, provided those payments are regularly made; the case not being one of a composition with a common debtor, agreed to, inter se, by several creditors. I prefer so to state the question instead of treating it (as it was put at the Bar) as depending on the authority of the case of Cumber v. Wane(3), decided in 1718. It may well be that distinctions, which in later cases have been held sufficient to exclude the application of that doctrine, existed and were improperly disregarded in Cumber v. Wane(3); and yet that the doctrine itself may be law, rightly recognised in Cumber v. Wane(3), and not really contradicted by any later authorities. And this appears to me to be the true state of the case. The doctrine itself, as laid down by Sir Edward Coke, may have been criticised, as questionable in principle, by some persons whose opinions are entitled to respect, but it has never been judicially overruled; on the contrary I think it has always, since the sixteenth century, been accepted as law. If so, I cannot think that your Lordships would do right, if you were now to reverse, as erroneous, a judgment of the Court of Appeal, proceeding upon a doctrine which has been accepted as part of the law of England for 280 years.

The doctrine, as stated in Pinnel's Case(1), is "that payment of a lesser sum on the day" (it would of course be the same after the day), "in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the Judges, that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum." As stated in Coke Littleton, 212 (b), it is, "where the condition is for payment of £20, the obligor or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater;" adding (what is beyond controversy), that an acquittance under seal, in full

(1) 5 Rep. 117 a.
(2) Co. Litt. 212 b.
(3) 1 Sm. L. C. 8th ed. 357.

satisfaction of the whole, would (under like circumstances) be valid and binding.

The distinction between the effect of a deed under seal, and that of an agreement by parol, or by writing not under seal, may seem arbitrary, but it is established in our law; nor is it really unreasonable or practically inconvenient that the law should require particular solemnities to give to a gratuitous contract the force of a binding obligation. If the question be (as, in the actual state of the law, I think it is), whether consideration is, or is not, given in a case of this kind, by the debtor who pays down part of the debt presently due from him, for a promise by the creditor to relinquish, after certain further payments on account, the residue of the debt, I cannot say that I think consideration is given, in the sense in which I have always understood that word as used in our law. It might be (and indeed I think it would be) an improvement in our law, if a release or acquittance of the whole debt, on payment of any sum which the creditor might be content to receive by way of accord and satisfaction (though less than the whole), were held to be, generally, binding, though not under seal; nor should I be unwilling to see equal force given to a prospective agreement, like the present, in writing though not under seal; but I think it impossible, without refinements which practically alter the sense of the word, to treat such a release or acquittance as supported by any new consideration proceeding from the debtor. All the authorities subsequent to Cumber v. Wane[(1)], which were relied upon by the appellant at your Lordships' Bar (such as Sibree v. Tripp[(2)], Curlewis v. Clark[(3)], and Goddard v. O'Brien[(4)]) have proceeded upon the distinction, that, by giving negotiable paper or otherwise, there had been some new consideration for a new agreement, distinct from mere money payments in or towards discharge of the original liability. I think it unnecessary to go through those cases, or to examine the particular grounds on which each of them was decided. There are no such facts in the case now before your Lordships. What is called "any benefit, or even any legal possibility of benefit," in Mr. Smith's notes to Cumber v. Wane[(1)], is not

(1) 1 Sm. L. C. 8th ed. 366.
(2) 15 M. & W. 23.
(3) 3 Ex. 375.
(4) 9 Q. B. D. 37.

(as I conceive) that sort of benefit which a creditor may derive from getting payment of part of the money due to him from a debtor who might otherwise keep him at arm's length, or possibly become insolvent, but is some independent benefit, actual or contingent, of a kind which might in law be a good and valuable consideration far any other sort of agreement not under seal.

My conclusion is, that the order appealed from should be affirmed, and the appeal dismissed, with costs, and I so move your Lordships.

LORD BLACKBURN :-

My Lords, the first question raised is as to what was the true construction of the memorandum of agreement made on the 21st of December 1876. What was it that the parties by that writing agreed to?

The appellants contend that they meant that on payment down of £500, and payment within a month after the 1st day of July and the 1st day of January in each ensuing year of £150, until the sum of £2090 19 *s.* was paid, the judgment for that sum and interest should be satisfied, for an agreement to take no proceedings on the judgment is equivalent to treating it as satisfied. This construction of the memorandum requires that after the tenth payment of £150 there should be a further payment of £90 19 *s.* made within the next six months. This is the construction which all three Courts below have put upon the memorandum.

The respondent contends that the true construction of the memorandum was that time was to be given on those conditions for five years, the judgment being on default of any one payment enforceable for whatever was still unpaid, with interest from the date the judgment was signed, but that the interest was not intended to be forgiven at all.

If this is the true construction of the agreement the judgment appealed against is right and should be affirmed, whether the reason on which the Court of Appeal founded its judgment was right or not. I am, however, of opinion that the Courts below, who on this point were unanimous, put the true construction on the memorandum. I do not think the question free from difficulty.

It would have been easy to have expressed, in unmistakeable words, that on payment down of £500, and punctual payment at the rate of £300 a year till £2090 19 *s.* was paid, the judgment should not be enforced either for principal or interest; or language might have been used which should equally clearly have expressed that, though time was to be given, interest was to be paid in addition to the instalments. The words actually used are such that I think it is quite possible that the two parties put a different construction on the words at the time; but I think the words "till the said sum of £2090 19 *s.* shall have been fully paid and satisfied" cannot be construed as meaning "till that sum, with interest from the day judgment was signed, shall have been fully paid and satisfied," nor can the promise "not to take any proceedings whatever on the judgment" be cut down to meaning any proceedings except those necessary to enforce payment of interest.

I think, therefore, that it is necessary to consider the ground on which the Court of Appeal did base their judgment, and to say whether the agreement can be enforced. I construe it as accepting and taking £500 in satisfaction of the whole £2090 19 *s.* , subject to the condition that unless the balance of the principal debt was paid by the instalments, the whole might be enforced with interest. If, instead of £500 in money, it had been a horse valued at £500, or a promissory note for £500, the authorities are that it would have been a good satisfaction, but it is said to be otherwise as it was money.

This is a question, I think, of difficulty.

In Coke, Littleton 212 b, Lord Coke says: "where the condition is for payment of £20, the obligor or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because *it is apparent* that a lesser sum of money *cannot* be a satisfaction of a greater. … If the obligor or feoffor pay a lesser sum either before the day or at another place than is limited by the condition, and the obligee or feoffee receiveth it, this is a good satisfaction." For this he cites Pinnel's Case[(1)].That was an action on a bond for £16, conditioned for the payment of £8 10 *s.* on the 11th of November 1600. Plea that

(1) 5 Rep. 117 a.

defendant, at plaintiff's request, before the said day, to wit, on the 1st of October, paid to the plaintiff £5 2 *s.* 2 *d.* , which the plaintiff accepted in full satisfaction of the £8 10 *s.* The plaintiff had judgment for the insufficient pleading. But though this was so, Lord Coke reports that it was resolved by the whole Court of Common Pleas "that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to 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, & c., in satisfaction is good, for it shall be intended that a horse, hawk, or robe, & c., might be more beneficial to the plaintiff than the money, in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction. But when the whole sum is due,

by no intendment the acceptance of parcel can be a satisfaction to the plaintiff; but in the case at bar it was resolved that the payment and acceptance of parcel before the day in satisfaction of the whole would be a good satisfaction in regard of circumstance of time; for peradventure parcel of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material; so if I am bound in £20 to pay you £10 at Westminster, and you request me to pay you £5 at the day at York, and you will accept it in full satisfaction for the whole £10, it is a good satisfaction for the whole, for the expenses to pay it at York is sufficient satisfaction."

There are two things here resolved. First, that where a matter paid and accepted in satisfaction of a debt certain might by any possibility be more beneficial to the creditor than his debt, the Court will not inquire into the adequacy of the consideration. If the creditor, without any fraud, accepted it in satisfaction when it was not a sufficient satisfaction it was his own fault. And that payment before the day might be more beneficial, and consequently that the plea was in substance good, and this must have been decided in the case.

There is a second point stated to have been resolved, viz.: "That payment of a lesser sum on the day cannot be any satisfaction of the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum." This was certainly not necessary for the decision of the case; but though the resolution of the Court of Common Pleas was only a dictum, it seems to me clear that Lord Coke deliberately adopted the dictum, and the great weight of his authority makes it necessary to be cautious before saying that what he deliberately adopted as law was a mistake, and though I cannot find that in any subsequent case this dictum has been made the ground of the decision, except in Fitch v. Sutton[1],as to which I shall make some remarks later, and in Down v. Hatcher[2], as to which Parke, B. in Cooper v. Parker[3],said, "Whenever the question may arise as to whether Down v. Hatcher[2] is good law, I should have a great deal to say against it," yet there certainly are cases in which great judges have treated the dictum in Pinnel's Case[4] as good law.

For instance, in Sibree v. Tripp[5], Parke, B. says, "It is clear if the claim be a liquidated and ascertained sum, payment of part cannot be satisfaction of the whole, although it may, under certain circumstances, be evidence of a gift of the remainder." And Alderson, B. in the same case says, "It is undoubtedly true that payment of a portion of a liquidated demand, in the same manner as the whole liquidated demand which ought to be paid, is payment only in part, because it is not one bargain, but two; viz. payment of part, and an agreement without consideration to give up the residue. The Courts might very well have held the contrary, and have left the matter to the agreement of the parties, but undoubtedly the law is so settled." After such strong expressions of opinion, I doubt much whether any judge sitting in a Court of the first instance would be justified in treating the question as open. But as this hals very seldom, if at all, been the ground of the decision even in a Court of the first instance, and certainly never been the ground of a decision in the Court of Exchequer Chamber, still less in this House, I did think it open in your Lordships' House to reconsider this question. And, notwithstanding the very high authority of Lord

(1) 5 East, 230.
(2) 10 A. & E. 121.
(3) 15 C. B. 828.
(4) 5 Rep. 117 a.
(5) 15 M. & W. 33, 37.

Coke, I think it is not the fact that to accept prompt payment of a part only of a liquidated demand, can never be more beneficial than to insist on payment of the whole. And if it be not the fact, it cannot be apparent to the judges.

I will first examine the authorities. If a defendant pleaded the general issue, the plaintiff could join issue at once, and if the case was not defended get his verdict at the next assizes. But by pleading a special plea, the plaintiff was obliged to reply, and the defendant often caused the plaintiff, merely by the delay occasioned by replying, to se an assize. If the replication was one to which he could demur he made this sure. Strangely enough it seems long to have been thought that if the defendant kept within reasonable bounds neither he nor his lawyers were to blame in getting time in this way by a sham plea - that a chattel was given and accepted in satisfaction of the debt. The recognised forms were giving and accepting in satisfaction a beaver hat: Young v. Rudd(1), or a pipe of wine(2). All this is now antiquated. But whilst it continued to be the practice, the pleas founded on the first part of the resolution in Pinnel's Case(3)were very common, and that law was perfectly trite. No one far a moment supposed that a beaver hat was really given and accepted; but every one knew that the law was that if it was really given and accepted it was a good satisfaction. But special pleas founded on the other resolution in Pinnel's Case(3), on what I have ventured to call the dictum, were certainly not common. I doubt if a real defence of this sort was ever specially pleaded. When there really was a question as to whether a debt was satisfied by a payment of a smaller sum the defendant pleaded the general issue, and if it was proved to the satisfaction of the jury that a smaller sum had been paid and accepted in satisfaction of a greater, if objection was raised the jury might perhaps, as suggested by Holroyd J. in Thomas v. Heathorn(4), find that the circumstances were such that the legal effect was to be as if the whole was paid down and a portion thrown back as a god's-penny. This, however, seems to me to be an unsatisfactory and

(1) 5 Mod. 86.
(2) 3 Chit. Plead. 7th Ed. 92.
(3) 5 Rep. 117 a.
(4) 2 B. & C. 482.

artificial way of avoiding the effect of the dictum, and it could not be applied to such an agreement as that now before this House.

For whatever reason it was, I know of no case in which the question was raised whether a payment of a lesser sum could be satisfaction of a liquidated demand from Pinnel's Case(1) down to Cumber v. Wane, 5 Geo. 1(2), a period of 115 years.

In Adams v. Tapling(3) where the plea was bad for many other reasons, it is reported to have been said by the Court that: "In covenant where the damages are uncertain, and to be recovered, as in this case, a lesser thing may be done in satisfaction, and there 'accord and satisfaction' is a good plea." No doubt this was one of the cases which Parke, B. would have cited in support of his opinion that Down v. Hatcher(4) was not good law. The Court are said to have gone on to recognise the dictum in Pinnel's Case(1), or at least not to dissent from it, but it was not the ground of their decision. In every other reported case which I have seen the question arose on a demurrer to a replication to what was obviously a sham or dilatory plea.

Some doubt has been made as to what the pleadings in Cumber v. Wane(5) really were. I have obtained the record(6). The plea is that after the promises aforesaid, and before the issuing of the writ, it was agreed between the said George and Edward Cumber that he, the said George, "daret

eidem Edwardo Cumber quandm notam in script vocatam 'a promissory note' manu propria ipsius Georgii subscript pr. solucon eidem Edwardo Cumber vel ordiñi quinque librarum," fourteen days after date, in full satisfaction and exoneration of the premises and promises, which said note in writing the said George then gave to the said Edward Cumber, and the said Edward Cumber then and there received from the said George the said note in full satisfaction and discharge of the premises and promises.

The replication is that, "the said George did not give to him Edward any note in writing called a promissory note with the

(1) 5 Rep. 117 a.
(2) 1 Sm. L. C. 8th Ed. 357.
(3) 4 Mod. 88.
(4) 10 A. & E. 121.
(5) 1 Str. 426.
(6) The reference is: Queen's Bench (Plea side) Plea Roll. 5 Geo. 1, Trinity, ro. 173.

hand of him George subscribed for the payment to him Edward or his order of £5, fourteen days after date in full satisfaction and discharge of the premises and promises." To this there is a demurrer and judgment in the Common Pleas for the plaintiff "that the replication was good in law."

The reporter, oddly enough, says there was an immaterial replication. The effect of the replication is to put in issue the substance of the defence, namely, the giving in satisfaction; Young v. Rudd[1], and certainly that was not immaterial. But for some reason, I do not stop to inquire what, Pratt C.J. prefers to base the judgment affirming that of the Common Pleas on the supposed badness of the plea rather than on the sufficiency of the replication. It is impossible to doubt that the note, which it is averred in the plea was given as satisfaction, was a negotiable note. And therefore this case is in direct conflict with Sibree v. Tripp[2].

Two cases require to be carefully considered. The first is Heathcote v. Crookshanks[3]. The plea there pleaded would, I think, now be held perfectly good, see Norman v. Thompson[4];but Buller J. seems to have thought otherwise. He says, "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. In the case in which Cumber v. Wane[5] was denied to be law, Hardcastle v. Howard (26 Geo. 3, B.R.), the party actually accepted. But as the plaintiff in the present case refused to take less than the whole demand, the plea is clearly bad."

That decision goes entirely on the ground that accord without satisfaction is not a plea. I do not think it can be fairly said that Buller J. meant by saying "that is a nudum pactum, unless they had afterwards accepted it," to express an opinion that if the dividend had been accepted it would have been a good satisfaction. But he certainly expresses no opinion the other way.

In Fitch v. Sutton[6] not only did the plaintiff not accept

(1) 5 Mod. 86.
(2) 15 M. & W. 23.
(3) 2 T. R. 24.
(4) 4 Ex. 755.
(5) 1 Str. 426.

(6) 5 East, 230.

the payment of the dividend in satisfaction, but refused to accept it at all, unless the defendant promised to pay him the balance when of ability, and the defendant assented and made the promise required, so that but for the fact that other creditors were parties to the composition there could have been no defence. There was no point of pleading in that case, the whole being open under the general issue. And in Steinman v. Magnus[1] it was pretty well admitted by Lord Ellenborough that the decision in Fitch v. Sutton[2] would have been the other way, if they had understood the evidence as the reporter did. But though this misapprehension of the judges as to the facts, and the absence of any acceptance of the dividend, greatly weaken the weight of Fitch v. Sutton[2], still it remains that Lord Ellenborough, a very great judge indeed, did, however hasty or unnecessary it may have been to express such an opinion, say, "It is impossible to contend that acceptance of £17 10 *s.* is an extinguishment of a debt of £50. There must be some consideration for the relinquishment of the residue; something collateral, to shew a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is nudum pactum. But the mere promise to pay the rest when of ability put the plaintiff in no better condition than he was before. It was expressly determined in Cumber v. Wane[3] that acceptance of a security for a lesser sum cannot be pleaded in satisfaction of a similar security for a greater. And though that case was said by me in argument in Heathcote v. Crookshanks[4] to have been denied to be law, and in confirmation of that Buller J. afterwards referred to a case (stated to be that of Hardcastle v. Howard (H. 26 Geo. 3)), yet I cannot find any case of that sort, and none has been now referred to; on the contrary the decision in Cumber v. Wane[3]is directly supported by the authority of Pinnel's Case[5], which never appears to have been questioned."

I must observe that, whether Cumber v. Wane[3] was, or was not denied to be law in Hardcastle v. Howard, it certainly was denied to be law in Sibree v. Tripp[6], and that, though it is

(1) 11 East, 390.
(2) 5 East, 230.
(3) 1 Str. 426.
(4) 2 T. R. 24.
(5) 5 Rep. 117 a.
(6) 15 M. & W. 23.

quite true that Pinnel's Case[1], as far as regards the points actually raised in the case, has not only never been questioned, but is often assented to, I am not aware that in any case before Fitch v. Sutton[2], unless it be Cumber v. Wane[3], has that part of it which I venture to call the dictum ever been acted upon; and as I have pointed out, had it not been for the composition with other creditors, there could have been no defence in Fitch v. Sutton[2], whether the dictum in Pinnel's Case[1] was right or wrong.

Still this is an authority, and I have no doubt that it was on the ground of this authority and the adhesion of Bayley J. to it in Thomas v. Heathorn[4], that Barons Parke and Alderson expressed themselves as they did in the passages I have cited from Sibree v. Tripp[5]. And I think that their expressions justify Mr. John William Smith in laying it down as he does in his note to Cumber v. Wane[3], in the second edition of his "Leading Cases," that "a liquidated and undisputed money demand, of which the day of payment is passed (not founded upon a bill of exchange or promissory note), cannot even with the consent of the creditor be discharged by mere payment by the debtor of

a smaller amount in money in the same manner as he was bound to pay the whole." I am inclined to think that this was settled in a Court of the first instance. I think however that it was originally a mistake.

What principally weighs with me in thinking that Lord Coke made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so. I had persuaded myself that there was no such long-continued action on this dictum as to render it improper in this House to reconsider the question. I had written my reasons for

(1) 5 Rep. 117 a.
(2) 5 East, 230.
(3) 1 Str. 426.
(4) 2 B. & C. 477.
(5) 15 M. & W. 23.

so thinking; but as they were not satisfactory to the other noble and learned Lords who heard the case, I do not now repeat them nor persist in them.

I assent to the judgment proposed, though it is not that which I had originally thought proper.

LORD WATSON :-

My Lords, I am of opinion that the judgment of the Court of Appeal ought to be affirmed.

I regret that I have been unable to adopt that construction of the memorandum of agreement which has commended itself to your Lordships who have already spoken as well as to the judges of the Court of Appeal. It appears to me that the respondent did not intend to pass, and did not pass, from her legal claim for interest on the judgment debt due to her by the appellant. She undertakes not to take proceedings on the judgment provided the stipulated termly instalments are regularly paid, "until the whole of the said sum of £2090 19 *s.* shall have been fully paid and satisfied." But these words, the "said sum," ought, in my opinion, to be construed as referring to the sum of £2090 19 *s.* previously described as being contained in a judgment of Her Majesty's High Court of Justice, and therefore bearing interest ex lege. The whole context of the memorandum appears to me to be consistent with this view, and to point strongly to the inference that there was no agreement, or even proposal, that the respondent should make any abatement of her legal claims, or do more than give her debtor time on the conditions expressed, "to pay such judgment."

I must assume, however, that I have wrongly construed the memorandum of agreement, and that its language imports that the respondent was to abstain from taking proceedings upon the judgment, if and when instalments to the amount of £2090 19 *s.* had been duly and regularly paid. Upon that assumption, I am still of opinion that the respondent ought to prevail, on the simple ground that, in that view of the memorandum her agreement to abate part of her claim was nudum pactum, for which the appellant gave no legal consideration.

I do not think it necessary to consider whether it would still be open to this House, if so advised, to overrule the doctrine of Cumber v. Wane[(1)] and Pinnel's Case[(2)], because I am not prepared to disturb that doctrine. Nor do I think it necessary to occupy the time of the House with a detailed explanation

of the considerations which have led me to that result, seeing that I concur in the judgment of the Lord Chancellor, and also in the opinion about to be delivered by my noble and learned friend opposite (Lord FitzGerald), which I have had the advantage of reading.

LORD FITZGERALD :-

My Lords, the first question is as to the true construction of the memorandum of agreement of the 21st of December 1876, and I express my opinion on it with the greatest diffidence. My excuse for expressing any opinion upon it is that I feel rather strongly on the point. The memorandum is, it may be observed, unilateral, for Dr. Foakes by it assumes no obligation.

The first recital is that Mrs. Beer had obtained a judgment against Dr. Foakes for a sum of £2090 19 *s.* The judgment would not per se, at common law, entitle the plaintiff to interest, but the statute 1 & 2 Vict. c. 110 s. 17 provides "that every judgment debt shall carry interest at 4 per cent. from the time of entering up until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment." This right to interest is different from interest arising on contract, or which a jury may give as damages or may withhold. It is a clear statutory right, arising immediately on entering up the judgment, and continuing until the judgment debt is fully paid. The position of the parties at the date of the agreement then was that Dr. Foakes owed Mrs. Beer the principal sum of £2090 19 *s.* , recovered by a judgment which carried interest at 4 per cent., arising de die in diem as a statutory right, and then (that is, at the time of the agreement) amounting to £113 16 *s.* 2 *d.*

The agreement then contains this recital: "And whereas the said J. W. Foakes has requested the said Julia Beer te give him time in which to pay *such judgment* , which she has agreed to do on the following conditions." He does not ask for any remission

(1) 1 Sm. L. C. 8th Ed. 357.
(2) 5 Rep. 117 a.

of any portion of his obligation, he solicits only time for payment, and she agrees to give him that time and no more.

It seems to me clear and free from doubt that "such judgment" in this recital would, if there was no more to guide us, mean the judgment debt with its statutable interest at 4 per cent. The language of the recital and of the whole agreement seems to be that of Mr. Smith, the defendant's solicitor, as we find in Mackreth's evidence this statement: "The agreement was prepared by Smith and sent to me, and I approved of it on behalf of Mrs. Beer."

Returning to the language of the agreement, it is remarkable that Dr. Foakes undertakes by it no obligation whatever; he does not bind himself to pay any instalment to her or to her "nominee;" and it was not necessary that he should, for I can entertain no doubt that if what is called the "condition" for payment of the instalments had not been fulfilled, then Mrs. Beer could have enforced the whole residue of her demand for principal and the interest that accrued, by execution on the judgment. Dr. Foakes enters into no obligation to pay to her "nominee," and this seems to displace in fact the foundation of the judgment of the Divisional Court, where Williams J. is reported to have said[(1)]: "The doctrine is that an agreement to pay a less sum in satisfaction of a debt is without consideration. The English law forbids such an agreement. That is the law in its naked simplicity. But I think a very little departure from the mere agreement to pay a less sum will make the agreement good. If the creditor says, 'You owe me a large sum of money - I am willing to accede to your request for time, but you must enter into an agreement in writing, at your expense (as it would be) and you

shall pay the money to me or to any person I may name at my election,' that, I think, is enough to make this agreement not a nudum pactum." (There is no such thing in the agreement here.) And Mathew J. adds, "It is noticeable that the agreement is framed so that it casts an obligation which would not otherwise have existed. The agreement to pay the creditor's nominee renders it a document available as a security." It would seem, to me at least, that the terms of the agreement

(1) These quotations are from the printed papers before the House.

had never been properly conveyed to the minds of the judges; for in fact Dr. Foakes assumed no greater obligation than the law imposed on him in respect of the judgment.

The expressed consideration is the payment to Mrs. Beer "of the sum of £500 in part satisfaction of *the said judgment debt of* £2090 19 *s.* ," and again I should repeat here that the last words would mean the debt and the right to interest which it carried, if there is nothing subsequent to impose a different meaning. The term "satisfaction" is specially applicable to a judgment. You could not in former times plead payment simply to a scire facias on a judgment. The plea should shew satisfaction. The judgment would not be satisfied on payment of the £2090 19 *s.* but only by payment of that sum and the interest. The agreement then provides as a condition for the payment of the instalments of £150, "until the whole of the said sum of £2090 19 *s.* shall have been fully paid and *satisfied* ." The whole difficulty arises on this passage. If in place of using the word "sum" it had used "judgment" or "judgment debt," in my opinion there could have been but one construction, viz., that "judgment" or "judgment debt" meant the principal sum of £2090 19 *s.* with "interest at 4 per cent." Now, having regard to what the parties were at, why should we not read "the said sum of £2090 19 *s.* " by the light of the antecedent parts of the same agreement as meaning "the said judgment for £2090 19 *s.* ," and thus do full and complete justice, and not deprive Mrs. Beer of about £350 as justly due to her as the £2090 19 *s.* , and which, it is to me manifest, she never intended and was never asked to relinquish? There is a special recital indicating what the parties intended, viz., "time on certain conditions" but without a word as to relinquishing any part of the plaintiff's demand, and if the subsequent words are more general, we should limit and qualify them by the special language of the recital.

Dr. Foakes did not ask for any remission, he asked for time and for time alone, and we ought to assume that when his solicitor prepared and furnished the memorandum of agreement he did not intend by its language that any part of Mrs. Beer's demand was to be released. Mackreth says that in the course of the negociation "interest was never mentioned at all in reference to that agreement." She adopted the language of the memorandum, and it became hers, but was it such as to lead Dr. Foakes to understand that Mrs. Beer agreed on performance of the condition to give up her claim to interest? I think that we ought not to adopt such a conclusion.

There are many authorities for the proposition that you may limit the general words of release by the antecedent recitals, so as to effectuate that alone which was within the intention of the parties. I might refer to a number of cases, for example Thorpe v. Thorpe[1], where it is said *per Cur* : "Where there are general words only in a release they shall be taken most strongly against the releasor, but where there is a particular recital and general words follow, there the general words shall be qualified by the special words."

Applying that rule to the present case, you may limit the general words at the conclusion of the memorandum to the giving of time alone, that is to say, if "judgment debt of £2090 19 *s.* " means the sum of £2090 19 *s.* and nothing more, then that Mrs. Beer agrees to give time for payment of

the principal debt of £2090 19 *s.* by the instalments and at the times indicated, and that pending that arrangement she would not "take any proceedings whatever on the said judgment." This would give effect to every word and leave the "interest" untouched, which, if the principal is to be paid by instalments, could not well be ascertained until the time had been reached for the payment of the last instalment. There is nothing in the memorandum, it should be observed, to prevent Dr. Foakes from coming in at any time and discharging the whole principal before the instalments became payable. Upon the construction of the memorandum I am of opinion that the decision of the Court of Appeal should be affirmed.

The second question now presents itself, but with my view on the first it is not actually necessary for me to express any opinion on it, but it seems more satisfactory that I should do so. Assuming that I have fallen into error in interpreting the agreement, and that it is to be read that if Dr. Foakes should pay the actual sum of £2090 19 *s.* by instalments according to the condition

(1) 1 Ld. Raym. 235.

she would relinquish her statutable debt for interest and not issue execution on the judgment to recover it, is such an agreement nudum pactum, and therefore incapable of being enforced?

I have listened with much interest, and I may add, with no small instruction, to the judgment of my noble and learned friend Lord Blackburn. He has as usual gone to the very foundation, and I regret that I have been unable to assist him in overturning the resolution of the Court of Common Pleas as reported by Lord Coke in Pinnel's Case[(1)], or in expunging from the books the infinitesimal remains of Cumber v. Wane[(2)]. It seems to me doubtful whether the question arises which my noble and learned friend has presented, viz.: whether payment of a part of a debt ascertained by judgment can be a satisfaction of the whole? In the case before us the whole of the £2090 19 *s.* , the principal of the judgment, has been paid to the last farthing.

The interpretation put by the judges of the Courts below, and adopted by the Lord Chancellor, and my noble and learned friend Lord Blackburn, on the memorandum, seems to me to divide it in effect into two stipulations, the first being that if Dr. Foakes, should pay down £500, and the remainder of the actual sum of £2090 19 *s.* in the manner prescribed, Mrs. Beer would so accept it, and pending the payments, would take no proceeding on the judgment; and the second being that if the £2090 19 *s.* should be paid in the manner indicated, she would relinquish her claim for interest, and would not take any proceedings whatever on the judgment to enforce that interest. The question is whether there is any sufficient legal consideration for the relinquishment of the debt for interest. I am clearly of opinion that there is not.

My noble and learned friend Lord Blackburn has shewn us very clearly that the resolution in Pinnel's Case[(1)] was not necessary for the decision of that case, and that the principle on which it seems to rest does not appear to have been made the foundation of any subsequent decision of the Exchequer Chamber or of this House, and further, that some of the distinctions which have been engrafted on it, make the rule itself absurd. But it seems to me that it is not the rule which is absurd, but some of

(1) 5 Rep. 117 a.
(2) 1 Str. 426.

those distinctions, emanating from the anxiety of judges to limit the operation of a rule which they considered often worked injustice. That resolution in Pinnel's Case[1] has never been overruled. For 282 years it seems to have been adopted by our judges. During that whole period it seems to have been understood and taken to be part of our law that the payment of a part of a debt then due and payable cannot alone be the foundation of a parol satisfaction and discharge of the residue, as it brings no advantage to the creditor, and there is no consideration moving from the debtor, who has done no more than partially to perform his obligation. Though it may not have been made the subject of actual decision, yet we find that every judge in this country who has had occasion to deal with the proposition states the law to be so. And in the sister country it has always been so received, and in the case of Corporation of Drogheda v. Fairtlough[2]Lefroy C.J. thus expresses himself - I may say that his language is entitled to very considerable weight; he was a judge who had sat at the feet of Lord Kenyon, and he was the well-known reporter of the decisions of Lord Redesdale. That very learned judge thus states the law:- "There is also a failure of evidence of the consideration for the contract to remove the rule of the common law that payment of a less sum cannot be a satisfaction of a greater liquidated sum, unless there is some further advantage accompanying the payment." And in another part of his judgment he puts the proposition thus:- "The payment merely of a less sum, not being in pursuance of any contract by deed, cannot by the common law be deemed to be a satisfaction of a greater liquidated sum, but the law will allow the payment of a smaller sum to be a satisfaction of a greater liquidated sum if there be any collateral advantage, however small, to the creditor attending the transaction." The question did arise directly in that case, but the plea failed in other points, and it was, therefore, not necessary actually to decide it. I refer to it as shewing how a judge of great experience considered the law to stand.

I am not aware of any decision that controverts this position, and the text-books uniformly present it thus; that "the payment of part of a liquidated and ascertained sum is in law no

(1) 5 Rep. 117 a.
(2) 8 Ir. C. L. R. 98, 110, 114.

satisfaction of the whole." The proposition itself is but a part of a rule of our law, which affects and governs many of the daily relations of life, "Nuda pactio obligationem non parit." And, again, the law says that "nudum pactum est ubi nulla subest causa præter conventionem."

I should hesitate before coming to a decision which might be a serious inroad on that rule, but I concur with my noble and learned friend that it would have been wiser and better if the resolution in Pinnel's Case[1] had never been come to, and there had been no occasion for the long list of decisions supporting composition with a creditor on the rather artificial consideration of the mutual consent of other creditors. We find the law to have been accepted as stated for a great length of time, and I apprehend that it is not now within our province to overturn it.

The short question then is, in relation to a judgment debt payable immediately, and on which the creditor is entitled to have execution, is the payment by the debtor of a part a sufficient consideration to support a parol agreement by the judgment creditor not to take any proceedings whatever on the judgment for the residue? In my opinion it is not; and I think, therefore, that the judgment of the Court of Appeal should be affirmed.

(1) 5 Rep, 117 a.