THE PRE EXISTING DUTY RULE OF FOAKES v. BEER— A VICTORY BY DEFAULT FOR STARE DECISIS

Socrates was a man
Socrates was mortal
Men are mortal

This, it may be recalled from elementary logic, is the introduction to deductive reasoning. However, to syllogize that "if X owes Y $10 and they agree that $5 will suffice, X still owes Y $10," makes even this famous nonsense lose something by comparison. Yet, this is apparently the result under the much besieged preexisting duty rule which provides that performance of, or a promise to perform, a preexisting duty is not sufficient consideration for a return promise.[1]

No one knows where the rule originated.[2] The earliest remarks alluding to the effect of part performance of a preexisting duty are apparently those of Judge Danvers in 1455;[3] and, oddly enough, he thought such performance *could* constitute an effective modification. However, 40 years later Chief Justice Brian reached an opposite conclusion: "The action is brought for 20 pounds and the concord is that he shall pay only 10 pounds which appears to be no satisfaction for 20 pounds. For payment of 10 pounds cannot be payment of 20 pounds."[4] This sounds logical enough. No one will argue that 10 pounds is equal to 20 pounds; the part cannot equal the whole. Yet, it should be apparent that such a simple generality does not provide a talismanic solution for problems involving modifications of agreements thought to be subject to the preexisting duty rule.

The notion that a " 'duty' should be performed without reward" is often proffered as the real basis for the preexisting duty rule.[5] Indeed this belief was at the core of Chief Justice Brian's remarks in 1495, and appeared again in 1602 in *Pinnel's Case*,[6] where Lord Coke of the Court of Common Pleas launched the rule on its incredible journey with his celebrated dictum:

> [P]ayment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole, because it

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1 1A A. CORBIN, CONTRACTS § 171, at 105 (1963).

2 *See generally* 1A A. CORBIN, CONTRACTS § 171-92 (1963); G. GRISMORE, PRINCIPLES OF THE LAW OF CONTRACTS § 67 (rev. ed. 1965); 1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 130 (3d ed. 1957).

3 Y.B. 33 Hen. 6, f. 48, A. pl. 32 (1455). It should be noted that this case dealt with the issue of part payment in satisfaction of a debt, as did most of the early decisions from which the rule was derived; however, the rule has since been extended to apply to the various other types of contracts to perform a preexisting duty. For a comprehensive historical analysis of the rule see Ames, *Two Theories of Consideration*, 12 HARV. L. REV. 515, 519-31 (1899).

4 Y.B. 10 Hen. 7, f. 4, pl. 4 (1495).

5 1A A. CORBIN, CONTRACTS § 171, at 105 (1963).

6 77 Eng. Rep. 237 (C.P. 1602).

> appears to the Judges that by no possibility . . . a lesser sum can be a satisfaction to the plaintiff for a greater sum . . . .[7]

Interestingly, although Coke subsequently qualified his opinion,[8] the House of Lords in the 1884 landmark case of *Foakes v. Beer*[9] relied upon the doctrine as stated by Coke in *Pinnel's Case.* In *Foakes v. Beer* the court held that a creditor's promise to forgo action on a judgment if the debtor pays the principal by installments is ineffective to discharge the creditor's claim to interest because there is no consideration for such a promise. The most plausible explanation for the precarious existence of this medieval rule would seem to be that Coke's real opinion, as expressed in subsequent cases, was simply not brought to the attention of the court in *Foakes v. Beer*, for if it had been made known to the Lords, it is unlikely that they would have applied the rule of *Pinnel's Case.*[10]

Furthermore, it has been suggested that the House of Lords might well have reached the opposite result had they been presented with the court's opinion in *Reynolds v. Pinhowe*,[11] a case decided prior to *Pinnel's Case.* In *Reynolds* the court held that part payment by a debtor makes the creditor's promise to acknowledge satisfaction of the debt in full in exchange therefor legally enforceable even though the entire debt would not be discharged by the partial payment. The debtor sued in assumpsit for damages for breach of the creditor's promise, and the court found in the debtor's favor, concluding that even though £4 does not satisfy a £5 debt, the payment of £4 makes the creditor's promise of acknowledged satisfaction enforceable. This case illustrates the distinction between a discharge of an existing duty and the creation of a new duty,[12] which Corbin, in his treatise on contracts, suggests could have been applied by the *Foakes* court to avoid the result which they reached.[13]

Thus, but for the apparently muddled state of England's earlier case

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[7] *Id.*

[8] Lord Coke stated:

> [A]lso if a man be bound to another by a bill in 10001. and he pays unto him 5001. in discharge of this bill, the which he accepts of accordingly, and doth upon this assume and promise to deliver up unto him his said bill of 10001. this 5001. is not satisfaction of the 10001. *but yet this is good and sufficient to make a good promise, and upon a good consideration, because he hath paid mony,(s)* five hundred pound, and he hath no remedy for this again. Bagge v. Slade, 81 Eng. Rep. 137 (C.P. 1614) (emphasis added); Rawlins v. Lockey, 1 Vin. Ab. 308, pl. 24 (1639).

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

[10] Ames, *supra* note 3, at 527; *cf.* 1A A. CORBIN, CONTRACTS § 174, at 113 (1963).

[11] 78 Eng. Rep. 669 (K.B. 1595). *See* 1A A. CORBIN, CONTRACTS § 174, at 113 (1963).

[12] Reliance on a promise which is unbargained for and not given in exchange for something else, is not deemed to be sufficient consideration for the creation of a contract, although it is sufficient for a contract of modification. It has been suggested that this distinction accounts for the discrepancy between Lord Coke's opinions in *Pinnel's Case* and *Bagge v. Slade*, 1A A. CORBIN, CONTRACTS § 174, at 113 (1963). *But see* Ames, *supra* note 3, at 527, where the author indicates that the discrepancy is really a change in Coke's convictions.

[13] 1A A. CORBIN, CONTRACTS § 174, at 113 (1963).

reporting system and some measure of lack of research on the part of the debtor's counsel, we might have been spared a rule which prevails today in most American jurisdictions.[14]

The purpose of the foregoing history of the rule is to illustrate the quagmire out of which the law of contract modification has developed. Unfortunately, the common law doctrine of *Foakes v. Beer* has survived its questionable origin and has been tenaciously adhered to by a majority of jurisdictions in this country. Armed with the historical background, and reinforced by the opinion that the rule is patently illogical, unjust and unreasonable in light of commercial understanding concerning the modification of contractual obligations, the thesis of this comment is a call for judicial abrogation of the rule and adoption of one of several more functional rules in its stead. Fundamental to any such undertaking is acceptance of the fact that consideration is not an essential element of all classes of contracts. That this was recognized at the time the rule originated cannot be disputed since there was no reference to the concept of consideration in the early English decisions from which the rule was derived.[15] In addition, there remain to date a substantial number of contracts which need no consideration to be binding, including modifications falling within the *Uniform Commercial Code* (where in the general "good faith" requirement of the Code becomes the applicable test for enforceability).[16] In such situations, traditional defenses such as fraud or duress are felt to provide adequate protection for the parties.

Due to the absurdity of the rule as well as its commercial undesirability, the doctrine of *Foakes v. Beer* has been most distasteful to the courts. Prior to discussing possible alternatives to the rule, it may be helpful to examine the reasons underlying this judicial dissatisfaction and the resultant exceptions which have been created to avoid application of the rule. Such an examination will hopefully support this writer's suggestion that contracts currently subject to the preexisting duty rule should be included within that class of contracts to which the doctrine of consideration does not apply.

FUNDAMENTAL OBJECTIONS TO THE PREEXISTING DUTY RULE

The rule is based on a mistake of fact

The earliest criticism advanced against the rule was that it is based

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[14] *See* Ames, *supra* note 3, at 527, where the author states:
> It is greatly to be deplored that the case of Bagge v. Slade, and the other similar cases, were not brought to the attention of the court. Had Coke's real opinion, as expressed in that case, been made known to the Lords, it is not improbable that they would have followed it, instead of making him stand sponsor for a doctrine contrary to his declared convictions.

[15] *Id.* at 522-23.

[16] For a list of several types of contracts which need no consideration see note 36 *infra*. The U.C.C. provisions are §§ 2-102, -209. *See generally* 1A A. CORBIN, CONTRACTS §§ 193-209 (1963); WILLISTON, *supra* note 2, § 150.

on a mistake of fact. The court in *Pinnel's Case* assumed that any limitation of a preexisting duty invariably adversely affected the interest of the party to whom the duty was owed. This unwarranted assumption was attacked by Lord Blackburn in his concurring opinion in *Foakes v. Beer*:

> [A]ll men of business, whether merchants or tradesmen, do every day recognise 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 often is so. Where the credit of the debtor is doubtful it must be more so.[17]

Blackburn's recognition of the commercial necessity and desirability of a rule permitting contract modifications did not carry the court then, but it served as a harbinger of what was to follow in American jurisdictions with the almost universal adoption of the *Uniform Commercial Code.* The Code simply eliminates the requirement of consideration for modified agreements and replaces it with a test of "good faith."[18] Although this represents a substantial inroad on the doctrine of *Foakes v. Beer* and it may have eased some of the hostility toward the rule, it is important to note that section 2-209 is limited in that it applies only to contracts for the sale of goods which are otherwise within the purview of the sales article of the Code. Therefore, in order to destroy the doctrine and all of its remnants, the ultimate foe—stare decisis—must suffer defeat at the hands of logic and reason. The draftsmen of the U.C.C. were not confronted with this obstacle since the legislatures adopting the Code were in a much more favorable position to make far-reaching changes in the law of contracts than are the courts. The legislatures by adopting the Code implement an entire field of law tailored to the absence of the preexisting duty rule. A court, on the other hand, typically is faced with an isolated factual setting, and a decision which overrules an existing legal doctrine may well have undesirable effects in unforeseeable areas.

It has been suggested in support of *Foakes v. Beer* that the argument that the preexisting duty rule is based on a mistake of fact is itself based on a mistake of fact.[19] In the words of one writer:

> It is of course true, as Lord Blackburn says, that a creditor who is owed £20 may regard £15 cash as more beneficial than the debtor's promise to pay the full amount at a later date. But no one could regard £15 cash as more beneficial than £15 cash *plus* the debtor's promise to pay the balance at a later date.[20] (emphasis original).

The fallacy of this position lies in the unwarranted assumption that the

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[17] 9 App. Cas. 605, 622 (1884).
[18] UNIFORM COMMERCIAL CODE §§ 1-203, 2-209 (ARIZ. REV. STAT. ANN. §§ 44-2210, -2316 (1967)).
[19] Hogg, *In Support of Foakes v. Beer,* 4 VICT. U.L. REV. 109, 110 (1966).
[20] *Id.*

creditor has an option to exact either the £15 cash alone or the £15 cash *plus* a promise to pay the remainder; yet, the promise to pay the remainder is precisely what the creditor forgoes in order to receive prompt payment of the £15. The adage "a bird in the hand is worth two in the bush" illustrates that there may be incentive to give up part of a preexisting right in order to be assured of obtaining at least *some* portion of that right.

Moreover, it is erroneous to assume that performance of a preexisting duty never can be a detriment to the promisee. For example, it may be more beneficial to the debtor-promisee to make a partial payment to each of his creditors rather than a full payment to any one creditor.[21] When confronted with this situation—where it is determined that there can *in fact* be benefit and detriment—proponents of the preexisting duty rule loose the technical monstrosity of *legal* benefit and detriment. They argue that a debtor who pays all or part of a due, liquidated and undisputed obligation suffers no legal detriment that he is not already bound to suffer, and his creditor receives no legal benefit that he is not already entitled to receive. In other words, any promise extracted by the performance of a preexisting legal duty is a priori without legally sufficient consideration. But, as Corbin points out, "[t]he addition of the adjective 'legal' subtly begs the question."[22] The circuity of the proposition is obvious: "It is merely saying that performance of duty is not a legally operative consideration because it is not a consideration that is legally operative."[23] What possible explanation can there be then for a rule which distinguishes between the legal enforceability of a bargained-for promise to perform a preexisting duty and other bargained-for exchanges? It has been suggested that the answer to this question is based upon considerations of public policy rather than whether there has been factual benefit or detriment.[24] In other words, the notion that a duty ought to be performed without reward prevails and "[p]erformance of duty will not be recognized as sufficient consideration for a promise if such recognition would be injurious to the general welfare."[25] Corbin points out that it is the anomaly of this conflict—of the performance of duty without reward with the existence of factual benefit and detriment—which has been a major reason for the trend toward abandonment of the benefit-detriment test of the sufficiency of consideration.[26]

The rule is undesirable on grounds of public policy

A great number of courts which have considered the rule of *Foakes*

21 1A A. CORBIN, CONTRACTS § 172, at 108 (1963).
22 *Id.* at 109.
23 *Id.*
24 *Id.*
25 *Id.*
26 *Id.*

v. Beer have determined that performance of, or a promise to perform, a preexisting duty is not sufficient consideration for a return promise.[27] Unfortunately, however, most of these courts have neglected to delineate any of the reasons or policy considerations upon which the rule is based; rather, they usually ground their decision on the lack of consideration, or perfunctorily dismiss the question by unabashedly conforming to the omnipotent "weight of authority."[28]

Given the broad array of exceptions which already have been carved out of the rule,[29] there can be little doubt but that the rule presents some serious conflict with considerations of public policy. Admittedly, there are on the one hand strong feelings that a man should not be allowed to "weasel" out of his debts; on the other hand, a weighty consideration is that a promisor ought to be required to uphold his end of a bargain whereby he has extracted performance from the promisee.[30] A court typically must choose between these competing considerations in an effort to achieve a just result.

Yet, the preexisting duty rule sweeps with such a broad broom that one or the other of these policy considerations must be subordinated, *i.e.*, one must yield to the interest in "certainty" of the law. The problem may be illustrated by the following factual situations: First, a prison inmate's adult children promise to compensate the sheriff for the special care of their father while he is in the sheriff's official custody. The children are the promisors and the sheriff is the promisee under a contract which unquestionably calls for the performance of a preexisting duty. Such a contract clearly is against public policy for if it were otherwise a public official would likely become a "private" official overnight.[31] On the other hand, where a debtor owes $1000 and his creditor agrees to discharge the debt for payment of $950, it certainly can be argued that public policy favors the parties settling their own disputes. However, the preexisting duty rule has been applied to invalidate the contracts in both of these situations.[32] It seems clear that public policy need not be ignored in one instance so that it may be upheld in another if, as here, the conflict is artificially imposed. More than one rule can be applied to satisfy the needs of public policy in both situations; or the preexisting duty rule might be abolished and replaced with a simple rule covering the performance of the duties of a public official; or a "good faith" test, similar to that of the *Uniform Commercial Code*[33] could be adopted to separate the "sheep"

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27 *Id.* § 183, at 144-45.

28 *E.g.*, Lingenfelder v. Wainwright Brewing Co., 103 Mo. 578, 586, 15 S.W. 844, 848 (1891); Nicolella v. Palmer, 432 Pa. 517, 520, 248 A.2d 20, 23 (1968).

29 Text at notes 35-55 *infra.*

30 1A A. CORBIN, CONTRACTS § 183, at 145 (1963).

31 *Cf. Id.*

32 *Compare* Gehrett v. Ferguson's Estate, 83 Ind. App. 717, 149 N.E. 86 (1925), *with* State *ex rel.* Warner Co. v. Massachusetts Bond & Ins. Co., 40 Del. 274, 9 A.2d 77 (1939); *cf.* Gallicchio v. Jarzia, 18 N.J. Super. 206, 86 A.2d 820 (1952).

33 UNIFORM COMMERCIAL CODE §§ 1-203, 2-209 (ARIZ. REV. STAT. ANN. §§ 44-2210, -2316 (1967)). Text at notes 71-73 *infra.*

from the "goats," allowing enforcement in favor of honest modification attempts while avoiding that result when faced with the dishonest.[34]

EXCEPTIONS TO THE RULE

In light of the severe criticism which has been heaped upon the rule,[35] it is truly incredible that it has been retained over the years; indeed, one would think there is a contest among jurisdictions to determine which can cling to the doctrine the longest. To date there remain a great many jurisdictions in the race to restrain the forces of logic. Yet it is not surprising that many exceptions have been created to alleviate the harshness of the rule, the following five of which stand as representative.[36]

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[34] "There is reason to believe that a considerable part of the apparent conflict in the decisions can be explained on this ground (*i.e.*, good faith test) 1A A. CORBIN, CONTRACTS § 183, at 146 (1963).

[35] Pittsburgh Testing Lab. v. Farnsworth & Chambers Co., 251 F.2d (10th Cir. 1958); Rye v. Phillips, 203 Minn. 567, 282 N.W. 459 (1938); Ames, *supra* note 3; Ferson, *The Rule in Foakes v. Beer*, 31 YALE L.J. 15 (1921); 39 CORNELL L.Q. 114 (1953).

[36] The five exceptions discussed herein by no means exhaust the judicial wit invoked at the expense of the preexisting duty rule. A list of some of the other important exceptions would include: a promise to perform a preexisting duty owed to a third party, *e.g.*, Enco, Inc. v. F.C. Russell Co., 210 Ore. 324, 311 P.2d 737 (1957); a promise to perform a preexisting duty supported by new consideration, no matter how slight, *e.g.*, House v. Lala, 214 Cal. App. 2d 239, 29 Cal. Rptr. 450 (1963); Jaffray v. Davis, 124 N.Y. 164, 26 N.E. 351 (1891); a promise to forbear discharge of a preexisting debt, *e.g.*, Hanold v. Kays, 64 Mich. 439, 31 N.W. 420 (1887); a contract between creditors whereby the debtor is made donee beneficiary of all or part of his debts, *e.g.*, Massey v. Del-Valley Corp., 46 N.J. Super. 400, 134 A.2d 307 (1957).

In addition, certain contracts have been held to require no consideration: 1. When the obligor promises to perform a preexisting duty which has been cut off by some rule of law, *e.g.*, Zavelo v. Reeves, 227 U.S. 625 (1913) (bankruptcy); Kopp v. Fink, 204 Okla. 570, 232 P.2d 161 (1951) (statute of limitations). *See also* RESTATEMENT OF CONTRACTS § 86 (1932); 2. A promise to perform a preexisting duty for which the obligor has a legal defense, *e.g.*, Bell v. Burkhalter, 176 Ala. 62, 57 So. 460 (1912) (infancy); St. Louis & S.F.R.R. v. Gorman, 79 Kan. 643, 100 P. 647 (1909) (duress); Whitcomb v. Hardy, 73 Minn. 285, 76 N.W. 29 (1898) (insanity); Rosenblum v. Schachner, 84 N.J.L. 525, 87 A. 99 (1913) ("Blue Law"); Wingate v. Render, 58 Okla. 656, 160 P. 614 (1916) (fraud); Rathfon v. Locher, 215 Pa. 571, 64 A. 790 (1906) (married woman's contract); Elbinger v. Capitol & Teutonia Co., 208 Wis. 163, 242 N.W. 568 (1932) (statute of frauds).

The rule has been modified by statute in at least 11 states. One group of statutes provides that a debt is discharged if less than the amount due has been received by the creditor in full satisfaction. GA. CODE ANN. § 20-1204 (1935); ME. REV. STAT. ANN. tit. 14, § 155 (1964); N.C. GEN. STAT. § 1-540 (1943); VA. CODE ANN. § 11-12 (1950). Others provide that partial payment by the debtor in addition to a written release signed by the creditor is necessary to discharge the debt. CAL. CIV. CODE §§ 1524, 1541, 1614 (West 1954); MONT. REV. CODES ANN. §§ 58-504, -509 (1947); N.D. CONT. CODE § 9-13-07 (1959); S.D. CODE §§ 47.0236, .0240 (1939). A third group of statutes provides that an executory agreement to discharge the debt upon partial payment is enforceable if in writing and signed by the creditor. N.Y. GEN. OBLIGATIONS §§ 5-1103, 1105, 1107, 1109, 1111 (McKinney 1964); ALA. CODE tit. 7, § 381 (1958); TENN. CODE ANN. § 24-707 (1956).

Unforeseeable difficulties

Perhaps the most readily justifiable exception to the preexisting duty rule is that which is invoked when the obligation one of the parties has undertaken to perform turns out to be much more difficult than either party had anticipated.

In *Pittsburgh Testing Lab. v. Farnsworth & Chambers Co.*,[37] the Court of Appeals for the Tenth Circuit enforced a promise of increased compensation made by a general contractor even though his subcontractor was to do nothing in excess of what he was required to do under the original written agreement. The court reasoned that since the actual time necessary for performance of the contract was more than twice as long as the parties estimated, and since the consideration for the contract was computed from the estimate of time needed for performance, the oral modification "was made in the face of unforeseen and substantial difficulties—circumstances which were not within the contemplation of the parties when the original contract was made . . . ."[38] The court considered the exception to the preexisting duty rule in the following language:

> Another more widely accepted exception might properly be called the 'unforeseeable difficulties exception,' under which the courts have recognized the equities of a promise for additional compensation based upon extraordinary and unforeseeable difficulties in the performance of the subsisting contract. In these circumstances, the courts generally sustain the consideration for the new promise, *based upon standards of honesty and fair dealing* and affording adequate protection against unjust or coercive exactions.[39] (emphasis added).

This exception to *Foakes v. Beer* clearly presents the conflict between traditional rules of consideration and the right of the parties to make an agreement which they regard as mutually beneficial. The courts usually sustain the subsequent modification when it rests upon some equitable ground such as unforeseeable difficulties.

Mutual rescission

A number of cases have eluded the grasp of *Foakes v. Beer* on the theory that where the parties have made a new agreement to perform a duty which existed under an old contract there has been an implied mutual rescission, so that the original consideration can now be considered as sufficient for the new agreement.[40] In these cases the courts

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[37] 251 F.2d 77 (10th Cir. 1958).

[38] *Id.* at 79.

[39] *Id.* It should be noted that the court's alternative basis for its holding was the bonafide dispute exception, discussed in text at notes 44-46 *infra.*

[40] *E.g.*, San Gabriel Valley Ready-Mixt v. Casillas, 142 Cal. App. 2d 137, 298 P.2d 76 (1956); Watkins & Son v. Carrig, 91 N.H. 459, 21 A.2d 591 (1941); Schwartzreich v. Bauman-Basch Inc., 231 N.Y. 196, 131 N.E. 887, 183 N.Y.S. 440 (1921).

justify the implication by pointing to the short interval of time between initial dissatisfaction with the old and making of the new agreement. In *Martiniello v. Bamel*[41] the Supreme Judicial Court of Massachusetts extended this theory by holding that the new agreement is supported by sufficient consideration even if the rescission is made simultaneously with and becomes part of the new agreement for the modified consideration. Such a "boot strap" argument makes the validity of the new agreement depend upon rescission of the old, while the validity of the rescission depends upon the new agreement.

If courts are going to continue to at least pay lip service to *Foakes v. Beer* by applying the mutual rescission doctrine, they must accept the applicability of the "sufficiency" test of consideration. But, if the "sufficiency" test is applicable, the mutual rescission theory may not be applied to sustain a new promise without violating the same test. Therefore, by applying the rescission theory, the court is in effect objecting sub-silentio to the "sufficiency" test of consideration as a requisite for avoidance of the preexisting duty.[42]

This doctrine was created to circumvent what the court no doubt felt was an unfair rule. However, it seems questionable indeed to create an exception which is at least as erroneous as the rule it seeks to avoid.[43]

Bonafide dispute of a liquidated debt

Where an obligor in good faith disputes the validity of his obligation and his obligee agrees to accept a lesser amount as satisfaction of the entire obligation, the courts have traditionally held that such an agreement is based upon sufficient consideration and therefore enforceable.[44] Initially, this exception appears entirely consistent with the "sufficiency" test of consideration since a debtor may litigate a disputed debt and remain free from liability until the court ultimately determines the dispute. However, the distinction should be kept in mind between "legal" and merely "factual" benefit or detriment. It has been argued in this situation that mere good faith dispute over the validity of a due and liquidated debt will not, where it is subsequently determined to be erroneous, allow enforcement of the creditor's promise of satisfaction under the strict "sufficiency" test of consideration.[45] The premise of the argument is that only economic detriment is suffered, which falls short of the legal sufficiency test. Whatever the merits of the argument, the courts have

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[41] 255 Mass. 25, 150 N.E. 838 (1926).

[42] *Cf.* 1A A. CORBIN, CONTRACTS § 186, at 159-60 (1963).

[43] The preexisting duty rule is unquestionably erroneous in at least some respects. *See* text at notes 17-26 *supra.*

[44] *E.g.*, Island Block Corp. v. Jefferson Constr. Overseas Inc., 349 F.2d 322 (3d Cir. 1965); Bedrock Foundations, Inc. v. George H. Brewster & Son, 31 N.J. 124, 155 A.2d 536 (1959); *cf.* RESTATEMENT OF CONTRACTS § 76(b) (1932).

[45] 1A A. CORBIN, CONTRACTS § 187, at 164 (1963).

held such agreements enforceable.

Perhaps, as it has been suggested, the bonafide dispute exception simply rests on the policy in favor of compromising disputed claims.[46] This would appear to be a more rational basis for the exception; certainly it is more appropriate than an attempt to reconcile the rules of consideration with the state of mind of the parties.

The Wisconsin fiction

Another dodge which has evolved in an effort to avoid application of the preexisting duty rule is the doctrine, commonly referred to as the "Wisconsin fiction," under which no new or additional consideration is required for the modification of an executory contract on the theory that the consideration for the original executory contract is imported into and becomes the consideration for the modified contract.[47] This doctrine originated with the unfortunate dictum of the Court of King's Bench in *Stead v. Dawber & Stephenson*,[48] and since its adoption by the Supreme Court of Wisconsin in 1881,[49] that jurisdiction has remained the only advocate of its application. Although the doctrine is of very limited application and has been thoroughly criticized by legal commentators,[50] it once again evinces dissatisfaction with the doctrine *Foakes v. Beer* has created. Wisconsin has attempted to circumvent the rule by what appears to be an equally questionable doctrine in light of accepted rules of consideration.

Rental agreements

There are numerous cases in which courts have upheld the validity of agreements between landlord and tenant to reduce the amount of the rent.[51] Under such an agreement the tenant does nothing more than

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[46] *Id.*

[47] *E.g.*, Jacobs v. J.C. Penney Co., 170 F.2d 501 (7th Cir. 1948); Holly v. First Nat'l Bank of Kenosha, 218 Wis. 259, 260 N.W. 429 (1935); *cf.* Mid-Century Ltd. of America v. United Cigar-Whelan Stores Corp., 109 F. Supp. 433 (D.D.C. 1953); 39 CORNELL L.Q. 114 (1953).

[48] 113 Eng. Rep. 22 (K.B. 1839).

[49] Brown v. Everhard, 52 Wis. 205, 8 N.W. 725 (1881). Although the doctrine was created three years before the *Foakes* decision, it is treated as an exception to the rule of that case because the courts of Wisconsin utilized it subsequent to *Foakes* to avoid application of the preexisting duty rule.

[50] 6 A. CORBIN, CONTRACTS § 154, at 1293 (1963); GRISMORE, *supra* note 2, § 67, at 109; WILLISTON, *supra* note 2, § 130A, at 1826; 39 CORNELL L.Q. 114, 116 (1953). *See also* RESTATEMENT OF CONTRACTS § 406, comment *a* at 765-66 (1932). At least the courts of Wisconsin are following what they believe to be a "just" rule. It is not difficult to find decisions in which courts have applied the preexisting duty rule even though expressly stating that they believe it to be something less than just. *E.g.*, State *ex rel.* Warner Co. v. Mass. Bond & Ins. Co., 40 Del. 274, 282, 9 A.2d 77, 81 (1939), wherein the court states: "We have but little sympathy with the rule and regret the necessity of following it. To us the opportunity for parties to settle their own disputes is of prime importance."

[51] *E.g.*, Julian v. Gold, 214 Cal. 74, 3 P.2d 1009 (1931); Pollack v. Briguglio, 164 Misc. 197, 297 N.Y.S. 531 (N.Y. City Ct. 1937). *But see* Wayland v. Latham, 89 Cal. App. 55, 264 P. 766 (1928).

agree to pay a lesser amount of rent in return for the landlord's promise to accept the reduced payment as satisfaction for the entire amount. Although it is apparent that such an arrangement ignores the doctrine of consideration, most courts decline to admit this, preferring to sustain the agreement either by labeling the landlord's conduct as "waiver of a right,"[52] by finding that the tenant has given new consideration by remaining in physical possession of the premises,[53] by holding that the contract was executed (so that the tenant has relied on it),[54] or by treating the amount of the reduction as a gift from the landlord to his tenant.[55]

Certainly much can be said for the sympathy which these courts have demonstrated for those tenants who entered into lease agreements at a time when the economy was relatively stable and subsequently found their rental payments to be prohibitive in periods of depression. Arguably, the average landlord is better equipped financially to carry the risk of depreciation in rental values. On the other hand, it is important to note that tenants who have entered into a lease agreement extending over an appreciable length of time frequently find themselves in an advantageous position because of subsequent increases in the rental value of property. Moreover, it would seem that rental agreements extending over a period of years would be structured so as to apportion the risk element between both parties and therefore the amount originally agreed upon should accurately reflect the risk element. Regardless, however, of what is said concerning the underlying bases for those decisions which have upheld modifications of lease agreements without new or additional consideration, one thing remains clear—this is another area in which the courts have attempted to alleviate the harshness of the preexisting duty rule.

SUBSTITUTES FOR THE PREEXISTING DUTY RULE

The foregoing discussion illustrates the lengths to which some courts have gone to pull the teeth of the rule of *Foakes v. Beer*. Rather than simply abrogating the rule outright, most jurisdictions have been content to chip away at it while attempting at the same time to reconcile such exceptions with traditional concepts of consideration. Since most of these inroads cannot reasonably co-exist with the doctrine of consideration, the result has been a series of inconsistent decisions. The most desirable way to avoid this problem would be simply to reject the rule and replace

[52] Sutherland v. Madden, 142 Kan. 343, 46 P.2d 32 (1935); Hurlbut v. Butte-Kansas Co., 120 Kan. 205, 243 P. 324 (1926).

[53] *E.g.*, Spry v. Pruitt, 256 Ala. 341, 54 So. 2d 701 (1951); Atwood v. Hayes, 139 Okla. 95, 281 P. 259 (1929).

[54] *E.g.*, Wilson v. Windham, 213 Ala. 31, 104 So. 232 (1925); Haun v. Corkland, — Tenn. App. —, 399 S.W.2d 518 (1965).

[55] *E.g.*, Doyle v. Dunne, 144 Ill. App. 14 (1908); McKenzie v. Harrison, 120 N.Y. 260, 24 N.E. 458 (1890).

it with a workable substitute such as the doctrine of promissory estoppel or the U.C.C.'s "good faith" modification rule. In the absence of such a forthright approach, however, an alternative solution might be to replace these exceptions with the doctrine that the existence of a moral obligation to do something is sufficient consideration to support a promise to do it.

The moral obligation doctrine

In 1782, Lord Mansfield, Chief Justice of the King's Bench, held that an informal promise is enforceable if the promisor is already under a moral duty to the promisee to render it.[56] With this decision Lord Mansfield was able to add his own court to those which had already utilized the theory, the origin of which is generally credited to him. Although the doctrine survived for half a century and was applied to a wide range of promises,[57] it was repudiated in England in 1840 because it was felt that satisfactory limits to its application could not be established and therefore the doctrine of consideration would be destroyed since the mere fact that a promise has been given logically creates a moral obligation to perform it.[58] This objection has remained an obstacle to any substantial rejuvenation of the rule as broadly stated by Lord Mansfield. However, it has been suggested that although the objection of a lack of certainty is often urged, "it would seem to be best answered not by discarding the doctrine, but by shaping it through a process of case-by-case adjudication as has been done in other related areas."[59] As pointed out by Corbin:

> The rule laid down by Lord Mansfield . . . operates as an escape from more hardened and definitely worded rules of law. By making a direct appeal to the mores of the time, it permits an easy and satisfying evolution of the law of promises by judicial action.[60]

The fate of the moral obligation doctrine provides an interesting comparison when juxtaposed to the phenomenal survival of the preexisting duty rule. On the one hand, the broad rule laid down by Lord Mansfield is no longer generally accepted because of its lack of certainty, albeit it is not considered harsh or unjust; on the other hand, the rule of *Foakes v. Beer*, which is perhaps unparalleled in its adverse effect on the certainty of the law and has been severely criticized for its harshness and

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[56] Hawkes v. Saunders, 98 Eng. Rep. 1091 (K.B. 1782).

[57] *E.g.*, Lee v. Muggeridge, 128 Eng. Rep. 599 (C.P. 1813) (promise to repay son-in-law's debt); Barnes v. Hedley, 127 Eng. Rep. 1047 (C.P. 1809) (promise to repay the principal and legal interest on a usurious debt); Atkins v. Hill, 98 Eng. Rep. 1088 (K.B. 1775) (promise by executor to pay a legacy).

[58] GRISMORE, *supra* note 2, § 74, at 121; WILLISTON, *supra* note 2, § 148, at 636.

[59] GRISMORE, *supra* note 2, § 74, at 121. *See* Webb v. McGowin, 27 Ala. App. 82, 168 So. 196 (1935) (where moral obligation was held sufficient consideration for promise to pay promisee who had been permanently disabled in process of saving promisor's life).

[60] 1A A. CORBIN, CONTRACTS § 230, at 342-43 (1963).

unreasonableness, has been spared a similar fate for nearly a century and remains today a very real threat in those areas of contract law which have not been consumed by its multifarious exceptions.

Promissory estoppel

The doctrine of promissory estoppel is succinctly set forth in the Restatement of Contracts:

> A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.[61]

In the early stages of its development, this rule was generally limited in application to cases involving charitable subscriptions. As stated by Williston, in his treatise on contracts:

> Dissatisfied with the prevailing theories by which consideration is found for such [charitable] agreements, the courts disposed to follow the weight of authority in sustaining the subscriber's promise, have explained the liability on the ground of estoppel.[62]

This language indicates that the doctrine emerged because of judicial impatience with the facade of importing consideration where it does not exist under generally accepted rules.[63]

In recent years, the doctrine of promissory estoppel has been extended to enforce promises because of the promisee's reliance thereon in a myriad of situations including a promise of employee pension,[64] a promise to confer retirement benefits to a former union officer,[65] and a subcontractor's refusal to perform according to his bid.[66] The enforcement of such promises brings them within the class of informal contracts without consideration. It is submitted that in like manner this doctrine can be applied to a large percentage of those contracts in which the preexisting duty rule presents a bar to enforcement because of a lack of consideration. Unfortunately, however, in two situations subject to the preexisting duty rule, the courts have refused to apply the doctrine of promissory estoppel.

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[61] RESTATEMENT OF CONTRACTS § 90 (1932). Promissory estoppel can be distinguished from the doctrine of "equitable" estoppel in that the latter requires a misrepresentation of fact.

[62] WILLISTON, *supra* note 2, § 140, at 609. *See also* Carver, *Consideration in Charitable Subscriptions*, 13 CORNELL L.Q. 270 (1928); 86 U. PA. L. REV. 669 (1938).

[63] Such a purpose has little merit other than its "placebo" effect on those who insist that consideration (even if fictional) remains the Cerberus of American contract law.

[64] Feinberg v. Pfeiffer Co., 322 S.W.2d 163 (Mo. Ct. App. 1959); 5 U. CHI. L. REV. 464 (1938).

[65] Van Hook v. Southern Calif. Waiters Alliance, 158 Cal. App. 2d 556, 323 P.2d 212 (1958).

[66] Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958).

In *Healy v. Brewster*[67] the Supreme Court of California held that the doctrine could not support a subcontractor's action for extra work occasioned by unexpected difficulties, where the contractor, upon discovery of the problem, specifically requested that the subcontractor proceed with the work, promising compensation "in some way." The court concluded that promissory estoppel could apply only if the contractor-promisor had not bargained for the promisee's reliance. Similarly, in *Mohr v. Shultz*[68] the Supreme Court of Idaho declined to apply the doctrine and held that where the seller of baking equipment offered to rescind an agreement, the buyer could not sustain his theory of mutual rescission merely by showing that in reliance on the promisor's offer he had negotiated with another seller of baking equipment.

Although the court in each of these cases rejected contentions based upon the doctrine of promissory estoppel, there was no indication in either decision that it would not be applicable under the proper circumstances. Thus, the door has not been closed on the possibility of replacing the rule of *Foakes v. Beer* with this immeasurably more desirable rule. Such a transformation would clearly restore much of the certainty to the law of contract modifications and, more importantly, would return to the courts much of the discretion which has been sacrificed under the present rule by magical efforts to create consideration out of thin air.

Interestingly, support for such a change can be found in developments in England—the birth place of the preexisting duty rule. In several decisions over the past 30 years, the English courts have applied the doctrine of promissory estoppel to situations involving attempted contract modifications. In fact, the English "High Trees" doctrine, under which voluntary relinquishment of a debt is sufficient consideration for a promise to discharge it, may well have tolled the death knell for the rule of *Foakes v. Beer*.[69] Since we borrowed this burdensome rule from the English in the first place, perhaps we should look to the English for guidance on how to rid ourselves of it.[70]

The Uniform Commercial Code approach

Prior to the U.C.C. most courts frustrated attempts to modify sales contracts by applying the preexisting duty rule. Thus, one party to a sales contract could agree to a good faith modification proposed by the

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[67] 59 Cal. 2d 455, 380 P.2d 817, 30 Cal. Rptr. 129 (1963).

[68] 86 Idaho 531, 388 P.2d 1002 (1964).

[69] See editorial comment in Hogg, *In Support of Foakes v. Beer*, 4 VICT. U.L. REV. 109, 114 (1966).

[70] There is American authority for the proposition that estoppel may govern a traditional preexisting duty rule situation. *In re* Campbell, 105 F.2d 197 (9th Cir. 1939). It should be noted that the requirement of detrimental reliance—essential to the application of the promissory estoppel doctrine—would be unlikely to create uncertainty since there is typically detrimental reliance in those cases in which injustice would result from a rigid application of the preexisting duty rule.

other party and either party subsequently could renege as to the modified agreement. Section 2-209[71] of the Code did away with this technicality, which for years hampered necessary and desirable adjustments of sales contracts, simply by providing that such modifications are binding without additional consideration. The only limitation is that the modification be made in good faith,[72] and that the contract otherwise be within the purview of the sales article.[73] The most satisfactory solution to the problems which have been created by the rule of *Foakes v. Beer* and its fictitious exceptions would be to extend the simple, yet direct approach of the Code to all attempted contract modifications. Admittedly, seemingly logical arguments in opposition to this suggestion may be asserted to the effect that doing away with the requirement of consideration will foster fraudulent claims by unscrupulous parties who find themselves on the difficult end of a hard bargain, or will encourage disenchanted promisees to harass their promisor for a modification since "there is no harm in asking." These considerations lose much of their surface appeal, however, when balanced with the injustice which results under the present rule, the commercial necessity and desirability of contractual modifications, and the fact that removal of the requirement of consideration does not remove the burden of proving the modified agreement—a burden which remains on the party who asserts it. Furthermore, the promisor retains the remainder of his arsenal of contract defenses, such as fraud and duress, which may be drawn upon to protect him from overreaching conduct on the part of the promisee. In short, the test to be applied in determining whether the parties would be bound by contract modifications would simply be one of good faith. This test in effect eliminates the strongest argument in favor of the preexisting duty rule; *i.e.*, the requirement of good faith prevents the promisor from taking unfair advantage of the promisee's predicament.

CONCLUSION

The rule of *Foakes v. Beer* is patently illogical, unduly harsh and commercially inconvenient.[74] It was created at a time when the doctrine of consideration had not yet obtained a place in English law,[75] yet

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[71] ARIZ. REV. STAT. ANN. § 44-2316 (1967).

[72] UNIFORM COMMERCIAL CODE § 1-203 (ARIZ. REV. STAT. ANN. § 44-2210 (1967)). Note that this merely removes the defense of lack of consideration from the arsenal of the promisor, the clear implication being that the other contract defenses of fraud, duress, misrepresentation and the like, are adequate protection for him.

[73] UNIFORM COMMERCIAL CODE § 2-102 (ARIZ. REV. STAT. ANN. § 44-2302 (1967)), states the scope of Article 2: "this Article applies to transactions in goods; it does not apply to any transaction . . . intended to operate only as a security transaction . . . ."

[74] Ames, *supra* note 3; Ferson, *The Rule in Foakes v. Beer*, 31 YALE L.J. 15 (1921); 13 U. MIAMI L. REV. 387 (1959).

[75] See authorities cited note 74 *supra*.

that doctrine traditionally has been relied upon as justification for the rule's continued existence.[76] It is a mistake of fact to assume that modification of a contract—so that one party does less than he was originally bound to do—results in no detriment to that party and no benefit to the other party.[77] Moreover, public policy considerations seem to dictate against retention of a rule which bars enforcement of good faith attempts to modify what are often harsh contracts.[78]

Judicial distaste for the rule has resulted in the creation of numerous exceptions to avoid its application.[79] In so doing, courts have often gone as far as to make the concept of consideration a red herring, while the real basis underlying their decisions has been a moral obligation doctrine, unheralded as such, but nonetheless pervasive throughout those opinions in which courts seek to avoid the injustice which would result from a rigid application of the rule. Candid avoidance of such fabrication accompanied by frank recognition and application of the moral obligation doctrine would enhance the integrity of our judiciary by removing much of the doubt which has been bred by arbitrary and fictitious attempts to circumvent the harshness of the rule of *Foakes v. Beer*.[80]

Two alternatives to the rule of *Foakes v. Beer* appear equally attractive. The *Uniform Commercial Code's* straightforward elimination of the rule for modifications of sales contracts could be extended to apply to all contracts;[81] or the growing doctrine of promissory estoppel might be expanded to include modified-contract promises.[82]

Since American jurisdictions have traditionally declined to challenge its logic, the continued viability of the preexisting duty rule represents a victory by default for stare decisis. Only by directly challenging this museum piece of the law which may have sprouted from a mistake in reporting, will the doctrine ever be able to pass on to its final reward —oblivion.[83]

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[76] See authorities cited note 74 *supra*.

[77] 1A A. CORBIN, CONTRACTS § 172, at 108 (1963). *See* text at notes 17-26 *supra*.

[78] 1A A. CORBIN, CONTRACTS § 183, at 145 (1963). *See* text at notes 27-34 *supra*.

[79] *See* text at notes 35-55, and note 36, *supra*.

[80] *Cf.* Comment, *The Hammer on the Anvil*, 101 SOL. J. 292 (1957); 13 U. MIAMI L. REV. 387 (1959).

[81] *See* UNIFORM COMMERCIAL CODE § 2-209 (ARIZ. REV. STAT. ANN. § 44-2316 (1967)).

[82] *See* text at notes 61-70 *supra*.

[83] This was the approach of the Supreme Court of Minnesota in *Rye v. Phillips*, 203 Minn. 567, 282 N.W. 459, 460 (1938), where Justice Stone discarded the rule with enlightening judicial frankness:

> The doctrine . . . 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.