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CONTRACTS — PROMISE TO PERFORM PRE-EXISTING DUTY — GIFTS — CHOSES IN ACTION — Plaintiff contracted to excavate a cellar for a stated price. He encountered solid rock and completed his duty under the contract only after defendant orally agreed to give extra compensation. When the excavation was finished, defendant refused to make payment except on the basis of the original terms. *Held*, defendant, by his later promise, effectively discharged plaintiff from his obligation under the original contract by way of gift. Thus, performance by the plaintiff was consideration for the later promise, thereby creating a new and binding contract. *Watkins & Son v. Carrig*, (N. H. 1941) 21 A. (2d) 591.

Many courts and legal writers have recognized that enforcement of a promise to pay additional compensation for completion of contractual duties which the promisee is already obliged to perform is often desirable from the standpoint

of practical justice.[1] Nevertheless, the strict rules of consideration as first presented in *Foakes v. Beer* [2] have prevented most courts from reaching that desired result.[3] A few states support the agreement whenever the basic contract is bilateral by declaring the first rescinded before the second was formed.[4] Others enforce the added compensation on the basis of a waiver,[5] or the equitable doctrine of moral consideration.[6] None of these holdings have won wide support, for they have been criticized as sidestepping the issue and propounding questionable legal concepts.[7] New Hampshire, on the other hand, is one of the few states which recognized the possible injustice of this technical view of consideration and repudiated it at the outset.[8] In the principal case, however, the court not only reaffirmed its previous stand, but extended its doctrine by emphasizing the concept of a gift of a chose in action. This modified approach obviates the difficulties of consideration and, if sound, might pave the way to a more satisfactory attitude toward contract adjustments on the part of other jurisdictions. It should be easy to find the necessary intent to give a chose in action, for it is obvious that the promisor intended to release the promisee from the duty of performing under the old terms. However, it is an established rule that the intent to give must be absolute.[9] It is not so clear that the promisor intended the release to be unconditional, but rather it would seem to be conditioned upon the enforceability of the second contract; and even the New Hampshire court would probably permit him to recover on the original contract if the second one were void

[1] King v. Duluth M. & N. Ry., 61 Minn. 482, 63 N. W. 1105 (1895); Schuler v. Myton, 48 Kan. 282, 29 P. 163 (1892); Corbin, "Does a Pre-existing Duty Defeat Consideration?" 27 YALE L. J. 362 at 374 (1918). See also N. Y. LAW REVISION COMMISSION, ACTS AND RECOMMENDATION RELATING TO THE SEAL AND CONSIDERATION 15 (1936) (N. Y. Leg. Doc. 65c).

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

[3] Schuler v. Myton, 48 Kan. 282, 29 P. 163 (1892). Other cases cited 25 A. L. R. 1451 (1923). See also 1 WILLISTON, CONTRACTS, rev. ed., § 130A (1936), for a discussion of the problem.

[4] Rogers v. Rogers & Bro., 139 Mass. 440, 1 N. E. 122 (1885). Other cases are cited in ANSON, CONTRACTS, Corbin ed., 146, note 3(2) (1930).

[5] Munroe v. Perkins, 9 Pick. (26 Mass.) 298 (1830).

[6] United States v. Cook, 257 U. S. 523, 42 S. Ct. 200 (1922).

[7] The idea of mutual recission is contrary to fact. 1 PAGE, CONTRACTS, 2d ed., 1006 (1920). Waiver must have consideration. 3 WILLISTON, CONTRACTS, rev. ed., § 678 et seq. (1936). The equitable doctrine involves faulty reasoning. 1 WILLISTON, CONTRACTS, rev. ed., § 130A (1936). This doctrine, probably the most popular of the group, excludes cases where "moral consideration" cannot be found, although enforcement of the contract may be desirable. See Zimmerman v. Rice County, 202 Minn. 54, 277 N. W. 360 (1938), and principal case.

[8] Frye v. Hubbell, 74 N. H. 358, 68 A. 325 (1907). Other states in accord with New Hampshire are Mississippi and Washington. A few states have statutes limiting or repudiating Foakes v. Beer. Cases and statutes cited, 1 WILLISTON, CONTRACTS, rev. ed., § 120, notes 8 and 9 (1936).

[9] Allen-West Commission Co. v. Grumbles, 63 C. C. A. (8th) 401, 129 F. 287 (1904); Bickford v. Mattocks, 95 Me. 547, 50 A. 894 (1901); THORNTON, GIFTS AND ADVANCEMENTS, 75 (1893); 28 C. J. 645 (1922).

or voidable.[10] Furthermore, it would seem that delivery, generally recognized as an essential element for any type of gift,[11] is lacking. The court, in relying on those cases which held valid a verbal promise to pay a debt previously barred by bankruptcy or the statute of limitations, found them enforceable not on the usual grounds of past or moral consideration, but on the "preferred" grounds of an oral gift by the debtor to the creditor of the right not to be sued upon the obligation. However, the treatment of such a promise as a gift is not only unprecedented but is inconsistent with the idea that the subject matter of a gift must be property.[12] The "right not to be sued," being a matter of remedy, is available only as a defense, and cannot be treated as a positive property right.[13] If the analogy is correct, any action brought by the creditor after the debtor has promised to pay the barred debt should be brought on the old debt and not on the new promise. While this is in accordance with the procedure in New Hampshire,[14] it is in conflict with the majority of the decisions on the point.[15] In general, it is to be doubted that states which could not slide over the problem of consideration will be prompt to accept an approach which has such technical and theoretical difficulties.

[10] While there have been few cases on the subject, the law supports this conclusion where decided. Indiana Flooring Co. v. Grand Rapids Trust Co., (C. C. A. 6th, 1927) 20 F. (2d) 63; Kane Realty Co. v. National Children's Stores, 169 Misc. 699, 8 N. Y. S. (2d) 505 (1938). New Hampshire seems to have no decision directly on the point, but the court has recently declared that a rescinded contract "is avoided ab initio and the rights of the parties in reference to the subject matter of it are as if no contract had ever been made." Copeland v. Reynolds, 86 N. H. 110, 164 A. 215 (1933), quoting Nash v. Minnesota Title, Ins. & Trust Co., 163 Mass. 574 at 581, 40 N. E. 1039 (1895).

[11] Reed v. Spaulding, 42 N. H. 114 (1860). Other cases cited 28 C. J. 630 (1922). The New Hampshire court has said: "If the thing given be a chose in action, incapable of transfer without an assignment, the law requires that an assignment, or some equivalent instrument be made, and the transfer must be actually executed." Sanborn v. Goodhue, 28 N. H. 48 at 56 (1853).

[12] A gift is a voluntary transfer of property. BOUVIER, LAW DICTIONARY, Rawles revision, 1352 (1914).

[13] State ex rel. Donovan v. Duluth St. Ry., 150 Minn. 364, 185 N. W. 388 (1921); Hopkins v. Lincoln Trust Co., 115 Misc. 257, 187 N. Y. S. 883 (1921).

[14] Badger v. Gilmore, 33 N. H. 361 (1856); Wiggin v. Hodgdon, 63 N. H. 39 (1884).

[15] Chabot v. Tucker, 39 Cal. 434 (1870); Depuy v. Swart, 3 Wend. (N. Y.) 135 (1829); 6 Am. Jur. 834 (1937).