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CONTRACTS—DISCHARGE BY PARTIAL PAYMENT.—An agreement was executed between the maker, payee, and indorsee of a note whereby after maturity the payee delivered the note to the indorsee for a car valued at $250, an amount less than the note, and the indorsee was to discharge the maker in consideration of the receipt of livestock also valued at $250. After getting the livestock, the indorsee brings action for the amount unpaid under the note, alleging the discharge ineffective because of lack of consideration. Held: The discharge is binding. *Rye v. Phillips* (Minn. 1938), 282 N. W. 459.

For a binding promise to discharge a contract there must be consideration.[1] Consideration is one of the fundamental requisites of modern bargain contract law[2] and is the giving up of a right, power, privilege, or immunity.[3] The promise to perform or the performance of a pre-existing legal duty owed to the promisor is not consideration for a new promise by the promisor nor will it support a promise to discharge, because no legal interest is given up by the promisee;[4] therefore the promise to pay or the payment of part of a liquidated

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[1] 4 Page on Contracts p. 4359, § 2461 (1920) "As in case of other contracts, a subsequent contract which is to operate as a complete discharge or a modification of a prior contract must itself be supported by sufficient consideration." In the present case there is no mention of the fact that the promissory note should be governed by Negotiable Instruments Law which allows a renunciation by the holder's rights when made in writing or by delivery of the instrument to the person charged to be effective without consideration. In the absence of such renunciation here, the case is governed by the law of simple contracts. Uniform Negotiable Instruments Law § 119(4) See Brannan on Negotiable Instruments Law (6th ed. 1938) p. 1955; Mason's Minn. Statutes, (1927) §§ 7162 and 7165; Burns Ind. Stat. Ann. (1933), §§ 19-801 and 19-804.

[2] "Consideration, offer, and acceptance are an indivisible trinity, facets of one identical notion which is that of bargain." Hansom, *The Reform of Consideration,* 54 L. Q. Rev. 233, 234 (1938).

[3] Willis, H. E., *Consideration in Anglo American Law of Contracts,* 8 Ind. L. Jl. 93, 111 (1932).

[4] Davis v. Morgan (1903), 117 Ga. 504, 43 S. E. 732. The promise to perform or performance of a pre-existing legal duty to a third person may be held supported by consideration because the promisee gives up the privilege of offering recision to the third party. DeCiccio v. Schweitzer et al. (1917), 221 N. Y. 431, 117 N. E. 807; Restatement, Contracts (1932), § 84 (d). The weight of authority, however is contra. 13 C. J. 356.

debt is not consideration for discharge of the whole amount.[5] Although this conclusion, first suggested by Coke in *Pinnel's Case*[6] over 300 years ago, seems to be logical and is formidably established in precedent, it has been vigorously attacked both as to function and as to concept.

Part payment on time without suit or other difficulty may be satisfactory to the creditor, and although he is willing to discharge the debtor for the whole amount of the debt, the crafty debtor today may refuse to make even a part payment on these terms because he realizes the creditor will be able to get a judgment for the remainder regardless of the promise to discharge. If the debtor were sure he would not later be charged for the balance, he would be glad to make a sacrifice to pay the part the creditor asks. In other instances the less wary debtor may pay part in cash on time for the creditor's promise to discharge the claim for the balance, yet when the creditor sues for this balance, the debtor has no defense even though the promise to discharge was in writing. Thus the rule that payment of a lesser sum is not consideration for discharge of the whole is a disadvantage both to the creditor and to the debtor. Since the seal is no longer effective in many states, there is a definite need for a new simple and effective method of discharge.

In the present case the court declares the rule that payment of a lesser sum is not consideration for discharge of the whole amount to be an anomaly in the law of consideration,[7] and that it developed from an historical accident.[8] The court suggests that the creditor should be held to have made a gift of incorporeal property when he purports to relinquish his claim for the whole amount.[9] But a transfer of such a chose in action is in substance not a gift but only an attempted discharge in disguise.[10] The court's last proposal is that since a promise to pay a debt barred by the statute of limitations is binding without consideration, a promise to discharge a debtor should be likewise. However the better view is that the former promise is binding because the courts have found sufficient moral consideration in the form of prior benefits to the promisor.[11] Since the doctrine of moral consideration is

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[5] This is the famous doctrine of Foakes v. Beer (1884), H. L., L. R., 9 App. Cas. 605. The doctrine is followed in most American jurisdictions. Restatement, Contracts (1932), § 76 (a). For Indiana cases see Restatement, Contracts Ind. Annot. (1933), § 76 (a).

[6] 5 Rep. 117, a; Moo. 677, pl. 923, s. c.

[7] The court states "The doctrine thus invoked is one of the relics of antique law which should have been discarded long ago. It is evidence of the former capacity of lawyers and judges to make the requirement of consideration an overworked shibboleth rather than a logical and just standard of actionability."

[8] For support of the court's statement see Ames, *Two Theories of Consideration*, 12 H. L. R. 515 (1899) where it is argued that there is a confusion of mathematics and consideration in the development of the doctrine. He states that the doctrine was promulgated before the concept of consideration was in existence. See also 1 Mo. L. Rev. 348 (1936) where the doctrine is condemned.

[9] See Ferson, *The Rule in Foakes v. Beer,* 31 Yale L. Jl. 15 (1921) where the gift theory is advocated.

[10] "Calling it a gift does not help the matter, whether the parties talk of recision, release, discharge, waiver, gift, or forgiveness of the obligation is immaterial." 6 Williston p. 5180, § 1829 (1938).

[11] Clark v. Jones (1919), 233 Mass. 591, 124 N. E. 426.

very narrow,[12] it is unlikely that the courts will extend it to the present situation.

Other arguments are that the creditor should be held on promissory estoppel,[13] waiver,[14] or an accord and satisfaction;[15] but aside from situations where the creditor receives something other than the lesser sum,[16] there seems to be no way to hold the promise binding on these grounds.

Consideration in bargain contract law serves to furnish some evidence of the parties' intent to make the promise binding,[17] and it follows the modern idea that something must be given for a binding promise. Although in an original contract, consideration appears to be a well founded requisite, a different rule may be needed for a contract to discharge the original one. Assuming, then, that logically there is no difference between an original contract and one to discharge, but acknowledging that modern business expediency demands otherwise, the problem is how to meet this dilemma.

Many states, having abolished the effectiveness of seals,[18] have enacted statutes making a written discharge effective without consideration.[19] A few courts have followed the dubious reasoning which the court in the present

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[12] Schnell v. Nell (1861), 17 Ind. 29. For a discussion of moral consideration see Holdsworth, *The Modern History of the Doctrine of Consideration,* 2 Boston U. L. Rev. 87, 174 (1922).

[13] In spite of the efforts as shown by Restatement, Contracts (1932), § 90 to revive the old theory of promissory estoppel, the weight of authority still confines the concept to a few stereotyped instances. In the present case, there is no showing that the debtor injuriously relied on the creditor's promise to discharge.

[14] The term waiver is often misused. Properly used it means a mere statement of relinquishment of a legal interest. Ballantine's Law Dictionary p. 351 (1930).

[15] For an accord and satisfaction there must be consideration. Restatement, Contracts (1932) § 420.

[16] For the various situations in which consideration has been found see 1 C. J. S. p. 498. The decision in the present case is said to be on the ground that the debtor gave chattels other than money and entered into a new agreement with the payee and indorsee so that there was plenty of consideration. The opinion, however, upon which this comment is based shows that the Minnesota court in the future will hold the discharge binding even though there be nothing other than the payment of a lesser sum.

[17] 1 Williston, Contracts § 148-149 (1936).

[18] For the states changing the common law of seals, see 1 Williston, Contracts (1936) § 218.

[19] A written receipt or agreement purporting to discharge the debtor has the same effect as a common law release under seal in Ala. Code § 7669, Calif. Civil Code § 1524, 154, Mont. Rev. Code § 7459, 7464, N. Dak Comp. Laws of 1913 §5828, Oregon Code 1930 § 89-706, S. Dak. Civil Code 1929 § 787, 792, Tenn. Code 1932 § 9741, 9742. In N. C. an executory agreement is sufficient. Consol. St., § 895. In 1927 Pa. and in 1929 Utah adopted the Uniform Written Obligations Act making any written agreement binding without consideration. As to the effect of these statutes see 23 Va. L. Rev. 446 (1936).

[20] A few representative cases are Frye v. Hubbell (1907), 68 A. 325, 74 N. H. 358 and Greener v. Cain (1924), 101 So. 859, 137 Miss. 33. Other jurisdictions that have intimated adherence to the principles of these cases are Conn., Wash., and Wis. See 1 Williston on Contracts p. 419 (1936).

case intimates.[20] The remainder of the jurisdictions adhere to the old rule but many do so only reluctantly.[21]

To devise a better method of discharge, the best remedy is simply to hold the social interest today is such that consideration is not needed for the promise to discharge the debtor.[22] Since the doctrine requiring consideration for a discharge has become so deeply imbedded in the common law, it appears the legislatures will have to bear the burden of making the change. The courts that have reached the desired result have done so only by couching the reasoning in a manner that it still seems to be following the logical concept of consideration. The judges have not had the courage to come directly forward and state that consideration is not needed for a discharge. Apart from fraying the edges of the logical concept of consideration, there appears that no ill result will come from holding a written promise to discharge to be sufficient. Perhaps ultimately consideration as a requisite for any bargain contract will be superseded by the requirement of writing, but at present this reform in the case of discharges seems a sufficient step.

Minnesota, like Indiana, having enacted a statute declaring the seal to no longer have its common law effect,[23] and holding to the old doctrine requiring some consideration other than payment of a lesser sum, one may well observe that an effective method of discharge is needed. By its opinion the Minnesota court has shown its readiness to revolt. It is submitted that the appropriate move is for these states to adopt one of the statutes making a written discharge effective without consideration. L. N. M.

DIVORCE—JURISDICTION OVER SUBJECT MATTER—RES JUDICATA.—Plaintiff husband, after obtaining in the District of Columbia a divorce *a mensa et thoro* from his wife on the ground of cruelty, made a claim that he had established his domicil in Virginia and there sought an absolute divorce for desertion, grounds not recognized by the District of Columbia. The defendant wife made an asserted special appearance only for the purpose of establishing the plaintiff's lack of domicil as required by Virginia law for divorce. The Virginia court found that the husband had acquired a domicil within the state and entered a decree of absolute divorce. There was no appeal taken from the decree holding that the court had jurisdiction of the subject matter and of the parties. The plaintiff then sought recognition of the absolute divorce in the District court; this was refused on the ground that the Virginia court did not have jurisdiction of the parties or of the marriage status. Held on appeal, reversed. The Virginia court's determination of its own jurisdiction over the subject matter is *res judicata* and entitled to full faith and credit in all other jurisdictions in this country. *Davis v. Davis* (1938), 59 S. Ct. 3.

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[21] The courts which criticize the doctrine most consistently are found in Colo., Minn., Kans., Texas and U. S. 1 C. J. S. p. 541.

[22] For a discussion of the abolition of the requirement of consideration in contracts generally see note in 23 Va. L. Rev. 446 (1936); Wright, *Ought the Doctrine of Consideration to be Abolished from the Common Law?*, 49 H. L. R. 1225 (1936); 3 U. of Chi. L. Rev. 312 (1935); 21 Ill. L. Rev. 185 (1926); 1 Ill. Law Bull. 65, 174 (1917).

[23] Burns Ind. St. Ann. (1933), § 2-1601. Mason's Minn. Gen. St. (1927) § 6933.