

ORIGINAL

IN THE SUPREME COURT OF OHIO

FirstMerit Bank, N.A.,	:	Case Nos. 2013-0091 and 2013-0203
	:	(Consolidated)
Plaintiff-Appellant,	:	
	:	
v.	:	On Appeal from the
	:	Summit County Court of Appeals,
Daniel E. Inks, et al.,	:	Ninth Appellate District
	:	
Defendants-Appellees.	:	Court of Appeals
	:	Case No. 26182

NOTICE OF SUPPLEMENTAL AUTHORITY OF APPELLANT
FIRSTMERIT BANK, N.A.

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 CLERK OF COURT
 SUPREME COURT OF OHIO

Pursuant to S.Ct.Prac.R. 17.08, as well as a conversation with this Court's clerk's office on December 4, 2013, authorizing the filing of this notice today, counsel intends to rely upon the following additional authority at oral argument, attached hereto for this Court's convenience: *Case v. Barber*, (1681) T. Raym. 450 (K.B.).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 4, 2013, a true and accurate copy of this Notice of Supplemental Authority of Appellant was served upon the following by electronic mail:

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Ruling Cases.

ARRANGED, ANNOTATED, AND EDITED

BY

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WITH AMERICAN NOTES

BY

IRVING BROWNE,

FORMERLY EDITOR OF THE AMERICAN REPORTS AND
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VOL. I.

ABANDONMENT — ACTION.

STANFORD UNIVERSITY

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P R E F A C E.

It is proposed, in this Work, to collect and arrange in alphabetical order of subjects, the leading authorities of English Case Law on points of general interest, and to illustrate their application by English and American notes.

The matter under each alphabetical heading will be arranged in sections, in an order indicated at the commencement of the heading. The more important and Ruling Cases are set out at length, subject only to abridgment where the original report is unnecessarily diffuse. The less important or subordinate English cases are briefly stated in the English Notes. The American notes point out the effect of American authority upon cognate points.

Our aim is to furnish the practitioner with English Case Law in such a form that he will readily find the information he requires for ordinary purposes. The Ruling Case will inform him, or refresh his memory, as to the principles; and the Notes will show in detail how the principles have been applied or modified in other cases.

The ordinary English Digests fail in usefulness by their want of information as to the principles of the decisions, and as to the relative importance and authority of the cases contained in them. Comyns' Digest was, indeed, an

exception, and was a most valuable book in its time. But it is bewildering in arrangement, and largely encumbered with now obsolete matter.

Collections of Leading Cases are generally fragmentary, and wanting in any system of arrangement. Saunders' Reports are, however, in some measure a precedent, and a suggestive example to show that a comprehensive work on somewhat similar lines may be of great use. The object is to adapt the mass of existing authority to modern requirements.

The object of the American notes will be to point out the agreement or the disagreement of the American Case Law with the English, and to direct attention to the leading and the most recent cases in all the States, thus commending the work to the American as well as the English practitioner. This will be done concisely. The principal citations of the Ruling Cases in the American reports will be given. Reference will also be made in every instance to the most authoritative, and especially to the latest, American text-writers on the subject in question.

R. CAMPBELL.
IRVING BROWNE.

March, 1894.

No. 6. — Case v. Barber. — Rule.

Healey, 39 Vermont, 522; *Boston Rubber Co. v. Peerless Wringer Co.*, 58 Vermont, 559; *Bull v. Bull*, 43 Connecticut, 455; *Potter v. Douglass*, 44 Connecticut, 541; *Reed v. Boardman*, 20 Pickering (Mass.), 441; *Donohue v. Woodbury*, 6 Cushing (Mass.), 148; *Hilliard v. Noyes*, 58 New Hampshire, 312; *Brick v. Plymouth Co.*, 63 Iowa, 462; *Hinkle v. Railroad Co.*, 31 Minnesota, 434. In *Preston v. Grant*, *supra*, the Supreme Court of Vermont very sharply, and, as we think, correctly, defined the line of discrimination which separates this class of cases from those where the defence fails. Judge PIERPOINT, delivering the opinion of the court, says: 'To constitute an accord and satisfaction, it is necessary that the money should be offered in satisfaction of the claim, and the offer accompanied with such acts and declarations as amount to a condition that if the money is accepted, it is accepted in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that if he takes it, he takes it subject to such condition. When a tender or offer is thus made, the party to whom it is made has no alternative but to refuse it or accept it upon such condition. If he 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. The principle is too well settled in this State to require either argument or the citation of authorities to support it.' To make out the defence, the proof must be clear and unequivocal that the observance of the condition was insisted upon, and 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 upon which it was offered. The defendant here has brought his case clearly within the rule," &c.

No. 6. — CASE v. BARBER.

(K. B. 1681.)

RULE.

ACCORD by mutual promises with reciprocal rights may, although unexecuted, be good in law as satisfaction.

Cass v. Barber.

Sir T. Raymond, p. 450.

The plaintiff declares, in an *indebitatus assumpsit*, for £20 for meat, drink, washing, and lodging for the defendant's wife, provided for her at the request of the defendant, and lays it two other ways. The defendant pleads that after the making the said promise, &c., and before the exhibiting the said bill, viz, such a day, it was agreed between the plaintiff and the defendant, and one Jacob Barber, his son, that the plaintiff should deliver to the defendant divers clothes of the defendant's wife then in her custody, and that the plaintiff should accept the said Jacob, the

No. 8. — Case v. Barber.

son, for her debtor for £9, to be paid as soon as the said Jacob should receive his pay due from his Majesty, as lieutenant of the ship called the Happy Return, in full satisfaction and discharge of the premises in the declaration mentioned; and avers that the plaintiff the same time did deliver to the defendant the said clothes, and that she accepted the said Jacob, the son, her debtor for the said £9, and that the said son agreed to pay the same to the plaintiff accordingly; and that the said Jacob afterwards, and as soon as he received his pay as aforesaid, — viz., 27 April (32 Car. 2), — was ready and offered to pay the said £9, and the plaintiff refused to receive it; and that the said Jacob hath always since been, and still is, ready to pay the same, if the said plaintiff will receive it. *Et hoc paratus, &c.* The plaintiff demurs. And it was alleged by the defendant's counsel that the plea is good; for though in *Peyto's Case*, and formerly, it hath been held that an accord cannot be pleaded unless it appears to be executed (9 Co. 79, b. 3 Cro. 46, pl. 2), yet of late it hath been held that upon mutual promises an action lies, and consequently, there being equal remedy on both sides, an accord may be pleaded without execution as well as an arbitrement, and by the same reason that an arbitrement is a good plea without performance: to which the Court agreed; for the reason of the law being changed, the law is thereby changed; and anciently remedy was not given for mutual promises, which now is given; and for this reason, Mich. 18 Car. B. R., *Palmer v. Lawson*. In *indebitatus assumpsit* against an executor upon a contract made by the testator, the defendant pleads judgment in debt upon simple contract against him for the debt of the testator, and after argument resolved a good plea; because though in debt against an executor upon a simple contract the defendant may demur, yet when he admits the demand, and executors are now liable to pay such debts in action upon the case, the judgment so obtained was pleadable; so Vaughan Rep., *Dec v. Edgcomb*.

But in this case at bar judgment was given for the plaintiff for two reasons: —

1. Because it doth not appear that there is any consideration that the son should pay the £9, but only an agreement without any consideration.
2. Admit the agreement would bind, yet now by the Statute of Frauds and Perjuries, 29 Car. 2, this agreement ought to be in

writing, or else the plaintiff could have no remedy thereon; and though upon such an agreement the plaintiff need not set forth the agreement to be in writing, yet when the defendant pleads such an agreement in bar, he must plead it so as it may appear to the court that an action will lie upon it, for he shall not take away the plaintiff's present action, and not give him another upon the agreement pleaded.

AMERICAN NOTES.

An oral agreement by the maker of a note to pay before maturity, and by the holder to accept, a smaller sum in satisfaction is valid. *Schweider v. Long*, 29 Minnesota, 254; 43 Am. Rep. 202, "a case of mutual promises, one of which is the consideration of the other." So the taking of the debtor's own note for a less sum in full. See cases *ante*, p. 392.

An instance of a substitution in satisfaction may be found in *Thurber v. Sprague*, 17 Rhode Island, 634 (A. D. 1892). A father, as trustee for his minor son, had made a deposit of \$500 in a savings bank. The son, coming of age, demanded the deposit, and the father replied: "I never want to hear of this matter again. I made the change of investment supposing it was for the best, but it was not. I have made it up to you many times over. If you are not satisfied, and want the \$500, take it and go; but if you remain here, I don't want to hear of it again." The son after this remained at home and was supported by his father. *Held*, a valid accord and satisfaction.

Debt on a judgment cannot be barred at common law by an accord and satisfaction by parol. *Mitchell v. Hawley*, 4 Denio (New York), 414.

But the contrary is held in *Savage v. Everman*, 70 Penn. St. 315; 10 Am. Rep. 676, *SHAUSWOOD, J.*, observing that this doctrine is maintained by "the American authorities, without a single exception that I can find," citing *Evans v. Wells*, 22 Wendell (New York), 341; *Harden v. Campbell*, 4 Gill (Maryland), 29; *Reid v. Hibbard*, 6 Wisconsin, 175; *Jones v. Ransom*, 3 Indiana, 327; *Bank v. Groves*, 12 Howard (U. S. Sup. Ct.), 51.