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THE RULE IN FOAKES V. BEER

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"The doctrine that payment by the debtor of a less sum than the whole amount of the debt will not extinguish the debt, although the creditor expressly agree to receive it in full and give a receipt or writing to that effect, is well established by abundant authority. But while the correctness of the rule stated may be conceded, it should be borne in mind that it rests mainly upon a want of consideration for the promise made."¹

The above quotation gives expression to a rule which prevails in most English and American jurisdictions.² It also indicates the reason for the rule. An obligor by paying all or part of a due, liquidated, and undisputed obligation suffers no detriment he is not bound to suffer; he surrenders no legal right he is not bound to surrender. In other words, there is no consideration for the act of the obligee. A creditor "might take a horse, or a canary, or a tomtit if he chose, and that was accord and satisfaction [since the obligor was under no pre-existing duty to deliver the horse, canary, or tomtit]; but by a most extraordinary peculiarity of the English Common Law, he could not take 19s. 6d. in the pound; that was *nudum pactum*."³

This doctrine is not only patently absurd but is inconvenient in commercial dealings, and, accordingly, distasteful to the courts.⁴ The thesis now ventured is that the result is not even technically correct, but is an error resulting from the application of rules regarding consideration to a situation where the whole question of consideration is beside the point. Professor Ames traced the history of this rule and clearly pointed out that it originated in a perversion of some decisions dealing with accord and satisfaction, rendered prior to the time when the doc-

¹ *Ludington v. Bell* (1879) 77 N. Y. 138, 143.

² 11 L. R. A. (N. S.) 1018, note, citing numerous cases.

³ *Couldery v. Bartrum* (1880, C. A.) L. R. 19 Ch. Div. 394, 399.

⁴ "What principally weighs with me . . . is my conviction that all men of business, whether merchants or tradesmen, do every day recognize and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this is often so. Where the credit of the debtor is doubtful it must be more so." *Foakes v. Beer* (1884, H. L.) 9 A. C. 605, 622, per Lord Blackburn.

"This rule, being highly technical in its character, seemingly unjust, and often oppressive in its operation, has been gradually falling into disfavor." *Seymour v. Goodrich* (1885) 80 Va. 303, 304.

"The rule is evidently distasteful to the courts, and they have always been anxious to escape it by nice distinctions." *Smith v. Ballou* (1851) 1 R. I. 496, 498.

"The history of judicial decisions upon the subject has shown a constant effort to escape from its absurdity and injustice." *Harper v. Graham* (1851) 20 Ohio, 105, 115.

trine of consideration obtained a place in English law.⁵ He did this incidentally to an endeavor on his part to arrive at a correct definition of consideration. It was his opinion that any act or forbearance should suffice as consideration, even though that act or forbearance was already due from the promisee by reason of a pre-existing legal obligation. While Professor Ames deplored the rule, he expressed no doubt that consideration is essential to a discharge. On the contrary he asserted that the decision in such cases as *Foakes v. Beer* "must vary accordingly as one or the other of the two theories of detriment (consideration) is adopted."⁶ His criticism of the rule above stated was that it involves a too narrow definition of consideration.

The present writer, of course, could not add anything to the account of the origin of the rule as found in Professor Ames' article, and it is with some feeling of presumption that he differs from that ripe scholar in admitting that there is no consideration for the discharge in such cases as *Foakes v. Beer* and asserting that according to legal analogies no consideration should be essential to the discharge.⁷

It is elementary that consideration is necessary in the creation of a contract, and the act of the obligee in surrendering the obligation is generally assumed to be the making of a contract.⁸ The fallacy lies in this assumption. While the creditor's discharge of a claim is made or attempted by a consensual act, the parties do not create or attempt to create a contractual obligation. The creditor does not "promise to do or not to do." No resultant right *in personam* with its correlative duty is claimed. The transaction, if allowed to take effect, is fully executed and the claim extinguished.

It is not contended that the obligation comes to an end by an act of the obligor who pays only a part of the amount due. He has not fully performed. Lord Coke was no doubt right in saying that "it is apparent that a lesser sum cannot be a satisfaction of a greater sum."⁹ If the obligation, under the circumstances stated at the outset, comes to an end, it is by virtue of the manifested consent of the creditor.

The transfer of a property right gives rise to no contract. There is, of course, a superficial difference between a release by the creditor

⁵ Ames, *Two Theories of Consideration* (1899) 12 HARV. L. REV. 515, 521, *Lectures on Legal History* (1913) 329.

⁶ Ames, *op. cit.*, 12 HARV. L. REV. 517, *Lectures on Legal History* 325.

⁷ Sir Frederick Pollock also asserts that "the discharge of a contract by the parol agreement of the parties would seem *on principle* to require the same elements of mutual consent and *consideration* that are necessary for the formation of simple contracts." Williston's Wald's Pollock, *Contracts* (1906) 815.

⁸ "The reasons upon which these cases were determined were . . . that, when the debt was due, payment of a part by the debtor was no consideration for a *promise* of the creditor to discharge the residue, as the creditor received nothing to which he was not entitled, and there being no consideration for any such *agreement* it was a nude pact and void." *Gray v. Barton* (1873) 55 N. Y. 68, 71.

⁹ Co. Lit. 212b.

CONSTITUTION
OF
THE YALE LAW SCHOOL ALUMNI ASSOCIATION

ARTICLE I.

NAME.

The name of this Association is the YALE LAW SCHOOL ALUMNI ASSOCIATION.

ARTICLE II.

OBJECT.

The purpose of this Association shall be to advance the interests of law education at Yale; to disseminate the current legal thought of the faculty and students of the Yale Law School among the Alumni of Yale, and, by the closer intellectual bond thus created, to extend the influence of the school throughout the country.

ARTICLE III.

MEMBERSHIP.

SECTION 1. Membership shall be open to any person holding a law degree from Yale University or any person engaged in law work holding a degree from any other department. Members of the faculty and teaching staff of the Yale Law School shall be eligible for membership even though they do not hold degrees from Yale. The eligibility for membership of others who have been students at Yale University shall be subject to the discretion of the Executive Committee.

SECTION 2. The members of this Association shall be designated as life members and annual members, and shall be entitled to annual subscriptions to the publication referred to in Article V.

SECTION 3. A life member shall be one who shall pay at one time not less than One hundred dollars as dues. An annual member shall be one who shall pay the sums fixed as annual dues.

ARTICLE IV.

ELECTION OF MEMBERS.

SECTION 1. Nominations for membership may be made in writing to the Executive Committee by any member of the Association. The name shall then be voted upon at the next meeting of the Committee. A majority of votes of those present shall elect to membership.

SECTION 2. Any member may, after due notice of such proposed action, be expelled by a vote of the Executive Committee but shall be entitled to a hearing before the Committee upon demand.

ARTICLE V.

DUES.

SECTION 1. The fiscal year shall begin on the first day of July in each year.

SECTION 2. Unless otherwise directed by an amendment to this Constitution the Executive Committee shall have authority to fix the amount of the annual dues which shall be and remain six dollars unless changed by the Committee; four dollars of this amount shall be paid over to the Treasurer of the corporation publishing a Law Journal approved by the Faculty of the Yale Law School.

SECTION 3. Persons joining the Association after six months of any fiscal year shall have expired, shall pay only one-half of the dues for that year.

SECTION 4. Unless otherwise directed by an amendment to this Constitution all moneys received from life memberships shall be immediately paid over to the university treasurer who shall invest and reinvest the same as a trust fund, four fifths of the income of which shall be paid annually to the treasurer of a law journal approved by the Faculty of the Yale Law School; the remainder of said income shall be paid annually to the treasurer of this Association.

SECTION 5. Any person whose dues are more than three months in arrears shall be notified by the treasurer, and if such dues shall become six months in arrears, he shall cease to be a member of the Association. He may be reinstated by a four-fifths vote of the Executive Committee upon payment of all arrears.

SECTION 6. Any person resigning from the Association shall pay his dues for the fiscal year in which his resignation takes place.

ARTICLE VI.

OFFICERS.

SECTION 1. The officers of the Association shall be a President, two Vice-Presidents, a Secretary, and a Treasurer.

SECTION 2. The term of office of the President, Vice-President, Secretary and Treasurer shall be one year, and they shall be elected, together with the Executive Committee, at the annual meeting of the Association, and shall hold office until their successors are elected and have qualified.

SECTION 3. The nomination and election of Officers shall be conducted as follows: The Executive Committee shall appoint a committee to bring in nominations but any member may make other nominations and demand a ballot.

SECTION 4. When an office shall become vacant, it shall be filled by the Executive Committee and the appointee shall hold the same for the unexpired term.

ARTICLE VII.

DUTIES OF OFFICERS.

SECTION 1. It shall be the duty of the President to preside at all meetings of the Association and the Executive Committee, and he shall have power to call special meetings of either. He shall be an ex-officio member of all committees and perform such other duties as pertain to the office of President. He shall make report in writing at the annual meeting of the affairs of the Association.

SECTION 2. It shall be the duty of the Vice-Presidents, senior in the order of their election, to assume the duties of the President in the case of his absence or disability. It shall also be the duty of the Vice-Presidents to assist the President in the performance of the duties of his office as he may request.

SECTION 3. It shall be the duty of the Secretary to record the minutes of all meetings of the Association and of the Executive Committee and see that members have reasonable notice of regular and special meetings of the Association and Executive Committee. He shall conduct the correspondence, keep all records together with the names and addresses of all members of the Association. He shall perform such other duties as the Executive Committee may assign him.

SECTION 4. It shall be the duty of the treasurer to collect the dues and keep an accurate account of the financial transactions of the Association. He shall pay over to the university treasurer the amounts provided in Article V and deposit all moneys in such bank or other depository as may be designated by the Executive Committee. He shall make disbursements when authorized by the Executive Committee by check signed by him as treasurer. At the annual meeting and whenever required by the Executive Committee, he shall make report on the finances of the Association, and shall perform such other duties as may be prescribed by the Executive Committee.

ARTICLE VIII.

EXECUTIVE COMMITTEE.

SECTION 1. The Executive Committee shall consist of the officers of the Association, the Chairman of the Publicity Committee, and the Chairman of the Membership Committee together with ten other members. Four members shall constitute a quorum.

SECTION 2. The Executive Committee shall direct all expenditures; it shall annually appoint two of its members to audit the accounts of the treasurer; it shall make appropriations for specific purposes; it shall act on applications for membership; and shall have general supervision and conduct of the affairs of the Association.

ARTICLE IX.

MEETINGS.

SECTION 1. At least one regular meeting of the Association shall be held each year, and shall be known as the annual meeting, and shall be held on the Monday of Commencement week unless a different date be fixed by the Executive Committee.

SECTION 2. Special meetings of the Association shall be called at the direction of the President, the Executive Committee, or upon request of ten members.

SECTION 3. Written notices of special meetings shall be sent by the Secretary to all members if possible at least one week in advance of any such meeting. A notice published in the Law Journal shall be deemed a written notice.

SECTION 4. Fifteen members shall constitute a quorum.

ARTICLE X.

AMENDMENTS.

Amendments to this Constitution may be made at any meeting by a two-thirds vote; provided a written notice enclosing copy of the proposed amendment or amendments to be voted upon shall have been sent to each member or published in the Law Journal at least one week prior thereto.

Adopted June 20, 1921.

OFFICERS OF THE ASSOCIATION

President:

CHARLES H. SHERRILL, '89, '91 L.

Vice Presidents:

E. G. BUCKLAND, '89 L.

ELTON PARKS, '04, '07 L.

Secretary:

FREDERICK L. PERRY, '97 L.

185 Church St., New Haven, Conn.

Treasurer:

ELIOT WATROUS, '99, '02 L.

121 Church St., New Haven, Conn.

Executive Committee:

George D. Watrous, '79, '83 L.

Judge Isaac Wolfe, '87 L.

Matthew A. Reynolds, '92, '94 L.

Arthur L. Corbin, '00 L.

Frederick H. Wiggin, '04, '07 L.

Arthur P. McKinstry, '05, '07 L.

W. V. Griffin, '08 L.

Richard C. Hunt, '08 L.

Carroll C. Hincks, '11, '14 L.

Karl N. Llewellyn, '15, '18 L.

Publicity Committee:

Chairman: Albert H. Barclay, '91, '95 L.

48 Church St., New Haven, Conn.

Membership Committee:

Chairman: Richard C. Hunt, '08 L.

165 Broadway, New York

and the ordinary transfer of property rights. That this difference is not essential in the present discussion appears when we note the true analysis of the so-called transfer of rights. Such a transfer consists of two parts: first, the transferor is divested of his right or rights, and, second, the transferee is invested with a similar right or rights.¹⁰ The first element is the same in case of a release by the creditor. He voluntarily divests himself of the right. The second element—viz., the investiture of the transferee (obligor)—seems to be lacking, and the parties perhaps desire that it should be so. The result could be no different, however, if they intended and desired to invest the obligor with a new right just like the one the obligee gave up. While there is no rule of law to prevent the investiture of an obligor with a new right similar to that which the creditor had, there is a rule of necessity which makes it impossible for such a right to endure in the obligor as a legal relation. The right which the creditor had was a capacity to control the obligor's conduct.¹¹ If we conceive of the obligor becoming invested with just the same kind of right, it is a capacity to control his own conduct and the right-duty ceases to be a legal relationship.¹² The fact that this new right cannot endure and is not desired to endure in the obligor presents no reason why the creditor should be hindered, in surrendering his claim to the obligor, by rules of law which do not hinder in case of ordinary transfer. The creditor's act by way of releasing a claim is of the same kind as the ordinary act of transfer. In either case the act is simply the manifested consent of the owner of the right. In either case the effect of the act on the owner is intended to be the same, i. e., to divest him of his right or rights. In neither case does the owner assume a contractual obligation. The sole difference—and this should not impede the releasing creditor—is that he attempts less than the ordinary transferor in that he does not pretend to invest the debtor with a right such as he has held. All difference between the releasing creditors and other transferors of rights *in personam* might be eliminated by regarding the discharge as a transfer to the debtor. There is no reason why the creditor should not transfer his right to the debtor. There is of course a reason why the debtor cannot hold it. It would instantly cancel itself with the correlative duty, and that would be exactly the result desired. The voluntary release of a right is thus closely analogous to, if not identical with, the voluntary

¹⁰ Cook, *Alienability of Choses in Action* (1916) 29 HARV. L. REV. 817.

¹¹ Pound, *Legal Rights* (1915) 26 INT. JOUR. ETH. 92, 94.

¹² "A debtor may pay his debt, but he cannot purchase it, so as to preserve it as a living chose in action against himself. He cannot be both the creditor of himself and a debtor to himself. For a man to stand in such a relation to himself, in individual right and duty, it would be necessary that the law should, for such a purpose, make two men out of one,—to transform a single indivisible unit into two separate, independent, and complete beings. Such a transformation is just as impossible in law as it is in physics." *Edison Electric Illum. Co. v. DeMott* (1893, Ch.) 51 N. J. Eq. 16, 25 Atl. 952, per Van Fleet, V. C.

transfer of the right, and the doctrines relating to transfer would seem applicable. It may be pertinent, therefore, to recall a few of the doctrines relating generally to the transfer of rights.

The barter of property does not give rise to a contractual obligation.¹³ The operative acts by which a barter is accomplished resemble those by which a contract is formed in that they indicate the mutual assent of the parties; and those consensual acts operate in one case as in the other to accomplish a change in the legal relations of the parties. A barter further resembles a contract in that each party receives *quid pro quo*. Each divests himself of rights with reference to the object of barter and invests the other with similar rights. A barter, however, does not create any right *in personam*.

While the reciprocal transfers of a barter result in each party receiving *quid pro quo*, a person may make just as effectual a transfer without receiving any reciprocal transfer or other *quid pro quo*. Such a one-sided transfer we call a gift instead of a barter; but, when fully executed, it is just as effectual as a transfer by barter. The gift, like a barter, is not a contract except in a loose sense. It does not give rise to any right *in personam*. When the obligee transfers his claim to the obligor for a *quid pro quo* we have the elements of a barter. When he makes the transfer without a *quid pro quo* his transfer should, on principle, be just as effective, the absence of a *quid pro quo* merely indicating that the name of the transaction is "gift."

That choses in action are species of property which may be transferred; that they may pass by way of barter or gift; and that they may be transferred or surrendered from the obligee to the obligor, are propositions that should require no argument. But these matters will be discussed briefly to point out that such objections as have been urged at times to the transfer of choses in action do not apply when the transfer or surrender is from the obligee to the obligor.

The alienability of a chose in action is no longer doubtful. The only mooted point in that connection is whether the assignee acquires equitable or absolute ownership.¹⁴ It should be observed here that the only sound objection ever interposed to the transfer of a chose in

¹³ Professor Corbin has clearly indicated that a barter or gift can be referred to as a contract only in the sense that it is a series of operative acts of the parties expressing their assent and resulting in new legal relations. The ordinary barter or gift does not give rise to a contract in the sense of "relations resulting from operative acts consisting of a right or rights *in personam* and the corresponding duties, accompanied by certain powers, privileges, and immunities." As indicated in the excellent article referred to, if A barter apples to B for money, or if A gives a chattel to B, the transaction works a change in legal relations but gives rise to no special right *in personam*. Corbin, *Offer and Acceptance* (1917) 26 YALE LAW JOURNAL, 169.

¹⁴ Cook, *op. cit.*, 29 HARV. L. REV. 816; Williston, *Is the Right of the Assignee of a Chose in Action Legal or Equitable?* (1916) 30 HARV. L. REV. 97; Cook, *Alienability of Choses in Action* (1917) 30 HARV. L. REV. 449.

action grew out of regard for the obligor.¹⁵ It was not deemed permissible to subject him to an obligation running to a person with whom he had made no contract. In case the obligor is the proposed transferee, privy and consenting to the transaction, this consideration can have no bearing.

It has been a mooted question whether a chose in action may be the subject of a gift.¹⁶ The question has usually arisen where the proposed donee was not the obligor. While there is some contrariety of opinion among writers and among courts, the validity of such gifts has frequently been recognized.¹⁷ So far as there is authority for upholding such gifts, it affords strong argument for the proposition that a creditor may gratuitously discharge his debtor, since, on principle, the debtor should be as eligible as any other donee. The authority against the validity of such gifts may be examined with the inquiry in mind as to how far the objections to such transactions apply when the proposed donee is the obligor.

The chief argument against recognizing the transfer of a chose by way of gift has proceeded from a real or supposed inability of the would-be donor to pass title in the chose. This difficulty, it will be remembered, grew out of a deference for the obligor.¹⁸ Whatever the true rule should be when the obligor is not party to the transaction, that argument against the obligee's ability to pass title is foreclosed in a case where the obligor is privy and consenting. The most prevalent analysis of assignments is one which harks back to the evolution of the rule which now enables an assignee to collect the chose.¹⁹ That analysis deems the assignee vested with a power of attorney to represent the assignor and collect the chose. In case the power of attorney has not been paid for, it is argued that it is revocable, and consequently an assignment gratuitously made does not put the chose beyond the reach of the would-be donor. Clearly such an analysis is out of place if the donee be the obligor. He has no need for a power of attorney

¹⁵ "A contract was conceived of as a strictly personal obligation. It was as impossible for the obligee to substitute another in his place as it would have been for him to change any other term of the obligation. This conception, rather than the doctrine of maintenance, is the source of the rule that a chose in action is not assignable." Ames, *Lectures on Legal History* (1913) 258.

¹⁶ Jenks, *Consideration and the Assignment of Choses in Action* (1900) 16 LAW QUAR. REV. 241; Anson, *Assignment of Choses in Action* (1901) 17 *id.* 90; Costigan, *Gifts Inter Vivos of Choses in Action* (1911) 27 *id.* 326; Rundell, *Gifts of Choses in Action* (1918) 27 YALE LAW JOURNAL, 643.

¹⁷ See note 16. See also *Warder v. Jack* (1891) 82 Iowa, 434, 48 N. W. 729; *Pugh v. Miller* (1890) 126 Ind. 189, 25 N. E. 1040; *Jones v. Moore* (1898) 102 Ky. 591, 44 S. W. 126; *Briscoe v. Eckley* (1876) 35 Mich. 112; *Coe v. Hinkley* (1896) 109 Mich. 608, 67 N. W. 915; *Buxton v. Barrett* (1882) 14 R. I. 40; *Herbert v. Simson* (1915) 220 Mass. 480, 108 N. E. 65; *Fortesque v. Barnett* (1854, Ch.) 3 Mylne & K. 36; Ames, *Cases on Trusts* (2d ed. 1893) 145, 155, 162.

¹⁸ See note 15.

¹⁹ 1 Williston, *Contracts* (1920) sec. 408 ff.

to represent the creditor. The parties to the discharge have no thought of giving him one. The creditor has endeavored simply to surrender his right and close the matter. Thus the chief objection to the gift of choses has no application to the question of a gratuitous discharge of the debtor by his creditor. When due regard has been taken of the interest of the debtor, there is no quality in a chose in action which should make it incapable of being transferred, by gift or otherwise, just as rights *in rem* are transferred. Professor Hohfeld has pointed out clearly that a right *in personam*, intrinsically considered, may be, point for point, the same as a right *in rem*, differing from the latter only externally and in the fact that it has few or no "fundamentally similar, though distinct, rights as its companions."²⁰

The giving of choses in action has frequently been impeded by formal requirements. Since a chose cannot be delivered in the way tangible chattels can and must be delivered in order to effectuate a gift, courts have often taken as determining factors, as to the validity of the gift, the character of the evidence of the chose and the fact of delivery of that evidence to the donee.²¹ Such requirements as these should, so far as they are based on reason or authority, be applied to the gratuitous discharge. No argument is intended to be made herein that such transactions should be spared from the usual rules of evidence, but only that they should be spared from the consideration requirement. If part payment by the debtor is not consideration, the discharge to be effective should comply with the formalities required in making a gift of a chose in action. In many cases where the rule requiring consideration for a discharge is enunciated as the reason for holding the discharge invalid, the same result might be reached on the ground that the character of the evidence of the chose and the manner in which its transfer was attempted were not suitable for accomplishing a gift. If this type of case were to be eliminated from the support of the oft-repeated rule that a discharge attempted on part payment by the debtor is invalid for want of consideration, that rule would be left much less firmly entrenched than it is generally supposed to be.

The possibility of gift of his claim by the obligee to the obligor need not be argued from principle alone. In addition to the numerous cases holding that the obligee may give his claim to anyone,²² the courts have frequently held that a debt may be the subject of a gift by the creditor to his debtor.²³ They have generally held in cases where a

²⁰ Hohfeld, *Fundamental Legal Conceptions* (1917) 26 YALE LAW JOURNAL, 710, 723.

²¹ 1 Williston, *op. cit.*, sec. 440.

²² See note 16.

²³ *Lanham v. Meadows* (1913) 72 W. Va. 610, 78 S. E. 750 (promissory note delivered by holder to maker); *Hathaway v. Lynn* (1889) 75 Wis. 186, 43 N. W. 956 (oral gratuitous release from contract to run bus from passenger trains to hotel); *McKenzie v. Harrison* (1890) 120 N. Y. 260, 24 N. E. 458 (gratuitous

claim consists of a part admittedly due and a balance in dispute that payment by the debtor of the undisputed amount will support a release of the entire claim.²⁴ Obviously, the debtor in these cases has done nothing more than he was bound to do, and the release stands unsupported by any consideration. These cases, also, might therefore be cited as authority for the proposition that claims may be surrendered without consideration.²⁵ Thus the rule quoted at the outset of this article not only seems wrong on principle but also contrary to the result reached in other situations where the problem, when analysed, is identical with that presented in the attempt of a creditor to discharge his debtor on part payment of the debt.

The gift of a claim by an obligee to his obligor has sometimes been taken to be a different sort of transaction from a discharge on payment of a smaller amount than is due.²⁶ As already indicated, the two propositions following are frequently laid down in the cases; first, a release or discharge executed by a creditor in exchange for part payment of a due and undisputed claim is inoperative; second, the gift of a debt by the creditor to his debtor, generally called a forgiveness, does extinguish the debt. Conceding that payment of a smaller amount than is due does not amount to consideration, what essential difference is there between the two attempted transactions? Looking particularly at the first situation, why should the attempt of the parties fail? Of course, the part payment by the obligor will not of itself discharge the debt. Nothing the *obligor* can do, short of complete performance, will exonerate him. But on principle it seems inconceivable that the *creditor's* act should not be given effect. If the creditor may be judged by his acts, he has endeavored, by the consent, to cancel, surrender,

remission of balance due under a lease, effected by giving a receipt in full. The court refers to the doctrine of *Foakes v. Beer*, but asserts that "this rule has no application when the payment is made under an agreement which is recognized as valid by the parties, and has been fully executed"; *Green v. Langdon* (1873) 28 Mich. 221 (gratuitous indorsements upon a mortgage held an extinguishment of the mortgage debt to the extent of the indorsement); *Holmes v. Holmes* (1902) 129 Mich. 412, 89 N. W. 47 (written receipt for money due as interest under a mortgage, only a part of that money being actually paid, deemed a gift of the interest above the amount received).

Contra, Metcalfe v. Kent (1898) 104 Iowa, 487, 73 N. W. 1037; *Whitehill v. Wilson* (1832, Pa.) 3 Pen. & Watt, 405.

²⁴ *Chicago M. & St. P. Ry. v. Clark* (1900) 178 U. S. 353, 20 Sup. Ct. 924; *Neely v. Thompson* (1904) 68 Kan. 193, 75 Pac. 117; *Tanner v. Merrill* (1895) 108 Mich. 58, 65 N. W. 664; *Treat v. Price* (1896) 47 Neb. 875, 66 N. W. 834.

²⁵ It has long been the rule in England that the holder of a negotiable instrument might without receiving consideration renounce his right against any party liable on the instrument. *Foster v. Dawber* (1851) 6 Exch. 839. That rule was incorporated in the Bills of Exchange Act, 1882, and in the Negotiable Instruments Law. Brannan, *Negotiable Instruments Law* (3d ed. 1919) sec. 122.

²⁶ *Gray v. Barton*, *supra* note 8; *McKenzie v. Harrison*, *supra* note 23.

forgive, or release the debt. Whether his language is that he "surrenders," "forgives," "releases," "discharges," or "receives in full," the essence of his endeavor is to divest himself of the right, and to leave nothing executory on either side.

The part payment may be the motive that induces the creditor to release, but, even so, it is of no importance whether this motive would fulfil the requirements for consideration. Assuming the absence of fraud and mistake of fact, the creditor knows just what he is receiving, and the only conceivable mistake on his part is a mistake as to the legal significance of the part payment, which mistake would, of course, be immaterial.

While the courts recognize these two classes of cases, deciding one class according to the first and one according to the second proposition above, the cases themselves give no very satisfactory criteria for the separation. In cases decided according to the first proposition the acknowledgment of receipt may be as formal as in those decided by the second²⁷ and the intention of release and cancel may be as clear.²⁸ In cases to which the second proposition is applied, the word "gift" may or may not appear;²⁹ the obligor need not be a near relative;³⁰ and there may or may not be part payment by the debtor.³¹ Justice Glover in one of the gift cases³² makes the following attempt to distinguish the part payment cases:

"The counsel of the respondent cites numerous cases where it has been held that a payment of a less sum upon a debt actually due cannot satisfy or discharge the entire debt, but only so much as is paid, although agreed to be *received in satisfaction of the whole*. The cases to this effect are uniform, from *Fitch v. Sutton*, 5 East 230, to *Ryan v. Ward*, 48 N. Y. 204; *Bunge v. Koop*, *id.* 225. The reasons upon which these cases were determined were, that it was not good as an accord and satisfaction, as it was obvious that a smaller sum could not satisfy a greater; that, when the debt was due, payment of a part by the debtor was no consideration for a *promise* of the creditor to discharge the residue, as the creditor received nothing to which he was not entitled, and there being no consideration for any such *agreement*, it was a nude pact and void."

Justice Haight in another gift case³³ makes the following observation:

"Under the view taken by us of this case, it does not become necessary to approve or disapprove of the doctrine [of *Foakes v. Beer*]; for this rule has no application when the payment is made under an agreement which is recognized as valid by the parties and has been fully executed."

²⁷ *Schlessinger v. Schlessinger* (1907) 39 Colo. 44, 88 Pac. 970: "The rule is settled . . . regardless of the form of receipt which may be given."

²⁸ *Schlessinger v. Schlessinger*, *supra*.

²⁹ *Holmes v. Holmes*, *supra* note 23.

³⁰ *Gray v. Barton*, *supra* note 8.

³¹ *Holmes v. Holmes*, *supra* note 23; *McKenzie v. Harrison*, *supra* note 23.

³² *Gray v. Barton*, *supra* note 8.

³³ *McKenzie v. Harrison*, *supra* note 23.

If the promise or agreement to release is executory, purporting merely to obligate the promisor to effect a release in the future, it clearly is not binding in the absence of consideration. It would seem equally clear that such an executory promise or agreement would be inoperative even if called a gift. On the other hand, if the creditor indicates an intention on his part that the discharge be executed, it should be effective whether we call the transaction a "gift" or something else. At any rate, there seems to be no foundation for the distinction taken in the extracts quoted, as there is no more reason for arbitrarily construing a discharge by way of settlement executory than for so construing a discharge called a "gift."

Professor Ames has clearly indicated the origin of the rule that a valid discharge cannot be given when the debtor pays only part of the amount due on a liquidated and undisputed claim.³⁴ If, however, this unpopular rule had depended on judicial precedent alone for its strength, it could not have endured and spread to practically all English law jurisdictions. The rule lived because the discharge was mistaken for a contract. In order to maintain a supposed consistency, consideration was held essential to the discharge. "The rule has always been regarded as more logical than just."³⁵ While it is perhaps too late to change, by the course of decision, a result so authoritatively established, it is at least fair to the common law to note that the rule is not required by any of the fundamental doctrines of that common law. The consideration requirement has been dragged outside the sphere of its legitimate operation. Its use to hamper the cancellation of claims is neither "logical" nor "just."

³⁴ Ames, *op. cit.*, 12 HARV. L. REV. 515, *Lectures on Legal History*, 329.

³⁵ Per Justice Mitchell in *Ebert v. Johns* (1903) 206 Pa. 395, 398, 55 Atl. 1064.