# CONSIDERATION FOR THE MODIFICATION OF CONTRACTS

## I. THE PROBLEM.

Consideration has often been defined as a benefit to the promisor or a detriment to the promisee. One trouble with this definition is that it is unhelpful without further definitions of the key words "benefit" and "detriment." This difficulty is particularly well illustrated by agreements which modify existing obligations. *Foakes* v. *Beer*[1] finally established the rule that a creditor's promise to accept part payment of a debt in full settlement was not binding as it was not supported by consideration. But Lord Blackburn in that case pointed out that the creditor might in fact benefit from the transaction; and more recently it has been suggested that the debtor might also suffer a detriment in giving up the tactical advantage enjoyed by a defendant in litigation.[2] Both these points are in a sense so obvious that one wonders how they can ever have escaped anyone. But whether or not they are sound depends upon the way in which the words "benefit" and "detriment" are defined.

Many possible definitions could be put forward, but for the purposes of this discussion two will suffice. The first is that any act, forbearance or promise which has economic value[3] can be regarded as a benefit or detriment sufficient to constitute consideration. The second is that an act, forbearance or promise is only a benefit or detriment if its performance is not already legally due. The first view stresses the factual benefit or detriment received or incurred. The second disregards this factual benefit or detriment and stresses instead some notion that may be called legal benefit or detriment.[4] The criticisms of *Foakes* v. *Beer,* mentioned above, assume that the first view should be accepted. But in fact English law has not consistently followed either view. It may therefore be worth while to lay bare some of the inconsistencies which these two uses of the

1. (1884) 9 App. Cas. 605.

2. *Frye* v. *Hubbell,* 74 N.H. 358, 68 A. 325 (1907), *infra* nn. 84-86. The suggestion is repeated by Kelly, (1964) 27 M.L.R. 540. See also annotation "Forebearance to interpose or insist upon defense which is doubtful or known to be unfounded as sufficient consideration for a promise", 139 A.L.R. 854 (1942).

3. No attempt will be made here to discuss the question whether an act, forbearance or promise which has purely sentimental value can constitute consideration.

4. Corbin, *Contracts,* (St. Paul, 1963), s. 172 points out that the notion of "legal benefit or detriment" does not explain *why* the performance of acts already legally due is not consideration. But at this stage of the present discussion we are concerned with a different question: *how* may the expressions "benefit" and "detriment" be defined? They are sometimes used in the second of the two senses mentioned in the text, and the terms *legal benefit and detriment* are only used here as shorthand ways of referring to that usage.

words "benefit" and "detriment" reveal; to consider the present position with regard to modification of contracts; and to suggest possible reforms.

Two questions arise with regard to the notion of legal benefit or detriment. The first is whether it is *sufficient* to support a promise where there is no, or no appreciable, factual benefit or detriment. The second is whether it is *necessary* to support a promise where there is an appreciable or substantial factual benefit or detriment.

## 1. IS LEGAL BENEFIT OR DETRIMENT SUFFICIENT?

If a legal benefit or detriment were sufficient to support a promise, any act which the promisee was not already legally bound to do would be good consideration. One attraction of this view is that it would provide an easy solution to many problems which are generally thought to be difficult. Voting in a particular way on the board of a charity,[5] executing a composition agreement with several creditors,[6] or asking for financial advice[7] could all be regarded as consideration simply because they were acts which the promisee was not already legally bound to do. This view may also be supported by the rule that nominal consideration will usually support a promise.[8]

But there are also difficulties. The view that legal detriment is sufficient suggests that there is consideration for a composition agreement between a debtor and a single creditor. It also suggests that any conditional promise to give becomes binding when the promisee performs the condition. It seems clear that the first suggestion is not law, and very doubtful whether the second can be accepted as a general rule. It can also be objected that a purely legal benefit or detriment is often an "invented" consideration. That is, the act or forbearance or promise which may be regarded as the consideration is not what the parties really bargained for. In the case of composition agreements, for example, the creditors do not bargain for the debtor's signature but for a dividend.

Invented consideration is, at least in some cases,[9] recognised in English law, though it is rejected by many authorities in the United

5. *Bolton* v. *Madden* (1873) L.R. 9 Q.B. 55.

6. *E.g., Boyd* v. *Hind* (1857) 1 H. & N. 938.

7. *De la Bere* v. *Pearson* [1908] 1 K.B. 280.

8. But such deliberate abuses of the doctrine of consideration may be supported on other grounds, e.g. as a species of formal contract. See *infra,* p. 11.

9. *E.g.. Cook* v. *Wright* (1861) 1 B. & S. 559 at p. 569 (infra, n. 42); *Sibree* v. *Tripp* (1846) 15 M. &W. 23 at p. 38 (giving of piece of paper on which a negotiable instrument is written treated as consideration for creditor's promise to release the debt); *Shadwell* v. *Shadwell* (1860) 9 C.B. (N.S.) 159 at p. 174 (promisee "*may* have made a most material change in his position . . . and *may* have incurred pecuniary liabilities . . ."); *Scotson* v. *Pegg* (1861) 6 H. & N. 295 at p. 299 (release of lien treated as consideration: no evidence that this was bargained for); the consideration for many "collateral" contracts may be invented. *Contra, Combe* v. *Combe* [1951] 2 K.B. 215.

States.[10] The trouble with such consideration is that the conduct or promise constituting it may in itself be quite neutral.[11] Whether it benefits the promisor or the promisee (and therefore the question for *whose* promise it can be consideration) may depend entirely on the surrounding facts, and especially on the way in which the parties regarded it. The best-known illustration of this point is the parting with the possession of a chattel.[12] This may be done for the benefit of the bailor or for that of the bailee; and until we know for whose benefit it was in fact done we should not lay down a general rule that "parting with the possession of a chattel is consideration for a promise." For this proposition might lead to the result that an act done for the benefit of the promisee is regarded as the consideration for the promisor's promise. The same point may be made with regard to the addition or subtraction of a debtor. Where the solvency of one debtor is doubtful, the addition of another is consideration for a promise made by the creditor.[13] The greater chance of being paid is clearly a benefit to him. But where a debt is owed by two debtors about whose solvency there is no doubt, the subtraction of one of them can be regarded as consideration for a promise made by the creditor. It has been said that he benefits because a remedy against one is easier to enforce than a remedy against two.[14] Again we should not lay down a general rule that "the addition or subtraction of a debtor is consideration for a promise." It is also sometimes said that forbearance by a debtor to have himself adjudicated bankrupt could be regarded as consideration for a composition with creditors. But would it be consideration if the debtor's whole object in agreeing to the composition was to avoid bankruptcy? And if the imagined forbearance can be regarded as consideration for the promises of several creditors, why not for the promise of one? If the courts have such licence to invent considerations, many promises may be held binding which are still generally regarded as gratuitous. This might not in itself be a bad thing. But a court which can treat acts as consideration in the absence of evidence of surrounding circumstances will in fact have a discretion whether to treat a promise as binding or not. Subject to the point made in the next paragraph, this discretion seems to be a completely free one; and its exercise could therefore lead to much uncertainty.

So far we have considered cases in which there is simply no evidence whether the act was bargained for, or for whose benefit it was done.

10. Restatement, *Contracts,* s. 75(1) ("bargained for and given in exchange for the promise"); Williston, *Contracts,* (rev. ed.), vol. I, at p. 320; *Philpot* v. *Gruninger*, 14 Wall. 570 at p. 577 (1872): "Nothing is consideration that is not regarded as such by both parties." Corbin, *Contracts,* is more sceptical; and the "inference of detriment" drawn by Cardozo J. in *De Cicco* v. *Schweizer,* 221 N.Y. 431 at p. 437, 117 N.E. 807 at p. 809 (1917) seems hard to reconcile with the general view which Cardozo J. purports to support. Certainly the benefit to the promisor found in that case by Corbin, s. 172 n. 3 (the "social prestige" derived by the promisor "from alliance with a noble Italian family") seems invented. There is nothing in the report to show how the promisor in fact regarded such an alliance.

11. Holmes, *The Common Law,* (Boston, 1888, 43rd printing 1949), p. 292.

12. See *Bainbridge* v. *Firmstone* (1838) 8 A, & E. 743.

13. *E.g., Bradley* v. *Gregory* (1810) 2 Camp. 383.

14. *Lyth* v. *Ault* (1852) 7 Ex. 669.

Where there is evidence that it was not bargained for by the promisor, it will not be regarded as consideration for his promise, even though the promisee was not already legally bound to do it. Thus payment of a debt at a place other than that stipulated *may* be consideration for a promise by the creditor, but it will not be so regarded if it was made entirely at the request, and for the convenience, of the debtor.[15]

2. IS LEGAL BENEFIT OR DETRIMENT NECESSARY ?

Some authorities support the view that an act is not consideration, though it may benefit the promisor, if its performance was legally due from the promisee before the promise was made. *Stilk* v. *Myrick*[16] is usually cited to support the proposition that the performance by A of a contractual duty which A already owes to B is no consideration for a promise made by B to A. It is, in fact, not at all clear that the case deals with such a situation. The plaintiff agreed to serve as a seaman on a voyage from London to the Baltic and back. We are not told with whom this agreement was made. After two of the crew had deserted, the captain promised to divide the wages of the two among the remainder (including the plaintiff). Lord Ellenborough rejected the plaintiff's claim for his share of the extra payment promised by the captain. The report in Campbell (which is the one usually cited) does not tell us who the defendant was. He might have been the captain or the shipowner (if they were separate persons). According to Espinasse, the defendant was the captain. Since Espinasse was counsel for the plaintiff, he may perhaps be trusted on this point. But even Espinasse does not tell us who were the parties to the original contract of service. Was it made between the plaintiff and the captain, or (as would be more usual nowadays) between the plaintiff and the shipowners? Both possibilities must be considered.

If the original contract was between the plaintiff and the captain, the case, as reported in Campbell, is authority for the proposition for which it is usually cited. But counsel for the defendant did not rely on lack of consideration. He relied simply on *Harris* v. *Watson*[17] where Lord Kenyon had held that a similar agreement, made when the ship was in actual danger, was contrary to public policy: "If sailors were . . . in times of danger entitled to insist on extra charge . . . they would in many cases suffer a ship to sink unless the captain would pay any extravagant demand they might think proper to make." [18]

Lord Ellenborough in *Stilk* v. *Myrick* reached the same result, but did he do so on the same principle? According to Espinasse, he "recognized the principle of the case of *Harris* v. *Watson* as founded on just and proper policy." [19] The word "consideration" does not occur in this

15. *Vanbergen* v. *St. Edmund's Properties, Ltd.* [1933] 2 K.B. 223.

16. (1809) 2 Camp. 317; 6 Esp. 129; 11 R.R. 717.

17. (1791) Peake 102.

18. *Ibid.,* at p. 103.

19. 6 Esp., at p. 130.

report. But according to Campbell, Lord Ellenborough said: "I doubt whether the grounds of public policy upon which Lord Kenyon is stated to have proceeded [in *Harris* v. *Watson*] be the true principle on which the decision is to be supported. Here, I say, the agreement is void for want of consideration."[20] As the reports conflict, we shall never know for certain whether Lord Ellenborough based his decision on public policy or on want of consideration. The public policy view still had judicial support in 1854.[21] But gradually the consideration view gained the upper hand. No doubt this was connected with the growing reluctance of English judges to base decisions invalidating contracts overtly on grounds of public policy. At any rate, most modern decisions in cases of this nature turn on lack of consideration.[22] They support the view that a legal benefit is necessary, for they must deliberately disregard the factual benefit which the shipowner or captain receives as a result of his promise: he gets the ship to its destination. There might also be evidence of factual detriment to the seaman: another captain might have offered him higher wages on what was evidently a thin labour market. But, in the absence of evidence to this effect, this would be an "invented" consideration.

We must return to the second possible state of facts in *Stilk* v. *Myrick*: that the original contract of service was between the plaintiff and the shipowner and that the defendant (the captain) was not a party to it. If those were the facts, the decision seems to be inconsistent with later cases which hold, or at least support the view, that the performance of a contractual duty owed to a third party (the shipowner) would be consideration for the captain's promise. The consideration for this promise would be the factual benefit derived by the captain from getting his ship home: he may have had some share in the profits of the venture, or he may have made an "entire" contract with the shipowner so that he would get no pay unless he completed the voyage. It could of course be argued that the captain got a legal benefit in the shape of the seamen's promise to work the ship home. But if the act of promising is relied on, this is probably an invented consideration; and if the binding force of the seamen's promise is relied on, the argument unjustifiably assumes that the exchange of new promises created new legal obligations, which is what we are trying to prove.[23] Perhaps the most obvious answer to the suggestion that the captain got a legal (in addition to a factual) benefit is that the men did not, so far as one can gather from the report, make any new promise at all. They simply acted in reliance on the captain's promise.

Nothing in Lord Ellenborough's judgment suggests that he cared in the least whether the plaintiff's original contract was with the captain

20. 2 Camp., at p. 319.

21. *Harris* v. *Carter* (1854) 3 E. & B. 559 at p. 562.

22. *E.g., Harrison* v. *Dodd* (1914) 111 L.T. 47; *Swain* v. *West (Butchers), Ltd.* [1936] 3 All E.R. 261.

23. I have more fully stated my arguments for taking this view in my textbook on *The Law of Contract,* (London, 1962), at pp. 59-60. G.H.T.

or with someone else. It seems that he would have disregarded the factual benefit and insisted on a legal benefit in either case. His view would at least have been more self-consistent than the present law. But the question remains: why did he disregard the factual benefit when neither logic nor authority compelled him to do so? It is, at least, arguable that he did so because he felt that the new promise had, in some sense, been improperly obtained; and that he was, after all, looking "to the policy of this agreement."[24] The older cases frankly adopted this approach, and it is a pity that *Stilk* v. *Myrick,* or the report in Campbell, obscured the issue by introducing the idea of consideration. For this idea makes it hard to discriminate satisfactorily between those promises resulting in factual (but not legal) benefit to the promisor which should, and those which should not, be enforced. Is it, for example, satisfactory to say that the captain's promise should be binding if the men's original service contract was with the shipowner, but not if it was with the captain himself? In each case the captain may in fact obtain a benefit; but it is also true that his promise may in each case have been obtained by improper pressure.[25]

The danger of improper pressure must also be considered in relation to *Foakes* v. Beer.[25a] Mrs. Beer recovered a judgment against Dr. Foakes for £2090.19s. (including costs). Sixteen months later Dr. Foakes had paid little or nothing.[26] By this time £113.16s. 2d. was due for interest at the statutory rate of 4% *per annum.*[27] At this stage an agreement was made between the parties in a form apparently drafted *by Dr. Foakes' solicitor.*[28] It recited that Dr. Foakes had "requested the said Julia Beer to give him time to pay . . ." It then provided that, *in consideration* of his paying £500 "in part satisfaction of the said judgment debt" and *on condition* of his paying specified instalments "until the whole of the said sum of £2090.19s. shall have been paid and satisfied . . . , then the said Julia Beer undertakes and agrees that she . . . will not take any proceedings whatsoever on the said judgment." Some five years later, when Dr. Foakes had paid £2090.19s., Mrs. Beer claimed £360[29] for interest on the judgment debt. The House of Lords upheld her claim.

In the negotiations leading up to the agreement there seems to have been no talk of interest. According to the recitals, the only concession

24. 2 Camp., at p. 320.

25. In (1956) 72 L.Q.R. 490 at p. 493 A.L.G. says: "The performance of a duty to third persons can be regarded as furnishing adequate consideration without running the risk that the promisee may bring improper pressure to bear in obtaining the promise." But although this is generally true, it seems that the men in *Stilk* v. *Myrick* might have brought improper pressure to bear on the captain whether their contract was with him or the shipower.

25a. (1884) 9 App. Cas. 605.

26. It is just consistent with the report that he had by then paid a sum not exceeding £90.19s. Whether he had actually paid anything is not stated.

27. 9 App. Cas., at p. 624.

28. *Ibid.,* at p. 625.

29. *Beer* v. *Foakes* (1883) 11 Q.B.D. 221 at p. 222.

Dr. Foakes had asked for was time. Lord Selborne doubted whether the effect of the agreement as a conditional waiver of interest was "really present to the mind of" Mrs. Beer.[30] But he held that the agreement did have this effect since the operative part was clear and so could not be controlled by the recitals. Lord Blackburn agreed with this, though he thought that the parties might well have differed as to the construction of the agreement.[31] Lords Watson and Fitzgerald thought that the agreement did not, on its true construction, cover interest. Lord Watson was, but Lord Fitzgerald was apparently not, prepared to assume that he was wrong on this point of construction.

It is probably not far wrong to say that Mrs. Beer was caught by one technicality, the rule that recitals cannot control clear operative words, and rescued by another, the rule in *Pinnel's* case.[32] For under the latter rule, as interpreted in subsequent cases, the payment of £500 by Dr. Foakes could not in law be regarded as consideration for Mr. Beer's promise to take no proceedings on a judgment debt of a larger amount. Nor could the payment of the instalments be consideration. It was described as a "condition": Dr. Foakes did not *promise* to pay the instalments. Lord Selbourne said that actual performance of the condition "might have[33] imported some consideration" if Dr. Foakes "had been under no antecedent obligation to pay the whole debt . . . But he was under the antecedent obligation."[34]

It is quite possible that Mrs. Beer as a result of the agreement obtained a factual benefit. Dr. Foakes had evaded payment for sixteen months and might have continued to do so for some considerable time. But if Mrs. Beer had no intention of giving up her claim to interest and if she signed the agreement under a misapprehension which the majority of the House of Lords must at least have thought excusable, then there seems to be nothing unjust about the actual decision. Perhaps this is one reason why Lord Blackburn did not drive his disagreement with the other members of the House to the point of actual dissent. His speech emphasises the factual benefit to a creditor in the position of Mrs. Beer: "It is not the fact that to accept payment of only a part of a liquidated demand can never be more beneficial than to insist on payment of the whole."[35] The other members of the House insisted that legal benefit

30. 9 App. Cas., at p. 610. It is improbable that Mrs. Beer intended to remit the £113. 16s. 2d. due for interest when the agreement was made.

31. It is just possible that Mrs. Beer might have been able to adduce sufficient evidence to force Dr. Foakes to elect between cancellation of the agreement (had it been binding) and rectification, on the principle of *Harris* v. *Pepperell* (1867) L.R. 5 Eq. 1 and *Paget* v. *Marshall* (1884) 28 Ch.D. 255.

32. (1602) 5 Co. Rep. 117a; in *Bagge* v. *Slade* (1616) 3 Bulst. 162 Coke said that part payment of a debt could be consideration for a promise, though it could not be satisfaction of the debt. But this *dictum* was not cited in *Foakes* v. *Beer*.

33. Performance of a condition is not necessarily consideration for a promise. Thus where a promise is made to a woman to let her alive in a house so long as she remains a widow, her remaining a widow is not consideration: see *Thomas* v. *Thomas* (1842) 2 Q.B. 851.

34. 9 App. Cas., at p. 611.

35. *Ibid.,* at p. 618.

was necessary to make the agreement binding. One cannot say that their view is any more, or less "correct" than Lord Blackburn's. One can only judge the respective merits of the two views by looking at the results. And it is not clear that the result in *Foakes* v. *Beer* was a bad one.

It will be said that hard cases should not be allowed to make bad law. There would be force in this objection if *Foakes* v. *Beer* were an entirely isolated case. But there may be other, similar, situations in which the rule in *Foakes* v. *Beer* could prevent injustice. A powerful debtor (such as an insurance company) might abuse its power to extract a favourable settlement. An unscrupulous debtor might incur a debt, intending all along to evade full payment.[36] Even if he did not intend this, he might simply refuse to pay without any shadow of excuse,[37] or deny liability on some quite obviously untenable ground.[38] On the other hand, there are no doubt many cases in which the acceptance of part payment of a debt in full settlement is a perfectly fair transaction which the law should, if possible, uphold. Some criterion is needed for distinguishing between a debtor who has taken unfair advantage of his position and one who has not done this. The court can of course say that there is a (factual) benefit when it wants to uphold the new agreement and that there is no (legal) benefit when it does not want to do so. But this is an unsatisfactory solution[39] because it leaves entirely at large the basis on which the choice between the two theories of consideration is to be made.

It is interesting, from this point of view, to compare Lord Blackburn's speech in *Foakes* v. *Beer* with his earlier judgment in *Cook* v. *Wright.*[40] The plaintiffs claimed contributions from the defendant towards the expense of executing street works. The claim was made against the defendant as owner of certain houses. He denied liability on the ground that he was only the agent of the owner, and this denial was legally correct. Eventually, a compromise was reached: the defendant agreed to pay a smaller sum than that claimed "in order to avoid the expense and trouble of legal proceedings against himself."[41] This was a clear factual benefit to the defendant, the promisor. But Blackburn J. found

36. He might be guilty of obtaining credit by fraud, contrary to s. 13 of the Debtors Act, 1869 (32 & 33 Vict., c. 62).

37. "A person cannot create a dispute sufficient as consideration for a compromise by a mere refusal to pay an undisputed claim. That would be extortion not compromise": *DeMars* v. *Musser-Sauntry Land, L. & Manufacturing Co.,* 37 Minn. 418, 35 N.W. 1 at p. 2 (1887); a mere statement in a release that the claim was in dispute is ineffectual if there is in fact no dispute: *Harms* v. *Fidelity and Casualty Co.,* 172 Mo. App. 241, 157 S.W. 1046 (1913).

38. "His denial cannot be fabricated for use as a pretext to evade the discharge of an obligation. Disclaimer must be *bona fide* and based upon real faith that the claim is not meritorious": *Schuttinger* v. *Woodruff,* 259 N.Y. 212, 181 N.E. 361 at p. 362 (1932).

39. See Sharp, (1941) 41 Col.L.R. 783 at pp.785, 786; Kessler, (1952) 61 Yale L.J. 1092 at p. 1102.

40. (1861) 1 B. &S. 559.

41. *Ibid.,* at p. 568.

consideration for the promise in various kinds of detriment to the plaintiffs.[42] He added: "It is this detriment . . . which . . . forms the real consideration for the promise and not the technical and almost illusory consideration arising from the extra[43] costs of litigation."[44] It is hard to see what is "technical" or "illusory" about this benefit, which seems to have been precisely *the* benefit which the defendant wished to secure. But of course Blackburn J. was right in his reluctance to recognise it as consideration, for the same factual benefit would exist where the claim was groundless and known to be so. A person against whom such a claim is made may in fact benefit by promising to buy it off at a moderate price. But it would be highly undesirable to enforce such a promise by legal action. This was, no doubt, the reason why Blackburn J. in this case disregarded the factual benefit to which he was to attach such importance in *Foakes* v. *Beer.* But he did not explicitly tell us how he made the choice between the two theories of consideration.

## II. PRESENT SOLUTIONS.

So far, then, one might say that the courts use the notion of legal benefit or detriment to strike down modifications of contract which they think to be in some way undesirable, but that the technique is unsatisfactory and that justice would be better served by the abolition of the notion. Of the leading cases, *Foakes* v. *Beer* can only be reversed by statute (as was recommended by the Law Revision Committee in 1937) ;[45] *Stilk* v. *Myrick* could perhaps be circumvented at common law, but again perhaps a statute would be simpler (as was also recommended by the Law Revision Committee). The rule would then be that a factual benefit or detriment is sufficient consideration unless there is some other articulate reason for making the agreement invalid. The formulation of such reasons would however be essential, for, as was rightly pointed out at the time of the Law Revision Committee's report,[46] to alter the present operation of the doctrine of consideration in these cases is to remove the only existing safeguard for distinguishing between modifications that should, and those that should not be enforced.

An approach to the problem from this point of view was in fact

42. *Ibid.*, at p. 569: "The plaintiff *may* be in a less favourable position for renewing his litigation, he *must* be at an aditional trouble and expense in again getting up his case, and he *may* no longer be able to produce the evidence which would have proved it originally." In addition the effect of the compromise "must be" to prevent the plaintiff from enforcing his rights against the owner of the houses. At least some of these are "invented" detriments, as the repeated use of the word "may" suggests.

43. *I.e.,* those which could not be recovered even by a successful party from his adversary.

44. 1 B. & S., at p. 570.

45. Cmd. 5449 (1937) (Sixth Interim Report). The suggestion made by Kelly, *op. cit.* n. 2 *supra,* at p. 543, that the case could be circumvented by judicial decision, seems unsound.

46. Hamson, (1938) 54 L.Q.R. 233.

suggested by Denning L.J. in *Williams* v. *Williams,*[47] where he said: "A promise to perform an existing duty is, I think, sufficient consideration to support a promise so long as there is nothing in the transaction which is contrary to the public interest." This case concerned the formation of contract, and a similar approach might solve some problems of modification and discharge of existing obligations. But this would be an incomplete solution. Even if it is accepted that the proposed grounds of invalidity would strike at modifications of contract more often than at formation of contract, at least two further things must be borne in mind when modification of contract is discussed. First, it is possible that there may be cases in which total, no less than partial, releases should be binding. To allow a release of a debt of £100 by a payment of £1, but not to allow it where no payment is made at all, would, it is arguable, be to substitute one artificiality for another.[48] Second, there are in the area of modification some situations where consideration is certainly not needed at all.

Taking the question of modification of contracts as a whole, it is suggested that there are two sorts of transaction that can be distinguished: formal releases (whether total or partial) and renegotiations, which are of two kinds, permanent alterations and temporary concessions.[49] It seems that this distinction is dimly, though not quite satisfactorily, taken in the present law.

1. RELEASES.

There are four possible ways of releasing liability under a contract. The first two are certainly valid, but the other two are extremely dubious.

*(a) Releases under seal.*

A release, total or partial, can certainly be effected under seal. The first difficulty here is that, although the formalities for executing a deed under seal have largely withered away,[50] they remain archaic. It is desirable that there should be some formality to draw the attention of the person concerned to the significance of what he is doing,[51] but it is also desirable that the formality be readily understandable. The second

47. [1957] 1 W.L.R. 148 at p. 151. See also *Ward* v. *Byham* [1956] 1 W.L.R. 496. But the other judgments do not take this view.

48. Though in the case of a total release, it is hard to see why a gift-promise to my debtor should be more binding than a gift-promise to anyone else. Yet that this should be so seems common opinion: see authorities cited at n. 2, *infra.*

49. The Uniform Commercial Code distinguishes between renunciation (s. 1-107), modification (s. 2-209(1)), and waiver (s. 2-209(5)): though renunciation is also called waiver.

50. Physical delivery is not required — the party executing a deed may keep it: *Doe* v. *Knight* (1826) 5 B. & C. 671; *Xenos* v. *Wickham* (1866) L.R. 2 H.L. 296. The rules as to sealing are very slight: see *Stromdale & Ball, Ltd.* v. *Burden* [1952] Ch. 223 at p. 230. Signing was originally less important than sealing, though it is now of primary importance by virtue of s. 73(1) of the Law of Property Act, 1925 (15 & 16 Geo. 5, c. 20).

51. Llewellyn, (1941) 41 Col.L.R. 777 at p. 781; Fuller, (1941) 41 Col.L.R. 799 at p. 800.

difficulty is that there is still little protection against the securing of such releases by improper pressure. If the debtor has abused his position, it should perhaps make no difference that the agreement is under seal. This is, however, a debatable point: it could be argued that the mere presence of a seal would put the creditor on his guard and so prevent some forms of abuse. But whether it would have had this effect in *Foakes,* v. *Beer* is highly questionable. Mrs. Beer was advised by a solicitor and could hardly have taken any further precautions against making greater concessions than she intended.[52]

(*b*) *Nominal consideration.*

A release can be effected by the use of nominal consideration. This is, however, to use the form of a renegotiation for what is in substance a release. Usually such a release is quite distinguishable from a genuine renegotiation.[53] The distinction is clearly seen in equity, which regards promises supported by nominal consideration as being voluntary.[54] It is arguable that nominal consideration should not be effective at all. But if it is, the device may need control against improper use in the same way as the release under seal.

(*c*) *Exoneration before breach.*

It is stated in *Smith's Leading Cases*[55] that "a person bound by a contract not under seal may before breach be exonerated from its performance by word of mouth, without any value of consideration." But in principle it would seem that this is only so in a genuine case of rescission by agreement, where the contract is wholly or partly executory on both sides, so that there is consideration for the promise of each party to release the other. One of the cases cited, *Morris* v. *Baron,*[56] is certainly an example of this. It seems most unlikely that there could be informal release without consideration where the contract was totally performed on one side. For example, where goods are sold and delivered on credit, a promise to release the buyer from his liability to pay the price would not be binding without consideration, whether made before or after the term of credit had expired.[57] There seems to be no reason

52. In the United States it is not unknown for the agents of insurance companies and the like to be over-zealous in securing releases: see *Ricketts* v. *Pennsylvania R.R.,* 153 F. 2nd 757 (1946). *Cf.* Kessler, 61 Yale L.J. at p. 1102, n. 52; Sharp, 41 Col.L.R. at pp. 787-788.

53. Cheshire and Fifoot, *Law of Contract,* (6th ed., 1964), at p. 75, seem to suggest that *Thomas* v. *Thomas, supra* n. 33, is a case of nominal consideration. But leaving aside the possibility that £1 p.a. might have been quite a substantial share of the ground rent obtaining in 1837, the plaintiff agreed to keep the premises in repair, which, as Lord Denman C.J. said, "might be a heavy burden."

54. *Milroy* v. *Lord* (1862) 4 De G.F. & J. 264; and see Law of Property Act, 1925, s. 205(1) (xxi).

55. (13th ed., 1929), vol. 1, at p. 385.

56. [1918] A.C. 1.

57. The other case cited is *Dobson* v. *Espie* (1857) 2 H. & N. 79, where the court quoted *Byles on Bills* (7th ed., 1857), at p. 168; "It is a general rule of law, that a

for allowing such exoneration before breach if it is not permitted after breach.[58]

(*d*) *Equitable release.*

There is some authority that an obligation may be released in equity by clear manifestation of intention to do so.[59] It is on principle arguable that, although a promise to release one's rights should (like other promises) require consideration or a seal to be binding, an actual release is analogous to a completed gift and should be binding in itself. It has been held that a statutory assignment of a *chose in action* is effective without consideration;[60] and, though the case law on the point is still obscure, it is probably also true that an equitable assignment can be effective as a completed gift. If the creditor can make such a gift to a third party, why can he not make it to the debtor? Where it is clear that the creditor makes a total or partial release (as by surrendering to the debtor a document evidencing the debt or part of it) is there any reason why this should not take effect as an equitable release, like an equitable assignment?[61] The objection may be made that a release is in effect a promise not to sue, and must be governed by the rules regulating promises. But the distinction between releases and covenants not to sue is recognised in the law relating to joint debtors;[62] and the law

simple contract may, before breach, be waived or discharged, without a deed and without consideration; but after breach there can be no discharge, except by deed or upon sufficient consideration." The statement in *Byles* (which still appears in the current (21st) edition at p. 246) is highly misleading: it must surely only refer to rescission cases, where in fact there is consideration. *King* v. *Gillett* (1840) 7 M. & W. 55, cited as authority in earlier editions, is certainly a case of rescission: the action was for breach of a contract to marry, the defence was that the contract had been rescinded, and the decision was simply that this could be raised by a plea of exoneration. Alderson B. said, "Although we are of opinion that this plea is good in point of form; yet we think the defendant will not be able to succed upon it ... unless he proves a proposition to exonerate on behalf of the plaintiff, acceded to by himself; and this in effect will be a rescinding of the contract previously made." *Dobson* v. *Espie* simply decided that this defence could not be raised by a plea of "leave and licence": the defence still seems to have been one of rescission. But for another view see Williston, *Contracts,* (rev. ed.,) s. 1830, where it is suggested that the statement in *Byles* is correct. See also (1926) 26 Col.L.R. 996; *Edwards* v. *Walker* [1896] 2 Ch. 157 at p. 168 *per* Lindley L.J.

58. Though release after breach is permitted in the case of bills of exchange: Bills of Exchange Act, 1882, (45 & 46 Vict., c. 61), s. 62.

59. *Richards* v. *Syms* (1740) 2 Eq.Cas.Abr. 617 pl. 2; *Wekett* v. *Raby* (1724) 2 Bro. P.C. 386; *Flower* v. *Marten* (1837) 2 My. & Cr. 459; *Major* v. *Major* (1852) 1 Drew. 165; *Yeomans* v. *Williams* (1865) L.R. 1 Eq. 184; *Re Applebee* [1891] 3 Ch. 422. And see *Sibree* v. *Tripp* (1846) 15 M. & W. 23 at p. 33 *per* Pollock C.B.: "It is clear, if the claim be a liquidated and ascertained sum, payment of part cannot be satisfaction of the whole, although it may, under certain circumstances, be evidence of a gift of the remainder."

60. *Harding* v. *Harding* (1886) 17 Q.B.D. 442; *Re Westerton* [1919] 2 Ch. 104.

61. *Cf. Gray* v. *Barton,* 55 N.Y. 68, 14 Am.Rep. 181 (1873).

62. Release of one releases all, but covenant not to sue one does not affect the liability of the others: *Hutton* v. *Eyre* (1815) 6 Taunt. 289; *Kearsley* v. *Cole* (1846) 16 M. ,& W. 128 at p. 136; *Webb* v. *Hewitt* (1857) 3 K. & J. 38; *Ex p. Good* (1876) 5 Ch.D. 46; *Re Wolmerhausen* (1890) 62 L.T. 541.

relating to assignment succeeds, despite considerable difficulty, in distinguishing between an assignment and a promise to assign. It should be equally possible to distinguish, in the present context, between releases and promises to release. For example, it could be said that a bailor who decides to give the article to his bailee is promising not to sue; but the law regards this as a release and property analogies are here preferred to contractual ones.[63]

However, the view that a debt can be assigned to the debtor is summarily rejected by the Restatement.[64] And as a general line of authority the cases on equitable release seem unlikely to have survived *Jorden* v. *Money,*[65] where it was held that an estoppel, to bind the representor, must be based on a statement of existing fact. Thus a statement that an obligation *has* been released (in some legally binding form) could be a statement of fact, and raise an estoppel;[66] but to hold that a statement that an obligation *is* released is a statement of fact, and itself releases the obligation by preventing the maker of the statement from denying the fact that the obligation is released is, it is submitted, to pull oneself up by one's own bootstraps.[67] Some of the cases can be explained as involving representations of intention, which could have been retracted (in accordance with the rule in *Hughes* v. *Metropolitan Railway)* [68] unless it would have been inequitable to do so.[69] It is however possible that there could still be a valid equitable release where a document evidencing the debt *(e.g.* a bond) is surrendered,[70] or where a person allows another making a disposition of property in his favour to assume that he will not enforce certain debts,[71] for here the property analogy is very strong.[72] Protection against extortion may be

63. *Re Stoneham* [1919] 1 Ch. 149. *Cf.* 38 *Corpus Juris Secundum,* Gifts, s. 24 (though the authorities cited scarcely support the proposition made).

64. *Contracts,* s. 150 comment *b*. But the matter is not argued. It is simply stated that an assignment ordinarily extinguishes the right of the assignor and creates a similar right in the assignee. "Therefore an effective assignment by a creditor to his debtor of the indebtedness owed by the debtor is impossible."

65. (1854) 5 H.L.C. 185.

66. *Cf. Neville* v. *Wilkinson* (1782) 1 Bro.C.C. 543.

67. *Pace* Sheridan, (1952) 15 M.L.R. 325 at pp. 332-3.

68. (1877) 2 App.Cas. 439; see *infra* p. 16.

69. Thus in *Flower* v. *Marten* and *Major* v. *Major, supra,* n. 59, the representor had died without seeking to go back on his representation: it would perhaps have been inequitable for anyone else to go back on it. (Though *Flower* v. *Marten* may be a case of gift.) But presumably Mr. Richards in *Yeomans* v. *Williams, ibid.,* could have done so during his lifetime: in any case it was admitted that interest was due from his death. Whether or not he could have gone back on his promise as regards accrued interest depends on whether the observations in the *High Trees* case are sound: see p. 17 *infra*. *Cf.* also *Dillwyn* v. *Llewellyn* (1862) 4 De G.F.&J. 517.

70. *Cf. Richards* v. *Syms, supra* n. 59.

71. As in *Wekett* v. *Raby, supra* n. 59 (where there was a bond but it was not actually surrendered) and *Re Applebee, ibid.* (where there was no bond).

72. The principle is that of secret trusts: where there is an actual bond to provide trust property it can be argued that the residuary legatee holds it on trust for

needed here too, unless it is thought that the unusual requirements for the operation of the doctrine themselves provide sufficient protection.

2. RENEGOTIATIONS.

These are of two types.

*(a) Permanent alterations.*

Under the present law, any permanent alteration in the obligation of either party must be supported by consideration. There will usually be consideration for such an alteration (i) if the claim is unliquidated;[73] (ii) if the claim is *bona fide* disputed;[74] (iii) if performance is, at the request of the creditor,[75] rendered in a different form (including payment by negotiable instrument, provided that this is taken in satisfaction and not, as would be more normal, as conditional payment)[76] or at a different time or place, or by a different person;[77] and (iv) if the contract expressly or by implication provides for renegotiation.[78] In some trades or professions it might be possible to establish a custom to renegotiate: increases in prices or salaries could then be sued for even though they were promised during the currency of long-term contracts.[79]

Most commercial renegotiations will in fact fall within one of these four categories. But in other renegotiation cases the search for consideration is, as we have seen, more difficult, for the court will tend to stress the factual benefit or detriment when it thinks that the agreement should be upheld, and the lack of legal benefit or detriment when it thinks that it should not. The doctrine of consideration does not satisfactorily

the debtor: see the explanation of *Wekett* v. *Raby* in *Byrn* v., *Godfrey* (1798) 4 Ves. Jun. 5 at p. 10. The extension of this idea from a bond to a mere debt is not difficult, as is shown by *Re Applebee.*

73. *Longridge* v. *Dorville* (1821) 5 B. & Ald. 117; *Wilkinson* v. *Byers* (1834) 1 A. &E. 106; *Sibree* v. *Tripp* (1846) 15 M. & W. 23. Williston, *Contracts,* (rev. ed.,) s. 128, defines an unliquidated claim as "one, the amount of which has not been fixed by agreement or cannot be exactly determined by application of the rules of arithmetic or of law." Plainly this definition can give rise to difficulties.

74. *Cooper* v. *Parker* (1855) 15 C.B. 822; *Re, Warren* (1884) 53 L.J. Ch. 1016. What if the defendant has no belief in his defence, yet it is in fact sound?

75. *Vanbergen* v. *St. Edmund's Properties* [1933] 2 K.B. 223.

76. *Hirachand* v. *Temple* [1911] 2 K.B. 330 at p. 340. See *Smith's Leading Cases,* (13th ed.), vol. 1, at pp. 380-381.

77. See *Andrew* v. *Boughey* (1552) Dyer 75; *Sibree* v. *Tripp, supra,* n. 73; *Cook* v. *Lister* (1863) 13 C.B. (N.S.) 543; *Hirachand* v. *Temple, supra,* n. 76; *Smith's Leading Cases,* (13th ed.), vol. 1, at pp. 386-388.

78. *Cf. Foley* v. *Classique Coaches* [1934] 2 K.B. 1. In that case no price was mentioned in the original agreement, and consideration was not discussed. It is submitted that the decision would have been the same had the contract provided for the supply of petrol "at *x*/- per gallon or such other price as may be agreed from time to time."

79. Fink, (1942) 9 U. of Chi. L.E. 292 at p. 293.

discriminate between the two groups of cases, for it may leave some renegotiations which should be valid unenforceable, while enforcing others which should be struck down.[80] If the requirement of legal benefit were removed,[81] it would be possible to require a factual benefit or detriment only, and to protect against extortion by other rules.

Of course it is always a factual detriment to give up one's tactical advantage in litigation,[82] and if such a detriment were sufficient it would be possible to find consideration in virtually everything that could be called a renegotiation as opposed to a release. Only an alteration that was clearly voluntary[83] would not be covered. But the step from this position to abandoning the requirement of consideration in the modification of contract altogether, though significant, is small. Such a development seems in fact to have taken place in New Hampshire. In 1907 the court in that State held that a promise to accept part payment of a debt in full settlement was binding:[84] it relied not only on the benefit to the creditor[85] but also on the detriment to the debtor.[86] In 1941 the same court held that in the earlier case "the need of consideration was assumed, but, as it is thought, unnecessarily" and that consideration was not necessary for the modification of contract at all.[87] Such a development, which seems to obliterate the distinction between renegotiation and release,[88] may be unlikely in England. But should it occur it would give rise to an even more urgent need for the formulation

80. See *infra* pp. 19-22.

81. See *supra* p. 9.

82. *Cf.* Kelly, *op.cit.* n. 2 *supra.*

83. As in *Parke* v. *Daily News, Ltd.* [1962] 2 All E.R. 929.

84. *Frye* v. *Hubbell,* 74 N.H. 358, 68 A. 325 (1907).

85. "The damages the law awards for non-payment of money is interest, and for the expense of obtaining judgment and execution, costs. If costs always equal the expense of litigation, if interest is always full recompense for delayed payment, and if an execution is always equivalent to money in hand, then a present part payment of a debt in cash is in fact never beneficial to the creditor or detrimental to the debtor, and can never be a consideration for a discharge of the balance. Whatever the conclusions of scholastic logic, as men having some acquaintance with affairs, judges are bound to know that none of these propositions are always, if ever, true": 68 A. at p. 333. *Cf.* the views of Lord Blackburn in *Foakes* v. *Beer.*

86. "Nor if detriment to the promisee is to be taken as the sole definition of consideration, is the conclusion that the present parting with money is no detriment defensible, judged by the fact and the practice of business men. When the parties have made a contract and agreed on the consideration — the immediate payment of a sum of money — it is the refinement of logic to say that such payment is no detriment": *ibid. Cf.* Kelly, *op. cit.* n. 2 *supra.*

87. *Watkins* v. *Carrig,* 91 N.H. 459, 21 A. 2d 591 (1941). "A promise with no supporting consideration would upset well and long established human interrelations if the law did not treat it as a vain thing. But parties to a valid contract generally understand that it is subject to any mutual action they may take in its performance": 21 A. 2d. at p. 593.

88. "The law has no policy that a creditor may not make voluntary and gratuitous concession to his debtor": *ibid.*

of rules against extortion.[89]

(*b*) *Temporary concessions.*

Under the doctrine sometimes called "equitable waiver" or "quasi-estoppel", a concession made in the course of the performance of a contract may to some extent be binding without consideration. As is well known, it was said in *Hughes* v. *Metropolitan Railway*[90] that a party to a contract who leads another "to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance" will not be allowed to enforce them "where it would be inequitable having regard to the dealings which have thus taken place between the parties."[91] The question is, of course, how far the decision goes, and when it would be "inequitable" to go back on such a promise.

Unless this doctrine is given very limited operation, it will expel the notion of consideration from the field of renegotiations altogether. It must, on the present authorities, be confined to temporary concessions. *Hughes* v. *Metropolitan Railway* itself may simply illustrate the established jurisdiction to relieve against forfeiture of a lease for breach of covenant to repair. Lord Tucker has said that the doctrine there stated "should ... be applied with great caution to purely creditor and debtor relationships involving no question of forfeiture or cancellation. It would be unfortunate if the law were to introduce into this field technical requirements with regard to notice and the like which might tend to penalize or discourage the making of reasonable concessions."[92]

It seems that the doctrine is unexceptionable as regards temporary concessions, the law being that a party who makes a concession cannot normally go back on it without giving reasonable notice, if it would be unfair to do so: but that he can on giving reasonable notice. It is sometimes argued that the doctrine only operates if the representee has acted on the representation to his detriment.[93] In principle this does not seem necessary, but if the representee has not altered his position in any way it will not normally be "inequitable" for the representor to assert his original rights without giving notice. There may however be cases where the representor is permanently precluded from doing so because circumstances make it impossible for the representee ever to resume his

89. Kessler, *op. cit.* n. 39 *supra,* at pp. 1101-1103; Sharp, 61 Yale L.J. at pp. 1125-1126; Sharp, *op. cit.* n. 39 *supra,* at pp. 785-788. *Watkins* v. *Carrig* itself was probably not a case of extortion, even though it involved a promise to pay for performance of a contract to excavate at nine times the original rate. There seems indeed to have been a factual benefit and detriment.

90. (1877) 2 App. Cas. 439.

91. *Ibid.,* at p. 448.

92. *Tool Metal Manufacturing Co., Ltd.* V. *Tungsten Electric Co., Ltd.* [1955] 2 All E.R. 657 at p. 675. *Cf.* Gordon, [1963] C.L.J. 222. The "technical" requirements referred to presumably relate to such matters as the date or form of the notice.

93. Wilson, (1951) 67 L.Q.R. 330.

position, even on notice.[94] But these cases mostly involve the elapsing of time limits and may be regarded as exceptional.

However, the mere fact that the representor has said that his concession is intended to be permanent should not of itself make it impossible for him to go back on it after giving notice. In this respect, the *High Trees*[95] case seems to take the doctrine beyond all existing authority. In that case, as is well known, Denning J. said that, where a reduced rent had been accepted in full settlement, the balance between that rent and the full rent for the period covered could no longer be sought. This is an advance on the previous cases in a number of ways: the doctrine of *Hughes* v. *Metropolitan Railway* is applied to a debt of money and thus moves towards the *Foakes* v. *Beer* area (the previous cases had concerned modifications of other sorts, *e.g.,* relaxation of the obligation to build or repair) ;[96] and it is implied that the concession may be permanent simply by its terms — for it does not appear on the facts that the representee could not have resumed his position had notice been given, nor indeed that he had altered his position in any way.[97] The actual decision in the *High Trees* case (which was that the concession was not intended to last for the whole period of the lease so that the landlord could resume the right to full rent by giving notice as soon as the war-time difficulties of subletting had ceased) is unexceptionable. But the suggestion that the landlord could not on notice reassert his right to full rent for the period gone by seems dubious.[98] And, even if it is correct, the suggestion should be confined to facts such as those in the *High Trees* case, *i.e.,* waiver of debts accruing periodically by instalments.[99] It need not be extended to simple promises not to enforce debts or parts of debts: these should be dealt with as releases or permanent alterations.

If the *High Trees* doctrine is not kept within such bounds, it could

94. *E.g., Birmingham & District Land Co.* v. *L.N.W.R.* (1888) 40 Ch.D. 268; *Fenner* v. *Blake* [1900] 1 Q.B. 426; *Salisbury* v. *Gilmore* [1942] 2 K.B. 38. *Cf.* Restatement, Contracts, ss. 88, 297, 308; Uniform Commercial Code s.2-209(5). In *Ajayi* v. *R. T. Briscoe* (*Nigeria*), *Ltd.* [1964] 3 All E.R. 556 at p. 559 the Privy Council said that the "equity" is "subject to the qualification (a) that the other party has altered his position, (b) that the promisor can resile from his promise on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position, (c) the promise only becomes final and irrevocable if the promisee cannot resume his position."

95. *Central London Property Trust, Ltd.* v. *High Trees House, Ltd.* [1947] K.B. 130.

96. See the cases collected by Wilson, *op. cit.* n. 93 *supra.*

97. See also on this point *Wallis* v. *Semark* [1951] 2 T.L.R. 222. *Cf.* Sheridan, *op. cit.* n. 67 *supra,* at pp. 340-342.

98. See *Re Venning* [1947] W.N. 196.

99. *Cf. Yeomans* v. *Williams, supra* n. 59, a case on mortgage interest. Though the the distinction does not seem to have any merit.

1. If the law is to retain anything like its present form, the suggestion in Cheshire and Fifoot, *op. cit.* n. 53 *supra,* at p. 81 that in view of the *High Trees* case the rule in *Foakes* v. *Beer* "may be neutralised by the exercise of a beneficent ingenuity" seems unsound. The "stream" referred to on p. 82 may be more "slender" than is suggested.

cover all discharge or modification of contract, which would thus become independent of consideration by a different route from that suggested in the treatment of permanent alterations. That this was happening was suggested by Denning L.J in 1952.[2] The only limitation on the doctrine then be the notion that it cannot stand alone to provide a cause of action: it can only be used as a defence.[3] This does not mean that the doctrine can only be used by a defendant: it can be used by a plaintiff provided that he does not use it as a cause of action solely. But it does mean that the doctrine only applies to promises involving a reduction of the obligation of the promisee.[4] However, it may be suggested that even this limitation could prove difficult to maintain. A buyer who agrees to accept late delivery without postponing payment is apparently reducing the obligation of the seller, so that the doctrine will enable the seller to claim damages for non-acceptance. A buyer who agrees to pay more for the same goods is increasing his own obligation, so that the doctrine would not enable the buyer to claim the higher price. But it could at least be argued that the buyer who agrees to pay for late delivery is, or may be, increasing his own obligation in paying the same sum at the same time for a later delivery; or even that a buyer who agrees to pay more for the same goods is reducing the obligation of the seller by yielding his right to have the contract performed at the original price.[5] Argument along these line might make it difficult to prevent the doctrine from covering all renegotiations (including cases where a party agrees to pay more for the same goods), and even releases.[6] Such a development in England seems highly unlikely.[7] But if it were to take place, clear rules against extortion would once more be needed.

## III. POSSIBLE REFORMS.

### 1. RELEASES.

In view of the archaic formalities of the seal, and the obscure possibilities as to release by other means, it may be tentatively suggested that some new type of release might be introduced, formal to draw the atten-

2. 15 M.L.R. 1. See also Pollock, *Contracts,* (13th ed., 1950) at p. 150; Indian Contract Act, 1872, s. 63 ("Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit"); Uniform Commercial Code s. 2-209(1).

3. *Combe* v. *Combe* [1951] 2 K.B. 215 at p. 220. The extraordinary *dicta* in this case, which seem to equate unilateral contracts with promissory estoppel as a cause of action, are often overlooked.

4. *Cf. D.* 18.1.72 *pr.: "detrahunt aliquid emptioni."*

5. "The defendant intentionally and voluntarily yielded to a demand for & special price for excavating work. In doing this he yielded his contract right to the price it provided": *Watkins* v. *Carrig, supra,* n. 87, 21 A. 2d at p. 594. Thus the two ways in which consideration could disappear in the discharge of contracts overlap.

6. *Cf.* Sheridan, *op. cit.* n. 67 *supra,* at p. 342.

7. Especially in view of the *Tool Metal* case, *supra* n. 92, and *Ajayi* v. *Briscoe, supra* n. 94.

tion of the party executing it to what he is doing,[8] yet comprehensible and simple. As parallels may be cited the statutory assignment introduced by the Law of Property Act, 1925[9] (it has already been argued that assignment and release could be regarded as similar) and the release of liability on bills of exchange permitted by the Bills of Exchange Act, 1882.[10]

A possible step would be the enactment of something similar to the Uniform Written Obligations Act,[11] requiring writing and possibly a statement to be legally bound. However, such a statute would affect the formation of new contracts as well, and here there may be difficulties: for example it could give rise to the same sort of problems as do home-made wills.[12] Thus it may not be without significance that the Act is only in force in Pennsylvania.[13] Such an Act could, of course, be confined to modification of contracts.[14] But even here the use of a statutory form by laymen would give rise to similar problems;[15] and rule would be needed to protect creditors against ruthless debtors.[16] Such rules are, indeed, needed whether the formality of the seal is modernized or not. They should be applied also to releases supported by nominal consideration, if this device is to be retained, and possibly to equitable releases, if this notion has any validity. It is difficult to see how this could be effected unless by legislation.[17]

## 2. RENEGOTIATIONS.

In cases to which the *High Trees* doctrine applies, adequate safeguards against extortion can probably be developed under the rule that it must be "inequitable" for the promisor to reassert his original demand. For whether this was inequitable would partly depend on the circumstances in which the new promise was obtained.

8. See n. 51 *supra.*

9. s.136(1). Writing and signature are required.

10. s .62. Writing is required unless the bill is delivered up to the acceptor. But bills of exchange cannot, of course, be released in part.

11. s. 1 reads "A written release or promise hereafter made and signed by the person releasing or promising shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound." *Cf.* Sharp, (1952) 61 Yale L.J. 1092 at pp. 1125-1126, (1941) 41 Col.L.R. at p. 790; Uniform Commercial Code s. 1-107 (writing and signature, but no statement of intention to be legally bound).

12. See *In re Goldstein's Estate,* 384 Pa. 1, 119 A. 2d 278 (1956).

13. Since 1927. It was in force in Utah also from 1929 to 1933.

14. As was provided in the New York Personal Property Law (N.Y.L. 1944, c. 588, s. 5).

15. Some useful materials are cited by Fink, *op. cit.* n. 79 *supra,* at p. 298 n. 18.

16. See 11. 52 *supra.*

17. Which would presumably take a form similar to that suggested for renegotiations on p. 22 *infra.*

More difficult problems arise in cases where the *High Trees* doctrine does not apply. There are at least two groups of these in which it seems that the new promise ought to be enforced even though there may not be any consideration for it under the present law.

The first group comprises those cases in which the new promise should be enforced on account of the previous conduct of the promisor. If he actually breaks the original contract in such a way as to give the promisee the option of rescinding it, the new promise is probably binding under the present law. It is more doubtful whether the new promise is binding where the breach is one which does not give the promisee the option of rescinding the original contract, or where the promisor's conduct is not a breach at all but simply makes performance of the original contract more difficult for the promisee. In *Stilk* v. *Myrick* Lord Ellenborough suggested that the case might have been different "if the captain had capriciously discharged the two men who were wanting."[18] The amount of extra work to be done by the other men would have been exactly the same as it was in the case of desertion. But it could be said that the need to do the extra work arose from conduct on the part of the captain which was in some sense unjustifiable.[19] The conduct of the promisor might, again, be relevant if in the original contract he secured some harsh or unfair advantage over the promisee — if, for example, he employed the promisee at rates of pay well below the current ones. The suggestion here is not that the court should reopen the transaction for inadequacy of consideration. But where the parties themselves have reopened it on this ground, the court should enforce their new agreement.

The second group comprises those cases in which supervening events or extraneous circumstances may provide grounds for saying that the new promise should be enforced. Performance of a contract to excavate, for example, may be held up because the contractor unexpectedly encounters frozen ground or hard rock.[20] Under the present law there would be consideration for the site-owner's promise to pay the contractor more than the contract rate if these factors frustrated the contract[21] or made it void for mistake. There would perhaps also be consideration if the contractor in good faith believed that the contract had been frustrated or that it was void: the analogy of compromises of disputed claims is very persuasive here. But even if such obstacles do not, and are not believed to, affect the original obligation as a matter of law, they may yet provide a ground for enforcing the new agreement. The same is probably true where the impact of the contract on the parties is altered by a severe economic depression,[22] or by war-time conditions.[23] The suggestion,

18. 2 Camp., at p. 319.

19. It would have been a breach of contract against the dismissed men but not against the remaining ones. *Quaere* as to the position where the dismissals are justified?

20. *Watkins* v. *Carrig, supra* n. 87 (hard rock); *King* v. *Duluth, Missabe & Northern Rly. Co.,* 61 Minn. 482, 63 N.W. 1105 (1895) (frozen ground). According to the latter case only unforeseen (or unforeseeable?) difficulties should be regarded as grounds for holding that the new promise should be enforced.

21. *E.g., Liston* v. *S.S. Carpathian (Owners)* [1915] 2 K.B. 42.

again, is not that the doctrines of frustration and mistakes should be stretched. It is merely that the court should give effect to new agreements made by the parties themselves on account of certain altered or previously unknown circumstances even if those circumstance fall short of frustration or mistake. It is more doubtful whether more normal market fluctuations should be regarded as sufficient grounds for enforcing the new agreement, especially if the main object of the original contract was precisely to speculate on the market.

How could these cases be accommodated? We have seen that an extension of the *High Trees* principle is unlikely to achieve this end;[24] and that a modification of the doctrine of consideration, making factual benefit sufficient, would raise further, unnecessary, problems.[25] The best course would be the statutory abolition of the requirement of consideration in the renegotiation cases. If this were done, safeguards would of course be needed. For it is easy to think of cases in which the conduct of the promisee is such that the new promise should not be enforced. His demand for extra pay or for the reduction of his debt may be extravagant: for example if the demand for extra pay goes far beyond the usual rate in the trade or business in question; or if the amount of reduction claimed is quite out of proportion with the ability of the debtor to pay. The promisee may, again, deliberately exploit some particular need of the promisor for performance of the original contract. He may have been bound to give vital information to the promisor which no-one else can supply.[26] Or he may offer part payment of a debt in full settlement to a nearly insolvent creditor whose need for cash is immediate and acute.[27] An even stronger case against enforcing the new promise would arise where the promisee had "planned it that way."[28] He may have induced the promisor to reject other offers by quoting favourable terms with a view to raising his demands when those other offers could no longer be recalled.[29] Or he may simply conceal from the promisor some other source of supply. It might, finally, be relevant that the promisee had deliberately broken or threatened to break the original contract before he began to renegotiate it.

22. In *Liebreich* v. *State Bank & Trust Co.,* 100 S.W. 2d 152 (1936), a Texas court said that "the economic depression was a sufficient consideration" for a promise by a landlord to reduce rent. It would be better to say that the depression was a ground for holding the landlord to his promise, whether there was any consideration for it or not.

23. *Central London Property Trust Ltd.* v. *High Trees House, Ltd., supra* n. 95.

24. *Supra,* pp. 16-18.

25. *Supra,* pp. 14-16.

26. *Swain* v. *West (Butchers), Ltd.* [1936] 3 All E.R. 261.

27. *Hackley* v. *Headley,* 45 Mich. 569, 8 N.W. 511 (1881).

28. Corbin, *Contracts,* s. 186. Where the original obligation is not one to pay cash, the criminal sanction referred to in n. 36 *supra,* has been removed by *Fisher* v. *Raven* [1963] 2 W.L.R. 1137.

29. Corbin, *Contracts, s.* 171.

Some of the factors so far discussed suggest that the new promise should be enforced; others that it should not be enforced. It is of course possible that two or more of them will occur in the same case, and that they will pull in opposite directions. For example, the victim of a harsh bargain might deliberately break or threaten to break his contract and by this means obtain a promise of more favourable terms. Or a debtor who is perfectly well able to pay may demand a reduction of his debt because the commercial impact of the original contract has been seriously affected by supervening events. These are cases of great difficulty. The task of weighing these conflicting factors is a delicate one; but-it seems that in most cases of this kind the new promise should probably be enforced. The English rules with regard to duress, duty of disclosure, frustration and mistake are very narrow. To extend them might well cause uncertainty. But this is not a strong argument where the parties themselves have reopened the transaction. In such a case their new agreement should be enforced unless it was clearly obtained by improper pressure.

It remains to see just how the necessary safeguards could be introduced. One possibility might be to resurrect the "public policy" argument of *Harris* v. *Watson;*[30] but this might fail because of the current objections to introducing "new heads" of public policy. Nor does there seem to be much chance of persuding the courts to introduce the American idea of "economic duress,"[31] since the scope of duress and even of undue influence in English law is, on the authorities, very narrow. If an agreement made under "duress of goods" is valid, the same rule probably applies to the sort of "duress" here under discussion. It is true that money paid under duress of goods can be recovered back.[32] But that rule does not invalidate promises to pay under duress of goods[33] and probably does not apply where money is first promised and then paid. It could, perhaps, be argued that a new promise obtained by a threat to break the old had been obtained by intimidation. The question whether such a threat was actionable as a tort at the suit of one contracting party against the other was left open in *Rookes* v. *Barnard;*[34] but even if no tort is committed it could still be argued that the intimidation provided a defence to an action on the new promise. It is of course very doubtful whether such an argument would be accepted; and even if it were it would only solve part of the problem. There may be other forms of improper pressure than threats of wrongful acts. There is, for example, nothing

30. *Supra,* p. 4.

31. Williston, *Contracts,* (rev. ed.), s. 1618; Corbin, *Contracts,* s. 171; *Hazelburst Oil Mill & Fertilizer Co.* v. *U.S.,* 42 P. 2d 331 (1930); *Bither* v. *Packard,* 115 Me. 306, 98 A. 929 (1916) (perhaps an extreme case); *cf.* Restatement, *Contracts,* s. 492 Comment g, suggesting that duress may include acts or threats "in violation of a contractual duty."

32. *Astley* v. *Reynolds* (1731) 2 Str. 915; *Maskell* v. *Homer* [1915] 3 K.B. 106.

33. *Atlee* v. *Backhouse* (1836) 3 M. & W. 633 at p. 650; *Skeate* v. *Beale* (1841) 11 A. & E. 983 at p. 990.

34. See [1964] 1 All E.R. at pp.386, 399, 400; Hamson, [1964] C.L.J. 159 at p. 168; Hoffmann (1965) 81 L.Q.R. 116 at p. 128; *cf. Stratford* v. *Lindley* [1964] 3 All E.R. 102 at p. 107.

in the reports of *Stilk* v. *Myrick* to show that the men made any threats at all.

Thus it seems unlikely that the courts will be able to develop adequate safeguards against extortion at common law. It would be better to provide them by legislation. This could either enumerate specific safeguards; or, preferably, it could give the courts specific statutory authority to develop them. It could, for example, provide that the new promise (or release) should be binding unless the promisee had taken unconscionable advantage of the promisor in obtaining it.[35] Our suggestions as to the factors which should be taken into account are necessarily tentative as these factors have been so little discussed in England. But they do seem to provide a better basis than the present law for distinguishing between the cases in which the new promise should and those in which it should not be enforced. For they at least try to recognize the policy questions involved instead of shifting mysteriously between theories of factual and legal benefit.[36]

F. M. B. REYNOLDS*

G. H. TREITEL†

35. *Cf.* Money-lenders Act, 1900, (63 & 64 Vict., c. 51), s. 1; and see Uniform Commercial Code s. 1-107, which provides for discharge without consideration. The comment adds that this provision "must be read in conjunction with the section imposing an obligation of good faith (s. 1-203)." In the United States wider rules relating to duress make statutory safeguards less important than they would be in England.

36. We should like to acknowledge our indebtedness to the writings on this subject of Professor Malcolm P. Sharp of the University of Chicago Law School.

* B.C.L., M.A. (Oxon.); of the Inner Temple, Barrister-at-Law; Fellow, Worcester College, Oxford.

† B.C.L., M.A. (Oxon.); of Gray's Inn, Barrister-at-Law; Fellow, Magdalen College, Oxford; All Souls Reader in English Law.