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ACCORD AND SATISFACTION
BY WAY OF FULL
SETTLEMENT CHEQUE

Simon Colin Currie

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INTRODUCTION

A debtor proposes to extinguish a debt by paying a lesser sum than a creditor claims to be due. He dispatches a cheque in that sum to the creditor expressing it to be in full settlement of the claim. The banking of the instrument, he adds, will constitute acceptance of his terms. The cheque is duly banked. What are the legal consequences of the transaction? The conventional response is this:

Accord and satisfaction depends on the debtor establishing an agreement whereby the creditor undertakes for valuable consideration to accept a sum less than the amount of his claim. As with any other bilateral contract, what matters is not what the creditor himself intends but what, by his words or conduct, he has led the other party, as a reasonable person, to believe. If the creditor at the very moment of paying in the cheque makes it clear that he is not assenting to the condition imposed by the debtor, how can it be said that, objectively, he has accepted the debtor's offer?...

This passage involves a series of linked propositions. I would state them thus -

- Accord and satisfaction is a contract whereby a right or an interest, or a bona fide assertion of a right or an interest, or a defence raised in good faith and intended to be maintained against a claim, is extinguished for valuable consideration moving from the party released.2

2 A right need not be valid and enforceable to form the subject-matter of an accord and satisfaction (see post). The above formulation makes this clear. The stock definition ("accord and satisfaction is the purchase of a release from an obligation, whether arising under a contract or tort by means of any valuable consideration not being the actual performance of the obligation itself" - see British Russian Gazette and Trade Outlook v Associated Newspapers Ltd [1933] 2 KB 616,643-644) is misleading on the point and has been omitted.
To create a contract there must be a meeting of minds in common intent evidenced by words or conduct.

If a debtor tenders a cheque in full settlement of a creditor's claim and the creditor rejects the debtor's terms there is no consensus.

If there is no consensus, there is no contract.

If there is no contract, the creditor's claim remains undischarged and actionable.

The conversion of the debtor's cheque (if it be a conversion) does not entrench upon the fundamental principle that there must be agreement between the parties to create a binding accord and satisfaction.

The pages that follow test this chain of reasoning at every point. Working from basic principles and avoiding any partiality in the matter, I address the following issues:

Under the heading "Accord" -

What is the legal position when a debtor stipulates the terms upon which an offer of settlement is to be accepted and the creditor complies with those terms? Does the conforming action create a contract or is something more required?

How reliable is the objective test of contract formation in the context of this particular transaction? How tractable is the material upon which it must operate

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3 Accord and satisfaction by full settlement cheque has an ideological component and partisan feeling is often detectable in the literature. I have taken particular care to avoid this; staying close to the authorities and making balanced submissions for both debtor and creditor.

4 See pp. 5-105.
and which party bears the burden of proof? Do the concepts of inducement and estoppel offer a more accurate means of analysis?

Is the recipient of money obliged to apply it the manner stipulated by the payor or may it be utilized it in any manner the recipient sees fit? If the latter, what is the legal basis of the entitlement?

Can a debtor render the acquisition of the rights represented by a full settlement cheque contingent upon the acceptance of his terms? If the debtor can, what are the legal consequences if the creditor acts in contravention of those terms? Does the banking of a full settlement cheque on account amount to conversion of the instrument?

If a conversion is committed, what modes of redress are available to the debtor? Must he issue proceedings or can the tort be raised by way of defence in an action for the balance of the debt? If it can, does policy support such an outcome?

Under the heading "Satisfaction" 5

What are the historical requirements of satisfaction? What is its relationship with the doctrine of consideration? Is it conceptually sound or a creature of policy? Are there compelling reasons for retaining it as an essential element of a discharge or could it be safely dispensed with?

Having reached conclusions upon each of these matters, I will consider the question of reform: does the common law deal efficiently with full settlement cheques, or is it time for legislative intervention?

5 See pp. 108-128.
CHAPTER ONE

ACCORD AND THE FULL SETTLEMENT CHEQUE
Full settlement cheques entered the law reports more than a century ago.\textsuperscript{6} Time enough, one would think, to identify the various issues and litigate them into coherence. The cases do not supply the orderly commentary one would expect, however. Consequently disputes, which a settled body of law would arrest on the frontiers of litigation, continue to occupy the courts.

The problem lies in the divergent answers that have been given to the following question: what is the legal significance of the banking of the cheque? There are two schools of thought.

On one view, the banking of a full settlement cheque is an inconclusive act which must be supplemented by something further to create a binding discharge. An early edition of \textit{Chitty} summarises the position:

\begin{quote}
... the mere banking of the cheque is not conclusive in law that it was taken in accord and satisfaction... the creditor is not bound either to keep it on the terms on which it was sent or return it ... the banking of the cheque [is] only evidence of accord and satisfaction ... [whether it was taken in satisfaction is] a question of fact to be determined according to the circumstances.”\textsuperscript{7}
\end{quote}

This approach, contractually sound\textsuperscript{8} but with severe shortcomings as an analytical tool,\textsuperscript{9} currently holds the field. For a time, however, it was supplanted by another. The alternative view was that the banking of a full settlement cheque foreclosed

\textsuperscript{6} See \textit{Ackroyd v Smithies} (1886) 54 TLR 130
\textsuperscript{7} See J. Chitty and W. Paine, \textit{A Treatise on the Law of Contract}, 15\textsuperscript{th} Ed (Sweet & Maxwell, London, 1909) p. 741
\textsuperscript{8} Contract law generally imputes to a person an intention corresponding to a reasonable construction of his words or actions. It does not affix specific and undeviating intentions to particular modes of dealing.
\textsuperscript{9} See pp 11-18 \textit{post}.
the usual objective inquiry and required the court to infer as a matter of law that consensus was reached and the debt discharged.\textsuperscript{10}

This latter view, based on the proprietary dimension of the transaction,\textsuperscript{11} has now been authoritatively rejected.\textsuperscript{12} The grounds of dismissal, however, are not wholly satisfactory. Likewise the reinstated approach is not as straightforward as it seems. I propose, therefore, to reopen the controversy and examine both positions afresh. The examination will be conducted through the lens of two separate scenarios:

- Where a creditor banks a full settlement cheque without protest and later renews his demand, and

- Where a creditor banks a full settlement cheque with an express and contemporaneous reservation of rights.

Having canvassed the issues, discovering merits on both sides, I will conclude by asking whether the law should be reconfigured to accommodate the rights and interests of both parties.

\textsuperscript{10} See Homeguard Products (NZ) Ltd. v Kiwi Packaging Ltd. [1981] 2 NZLR 322

\textsuperscript{11} When a creditor banks a full settlement cheque on account the laws of contract and property meet in a tidal race. The result is a violent clash of principle. Contract denies a discharge. Property, some assert, decrees one. Each refutes the other on \textit{a priori} grounds - see \textit{post}.

\textsuperscript{12} See Magum Photo Supplies Ltd. v Viko New Zealand Ltd. [1999] 1 NZLR 395.
SCENARIO (A)

THE TARDY RESPONSE
A disagreement arises over a debt. Negotiations ensue, but no settlement is reached. The debtor then decides to force the issue. He draws a cheque for less than the sum claimed and sends it to the creditor accompanied by a statement that it is tendered in full and final settlement. He details how the figure was reached and adds that the presentation of the instrument will constitute acceptance of the proffered terms. If the terms are unacceptable, the cheque should be returned. The cheque is banked without protest. Four weeks later the creditor telephones the debtor renewing his demand. The debtor claims that the debt was discharged when the cheque was banked. "No, no, no" responds the creditor "the money was taken on account. If the remainder isn't forthcoming, I'll sue you for it." "Go to hell" responds the debtor and breaks the connection. True to his word, the creditor issues proceedings for the balance of his claim. The debtor pleads release by accord and satisfaction.

Battle is joined. The debtor claims that he was reasonably entitled to assume, and did assume, that his offer of compromise had been accepted. The creditor avers that the offer was not accepted and that the debtor had no reasonable grounds for assuming that it had been. Given the conflicting claims and the absence of documentation, the court examines the conduct of the parties. It finds:

- The debtor's offer was unambiguous and communicated to the creditor.\(^{14}\)

\(^{13}\) The cases furnish a variety of scenarios. The dispute may relate to the quality or quantity of goods delivered. There may be some confusion over the contract price or the adequacy of services rendered. The obligation's very existence may be in issue - i.e., a claim against an estate on the basis of a testamentary promise.

\(^{14}\) The terms upon which the cheque is offered must be both clear and mandatory. An ambiguous offer, or one which reposes any discretion in the creditor, will not suffice - see *HBF Dalgety Ltd. v. Morton* [1987] 1 NZLR 411, 415 [ the debtor's offer precatory rather than imperative ]. See also *R H Page v Hitex Plastering Ltd* (HC, Auckland, CP 428/97, 22 December 1997, Paterson J) at p 11.
• The debtor’s terms were not inherently unreasonable.\(^\text{15}\) 
• The offer was not rejected. 
• The creditor acted in the manner prescribed by the offer as constituting acceptance, and 
• A reasonable period elapsed before the creditor renewed his demand.

It concludes that a reasonable person of ordinary comprehension, disinterested in the transaction and placed in the debtor’s position would have assumed that the offer had been accepted. The creditor’s cause of action was thus extinguished by accord and satisfaction.\(^\text{16}\)

Although this seems a reasonable conclusion, there is a formidable array of contractual apparatus opposing it.

**ESTABLISHING THE CONTRACT**

Accord and satisfaction is a contract. It is subject, therefore, to general contractual principles.\(^\text{17}\) One such principle is the objective test of contract formation.

\(^\text{15}\) Although courts do not ordinarily inquire into the adequacy of consideration, the ratio of exchange can shed light on the intentions of the parties. The fact that the sum received was significantly lower than that claimed, for example, may furnish evidence that it was not accepted in full settlement – see *Rustenburg Platinum Mines Ltd. v South African Airways and Pan American World Airways Inc.* [1979] 1 Lloyds Rep 19, 25 per Sir David Cairns. See also *Turners Horticultural Supplies Ltd. v Waitui Holdings* (1990) 4 NZBLC 102,485, 102,489.


\(^\text{17}\) See McLauchlan: "Cheques in Full Satisfaction: An Update" [1989] NZ Rec L Rev 399, 399. I do not challenge this view. What I hope to demonstrate is that there are certain contracts, far from pathological, which resist conventional analysis.
The objective test is a canon of evidence. It is resorted to when an agreement is alleged by one party and disputed by the other and there is no formal record of what actually passed between them. The method is well captured by Gloag:

If... the words or acts of one party are calculated to convey to a reasonable and neutral person, the impression that he agreed to a proposal, and did convey that impression to the other party, agreement, for all legal purposes is established... [T]he judicial task is not to discover the actual intentions of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the other.18

A uncontroversial formula this, and one which purports to reach every class of contract. But how reliable is it?

THE LIMITATIONS OF THE OBJECTIVE TEST

The objective test rests on the assumption that a genuine contract will manifest itself in some form of overt conduct. Although a reasonable premise in most cases,19 there are contracts for which it is an unreliable touchstone; contracts in

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18 See W. Gloag, The Law of Contract, 2nd Ed (Caledonian Books, Collieston, Aberdeenshire, Scotland, 1985 reprint) at p.7. The objective test is displaced if the offeror knew that the offeree's real intention did not correspond with an objective construction of his words or conduct - see Airways Corporation of New Zealand v Geyserland Airways Ltd [1996] 1 NZLR 116, 125. This is not the scenario we are dealing with and I do not propose to examine the proposition in depth.

19 Positive engagements generally manifest themselves in positive conduct, either in the commencement of performance or in some ancillary act consonant with the terms of the alleged agreement. Granted such conduct, the objective test is easily applied. If the act in question is unambiguously referable to the offer and was executed on faith of receiving reciprocal performance, a perception of agreement on the part of the offeree can be safely inferred. If the conduct of the offeror justified that assumption, a contract will be established. The variation of a running contract will generally exhibit similar earmarks.
which conduct corroborative of agreement lies beyond the bounds of the directly observable.\textsuperscript{20}

Accord and satisfaction conducted \textit{inter absentes} by way of full settlement of cheque is a good illustration. In the absence of an express declaration, the parties' intentions must be gathered from an objective appraisal of their conduct; in this case, a net assessment of meagre and highly ambiguous data. The debtor's offer, the banking of the cheque and the interval before the renewal of the creditor's demand are all consistent with the contract alleged. They are also explicable on other bases.\textsuperscript{21} Given the classically equivocal nature of silence,\textsuperscript{22} the fact that contractual rights are not generally lost through mere effluxion of time\textsuperscript{23} and that the burden of proving the contract rests upon the debtor\textsuperscript{24} the possibility of a discharge should be remote. The inference, however, is in favour of an accord.\textsuperscript{25}

\textsuperscript{20}A test based on tangible expression runs into difficulty when rights are alleged to have been relinquished. Negativing transactions, such contracts often manifest themselves in negative conduct. The parties do not embark upon performance because performance has been rendered. They do not press for performance for the same reason. Mutual inactivity, generally fatal to the establishment of a positive undertaking, is perfectly consistent with, often probative of, a consensual discharge.

\textsuperscript{21}The creditor's lack of response may have been the result of a mistake or simple administrative laxity. On the other hand, he may have accepted the debtor's offer and then changed his mind. Intentions (and occasionally events) often become clear only after consultation with a legal advisor.


\textsuperscript{23}See \textit{Amherst v James Walker Ltd} [1983] 1 Ch 305, 315 G-H.


\textsuperscript{25}See \textit{Magnum Photo Supplies Ltd v. Viko New Zealand Ltd} [1999] 1 NZLR 395, 401 ["Of course, where an offeree presents the offeror's cheque, draws the funds and appropriates them without promptly notifying any demur from the terms on which it is offered, he or she is unlikely to be heard to claim any different intention than that logically to be inferred"]. [hereafter "\textit{Magum v Viko}"] . See also McLauchlan, "Cheques in Full Satisfaction: Accord Despite Discord?" (1987) 12 NZULR 259, 294. [hereafter "\textit{Discord}"].
How does one account for this? Have the rules of contract been unobtrusively adjusted to facilitate the transaction? or does the creditor's compliance with the debtor's terms supply the evidential gap?

**PRESCRIPTION OF TERMS**

The debtor's letter, if you recall, stated that presentation of the cheque would constitute acceptance of the terms of tender. The letter was read and comprehended by the creditor and the cheque was banked and honoured. This raises two issues: is an offeror competent to impose such a condition and, if so, what is the significance of the offeree's compliance with it?

The following principles can be drawn from the cases

- An offeror can invite acceptance on strictly prescribed terms. He may impose, in other words, a condition precedent to the formation of the contract.

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26 The law's partiality to compromises has prompted adjustments elsewhere - see pp 123-125 post.


28 The presentation of a cheque occurs when it is delivered (constructively by way of electronic transmission or physically via a clearing house) to the drawee bank. If the instrument is regular on its face, if there are sufficient funds lying to the drawer's credit to meet it, if no countermand has been lodged and the account has not been frozen by injunction, it will be thereupon honoured. This interval between the banking of a cheque and its presentation could have significant consequences if presentation is the prescribed mode of acceptance. In *Magnum v Viko*, for example, the cheque was banked in the late afternoon and the error communicated to the defendants the following morning. There is a distinct possibility, therefore, that the defendant's terms were rejected before the occurrence of the act prescribed as constituting acceptance. If this was the case, no contract could come into existence.

29 An offeror generally prescribes a mandatory step in the procedure of acceptance to protect himself against the assumption of contractual duties on terms other than his own. An offer so
• Performance of that condition binds both parties from the moment of compliance\(^{30}\) - however;

• There must have been a causal connection between the condition and the act\(^{31}\)

• A connection will be implied if it was reasonable for the offeror to believe that the offeree had assented to his terms.\(^{32}\)

What we are dealing with, then, is a binary test of intention; a rule of strict construction as regards the offeror (who will generally have reduced his intentions couched will only create a contract if the offeree accepts it in the stipulated manner - see *Manchester Diocesan Council for Education v Commercial and General Investments Ltd.* [1970] 1 WLR 241, 245-246. See also A. Corbin and J. Perillo, *Corbin on Contracts*, Revised Ed (West Publishing Co, St. Paul, 1993), Vol. 1, s 3.34, p. 484 [by advancing the offer, the offeror creates the power of acceptance and has full control over the character and extent of the power so created] and Winfield “Some Aspects of Offer and Acceptance” (1939) 55 LQR 499, 516.

\(^{30}\) See *Brogden Metropolitan Railway Co* (1877) 2 App.Cas 666, 691 per Lord Blackburn [“when an offer is made to another party and in that offer there is a request express or implied that he must signify his acceptance by doing some particular thing, then as soon as he does that thing he is bound”]. See also *Household Insurance Co v Grant* (1879) 4 Ex D 216, 236 per Bramwell LJ, *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256, 269-270 per Bowen LJ and *Minorities Finance Ltd. v Afribank Nigeria Ltd.* [1995] 1 Lloyds Rep 134, 139.

\(^{31}\) See *Magnum v Viko* at 400-401 [“In circumstances in which one party purports to prescribe conduct on the part of the other as constituting acceptance, the mere coincidental conduct of the kind prescribed cannot attract legal consequences. At least the conduct must be linked to the offer.”].

\(^{32}\) This seems logical, for whilst the offeror’s intentions may be drawn, ex hypothesi, from the terms of the offer, the offeree’s intentions in complying with those terms cannot be deduced from the simple act of compliance. The offeree may, for example, be unaware of the offer but unwittingly adhere to the offeror’s terms in the ordinary course of business. In such circumstances the necessary contractual intention will be absent and the offeree will remain unbound - see McLauchlan “Cheques in Full Satisfaction: A Simple Case of Offer and Acceptance?” (1998) 4 NZBLQ 119, 122-123 [hereafter “Simple”].
to writing) and an objective test of intention as regards the offeree. Non-compliance with the offeror's terms will thus automatically prevent consensus, whilst compliance will only create it if supported by other indicia. Consequently

- The banking of a full settlement cheque is an action open to explanation. Its true purport must be extracted from all of the surrounding circumstances.34

In my view, there are problems, both practical and theoretical, in applying this proposition to the case at hand.

**COINCIDENTAL COMPLIANCE**

Coincidental compliance with an offeror's prescribed mode of acceptance does not create a binding contract.35 This is theoretically sound and easy to apply when the conforming action is accompanied by an expression of dissent.36 Difficulties arise,

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33 Quaere the position when the cheque is detained rather than banked in accordance with the debtor's terms. If banking is the stipulated mode of acceptance, authority suggests that no other method will suffice to bind the offeror. If this is correct, then the prolonged detention of such a cheque can never amount to an accord and satisfaction. Although such conduct (extended detention with knowledge of the terms of the offer and no reservation of rights) could, on objective analysis, amount to acceptance, in other words, it cannot do so because the offeror declared that he would only be bound if the cheque was banked. Indorsment or pledge to a third party, actions even more consistent with acceptance, would have the same lack of effect. Unless the offeror could be held to have waived the condition (through his failure to either remonstrate or countermand the cheque), he could not, in my view, claim its mere detention as conclusive of acceptance.

34 See James Wallace Pty Ltd v William Cable Ltd [1980] 2 NZLR 187, 203 and Simple at 123.

35 See Magnum v Viko at 400-401.

however, when compliance with the offeree's terms is the only tangible evidence before the court. How does it differentiate in such circumstances between deliberation and coincidence? The complexity of the invited action may offer a clue,37 but even if all that is required is the presentation of a cheque, can its subsequent banking be reasonably described as coincidental? There are organisations, it is true, where cheques are detached and banked without any examination of the accompanying terms, but whether this (systemic failure, if you like) is effective to prevent the formation of a contract remains controversial.38 It could not, in any event, shield a person who was aware of the offeror's terms, had the authority to accept them and who, possessed of that knowledge and authority, elected to bank the cheque. Such a person can lay no claim to a coincidence.

THE SURROUNDING CIRCUMSTANCES: WHAT DO THEY YIELD?

Accepting that the unqualified banking of a full settlement cheque is inconclusive of acceptance, what sort of supplemental conduct on the part of the creditor is required to render it so? This from the New Zealand Court of Appeal:

... where an offeree presents the offeror's cheque, draws the funds and appropriates them without promptly notifying any demur from the terms on which it is offered, he or she is unlikely to be heard to claim any different intention than that logically to be inferred. Even in a case such

37 The performance of a complicated action suggests deliberation (see, for example, Thompson v Burrows [1916] NZLR 223: goods loaded onto railways wagons). A more commonplace action may not - see Simple at 123 [the offeree invited to eat breakfast or raise a flag on the nation's birthday: compliance inconclusive].

38 See Neuchatel Asphalte Co v Barnett [1957] 1 All ER 362, 365, Broadlands Finance Ltd. v St Johns Motors (Wanganui) Ltd. (1986) 1 NZBLC 102, 438, 102, 441, Dunrae Manufacturing Ltd. v C.L. North & Co Ltd. [1988] 2 NZLR 602, 607 and Consolidated Edison Co of New York Inc v Arroll (1971) 66 Misc 2d 816, 322 NYS 2d 420 [organisations cannot shelter behind flaws in their system] - c.f. Inland Revenue Commissioners v Fry [2001] STC 1715 - available on Lexis at pp 4-5 of the transcript [the reasonable man is aware, or ought to be, of the banking practices of the taxation department].
as that, however, the lapse of time would be only a factor to be assessed in determining whether agreement was to be inferred.  

This seems reasonable, but what other factors may the court resort to? The sole occupants of the factual matrix are the debtor's offer, the banking of the cheque and the ensuing delay. It might be argued, of course, that two equivocal acts amount to an unequivocal one, but it still seems heterodox to suggest that a supposedly neutral act (the banking of the cheque) can be rendered binding by silence and inactivity; factors classically regarded as inconclusive of agreement.

The fact that accords have been established after relatively brief intervals further complicates the issue.

CONCLUSION

Accord and satisfaction is regularly implied when the probative force of the available evidence falls short of the strength generally required to infer agreement. There seems only one possible explanation for this. The unreserved banking of a full settlement cheque is of greater significance than many commentators are prepared to concede.

In my opinion, the unqualified banking of a full settlement cheque raises, not just an inference, but a rebuttable presumption of acceptance; the presumption

39 See Magnum v Viko at 401.
40 See fnn 22 & 23. See also The Leonadis D [1985] 2 All ER 796, 805 per Goff LJ ["silence is inherently equivocal and, as such, can constitute neither offer, acceptance or representation"]
41 e.g., Turners Horticultural Supplies Ltd. v Waitui Holdings (1990) 4 NZBLC 102,485 [6 days], Haines Haulage Co Ltd. v Gamble [1989] 3 NZLR 221 [10 days], Hutt City Council v N.Z. Railways Corp (1997) 6 NZBLC 102,320 [14 days] and Re Cohen & Sweigman, ex p. Gelman [1925] 4 DLR 359 [3 weeks].
42 The existence of even an inference was denied in NGC Metering Limited v Todd Energy Limited (HC, Wellington, CIV 2004 485 2633, 21 December 2005, Wild J) at para [33]. This is clearly incorrect. Compliance with terms prescribed as constituting acceptance raises an inference at
prevailing unless displaced by evidence to the contrary. I base this conclusion on more than circumstantial evidence. There is explicit authority supporting it. Note the categorical tone of the following:

...If Smithies had [sent the cheque in full satisfaction of his debt and told the plaintiffs that if they refused to take it on those terms they must send it back], and the plaintiffs had not sent the cheque back, that would have been very strong evidence that they took it in satisfaction of the whole amount of the debt, and in some instances, conclusive.44

Clearing the cheque without any demur or further qualification must be regarded as excluding [the plaintiff] from prosecuting a further claim.45

...by paying the cheque into their bank account without in any way objecting that they were not receiving it on [the terms set out in the defendant's letter] the plaintiff's clearly bound themselves to those terms.46

If the cheque had been banked without demur or qualification by [the plaintiff] that would have been compelling evidence that [the plaintiff] intended to accept [the defendant's] offer.47

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43 The circumstantial evidence is nonetheless strong. If the unqualified banking of a full settlement cheque is largely free of legal colouration, how can a contract ever be established in the circumstances outlined? It surely cannot be argued that the cases were all wrongly decided. If this is an error, it is a pervasive one which has seduced English and Commonwealth courts, high and low, for a century.

44 See Ackroyd v Smithies [1886] 54 TLR 130, 132 per Cave J.

45 See Bell v Galynski and Kings (A) Loft Extensions [1974] 2 Lloyds Rep 13, 15 per Edmund Davies LJ.


47 See Auriema Ltd v Haigh and Ringrose Ltd (1988) 4 Const. LJ 200 per Judge Fox-Andrews QC. See also Inland Revenue Commissioners v Fry [2001] STC 1715 - available on Lexis at p. 6
I am unable to see that the banking of the cheque by the respondent can be taken to indicate anything other than acceptance of the offer contained in the note attached to it. 48

...there is some onus on a creditor wishing to escape the consequences of the general rule that an inference is to be drawn from the banking of the cheque in favour of the debtor; the creditor should very promptly indicate its dissent from the basis on which the cheque was sent.49

The position seems clear. The recipient of a full settlement cheque, aware of the terms of the debtor’s offer and with the authority to accept them, cannot silently bank the instrument and expect to preserve his claim for long. The cases show that a positive response is required of the creditor. If no response is forthcoming, the inference drawn from its absence will generally be assent to the debtor’s terms. Only explicit and timely dissent, in other words, will be sufficient to prevent an acceptance; the accord resting, not upon cogent evidence of assent, but upon the creditor’s failure to adduce evidence indicating non-assent.50

of the transcript [“Cashing of the cheque gives rise to no more than a rebuttable presumption of acceptance ”].

48 See Dunrue Manufacturing Ltd. v C.L. North & Co Ltd [1988] 2 NZLR 602, 606 per Smellie J.
49 See Haines House Haulage Co Ltd v Gamble [1989] 3 NZLR 221, 225 per Barker J.
50 Difficulties concerning the moment of contract formation (see Burrows, Finn & Todd at para 19.2.3., pp 628-629) are resolved if one accepts this view. If performance of the invited action raises a presumption of acceptance and the creditor fails to rebut it, formation will take place at the moment of compliance. The debtor need not have been immediately aware of the complying action - see Manchester Diocesan Council for Education v Commercial and General Investments Ltd. [1970] 1 WLR 241, 245 H [“If an offeror stipulates by the terms of his offer that it may or shall be accepted in a particular manner a contract results as soon as the offeree does the stipulated act, whether it comes to the notice of the offeror or not.”] - c.f. Magnum v Viko at 400.
Before leaving this topic, I wish to review an authority which, despite its importance, I found impossible to integrate into the foregoing discussion. On the face of it, it opens an entirely new avenue of inquiry.

Day v McLea\(^{51}\) involved a claim for damages arising from the non-acceptance of an item of machinery.\(^{52}\) The defendants acknowledged the breach of contract, but disputed the extent of the loss. Ultimately they sent a cheque to the plaintiffs for less than the sum claimed, stating that it was in full satisfaction of all demands and enclosing a receipt to be signed on those terms. The plaintiffs replied that they were taking the cheque on account only and requested payment of the balance. The defendants reiterated that the cheque represented payment in full. The plaintiffs issued proceedings and obtained judgment. On appeal, the defendants argued that the retention of a cheque sent in full satisfaction of a disputed claim was conclusive in law that there had been an accord and satisfaction. This contention was firmly rejected by a strong Court. Lord Esher MR analysed the matter thus:

The contention... was that having kept the cheque [the plaintiffs] must be taken in law to have accepted it in satisfaction... It is said that an inference of law must be drawn even though the person receiving the cheque never intends to take it in satisfaction and says so at the time he receives it. All I can say is if that is a conclusive inference it would be one contrary to the truth. I object to all such inferences of law... the question whether there has been an accord and satisfaction is one of fact.\(^{53}\)

Bowen LJ agreed,\(^{54}\) adding

\(^{51}\) (1889) 22 QBD 610 [hereafter "Day v McLea"].

\(^{52}\) See (1889) L1QB 293, 293 for the essential facts.

\(^{53}\) See Day v McLea at 612-613. The authority relied upon was Miller v Davies (1879), an unreported judgment of the Court of Appeal.

\(^{54}\) Fry LJ also agreed (see at 613). His judgment, a two line endorsement of Miller v Davies, need not detain us.
If a person sends a sum of money on terms that it is to be taken, if at all, in satisfaction of a larger claim; and if the money is kept, it is a question of fact as to the terms upon which it is so kept. Accord and satisfaction implies an agreement to take the money in satisfaction of the claim in respect of which it is sent. If accord is a question of agreement, there must be either two minds agreeing or one of the two persons acting in such a way as to induce the other to think that the money was taken in satisfaction of the claim, and to cause him to act on that view.55

Since the defendants had clearly and timeously rejected the plaintiff's terms, it followed that no accord had been established.

For what proposition of law, then, does Day v McLea stand as authority? All of the judges agreed that establishing an accord was a question of fact56 and Bowen LJ advanced a specific mechanism for ascertaining that fact.57 It is upon this latter formulation that I propose to concentrate58 It possesses an unusual feature.

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55 Ibid. at 613.
56 By "fact" the court presumably meant a fair appraisal of events, free of any inference or presumption. This sits well with orthodox theory, but practically the same panel came to a contrary conclusion in London and County Banking Co v London River Plate Bank (1888) 21 QBD 535. In that case certain bonds had been surreptitiously removed from the plaintiff's possession and then secretly returned. The question was whether the plaintiffs, ignorant of both theft and restoration, had accepted the bonds in accord and satisfaction of their right of action against the defendant (the case is unquestionably one of accord and satisfaction - see Lloyds Bank v Swiss Bankverein (1912) 17 Com Cas 280, 297). Although conventional wisdom suggests that a right of action can only be released by consent (see at 537 per Davey QC *arguendo*) and that an offeree must be aware of an offer before he can accept it (see *Simple* at 122-123), the court found that the plaintiffs had taken the bonds in discharge of their claim. Of particular interest is the joint judgment of Lindley and Bowen LLJ; the plaintiff's acceptance presumed in the absence of evidence to the contrary (see at 541-542). Whatever this was, it was not a conclusion of fact.
57 Whether the Bowen formulation forms part of the *ratio decidendi* is a nice question. It does not appear to have been drawn from *Miller v Davies* (see Bowen LJ at 613: "upon principle, as well as upon the authority of the case of *Miller v Davies*"") and neither Lord Esher or Fry LJ, who rested their judgments on *Miller*, make any reference to it. Although the issue does not affect
Although Bowen LJ's statement of principle adheres closely to the objective theory of contract formation, it departs from it in one significant particular. The pith lies in the postscript and, in my view, it significantly qualifies all that precedes it. The key phrase is this -

... There must be either two minds meeting or one of the two persons acting in such a way as to induce the other to think that the money was taken in satisfaction of the claim, and to cause him to act on that view [my italics]

To fix an accord by implication, in other words, the debtor must have been -

- Induced to believe that the creditor had compromised his claim, and

- To have acted upon that belief.

What are we dealing with here?

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non-English courts (free to adopt mere dicta), its status as binding English authority is at least debatable.

58 It is upon the Bowen judgment that courts generally rely when Day v McLea is placed before them - see, for example, Magnum v Viko at 398-399 and Homeguard Products (NZ) Ltd v Kiwi Packaging Limited [1981] 2 NZLR 322,332. See also Neuchatel Asphaltic Co v Barnett [1957] 1 All ER 362,368, Phillip v. Massey-Ferguson Finance Co of Canada Ltd [1973] 1 WWR 443,446 Inland Revenue Commissioners v Fry [2001] STC 1715 - available on Lexis at p.5 of the transcript and Pereira v Inspirations East Limited, Court of Appeal (UK), unreported judgment of 9th November 1992 - available on Lexis at p.2 of the transcript. It also has powerful support from commentators - see "Discord" at 261-262,273 and Russell, “Cheques Sent in Full and Final Settlement” (1984) ABLR 301,305.

59 Although Bowen LJ refers to “one of the two persons”, it is surely the debtor’s perceptions we are concerned with. How does one induce a creditor to think that he has accepted a cheque in full settlement? Hypnosis?
CONSEQUENTIAL RELIANCE

Reliance by an offeror on the apparent assent of an offeree has never been required to establish a contractual relationship. In prescribing it as an element of an imputed accord, therefore, Bowen LJ was advancing something other than the settled contractual rule. I can think of only one doctrine which matches his description: estoppel by representation.

ESTOPPEL BY REPRESENTATION

An estoppel by representation arises when a person has made an unequivocal representation of existing fact (either by words or conduct) with the intention (express or implied), and with the result, of inducing the representee on faith of that representation to alter his position to his detriment. If this occurs, the representor will be thereafter estopped as against the representee from making any averment substantially at variance with that representation.

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60 It is sufficient that the offeree’s words or conduct induced the offeror to reasonably believe that his terms had been assented to- see Smith v Hughes (1871) LR 6 QB 597, 607 per Lord Blackburn.

61 Although reliance supplies cogent evidence that the offeror entertained a genuine belief that an agreement had been concluded (see the Hannah Blumenthal [1983] 1 AC 854, 924 E-H per Lord Brightman), on no settled contractual analysis does it possess determinative importance.

62 Could it be that Bowen LJ, perceiving the evidential problems inherent in a tacit accord, annexed an additional requirement to place the matter beyond doubt? His invocation of “principle” argues against it. Whatever he was reaching for had legal pedigree.


64 See Hopgood v Brown [1955] 1 All ER 550, 559 per Lord Evershed MR and Spencer Bower and Turner at pp 4-5. If an estoppel is established, the legal relationship between the parties will be determined in accordance with the facts as represented, not as they truly are - see Wilkin & Villiers at p. 115, para 8.016.
In my opinion, there are distinct advantages in analyzing a tacit accord in these terms.

**THE ADVANTAGES OF AN ESTOPPEL ANALYSIS**

Unlike the conventional notion of acceptance (which generally involves a single definitive act), a representation by conduct is a mosaic; embracing the entire course of dealing between the parties. It is thus free of many of the conceptual difficulties which arise when one attempts to place an imputed accord within a contractual framework.

Firstly, there is no doctrinal need to fix the moment of formation. Whether acceptance occurs upon presentation of the cheque or upon the commission of the final act in the chain of circumstances amounting to acceptance is immaterial for the purposes of estoppel. The Court must simply decide whether the debtor was induced to think that the cheque was taken in satisfaction. Since a representation is a compendious concept, every aspect of the transaction may be legitimately examined for this purpose.\(^6\) Compliance with the offeror's terms, for example, shorn of its contentious contractual significance, becomes simply another factor to be taken into consideration. Estoppel could also supply a sharper means of analysis when a full settlement cheque is merely detained, whilst its rules relating to agents and servants acting without, or beyond, their authority could dispel some of the problems created by institutionalised creditors.

I turn to the individual elements.

\(^6\) Although this approach can also be employed in a contractual context (see *Boulder Consolidated Ltd v Tangaere* [1980] 1 NZLR 560, 563 per Cooke J), it has serious shortcomings if the moment of formation raises a substantive issue - e.g., where the contract spans jurisdictions.
A REPRESENTATION OF EXISTING FACT

To establish an estoppel by representation, the statement or conduct relied upon must constitute a representation of existing fact.\(^{66}\) A representation of future intention cannot give rise to an estoppel by representation.\(^{67}\) What does a creditor represent, then, when he banks a full settlement cheque in circumstances amounting to acceptance? There are two possible interpretations:

- That the creditor’s rights subsist but he will hereafter forbear from their enforcement, or

- That the creditor’s rights against the debtor have been compromised and extinguished.

The first of these amounts to an executory promise and cannot give rise to an estoppel by representation.\(^{68}\) The second is a representation of executed fact and should satisfy the first element of the doctrine.\(^{69}\) In my view, the acceptance of a full settlement cheque falls into the latter category. I base this conclusion on the legal consequences which ensue when an accord and satisfaction is established.


\(^{67}\) Ibid at 151.

\(^{68}\) See *Jordan v Money* (1854) 5 HCL 185; 10 ER 868 at 214-215; 882 per Lord Cranworth LC and 229; 877 per Lord Brougham [a promise not to enforce a debt cannot give rise to an estoppel by representation].

\(^{69}\) The discharge of the creditor’s cause of action is generally contingent upon the cheque being honoured - see *Jameson v CEGB* (1999) 1 All ER 193, 207. An accord based on the prolonged detention of the instrument might thus be regarded as promissory (i.e., “you will be discharged if the cheque is met”). The situation is different, however, when the cheque has been banked and honoured and the creditor has retained the proceeds without qualification. If these actions (which comprise the representation) amount to accord and satisfaction, the creditor’s rights will be extinguished as of the date of tender - see *G. Nicks & Son Ltd v Taylors Bakery Ltd* [1962] NZLR 286, 290-291. If the creditor’s rights are gone, he cannot forbear from their enforcement.
A forbearance to sue generally implies a right of retraction.\(^{70}\) Accord and satisfaction, by contrast, is irretractable.\(^{71}\) Even if the agreement proves to be unenforceable, the creditor's original rights cannot be resurrected.\(^{72}\) The extinptive nature of the doctrine is further demonstrated by the fact that when a creditor compromises his claim he simultaneously discharges all co-obligants.\(^{73}\) The reason for this lies in the derivative nature of joint liability; the extinction of the debt effecting a general release because there is no longer any obligation to which accessory liability can attach.\(^{74}\) This phenomenon cannot be explained on promissory grounds. A creditor will generally have given no indication to joint debtors that they have been released. Their release may have been quite inadvertent.\(^{75}\) The reason they are discharged is because the obligation upon which their liability is premised has been extinguished.

\(^{70}\) A forbearance does not irrevocably alter the rights of the parties under the original contract (see Levy v Goldberg [1922] 1 KB 688, 690) and is generally retractable on notice - see Ficom S.A. v Sociedad Cadex Ltd [1980] 2 Lloyds Rep 118, 131. A forbearance which carries no power of retraction is a substantive discharge.

\(^{71}\) I refer here to a fully executed accord and satisfaction. An accord conditioned upon the provision of the agreed satisfaction does not extinguish the creditor's rights until the condition is fulfilled - see pp 113-115 post.

\(^{72}\) See Elton Cop Dyeing Co Lim. v Broadbent & Son Lim. (1920) 89 LJB 186, 187 and Auckland Bus Co Ltd. v New Lynn Borough [1965] NZLR 542, 559.


\(^{74}\) See McDonald v Denny's Lascelles Ltd. (1933) 48 CLR 457, 481. This would not be the result if release by accord and satisfaction constituted a mere forbearance to sue the principal debtor. In such circumstances, the liability of co-obligants would remain intact. If proceeded against, their rights of contribution and indemnity would render the debtor's release illusory - see Re Natal Investments (Nevill's Case) 6 Ch App 43, 47.

\(^{75}\) See, for example, Deanplan v Mahmoud [1992] 3 All ER 945 where the collateral effects of accord and satisfaction with a subsequent assignee were wholly unappreciated by the landlord. The
The effect of accord and satisfaction is to extinguish, rather than suspend, the creditor’s rights. The representation giving rise to an accord and satisfaction can hardly bear a different message. I would accordingly argue that the representation embodied in the acceptance of a full settlement cheque is one of fact.

**THE REPRESENTATION MUST HAVE BEEN RELIED UPON**

To establish an estoppel by representation the representee must have acted in reliance upon the representation.\(^{76}\) This does not necessarily entail an overt alteration of position, however, and if inaction is the natural consequence of the representation a causal connection may be presumed.\(^{77}\) The inertia which generally follows the banking of a full settlement cheque is not necessarily impeachable, therefore, on grounds of non-reliance; inaction on the part of the debtor being a natural response to a perceived discharge.

**THE RELIANCE MUST BE REASONABLE**

For an estoppel to arise it must have been reasonable for the representee to rely on the representation. This will be established if -

- The representation would have misled a reasonable person,\(^{78}\) and

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\(^{76}\) See *Amalgamated Investment & Property Co Ltd. (in liq.) v Texas Commerce International Bank Ltd.* [1982] 1 QB 84, 105a [ to give rise to an estoppel there must be a causative link between the representation and the representee’s subsequent conduct].

\(^{77}\) See *Newbon v City Mutual Life Assurance Society Ltd.* (1935) 52 CLR 723, 734-735.

\(^{78}\) See *Carr v London and North Western Ry. Co* (1875) LR 10 CP 307, 317 and *Trane (UK) Ltd. v Provident Mutual Life Assurance* [1995] EGLR 33, 39 b-c [ it will not be reasonable to act
• The consequent act of reliance was reasonable in the circumstances.\(^{79}\)

This requirement chimes with the caselaw. A debtor will not have been misled, for example, if the banking of the cheque was accompanied by a prompt reservation of rights. Nor, when dealing with organisations with automatic clearance facilities, might it be reasonable to assume that compliance with the terms stated in an accompanying letter constitutes acceptance. If a full settlement cheque is banked with no reservation of rights, however, and the proceeds wordlessly retained for a significant period, the debtor may reasonably assume a discharge. If he thereafter acts in manner consistent with that assumption, the above test will be satisfied.

**THE REPRESENTEE'S RELIANCE MUST INVOLVE DETRIMENT**

To raise an estoppel by representation the representee must establish some form of prejudice which will flow from his change of position if the representation which induced it is deserted.\(^{80}\) This presents a major hurdle for the remitter of a full settlement cheque.

To complete the estoppel the debtor must adduce evidence of detriment. This could prove extremely difficult in the ordinary walk of case. The transmission of the cheque might be considered detrimental, but the act preceded the representation and cannot be relied upon.\(^{81}\) Remove the cheque and what remains? If the debtor

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\(^{79}\) See *Seton, Laing v Lefone* (1887) 19 QBD 68, 73.

\(^{80}\) See *Grundt v Great Boulder Pty Gold Mines Ltd.* (1937) 59 CLR 641, 674 per Dixon J. It is insufficient for the representee to have been simply misled. He must stand to sustain actual detriment if the representation is retracted.

\(^{81}\) See *Re Vulcan Ironworks Co* (1885) WN 120, 120. A full settlement cheque is tendered in anticipation of, rather than in reliance upon, the creditor's acceptance.
reorganised his finances or assumed additional liabilities on faith of a full discharge, he will have sustained detriment for the purposes of an estoppel.\textsuperscript{82} Establishing a causal connection will be difficult, however, especially if the sum is a relatively modest one.

The problem here is that detrimental reliance is not a natural consequence of the transaction; the response to a perceived discharge being generally (and understandably) quite passive.\textsuperscript{83}

But what if we retreat a step?

\section*{REVOCATION BY COUNTERMAND}

When a debtor draws a full settlement cheque he instructs the drawee bank to pay a specified sum to the payee-creditor or a party answering the statutory description of a holder. In executing its mandate, the bank acts as the debtor’s agent.\textsuperscript{84} It is open to the debtor-principal, therefore, to countermand his instructions and stop the cheque.\textsuperscript{85} A timely countermand would effectively undo the transaction. It would not be welcomed, therefore, by a pressing creditor; the action

\textsuperscript{82} There are many possibilities. New debts may be incurred in the belief that the old debt has been discharged. A false impression of liquidity could lead to the placement of an unsustainable bid or tender. Likewise it could prompt a disbursement that would not otherwise have been made. In all such cases the debtor would be materially prejudiced by the revival of the debt.

\textsuperscript{83} Induced inertia cannot, of itself, found an estoppel - see \textit{Simms v Anglo-American Telegraph Co} (1879) 5 QBD 188, 211 [it must be shown that [the representee] has not only been put to rest, but has been damaged by being put to rest]. See also \textit{Spencer Bower & Turner} at pp 101-102, para 108.


\textsuperscript{85} See s 75(1)(a) BEA.
he gains on the instrument\textsuperscript{86} a poor substitute for the tangible and tactical advantages inherent in possession of the money.\textsuperscript{87}

What would be the position, then, if the creditor, anxious to claim the money but fearing a countermand if he immediately rejected the debtor's terms, deferred rejection until the cheque had been cleared and the funds deposited in his account?

An estoppel arises when a party -

\textit{...either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts.}\textsuperscript{88}

Damage is sustained -

\textit{...not only when [the representee] has adopted a positive course of action, but also when he has abstained from taking measures for his protection, security or advantage which he had in contemplation and which, but for the representation, he would have taken.}\textsuperscript{89}

These principles seem readily applicable to the situation under discussion. In one case, they may have exerted some influence.

\textsuperscript{86} See \textit{Nova (Jersey) Knit Ltd. v Kammgarn Spinnerei GmbH} [1977] 1 WLR 713, 732-733 (HL).

\textsuperscript{87} Part payment with rights reserved is more valuable to a creditor than a mere cause of action for the full debt. Not only may the money be utilized in the meantime, but the creditor will hold the whip hand in any subsequent negotiations. What advantages the creditor perforce disadvantages the debtor.

\textsuperscript{88} See \textit{Carr v London and North Western Railway Co} (1875) LR 10 CP 307, 317.

\textsuperscript{89} See \textit{McKenzie v British Linen Co} (1881) 6 App Cas 82, 91 per Lord Selbourne LC and \textit{Spencer Bower & Turner} at pp 106-108, para 111.
Triple "C" Floorings Ltd. v Wright Carpets\textsuperscript{90} involved a composition proposal. The parties met at the defendant's offices and, after a period of negotiation, a full settlement cheque was handed to the plaintiff's credit manager. The instrument was received without comment and swiftly banked. Twenty-four days later the defendant's terms were formally rejected. When the matter proceeded to court the defendant successfully pleaded release by accord and satisfaction. What makes the case interesting is not the result (surely justifiable on objective grounds\textsuperscript{91}), but the reasoning. Jewers Co.Ct.J put the matter bluntly:

...the plaintiff...wanted to leave the clear impression with Mr Wright that the cheque had been accepted [in full settlement] and wanted that impression to stay with him at least until the cheque had been cashed and cleared...the plaintiff advised the defendant that it regarded the cheque as partial payment only after the cheque had safely cleared the bank and Mr. Wright had no further opportunity to reconsider and stop payment...the plaintiff's utter and deliberate silence as to the notation on the bottom of the cheque led the defendant to believe that the offer had been accepted.\textsuperscript{92}

Although not identified as such, this bears all the hallmarks of an estoppel; the plaintiff's calculated silence inducing the defendant to neglect his power of countermand and thereby safeguard his position. Having persuaded the defendant to sacrifice a valuable right,\textsuperscript{93} the plaintiff was thereafter precluded from denying assent to the composition.

Now I make no extravagant claims for this case. The facts are atypical,\textsuperscript{94} the underlying premise (that a debtor will immediately countermand the cheque if his

\textsuperscript{90} (1980) 4 WWR 440 [thereafter "Triple "C" Flooring"]

\textsuperscript{91} Silent receipt inter partes carries a more powerful intimation of acceptance than a tardy response to a letter. Add a three week delay, and you have solid material for an imputed accord.

\textsuperscript{92} See Triple "C" Flooring at 442, 444. Similar conduct may have influenced Barker J in Turners Horticultural Supplies Ltd. v Waitui Holdings (1990) 4 NZBLC 102,485 - see at 102,488.

\textsuperscript{93} I.e., the locus poenitentiae which exists between the sending of the cheque and its presentation for payment - see fn. 28.

\textsuperscript{94} In most cases negotiations are conducted at arms length with the debtor the active agent. Not so here. In this instance the creditor engineered a personal meeting and dissembled from the
terms are rejected) is questionable and the authorities relied upon offer oblique support at best. It nonetheless illustrates how deliberate foot-dragging by the creditor might result in active prejudice to the debtor; prejudice sufficient, in principle at least, to support an estoppel.

CONCLUSION

Estoppel by representation cannot create a cause of action. It can assist, however, in the establishment of a defence. It should be available, therefore, when a party represents that his rights have been extinguished for valuable consideration, then attempts to enforce them by action and the outset; listening patiently to the defendant's proposal and doing nothing to dispel the impression that his terms were acceptable - see Triple "C" Flooring at 441.

95 Oddly enough, debtors granted the opportunity to countermand full settlement cheques rarely avail themselves of it - see, for example, Brown v Reardon [1985] 2 NZLR 530, Broadlands Finance Ltd. v St Johns Motors (Wanganui) Ltd. (1986) 1 NZBLC 102,438 and James Cook Hotel Ltd v Cans Corporate Services Ltd [1989] 3 NZLR 213.


97 The policy issue (should the law countenance deceptive conduct or must the debtor be granted an opportunity to retract his offer?) I address post.

98 See The Anemone [1987] 1 Lloyds Rep 546,557. Suggestions to the contrary in Waltons Stores (Interstate) Ltd. v Maher [1988] 164 CLR 387 (the High Court of Australia's first attempt to confederate the doctrine of estoppel) I leave aside for two reasons. Firstly, Bowen LJ, whose dictum in Day v McLea is the object of this discussion, flatly rejected the view (see Low v Bouverie [1891] 3 Ch 82, 105 and Re Otto's Kopje Diamond Mines Ltd. [1893] 1 Ch 618,628) and, secondly, accord and satisfaction does not constitute a cause of action. Like a conventional estoppel, it creates no new rights and can be deployed in a defensive capacity only.

99 See Wilkin & Villiers at p. 116, para 8.019

100 As things presently stand, an agreement to abandon a contractual right is ineffective unless supported by consideration - see Mulcahey v Hoyne [1925] 36 CLR 41, 55. The classical view is that estoppel cannot make good this deficiency - see Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd [1982] 1 QB 84, 106. If consideration sufficient to support a discharge is present, however, estoppel by representation can establish a contract to that
representee raises the discharge by way of defence. The sticking point is the need for detrimental reliance on the part of the debtor. The countermand argument enumerated above surmounts this problem, but its judicial reception is difficult to forecast. If it was not accepted, estoppel would be a precarious plea. However salient the creditor’s representation, however sincere and reasonable the debtor’s belief, the defence would generally fail for want of an essential element.

AN ENIGMATIC AUTHORITY

Establishing an accord, Bowen LJ tells us, is a question of fact. His celebrated formula for ascertaining that fact, however, cuts against both contractual orthodoxy and common experience. Irregular methodology, however, is the least of its mysteries.

A judicial statement must be taken as it stands. You cannot add, elide or delete elements to make it more satisfactory. This is precisely what has happened, however, to the Bowen formulation. To establish an accord, he clearly states, the effect - see The Hannah Blumenthal [1983] 1 AC 854, 914 per Lord Brandon [ the abandonment of an arbitration clause may be established by way of estoppel; consideration lying in the mutual surrender of rights under the clause ]. In Day v McLea consideration would have lain in the compromise of an unliquidated claim - see pp 116-117 post.

101 I would anticipate resistance. Countless creditors have allowed full settlement cheques to clear before rejecting the debtor’s terms ( Day v McLea was such a case ). The propriety of the action has been questioned ( see Harris v Jenkins [1922] SASR 59, 74 ), but never its legality.

102 In form it resembles an estoppel, but even if it is something else, it offers little leeway for the debtor; a perceived remission in liability rarely provoking a positive response - see ante.

103 This was not the only occasion that Bowen LJ departed from conventional wisdom. The most striking example is London & County Banking Co v London River Plate Bank ( see fn. 56 ). Although reported Court of Appeal authority on a new and novel point of law, you will not find it in any textbook. His formula for establishing laches in Allcard v Skinner (1887) 36 Ch D 145, 192 ( a test strongly reminiscent of his effort in Day v McLea ) is similarly unorthodox.

104 You cannot pick out the plums and leave the duff behind - see Post Office v Norwich Union Fire Insurance Society Ltd [1967] 2 QB 363, 376 D-E.
debtor must have been induced to think that the money was taken in satisfaction
and to have acted upon that view. Commentators who endorse the judgment, and
courts which purport to follow it, however, routinely omit the latter requirement;
the consequential conduct of the creditor their sole frame of reference. I can
offer no ready explanation for this and do not propose to speculate. Only one
thing is certain; those who advance the Bowen judgment as an exemplification of
the objective principle misrepresent it. Whatever it is, it is not that.

See, for example, McLauchlan: “Cheques in Full Satisfaction: An Update” [1989] NZ Rec. LR
399, 408 and “It Wasn’t a Simple Case of Offer and Acceptance” (1999) 5 NZBLQ 4, 7 fn. 6
[the vital phrase replaced by three dots]. See also Russell: “Cheques Sent in Full and Final
Settlement” (1984) ABLR 301, 305.

An exception is Magnum v Viko (see at 397, lines 11-15). This was probably the result of a
closer-than-usual reading of Bowen LJ’s judgment. Interestingly, however, the court also cited
Taylor v Allon (1966) 1 QB 305 [an insurance case in which Lord Parker CJ suggested (obiter
at 311 D-F) that uncommunicated reliance upon an offer could, of itself, create a contract] and
R v Clarke (1927) 40 CLR 227 [a reward case in which compliance with the terms of the offer
was held to raise a rebuttable presumption of acceptance - see at 242 & 244]. These authorities
(assembled unanalyzed for future reference - see at 401), would carry a court well outside the
usual channels of inquiry.
SCENARIO (B)

THE BRISK RESPONSE
A creditor submits a bill for goods supplied or services rendered. The debtor, alleging a defect in product or performance, forwards a cheque for a lesser sum expressing it to be in full and final settlement. If the terms are unacceptable, the cheque is to be returned. Four days later the creditor informs the debtor that he has banked the cheque on account and that unless full payment or some other satisfactory arrangement is made within seven days he will initiate proceedings for the balance. No response is received and proceedings duly issue. The debtor pleads release by accord and satisfaction.

As the authorities presently stand, the creditor will have little difficulty in overcoming the debtor’s defence. Lloyd LJ gives the standard explanation:

*Accord and satisfaction depends on the debtor establishing an agreement... as with any other bilateral contract, what matters is not what the creditor himself intends but what, by his words or conduct, he has led the other party, as a reasonable person, to believe. If the creditor at the very moment of paying in the cheque makes it clear that he is not assenting to the condition imposed by the debtor, how can it be said that, objectively, he has accepted the debtor’s offer?*

Just so, but does the absence of objective agreement exhaust the legal content of the transaction? No-one would question the creditor’s right to reject the debtor’s terms, but how does one explain his concomitant power to utilise the debtor’s cheque in contravention of the terms of tender? Upon what legal basis does the entitlement rest? Why does a prima facie wrongful act attract no adverse legal consequences?

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These questions will be considered against the backcloth of *Homeguard Products (N.Z.) Ltd v Kiwi Packaging Ltd.*

**THE MAVERICK**

*Homeguard* had a lengthy but extremely troubled existence. Initially followed, then distinguished, it was finally overruled in 1999. Epithets of varying intensity were applied throughout and the judge’s reasoning is now regarded as erroneous. The facts were these:

For some time Kiwi had been supplying goods to Homeguard pursuant to a contract of sale. Although most of the goods conformed to their contractual description, a number had proven defective and had been rejected and returned. No issue was taken on the rejection point, but a dispute eventually arose over the quantity of goods that Homeguard had accepted and retained. After several abortive meetings Homeguard informed Kiwi that, in its view, the debt stood at $765. Kiwi replied that the amount outstanding was $900. Homeguard rejected this figure and a week later sent Kiwi a cheque for $765 along with a letter stating that the sum had been sent “in full settlement of our account”. Kiwi banked the cheque but did not respond to Homeguard’s letter. Six weeks later Kiwi sent a letter to Homeguard claiming a further $1187. Homeguard claimed that the debt had been discharged.

After surveying the authorities, Mahon J held that Kiwi had compromised its claim. In his view, when a cheque was offered in full settlement of a disputed or

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108 [1981] 2 NZLR 322 [hereafter “*Homeguard*”]
109 See *Kirkland v Lindisfarne Landscape Ltd.* [1985] 2 NZLR 534 and *Broadlands Finance Ltd. v St Johns Motors (Wanganui) Ltd.* (1986) 1 NZBLC 102,438.
unliquidated debt, the creditor was obliged to either reject the tender or accept it in conformity with the specified condition. Kiwi’s banking of the cheque had accordingly amounted to acceptance of Homeguard’s terms. Its claim was thus extinguished by accord and satisfaction.

THE RATIO

Mahon J placed his judgment on two separate grounds. The first was a general principle of the common law which requires the recipient of money to apply it in the manner stipulated by the payor. In Mahon J’s view, this principle, common to Anglo-American law and exemplified by *Croft v Lumley*, precluded a creditor from taking a full settlement cheque on account. A cheque so received, he held, must be either refused or accepted in accordance with the debtor’s terms. If the cheque was banked, the creditor would be conclusively presumed to have adopted the latter course.

Mahon J’s second ground (possibly obiter) turned on the legal consequences which ensue when a creditor banks a full settlement cheque in contravention of the terms of tender. His Honour stated the matter thus:

> In my opinion, the respondent…had no legal right to bank the cheque without accepting the condition upon which it was sent. The terms of delivery of the appellant’s cheque fall within s 21(2)(b) of the *Bills of Exchange Act* 1908 as being “conditional or for a special purpose only, and not for the purpose of transferring property in the bill.” It therefore follows that the property in this cheque could not pass to the respondent until it

112 For the significance of the qualification see pp.116-125 post.

113 Why Mahon J chose to depart from orthodox analysis is difficult to gauge. He cannot have been prompted by the facts. Couple the unqualified banking of a full settlement cheque to six weeks of silence and you have ample objective grounds for declaring a discharge.

114 See *Homeguard* at pp 331-332.

115 (1858) 6 HL Cas. 672; 10 ER 1459. [Hereafter “*Croft v Lumley*”].

116 See *Homeguard* at 333.
complied with the condition. By banking the cheque and then repudiating the condition, the respondent, in my opinion, converted the cheque. Thus it might be said that the respondent is precluded from asserting any right to disclaim the condition and to treat the cheque only as a payment on account, for it could only adopt that course by committing against the appellant the tort of conversion.\textsuperscript{117}

I will deal with these separately.

**THE FIRST GROUND: GENERAL PRINCIPLE**

Mahon J's first ground was based on *Croft v Lumley*; an authority frequently urged in accord and satisfaction cases and one consistently dismissed as not in point.\textsuperscript{118} The case well repays examination.

The defendant (the tenant of Her Majesty's Theatre, Haymarket) was alleged to have committed a breach of covenant and thereby forfeited his lease. After notification of the lessor's intention to forfeit, however, the defendant tendered the rent which had accrued since the alleged breach. The lessor refused to accept the payment as rent but took it as "compensation for use and occupation", expressly reserving his right of re-entry. The lessor subsequently brought ejectment for breach of covenant. There were consequently two issues before the court. Firstly, whether the covenant had been broken and, secondly, if it had, whether acceptance of the money constituted a waiver of the lessor's right of forfeiture.

\textsuperscript{117} Ibid.

The Court of Queen's Bench,\textsuperscript{119} answered both of the above questions in the affirmative; Lord Campbell, who delivered the judgment, stating that -

There is an established maxim of law that where money is paid it is to be applied according to the will of the payer, not of the receiver [\textit{solutio accipitur in mondo solventis}]. If the party to whom the money is offered does not agree to apply it according to the expressed will of the party offering it, he must refuse it and stand upon the rights the law gives him\textsuperscript{120}

The plaintiff subsequently appealed to the House of Lords which reversed the judgment on the ground that no breach of covenant had been disclosed. The question of forfeiture was also put to the judges and of the nine summoned only one (Crompton J) was of the opinion that acceptance of rent did not furnish conclusive evidence of a waiver. The others endorsed the views of Lord Campbell set out above.\textsuperscript{121} It is this latter point which holds the interest. Before proceeding, however, it is necessary to clarify the plaintiff's legal position.

An action for use and occupation is premised on the existence of a tenancy.\textsuperscript{122} To accept money for use and occupation and at the same time reserve a right of re-entry (as the plaintiff purported to do in \textit{Croft v Lumley}) thus involved the simultaneous adoption of totally inconsistent positions; the plaintiff asserting on the one hand that the defendant was liable as a tenant and on the other that he was no longer a tenant and must deliver up possession for breach of covenant.

\textsuperscript{119} 5 E & B 648; 119 E.R. 622.

\textsuperscript{120} Ibid at 680; ER 634-635.

\textsuperscript{121} See \textit{Croft v Lumley} at 706; ER 1473 per Bramwell B and at 725; ER 1480 per Williams J. Since there had been no breach of covenant the opinions expressed on this latter point are probably obiter dicta. It was upon these, however, that Mahon J relied.

\textsuperscript{122} See \textit{Minister v Mathieson} (1903) 3 SR (NSW) 298, 302 [an action for use and occupation will not lie unless there is some evidence from which the relationship of landlord and tenant can be implied].
This cannot be done. As Martin B pointed out, the only legal basis upon which the lessee's money could be taken with a right of re-entry reserved was as mesne profits - i.e., as damages for the tort of trespass in holding over after the breach of covenant. This being the substance of the lessor's position, the question was whether he was entitled to adopt it.

**THE FIRST JUSTIFICATION: APPROPRIATION OF PAYMENTS**

As Lord Campbell observed, a debtor possesses a common law right to nominate the debt to which his money will be applied. The rule to which he referred is the doctrine of appropriation. In my view, it applied in neither *Croft v Lumley* nor in *Homeguard*.

The reason for this is fundamental. For the doctrine of appropriation to operate the debtor must be subject to at least two separate and distinct sources of liability. It cannot be invoked in a case like *Homeguard*, therefore, where the debtor is seeking to discharge a single debt through a lesser payment.

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123 The lessor could not claim the money for use and occupation without assenting to the very proposition that he simultaneously sought to deny - i.e., that a tenancy existed - See *Birch v Wright* (1786) 1 TR 378; 99 ER 1148, 1153-1154 and *Zegir v Woop* [1955] VLR 394, 400-401.

124 See *Croft v Lumley* at 721; ER 1478 - see also at 715; ER 1476 per Crompton J.

125 The best expositions on the doctrine are to be found in *Simpson v Ingham* (1823) 2 B & C 65, 72; 107 ER 307, 310, *Kinniard v Webster* (1878) 10 Ch D 139,145 and *Cory Bros & Co Ltd. v Owners of the Turkish Steamship “Mecca”* [1897] AC 286, 293 [ if the payor appropriates the payment, the payee must rest content with its destination. If the payer does not appropriate the payment, the payee may do so. If neither appropriates the payment, the debts will be satisfied in order of date ].

126 Where several debts are due from the debtor to the creditor, the debtor may, when making the payment, appropriate the money paid to a particular debt or debts. If the creditor accepts a payment so appropriated, he must apply it in the manner directed – see *Chitty*, Vol I, pp 1266-1267, para 21-059.

127 The doctrine of appropriation entitles a debtor to nominate to which of several admitted debts his money will be applied. It does not entitle him to dictate the terms upon which his money will
it available in *Croft v Lumley*, in my view, where the two debts (rental on the one hand and mesne profits on the other) were incapable of co-existence. That is, if rent was due, the tenancy subsisted and the plaintiff had no entitlement to mesne profits. If the lease had been validly forfeited, on the other hand, no rent was due but the plaintiff was entitled to damages for the trespass. Under no circumstances, however, could the defendant be liable for both. Since at all times there was a single (albeit undetermined) debt, the doctrine of appropriation could not apply; the defendant having nothing to appropriate between. I turn to the waiver point.

**THE SECOND JUSTIFICATION: WAIVER BY WAY OF ELECTION**

The dispute in both *Croft v Lumley* and *Homeguard* lay in the character in which the debtor's payment had been taken: as rent or mesne profits in the first instance; in full or partial satisfaction in the second. This eliminates the doctrine of appropriation but it can furnish grounds for a waiver or an election.

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128 The plaintiff in an action for mesne profits is entitled to recover the full loss resulting from his dispossession (in addition to market rental, damages may also be recovered, as may the costs of an action for ejectment - see *Dunn v Large* (1783) 3 Doug 335; 99 ER 683 and *Lee v Blakeney* (1887) 8 LR (NSW) 141, 145-146. Reserved rent and mesne profits thus differ in both source and measure. Nor, since one is premised on the termination of the tenancy and the other on its continuance, can a lessee be liable for both.

129 See *Croft v Lumley* at 714-715; ER 1476 per Crompton J and at 774; ER 1487 per Lord Wesleydale - c.f. at 694; ER 1468 per Channell B and at 722; ER 1479 per Martin B.

130 Waiver bears a variety of meanings - see *Ross T. Smyth & Co Ltd. v Bailey, Son & Co* (1940) 164 LT 102, 106. The species we are dealing with here is waiver by way of election - i.e., where a party is obliged to choose between two mutually exclusive courses of action. For the sake of clarity, I will hereafter refer to this doctrine as "election."
A party is put to his election when he is confronted by two alternative courses of action, either of which he may pursue, but not both. If the party so confronted thereafter acts in a manner consistent with the exercise of one of these options, he will be deemed to have made his election and will be precluded from reverting to the other. Waiver of forfeiture thus occurs when a lessor, with knowledge of the facts upon which the right to forfeit arises, performs some unequivocal act which recognises the continuance of the lease. The most common form of affirmative conduct in this context is the acceptance of rent with knowledge of a breach of covenant. Such acceptance, even if inadvertent, will be deemed to constitute an unequivocal election to waive forfeiture and affirm the tenancy. This was the majority opinion in Croft v Lumley and it remains the rule.

Crompton J, however, saw things differently. The money in Croft v Lumley, he observed, although tendered as rent, was not accepted in that character. It was

131 To establish an election, there must be a clear demonstration of a choice between two alternatives, one being chosen to the necessary exclusion of the other - see Lakshmijit v Sherani [1973] 3 All ER 737, 744 (PC). See also Spencer Bower & Turner, p. 324, para 325.

132 See The Kanchenjunga [1991] 1 Lloyds Rep. 391, 397-398. The elector's options must, however, be inconsistent. If they are co-extensive (i.e., if the adoption of one does not necessarily involve the abandonment of the other), the party will not be put to his election and will be free to pursue both - see Lissenden v C.A. Bosch Ltd. [1940] AC 412, 429 per Lord Atkin; 436 per Lord Wright.

133 See Matthews v Smallwood [1910] 1 Ch 777, 786 [a lessor will not be permitted to blow hot and cold; acknowledging the tenancy on the one hand and asserting its termination on the other].

134 See Central Estates (Belgravia) Ltd. v Woolgar (No. 2) [1972] 3 All ER 610, 614-615 per Lord Denning MR; 616 per Buckley LJ

135 When rent is tendered subsequent to a breach of covenant the lessor must either reject the money outright or accept it and be conclusively presumed (disclaimer or no) to have assented to the continuance of the lease. This stark alternative is atypical of election, however, and the all-but irrebuttable presumption arising from the acceptance of rent may be sui generis within the doctrine - see Expert Clothing Services and Sales Ltd. v Hillgate House Ltd. [1985] 2 All ER 998, 1012.

In normal circumstances, election is a question of fact to be ascertained on all of the evidence - see Leyman v Panjani [1985] 1 Ch 457, 488 C-E per Stephenson LJ.
taken, rather, as damages for trespass in holding over after a breach of covenant. At no stage, therefore, did the lessor adopt inconsistent positions; the acceptance of mesne profits being perfectly compatible with the termination of the tenancy. Far from blowing hot and cold, in other words, the appellant was blowing appreciably hotter; forfeiting the lease and claiming damages for the tort. These were perfectly consistent actions and it was open to the appellant to pursue both. He could, as a consequence, maintain forfeiture.\(^\text{136}\)

In my opinion, Crompton J was both correct and mistaken in his assessment of the position in *Croft v Lumley*; correct in asserting that the doctrine of election did not apply, but mistaken as to the reason. The reason, in my view, lies in the pre-emptory nature of the lessor's actions.

When a person entitled to the immediate possession of land, enters upon that land in exercise of that right, he is deemed (by virtue of the legal fiction of trespass by relation) to have been in possession since the acquisition of his right of entry. He may, as a consequence, sue for any loss sustained during the period of his wrongful dispossession.\(^\text{137}\) This is an action for mesne profits and it allows a lessor to claim compensation for any trespass committed by the lessee following the determination of the lease. Being grounded in trespass, however, the action does not accrue until the plaintiff has either regained possession of the land or obtained judgment in an action for its recovery.\(^\text{138}\) Although there are two schools

\(^{136}\) See *Croft v Lumley* at 716; ER 1476 per Crompton J.


\(^{138}\) Although the right to mesne profits did not originally arise until the plaintiff had regained actual possession, the claim can now be combined with an action for recovery of the land - see R. Heuston and R. Buckley, *Salmond and Heuston on The Law of Torts*, 20th Ed (Sweet & Maxwell, London, 1992) at p. 56. Mere notice of an intention to re-enter on a future day, however (the position in *Croft v Lumley*) is insufficient to determine a lease - see *Rosa Investments Pty Ltd v Spencer Shier Pty Ltd* [1965] VR 97, 106-107.
of thought as to which of these perfects the lessor’s right to damages,139 neither view affects the position in *Croft v Lumley* where the money was taken prior to re-entry or the bringing of ejectment. Since re-entry (actual or deemed) is a condition precedent of an action for mesne profits, the lessor’s right to damages had not yet accrued. He thus had no standing to take the money in that character.

To claim damages, one must first possess a right to damages. In *Croft v Lumley*, the appellant had yet to acquire that right. To claim the respondent’s money in that character thus constituted a wrongful act. I would accordingly argue that although unjustifiable on the basis of either appropriation or election,140 the majority reasoning in *Croft v Lumley* was sound. If an act is capable of being done rightfully or wrongfully, the person who does it will not be heard to say that he did it wrongfully.141 It was not open to the appellant, therefore, to say that he had taken the money as mesne profits. He would be presumed, rather, to have taken it in the only capacity in which he had a present right to claim it - i.e., as rent. The effect was to affirm the tenancy.142

139 On the one hand, there is solid authority for the proposition that mesne profits are to be assessed from the date of re-entry. This is premised on the view that although the lessor’s right of action accrues upon the breach of covenant, it is not perfected until the lessor takes an active step to resume possession - i.e., until he either re-enters or is deemed to have done so through the institution of proceedings for recovery. Until this occurs, the lessee remains in lawful occupation and is liable for rent only - see *Elliot v Boynton* [1924] 1 Ch 236, 246-247, 248-249 per Pollock MR; 250-251 per Warrington LJ; 252-253 per Astbury LJ. The other view, equally well-supported, is that re-entry determines the lease as of the date of breach. Mesne profits may consequently be claimed for the period between the lessee’s default and the plaintiff going back into possession - the cases collected in Denning: “Re-Entry for Forfeiture” (1927) 43 LQR 53.

140 To create a binding election the elector must possess two rights; either of which he is at liberty to exercise, but not both (see fn.131 & 132). In *Croft v Lumley* the lessor had yet to acquire the right he purported to exercise. The doctrine of election thus had no application; not because the lessor’s rights were complementary, but because the essential foundation of an election was missing - i.e., a choice between subsisting rights.

141 See *Re Hallet’s Estate* (1880) 13 Ch D 696, 727 [“universal law”]

142 See fn. 135.
CONCLUSION

In my view, the disentitling factor in *Croft v Lumley* was the lessor's non-possession of accrued rights against the lessee. This may be contrasted with *Homeguard*, where the plaintiff's cause of action vested immediately upon the defendant's acceptance of the goods. On this ground I would distinguish the cases. Mahon J's first proposition cannot be sustained, in my view, on the authority of *Croft v Lumley*.

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143 A cause of action vests and runs from the moment an action can be brought - see *Reeves v Butcher* [1891] 2 QB 509, 511. In *Homeguard*, the plaintiff's right to proceed for the price arose immediately upon the defendant's acceptance of the goods. In *Croft v Lumley*, by contrast, the lessor's action for mesne profits (unperfected by possession or the initiation of proceedings for recovery) had yet to accrue. In purporting to exercise a right he did not yet possess, therefore, the lessor acted without legal justification.

144 Whether it is altogether unsustainable is another matter. The powers conferred by the possession of an accrued cause of action I examine at pp 101-102.
THE SECOND GROUND: ESTOPPEL BY TORT

When a creditor takes a full settlement cheque on account, he claims a remedy against the debtor. When a creditor takes a full settlement cheque on account, he claims a remedy against the debtor. The precise nature of this remedy and whether it lies within the compass of the creditor’s legal rights, depends on the legal consequences of the cheque’s transfer. If voluntary dispossession in favour of the payee is sufficient to pass property in the instrument, the creditor’s actions are probably unassailable; the exercise of the remedy in no way defeating the interests of the debtor who relinquished title to the cheque when he delivered it into the creditor’s hands. If property in the cheque does not pass on delivery, however, the creditor’s actions are more contentious; the exercise of the remedy invading the debtor’s rights in the cheque. I turn to Mahon J’s second and alternative ground.

Mahon J’s second ground turned on s 21(2)(b) of the Bills of Exchange Act 1908. I repeat the relevant passage in full:

In my opinion, ... the respondent in this case had no legal right to bank the cheque without accepting the condition upon which it was sent. The terms of delivery of the appellant’s cheque fall within s 21(2)(b) of [the BEA] as being “conditional or for a special purpose only, and not for the purpose of transferring the property in the bill.” It therefore follows that the property in this cheque could not pass to the respondent until it complied with the condition. By banking the cheque and then repudiating the condition the respondent, in my opinion, converted the cheque. Thus it might be said that the respondent is precluded from asserting any right to disclaim the condition and to treat the cheque only as a payment on account, for it could only adopt that course by committing against the appellant the tort of conversion

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145 i.e., he compensates himself, pro tanto and without judicial sanction, for the injury sustained.

146 No possession is adverse if it can be referred to good title. This is the position with real property (see Corea v Appuhamy [1912] AC 230, 236) and the same must surely be true of personal property.

147 Hereafter “BEA”

148 See Homeguard at p. 333. This passage should be read in conjunction with Property Life Insurance v Edgar, unreported, Supreme Court, 15 March 1980; a comprehensive judgment
This proposition has three aspects and I propose to deal with them individually. Firstly, I will examine s 21(2)(b) BEA: the incidents it may attach to a full settlement cheque and the relationship it creates between the parties. I will then look at the legal personality of cheques in general and the tort of conversion as it relates thereto. Lastly, I will explore whether conversion can be raised by way of defence in a debt action.

**INTERPRETING THE SECTION**

Mahon J believed that s 21(2)(b) BEA governed the operation of a cheque sent in full and final settlement. This assertion was challenged by Greig J in *James Cook Hotel Ltd. v Canx Corporate Services Ltd.* I will summarise the latter's views and then respond to them.

Section 21 BEA provides –

21: DELIVERY - (1) Every contract on a bill, whether it is the drawer’s, the acceptor’s, or an indorser’s, is incomplete and revocable until delivery of the instrument in order to give effect thereto.

(2) As between immediate parties, and as regards a remote party other than the holder in due course, the delivery -

(b) May be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring property in the bill.

wherein Mahon J explores both s 21(2)(b) BEA and the tort of conversion as it relates to conditionally-delivered cheques. The case, decided a mere six months prior to *Homeguard*, could easily have been on the judge’s mind.

(4) Where a bill is no longer in the possession of the party who has signed it as a drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved.

Section 21(2)(b), Greig J observed, allows an immediate party to a bill of exchange, and others save a holder in due course, to show that delivery was conditional and not for the purposes of transferring property in the bill. The first purpose of the subsection, therefore, was to allow evidence to be given that would otherwise be extrinsic and inadmissible. To that extent, it was a rule of procedure or evidence rather than a rule of substantive law. The subsection was limited, furthermore, to conditions which show that the delivery or the transfer was not for the purpose of transferring the property in the bill. A typical example was a transfer in escrow or a payment on some other condition which means that the cheque is not delivered and is otherwise incomplete.

The cases in which s 21(2)(b) had been held to operate, Greig J further noted, all involved questions of liability under a bill. The issue, in other words, was whether the bill had come into operation and was complete by delivery or not. When there was a question of another condition in defeasance of the bill or to

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150 Immediate parties are those who in addition to the privity created by the bill have a direct legal relationship with one another. This will generally be the relationship between the drawer and payee of a full settlement cheque; the instrument given in respect of previous dealings - see A. Guest, Chalmers & Guest on Bills of Exchange, Cheques and Promissory Notes, 15th Ed (Sweet & Maxwell, London, 1998) at p. 222, para 702 [hereafter “Chalmers & Guest”]

151 See James Cook at 218. I would contest this. Although the role of s 21(2)(b) is evidential, its operation is substantive inasmuch as it admits (through the reception of evidence essential to its establishment) what was a common law defence. The subsection cannot be dismissed, therefore, as a mere rule of procedure. It is more akin to a saving provision; a conduit pipe for the Law Merchant as it relates to conditional delivery.

152 See James Cook at 218.

153 A condition operates in defeasance of a bill when it defeats or annuls the undertaking inscribed thereon – see p. 56 post.
the payment thereunder then it was treated as being extrinsic and inadmissible.\footnote{154} In Greig J’s view, the defendant’s condition fell into this latter category and could not be received in evidence. Absent such evidence, a valid and unconditional delivery would be presumed, with a concomitant transfer of property in the cheque to the plaintiff.\footnote{155} There could, as a consequence, be no conversion of the instrument; there being no property left in the defendant with which the plaintiff could perform an inconsistent act.\footnote{156}

In my opinion, the above analysis is inconsistent with established authority. I will first set out the law as I have collected it and then contrast it with the above dicta.

**THE DELIVERY OF A CHEQUE**\footnote{157}

A bill of exchange remains incomplete until delivery.\footnote{158} Delivery is defined as “a transfer of possession, actual or constructive, from one person to another.”\footnote{159} This suggests that physical transfer inter partes is all that is necessary to effect

\footnote{154} See *James Cook* at 219.
\footnote{155} Whether property in a bill passed on delivery or was reserved to the deliveror pending the fulfilment of a condition or special purpose must be established in accordance with s 21(4); the onus on the deliveror to prove both the condition and notice of it to the deliveree - see *Jones v Thomas* (1922) 65 DLR 491, 494 and *Equitable Securities v Neil* [1987] 1 NZLR 233, 239. If the deliveror cannot discharge the burden, an unconditional delivery and full transfer of property will be presumed - see *Equitable Securities* at 240.
\footnote{156} There was no allegation of conversion in *James Cook* (see at 217). Had there been, it would, in all likelihood, have been discounted on this ground.
\footnote{157} See generally M. Megrah and F. Ryder, *Byles on Bills of Exchange*, 25\textsuperscript{th} Ed (Sweet & Maxwell, London, 1983) [hereafter “*Byles*”] at pp 373-376 and *Chalmers & Guest* at pp 116-125. The principles of English law relating to bills of exchange apply in New Zealand - see *New Zealand International Ore & Fertilizer Corporation v East Coast Fertilizer Co Ltd* (1987) 1 NZLR 9, 14 (CA).
\footnote{158} See s 21(1) BEA.
\footnote{159} See s 2(1) BEA.
the delivery of a bill of exchange.\textsuperscript{160} This is not, however, the case. By virtue of s 21(2)(a) BEA it may be shown that delivery was ineffectual because it was not made by or under the authority of the party drawing, accepting or indorsing the bill. Alternatively, by s 21(2)(b) it may be shown that delivery was conditional or for a special purpose only and not for the purpose of transferring property in the bill.

It is this latter provision with which we are concerned.

**ESCROW**

A written instrument does not necessarily operate from delivery. It is competent for a party to show, rather, that although physically delivered and although appearing on its face to be presently operative, the instrument was not intended to take effect until the occurrence of a given event or the performance of a stipulated condition.\textsuperscript{161} An instrument so delivered is called an escrow. The effect of such a delivery is to suspend the binding effect of the instrument until and unless the nominated contingency is consummated. Only then does delivery become absolute and the undertaking binding upon the deliveror.\textsuperscript{162} Delivery in escrow does not require any special form, nor need it be accompanied by any particular words. The essential thing is that the deliveror has expressly or

\textsuperscript{160} This seems to have been the perception in *James Cook*; Greig J advancing the defendant’s voluntary transfer of the cheque to the plaintiff-payee as conclusive evidence of delivery (see at 218, lines 14-17 – see also *NGC Metering Limited v Todd Energy Limited* (HC, Wellington, CIV 2004 485 2633, 21 December 2005, Wild J) at para [58]). If this was the case, His Honour erred. The physical transfer and delivery of a cheque are not necessarily correlative. A drawer may entrust manual possession of the instrument to the named payee without actually effecting a delivery - see *post*.

\textsuperscript{161} See *Davis v Jones* (1856) 17 CB 625, 634; 139 ER 1222, 1225 per Jervis CJ

\textsuperscript{162} See *Xenos v Wickham* (1867) LR 2 HL 296, 323.
 impliedly declared his intention not to be bound by the instrument until the stipulated condition has been fulfilled.  

These principles are all relevant because the delivery of a bill of exchange conditionally or for a special purpose only is akin to the delivery of a deed in escrow. The difference lies in the fact that whilst an orthodox escrow must be delivered into the custody of a party outside the contract, a bill of exchange may be conditionally delivered to an immediate party. In the former instance, a second delivery subsequent to the fulfilment of the condition is necessary to render the instrument operative. In the latter instance, the instrument becomes operative upon the fulfilment of the condition. There need be no second delivery.

EVIDENCE OF THE NATURE OF DELIVERY

Bills of exchange are required by law to be in writing. They are thus subject to the parol evidence rule. The effect of this rule is to bind the parties to the

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163 See Foundling Hospital v Crane [1911] 2 KB 367, 374 [the nature of delivery to be gathered from all of the circumstances of the case].


166 See Jeffries v Austin (1726) 1 Stra. 674; 93 ER 774, 774, Bell v Ingestre (1848) 12 QB 317, 319-320; 116 ER 888, 888 and Molsons Bank v Cranston (1918) 45 DLR 316, 323-324.

167 Greig J may have been unaware that, unlike an ordinary deed, a bill of exchange may be suspensively delivered to the obligee. This would explain his remarks at p. 218, where he contrasts delivery in escrow with what appears to be a description of a delivery in escrow [“a typical example is a transfer in escrow or payment on some other condition which means that the cheque is not delivered and is otherwise incomplete”].

168 See BEA, ss 3(1), 32(a) & 84(1).
contract expressed in the instrument; evidence in any way qualifying that contract being inadmissible.\textsuperscript{170} The parol evidence rule, however, relates exclusively to the contents of a written contract. It has no application to evidence going to the validity or effectiveness of that contract. Evidence (oral or written) is thus always admissible to show that a document, although on its face a valid and enforceable contract, was executed subject to a condition suspending its operation until the occurrence of some event or the fulfilment of some condition.\textsuperscript{171} This principle was given statutory recognition in s 21(2)(b) \textit{BEA}.\textsuperscript{172}

\textbf{THE FALLACY IN JAMES COOK}

As adverted, Greig J considered the defendant’s condition inadmissible under the parol evidence rule. His Honour put it this way -

\begin{quote}
The cases to which the section applied appear to be cases upon which liability under the bill, promissory note or cheque was in question. In other words the question was whether the bill has come into operation and is complete by delivery or not. When there is a question of another condition in defeasance
\end{quote}

\textsuperscript{169} When a contract has been reduced to writing, extraneous evidence cannot be adduced to contradict, vary, add to or subtract from the document - see \textit{Edwards v O'Connor} [1991] 2 NZLR 542, 548. In the context of bills of exchange - see \textit{Chalmers \\& Guest} pp 119-122, paras 384-393.

\textsuperscript{170} Thus a contemporaneous oral agreement in defeasance of a party’s absolute undertaking on a bill of exchange will not be received in evidence; the effect being to contradict the terms of the instrument - see \textit{New London Credit Syndicate Ltd. v Neale} [1898] 2 QB 487, 490 [liability postponed until a time later than that expressed on the face of the instrument] and \textit{Hitchings \& Coulthurst Co v Northern Leather Co of America} [1914] 3 KB 907, 910 [the bill to be enforceable only if goods proved equal to sample].

\textsuperscript{171} Evidence of a condition precedent to the effectiveness of a contract is always admissible. The effect of such evidence being, not to vary or contradict the written instrument, but to establish that what purports to be a complete contract never came into operative existence - see \textit{Pym v Campbell} (1856) 6 E \\& B 370, 373-374; 119 ER 903, 904-905 and \textit{Wallis v Littell} (1861) 11 CB (NS) 369, 375; 142 ER 840, 842.

of the bill or as to payment thereunder then it is treated as being extrinsic and evidence of it is inadmissible.\textsuperscript{173}

Now a condition operates in defeasance of a bill of exchange when it defeats or annuls a party's absolute undertaking thereon. A condition in defeasance of payment thereunder is less clear, but what I think Greig J was driving at was this: the defendant's cheque embodied an unconditional order to the drawee bank to pay a sum certain in money to the plaintiff-payee upon presentation. The condition was that the cheque should not be presented unless it was accepted in full and final settlement.\textsuperscript{174} It followed that to admit the condition would be to import a contingency which did not appear on the face of the instrument; presentation authorised by the cheque, but restricted by the condition.

If this was Greig J's perception of the matter, he was mistaken. A discrepancy of this nature does not fall outside s 21(2)(b) BEA; extrinsic evidence going to the operational status of a cheque being admissible even if it flatly contradicts the drawer's engagement on the instrument.\textsuperscript{175}

\textsuperscript{173} See James Cook at 219 - citing Hitchings & Coulthurst Co v Northern Leather Co. of America [1914] 3 KB 907. The persuasive value of Hitchings is blunted by the weight of contrary authority; s 21(2)(b) having been held to apply in very similar circumstances - see post.

\textsuperscript{174} Greig J puts the matter rather awkwardly (at 218, lines 16-19) but this, in my view, was the substance of the defendant's stipulation - i.e., that the cheque was to be presented for payment only if it was accepted in full and final settlement (the text of the defendant's letter set out at 215). Acceptance in full settlement was the condition, in other words, and presentation the prescribed mode of communicating acceptance.

\textsuperscript{175} See Imperial Bank v Heisz (1930) 1 DLR 339, 343.
DOES s 21(2)(b) APPLY TO A FULL SETTLEMENT CHEQUE?

A cheque expressed to payable on a condition is not a bill of exchange. A cheque, unconditional in form, may be delivered, however, subject to a condition or for a special purpose only. If the condition or purpose is unfulfilled, s 21(2)(b) allows the deliveror to show that the cheque, although perfect in form, never took effect and that property in the instrument remained in him, notwithstanding its physical transfer to the payee.

The question for resolution is whether the principle applies to a cheque tendered in full settlement. This raises two issues -

- Is the tendering of a full settlement cheque “conditional or for a special purpose only”, and
- Can such a condition or purpose be unilaterally imposed?

A cheque is an unconditional order in writing, drawn by one person upon another person who is a bank, signed by the drawer, requiring the bank to pay on demand a sum certain in money to, or to the order of, a specified person or to bearer (see ss 3(1), 10 & 73 BEA). If the order to the drawee bank makes the payment in any way conditional, therefore (e.g., if the cheque instructs the bank to meet the instrument only if the creditor accepts the payment in full and final settlement), the instrument will be invalid as a bill of exchange - see Bavins Jnr & Simms v London and South Western Bank Ltd. [1900] 1 QB 270. If the condition is directed to the payee, however, the instrument is valid; the order to the payee bank remaining unqualified - see Nathan v Ogdens Ltd. (1905) 93 LT 533, 535. A full settlement cheque (embodying an unconditional order to the drawee bank but accompanied by a condition addressed to the payee) is thus a bill of exchange and subject to the provisions of the BEA.

See Dextra Bank & Trust Co Ltd. v Bank of Jamaica [2002] 1 All ER (Comm) 193 (PC) – available on Lexis at pp 7-8 of the transcript.

If the condition or special purpose is unfulfilled and the cheque remains at large the deliveree (unless a holder in due course) will be unable to enforce it by action - see, for example, Russell v Hellaby [1922] NZLR 186. If the cheque has been applied in contravention of that condition or purpose, however, the deliveror may be answerable in conversion; his actions constituting a denial of the deliveror’s property in the bill - see pp 69-72 post.
Neither "conditional" nor "special purpose" is defined in the BEA. They are clearly separate concepts, however, ( parted by a disjunctive and different in substance ) and I will deal with them accordingly. Firstly, "conditional".

A contract or property interest is conditional when its operation or investiture depends upon the occurrence of a future, uncertain event. Such a condition may be either precedent or subsequent. Section 21(2)(b) seems to contemplate a condition precedent, and this is supported by the caselaw; cheques tendered on condition that a consignment of beef passed quality control or that two named persons subscribed to a share issue in the same sum or that a cheque drawn

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179 I mention both because a cheque is both a contract and an item of property; the completion of the former and the transmission of the latter both dependant on delivery.

180 A condition is precedent (or suspensive) if it provides that a contract will not be binding or property will not vest until the occurrence of a specified event. A condition is subsequent (or resolutive) if it provides that a previously binding contract will determine or that property will divest upon the occurrence of a specified event - see Wickman Machine Tool Sales Ltd. v L. Shuler A.G. [1972] 1 WLR 840, 859 (contract) and Kwei Tek Chao & Ors v British Traders and Shippers Ltd. [1954] 2 QB 459, 487-488 (property).

181 "...and not for the purpose of transferring property in the bill" suggests, not a divesting of property if the condition fails, but a retention of property until and unless the condition is fulfilled.

182 See Insurance Corporation of Ireland Plc v Dunlace Meats Ltd. [1991] NI 286. The facts in this case differ in no material particular from those in Hitchings & Coulthurst Co v Northern Leather Co of America [1914] 3 KB 907 (promissory note delivered on condition that goods supplied proved equal to sample). The latter case is cited contra the present proposition in James Cook at 218-219.

183 See Ontario Ladies College v Kendry (1905) 10 OLR 324
by the defendant was also honoured all supporting pleas of non-delivery. Does a full settlement cheque fall into this class of transaction?

Possibly not. Although redolent with conditionality, a full settlement cheque may not be conditional in the legal sense of the word; its availability tied, not to a future event, but to an act of compliance on the part of the deliveree. Although the point is not beyond argument, I am content to discount conditional delivery on this ground. Delivery for a special purpose, however, stands on an altogether different footing.

Unlike "conditional", "purpose" has no settled legal meaning. In the context of the subsection, however, it seems safe to adopt the definition assigned to it by The Shorter Oxford Dictionary - i.e., a thing to be done, an object to be

184 See Property Life Insurance v Edgar, unreported, Supreme Court, 15 March 1980, Mahon J – c.f. Clifford Chance v Silver [1992] 2 Bank LR 11 where the condition (that a formal exchange of contracts be subsequently effected) was fulfilled and the cheque rendered complete and operative.

185 When a debtor tenders a full settlement cheque he grants conditional access to the funds lying to his credit at the drawee bank. Access is conditional because the debtor has stipulated that the sum represented by the cheque will only be available to the creditor if he accepts it in full and final settlement. This, at least, is the condition that the debtor purports to impose.


187 A condition in law seems to contemplate, not just an event, but an event outside the volitional control of the parties. This is evidenced by the fact that a condition generally imports two tiers of obligations; the primary obligation (e.g., to buy and sell) hedged by a series of ancillary obligations geared to the creation of a binding contract - i.e., an implied undertaking not to withdraw during the pendancy of the condition and to take no action that might thwart its occurrence. If this was the case with a full settlement cheque, of course, the creditor would be obliged to accept the debtor's terms.

188 One might argue, for example, that the creditor's decision is both future and uncertain and that an event (i.e., the extinction of his cause of action against the debtor) issues directly from its making; all of the constituent elements of a condition being thereby present.
attained.\textsuperscript{189} This is consonant with the caselaw wherein bills and notes transferred for the purpose of discount,\textsuperscript{190} or as collateral security,\textsuperscript{191} or on condition that the payee procured the maker's restoration to a certain office,\textsuperscript{192} or that a separate bill be retired and returned by the next post\textsuperscript{193} or that the steering arm of a Scripps Booth roadster was put in order\textsuperscript{194} or that the deliveree accepted the plaintiff's drafts upon themselves\textsuperscript{195} or that the proceeds of the bill be applied to the purchase of a specified commodity\textsuperscript{196} have all been impeached on grounds of non-delivery.

For present purposes, the salient features of these cases are as follows:

- In each case the special purpose\textsuperscript{197} required a future voluntary act on the part of the deliveree;

- In none of the cases did the deliveror declare that non-compliance with the special purpose would prevent the passing of property in the bill;\textsuperscript{198}

\textsuperscript{189} See fn. 186, Vol. 1 at p. 2409
\textsuperscript{190} See Lloyd v Howard (1850) 15 QB 995; 117 ER 735 and Dawson v Isle \[[1906] 1 Ch. 633\].
\textsuperscript{191} See Alsager v Close (1842) 10 M & W 576; 152 ER 600 \[the note to be resorted to only in the event of default\].
\textsuperscript{192} See Jeffries v Austin (1726) 1 Stra. 674; 93 ER 774.
\textsuperscript{193} See Bell v Lord Ingestre \[(1848) 12 QB 317; 116 ER 888\].
\textsuperscript{194} See Russell v Hellaby \[1922\] NZLR 186.
\textsuperscript{195} See Seligman v Huth \[(1877) 37 LTR 488\].
\textsuperscript{196} See Muttyloll Seal v Dent \[(1853) 8 Moo PC 319; 14 ER 122 \text{ (opium)}\].
\textsuperscript{197} The diverse nature of the stipulations suggest that a "special purpose" is simply a clearly designated purpose excluding any other.
\textsuperscript{198} To fall within s 21(2)(b) the condition or special purpose must be inimical to the passing of property in the bill \text{i.e., "delivery. . . may be shown to have been conditional, or for a special purpose only and not for the purpose of transferring property in the bill"}. Like most escrows, therefore, the question is one of inference - i.e., the condition or special purpose relied upon must, by necessary implication, preclude the immediate passing of property in the bill. The inference was drawn in the above cases because the deliveree was aware that he would not be entitled to
In several of the cases the remitters were debtors; and

In each case, the deliveree (generally the payee) possessed full physical control over the instrument and yet was held to have no legal right to deal with it save in accordance with the deliveror's mandate.

What then is the position with a full settlement cheque?

When a debtor tenders a full settlement cheque, he does not purport to confer an unrestricted power of disposition upon the creditor. He proclaims, rather, that the cheque is to be applied for a specific purpose - i.e., in compromise and discharge of the creditor's cause of action against him. If the creditor is unwilling to accede to the debtor's terms, he is often directed to return the instrument. This, in my view, qualifies as delivery for a special purpose within s 21(2)(b); the deliveror making it plain that the deliveree will only be entitled to the benefit of

treat the bill as his own until either a designated act was performed or unless the instrument was applied as directed. There was (and clearly need be) no express reservation of property - c.f. James Cook at 218.

See Bell v Lord Ingestre (1848) 12 QB 317; 116 ER 888, Seligman v Huth (1877) 37 LTR 488 and Dawson v Isle [1906] 1 Ch. 633.

To successfully invoke s 21(2)(b) the debtor must establish both the special purpose and notice of it to the deliveree (see fn. 155). Ordinarily this will not be difficult - the debtor's terms generally sufficiently prominent and unambiguous to have been specifically rejected. The circumstances relied upon to show delivery in escrow, however, must occur prior to, or contemporaneously with, the transfer of possession (see Doe v Bennett (1837) 8 Car & P 124; 173 ER 426). A condition imposed, or an ambiguous condition clarified, subsequent to transfer does not create a conditional delivery - see Equitable Securities v Neil [1987] 1 NZLR 233, 339-340.
the cheque if he performs a future, exclusive, voluntary act.\textsuperscript{201} The fact that the deliveror is a debtor\textsuperscript{202} and that the cheque has been placed within the physical control of the deliveree are, for reasons already given, irrelevant. The critical issue is whether such a restriction can be unilaterally imposed.

**CAN A 'SPECIAL PURPOSE' BE UNILATERALLY IMPOSED?**

If the deliveror of a deed intends the interest embodied in the instrument to vest immediately and unconditionally in the deliveree, it will do so from the moment of physical transfer.\textsuperscript{203} If he expresses an intention to retain control over the instrument, however, it will operate as an escrow only; the acquisition of the interest postponed until the parol condition (whatever it may be) is consummated. In either event, however, it is the declared intention of the deliveror which determines the operation of the deed.\textsuperscript{204} The intentions of the deliveree are consulted only to the extent that he cannot be seised of property against his

\textsuperscript{201} In my opinion, “full settlement” admits of only one interpretation: a complete extinction of liability. This clearly excludes acceptance on account which preserves the creditor’s cause of action.

\textsuperscript{202} The drawer of a cheque is the person who writes (or causes to be written) and signs the instrument. s 21(2)(b) allows the drawer of a cheque to show that delivery was conditional or for a special purpose only. There is nothing to suggest that a cheque tendered by a debtor in attempted compromise of an unliquidated claim falls outside the subsection.

\textsuperscript{203} Possibly earlier - see *Alan Estates Ltd. v W.G. Stores Ltd.* [1982] 1 Ch 511, 526 C-E.

\textsuperscript{204} See *Xenos v Wickham* (1867) LR 2 HL 296, 323 [“... the maker may deliver [the instrument] so as to suspend or qualify its binding effect. He may declare that it shall have no effect... till some condition has been performed “] and *Foundling Hospital v Crane* [1911] 2 KB 367, 377 [“the mode in which [the instrument] operated is a question of intention, primarily of the grantor and secondarily of the grantee; nothing passes out of the grantor against his intention”]. See also *Vincent v Premo Enterprises (Voucher Sales) Ltd.* [1969] 2 QB 609, 623 and J. Salmond & J. Williams, *Principles of Contract*, 2\textsuperscript{nd} Ed (Sweet & Maxwell Ltd, London, 1945) at p.66. [Hereafter “Salmond and Williams”].
In my view, the position is the same when the instrument of investiture is a cheque. I say this for several reasons.

Firstly, it is important recognise that what we are dealing with is not a debtor’s power to dictate terms viz his indebtedness, but his power to control the operation of a cheque; an item of personal property tendered in respect of his indebtedness. Secondly, it must be stressed that although s 21(1) BEA refers to “the contract on the bill”, a cheque is not a contract in the orthodox sense of the word. A cheque has, in fact, much in common with a conveyance and operates along similar lines. These points registered, I will now attempt to describe the juristic character of a cheque.

205 See Foundling Hospital v Crane [1911] 2 KB 367, 377.
206 This is not to say that a debtor can never impose his will upon a creditor. A cheque accompanied by a letter appropriating the payment to one of two debts, for example, binds the creditor to compliance; it being no answer that the creditor did not agree to the debtor’s terms or that the stipulation contradicted the instrument which gave no such direction - see pp. 43-44 ante.
207 A full settlement cheque will only effect a discharge if it is accepted in that character. If the debtor’s terms are rejected, the payment, although sufficient in itself to extinguish the obligation, will effect a pro tanto discharge only. The status of the underlying debt is not, however, the present issue. The question is whether the debtor can make the passage of property in a cheque, a unilateral instrument issued pursuant to that obligation, contingent upon the acceptance of his terms.
208 When a cheque is delivered for a special purpose it acquires the central characteristic of a unilateral contract - i.e., formation becomes contingent upon the performance of a stipulated act (see most famously Carlill v The Carbolic Smoke Ball Co (1893) 1 QB 256). In my view, however, it is extremely misleading to analyse cheques on a purely contractual basis. Nor is the task an easy one - see Goode: “Abstract Payment Undertakings” in "Essays for Patrick Atiyah" (eds. Peter Cane and Jane Stapleton, Oxford; Clarendon Press; New York, Oxford University Press, 1991), Chapter 9, p. 208.
209 A contract to sell land creates an obligation between the parties whereby the seller is bound to convey the subject property to the buyer. The instrument which effects the transfer is called a conveyance. The execution and delivery of a conveyance does not result, however, in the creation of an obligation. Its effect, rather, is to alter the ownership of existing rights; that alteration giving effect to a separate bilateral contract of sale. A conveyance is not, therefore, a contract. Its
THE LEGAL CHARACTERISTICS OF A CHEQUE

An orthodox bilateral contract is based on unity of intention and reciprocity of performance. The terms of such a contract require consensus to be binding. In stark contrast stands a cheque which involves no element of agreement between the parties, requires no counter-performance on the part of the payee and remains revocable by the drawer (the sole executing party) until delivery – i.e., until he transfers the instrument with the intention of passing the property therein. It follows, in my view, that the tenor and legal operation of a cheque, a unilateral instrument rendered operative by voluntary investiture rather than execution, lies within the exclusive control of the drawer. It is accordingly open to that party to prescribe the terms upon which the instrument can be employed; the payee’s power of dealing circumscribed by that mandate. There need be no consensus between the parties.

This view surely accords with general principles. A creditor’s power to deal with a full settlement cheque is dictated by the extent of the interest he obtains upon operation is accordingly governed by the declared will of the alienor (see Salmond & Williams at pp 5-6). A cheque, in my view, shares all of the above characteristics. Like a conveyance, it is a vesting instrument; a means whereby the drawer relinquishes a right against the bank and vests an equivalent right against himself in the payee. Like a conveyance, it is generally issued pursuant to a separate bilateral contract and like a conveyance, I submit, its operation is subject to the unilateral control of the alienor.

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210 See Bloomer v Bank of Montreal (1964) 43 DLR (2d) 84, 89-90 [“... property in the [bill] does not pass to the payee until and unless there has been a delivery with an intention to transfer the property”].

211 See Muttyoli Seal v Dent [1853] 8 Moo. PC 319, 327; 14 ER 122, 125-126 and Seligman v Huth (1877) 37 LTR 488, 492.

212 The parol evidence rule illustrates the point; extrinsic evidence inadmissible to contradict instruments intended to be the formal and conclusive expression by the parties of their agreement or, in the case of a unilateral instrument such as a deed [or, I submit, a cheque] the formal and conclusive expression of the intentions of the maker - see Chitty, Vol 1, p. 759, para 12-107, fn. 452.
receipt of the instrument. If he is entitled to bank it on account, his interest would exceed that purportedly granted by the debtor. Why should this be? A debtor does not lose his power of disposition simply because he is a debtor. It is difficult to see, therefore, how a cheque, an item of personal property, can enure immediately and unconditionally to the creditor if it is the debtor's manifest intention that it should not. To effect such an ouster the creditor would have to possess either a superior title to the instrument or a power to levy something akin to distress upon the debtor's property. The nature and source of such title or power is far from clear; the creditor's inchoate right to claim judgment (if he can) carrying no pre-emptory right of execution.

THE CONSEQUENCES OF BANKING A FULL SETTLEMENT CHEQUE IN BREACH OF MANDATE

Section 21(2)(b) BEA allows a party to show that property in a cheque did not pass on delivery. What the subsection does not make clear is the nature of the property retained by the deliveror after the cheque leaves his possession. Before addressing the subject of conversion, therefore, I propose to look at the deliveror's residual interest in a conditionally-delivered cheque. What does it amount to and will it support an action if interfered with?

THE RELATIONSHIP BETWEEN THE PARTIES DURING THE PENDENCY OF THE CONDITION

When a party delivers a cheque conditionally or for a special purpose only he surrenders possession of the instrument to the deliveree. The interest he retains is thus something less than full ownership; the grant of possession reducing his

213 If an accrued cause of action was secured by a power of distress the debtor's property in the cheque would be of no consequence; the creditor entitled to detain it as a pledge against outstanding liability. There are, however, several objections to this notion - see pp. 102-103 post.

214 See pp 97-102 post.
absolute interest to a mere superior right. In my view, this division of interests creates a particular legal relationship between the parties.

When a cheque is delivered unconditionally the deliveror makes an outright disposition of his interest in the instrument.\textsuperscript{215} When delivery is made conditionally or for a special purpose only he transmits a lesser interest; relinquishing possession but retaining property in the cheque until the designated condition or purpose is fulfilled.\textsuperscript{216} It follows, in my view, that the initial relationship between the immediate parties to a conditionally-delivered cheque is that of bailor and bailee; s 21(2)(b) \textit{BEA} allowing the former to show that delivery was made, not for the purpose of passing the general property in the cheque, but merely with the intention of passing a special property in the form of possession and a power to acquire full title through the fulfilment of the designated condition or purpose.\textsuperscript{217}

The situation with which we are dealing sits a little outside the orthodox conception of a bailment; the chattel delivered, not for purposes of custody, but for application in a specific manner. Unusual also is the non-contractual and to a certain extent involuntary nature of the deliveree’s possession. In my view, however, neither of these considerations disqualify a bailment. I will deal with each point in turn.

\textsuperscript{215} The deliveree acquiring both possession of the instrument and the property therein. The effect of the transfer is thus to confer full legal ownership. The deliveree may thereafter deal with the instrument as he pleases.

\textsuperscript{216} “Property” is not defined in the \textit{BEA}. Some guidance may be gained, however, from s 2 of the \textit{Sale of Goods Act} 1908 which describes it as “the general property in the goods and not merely a special property”. In my view, special property comprehends any grant which does not convey the whole of the interest enjoyed by the grantor.

\textsuperscript{217} When property in a chattel resides in one party and possession in another the relationship is generally one of bailment; the owner retaining general property in the item but parting with special property in the form of possession and the rights and remedies incident thereto - see \textit{Re Bond Worth} [1980] 1 Ch 228, 247.
Firstly, although bailment generally contemplates the return of the subject chattel, re-delivery to the bailor is not essential to the relationship. Under a contract of hire purchase, for example, the prospective owner acquires a chattel under a contract of hire but with a concurrent option to purchase it. This creates a bailment of the chattel until either the option is exercised or the chattel is returned. Although either action terminates the bailment, in the former instance full property in the chattel passes to the purchaser. The bailee’s acquisition of full title results, of course, in the non-return of the chattel.218 A similar form of bailment arises where goods are supplied subject to a clause reserving property in the supplier until the buyer’s obligations have been discharged. Such transactions (conditional sales) give rise to a bailment in the interval between delivery and the passing of property by way of payment.219 The corollary of the bailee’s acquisition of full title being, again, the non-return of the chattel.

Although slightly different, both of the above scenarios demonstrate that the relationship of bailor and bailee and vendor and purchaser can arise consecutively within the same transaction. In my opinion, the same evolution occurs when a party delivers a cheque for a special purpose and the deliveree applies it as directed. In such circumstances, the latter will successively occupy the roles of bailee and full owner; the fulfilment of the condition unifying his title and terminating the bailment.220

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218 See Karflex v Poole [1933] 2 KB 251, 264.
220 Fulfilment of the condition also renders the cheque operative. If it is duly honoured, its acceptance will create a superseding contract of release. If it is dishonoured, the creditor will be generally remitted to his original rights - see Jameson v CEBG (1999) 1 All ER 193, 207 (HL).
Secondly, although most bailments arise from a contract between bailor and bailee, bailment is not premised on a contractual relationship.\textsuperscript{221} A bailment may exist, therefore, even if the bailee was under no contractual obligation to take possession of the chattel. Thirdly and lastly, a bailment may arise even if the possessor has acquired the chattel independently of any conduct or desire on his part. The bare fact of possession, in other words, is sufficient to bring the relationship into existence.\textsuperscript{222} The fact that the bailee neither bargained for possession nor induced the bailor to part with it is immaterial.\textsuperscript{223}

In my opinion, when a creditor acquires possession of a full settlement cheque he becomes, for the foregoing reasons, a bailee of the instrument; the bailment spanning the divide between the physical transfer of the cheque and either its restoration to the debtor, its application in the stipulated manner or its misapplication by the creditor.\textsuperscript{224}

\section*{CONSEQUENCES OF THE BAILMENT}

When a creditor receives a full settlement cheque he may act in one of three ways. He may -


\textsuperscript{222} See \textit{Evan and Powell Ltd. v Plummer Roddis Ltd.} (1933) 50 TLR 158, 159. The fact that possession is involuntary does not detract from the possessor's status as a bailee. His duties are lighter, however, by virtue of the unprojected nature of his possession. He will only be liable in conversion, therefore, if he fails to exercise reasonable care.

\textsuperscript{223} The tendering of a full settlement cheque is often the penultimate act in a protracted course of dealing between contracting parties; the debtor countering the creditor's demand for payment with a legitimate invitation to accept substituted performance and thereby terminate the relationship. The involuntary nature of the creditor's possession (arising, as it generally does, within an existing relationship and not wholly unsolicited by the creditor) should not, therefore, be overstated.

\textsuperscript{224} See \textit{Property Life Insurance v Edgar}, unreported, Supreme Court, 15 March 1980, Mahon J [ a cheque delivered subject to a restrictive mandate creates a bailment ].
Return the instrument to the debtor; or
Apply the instrument as directed; or
Apply the instrument in contravention of the condition.

Although the exercise of any of these options will terminate the bailment, the legal consequences all differ. In the first instance, full ownership (property supplemented by possession) will vest in the debtor. In the second, full ownership (possession supplemented by property) will vest in the creditor. What occurs in the third instance I will shortly discuss. Firstly, however, I will give a brief outline of the tort of conversion and its application to cheques.

CONVERSION

Conversion is an act, or complex series of acts, of wilful interference, without lawful justification, with any chattel in a manner inconsistent with the right of another, whereby the other is deprived of the use and possession of it. Conversion, moreover, is a tort of strict liability. There need be no knowledge on the part of the converter that the goods belonged to someone else, nor any


226 See Salmond & Heuston at p. 101. Although it is impossible to frame a definition which covers every conceivable case, the essence of the tort is a wrongful exercise of dominion over the chattel of another - see Property Life Insurance v Edgar, unreported, Supreme Court, 15 March 1980, Mahon J at p. 13.

227 See Blenheim Borough and Wairau River Board v British Pavements (Canterbury) Ltd. [1940] NZLR 564, 572 and R v Backland & Sons Ltd. [1922] NZLR 683, 691. It is irrelevant to liability that the converter was unaware of the owner’s interest or believed it resided in another.
positive intention to challenge the rights of the true owner.\textsuperscript{228} It is sufficient that the true owner's rights were, in fact, challenged.\textsuperscript{229} Slightly more intricate is the question of standing.

Although a wrong to ownership, conversion is essentially a possessory tort.\textsuperscript{230} This does not mean, however, that the plaintiff must have been in actual possession of the chattel at the time of the conversion. So long as the plaintiff was entitled to its immediate possession at that time, the action will lie.\textsuperscript{231} To found a claim upon an immediate right of possession, however, the claimant must be able to demonstrate some legal proprietary interest in the chattel.\textsuperscript{232} An equitable interest or a bare contractual right of delivery will not suffice.\textsuperscript{233}

To establish the conversion of a full settlement cheque, then, the debtor must show the following:

- That he retained a legal proprietary interest in the cheque; that interest giving rise to an immediate right of possession, and

\textsuperscript{228} Although the converter must intend to deny the owner's right or assert a right inconsistent with it, such an intention will be imputed when a chattel is deliberately used or interfered with. An intentional act inconsistent with the owner's rights is thus all that is required to establish the tort - see Caxton Publishing Co Ltd. v Sutherland Publishing Co Ltd. [1939] AC 178, 202.

\textsuperscript{229} Again, conversion does not depend on a deliberate or malicious denial of the plaintiff's title or immediate right to possession. Provided the necessary degree of deprivation or adverse interference is present, liability can be incurred quite innocently - see Hiort v Bott (1874) LR 9 Exch 86, 92 and R.H. Willis & Son v British Car Auctions Ltd. [1978] 1 WLR 438, 441-442.

\textsuperscript{230} A plaintiff need not demonstrate full ownership of a chattel to maintain an action for its conversion. A possessory entitlement superior to that of the defendant is all that is required - see The Winkfield [1902] P 42, 54.


\textsuperscript{232} See Penfolds Wines Pty Ltd. v Elliot (1946) 74 CLR 204, 229.

\textsuperscript{233} See MCC Proceeds v Lehman Bros [1998] 4 All ER 675, 691 (equitable interest) and Jarvis v Williams [1955] 1 WLR 71, 74-75 (contractual right).
The right subsisted when the cheque was presented for payment, and

In presenting the cheque contrary to the terms of tender, the creditor committed an act of dealing inconsistent with that right.

DOES BANKING ON ACCOUNT CONSTITUTE A CONVERSION OF A FULL SETTLEMENT CHEQUE?

When a chattel is placed in the hands of a bailee for a limited purpose and he deals with it in a manner wholly inconsistent with the terms of the bailment, and consistent only with an intention to treat it as his own, the bailment terminates and possessory title reverts to the bailor, who may thereupon sue the bailee in conversion. In my view, this formula is directly applicable to the situation under discussion. I would state the matter thus:

When a creditor, aware of the terms of tender, banks a full settlement cheque on account he arrogates to himself the rights of full ownership. In so doing, he performs an act at variance with the terms of the bailment established by

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234 See Plasycoed Colleries Co Ltd. v Partridge, Jones & Co Ltd. [1912] 2 KB 345, 351.

"Possessory title" means an immediate (c.f. a postponed) right to possession.

235 The tendering of a full settlement cheque involves a voluntary transfer of possession accompanied by a stricture as to use. It is this latter aspect which forms the basis of the suggested conversion; the tort arising, not through a deprivation of actual possession, but through a positive act of misfeasance subsequent to the chattel's lawful acquisition. This is generally the position when dealing with conversion by a bailee.

236 To arrest the passage of property in a cheque the conditions of tender must be brought adequately to the deliveree's attention. If this does not occur (i.e., if the condition is obscurely placed, ambiguous in its terms or imposed after delivery), the deliveror will be presumed to have relinquished full property in the instrument (see fn. 155). In such circumstances there will be no proprietary foundation for an action in conversion - i.e., there will be no interest left in the deliveror with which the deliveree can perform an inconsistent act.
s 21(2)(b) BEA. The bailment thereupon terminates and the debtor becomes entitled to immediate possession of the instrument. He simultaneously acquires standing to sue in conversion;\textsuperscript{237} the creditor having acted in derogation of his property in the cheque\textsuperscript{238} and, in so acting, destroyed the subject-matter of the bailment.\textsuperscript{239}

**POSSIBLE DEFENCES TO CONVERSION**

In my opinion, a creditor who knowingly banks a full settlement cheque on account converts it against the debtor. I maintain this view in the face of two judgments to the contrary.

In *Equitable Securities v Neil*\textsuperscript{240} conversion was disallowed on the ground that notice of the condition had been brought insufficiently to the plaintiff's attention.

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\textsuperscript{237} The debtor's immediate right to possession revives when the creditor banks the cheque on account; an act wholly repugnant to the terms of the bailment - see *Penfolds Wines v Elliot* (1946) 74 CLR 209, 214, 217-218, 241-242. The crystallisation of the debtor's right to possession and the conversion thus arise from the same act.

\textsuperscript{238} The honouring of a cheque to which the payee has no, or defective, title generally involves successive conversions; the drawee and collecting banks independently liable for the misuse of the instrument. By virtue of s 5 of *The Cheques Act* 1960, however, such parties will not be liable in conversion if they have acted in good faith and without negligence. This would almost certainly be the case with a full settlement cheque; the banks having no reasonable cause to suspect (unless the condition was inscribed upon the instrument itself) that the cheque had been tendered subject to a restrictive mandate. The statutory exoneration of intermediaries does not, however, annul the original tort. If property in the cheque has not passed, the creditor will have converted it against the debtor.

\textsuperscript{239} When a creditor banks a full settlement cheque he destroys the debtor's chose in action against the drawee bank and reconstitutes it between himself and the collecting bank - see *R v Preddy* [1996] AC 815, 841. The cheque is thereupon exhausted as a bill of exchange. Even if subsequently returned, it would be but a spent relic of the transaction; shorn of the characteristics which rendered it an item of property - see *Parsons v R* [1999] 160 ALR 531, 542.

\textsuperscript{240} [1987] 1 NZLR 233.
Full property in the cheque had accordingly passed on delivery leaving no interest in the defendant upon which to found the action.\textsuperscript{241} This is a cogent objection and had the matter rested there the judgment would have been unexceptionable. In the event that he was mistaken, however (i.e., in the event that property in the cheque remained in the defendant), Chilwell J advanced a separate ground for discounting the tort; adopting the following passage from \textit{Fleming}:

To establish that the detention had become adverse and in defiance of his rights, the claimant must prove that he demanded the return of the chattel and the defendant refused to comply. But such refusal must be categorical; if qualified for a reasonable and legitimate purpose, without expressing or implying an assertion of dominion inconsistent with the plaintiff's rights, it amounts to neither detinue or conversion. A man does not always act unreasonably in refusing to deliver up property immediately on demand; he is entitled to inquire first into the rights of the claimant.

In Chilwell J's view, there was no better means of inquiry than to bring the matter promptly before the Court.\textsuperscript{242} I would dispute this proposition.

If a defendant entertains a bona fide doubt as to a plaintiff's title in a chattel and detains the article for a reasonable period in order to clarify (and thereby safeguard) his position, he will, it is true, have a viable defence to conversion.\textsuperscript{243} As the above passage makes plain, however, a bona fide doubt as to title furnishes grounds for detention only. It does not authorise a positive act of dealing which places the chattel beyond recovery. I would argue, therefore, that the principle has no application to the unauthorised banking of a full settlement cheque; an action which, for reasons already given, amounts to a positive denial of title. In such circumstances, the act completes the tort. The knowledge and intentions of the actor/actress are immaterial.

\textsuperscript{241} Ibid at 240.
\textsuperscript{242} Ibid at 240-241.
A slightly different approach was taken in *Pereira v Inspirations East Limited*.\(^{244}\) In this case a disgruntled traveller was demanding a full refund (plus costs and losses) from the travel agents who had organised his holiday in Southern India. The defendant’s response, after some sparring, was to forward a cheque for $225 "in full and final settlement of this matter". The plaintiff’s counter-response was to pay the cheque into his bank account and send a letter to the defendants stating that it had been "accepted on account" and that he awaited their revised offer in short course. He did not mention that he had banked the cheque. The instrument cleared the following day and the defendant’s account was debited. When proceedings issued, the defendants argued that the claim had been compromised by the presentation of the cheque.

The defendant’s submissions in *Pereira* ranged widely. For present purposes the interest lies in the court’s response to the suggestion that by banking the cheque contrary to the terms of tender the plaintiff had converted the instrument. Rose LJ had this to say -

> The paying in of the cheque by [the plaintiff] may have been attempted conversion. But in view of the receipt of his letter by the defendants, following its posting on the day that the plaintiff paid the cheque into his account and before the cheque was presented...to the defendant’s bank, it cannot be said that any conversion here occurred.\(^{245}\)

Nolan LJ agreed; adding -

> The plaintiff ran things fine; if the cheque had been cleared before the defendants received the counter-offer, other considerations might well have arisen. But, by communicating his counter-offer before the [money] had been transferred and while there was still time for the defendants to stop the

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\(^{244}\) Court of Appeal (UK), unreported judgment of 9th November 1992 (Glidewell, Nolan and Rose LLJ) - transcript available on Lexis. [hereafter "Pereira"]

\(^{245}\) See at p. 4 of the transcript.
transfer, he avoided any inference of acceptance, and avoided also the charge that he had converted the money.246

Conversion was disposed of, therefore, on the ground that the plaintiff’s counter-offer had been communicated to the defendant while he still had the opportunity to countermand the cheque. This proposition warrants close examination. Before proceeding, however, I wish to clarify one point.

It is clear from the judgment that the court regarded the tort as arising, not when the cheque was banked, but when the proceeds were credited to the plaintiff’s account. I would challenge this. Conversion is committed when a person exerts dominion over a chattel in a manner impairing the rights of the true owner. This occurred when the plaintiff banked the cheque.247 Its successful presentation involved successive conversions by the drawee and collecting banks.248

This said, I return to the issue: did communication of the plaintiff’s intentions afford a viable defence to conversion?

It has been held that if an owner of goods knows of a proposed course of conduct in relation to those goods and raises no objection to it, he thereby acquiesces to that conduct and forfeits the right to complain that it constitutes conversion.249 This principle is prima facie applicable to the facts in Pereira. For two reasons, however, I would reject the possibility.

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246 See at p. 5 of the transcript.
247 See ante p. 71-72.
248 See fn. 238.
249 See Maynegrain Pty Ltd. v Campafina Bank [1984] 1 NSWLR 258, 264-265 (PC) [ no act in relation to goods is wrongful if performed with the knowledge and consent of the owner ]. This principle bears a powerful resemblance to the doctrine of acquiescence described in De Bussche v Alt (1877) 8 Ch D 286, 314 [ “If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, cannot afterwards be heard to complain of
Firstly, to successfully invoke the principle the putative converter must have been aware of the owner’s acquiescence to his proposed course of conduct or to have been reasonably able to infer it.\(^{250}\) No such claim could be made by the plaintiff in *Pereira*, who committed the cheque to the banking system before rejecting the defendant's terms. The tort was complete, in other words, before the defendant had the opportunity to sanction it.\(^{251}\)

Secondly, it is implicit in the judgment that communication of the plaintiff’s intentions placed the defendant under a positive duty to stop the cheque; failure to do so amounting to acceptance of the plaintiff’s terms and the loss of the right to allege conversion. Even if supportable in principle, this proposition involves a significant double standard; the defendant’s failure to immediately countermand the instrument constituting an irretrievable manifestation of assent.\(^{252}\) A suggestion the court had been quick to reject in respect of the cheque’s banking.\(^{253}\)

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250. This was the position in *Maynegrain Pty Ltd. v Campafina Bank* [1984] 1 NSW 258. See also *De Bussche v Alt* (1877) 8 Ch D 286, 314 [“This... is the proper sense of the term acquiescence... quiescence under such circumstances as that assent may be reasonably inferred from it”]. Although acceptance will not ordinarily be imputed from silence and inaction, acquiescence is founded upon those very elements.

251. The position might be different if the creditor informed the debtor that he intended to hold the cheque for a prescribed period before banking it. If the grace period was sufficient to issue an effective countermand (21 days were granted in *James Cook*) and the debtor failed to exploit it, acquiescence to the creditor’s counter-proposal might be implied - i.e. that the cheque would be taken on account and any outstanding liability would be settled by either negotiation or action.

252. Assuming that the plaintiff’s letter was examined immediately on arrival (by no means a certainty: the defendants were a firm of travel agents, dealing, one presumes, with a fair volume of daily correspondence), the defendant would have had 24 hours (possibly less) to countermand the cheque. Further, since the plaintiff omitted to mention that the cheque had been banked (not, one suspects, an oversight), the stop order would have issued on the basis of suspicion rather than actual knowledge. In the light of these circumstances, it is difficult to see how the defendant...
CONCLUSION

In my opinion, Mahon J was correct in his interpretation of s 21(2)(b) BEA, correct in applying it to a full settlement cheque and correct in his assertion that the banking of such an instrument in contravention of the terms of tender amounts to conversion. I turn now to his second and more provocative assertion: that the conversion could be pleaded in bar to an action for the balance of the debt.

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could be deemed to have assented to the plaintiff's counter-offer. A failure to respond instantaneously does not equate to consent.

See at p. 4 of the transcript.
CHAPTER TWO

CONVERSION BY WAY OF DEFENCE: THE AMERICAN RULE
To suggest that conversion may be raised by way of defence in a debt action is incomprehensible to some. Professor McLauchlan states the case:

Let us assume that the creditor who banked the cheque yet repudiated the condition on which it was sent would, technically speaking, commit the tort of conversion. Why does it follow that the creditor must be taken to have agreed to the condition? What is the basis for the equation “tort = contract”. Why can’t the creditor admit the tort but deny the contract? ... It seems to the writer to be an extraordinary proposition that one cannot deny the existence of a contract with a person where the consequence of there being no contract would be liability in tort to that person.

A contract which arises from the commission of a tort does seem a rather unorthodox notion. Three factors, however, militate against the word “extraordinary”. Firstly, the proposition does not originate with Homeguard, secondly, it bears the imprimatur of some of the greatest names in American jurisprudence and, thirdly, it is accepted without cavil in most American States.

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254 See Discord at 281. This is as much a philosophical objection as a point of pleading. Contract and tort, the passage suggests, are immiscible concepts; polar phenomena which do not impinge upon one another even in the context of the same action.

255 Professor McLauchlan isolates most of the vulnerable areas. Conversion is not ordinarily punished by fixing the tortfeasor with a contract and a contract divested of agreement is a contract shorn of its defining characteristic.

256 For some reason Mahon J gives no indication of the doctrine’s provenance (see Homeguard at 333). Professor McLauchlan is equally reticent; doing little to dispel the impression that Mahon J was breaking new ground - see Discord at 281-282.

257 Corbin, Williston and Cardozo among others - unlikely champions for an affront to legal science.

258 It is the common law position we are here concerned with. Possible encroachments by the Uniform Commercial Code I leave for later consideration.
Before acquiescing in Professor McLauchlan's verdict, then, it is probably best to examine the common law position in America and the various rationales assigned to it. The proposition may not be as extraordinary as it first appears.
THE AMERICAN RULE

In most American jurisdictions the banking of a full settlement cheque tendered in respect of disputed or unliquidated liability raises a conclusive presumption of acceptance on the debtor's terms; the creditor precluded from asserting otherwise by virtue of the tort. *The First Restatement of Contracts* explained the principle thus:

The effect of the creditor's assent to receive what the debtor offers cannot be overcome by a statement, even though made contemporaneously with his acceptance, that he does not forgo or entirely forgo his pre-existing claim. The acceptance would be tortious unless the debtor's terms are assented to, and the creditor is not allowed to assert that he is a tortfeasor, when his acceptance can be given an effect involving no legal wrong.\(^{259}\)

*Williston* is to similar effect:

It is a general principle that where an act may be rightfully done with certain consequences or effect, the actor cannot assert for his own advantage to avoid that effect that the act was done wrongfully... The creditor is not allowed to assert his tortious conversion, though the effect is to fix upon him a bargain to which he never purported to assent.\(^{260}\)

And another commentator offered this interpretation -

The debtor is disposing of his own property and may, therefore, attach whatever condition he likes to the disposition. To hold that a creditor may ignore the condition on which the money is offered would amount to a finding of conversion by the creditor. To avoid this predicament, courts have preferred the view that the creditor accepts the condition


notwithstanding the most heated objections... there is no real consensus ad idem but rather an agreement by estoppel\textsuperscript{261}

Although the formulations differ, each of these explanations proceeds from the same premise: the creditor will not be heard to say that he is a tortfeasoer. This has a plausible ring to it, but counter-arguments are not difficult to find. A legitimately acquired right is not ordinarily lost through the commission of an incidental wrong,\textsuperscript{262} for example, and there are scant materials for an orthodox estoppel.\textsuperscript{263} Moving a little further afield, the absence of any recuperative element seems to rule out a restitution-based defence\textsuperscript{264} and the law’s partiality to compromises hardly warrants the coercion of an unwilling party.\textsuperscript{265}

\textsuperscript{261} See Gold “Accord and Satisfaction by Estoppel” 27 Iowa Law Review 31 (1941) [hereafter “Gold”].
\textsuperscript{262} See Hooper v Lane (1857) 6 HLC 433, 461; 10 ER 1368, 1375-1376 per Bramwell B [“the maxim [no man shall take advantage of his own wrong]... means that a man shall not gain a right from his own wrong... not that if he has a right he shall lose it, or the power of exercising it, by virtue of a wrong committed in connection with it”]. This would seem to cover the present case; the creditor’s right to payment antedating the conversion and being wholly unrelated to it.
\textsuperscript{263} Conceded by Gold at 32 [no representation of assent by the creditor]. Nor, generally speaking, will there have been any alteration in position by the debtor.
\textsuperscript{264} The American Rule is strongly reminiscent of an old action in quasi-contract; the court interpolating a fictitious agreement between the parties and thereby converting a wrongful act into a consensual transaction (see Fridman, “Waiver of Tort” (1955) 18 MLR 1, 3). Striking though the resemblance is, however, one hesitates to suggest a doctrinal connection. Quasi-contract was, on the face of it, purely restorative; a means (now superseded) of recouping the plaintiff for some unjust advantage gained by the defendant. The American Rule cannot be rationalized on this basis. Amelioratory rather than revendictory, it simply makes right what would otherwise be wrong.
Before dismissing the American position as an ideological caprice, however, let us review the course of events:

- An item of property is transferred *inter partes* on condition that it be employed in a particular manner or returned.

- The recipient disclaims the condition and renders the item incapable of return.

- The judicial response is to impute acceptance in the teeth of declared intention and thereby convert a tortious act into a lawful transaction.

An analogue immediately suggests itself - an area in which Commonwealth law follows the lineaments of the American Rule very closely indeed.

**THE AMERICAN RULE BY WAY OF ANALOGY WITH THE SALE OF GOODS**

Acceptance, in the case of simple contracts, is a matter of inter-party communication; the intentions of the offeree fixed by what the offeror was reasonably entitled to conclude from his words or conduct. In sharp contrast stands the acceptance of a physical thing. When this is the issue, the focus of the inquiry is altogether different; the interaction between the parties giving place to the interaction between the recipient and the *res*. A party may consequently incur obligations through his dealings with the *res* irrespective of his declared intentions.

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266 See Gold at 33 ["It is doubtful which rule, the English or the majority American, is the more defensible on logical grounds. The choice seems to depend on taste. English Courts have a more tender regard for the creditor. American for the debtor "].

267 See ante. In this context "assent" is probably the better word; the offeree indicating agreement rather than willing receipt.
As can be seen, there is a strong similarity between this result and the consequences which ensue when a full settlement cheque is banked in American jurisdictions. The point warrants expansion and I propose to approach it by way of rebuttal; reciting and meeting a specific objection to *Homeguard*. In the process I hope to disclose a tenable legal basis for the American Rule.

**THE OBJECTION**

Professor McLauchlan states:

Let us assume that the creditor who banked the cheque yet repudiated the condition on which it was sent would, technically speaking, commit the tort of conversion. Why does it follow that the creditor must be taken to have agreed to the condition? What is the basis for the equation "tort = contract". Why can't the creditor admit the tort but deny the contract?... If Mahon J were correct it would follow that an offeree in possession of the offeror's goods who negligently destroys or disposes of the goods (whether before or after rejecting the offer) would be bound to pay the contract price rather than the normal tort damages representing the fair market value of the goods. That is not the common law as the writer understands it.

First, let us be clear about the scenario. What Professor McLauchlan is probably referring to are unrequested goods delivered to a person on terms of sale or return; goods which through some negligent act on the part of the recipient are now incapable of restoration to the sender. If this is the case, the argument may run something like this -

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268 Note the quiet transition from conversion to negligent loss or destruction.
269 See *Discord* at p. 281.
270 The description is equally consistent with goods offered on approval or pursuant to a sale or return agreement. The negligent loss or destruction of such goods, however, does render the offeree liable for the price; the inability to return the goods amounting to an adoption of the transaction within s 20. Rule 4(a) of the *Sale of Goods Act* 1908 - see A. Guest, *Benjamin’s Sale of Goods*, 6th Ed (Sweet & Maxwell, London, 2002), p. 206, para 5-055 [hereafter “*Benjamin*”].
The delivery of unsolicited goods creates an involuntary bailment.\textsuperscript{271} If the goods are thereafter negligently lost or destroyed, the bailment terminates (no bailment can survive the dissolution of its subject-matter) and the quondam bailee becomes liable in damages.\textsuperscript{272} The measure of damages for negligent loss is the market value of the goods.\textsuperscript{273} This will not be the result, however, if one adopts Mahon J's reasoning. By his lights, the negligent loss or destruction of the goods would amount to acceptance. Property in the goods would accordingly pass to the offeree who would be liable for the contract price.\textsuperscript{274} Such a result flies in the face of basic principle and cannot be supported.

If this is a fair representation of Professor McLauchlan's argument, I take issue with it on two grounds. Firstly, whilst a comparison might conceivably be drawn between the negligent destruction of unsolicited goods and the inadvertent banking of a full settlement cheque,\textsuperscript{275} the deliberate banking of such a cheque (an act of conscious dominion and wilful destruction) is an altogether different proposition.

\textsuperscript{271} See \textit{Property Life Insurance v Edgar}, unreported, Supreme Court, 15 March 1980, Mahon J at p. 17 ["the involuntary bailee is a person who has come into possession of goods without any volition on his part, as for example...The recipient by delivery of unsolicited goods"] and N. Palmer, \textit{Bailment}, 2\textsuperscript{nd} Ed (The Law Book Company, Sydney, 1991) at p. 66 et seq.

\textsuperscript{272} See \textit{Attorney-General v Guardian Newspapers Ltd} (No 2) [1990] AC 109, 286 per Lord Goff ["A bailee who by his own wrongful, even deliberately wrongful, act destroys the goods entrusted to him is obviously relieved of his obligation as bailee, though he is of course liable in damages for his tort."]

\textsuperscript{273} See \textit{A.V.X. Ltd. v E.G.M. Solders Ltd.}, The Times, 7 July 1982 - available on Lexis at p. 6 of the transcript [involuntary bailee liable for the negligent destruction of 300 kg of capacitators].

\textsuperscript{274} An action for the price is only maintainable if the property in the goods has passed to the buyer - see s 50 of the \textit{Sale of Goods Act} 1908. This was also the position at common law - see \textit{Martin v Hogan} (1917) 24 CLR 234, 262.

\textsuperscript{275} Even then the analogy is inexact. The negligent offeree reaps no benefit from the loss of the seller's goods. A creditor who accidently banks a full settlement cheque reaps and retains the full benefit.
Secondly, I challenge the view that the legal issue lies exclusively in tort. The situation is also open to contractual analysis. I will deal with each of these points in turn.

**A RESTATEMENT OF THE ISSUE**

Mahon J’s suggestion was not that negligence = contract,\(^{276}\) but that conversion = contract. If the proposition is to be tested with a sale of goods analogy, therefore, the question should be this: what is the legal position when the recipient of unsolicited goods rejects the seller's terms but then converts the goods to his own use?\(^{277}\) In my view, initial guidance is to be found in s 37 of the *Sale of Goods Act* 1908.\(^{278}\)

s 37 *SGA* provides -

The buyer\(^{279}\) is deemed to have accepted the goods when he intimates to the seller that he has accepted them or when the goods have been delivered to him and he *does any act in relation to them which is inconsistent with the ownership of the seller*, or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.\(^{280}\) [my italics]

\(^{276}\) Far from it. Mahon J makes it perfectly plain that the banking of the cheque must be an informed and voluntary act - see *Homeguard* at 333.

\(^{277}\) The suggestion is not my own. A leading American text makes an explicit connection between the retention and use of unsolicited goods and the banking of a full settlement cheque - see A. Corbin and J. Perillo, *Corbin on Contracts*, Revised Ed (West Publishing Co, St. Paul, 1993), Vol. 1, s 3.21, pp 422 and 424 [hereafter “*Corbin*”].

\(^{278}\) Hereafter “*SGA*”.

\(^{279}\) To those who question the analogy between a party to an existing contract of sale and the recipient of unsolicited goods I bid patience. The relevant principles are remarkably similar.

\(^{280}\) Like s 21(2)(b) *BEA*, the principles set forth in s 37 *SGA* are not statutory innovations. They were laid down in a series of 19\(^{th}\) Century cases and subsequently codified by the Act - see *Healing Sales Pty. Ltd v. Inglis Electrix Pty. Ltd* (1968) 121 CLR 584, 612 per Windeyer J. [The
A buyer who performs an act inconsistent with the ownership of the seller of delivered goods, then, is deemed to have accepted them under the second limb of s 37 SGA. Conduct is the yardstick and buyers who have sold or offered the goods for sale, mortgaged them, entered them at auction, incorporated them into an existing structure, consumed a portion of them, sought to negotiate a price reduction on account of defects, registered a transfer of the goods or simply used them have all been captured by the section. Is there a common denominator?

SGA is a digest of the common law of sale as it stood at the time of enactment] and Chalmers, "Codification of Mercantile Law" (1903) 19 LQR 10, 11.

281 Inconsistent acts are not absolved by disclaimer. If the buyer expressly rejects the goods but then deals with them in a manner inconsistent with that rejection, he will be deemed to have accepted them - see Metals Ltd. v Diamond [1930] 3 DLR 886, 891 and Tradex Export S.A. v European Grain and Shipping Co [1983] 2 Lloyds Rep 100, 107. Rejection followed by an inadvertent act inconsistent with the seller's ownership, however, may not amount to acceptance - see Breckwoldt v Hanna (1963) 5 WIR 356, 360.

282 See Hardy v Hillerns & Fowler [1923] 2 KB 490.

283 See Symonds v Clark Fruit and Produce Co Ltd [1919] 1 WWR 587.

284 See Metals Ltd. v Diamond [1930] 3 DLR 886, 891.

285 See Hichcock v Cameron [1977] 1 NZLR 85, 88 [sale attempted pending an appeal from a judgment holding the buyer liable for the price].

286 See Mechan & Sons v Bow, McLachlan & Co Ltd. 1910 SC 758 [a tugboat] and Scott v McGeorgeh (1899) 1 GLR 268 [an item of farm machinery].

287 See Hamor v Groves (1855) 15 CB 667, 673; 139 ER 587, 589. The fact that goods have been damaged or destroyed does not preclude rejection, however, if the buyer was not at fault - see Head v Tattersall (1871) LR 7 Ex 7 at 10, 11.


289 See Armaghdown Motors Ltd. v Gray Motors Ltd. [1963] NZLR 5, 9.

290 See Electric Construction Co v Hurry & Young (1897) 24 R 312 (Ct. of Sess) and Lee v York Coach & Marine [1977] RTR 35.
Ownership, in its most absolute form, involves the right to possess, use or enjoy a thing, along with the right to encumber, alter, alienate or destroy it.\(^{291}\) The cases show that a buyer who usurps any of these rights (save possession, which has been voluntarily surrendered) will be deemed to have accepted the goods.\(^{292}\) Generally speaking, such conduct also constitutes conversion at common law.\(^{293}\) It will do, at least, if property in the goods resided in the seller at the time of the relevant act.\(^{294}\)

**PROPERTY IN THE GOODS**

The effect of s 37 \(\text{SGA}\) is to debar rejection and either (a) vest property in the goods in the buyer or (b) prevent it from revesting in the seller.\(^{295}\) I mention both possibilities because the movement of property in goods delivered under a contract of sale remains controversial.\(^{296}\) "An act inconsistent with the seller’s ownership" suggests, however, that property remains in the seller. If this is the case, then an affirmative finding under s 37 could also amount to conversion at

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292 An inability to return the goods in the state in which they were received is clearly unnecessary to attract the operation of s 37. Goods entered at auction may be passed in, after all, mortgages may be discharged, goods withheld may be surrendered and those merely offered for sale may be withdrawn and returned. What is required, in my view, is a positive act amounting to a denial of the seller's title.

293 See Edelstein v Shuler [1902] 2 KB 144, 156 [unauthorised transfer by way of sale and delivery], MCC Proceeds v Lehman Bros [1988] 4 All ER 675 [unauthorised pledge], Fouldes v Willoughby (1841) 8 M & W 540, 547; 151 ER 1153, 1156 [intentional destruction or consumption] and Aitkin Agencies Ltd. v Richardson [1967] NZLR 65, 66 [unauthorised use].

294 See The Playa Laga and Marble Islands [1983] 2 Lloyds Rep 171, 187 [No conversion; the plaintiffs having relinquished their interest in the goods prior to the tortious act. Nor did the subsequent re-acquisition of that interest relate back to the commission of the wrong].

295 See Tradex Export S.A. v European Grain and Shipping Co [1983] 2 Lloyds Rep 100, 107 ["a clear, unequivocal and bona fide rejection of goods liable to rejection has the effect of preserving or revesting the ownership of the goods in the seller"].

296 See Benjamin at pp 556-557, paras 12-046 & 12-047.
common law. Unlike conversion, however, the buyer is liable for the contract price; property passing on acceptance.\textsuperscript{297} Is the position any different when the goods are unsolicited?

**UN_SOLICITED GOODS**

It might be argued that a rule which operates within the framework of an existing contract of sale has no application to unsolicited goods; the former resting upon a consensual foundation and the latter not. There are indications, however, that this is not so. Firstly, there is common law authority which suggests that the same considerations apply to both transactions.\textsuperscript{298} Secondly, there is the fact that s 37 SGA is reproduced almost verbatim in s 6(a) of the Unsolicited Goods and Services Act 1975. I turn to that.

*The Unsolicited Goods and Services Act 1975*\textsuperscript{299} was the legislative response to the (then) proliferating practice of inertia selling.\textsuperscript{300} The Act does not prohibit the tactic but discourages it by providing for the passing of title to the recipient after the expiry of a specified period.\textsuperscript{301} For present purposes, the interest lies in

\textsuperscript{297} This would bring the section very close to the principle suggested in *Homeguard* - i.e., the buyer is deemed to have accepted the goods because to allow him to reject them (and thereby escape the contract) would be to condone a tortious act - see *Benjamin* at p. 557, para 12-047. It is doubtful whether the buyer would be heard to say that he had converted the goods but had not accepted them.

\textsuperscript{298} See *Weatherby v Banham* [1832] 5 C & P 228; 172 ER 950, 951 and *Benjamin* at p. 105, para 2-014 [The exercise of dominion over unsolicited goods amounts to acceptance.] See also *The First Restatement* at s 72(2), p. 77 and *Corbin*, Vol 1, s 3.21, pp 422-424.

\textsuperscript{299} Hereafter "UGSA"

\textsuperscript{300} I.e., where unrequested goods are delivered to prospective customers on a sale or return basis. The process is inertial because most recipients would sooner pay for the goods (it seems) than submit to the inconvenience and expense of returning them - see generally Williams, "The Unsolicited Goods and Services Act 1975" (1976) 7 NZULR 190

\textsuperscript{301} If the recipient does nothing, title in the goods passes three months from the date of receipt
the interregnum between receipt of the goods and the recipient's acquisition of title by operation of the Act.

s 6(a) provides:

The recipient of unsolicited goods is not liable to make any payment for the goods unless he agrees to acquire them or does any act in relation to them which is inconsistent with the ownership of the sender...

The meaning of this subsection seems clear: the recipient of unsolicited goods will be obliged to pay for them if, prior to the vesting of statutory title, he either (a) accepts the goods or (b) is deemed to have done so by performing an act inconsistent with the sender's ownership. This is the prima facie position at common law and if s 37 SGA is any guide, the latter limb will be satisfied by any positive act amounting a denial of the sender's title. It follows, in my view, that if the recipient rejected the sender's terms but then proceeded to deal with the goods in a manner explicable only on the basis that he was the owner and with the overt object of placing them beyond recovery he would both convert them at common law and be deemed to have accepted them under s 6(a) UGSA.

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302 The third limb of s 37 SGA ["or when after a reasonable lapse of time [the buyer] retains the goods without intimating to the seller that he has accepted them"] has, of course, been excised. See fn. 298.

303 One is confined to comparisons because s 6(a) UGSA has yet to be judicially examined. Liability for negligent loss or destruction is implicitly excluded, however, by s 6(b) ["wilful and unlawful"]: see fn. 298.

304 I.e., if he comported himself like the creditor in Homeguard.

91
He should, as a consequence, be liable for the price; property in the goods passing contractually rather than prescriptively.\textsuperscript{306}

**CONCLUSION**

When a transaction is wholly contractual, declared intent governs. When property is involved, what has been said is generally subordinated to what has been done. In my opinion, the American rule sits comfortably with this latter principle; the creditor’s disclaimer negated by his exercise of dominion over the debtor’s cheque.\textsuperscript{307} This conclusion does not coalesce the laws of contract and tort.\textsuperscript{308} It simply reflects the fact that, where property is concerned, the elements of conversion and acceptance often coincide.

**THE LIMITED OPERATION OF THE AMERICAN RULE**

Before leaving this topic, I wish to make one final point. The American rule does not apply to liquidated claims.\textsuperscript{309} This limitation is logically unsustainable according one commentator. As I have done throughout, I will recite the objection and then suggest an explanation.

\textsuperscript{306} The payment required of a recipient who agreed to acquire the goods would clearly be the contract price. Agreement by inconsistent act surely stands on the same footing. Whether “not liable to make any payment” (c.f. “payment” simpliciter) allows a deduction to be made if the price is exorbitant is unclear. It may just be infelicitous drafting.

\textsuperscript{307} See *The First Restatement*, ss 420, comment (a) & 72(2), pp 791 & 77 and *Corbin*, s 3.21, p.422.

\textsuperscript{308} C.f. “Discord” at 281.

\textsuperscript{309} See *Hudson v. Yonkers Fruit Co* 258 NY 168; 179 NE 373, 375 (1932) per Cardozo J [“the rule has grown in connection with the satisfaction of unliquidated demands that one who sends a check to another upon a condition explicitly declared that the demand will be extinguished or the check sent back unused may hold the creditor to the condition, however embarrassing the choice”].
Is not the same argument regarding the tort of conversion logically applicable in a situation where the creditor banks the full payment cheque intending all along to claim the balance on the ground that any agreement would not be binding for want of consideration ... does not the creditor, by banking the cheque and repudiating the condition, equally commit against the debtor the tort of conversion? Yet it is clear from earlier statements in Mahon J's judgment that he accepted that, where there is no consideration, the creditor who banks the full payment cheque is entitled to recover the balance of the debt.\(^{310}\) [italics in the original].

In my view, there is a principled reason for placing liquidated debts outside the ambit of the rule. It turns on the legal operation of a cheque.

At American law, a creditor who banks a full settlement cheque is presumed to have done so in conformity with the debtor's terms. The effect of this presumption is to pass the property in the instrument and annul the conversion that would otherwise occur. Whether it effects a discharge, however, depends upon the nature of the debtor's liability. A release unsupported by consideration is binding neither at law nor in equity.\(^{311}\) If the demand is liquidated, therefore, it is open to the creditor to plead absence of consideration in defeasance of the agreement.\(^{312}\) Such a plea does not revive the conversion. Property in the cheque passed when the creditor agreed (presumptively) to the debtor's terms.\(^{313}\) The consideration necessary to elevate that agreement into a binding contract, however,

\(^{310}\) See *Discord* at 281-282. See also *Burrows, Finn & Todd* at p.630, para 19.3.

\(^{311}\) An obligation cannot be released in equity unless there is a corresponding release at common law - see *Stackhouse v Barnston* (1805) 10 Ves 453, 466; 32 ER 921,925-926 and *Mulcahey v Hoyne* (1925) 36 CLR 41, 56.

\(^{312}\) This was the position in *Foakes v Beer* (1884) 9 App.Cas 605; the plaintiff accepting a lesser sum in extinction of a liquidated debt and then avoiding the agreement on the ground that there was no consideration to support it.

\(^{313}\) Actual and presumptive agreements differ only in the mode of their establishment. The legal consequences (in this case, the dissolution of the escrow and the resultant passing of property in the cheque) are the same.
was never furnished. The creditor's cause of action thus survives and may be sued upon.\textsuperscript{314}

\textsuperscript{314} See pp 115-118 \textit{post}.
CHAPTER THREE

THE COMMONWEALTH RULE
In Commonwealth jurisdictions the remitter of a full settlement cheque posts a hostage to fortune; the creditor entitled to accept it or bank it on account at his option. Resting on a simple paradigm of offer and acceptance, this entitlement has attracted little forensic attention - the proposition too obvious, perhaps, for detailed analysis.

But is the proposition really so obvious? In sketching out the genesis of the American rule, Cardozo J made a powerful point:

>A debtor paying his own money may couple the payment with such conditions as he pleases. The mere fact that he is a debtor does not deprive him of that privilege. If he has the title to the money, he may pick and choose among his creditors, or refusing to pay any one until coerced by legal process, may keep the money for himself...  

This is a pertinent observation. A debtor, solvent, competent and with no judgment entered against him, generally retains control of his own property; free to preserve it, abandon it or alienate it on strictly prescribed terms if he so chooses. If a creditor wishes to acquire it, he must resort to legal process. Deny the debtor these rights and you deny three centuries of legal development.

Denial of these rights, however, is an unavoidable concomitant of the Commonwealth position on full settlement cheques; the creditor, without application to the court and contrary to the express will of the debtor, permitted to retain on his own terms an article of the debtor's property.

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315 See, for example, Inland Revenue Commissioners v Fry [2001] STC 1715 - available on Lexis at p. 3 of the transcript ["The question simply is, contract or no "].

316 See Hudson v Yonkers Fruit Co 258 NY 168; 179 NE 373, 375 (1932).

The creditor's power to do this, implicit in the caselaw, has never been satisfactorily accounted for. Few authorities advert to the issue\(^{318}\) and commentators who defend the creditor's freedom of choice rarely hazard an explanation.\(^{319}\) "Can" is the argument, "why" is persistently overlooked.

The unarticulated premise at the heart of "The Commonwealth Rule" is the subject of the next section. The treatment is necessarily speculative. The American Rule explains why a full settlement cheque cannot be banked on account. Commonwealth law gives little indication of why it can.

\(^{318}\) If one treats every aspect of the transaction as an emanation of contract law the issue is sidestepped. Most courts adopt this approach. An exception is *James Cook* [the debtor retains no defensible interest in the instrument]. For why I believe this to be erroneous see pp. 50-77.

\(^{319}\) See, for example, *Discord* at 275 ["The very point being made by Bowen LJ and the other judges [in *Day v McLea*] was that the creditor’s action in keeping and banking the cheque was not in law conclusive. It was legally possible for the creditor to keep the cheque yet reject the debtor’s terms"]. A legitimate inference, certainly, but the crucial question remains unanswered: How does non-acceptance of the debtor’s terms justify the misapplication of his cheque? Neither case nor commentator give any clue.
THE COMMONWEALTH CREDITOR’S POWER OF SELF-REDRESS

A creditor’s right to take a full settlement cheque on account must reside somewhere in the legal relationship between the parties. This casts up several possibilities. I will examine each and discuss whether they afford legal grounds for the creditor’s action. Having concluded that they do not, I will turn to policy - discovering there a more likely basis for the Commonwealth position.

POTENTIAL JUSTIFICATION 1: THE DEBT

If asked what entitles a creditor to claim a full settlement cheque on account, many would say the debt. Although a pardonable assumption, this cannot be correct. A debt does not come into existence until it has been quantified.320 Full settlement cheques, however, have been regularly and successfully credited against unliquidated claims.321 This is a simple objection, but I can see no way past it. Even if the creditor was subsequently adjudged entitled to the proceeds of the cheque, the debt could not have created the pre-emptive right we are looking for.322

320 A debt is an ascertained sum of money which is actually payable or will become payable in the future by reason of a present obligation - see J. Starke, Assignments of Choses in Action in Australia (Butterworths, Sydney, 1972) p. 77. The important word here is “ascertained”. Until the sum is fixed, there is no debt - see Jervis v Harris [1996] Ch 195, 202-203.

321 To successfully plead accord and satisfaction the claim must be unliquidated. Full settlement cheques tendered in respect of liquidated liability run afoul of the rule in Pinnel’s Case - see pp 116-124 post.

322 If subsequently established by action, a right can be deemed to relate back to the moment it was first acquired (mesne profits, letters of administration, acts of bankruptcy and maritime liens all partake of this principle). The right in question must have accrued, however, prior to the bringing of proceedings - see Minister of State for the Interior v R.T. Co Pty Ltd. (1963) 107 CLR 1, 7. As indicated above, an unliquidated claim does not become a debt until judgment. It cannot be the debt, therefore, that sanctions the misapplication of the cheque.
Or might something be made of the concession which necessarily accompanied the instrument?

This seems to be the suggestion in *Bagnall National Tobacco Corporation of Australia Ltd*; 323 Jordan CJ endorsing a creditor’s right to claim a debtor’s money on account of acknowledged liability but denying him any such power if the debtor disclaims all liability. I reproduce the passage in full:

Where...there is no dispute that one person is liable to pay another at least a certain sum, and the obligor tenders to the obligee that sum on the footing that that it is to be accepted in full satisfaction, and the obligee, by taking it with an intimation that he does not accept it in full satisfaction, does nothing wrongful, and does not preclude himself from proceeding to recover debt or damages ultra. This is so in the case of claims to unliquidated sums claimed to be due for breach of contract...as well as to claims for liquidated sums...The position would be different [however] if, in a case where the existence of any liability was disputed, money were tendered in settlement, accompanied by a denial of liability, and on terms that it was not to retained unless the alleged liability was admitted not to exist.324

This passage has caused some perplexity.325 The rule it lays down is clear enough (a concessionary offer of settlement invests the creditor with a proleptic power of execution326—a non-concessionary offer does not), but the operative principle is nowhere stated. I offer the following hypothesis.

When a debtor tenders a cheque in full settlement he generally disputes the extent, rather than the fact, of his liability.327 This concession, it might be argued,

323 (1934) 34 SR (NSW) 421. [hereafter “Bagnall”].
324 Ibid at 426-427
325 See *Discord* at 270.
326 This is what the creditor’s actions amount to; an act of pro tanto execution without resort to legal process. The fact that it is achieved through breach of mandate rather than direct requisition makes no difference.
327 Generally, but not invariably. It may simply be the price he is prepared to pay to be quit of the dispute.
invests the creditor with the power to claim the instrument on account; his rights established by the debtor’s attempt to assign a value to them. There will be no such entitlement, however, if the payer denies all liability. In such circumstances (i.e., where the payment is made *ex gratia*), the relationship of debtor and creditor can only be established by judgment. With no debt to sanction the taking of money on account, therefore, the payee’s only prima facie options would be to either:

- Reject the payment and issue proceedings or,
- Accept the payment on the basis upon which it was made - i.e., that he possesses no enforceable rights against the payer

If this is a correct interpretation of Jordan CJ’s dictum, it leaves one major issue outstanding. Upon what doctrinal basis does an acknowledgement that some money is owing exculpate the banking of a cheque in contravention of the terms of tender? I can think of nothing to justify it. The part payment of a demand accompanied by a denial of liability for the balance does not revive a claim that has become statute-barred; it does not support an action on an account stated and would provide precarious foothold for an estoppel. How, then, does it call up rights exercisable against the debtor’s cheque? A debt, acknowledged or otherwise, is a right *in personam*. What is argued for here is a right *in rem*. Such a right is not a normal legal accessory of a debt. We must look elsewhere

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329 See *Wayman v Hilliard* (1830) 7 Bing 101, 102; 131 ER 39, 39.
330 A general concession of liability might amount to a representation. Detrimental reliance on the part of the creditor, however, will be difficult to find.
331 *i.e.*, a right to enforce an obligation against a specific person
332 *i.e.*, a right exercisable against property without reference to its ownership.
POTENTIAL JUSTIFICATION 2: AN ACCRUED CAUSE OF ACTION

What rights do the trade creditor, the tax official, the victim of a tort, the landlord pressing for arrears of rent and the various other parties who have successfully banked full settlement cheques on account all possess prior to judgment? The answer is an accrued cause of action against the debtor. This is a more promising line of inquiry.

Unlike a debt, a cause of action confers immediate rights even if it involves an unliquidated sum. This obviates an objection raised above and allows the following question to be posed: could the creditor, invested with a cause of action when he received the cheque and subsequently declared entitled to its proceeds, argue that judgment retroactively validated the cheque’s banking in contravention of the terms of tender?

To answer this we must examine the legal character of a cause of action.

A cause of action is generally defined as the sum of facts necessary to sustain a claim in a court of law. This is questionably accurate and does not advance matters far. Perhaps its legal incidents will give a clearer picture.

333 A cause of action vests and runs from the moment an action can be brought - see Reeves v Butcher [1891] 2 QB 509, 511. An action in contract, for example, arises upon the breach; an action for the price of goods upon the passing of property and an action in negligence from the moment consequential damage is either sustained or disclosed.

334 See fn. 322.


336 Although sound enough from a pleading point of view, the definition faulters in the present context. When a creditor compromises a cause of action he does not relinquish the facts giving rise to his claim. He relinquishes, rather, the claim arising from the facts - see Hawke (decd), Hawke v Public Trustee [1957] NZLR 152, 153-154.
A cause of action is a chose in action.\textsuperscript{337} It is an item of property.\textsuperscript{338} It is indivisible\textsuperscript{339} and technically transmissible.\textsuperscript{340} It can be relinquished for value or lost through delay. If arising from a tort, it is extinguished by death.\textsuperscript{341}

This brings us no closer to a solution. A cause of action has various characteristics, but like a debt, it confers no interest in the debtor's assets until they are taken in execution pursuant to a court order. Until that moment I can perceive no discernible foundation for the exercise of proprietary rights over the debtor's cheque. A retroactive interest by way of judgment I would discount for the same reason.\textsuperscript{342} Again, we must look elsewhere.

**POTENTIAL JUSTIFICATION 3: SELF-HELP**

A creditor who seizes a debtor's property without the sanction of a court order does not always act wrongfully. Examples are distress\textsuperscript{343} and the possessory lien;

\begin{itemize}
  \item \textsuperscript{337} I.e., a right of proceeding in a court of law to procure the payment of a sum of money or to recover pecuniary damages for the infliction of a wrong or the non-performance of a contract - see Jowitt, Vol. 1, p. 338. See also J. Starke, Assignments of Choses in Action in Australia (Butterworths, 1972), pp 7, 8-9. [hereafter "Starke"].
  \item \textsuperscript{338} See Loxton v Moir (1914) 18 CIR 360, 379 and Starke at pp.1-3.
  \item \textsuperscript{339} See Duck v Mayeu [1892] 2 QB 511, 513.
  \item \textsuperscript{340} It is policy rather than conceptual impossibility which forbids the assignment of a cause of action - see Trendex Trading Corp v Credit Suisse [1982] AC 679, 702.
  \item \textsuperscript{341} See Ingall v Moran [1944] 1 KB 160, 164. The common law rule has been long since abrogated by statute.
  \item \textsuperscript{342} A judgment is likewise a right in personem. A necessary preface to setting a process of execution in train, it creates no proprietary rights in the debtor's property - see Hall v Richards (1961) 108 CLR 84, 91-92.
  \item \textsuperscript{343} Distress is the right to seize and detain chattels as security for the redress of an injury; the non-performance of a duty or the satisfaction of a demand - see T. Street, Foundations of Legal Liability (Edward Thompson, New York, 1906), Vol. III, p. 278 [hereafter "Street"]. The remedy is confined to two situations. Distress for rent allows the holder of the reversion to seize, upon the tenant's default, moveables lying upon the premises out of which the rent issues (ibid at 298).
\end{itemize}
self-help remedies which allow a creditor to act as judge and bailiff on his own behalf. Is the remedy exercisable against a full settlement cheque analogous to either?

On the face of it, no. A remedy which confers full ownership rights upon a creditor is not a recognizable manifestation of distress. Nor is it consistent with a possessory lien or, indeed, any other form of self-help. To all appearances it is a remedy sui generis; annexed to this transaction and no other.

POTENTIAL JUSTIFICATION 4: POLICY

For no doctrinal reason that I can discover banking a full settlement cheque on account is regarded as a legitimate preliminary to a lawsuit. Theory having proven unproductive, I turn to policy. The following sentiments, I believe, can be fairly drawn from the cases.

Distress damage feasant permits a landowner to seize any object, animate or inanimate, which is unlawfully on his land and doing damage, and detain it until the wrongdoer tenders adequate compensation for the damage done (ibid at 309).

A possessory lien allows a person to retain property placed in his possession until a demand against the owner is satisfied - see Clark v Gilbert (1835) 2 Bing (NC) 343, 356; 132 ER 135, 140.


A lien is likewise a passive right of detention - see Donald v Suckling (1866) LR 1 QB 585, 604. Contrast this with a full settlement cheque; the creditor entitled, the cases give no indication to the contrary, to full and immediate use of the funds.

Recapture of chattels, a useful analogy if the creditor was resuming possession of his own property, offers little guidance when he assumes the property of someone else. Stoppage in transitu is incompatible for the same reason. Abatement bears no comparison whatsoever.
Firstly, creditors have been taking full settlement cheques on account for more than a century without judicial censure. The right is well-established and of manifest utility. To suggest a legal impediment at this stage is to take an unsophisticated view of modern commercial practice.\textsuperscript{348}

Secondly, even if banking a full settlement cheque on account constitutes a tort, the debtor sustains no discernible loss through its commission. The creditor has applied the money to the debt and the debtor’s liability has been diminished in that sum. Credit must be given for the payment, but that is the extent of the creditor’s obligations.\textsuperscript{349}

Thirdly, conversion does not lie for currency.\textsuperscript{350} Had the debtor attempted to settle in cash, therefore, the American defence would be unavailable. Why should the assimilation of the sum into a document make such a difference? If money cannot extinguish rights acquired in the course of a wholly unrelated transaction, how can money’s worth? Why should the controversy between the parties be resolved in the debtor’s favour because he placed a cheque rather than a roll of notes in the creditor’s hands? \textsuperscript{351}

Lastly, if debtors believed that they could gain a remission in liability through the simple expedient of marking a cheque in full and final settlement, the practice would rapidly take hold.\textsuperscript{352} The disruption this would bring to commercial life is...

\textsuperscript{348} See \textit{Harris v Birchwood Farm Holdings Ltd} [2002] 2 ERNZ 392, 409 para [60].


\textsuperscript{351} See \textit{D & C Builders Ltd v Rees} [1966] 2 Q.B. 617, 623.

\textsuperscript{352} The avenue must remain closed; for although some will travel it honestly, the greater proportion will employ it for ulterior transit - see \textit{Inland Revenue Commissioners v Fry} [2001] STC 1715 available on Lexis at p. 3 of the transcript ["we have a duty to consider the potential damage..."].
easily imagined; parties accepting the fruits of performance and then seeking to re-negotiate their reciprocal obligations.\textsuperscript{353} The life of the trade creditor is impressed with sufficient perils as things presently stand.\textsuperscript{354} The courts should not compound their difficulties by upholding theoretical defences.\textsuperscript{355} If the creditor's actions involve a technical infraction of the debtor's rights, then so be it. The conversion can be carried into account when the matter comes before the court.\textsuperscript{356}

which may be caused if the impression were to gain currency that taxpayers might derive advantage from a failure to comply with their statutory obligations "].

\textsuperscript{353} The scenario is not difficult to imagine: having taken the benefit of the creditor's goods or services, the debtor alleges a defect in product or performance. He then draws a cheque for a sum less than that contracted for and forwards it to the creditor stipulating that it is to accepted in full and final settlement. If the cheque is banked, the debt will be extinguished by presumptive agreement. If the cheque is returned, the debtor resorts to excuses and evasions until the creditor is sufficiently malleable for a second attempt.

\textsuperscript{354} Even the best-grounded claims can founder. Book-keeping may have been lax, for example, making a debt difficult to substantiate. A claim for damages may be reduced on grounds of remoteness or non-mitigation of loss. The defendant may have insufficient means (or no inclination) to satisfy judgment. Even if a debtor pays without prompting problems can still arise - if insolvency supervenes the payment may be vacated as a preference.


\textsuperscript{356} The most obvious course is for the debtor to counterclaim for the conversion - see \textit{Prosser v DJ & J Barrie (trading as Bargold Constructions)} [1994] 62 SASR 312,321-322. A successful counterclaim would result in judgment for both parties with execution issuing on the balance - see \textit{McDonnell & East v McGregor} (1936) 56 CLR 50,62. The remedial consequences of the creditor's tort would be neutralised, of course, but the debtor's rights in the cheque will have been vindicated.

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CONCLUSION

In my view, a creditor's inchoate and precarious right to claim judgment creates no pre-emptory rights over a full settlement cheque. To bank the instrument on account thus constitutes a wrongful act. This brings me to my final question: in light of the policy objections identified above, should the law do anything about it?
THE CASE FOR REFORM

A rule of law may be theoretically indefensible and still work well in practice.357 If that was the position here, I would argue against reform. In my opinion, however, reform is essential. I say this for several reasons.

Firstly, the law in this area remains deeply unsettled. This is largely a result of the objective test of contract formation. Although sound in principle and perfectly adequate in most contexts, the test has severe deficiencies when a tacit contract of discharge is alleged.358 In my view, it should be replaced by a statutory scheme. Commercial law requires firm and uncomplicated rules to which businesspeople can tailor their affairs. An impressionistic exercise which can produce different results on similar facts with equal justification359 will not do.

Secondly, to view the matter on a purely contractual basis fudges a key issue. What the transaction involves is the simultaneous assertion of countervailing rights; the creditor’s right to payment360 opposed by the debtor’s right to control his assets until legally disabled from so doing. To support one of these rights to the complete exclusion of the other (the position in both America and the Commonwealth) creates intractable problems in theory and practice. A via media must be found.

358 See pp 11-18 ante.
359 The problem is not the neglect of a settled and workable formula (c.f. Discord at 296). It lies in a formula that produces variform results even when faithfully applied. Magnum v Viko disposed of Homeguard, but left this difficulty intact - see Keere, “Cheques in Full Satisfaction” (1998) NZLJ 393, 393 and Beck, Note (1999) 1 NZL Rev 51, 62.
360 Asserted in a contested sum and as yet unperfected by legal process.
Lastly, informal settlement is a valuable legal institution and must not be unreasonably inhibited. The point was pressed in *NGC Metering Limited v Todd Energy Limited*.

If creditors are allowed to appropriate cheques tendered on strict terms without penalty, debtors may not tender payment to secure settlement because of the risk that the cheque will simply be banked to no advantage to the debtor...this [would] take away an effective means of achieving settlement and may ultimately lead to more costly and time consuming means of resolving disputes such as the present.

Although briskly rejected, this argument has much to recommend it. It must be open to a debtor to say “I dispute the existence or extent of my liability. I am nonetheless prepared to settle the matter on the following terms. I enclose a cheque in the sum of (X). You may accept it or claim your remedy at law.” Likewise it must be open to the creditor to reject the debtor’s terms. To allow him to resort to subterfuge; banking the cheque and waiting for it to clear before informing the debtor of his intentions; however, is another matter.

I convert these thoughts into specific recommendations for reform at the conclusion of this paper. Firstly, however, I examine the law relating to satisfaction. Here too improvements might be made.

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361 See *Walker v Wilsher* (1889) 23 QBD 335, 339 [it is most important that the door should not be shut on compromises].


363 Ibid at para [63].

364 On grounds of non-conversion of the cheque and “a countervailing policy imperative to discourage debtors from paying less than they properly owe” – see at para [64]. Comments of this nature lose much of their force when the dispute is genuine and the debtor is attempting to resolve it without litigation.

365 See pp 29-33 ante.
CHAPTER FOUR

SATISFACTION AND THE FULL SETTLEMENT CHEQUE
To successfully plead accord and satisfaction, the defendant must establish three things:

- An agreement whereby one of the parties undertakes to render, and the other to accept in satisfaction of a claim, something different from which the latter is, or conceives himself to be entitled.

- The provision of the agreed satisfaction,\(^{366}\) and

- The sufficiency of the satisfaction at law.

I will discuss these elements in the context of two separate rules

**SCHEME OF ANALYSIS**

Satisfaction, in its original form, had two governing principles. Firstly, the agreement between the parties had to be carried into execution before it could operate as satisfaction and, secondly, the part payment of an ascertained debt was no satisfaction for the whole, even if accepted on that basis.

The first of these principles has been liberalised since the Fifteenth Century and bears only lightly on the transaction under discussion. I provide a brief historical sketch, but little in the way of commentary.

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\(^{366}\) The fact that a promise to perform the accord can itself be accepted in satisfaction does not affect this proposition. In such a case, satisfaction is given at the moment of the promises’ making. In the event of default, the creditor is confined to whatever rights he can claim under the new agreement - see *post*.
The second principle, which survives intact, receives lengthier treatment. I trace its history, note its exceptions, highlight its incongruities and finally question its continued existence. If there is one aspect of the doctrine that invites reform, this is it.
Accord and satisfaction originated in the action of Debt and for several centuries bore the dominant characteristic of that writ. An action in Debt would only lie if the defendant had received something in recompense for the obligation sought to be enforced against him. Unlike the modern contract, such benefit had to be tangible and conferred. A mere promise to confer it was insufficient. In like fashion, accord and satisfaction required an executed exchange before it could be raised by way of defence. Only when performance was rendered and accepted, in other words, would the former obligation be discharged. A debtor who tendered performance in conformity with the accord had no redress, therefore, if the creditor rejected the tender and sought to enforce his original claim.

Although an inescapable concomitant of Debt, the subsequent recognition of the bilateral contract should have consigned the execution rule to history. Since the law now gave effect to mutual promises, the argument ran, there was no cogent reason for denying efficacy to the executory accord. The promise, no less than its performance, could now be received in satisfaction. The law, however, did not follow this course. Long after mutual promises were acknowledged as creating an


368 Debt was premised, not on agreement, but upon the conferral of a material benefit. Until such benefit was received (i.e., money paid or goods delivered), the promisor had no quid quod pro and the promisee no cause of action - see W. Holdsworth, A History of English Law, 2nd Ed (Sweet & Maxwell, London, 1966 reprint), Vol. III, pp 420-423. [Hereafter "Holdsworth H.E.L."] and Gold: "Executory Accords" 21 BULR 465, 468 (1941). [Hereafter "Executory Accords"].

369 The rule was severe but doctrinally sound. Until the performance of the stipulated act, there was no quid quod pro. Sans quid quod pro there was no legal obligation. The result was a locus poenitentiae between agreement and execution - see S. Stoljar, A History of Contract at Common Law (Canberra, Australian National University, 1975) p. 123 [Hereafter "Stoljar"].

enforceable contract, courts continued to insist on performance before they would declare a release by accord and satisfaction. The creditor's right to reject performance was likewise unimpaired. 371

Various reasons have been assigned to the survival of the old rule. To Street 372 it was explicable on policy grounds. Compromise agreements, he observed, nearly always embody concessions to debtors. The reason such concessions are granted is to secure doubtful performance. It was reasonable, therefore, that the parties should remain unbound until performance was rendered; the injustice inflicted upon a debtor who tendered satisfaction only to have it capriciously refused outweighed by the injustice of confining a creditor to the new agreement if the debtor failed to honour it. 373 The avoidance of circuity of action was also advanced as a rationale, 374 but this is less plausible. 375

In any event, for whatever reason, the rule requiring an executed satisfaction resisted reform until the Twentieth Century. The official turning point was British Russian Gazette and Trade Outlook v Associated Newspapers Ltd. 376 To Greer LJ, it was time old dogma gave way to newer reason:

I think at the present stage of development of the law we ought to decide that an agreement for good consideration, whether it be an agreement to settle an existing claim or any other kind of agreement, is enforceable at

371 See Allen v Harris (1696) 1 Ld. Raym. 122, 122; 91 ER 978, 978 and Lynn v Bruce (1794) 2 H. Bl. 317, 318; 126 ER 571, 572. Nor was part performance a valid plea - see Gabriel v Dresser (1855) 15 CB 622, 629-630; 139 ER 568, 571-572.

372 See Street at p. 93.

373 The obvious solution was to impose a moratorium between agreement and performance. The methodology necessary to achieve this did not become available, however, until the late Eighteenth century. Only with the recognition of concurrent conditions did facilitative obligations become technically possible - see Stoljar at 155-159. Even then, change was sluggish.

374 See Lynn v Bruce (1794) 2 H. Bl. 317, 318; 126 ER 571, 572.

375 See Stoljar at 128.

376 [1933] 2 K.B. 616. [hereafter “British Gazette”]
law by action if it be an agreement for valuable consideration, and such valuable consideration may consist of the promise of the other party.\textsuperscript{377}

Although clearly a step in the right direction, \textit{British Gazette} had one troubling aspect. In the court's view, the new agreement superceded and extinguished all antecedent liability. The parties' remedies were thereafter confined to the accord and if either defaulted on its terms the answer lay in damages.\textsuperscript{378} The original dispute, compromised and discharged by agreement, could not be revived.\textsuperscript{379}

This aspect of the judgment did not commend itself to everyone\textsuperscript{380} and Australian courts were swift to distance themselves from it.\textsuperscript{381} In their view, the extinction of the creditor's cause of action was generally contingent on the performance of the accord.\textsuperscript{382} If performance was not forthcoming, the creditor would be restored to his original rights.\textsuperscript{383}

\begin{itemize}
\item \textsuperscript{377} Ibid at 654. Hitherto satisfaction had meant precisely what it said: gratification present rather than prospective.
\item \textsuperscript{378} Ibid.
\item \textsuperscript{379} Although a leading case, it is questionable whether \textit{British Gazette} describes an accord and satisfaction at all. A bilateral agreement whereby one contract is entered into in substitution and supercession of another is a novation - see \textit{Tito v Waddell (No 2)} [1977] 1 Ch 106, 287.
\item \textsuperscript{380} The objection was a practical one. Accord and satisfaction often involves a party who has failed to perform, or who has defectively executed, a previous undertaking. A superceding promise from such a person, still less a tortfeasor, it was argued, should not immediately deprive the creditor of his original cause of action. Only when accord was matched by satisfaction should the debtor be released - see Stoljar, "The Discharge of Contracts by Agreement" (1956-1959) 3 UQLJ 356, 372-373.
\item \textsuperscript{381} See \textit{McDermott v Black} (1940) 63 CLR 161, 185-186 [hereafter "\textit{McDermott v Black}" ] and \textit{Tallerman and Company Proprietary Limited v Nathan's Merchandise (Victoria) Proprietary Limited} (1956-1957) 98 CLR 53, 148-150. [hereafter "\textit{Tallerman v Nathans}" ].
\item \textsuperscript{382} An accord is plastic to the will of the parties and it is open to a creditor to accept the debtor's promise in immediate discharge of his cause of action - see \textit{McDermott v Black} at 186. An agreement to this effect will stand; there being no room for contrary implication. If the accord is silent on the point, however, a conditional discharge will be presumed - see \textit{Dudding v Dalrymple} (1894) 12 NZLR 698, 708 and \textit{Tellerman v Nathans} at 149-150.
\end{itemize}
Although a contingent extinction of liability raises certain theoretical difficulties,\textsuperscript{384} the Australian view has prevailed. The operative principles of satisfaction may be thus tabulated as follows:

- An executory promise may be accepted in satisfaction of an existing claim. Such an arrangement effects an immediate discharge of the creditor's cause of action. In the event of default, the parties are confined to their remedies on the accord.\textsuperscript{385}

- As a general rule, however, the discharge will be conditional on performance. An arrangement of this nature creates intermediate obligations only; the debtor obliged to perform the new agreement in accordance with its terms and the creditor precluded from pursuing his original claim until and unless the accord proves unproductive.\textsuperscript{386} If the debtor defaults on his substituted obligations, the creditor will be remitted to his original rights. If the creditor defaults,\textsuperscript{387} the debtor may raise the new agreement in bar.

\textsuperscript{383} See \textit{Scott v English} [1947] VLR 445, 454. Intermediate obligations, however, were now acknowledged; the creditor obliged to await performance and accept it if tendered.

\textsuperscript{384} To the House of Lords, an executory accord is an immediately binding agreement subject to an implied resolutive condition rendering it void ab initio if the debt due under it is not satisfied - see \textit{Jameson v CEBG} [1999] 1 All ER 193, 207 per Lord Hope. Although this is probably the best view of the matter (a condition subsequent providing a solid basis for implying facilitative obligations), there are distinguished dissenters - see \textit{Auckland Bus Co Ltd. v New Lynn Borough} [1965] NZLR 542, 568 per Turner J [hereafter "\textit{Auckland Bus Co}"] and (more cautiously) \textit{Jameson v CEBG} at 211 per Lord Clyde.

\textsuperscript{385} See \textit{Elton Cop Dyeing Co Lim. v Broadbent & Sen Lim} (1920) 89 LIKB 186, 187 and \textit{Auckland Bus Co} at 537 per McCarthy J.

\textsuperscript{386} See \textit{Auckland Bus Co} at 557 per North P.

\textsuperscript{387} I.e., if he rejects the agreed satisfaction or brings an action before the time appointed for its performance.
The substance of an accord is a matter of construction. Unless it is the manifest intention of the parties to effect an immediate discharge, however, a conditional release will be presumed.\textsuperscript{388}

I included this discussion to demonstrate the antiquity of accord and satisfaction and the refinements it has accumulated during its long journey down the legal turnpike. The principles set out above have only marginal relevance, however, to the fully executed transaction with which we are dealing. Once a full settlement cheque has been banked and honoured the inquiry narrows to two questions -

- Did the creditor accept the proffered satisfaction; and
- Was the satisfaction sufficient at law.

The first of these has been fully dealt with.\textsuperscript{389} I turn to the second.

**SUFFICIENCY OF SATISFACTION**

By identifying satisfaction as the consideration for an agreement,\textsuperscript{390} the English Court of Appeal detached accord and satisfaction from its historical roots and placed it firmly within the law of contract. The full ramifications of this have yet to be explored.\textsuperscript{391}

\textsuperscript{388} See fn. 382.

\textsuperscript{389} See pp 7-93.


\textsuperscript{391} What is the position, for example, under the *Contracts Enforcement Act* 1956? Accord and satisfaction, in its original form, fell outside the *Statute of Frauds* (prior to satisfaction there was no contract. Once satisfaction was rendered, there was no obligation to enforce - see *Lavery v Turley* (1860) 6 H & N 239; 158 ER 98). A binding agreement subject to a condition subsequent (see fn. 384) may not. Executory compromises relating to real property, leases or guarantees could accordingly fail for want of a written memorandum.
In one respect, however, the transition to contractual reasoning wrought no substantive change; for even when regarded as conceptually distinct, satisfaction and consideration possessed a common characteristic. In neither case did the payment of a lesser sum in lieu of an ascertained debt of a larger amount acquit the debtor of his obligation to pay the residue.\textsuperscript{392} This rule, which dates from the Sixteenth Century, remains in effect. An executed accord will only procure a discharge, therefore, if the agreed satisfaction is sufficient at law.

**SATISFACTION AND THE RULE IN PINNEL'S CASE\textsuperscript{393}**

To give effective satisfaction a debtor must move outside his existing obligations and provide the creditor with something to which the latter is not already legally entitled.\textsuperscript{394} What the creditor takes is a matter of personal choice and the necessary innovation in performance may be effected in a variety of ways. If the

\textsuperscript{392} To give good satisfaction a debtor must provide something he is not already bound to render (see post). To give good consideration, by contrast, he must surrender something of legal value for the promisor's undertaking; such value classically residing in a present or contemplated detriment - see Salmond & Williams at pp. 112-113. For disparate reasons, therefore, there is neither satisfaction nor consideration in the part payment of a liquidated debt presently due; the debtor conferring nothing over and above that which he is already bound to provide in the first instance and sustaining no detriment he not already bound to sustain in the second.


\textsuperscript{394} See Auckland Bus Co at 570 per Turner J ["It [is] the essence of accord and satisfaction that an obligation of the debtor to his creditor is performed, not in the way originally prescribed by the duty existing between them, but in some substituted way"]. The equitable doctrine of satisfaction operates along similar lines - see Cullity: "Performance and Satisfaction" (1964) 38 ALJ 147, 147.

\textsuperscript{395} Although the law requires a permutation in performance, it bows to the parties as to the form it takes. The creditor's claim may be thus satisfied by any agreed equivalent - see Pinell's Case (1602) 5 Co. Rep 117a; 77 ER 237 ("a horse, a hawk or a robe"), [Hereafter "Pinell's Case"], Sibree v Tripp (1846) 15 M & W 23; 153 ER 745 ("a piece of paper or a stick of sealing wax") and Couldrey v Bartrum (1881) 19 Ch D 394 ("a horse, canary or tomtit").
creditor’s claim is unliquidated, for example,\textsuperscript{396} or disputed in good faith,\textsuperscript{397} the payment of any sum agreed between the parties will operate as satisfaction.\textsuperscript{398} Similarly, in the case of liquidated debts, the payment of a lesser sum at an earlier date,\textsuperscript{399} in a different place\textsuperscript{400} or in a different currency\textsuperscript{401} will procure a valid and enforceable discharge.

The position is different, however, when a debt is liquidated and presently due and the debtor tenders no more than part payment in full satisfaction. In such circumstances there will be no discharge, even if the money is accepted on that basis.\textsuperscript{402} The reason for this is that the transaction carries no element of extraneous performance. The creditor may consequently recant the agreement and enforce the original debt.\textsuperscript{403} The point arose in \textit{James Cook Hotel Ltd. v Canx Corporate Services Ltd.}\textsuperscript{404}

\textsuperscript{396} See \textit{Wilkinson v Byers} (1834) 1 Ad. & El. 106; 110 ER 1148, 1150 and \textit{Ibberson v Neck} (1886) 2 TLR 427, 429. A debt is unliquidated when it can be reduced to certainty only by judgment - see \textit{Paterson v Wellington Free Kindergarten Association Inc} [1966] NZLR 468, 471 ["a claim is unliquidated where, even though specified as a definite figure, its ascertainment requires investigation beyond mere calculation”].

\textsuperscript{397} See \textit{Miles v New Zealand Alford Estates Co} (1886) 32 Ch D 266, 291-292, \textit{Wigan v Edwards} (1973) 1 ALR 497, 512 and \textit{HBF Dalgety Ltd. v Moron} [1987] 1 NZLR 411, 413.

\textsuperscript{398} In both instances the creditor’s claim is uncertain. By making the agreed payment, therefore, the debtor performs an act he is not yet bound to perform; surrendering the possibility that a court would award a lesser sum or exonerate him altogether.

\textsuperscript{399} See \textit{Smith v Trowsdale} (1854) 3 E & B 83; 118 ER 1072

\textsuperscript{400} See \textit{Pinnel’s Case} - cf. \textit{Vanbergen v St Edmunds Properties Ltd.} [1933] 2 KB 223, 234-235 [payment at a different place supplies no satisfaction when made at the debtor’s request; the variation being of no conceivable benefit to the creditor].


\textsuperscript{402} See \textit{Foakes v Beer} (1884) 9 App. Cas 605.

\textsuperscript{403} See \textit{Vanbergen v St Edmunds Properties Ltd.} [1933] 2 KB 223, 235.

\textsuperscript{404} [1989] 3 NZLR 213 [Hereafter “James Cook”]
GRAND HOTEL

In 1987 the defendant arranged accommodation at the James Cook Hotel for a concert tour party. Although the concert was subsequently cancelled, charges had mounted to $12,922.20 by the time the party left the hotel. Payment was not made upon departure, but the amount owing was not disputed. Nothing further was heard until 18 April 1988 when the plaintiff received a cheque from the defendant for $969.16, together with a circular letter notifying it that final payment would be made in due course. A cheque for $3346.85 followed on 17 December, accompanied by a letter conceding liability in the full sum, but declaring the cheque to be in full and final settlement of any claim. The banking of the cheque, the letter went on, would be deemed acceptance of those terms. The plaintiff's solicitors replied a week later, rejecting the defendant's terms and advising that unless full payment or some other satisfactory arrangement was made within 21 days the cheque would be banked and proceedings instituted for the balance. No reply was forthcoming and the cheque was duly banked on 20 January 1989. On 3 May 1989, the plaintiff, having made a further demand in the meantime, filed an application for summary judgment for the balance. The defendant pleaded release by accord and satisfaction.

The first obstacle confronting the defendant in James Cook was the acknowledgement of liability in a fixed sum. The effect of this admission was to liquidate the debt.405 Unless the defendant could show that the payment was accompanied by something separate and additional to its conceded obligation to pay the full amount, therefore, it would remain liable for the balance. To overcome the difficulty the defendant resorted to a line of cases in which payment by cheque had been held sufficient to discharge a liquidated debt, even when drawn for a lesser amount.

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405 See Fergusson v Davis [1997] 1 All ER 315, 324.
THE CHEQUE CASES

For more than a century a debtor who gave bill of exchange in place of legal tender was held to have rendered good satisfaction. The proposition, best expressed in syllogistic form, was this -

(1) *Pinnel’s Case* allowed a chattel to be accepted in full satisfaction of a liquidated debt, even if its intrinsic value was significantly lower than the debt itself.\(^{406}\)

(2) A bill of exchange is a chattel at law.\(^{407}\)

(3) To give a bill of exchange in place of legal tender thus supplied the novelty in performance necessary to discharge a liquidated debt, even if drawn for a lesser sum.\(^{408}\)

\(^{406}\) See *Pinnel’s Case* at 117a; ER 237-238; the court observing that whilst there could be no satisfaction in mere partial performance, the introduction of some new element into the debtor’s promise (i.e., the tender of a chattel, payment at a different place or at an earlier date) would furnish a good discharge; the substituted performance being possibly more beneficial to the creditor than payment in full. The dicta in *Pinnel’s Case* was first applied to negotiable instruments in *Sibree v Tripp* (1846) 15 M & W 23; 153 ER 745. It was extended to payment by cheque in *Goddard v O’Brien* (1882) 9 QBD 37 and the principle was accepted (obiter) by The Earl of Selborne and Lord Blackburn in *Foakes v Beer* (1884) 9 App. Cas 605, 613 and 622 respectively (alluded to in *James Cook* at 219). For a relatively modern application see *Foot v Rawlings* [1963] SCR 197 (SCC).


\(^{408}\) See *Sibree v Tripp* (1846) 15 M & W 23, 32; 153 ER 745, 749 per Pollock CB; at 34; ER 750 per Parke B (“the satisfaction is by giving a different thing, not part of the sum itself, having different properties”) and at 37-38; ER 752 per Alderson B. The same reasoning was applied in *Curlewis v Clark* (1849) 3 Ex. 373; 154 ER 889; a blank acceptance signed by the Duke of Mexborough held to be good satisfaction for a larger sum. Parke B recapitulated that since the plaintiff might have accepted a chattel of any description in satisfaction, there was no reason why he could not take a blank acceptance (at 378-379; ER 891). Alderson B concurred, but thought that the signature of a hereditary peer might be worth something as an autograph (at
The element generally advanced as giving an added dimension to payment by cheque was the negotiability of the instrument - i.e., the holder's power to transfer it to a third party for its full value. Although the advantage this quality conferred upon a creditor was questionable,\textsuperscript{409} the line of authority recognising it as consideration remained unbroken until 1966; finally terminating with the judgment of the English Court of Appeal in \textit{D & C Builders Ltd. v Rees}.\textsuperscript{410} Lord Denning MR stated the matter thus:

...no sensible distinction can be taken between payment of a lesser sum by cash and payment of it by cheque. The cheque, when given, is conditional payment. When honoured, it is actual payment. It is then the same as cash. If the creditor is not bound when he receives payment by cash, he should not be bound when he receives payment by cheque... in point of law payment of a lesser sum, whether by cash or cheque, is no discharge of a greater sum.\textsuperscript{411}

Winn LJ agreed, adding:

\textsuperscript{409} The negotiability of a cheque is unaffected by the drawer's financial circumstances. A creditor may thus obtain the full face value of the instrument by negotiating it to a third party irrespective of the debtor's power to meet it on presentation. The benefit this confers upon the transferor is contingent, however, upon the cheque being met. If it is subsequently dishonoured (unless the instrument was indorsed without recourse, significantly reducing its value), the holder will be able to recover its full value from the creditor - see ss 25 & 47(2) BEA and Gold: “The Present Status of the Rule in Pinnel's Case (Part 1)” (1941) 30 Ky. LJ. 72, 93. Quaere the position if the cheque was marked “not negotiable”.

\textsuperscript{410} [1966] 2 QB 617 [hereafter “\textit{D & C Builders}”].

\textsuperscript{411} Ibid at 623 - citing, inter alia, \textit{Cumber v Wane} (1721) Stra. 426; 93 ER 613 and \textit{Smith's Leading Cases}, 13th Ed. (1929) Vol. 1, p. 380 [Editor: A.T. Denning]. The formalistic note was not sustained. Having restored the part payment rule to full health, his Lordship then pronounced it dead - see at 624. See also \textit{Arrale v Costain Civil Engineering Ltd.} [1976] 1 Lloyds Rep 98, 102.
... I find it impossible in the instant case to visualise any benefit or legal possibility of a benefit to the builders which might derive from the receipt of the defendant's cheque ... instead of the same amount in cash.412

Since D & C Builders almost certainly represents the law in New Zealand,413 the defendant's contention was bound to fail. Greig J so holding.414

HOW SOUND IS D & C BUILDERS?

Although it has been cordially received, D & C Builders is, in my opinion, an unsatisfactory authority. The problem lies in the categorical nature of its central proposition. True, a creditor generally derives no additional benefit from payment by cheque. There are circumstances, however, in which he palpably does. In the case of volume creditors, for example, payment by cheque has substantial practical advantages over cash; a cheque conferring not only ease of handling and transfer but, given the many hands through which it must pass, far greater security against misappropriation by servants and carriers.415 Cash is a highly fungible item and, unlike a cheque, it leaves no spoor. If consideration can be found in tomtits,416 used toffee wrappers417 and, in one case, a salutary example to others,418 then it can surely be found in manifest convenience and enhanced security.

412 See D & C Builders at 629 G. This observation is undercut by the facts. In this case the plaintiffs were given the option of payment in cash or by cheque (see at 627). Since they opted for a cheque, they presumably saw some advantage in payment in that medium.
413 See Burrows, Finn & Todd at p. 119, para. 4.6.2.
414 See James Cook at 215-216, 219-220.
415 The utility of cheques is widely acknowledged in this context. The Inland Revenue Department and Police Infringement Bureau, for example, (as I know from personal experience) forbid payment in cash.
416 See Couldrey v Bartrum (1881) 19 Ch D 394, 399.
418 See Anangel Atlas Compania S.A. v Ishikawajima Harima Heavy Industries Co Ltd (No 2) [1990] 2 Lloyds Rep 526,544-545. Here the defendants had granted an abatement in price in
THE GENERAL SCENARIO: SATISFACTION IN THE COMPROMISE OF A DISPUTED CLAIM

It should be evident by now that satisfaction is one of the law's more colourful concepts. Despite a theatrical air, however, the examples given to date are doctrinally sound; the super-addition of even a trinket establishing the exchange classically necessary to cement an agreement.

No claim of theoretical soundness, however, can be made for the next example - an exception to Pinnel's Case in which the law's insistence on a tangible exchange has been long since overthrown by policy.

Compromise of suit and accord and satisfaction are often thought to be conceptually distinct. In truth, however, they are convertible terms. Any confusion on the point stems from the subject-matter of the transaction.

To give good satisfaction the defendant must do or provide something supplementary to his existing obligations; the doing or provision of that something conferring a possible benefit upon the plaintiff. The benefit, as already outlined, may lie in an agreed variation in performance. In most cases, however, it lies in the abandonment of some legal impediment to the creditor's claim - i.e., something return for an undertaking on the part of the plaintiffs to take timely delivery of the hull of a ship; an article they were already contractually bound to accept. Consideration lay in the encouragement such acceptance would give to the defendant's other customers to similarly honour their obligations. Good consideration may thus be found in questionable psychology.

Text writers, for example, often accord them separate treatment - see Salmond & Williams at pp 118-119 (compromise) and pp 496-501 (accord and satisfaction) and Burrows, Finn & Todd at pp 103-106, para 4.5.2 (compromise) and pp 622-624, para 19.2.2 (accord and satisfaction).

See Executory Accords at 494-495 and S. Jenkins and J. Perillo, Corbin on Contracts, Revised Ed (LexisNexis, 2003), Vol. 13, Ch. 70.1, pp 305-308.
which either impeaches the creditor’s right to the full amount 421 or some independent matter which could have been pleaded in diminution or bar. 422 Coupled to such a concession, the payment of any sum will effect a complete discharge. 423

On the face of it compromises fulfill all of the necessary formalities of contract law (offer matched by acceptance and consideration 424 evolving naturally from the cessation of the legal tie). In reality, however, they are an artificial construct; the parties bound even if the ceded right is unfounded in fact or law.

**DISPUTED IN GOOD FAITH**

A compromise based upon a mutual surrender of rights should only be effective if the dispute was well founded; a party conferring no benefit (and certainly sustaining no detriment) through the surrender of a non-existent right. It is well-settled, however, that a debtor who withdraws an honest objection to a creditor’s demand gives good consideration for the creditor’s promise to forgo a portion of

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422 See, for example, *Jones Sawkins* (1847) 5 CB 142; 136 ER 828 [cross-claim for conversion], *Cooper v Parker* (1855) 15 CB 822, 827, 828; 139 ER 650, 652 [withdrawal of a plea of infancy], *Ackroyd v Smithies* (1885) 54 LT 130 [cross-claim] and *McDermott v Black* (1940) 63 CLR 161 [waiver of a contractual term].

423 See *Wigan v Edwards* (1973) 1 ALR 497, 512.

424 The cases under this head are couched purely in terms of consideration. Nothing turns on the shift in terminology (see fn. 392) and I hereafter adopt it.
that demand. This rule is candidly based on policy and the determinative factor is the sincerity of the debtor's challenge. Whether the renunciation of that challenge confers anything of value upon the creditor is rarely investigated. Although disclaimers are common, very few settlements are vacated for want of consideration.

A RATIONAL REQUIREMENT?

Again, to claim a discharge by way of full settlement cheque the debtor must establish two things:

• The creditor's acceptance of the proffered satisfaction, and

425 The law encourages the resolution of disputes by settlement. This policy would be undermined if a party was able to avoid a negotiated compromise on the ground that there was no sustainable defence to his claim - see Hunter v Bradford Property Trust Ltd. (1970) SLT 173, 194 (HL). The rules of contract have been adjusted accordingly; consideration lying, not in the sacrifice of a right, but in the abandonment of a claim to a right - see Trigge v Lavallee (1862) 15 Moo. PC 271, 292, 293; 15 ER 497, 505.

426 A surrendered claim is measured, not by the law as it is ultimately discovered to be, but by the state of the surrendering party's mind at the time of the concession. If a debtor honestly believes that he is bound to pay a lesser sum than the creditor is seeking to exact, therefore, there will be consideration for a compromise - see Re AV & MEM Cole [1931] 2 Ch 174, 178-179. If the position was otherwise, a judicial ruling on the merits of the debtor's case would be a necessary element in every settlement - see Miles v New Zealand Alford Estate (1886) LR 32 Ch D 266, 291 per Bowen LJ.

427 See Naylor v Winch (1824) 1 Sim & St 555, 556-557; 57 ER 219, 223-224 and Attwood v ____ (1826) 1 Russ 353, 357-358; 38 ER 137, 139.

428 If the debtor's claim is vexatious, frivolous or altogether without prospect of success, the court might disallow it as consideration - see Couch v Branch Investments (1969) Ltd. [1980] 2 NZLR. 314, 319-320, 335. Cases in which this has occurred, however, are few and far between (see, for example, Pitt v P.H.H. Asset Management Ltd. [1994] 1 WLR. 327, 332 B-E). A misguided belief in the soundness of one's legal position will generally support a compromise - see Owners of the Steamer Portofino v Berlin Derunapha (1934) 39 Cor. Cas. 330, 351-352 per Slesser L.J.
• The sufficiency of that satisfaction at law.

As I have endeavoured to demonstrate, this latter element is far from exacting; the requirement only raising an issue if -

• The debtor was sufficiently imprudent to concede liability for the full amount,429 or

• The contract between the parties makes liability in that sum incontestable.430

In almost any other circumstances, consideration will be found and the only question will be whether the creditor agreed to release his claim.431 This being the position, it is pertinent to ask whether consideration should still be an essential element of a binding discharge.

SHOULDN'T AGREEMENT BE ENOUGH?

The exceptions to the rule in Pinnel's Case are artificial in the extreme. This is particularly true of compromises, where the rules of contract have been openly subverted to a policy end. This is not a case, I stress again, of policy operating sub silentio beneath a conventional formula. The theoretical deficiencies of

431 In most of the above instances want of consideration was an auxiliary finding; the case having already been disposed of on grounds of non-agreement - see James Cook at 219-220, Budget Rent-A-Car at 725 and Dawson v Jordan at [32].
compromises are freely admitted and the policy considerations which allow them to be ignored repeatedly stated. Surely the time has arrived, then, to acknowledge the primacy of agreement and abandon the formality (for formality it has become) of consideration. Recent case law suggests that it can be safely dispensed with.

In *Antons Trawling Co Ltd. v Smith* the New Zealand Court of Appeal held a contractual variation to be binding even in the absence of consideration. Baragwanath J spoke straight to the present point:

> ... The essential principle underlying the law of contract [is] that the law will seek to give effect to freely accepted reciprocal undertakings. The importance of consideration is as a valuable signal that the parties intend to be bound by their agreement, rather than an end in itself. Where the parties who have already made such an intention clear by entering legal relations have acted upon an agreement to a variation, in the absence of policy reasons to the contrary, they should be bound by their agreement.

Although this rationale seems equally applicable to the release of a liquidated debt, *Antons Trawling* has been hitherto confined to the variation of a running contract. In my view, this is an unwarranted limitation.

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432 See, for example, *Ballantyne v Phillott* (1960-1961) 105 CLR 379, 390 per Dixon J.

433 See fn 425. See also *Pullen v Ready* (1743) 2 Atk. 588, 592; 26 ER 751, 753 per Lord Hardwicke LC ["there is nothing more mischievous than for this court to decree a forfeiture after an agreement ... they would rather rejoice at the agreement because it has absolutely tied up the hands of the court from meddling in the question "].

434 [2003] 2 NZLR 23 [hereafter "Antons Trawling "].

435 Ibid at para 93, pp 45-46.

436 See *Burrows, Finn & Todd*, para 4.6.2, pp 116-117 [Antons Trawling is unlikely to make inroads into the rule in *Foakes v Beer*].
LETTENTION GOVERN

If the purpose of contract law is indeed to give effect to freely accepted reciprocal undertakings, why should it impede the consensual release of an asserted right? A meretricious challenge to the creditor's claim will be of no effect, after all, unless the creditor agrees to compromise it on terms. This is a matter of personal choice, and if the creditor is prepared to release his claim for less than its full value why, absent fraud or duress, should he be permitted to resile from the bargain? He will often have excellent reasons for making the concession. It seems contrary to justice that he may thereafter recall his promise and issue proceedings for the balance. Such a power can only exacerbate debtor recalcitrance with the inevitable waste of time, money and judicial resources.

CONCLUSION

An agreement to release a liquidated debt by part payment is valid and enforceable when made by way of deed. An informal agreement should be no

437 See Baltic Shipping Co v Dillon [1991] 22 NSWLR 1 [the releasor distracted by shock and grief] and, perhaps, D & C Builders at 625, 626. [the debtor exploiting the creditor's parlous financial circumstances to force a settlement]. These situations aside, it is difficult to see how an offer of compromise can ever be sufficiently coercive to establish duress. A threat to defend legal proceedings or appeal against a judgment does not vitiate a bona fide settlement - see Chitty at para 7-042, p 531. A creditor, sound in mind and solvent, should not be reprieved simply because he misjudged his position.

438 If a debtor is in financial difficulties, a creditor will often be well advised to abridge his rights and settle for less than the full amount; a reduced payment from a solvent debtor generally more advantageous than an unsecured claim in bankruptcy. By settling, furthermore, the creditor avoids litigation (costs generally follow the event but rarely cover full expenditure), keeps his assets liquid and possibly gains goodwill.

439 See Salmond & Williams at p.485. The position is the same under s 92 of the Judicature Act 1908 save that the agreement must be carried into execution before it can effect a discharge - see In Re Goile, ex p. Steelbuild Agencies [1963] NZLR 566, 679.
If it transpires that the creditor has parted with his cause of action at an undervalue, that is a misfortune he will have to bear. The court should have no power to relieve against mere improvidence.

Drawing everything together, I offer the following proposals for reform.

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440 Whether the practical benefits of a timely lesser payment would support a defence on the basis of Williams v Roffey Bros. & Nicholls (Contractors) Ltd [1991] 1 QB 1 is debatable. The plea was rejected in Re Selectmove Ltd [1995] 1 WLR 474 and solid doctrinal arguments have been advanced in support of the judgment—see O'Sullivan: "In Defence of Foakes v Beer" (1996) 55 CLJ 219—c.f. Robichand v Caisse Populaire de Pokemouche Ltee (1990) 69 DLR 589, 595-596. In my opinion, extending Roffey to part payments would be an unfortunate development; adding yet another tier of artifice to an already hopelessly contrived doctrine. What is required is a clean excision of the requirement.

441 The rule in Pinnel's Case has been occasionally exploited to this end—see, for example, Great Fingall Consolidated Ltd. v Sheehan [1906] 3 CLR 176, 189-190. Could this be the reason why the doctrine of consideration, under concerted attack in almost every other context, maintains so tenacious a foothold in this corner of the law? Abolish the requirement and you curb the court's power to intervene in a sympathetic case. Some might regard this as a retrograde step.
CHAPTER FIVE

PROPOSALS FOR REFORM
I have suggested that a rebuttable presumption of acceptance attaches to the banking of a full settlement cheque. This presumption, sustainable in principle and reasonable in my view, should now receive statutory recognition.

The presumption will be rebutted if the creditor informs the debtor that the proceeds of the instrument are to be applied on account only. The creditor’s intentions must be communicated, however, prior to or contemporaneously with, the banking of the cheque. If the instrument is banked and cleared without reservation, the debtor’s liability will be discharged.

To secure a discharge the debtor’s terms must be unambiguous and brought clearly to the creditor’s attention. No particular form of words is necessary provided it is clear that the cheque is tendered in full extinction of the debtor’s liability.

The creditor’s reservation of rights need likewise take no particular form. It must amount, however, to a clear and unequivocal statement that the cheque was not taken in full settlement. An evasive response (i.e., a bare acknowledgement of payment) will not suffice.

Coercive conduct is a possibility in transactions of this nature and I would leave the law relating to duress unaffected. A claimant incapacitated by grief or illness or with no financial alternative but to accede to the debtor’s terms would thus be able to avoid a statutory settlement. A creditor, solvent, sound in mind and body and threatened with no more than a contested lawsuit, however, would not. Pressure of this sort is a natural concomitant of business life and should not be legislated against.

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442 See pp 18-20.
443 See p. 127, fn. 437.
444 Ibid.
Volume creditors with automatic clearance facilities\textsuperscript{445} warrant separate treatment. In my view, such organisations should be granted a grace period of one working week from the receipt of the cheque.\textsuperscript{446} This would give them adequate time to acquaint themselves with the debtor’s offer and formulate a response. Consequently

- If the debtor’s terms are rejected, and the rejection communicated to the debtor within the statutory period, there will be no discharge; the interim clearance of the cheque notwithstanding. However -

- If the debtor’s terms are not rejected within the statutory period, the claim will be discharged. It will be no answer that the creditor’s administrative machinery was unequal to the task.

Lastly, for reasons enumerated in the previous section,\textsuperscript{447} no discharge will be invalid on the ground that there was no consideration supporting it.

Leaving aside questions of definition, confining the intervention to cheques and with apologies for the drafting, the operative section might look something like this:

**CHEQUES IN FULL SETTLEMENT**

(1) Subject to subsection (2) and (3) of this section, if any person against whom any claim is asserted -

   (a) Tenders a cheque in full settlement of the claim; and

\textsuperscript{445} See pp. 16-17.

\textsuperscript{446} In most cases the banking of the cheque will be a purely ministerial act. A short moratorium would thus seem in order.

\textsuperscript{447} See pp 116-128.
(b) The cheque or an accompanying written communication carries a clear and conspicuous statement to that effect,

The claim will be discharged where -

(c) The claimant obtains payment on the instrument.

(2) Notwithstanding anything in subsection (1) but subject to subsection (3) of this section, a cheque tendered in full settlement of a claim will not effect a discharge if -

(a) The claimant informs the person against whom the claim is asserted in writing that the cheque is not accepted in full settlement; and

(b) The claimant's statement to that effect is conspicuous and unequivocal in its terms; and

(c) The claimant's statement is communicated either before or contemporaneously with the banking of the cheque; and

(d) Payment on the cheque is obtained in the ordinary course of banking and not by way of special answer.

(3) Notwithstanding anything in this section -

(a) No claim shall be discharged if the claimant, being an organisation with automatic clearance facilities, establishes that a statement complying with the requirements of subsection (2) was communicated to the person against whom the claim is asserted within 7 working days of the claimant receiving the cheque.
(b) No discharge under this section shall be invalid on the ground that there is no consideration supporting it.

(c) Nothing shall be taken to limit the law relating to duress.
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