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CONTRACTS - CONSIDERATION - THE RULE OF FOAKES v. BEER DISCARDED

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CONTRACTS — CONSIDERATION — THE RULE OF FOAKES V. BEER DISCARDED — In an action on a promissory note, by an indorsee who was not a holder in due course, the defendant pleaded the following facts. In 1930 the payee held the promissory note of the defendant, who was known to be hopelessly insolvent. An agreement was thereupon made and executed between the payee, the plaintiff and defendant, whereby the plaintiff agreed to purchase the note from the payee in exchange for his automobile. The defendant in turn agreed to turn over to the plaintiff certain livestock or produce, to pay a certain balance in cash, and also to pay the license on plaintiff's automobile when transferred by the payee. The plaintiff's motion for a directed verdict was granted by the trial court on the theory that "a mere promise of a creditor to receive, and of the debtor to pay, a sum less than the debt in full satisfaction of it, is without consideration and binds neither party." [1] *Held*, that the trial court was in error in that there was a tripartite agreement supplying adequate consideration, and that whether this was so or not the ancient rule of *Foakes v. Beer* [2] is no longer law in the state of Minnesota. *Rye v. Phillips*, (Minn. 1938) 282 N. W. 459.[3]

Probably no other case in the common law has been criticized more severely, and at the same time more consistently followed, than the case of *Foakes v. Beer*,[4] which announced the doctrine [5] set out by the lower court in the principal

[1] Rye v. Phillips, (Minn. 1938) 282 N. W. 459 at 460.

[2] 9 App. Cas. 605 (1884).

[3] This dicta denies a long line of cases from Sage v. Valentine, 23 Minn. 102 (1876), to C. W. La Moure Co. v. Cuyuna-Mille Lacs Iron Co., 147 Minn. 433, 180 N. W. 540 (1920).

[4] 9 App. Cas. 605 (1884).

[5] For a complete discussion of the history and a criticism of the rule of Foakes v. Beer, see Ames, "Two Theories of Consideration," 12 HARV. L. REV. 515 at 521 (1899), reprinted in SELECTED READINGS OF THE LAW OF CONTRACTS 320 at 324 (1931) (Association of American Law Schools). See also, 32 MICH. L. REV. 1001 (1934).

case. The courts of the United States have accepted it [6] with but few exceptions,[7] although the rule has been changed by statute in at least ten states.[8] The rule can be criticized as based on misinterpretation of the first case on the subject,[9] and as being based upon an application of logic to a situation which demands a practical viewpoint. As a matter of fact, the relative number of decisions in the creditor's favor in such cases is small, since the courts are alert to find the existence of facts in the particular case which make the rule inapplicable.[10] However, it has remained a judicial hurdle for two centuries, and other courts will do well to follow the Minnesota court, even though it requires judicial courage to deny the validity of previous decisions. It should be noted that the Minnesota court's rejection of the rule of *Foakes v. Beer* is a mere dictum in the principal case, since the agreement was supported by a legal consideration. But there can be little doubt as to the present status of the rule in Minnesota,[11] since the court declared itself unequivocally, and since it had previously announced its dissatisfaction with the rule.[12]

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[6] 1 C. J. 539, § 40 (1914).

[7] Frye v. Hubbell, 74 N. H. 358, 68 A. 325 (1907) (the opinion contains a complete discussion of the rule, its history and its weakness); Clayton v. Clark, 74 Miss. 499 (1896). Two states do not apply the rule where receipt in full is given. Dreyfus & Co. v. Roberts, 75 Ark. 354, 87 S. W. 641 (1905); Johnson v. Cooke, 85 Conn. 679, 84 A. 97 (1912).

[8] Ala. Code (Michie, 1928), § 5643; Cal. Civ. Code (Deering, 1937), § 1524; Ga. Code Ann. (Park, 1938), § 20-1204; Maine Rev. Stat. (1930), c. 96, § 65; N. C. Code (1935), § 895; N. D. Comp. Laws (1913) § 5828; Ore. Code Ann. (1930), § 9-706; S. D. Comp. Laws (1929), § 787; Tenn. Code (Michie, 1938) § 9742; Va. Code (1930), § 5765.

[9] See citations in note 5, supra.

[10] Frye v. Hubbell, 74 N. H. 358 at 367, 68 A. 325 (1907). It is inapplicable in the following situations: release under seal, Sonnenberg v. Riedel, 16 Minn. 83 (Gil. 72) (1870); payment by a third party, Clark v. Abbott, 53 Minn. 88, 55 N. W. 542 (1893); composition agreement, Murchie v. McIntire, 40 Minn. 331, 42 N. W. 348 (1889); a new, unsecured note is given, Jaffrey v. Crane, 50 Wis. 349, 7 N. W. 300 (1880).

[11] It is of interest to note that the Minnesota court bases its result on the proposition that consideration is not necessary, as comparable to the rule that a new promise to pay a debt barred by the statute of limitations, or discharged by bankruptcy, is binding without consideration, or that release of the residue can be considered a gift. It is suggested that this method of avoiding the rule may raise additional problems, and that the method of the New Hampshire court is to be preferred. Frye v. Hubbell, 74 N. H. 358, 68 A. 325 (1907). The New Hampshire court gives weight to the practicalities of the situation, and holds that there is consideration for the promise.

[12] Oien v. St. Paul City Ry., 198 Minn. 363, 270 N. W. 1 (1936).