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ACCORD AND SATISFACTION BY A THIRD PERSON

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A owes *B* a debt of ten dollars. C tenders to *B* ten dollars, or eight dollars, or a book, if *B* will accept such tender in satisfaction of *A's* duty to pay his debt. *B* accepts the tender. Is *A's* duty thereby discharged—so that, if *B* sues *A* on the original debt, the latter may rely upon the executed *C-B* agreement as a defense?

This problem has for centuries caused the courts considerable difficulty and has been answered in several different ways. It is the purpose of the present article to trace the historical development of those answers and to consider their relative value.

In England the question whether an accord and satisfaction, when effected between the obligee and a third person, is available as a defense in a suit by that obligee against the obligor, has had an unstable history. There is considerable authority in the early English cases to support either an affirmative or a negative answer. For an understanding of the present day decisions in the United States a brief consideration of some of the more significant historical English cases is necessary.

An early case is quoted in Fitzherbert's *Abridgement*[1] as follows: "If a stranger doth trespass to me and one of his relatives, or any other, gives anything to me for the same trespass, to which I agree, the stranger shall have advantage of that to bar me; for if I be satisfied it is not reason that I be again satisfied."[2]

Coke adds his weight to that view, saying in his *Commentaries on Littleton:* "If any stranger, in the name of the morgagor or his heir (without his consent or privity), tender the money, and the morgagee accepteth it, this is a good satisfaction, and the morgagor or his heir agreeing there-

1. Tit. "Barre" pl 166 (Hilary, 36H6).
2. See also: Hawkshaw v. Rawlings, 1 Stra. 23, 93 Eng. Rep. 360 (1716); Rigsby v. Woodward, 1 Freem. 464, 89 Eng. Rep. 347 (1678); Hawes v. Birch, 1 Brownl. & Golds. 71, 123 Eng. Rep. 672 (1615).

unto may re-enter the land; *omnis ratihabitio retro trahitur et mandati aequiparatur.* But the morgagor or his heir may disagree thereunto if he will."[3]

In spite of the clarity of these statements to the effect that the third person's satisfaction was available to the obligor, the most influential of the early cases, so far as later decisions are concerned, was to the contrary. That case was *Grymes v. Blofield*[4] in which the facts and holding were apparently these: When sued on an obligation, the defendant-obligor pleaded that a third person had surrendered a copyhold tenement to the plaintiff in satisfaction of the obligation and that the plaintiff had accepted such copyhold on those terms. A demurrer was sustained on the ground that since the third person was a mere stranger and not in privity to the obligation there was no satisfaction.[5]

This holding, as stated, can be accepted as quite in accord with the narrow concept which was given to a contract by the courts of that time and even later times. Only the parties orginally negotiating a contract were viewed as able to participate in it, or, that is, in privity. The long standing difficulty with third party beneficiaries is but another consequence of this narrow interpretation given the contract. As for accord and satisfaction, the obligee was not bound to accept a discharge tendered by a third person and, according to *Grymes v. Blofield,* as stated above, the obligor was not allowed to accept the benefit of an accord and satisfaction agreed and executed between the third person and the obligee.

The authoritative value of this case is, however, considerably weakened by the apparent inaccuracy in the date of the case in the Croke report in Cro. Eliz. and by the inconsistencies to be found in the various reports of it that are extant. Comyns' *Digest*[6] and Hughes' *Abridgment* of Croke's Reports[7] report that the holding in *Grymes v. Blofield* was as above stated but in Rolle's *Abridgment*[8] and Viner's *Abridgment*[9] the case is reported as

3. Co. LITT. 207a.
4. Cro. Eliz. 541, 78 Eng. Rep. 788 (1594).
5. ". . . for J. S. is a mere stranger and in no sort privy to the condition of the obligation; and therefore satisfaction given by him is not good." 78 Eng. Rep. at 788.
6. "So it is no plea, if the satisfaction accrues from a stranger: as, if an obligee plead, that A surrendered a copyhold to the plaintiff, which he accepted. *Per* two J. Cro. El. 541." Accord, A, 2.
7. Case 1146, p. 241 (1665).
8. "Si le condition dun obligation soit a paier £ 20 al un jour & un estranger surrender un copihold al use del obligée on satisfaction del £ 20 le quel obligée accept, ceo est un bon satisfaction & discharge del obligation. Trin. 39 Eliz. B. R. enter Grimes & Blofield." Condition F. 1. (p. 471).

holding that the satisfaction was good and the judgment for the defendant.[10] As a part of his opinion in *Jones v. Broadhurst*,[11] Justice Cresswell gave careful consideration to all the historical materials available, including a search of the original rolls, and has given as final and definite an answer as to the holding as was then, or is now, possible. Cresswell says, "It seems probable that the report in Croke, stating the judgment to have been given for the plaintiff, is correct; although no answer is suggested to the authority of the 36 H. 6 [The allusion is to the case reported by Fitzherbert, above referred to.], which seems contrary to the decision, and to have been referred to [in *Grymes v. Blofield*]. . . . Such seems to be the state of authority upon that question; and the court does not feel called upon to express any opinion upon the point, although it must be obvious that the decision in 36 H. 6, reported in Fitzherbert, is consistent with reason and justice."

The actual holding in *Grymes v. Blofield* is really quite academic, although interesting. It is but another of those instances in which the holding of the deciding judge is less influential than what subsequent judges say he held. In this instance subsequent judges have relied upon the Croke report of the case. Hence, *Grymes v. Blofield* has been repeatedly cited and quoted as holding that accord and satisfaction by a third person is not available as a defense to the obligor when sued by the obligee. It has been the basis for a considerable number of holdings both in England and in the United States.

Edgcombe v. Rodd[12] was an action for false imprisonment. Upon complaint by the prosecuting witness the plaintiff, being unable to furnish sureties, was committed to jail by the defendant magistrates for having violated the Toleration Act. That Act provided for discharge of a prisoner prior to trial if he could reasonably establish his innocence. The prosecuting witness agreed not to prosecute plaintiff under the Toleration Act in return for the plaintiff's agreement not to prosecute for false imprisonment. There-

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

10. See also: Lord Denman's remarks in Thurman v. Wild, 11 Ad. & E. 451, 113 Eng. Rep. 487 (1840); Argument of counsel in Edgcombe v. Rodd, 5 East 294, 102 Eng. Rep. 1082 (1804); Gold, *Accord and Satisfaction by a Stranger*, 19 CAN. B. REV.. 165, 175 (1941).

11. 9 C. B. 173, 137 Eng. Rep. 858 (1850).

12. 5 East 294, 102 Eng. Rep. 1082 (1804).

upon, the plaintiff's release was effected. The plaintiff then sued the defendants—the committing magistrates—for false imprisonment. The decision was in the alternative. If the agreement for the release of the plaintiff was illegal, it could provide no consideration for a satisfacion. If the agreement was legal, the consideration for the satisfaction was provided by a third person, as the court holds the prosecuting witness to be in regarding his relation to the defendants. Under the authority of *Grymes v. Blofield* the satisfaction by the third person would not serve as a defense for the defendants. Counsel for the defendants vigorously attacked the principle of *Grymes v. Blofield* but the court accepted it as the existent rule of law.

In *Benning v. Dove*[13] the defendant had agreed, in connection with the sale of certain copies of Chitty's edition of Blackstone's *Commentaries,* that no copies of this work would be sold to other purchasers for less than a stated price. But in breach of his promise, defendant did sell some copies to Butterworth, as well as to other purchasers, below the agreed price. When plaintiff threatened to sue for the breach of contract, Butterworth, by offering to return the books which he had purchased and not resold, attempted to effect a settlement of the dispute. Plantiff accepted the return of the books from Butterworth but proceeded with his suit for the injury resulting from the defendant's sale of books to the other purchasers.

The court instructed the jury that if the return of the books was assented to by plaintiff only to satisfy the injury incurred by the sale of the books to Butterworth, they would find for plaintiff, if the other prerequisites for recovery were satisfied; but if the return of the books was assented to by plaintiff in complete settlement of all injuries resulting from defendant's sales of the books to anyone, they would find for defendant. The verdict was for defendant.

In *Benning v. Dove* there is no discussion of prior decisions. However, the instructions as given allow the act of a third person to be in satisfaction of the defendant-obligor's duty to pay for the injury resulting from the sale of the books to persons other than Butterworth. No mention is made of the privity problem which concerned the courts in the earlier cases. The case itself gives no explanation of the judge's attitude toward the doctrine which had grown out of *Grymes v. Blofield.* Was he unaware of the contrary precedents? Did he believe them distinguishable? Was he refusing to follow them?

13. 5 Car. & P. 428, 172 Eng. Rep. 1039 (1833).

In *Thurman v. Wild*[14] the court was concerned with a trespass suit against an agent after the plaintiff had accepted from the principal satisfaction for the wrong. The court distinguished the case from prior authorities on the ground that the principal and the agent were co-trespassers and, hence, an accord and satisfaction by one discharged both if it were given with that intent. However, it is noteworthy that Lord Denman, in the course of his opinion, takes occasion to question the correctness of the commonly referred to holding in *Grymes v. Blofield.*

Jones v. Broadhurst[15] involved suit on a bill of exchange by the endorsee against the acceptor. The bill had been drawn payable to order by Cook and had been endorsed to plaintiff. It was alleged by way of defense that after acceptance Cook had delivered certain goods to plaintiff in satisfaction of the bill and of all damages and causes of action in respect thereto. The plaintiff contended that there was no showing that the goods were delivered or accepted in satisfaction of the claim in suit. Verdict was for the defendant below. The higher court, however, gave judgement for the plaintiff. It based its reversal primarily upon another point but, because the problem was pressed by the attorneys in their argument, took occasion to make some observations on the question of accord and satisfaction by a third person. It concluded "that the decision in the 36 H. 6 reported in Fitzherbert[16] is consistent with reason and justice." As has already been pointed out,[17] Justice Cresswell in his opinion questioned the correctness of the holding in *Grymes v. Blofield* as reported by Croke.

In *Belshaw v. Bush*[18] plaintiff sued in debt for forty pounds and defendant, Mary Ann Bush, pleaded that before the suit, plaintiff drew a bill on William Bush for thirty-three pounds, ten shillings, which was accepted by William, "and the plaintiff then took and received the said bill from the said William Bush for and on such account. . . ." The court held that this payment by William Bush "might be adopted, and has been adopted by the defendant, who relies on it in his plea; and, consequently, that it bars the action."[19] Hence, judgment was given for the defendant.

Thus, the rule of *Grymes v. Blofield* and other earlier cases, that the accord and satisfaction by a third person is not available to the obligor

14. 11 Ad. & E. 451, 113 Eng. Rep. 487 (1840).
15. 9 C. B. 172, 137 Eng. Rep. 858 (1850).
16. *Supra,* n. 1.
17. *Supra,* p. 117.
18. 11 C. B. 190, 2 J. Scott 191, 138 Eng. Rep. 444 (1851).
19. *Id.* at 207, 138 Eng. Rep. 451.

as a defense, is relieved by the principle that there may be an adoption of it by the obligor. By the doctrine of *Belshaw v. Bush,* the difficulty that the third person is not in privity to the transaction is circumvented. It remains to be seen what form this "adoption" by the obligor will take in the subsequent cases.

Against this background of English cases, which were known to the early American judges and were influential at least until the middle of the nineteenth century, let us look at the American decisions.

First, there is the group of cases which follow the doctrine of *Grymes v. Blofield* in holding that the accord and satisfaction by a third person is not available to an obligor as a defense. Almost all of the cases so holding were decided during the first half of the nineteenth century. The New York courts handed down most of these cases. In 1810, in *Clow v. Borst & Best*[20] the Supreme Court of that state considered a suit for breach of covenant in which the defendant pleaded that the plaintiff had received and accepted discharge in another action then pending against him in favor of a third person in full satisfaction of the breach of covenant in suit. The plaintiff demurred. The court quite summarily refused to allow the defense, saying, "In the case of *Grimes v. Bolfield* [*sic*] *(Gro. Eliz. 541.),* and which is cited as law by Baron *Comyns* (tit. *Accora,* A. 2), it was held not to be a good plea of accord and satisfaction to a bond, that a *stranger* had surrendered a tenement to a plaintiff in satisfaction of the debt, which he accepted; because the stranger was not privy to the bond; and a satisfaction given by him was not good. If this case be an authority, and it does not appear ever to have been questioned, the plea in the present case is bad, and judgment must be given for the plaintiff." This decision was subsequently followed several times.[21]

It should be noted that in the New York case of *Daniels & Lamont v. Hallenbeck,*[22] the plea alleged that the obligee had agreed with the obligor as to the satisfaction which was to be provided by the third person. The court held the plea bad on the ground that the consideration did not move from the obligor. That is, even though the accord was between the obligor

20. 6 Johns 37 (N. Y. 1810).
21. Atlantic Dock Co. v. City of New York, 53 N. Y. 64 (1873); Blum v. Hartman, 3 Daly 47 (N. Y. 1869); Muller v. Eno, 14 N. Y. 597 (1856); Daniels & Lamont v. Hollenbeck, 19 Wend. 408 (N. Y. 1838); Bleakley v. White, 4 Paige, Chancery Rep. 654 (N. Y. 1834).
22. 19 Wend. 408 (N. Y. 1838).

and the obligee, this did not make the third person, who provided the satisfaction, privy to the original transaction and the satisfaction was not available to the obligor as a defense.

The Court of Appeals of Missouri also expressed itself in accord with this doctrine at an early date. In *Armstrong v. School Dist. No. 3*[23] a teacher was suing the school board for breach of contract arising out of an allegedly wrongful discharge. After a first verdict was appealed and a new trial granted, the plaintiff-teacher told several of his witnesses in that trial that, if they would not require him to pay their fees, he would not litigate the matter further. To this they agreed. He did, nevertheless, bring a new suit and the school board among its defenses alleged these facts as an accord and satisfaction. On appeal of this second action the court refused to allow this defense, and said: "That the persons who settled their witness fees with the plaintiff did not sustain the relation of privy with the defendant is too manifest to admit of debate. The concern the party must have in the pending action must be the beneficial interest that springs from privity in estate. Simply because they may chance at the time to be taxpayers in the given district will not meet the requirements of the law. Such a doctrine would make every taxpayer in a municipal corporation a privy in every action, ex contractu or ex delicto, against the corporation. Neither can it be permitted that every citizen of the neighborhood who feels an interest in a law suit against his neighbor or his district, can be regarded as a privy. The law recognizes no such inter-meddling in the judicial proceedings by outside parties."[24]

The Kentucky court in *Stark's Adm'r v. Thompson's Ex'rs*[25] and the Maine court in *Brown v. Chesterville*[26] have each expressed themselves as in accord with *Grymes v. Blofield.*

Because of the antiquity of the cases in Missouri, Kentucky and Maine and the widespread repudiation of *Grymes v. Blofield* in other jurisdictions, it is submitted that they would not be followed today were the question presented to the courts of those states.[27] The modern decisions in New

23. 28 Mo. App. 169 (1887).
24. *Id.* at 182.
25. 3 T. B. Mon. 296, 19 Ky. 296 (1826).
26. 63 Me. 241 (1874).
27. The Kentucky Annotations to the RESTATEMENT OF THE LAW OF CONTRACTS, Sec. 421, cite the following cases as overthrowing the rule laid down in Stark's Adm'r v. Thompson's Ex'rs: Hardesty v. Graham 8 Ky. L. Rep. 954 (1887); Ricketts v. Hall 65 Ky. 249 (1867); Woolfolk v. McDowell, 39 Ky. 268 (1840); Bruce v. Bruce, 34 Ky. 268 (1836).

York require a fuller consideration and will be discussed subsequently in this article. Other than these four, no American jurisdiction has ever accepted the doctrine of *Grymes v. Blofield.*

Most of the American decisions accept the doctrine of *Belshaw v. Bush* and hold that an accord and satisfaction executed between the obligee and the third person is available to the obligor as a defense if it was the intent of the obligee and the third person that the obligor's duty be discharged and the transaction was with the consent of the obligor. This consent may be either an authorization prior to the transaction or a ratification subsequent to it. Because the facts in the great bulk of the cases involve a ratification based upon the obligor's reliance on the accord and satisfaction, as a defense, the doctrine of *Belshaw v. Bush* is often referred to as including only the ratification situation. However, the basis of the doctrine is broader. It includes also the situation in which the consent has been given prior to the third person transaction.

The New York courts, after consistently adhering for a time to the doctrine of *Grymes v. Blofield,* later began to hand down decisions which accepted the idea that the obligor could avail himself of the satisfaction given by a third person when sued. However, the later New York opinions have, too often, shown neither clarity nor consistency.

In *Van Etten v. Troudden*[28] the appeal raised the question whether there was sufficient evidence to sustain the jury's finding that a note by a third person had been given as collateral for the debtor's obligation rather than as satisfaction. The court held that there was sufficient evidence to sustain such finding and, by way of dictum, said with regard to accord and satisfaction: "Now if such agreement had been proved it would have operated as an extinguishment of the plaintiff's claim. The agreement would not have been technically payment, but it would have discharged the debt by way of accord and satisfaction." The court failed to give express consideration to the earlier cases that held contra. But, nonetheless, here is a holding which cannot be reconciled with the original New York rule.

In *Atlantic Dock Company v. Mayor of the City of New York*[29] the plaintiff had had a dock and a dredging machine injured in draft riots in 1863. Responsibility for protection against such injury and liability for failure to extend such protection were upon the city within which the

28. 3 Thomp. & C. 603, 1 Hun. 432 (N. Y. 1874).
29. 53 N. Y. 64 (1873).

property was located. The dock was within the City of Brooklyn and the dredging machine within New York City. Plantiff filed a suit against each city for both injuries. The Brooklyn suit came to trial and resulted in judgment for plaintiff. The City of Brooklyn satisfied that judgment. Then the suit against the City of New York was prosecuted. At the trial New York admitted its original liability for the injury to the dredging machine but claimed that its liability had been satisfied by the result of the other litigation. The court, however, held to the contrary on the ground that, since there was no joint liability, Brooklyn should not have been held responsible for the injury to the dreging machine and cloaking the error in the form of a judgment at law did not correct it. The court did not discuss the possibility, but it seems reasonable to assume that Brooklyn had no intention of discharging New York City's responsibility. A finding to that effect would, of course, have made it correct not to allow New York to claim the benefit of the satisfaction provided by Brooklyn. The appellate court affirmed the judgment against New York and set down this paragraph: "A liability *ex delicto* may be extinguished by a release. That has not been given here. It may be extinguished by payment. But a payment[30] by a stranger, between whom and the defendant there is no privity, cannot be availed of. . . . To be effectual payment, if by a third person, must be made by him as agent for or on account of the one liable, and with the prior authority or subsequent ratification of the latter . . . which was not the case here, where it was made for the benefit of the one making it, and as a purchase of the cause of action. . . . It may be extinguished by an accord and satisfaction. But satisfaction by a stranger is no plea. . . ."[31]

It must be admitted that the quoted statements of the court are dicta and it may also be conceded that the statements are somewhat hazy and confused. However, out of them does come a recognition that, although the court would not regard satisfaction by a third person without more as a discharge of the obligor's duty, if the obligor had either authorized or ratified that satisfaction, such would operate as a discharge. The New York court in these dicta, while paying homage to both *Grymes v. Blofield* and its

30. Doesn't the court mean accord and satisfaction rather than payment? Receipt from a third person of even the exact sum owing in discharge of a liquidated and undisputed debt is not payment because of the very fact that it is received from a person other than the debtor. See: 6 WILLISTON, CONTRACTS § 1857 (Rev. ed. 1938).

31. Atlantic Dock Co. v. City of New York, 53 N. Y. 64, 67 (1873). The court's citations are omitted.

own decision in *Clow v. Borst,* has in reality committed itself to the *Belshaw v. Bush* doctrine.

In *Dusenbury and DeGuerre v. Callaghan*[32] the New York court again indirectly but, it would seem, inescapably recognized that an accord and satisfaction by a third person will be a defense available to the obligor-defendant under certain conditions. In that case, plaintiff's guardian ad litem and another, by connivance, procured a fraudulent sale of the plaintiff's property to such other person. The property passed through several grantees' hands and a remote grantee, in exchange for $3,000, secured a release of the plaintiff's claims to a constructive trust against the land. The plaintiff then sued the guardian *ad litem* because of his fraudulent participation in the transaction. From a refusal of the trial court to allow the defendant to introduce the release as a defense, there was an appeal. The appellate court affirmed this holding, saying: "The release which the defendant sought to interpose was given to the holder of the title without any concert of action between him and the defendant. It was procured doubtless to set at rest all questions about the title." Further on, in its opinion, the court says: "The holder of the title was a stranger, paying the money for a specific purpose, and not with any intention to relieve the defendant from any liability which he might have incurred. To be effectual, payment, if by a third person, must be made by him as agent for or on account of the one liable, and with the prior authority or subsequent ratification of the latter." The court was concerned with the intent with which the third person made the satisfaction and rejected it as a defense not because it was made by a third person but because that third person in making it had not intended that rights against the defendant should be effected.

In *Hun, Receiver v. Van Dyck*[33] a bank had illegally purchased certain bonds. At the insistance of the Superintendent of Banking the amount paid for these bonds was repaid by certain of the then trustees. Later, after the bank failed, the receiver sued certain successor trustees to recover the amount paid for the same bonds. The First Department of the Supreme Court, affirmed the action of the lower court in dismissing the complaint. In this case the facts suggest the possibility of regarding the first group of trustees, who provided the consideration for the satisfaction, and the

32. 8 Hun. 541 (N. Y. 1876).
33. 26 Hun. 567 (N. Y. 1882).

second group, the present defendants, as having a common identity and as being in privity for that reason. A finding to that effect would allow the defendant to claim the satisfaction as a defense even within the doctrine of *Grymes v. Blofield.* The decision, however, ignores such a possible interpretation and regards it as a case in which the satisfaction has been provided by a third person. The court specifically considered the earlier cases in New York, such as *Clow v. Borst,* and purported to over-rule them. The court dismissed these earlier cases for the inadequate reason that the *Grymes v. Blofield* doctrine was one of pleading only.

From the foregoing cases and numerous others,[34] it would seem safe to conclude that the trial and intermediate appellate courts of New York had become willing to overthrow the earlier New York opinions and accept the possibility of the accord and satisfaction by a third person being a defense available to the obligor when he is sued by the obligee. Furthermore, the top appellate court has at times indicated a willingness to adopt such a position. But what of the present attitude of the Court of Appeals of New York?

In 1881 that court stated that the doctrine of *Grymes v. Blofield* as adopted by New York in *Clow v. Borst* "has not been authoritatively overruled and we need not now determine whether it should any longer be regarded as authority."[35]

In *Gordan Malting Co. v. Bartels Brewing Co.*[36] the problem was presented in this manner: The Lake Shore Malting Co. and the defendant, the Bartels Brewing Co., although legally independent corporations, were operated in close cooperation and both managed by a man named Bartels. The defendant bought certain malt. The plaintiff accepted in satisfaction notes signed by the Lake Shore Brewing Co. and endorsed by Bartels. The notes were endorsed to a bank and a judgment obtained for them. The present suit to recover the price of the malt was prosecuted and judg-

34. Jessewich v. Abbene, 154 Misc. 768, 277 N. Y. Supp. 599 (Munic. Ct. 1935); Hemingway v. Mackenzie, 137 Misc. 876, 244 N. Y. Supp 48 (Sup. Ct. 1930); Wilmont Engineering Co. v. Blanchard, 208 App. Div. 218, 203 N. Y. Supp. 700 (Sup. Ct. 1924); Croker v. Hotchkiss, Vail & Garrison Co., 107 Misc. 626, 177 N. Y. Supp 189 (Sup. Ct. 1919); Partridge v. Moynihan, 59 Misc. 234, 110 N. Y. Supp. 539 (Sup. Ct. 1908); Danziger v. Hoyt, 120 N. Y. 190, 24 N.E. 294 (1890); Babcock v. Bonnell, 80 N. Y. 244 (1880); Bunge v. Koop, 48 N. Y. 225 (1872); Boyd v. McDonough, 39 How. Pr. 389 (N. Y. 1870); Fowler v. Moller, 10 Bosw. 374 (N. Y. 1863).

35. Wellington v. Kelly, 84 N. Y. 543 (1881).

36. 206 N. Y. 528, 100 N.E. 457 (1912).

ment given below for the defendant. In reversing that judgment the court of Appeals said: "Another difficulty in the case arises out of the referee's findings sustaining the defense of payment. The referee's conclusions upon this issue are evidently founded upon the plaintiff's acceptance of the notes of the Lake Shore Malting Company in payment of the malt delivered under contract 2. It appears to be the fact that the plaintiff had these notes discounted at a bank and, when they were not paid at maturity, brought suit upon some of them against the Lake Shore Malting Company, which was prosecuted to judgment. Action was also commenced against Bartels as endorser upon some of the notes. All this might be cogent evidence in support of the defense of payment, if it tended in any degree to connect the defendant, the party to the contract, with the transactions upon which this defense is based. But there is no such evidence in this record. The notes were those of a stranger to the contract. There was no privity between the Lake Shore Company and the defendant. So far as appears neither acted as agent for the other. The Lake Shore Company was apparently a mere volunteer in the giving of its notes, and in these circumstances no attempted payment by it could inure to the benefit of the defendant.[37]

Three possible explanations for the holding in this case may be suggested: The first—which is the most apparent and most acceptable, in view of the closing sentences in the above quotation and the authorities which the court cites—is simply that the court is continuing to follow the early cases in refusing to recognize payment by the third person as a defense available to the obligor. The second is that the court would be willing to accept the doctrine of authorization or ratification by the obligor as making the defense available to him but is not willing to accept the idea that merely pleading the accord and satisfaction as a defense when sued on the debt is a sufficient act to constitute ratification. The answer to this would seem to be that the court does not in its opinion suggest such a refinement. The doctrine of *Grymes v. Blofield,* in distinguishing between an accord and satisfaction made by the obligor and one made by a third person, has never been supposed to carry to the extent of insisting that the physical execution either of the act of entering into the accord or of the act of delivering the consideration in satisfaction thereof must be done by the obligor. An obligor

37. *Id.* at p. 532, 100 N.E. at p. 460. The court supports the quoted statement by the following citations: Atlantic Dock Co. v. City of New York, 53 N. Y. 64 (1873); King v. Barnes, 109 N. Y. 267, 16 N.E. 332, (1888); Muller v. Eno, 14 N. Y. 597 (1856).

may make an accord and satisfaction which is valid within that doctrine through the use of an agent just as he may, in such manner, execute almost any other legal act. The authorization or ratification principle of the *Belshaw v. Bush* doctrine is quite different from the authorization or ratification usually required by the law of agency. The Court of Appeals said that in the *Gordon Malting Co.* case the notes were "those of a stranger," that "there was no privity," that the third person was "a mere volunteer," and that "neither acted as agent." The court's reference to an agent, it would seem, is to a true agency relationship because in this case there is presented the typical fact situation which ordinarily allows the *Belshaw v. Bush* principle to apply, namely, reliance by the obligor upon the third person's accord and satisfaction as a defense. To say that such is an inadequate ratification is largely to confine the third person's satisfaction to the limits of *Grymes v. Blofield.* The third possible explanation for the holding in the *Gordon Malting Co.* case is that the third person's giving of the notes was not intended as a satisfaction for the benefit of the debtor. The answers here would appear to be that, again, there is no discussion by the court to this effect; and that in view of the close manner of operation between the two corporations this would appear to be contrary to fact.[38]

Thus, in New York there is in the opinions of the intermediate courts a considerable body of authority indicating a willingness to repudiate *Grymes v. Blofield* and there is also a clear expression by the Court of Appeals adhering to it. And as late as 1940 a New York court, in referring to the early cases which had followed *Grymes v. Blofield,* said: "While the principle of these cases has been criticized in other jurisdictions . . . . They nevertheless lay down the well established law of this state."[39] It is unfortunate that the Court of Appeals has not seen fit to give comprehensive consideration to the problem not only because of the criticism "in other jurisdictions" but particularly because of the repeated refusal of its own lower courts to follow this rule of law which the Court of Appeals describes as "well established."

One further matter should be noted in the New York cases. In several of them the third person who has given the satisfaction is a relative of the

38. See also: McGrath v. Carnegie Trust Co., 221 N. Y. 92, 116 N.E. 782 (1917).

39. Murray Oil Products Co. v. Hanover Fire Ins. Co., 24 N. Y. S.2d 101 (Sup. Ct. 1940).

debtor.[40] In such cases the courts have consistently allowed the obligor to use the satisfaction as a defense. Williston—in discussing the status of the doctrine of *Grymes v. Blofield* in New York—suggests: "The New York courts apparently do not consider a close relative of the debtor a stranger within the meaning of this rule."[41] It may be questioned whether the courts there have intentionally set forth and adhered to such a specialized distinction. The courts which allow the obligor a defense based on the third person's accord and satisfaction in these "near-relative" cases do not base their holding on that ground nor attempt to use it as a basis of distinction. Probably these cases are but further illustrations of the vacillation in the New York holdings.

One of the leading cases in this country repudiating the doctrine of *Grymes v. Blofield* was *Leavitt & Lee, Ex'rs v. Morrow.*[42] In that case a widow had procurred a third person to make a conveyance of property to the creditor in satisfaction of a debt owed by the widow's deceased spouse. When the creditor subsequently sued the deceased husband's executors they pleaded the satisfaction which had been given by the third person. The creditor was given judgment. When the lower court refused a motion for a new trial, the executors appealed, charging error (inter alia) in the court's instructions that satisfaction could not be made by a third person. The Ohio Supreme Court reversed and remanded the case. That court recognized the ancient uncertainty surrounding the supposed decision in *Grymes v. Blofield* and repudiated the doctrine which had developed out of it saying, "It requires powers of discrimination looking far beyond the justice of the case, to see the reason of the rule, that accord and satisfaction, although moving from a stranger, yet accepted by the creditor, and set up in the plea of the defendant, as a discharge of the debt, does not constitute a legal defense to the action. It is said, in some of the early adjudications touching this subject, that the reason of the rule is, that the person from whom the accord and satisfaction comes is not privy to the contract giving rise to the debt. This reason might give just cause to the creditor to refuse to receive the satisfaction from a stranger, or third person, not known in the transaction of the parties, even an agent of the debtor. But where the creditor has

40. Cahn v. Shulman, 156 Misc. 612, 281 N. Y. Supp. 634 (Munic. Ct. 1935) (brother); Weill v. Paradiso, 188 N. Y. Supp. 287 (Sup. Ct. 1921) (spouse); Partridge v. Moynihan, 59 Misc. 234, 110 N. Y. Supp. 539 (Sup. Ct. 1908) (mother); Fowler v. Moller, 10 Bosw. 374 (N. Y. 1863) (father).

41. 6 WILLISTON, CONTRACTS Sec. 1858, n 6. (Rev. ed. 1938).

42. 6 Oh. St. 71 (1856).

actually received and accepted the contribution in satisfaction of the debt, to allow him to maintain an action on the same debt afterward, would seem to shock the ordinary sense of justice of every man."[43] Later in the opinion occurs this statement: "The rule laid down is purely technical; and the reason assigned, that the stranger is not privy to the condition of the obligation, loses all its reality when we consider that the satisfaction must have been accepted by the plaintiff, and assented to, or ratified by the defendant. It would seem, therefore, that a rule which, in its tendency, is calculated to foster bad faith and defeat the purpose of justice, ought not to be adhered to, simply because of its antiquity."[44] As has been stated, the historical analysis of the contract concept which made the contract relationship entirely personal to the parties who negotiated it is manifest in the question with which this paper is concerned: Can accord and satisfaction by the third person be regarded as accruing to the benefit of the obligor? To this question the answer of *Grymes v. Blofield* was an abrupt "No." In other words, regardless of what the creditor's left hand might accept from a third person with the understanding that it was accepted in discharge of the debt, the right hand knew nothing of all this and was still free to reach out and take from the obligor the amount of the original debt. This is hardly a result designed to be accepted with understanding by either the third person or the obligor. This result—based on the lack of privity between the third person and the obligor—was insisted upon although the obligee, with complete free will, had accepted the consideration from the third person and the obligor had either authorized the third person to make the accord and satisfaction beforehand or ratified it, at least, by insisting upon the third person's satisfaction as a defense when sued by the creditor. It is not difficult to understand the repudiation of the rule by both English and Ameri-

43. *Id.* at p. 76. In Gray v. Herman, 75 Wis. 453, 44 N.W. 248 (1890), the doctrine of *Grymes v. Blofield* is criticized in the following appropriate language: "In the charge of the learned circuit judge, he says that, in his opinion, it was not competent for the party sued to plead payment by another party who was not sued and could not be affected by the judgment. Why not, if it is shown that the creditor accepts the payment in satisfaction of the debt? Can it be said that the obligation is still in force? What sense or reason is there in any such technical rule as that, if it exists? The plaintiff's counsel says that the satisfaction of a debt by a stranger, between whom and the defendant there is no privity, is not available to the debtor as a defense. But again we ask, why should it not be, if the creditor accepts the payment in satisfaction of the debt? If a debt is fully paid, it would seem, according to plain common sense, that the obligation was extinguished and is no longer in force as a contract. What concern is it to the creditor who pays his debt, especially where he accepts the payment made in satisfaction of his debt?"

44. *Id.* at p. 80.

can cases nor Chief Justice Bartley's comment that the ancient rule is "calculated to foster bad faith and defeat the purposes of justice."

At a later point in the present paper further consideration will be given to the holding in *Leavitt & Lee, Ex'rs. v. Morrow,* but for now it is to be noted that that case is one of the most vigorous repudiations of *Grymes v. Blofield* in the American courts; that in the closing sentences of the opinion Chief Justice Bartley refers to an assent or ratification by the obligor as being a necessary condition for the accord and satisfaction to be a defense in the hands of the obligor; and that the case has been regarded, by the American cases collectively, as a landmark in establishing the right of the obligor successfully to plead the defense.

Most of the American decisions during the last century have been in accord with *Leavitt & Lee, Ex'rs v. Morrow* in firmly rejecting the rule of *Grymes v. Blofield.*[45] They hold that when the third person has made an agreement with the obligee, intending that it would be in satisfaction of the claim against the obliger, when it has been voluntarily accepted by the obligee with a similar intent, then the obligor may use such facts as a defense of accord and satisfaction when sued on the original obligation—provided the obligor has authorized or ratified such discharge by the third person. They further hold that the pleading of the accord and satisfaction is itself a sufficient ratification.

The consent which must be given by the obligor to the third person's satisfaction of the obligor's duty would seem to include a consent of even the most informal nature and, as stated, may be manifested either by prior

45. Merrick's Ex'r v. Giddings, 115 U. S. 300, 6 Sup. Ct. 65, 29 L.Ed. 403 (1885); Snyder v. Pharo, 25 Fed. 398 (1885); Grand Lodge v. Archibald, 227 Ala. 595, 151 So. 454 (1933); Underwood v. Lovelace, 61 Ala. 155 (1878); Martin v. Quinn, 37 Cal. 55 (1869); White v. Cannon, 125 Ill. 412, 17 N.E. 753 (1888); Thompson v. Conn. Mut. L. Ins. Co., 139 Ind. 325, 38 N.E. 796 (1894); Marshall v. Bullard, 114 Iowa 462, 87 N.W. 427, 54 L. R. A. 862 (1901); Sigler v. Sigler, 98 Kan. 524, 158 Pac, 864, L. R. A. 1917A, 725 (1916); Chamberlain v. Barrows, 282 Mass. 295, 184 N.E. 725 (1933); Cunningham v. Irwin, 182 Mich. 629, 148 N.W. 786 (1914); Bacich v. Northland Trans. Co., 185 Minn. 544, 242 N.W. 379 (1932); Clark v. Abbott, 53 Minn. 88, 55 N.W. 542 (1893); Chicago, R.I. & P. Ry. v. Brown, 70 Neb. 696, 97 N.W. 1038 (1904); Jackson v. Penn. R.R. Co., 66 N. J. Law 319, 49 Atl. 730, 55 L. R. A. 87 (1901); *supra,* text and n. 33 for N. Y. citations; Hollem & Truitt Lbr. Co. v. Medicine Park Co., 198 Okla. 555, 180 P. 2d 152 (1947); Beck v. Snyder, 167 Pa. 234, 31 Atl. 555 (1895); Hutchinson v. Culbertson, 161 Pa. Super. 519, 55 A. 2d 567 (1947); *Ex parte* Zeilgler, 83 S. C. 78, 64 S.E. 513, L. R. A. (N. S.) 1005 (1909); Somers & Sons v. Le Clerc, 110 Vt. 408, 8A. 2d 663 (1939); Crumlish's Adm'r v. Central Imp. Co., 38 W. Va. 390, 18 S.E. 456 (1893); Smader v. Columbia Wis. Co., 188 Wis. 530, 205 N.W. 816 (1926); Gray v. Herman, 75 Wis. 453, 44 N.W. 248 (1890).

authorization or by subsequent ratification. The decisions are almost entirely barren of discussion of the qualifying factors which are necessary in order to frame a legal definition of either term. When a third person-agent properly authorized, according to the standards set by the law of agency, acts for an obligor or when an unauthorized agent whose transaction with the obligee is subsequently ratified, according to the same standards, by the obligor-principal, acts for the obligor, the courts find an adoption by the obligor of the third person's satisfaction. But the same courts find an adoption where there is no proof of prior authorization of the third person by the obligor; where there is no proof that the third person purported to act as agent in giving the satisfaction; and where the only affirmative manifestation, which it is possible to construe as a ratification, is the reliance upon the satisfaction by the obligor as a defense when sued on the original obligation by the obligee.[46] The validity of the prerequisite of consent is called into question by this very cursory judicial treatment.

Since the courts in deciding the third person accord and satisfaction cases use the terms "authorization" and "ratification," which, in the law of agency, have defined meanings, it would be supposed that these courts were using them within that meaning. If the requirement of an adoption of the act of the third person by the obligor, is established in order that the doctrine of privity will be satisfied and one not a party to the original transaction will be allowed to participate in it by way of discharge, then we should not allow the obligor to adopt an act which he could not have done himself. Even were we to admit that the courts are not using the terms "authorization" and "ratification" according to the standards set by the law of agency the question would still remain as to whether the obligor should be allowed to "authorize" or "ratify" an accord and satisfaction which he could not have entered into himself as long as we require that the obligor make the accord and satisfaction his own act by an affirmative manifestation in order for him to claim the discharge.

These two questions immediately call into discussion the ancient doctrine of *Pinnell's Case*[47] that a man cannot, by giving less than he owes, discharge in full, a liquidated claim against him. It is not the purpose of

46. *E.g.* Chicago, R.I. & P. Ry. v. Brown, 70 Nebr. 696, 97 N.W. 1038 (1904); Jackson v. Pennsylvania R.R., 66 N. J. Law 319, 49 Atl. 730, 55 L. R. A. 87 (1901); Leavitt & Lee, Ex'rs v. Morrow, 6 Oh. St. 71 (1856); Bennett v. Hill, 14 R. I. 322 (1884).

47. 5 Coke's K. B. 117, 77 Eng. Rep. 237 (1602).

the present article to do any shadow boxing with that belabored principle. However, it must be recognized that, in spite of the extensive and intensive adverse criticism leveled against it and in spite of statutory and judicial reversal in some quarters, the doctrine still prevails.[48] Because of the widespread dislike of the doctrine of *Pinnel's Case* and the numerous exceptions which have been found to that principle, it is not at all surprising that the courts have accepted the giving of less than the amount of the claim owed by the obligor as enough to fully satisfy the obligor's claim, when that satisfaction is provided by a third person. Be that as it may, when we accept the doctrine of *Pinnell's Case,* we are confronted with this quandary: An obligor cannot by giving less than he owes discharge in full a liquidated claim that he owes. An agent should not be able to do something, on behalf of a principal, which the principal himself could not do—or, specifically, an obligor should not be able to adopt as his own act a satisfaction in which the third person has paid less than the amount owed on a liquidated claim. Yet the proposition which cases have laid down is that, while a third person cannot, without the authorization or ratification of the obligor, give a satisfaction which will be available to the obligor as a discharge; still, with that authorization or ratification, the third person can give as a satisfaction, available to the obligor as a discharge, anything which the obligee cares to accept, whatever its value or character, even though it be less than the full amount of a liquidated undisputed claim. When the cases contemporaneously: hold to the doctrine of *Pinnell's Case,* will not allow the third person's satisfaction to be available to the obligor without his adoption, and allow the obligor to ratify a satisfaction that he could not himself have made because of *Pinnell's Case,* a logical reconciliation becomes impossible.

There is yet another aspect to this logical problem. One explanation for abandoning *Grymes v. Blofield* was the difficulty of giving a just answer to the question: Why should the obligee be concerned with the identity of the person from whom the satisfaction comes if he voluntarily accepts it? Yet, because of the overlap of the problem under discussion with the doctrine of *Pinnell's Case* it becomes necessary to reconsider the source of the performance which results in the satisfaction.

In *Shaw v. Clark*[49] a third person, using money provided by the obligor

48. 1 WILLISTON, CONTRACTS § 120 (Rev. ed. 1938).
49. 6 Vt. 507, 27 Am. Dec. 578 (1834).

and acting under his instructions, procured from the obligee a discharge of the debt for less than the full amount owed without revealing that he acted for the obligor. Later, the obligee sued the obligor for the balance of the claim originally owed. The obligor pleaded payment. From a verdict and judgment for the plaintiff there was an appeal. In affirming the result the appellate court said: "As 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." An investigation by the court as to whose money was used in discharging the debt has several times been made in the decided cases which involve satisfaction by a third person at a sum less than the amount of the liquidated claim originally owed by the obligor.[50] The distinction is that if the debtor has given money to the third person which in turn was used by the third person for the satisfaction, it is too obvious a violation of the doctrine in *Pinnell's Case* to allow the obligor to claim that the part payment was made by a third person and was not the act of the obligor.[51] But if the third party has used his own money the obligor may insist upon the satisfaction as a defense to the obligee's suit on the debt even though it was required that the obligor adopt the satisfaction by authorization or ratification.[52]

It would seem that the courts have no intention of insisting upon an agency relationship in its conventional sense in the law of agency. Authorization and ratification would seem to be merely an unhappy choice of terminology. But even though the terminology is freed from the requirement of the law of agency there still remains the underlying conflict that the obligor is, through his adoption of the third person's accord and satisfaction, accomplishing indirectly what the law would not allow him to do directly.

It would appear that the conclusions to be drawn from the American cases which have followed *Belshaw v. Bush* are these: The courts require a

50. Bealkowski v. Powers, 310 Ill. App. 662, 35 N.E. 2d 386 (1941); Emerson v. Deming, 304 Mass. 478, 23 N.E. 2d 1016 (1939); Dime Bank & Trust Co. v. Walsh, 143 Pa. Super. 189, 17 A. 2d 729 (1941); MacDonald v. Williams, 121 W. Va. 580, 5 S.E. 2d 528 (1939).

51. Dickerson v. Campbell, 47 Fla. 147, 35 So. 986, 110 Am. St. Rep. 116 (1904); Specialty Glass Co. v. Daley, 172 Mass. 460, 52 N.E. 633; Shaw v. Clark, 6 Vt. 507, 27 Am. Dec. 578 (1834).

52. Wilkes v. Slaughter, 49 Ark. 235, 4 S.W. 766 (1887); Marshall v. Bullard, 114 Iowa 462, 87 N.W. 427, 54 L. R. A. 862 (1901); Sigler v. Sigler, 98 Kan. 524, 158 Pac. 864, L. R. A. 1917A, 725 (1916); Cunningham v. Irwin, 182 Mich. 629. 148 N.W. 786 (1914); Clark v. Abbott, 53 Minn. 88, 55 N.W. 542, 39 Am. St. Rep. 577 (1893); Seymour v. Goodrich, 80 Va. 303 (1885).

consent—authorization or ratification—by the obligor to the third person's accord and satisfaction, that is, an affirmative manifestation, if the satisfaction is to be a valid discharge of the obligation for the obligor. This affirmative manifestation is sufficiently established by the obligor's act of ratification in relying on the accord and satisfaction as a defense when sued on the original obligation. This ratification is in fact either totally unrelated to the ordinary ratification of the law of agency or it is a violation of the cardinal principle that to authorize or ratify an agent's act a principal must have present capacity to perform that act. And aside from the law of agency the obligor is allowed to adopt a third person's act in order to gain a benefit for himself when he could not have performed that act himself.

The strange nature of this ratification, plus the easiness of its proof, plus the inescapable factual presumption that an obligor will ordinarily be willing to have his debts paid for him, leads us to the question: Why should it be required that an obligor give an affirmative manifestation before the third person's accord and satisfaction will be a valid discharge of the debt? Should we not be concerned merely with giving the obligor opportunity to object, if he wishes, to having his duty discharged by another?

This suggests a third solution to the problem under discussion—a solution made explicit in Section 421 of the *Restatement of the Law of Contracts* which reads as follows: "A payment or performance by a third person, accepted by a creditor as full or partial satisfaction of his claim, discharges the debtor's duty in accordance with the terms on which the third party offered it. But the debtor on learning of the payment or other performance has the power of disclaimer within a reasonable time to make the payment or other performance inoperative as a discharge."

The importance of the doctrine set forth in Section 421 is not to be found in a difference in result in the cases decided but rather in a possibility of new honesty in the reasoning whereby the result is reached. As we have seen, most courts have for some time required that the obligor authorize or ratify the act of the third person in discharging the obligor's duty, but have been willing to find that authorization or ratification implied from a course of non-action prior to the suit by the obligee versus the obligor and the pleading by the obligor of the defense of the third person's satisfaction when sued by the creditor. Now expression is given to a doctrine which recognizes the human fact that only very rarely will the obligor object to having his duty discharged for him. It dispenses with the necessity of an artificial

ratification by the obligor by dispensing with the requirement that the obligor adopt the third person's act of giving the satisfaction as the obligor's own. Section 421 recognizes that it is possible for the obligor to accept the benefit of an independent act of a third person without that act being made the act of the obligor.

Under Section 421 the inconsistency resulting from the conflict with the doctrine in *Pinnell's Case* disappears. If a true agent should be employed by the obligor to procure a satisfaction which the obligor could not himself have entered into, or if the obligor should attempt to ratify a satisfaction of a third person of such nature that he could not have gained a discharge had he entered into it himself, the rule expressed in Section 421 would not apply because of the doctrine of *Pinnell's Case.* But in the typical case where the third person enters into and gives the satisfaction as his own act no difficulty is presented. Whether the transaction between the third person and the obligee is regarded as a contract for the benefit of the obligor or whether the third person is regarded as an agent, according to the law of agency, acting on behalf of the obligor would be immaterial. The obligor would be allowed the benefit of the resulting discharge in either case.[53] Section 421 is concerned with claiming of a benefit by the obligor and not with attempting to find an affirmative manifestation whereby he makes the third person a party to the original transaction. We are free not only of the strict application of the ancient concept of privity as expressed in *Grymes v. Blofield* but also of the crude attempt to circumvent it without overthrowing it which originated in *Belshaw v. Bush.*

The principle of Section 421 did not originate with it. The high degree of artificiality of the ratification in cases following the *Belshaw v. Bush* doctrine is itself a precedent. Further, several cases have simply overlooked the ratification principle in their opinions.[54] As early as 1811 a New York Court held[55] that where a constable had personally paid an execution order given him to serve, a request to do so by the obligor "was to be inferred as admitted when nothing was said to the contrary." Similar reasoning can be found in other cases.[56]

53. RESTATEMENT, CONTRACTS, § 421, comment a (1934).
54. *E.g.,* Harvey v. Tuma County, 53 Iowa 228, 5 N.W. 130 (1880); Vaughn v. Robbins, 254 Mass. 35, 149 N.E. 677 (1925); Beck, Adm'rs v. Snyder, Adm'rs, 167 Pa. 234, 31 Atl. 555 (1895).
55. Menderback v. Hopkins, 8 Johns. 436 (N. Y. 1811).
56. Snyder v. Pharo, 25 Fed. 398 (1885); Bacich v. Northland Trans. Co. 185 Minn. 544, 242 N.W. 379 (1932); Carter v. Black, 4 Dev. & Bat. 425 (N.C. 1839); Sargeant v. Town of Sunderland, 21 Vt. 284 (1849).

In *Leavitt v. Morrow*,[57] which is, as we have said, one of the landmark cases in this country and which is an authority relied upon by most of the American cases for supporting the ratification doctrine, there is language much more liberal in effect than the cases which cite it usually indicate. That opinion contains the following remark: "It may be set down as incontestable, as a general thing, that, where one man is indebted to another, and a third steps in and pays the debt, in the absence of all circumstances to show the contrary, the rational inference would be, that the act done, being for the debtor's benefit, was done *with his consent*, or, if without his knowledge at the time, that it would, as a matter of course, *be ratified* by him afterward." The legal standard of an "acceptance presumed in the absence of all circumstances to the contrary" is very close to the legal standard of a "failure to exercise a power of disclaimer" as a prerequisite for allowing the third person's accord and satisfaction to be available to the obligor as a defense.

The courts in applying Section 421 have not always been careful to note the change which that section makes in the statement of the rule. In *Smith v. Knapp*[58] we find this language: "When Miss Tripp paid the mortgage without any express agreement in advance to do it in discharge of her obligation to the defendent it was necessary [in order to find that the defendant-mortgagor was bona fide for the result of the decision] that the defendant ratify or adopt the payment made by Miss Tripp in order to make the payment effective as a payment of the obligation of the defendant to the bank. *Edgeworth Co. v. Wetherbee*, 6 Gray, 166, 167; Am. Law Inst. Restatement: Contracts, Section 421; 3 Williston on Contracts, Section 1857 et seq. It is to be inferred that the defendant ratified or adopted this payment." The court although citing Section 421 says that the affirmative manifestation of the defendant to "ratify or adopt" is necessary. The court thus fails in its language to appreciate the shift in doctrine from the affirmative manifestation principle to the principle of the failure to exercise a power of disclaimer as intended by Section 421. Yet, the court in this case, even as the courts in the later pre-Restatement cases, is not in reality insisting upon any valid affirmative manifestation. Immediately upon requiring the defendant to "ratify or adopt" the court says: "It is to be inferred that the defendant ratified or adopted." "Inferred" from what? The

57. 6 Oh. St. 71 (1856).
58. 297 Mass. 466, 9 N.E. 2d 399 (1937).

opinion is barren of any facts other than the defendant's use of the payment in her defense which could form the basis of the inference.

Again, in *F. I. Somers & Sons, Inc. v. Le Clerc*,[59] a case involving a factual dispute as to whether a daughter had assumed responsibility for paying an account owed by her mother in exchange for release of the mother's duty to pay, occurs the following language: "But we do hold, particularly in view of the relationship of the parties, their living together, the mother's inability to pay and the long time that has elapsed, that, in the absence of any showing to the contrary, the jury could have rightfully inferred that the defendant's (daughter's) assumption of her mother's debt was either authorized or subsequently ratified by her mother." Perhaps so, but why is it necessary to seek such an authorization or ratification? If the opportunity of disclaimer is present, then is not the court really interested in the absence of a disclaimer without further proof?

Apparently, it will take time for the courts, even those who cite and rely upon the language of Section 421, to realize that *Belshaw v. Bush* is abandoned by Section 421.

Thus we have in the successive solutions to the problem under discussion a rather discouraging example of how slowly the evolutionary processes of the common law can move. In 1594 a case is decided which, according to certain reports of it, is contra to prior authority. That case is followed with little question of its propriety for about two hundred and fifty years. At the end of that period of time the courts find a method of circumventing it based largely upon a requirement which puts the result in conflict with other principles of law and which is often artificial. Eighty years later a non-judicial statement is given out which corrects this conflict and this artificiality. The courts, while citing and purporting to rely upon this new pronouncement, continue to base their decided cases upon the principles already familiar to them. Time and patience are required to await the final correction.

59. 110 Vt. 408, 8A. 2d 663, 25 A. L. R. 1494 (1939).