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CONTRACTS — CONSIDERATION —PRE-EXISTING DUTY

Plaintiff— mortgagor sued on an oral promise by the defendant — mortgagee to refund accrued interest paid by the plaintiff simultaneously with prepayment of the principal amount of a debt. The debt was evidenced by a note and secured by a mortgage. The pre-payment was pursuant to a right expressly reserved to the mortgagor in the mortgage. *Held,* the alleged promise to refund was unenforceable for lack of consideration. *Casa Marina Hotel Co. v. Barnes, 105 So.2d 204 (Fla. App. 1958).*

The question of the validity of a subsequent agreement involving as consideration a *pre-existing duty* is by no means a recent one. The earliest allusion to that effect is the remark of Judge Danver in 1455[1]: "Where one has a quid pro quo, there it shall be adjudged a satisfaction. As if one be indebted to me in 40 pounds and I take from him 12d. in satisfaction of the 40 pounds, in this case I shall be barred of the remainder." Consequently, under this venerable principle, defendant's promise to refund part of the payment in satisfaction of a pre-existing debt would be enforceable. At the beginning of the 17th century[2] the doctrine of consideration did not exist, and the action of indebitatus assumpsit was in its embryonic stage[3]. If it then appeared to the judges that a lesser sum could not possibly be a satisfaction for a greater, that conclusion was based only on arithmetical reasoning: "A part cannot be the whole, ten cannot be twenty."[4] The distinction was made that an object, other than money, could satisfy the debt if such was the agreement between the parties, because the different object was something new to the promise.[5] With the appearance of contracts as separate legal entities, some courts properly distinguished between prepayment as a mere satisfaction of a debt and as consideration for an agreement of settlement.[6] True, that artithmetically ten did not amount to twenty, but legally if ten was given as the consideration of an agreement, that promise was valid and enforceable. A false gloss by Lord Ellenborough in the beginning of the 19th century[7] was perhaps

1. Y.B. 33 Hen. 6 f.48, pl.32 (1455).
2. Pinnel's Case, 5 Eng. Rep. 117 (S.C. 1602).
3. For a complete study on the history of the doctrine of consideration, see Ames, *Two Theories of Consideration,* 12 HARV. L. REV. 515 (1899).
4. *Id.* at 521.
5. The distinction was criticized in its own day by saying that "A creditor might take a horse or a canary or a tomfit, if he chose, and that was accord and satisfaction; but by a most extraordinary peculiarity of the English Common Law, he could not take 19s.6d. in the pound; that was nudum pactum . . . . That was one of the mysteries of the English Common Law." Couldery v. Bartrum, 19 Ch.D. 394,399 (1890).
6. As Lord Coke expressed it in Bagge v. Slade, 3 Bulst. 162 1 Roll.R. 354, Jenk. Cent. Cas. 324 pl. 38, Harv. Ms.R.Temp. 14 James I., 2, S.C. (1600): "If a man be bound to another by a bill in 1000 pounds and he pays unto him 500 in discharge of the bill, the which he accepts accordingly, and doth upon this assume and promise to deliver up unto him the said bill of 1000, this 500 is no satisfaction of the 1000 pounds, but yet this is good and sufficient to make a good promise and upon good consideration, because he has paid money, and he hath no remedy for this again." See also Reynolds v. Pinhowe, 1 Roll. Ab. 28, pl.54, Moo.412 S.C. (1595): "It is valid because speedy payment excuses and prevents labor and expense of suit".
7. Fitch v. Sutton, 5 East 230 (1804).

the determining fact in the complete deviation from Judge Danver's remark.[8] The satisfaction of a debt was lamentably confused with an agreement purporting to effectuate it. Finally, some additional requirement appeared, something collateral in the nature of a benefit to the party relinquishing his further claim, otherwise the agreement was nudum pactum[9]. Thereafter the application of the "pre-existing duty" rule became almost uniform throughout the common law system[10], notwithstanding occasional reticence from scholars.[11]

The instant case is an exponent of the majority rule in common law countries and especially in the United States. Specifically it is stated that "the doing or promising to do what one is legally bound to do is not a valid consideration to support the new agreement."[12] As mentioned in the preceeding paragraph, this conclusion can only be supported by a major premise holding as consideration a benefit accruing to the promisor or a detriment incurred by the promisee.[13] The indiscriminate application of the pre-existing duty rule as a corollary of the doctrine of consideration (which of course it is not),[14] has led to innumerable hardships in regard to mutual assent if manifested in a subsequent modifying agreement. To alleviate the situation several escape doctrines are being utilized by the courts. Some courts distinguish (as was done by the mediaeval judge)

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8. Y.B.33 Hen. 6 f.48,; 1.32 (1455).
9. Fitch v. Sutton, 5 East 230 (1804).
10. Ames, *supra* note 3, at 523. See a cases cited *infra* note 12.
11. "The application of the pre-existing duty involves either an error of fact or of logic. The performance of the duty is a consideration in fact because a bird in hand is worth much more than a bird in the bush, and that is why the promisor bargains to get more in order to get it. But if it is granted that the performance is a benefit in fact to the promisor, and perhaps a detriment in fact to the promisee, then the statement that nevertheless there is no "legal benefit" or "legal detriment" is an error of logic because it is merely saying that the performance of a duty is not a legally operative consideration because it is not a consideration that is legally operative . . . ." 1 CORBIN CONTRACTS 550-630 (1950).
12. The rule was first stated in Pinnel's Case, 5 Eng. Rep. 117 (S.C. 1602). Followed in Foakes v. Beer, 9 App. Cas. 605 (1884) it was spread throughout the common law world. A glance through some American jurisdictions will show the prevalence of the pre-existing duty rule. *Ala.*: Life & Casualty Ins. Co. of Tenn. v. Powell, 235 Ala. 537, 180 So.559 (1937). *Fla.*: Blain v. Howard, 144 Fla. 421, 198 So. 80, 81, (1940); Hogan v. Supreme Camp of American Woodmen, 146 Fla. 413, 1 So.2d 256, 258 (1941). *Ky.*: Nuckols v. Nuckols, 293 Ky. 603, 169 S.W.2d 828 (1943); *Mass.*: Emerson v. Deming, 304 Mass. 405, 23 N.E. 2d 1016 (1939); Knight v. Farren, 313 Mass. 406, 47 N.E.2d 949 (1943); *N.J.*: Wilentz v. Hendrickson, 133 N.J. Eq. 447, 33 A.2d 384 (1940); Levine v. Blumenthal, 117 N.J.L.426, 189 Atl. 54 (1937). *N.Y.*: Pape v. Rudolph Bros. Inc., 257 App. Div.1032, 13 N.Y.S.2d 781 (1939); Davison v. Klaess, 280 N.Y. 252, 20 N.E.2d 744 (1939). *Ohio*: Heidelberg College v. Natl. City Bank of Cleveland, 65 Ohio App. 212, 29 N.E. 2d 572 (1940). On the prevalence of the pre-existing duty problem in the United States see Hvighurst, *Consideration, Ethics and Administration*, 42 COLUM. L. REV. 25 (1942). For a recent English study on the same problem, see Comment, 101 SOL. L.J.292 (1957). For Australia's law see note in 7 RES JUDICATAE 382,384 (1957).
13. 1 WILLISTON, CONTRACTS §§ 103 b, 131 (Rev. ed. 1936); RESTATEMENT, CONTRACTS § 76 (1932).
14. Ames, *supra* note 3 at 521.

between the old terms and the inclusion of something "new"[15]; others have avoided the strictness of the rule by being liberal on the determination of the sufficiency of the benefit to the promisor, their rationale being shaped by public policy.[16] Finally, on certain conditions, the element of consideration has been dispensed with by statutes enacted in about a dozen states.[17]

The ancient confusion rejecting a pre-existing duty as a basis for consideration is evident in the present decision. Logically the reasoning of the court applied to the facts is incongruent. For, if the oral agreement is held invalid for lack of consideration (no sufficient benefit to the promisor), on what basis is the defendant allowed to retain the prepayment? Apparently it is based on the terms of an agreement extending the *time* of the original note.[18] However, this extension agreement or clause if tested under the benefit-detriment and pre-existing duty rules, would also be invalid for lack of consideration. For, the court made it clear that pre-payment in no way benefited the defendant (when it invalidated the oral promise to refund accrued interest paid simultaneously with principal). On the other hand if the benefit, so repeatedly mentioned by the court, was the payment of an excess of interest would it not be in violation of the terms of the extension agreement expressly prohibiting the imposition of penalties on prepayment? The court bluntly rejects any distinction and

15. A typical court construction of the term "new" may be found in: Schwartzreich v. Bauman-Basch, Inc., 231 N.Y.196, 131 N.E. 887 (1921): Such elements as time and place of performance may constitute something new. See also 1 WILLISTON, CONTRACTS *supra* note 13 at 521, supporting the rescission view: "[A] rescission shortly followed by a new agreement in regard to the same subject matter would create the legal obligations provided in the subsequent agreement."

16. Adamson v. Bosick, 82 Colo. 309, 259 Pac. 513 (1927). See also Frye v. Hubbell, 74 N.H.358, 68 Atl. 325 (1925).

17. Some states make acceptance by the obligee of actual part performance by the obligor a sufficient discharge or modification by way of rescission of the original agreement: GA. CODE ANN. §§ 20-1204 (1935): "Actual payment of smaller sum, not promise to pay, may discharge larger debt"; ME. REV. STAT. § 65, ch. 100 (1944): "No action may be maintained on demand settled in full discharge by payment of any money or valuable consideration however small"; N.C. GEN. STAT. §§ 1-540 (1943): "Payment of lesser sum discharges greater when parties so agree"; VA. CODE § 5765 (1943): . . . ."Part performance of the obligation if expressly accepted by the creditor in writing, though without any new consideration extinguishes the obligation". Same language may be found in CAL. CIV. CODE §§ 1524 (1933); MONT. REV. CODE § 7459 (1935); N. D. REV. CODE § 9-1307 (1935). In N.Y., if the agreement is in writing, signed by the party to be bound, consileration is no longer necessary, N.Y. PERS. PROP. LAW §§ 33(2). For a complete picture of the statutory law of consideration in the United States and its effects on the pre-existing duty, see Note, 47 COLUM. L. REV. 431 (1947). For a comparative law analysis, see Lorenzen, *Causa and Consideration in the Law of Contracts*, 28 YALE L.J. 621 (1919); see also study by Prof. A. A. Schiller, *The Counterpart of Consideration in Foreign Legal Systems*, REP. N.Y. LAW REV. COM. 183 (1936). Specifically in relation to the pre-existing duty problem, see Kozolchyk, *La Relatividad de los Principios Juridicos en el Derecho Comparado*, BOLETIN DEL INSTITUTO DE DERECHO COMPARADO, Mexico, Diciembre (1958).

18. Subsequent to the original agreement, but prior to the oral promise to refund by the defendant an extension to the original note was granted to the plaintiff on the following terms: "[T]he first party reserves the right to prepay all or any part of the principal or interest at any time without notice and without penalty." Casa Marina Hotel v. Barnes, 105 So. 2d 204, 205, (Fla. 1958).

ignores all mitigating doctrines.[19] Being absolutely convinced of the axiomatic nature of the benefit — detriment pre-existing duty rules it states that even under the most favorable statement of facts, the defendant would still be entitled to judgement as a matter of law.[20] This is certainly the creditor's panacea: It will be applied to stop the enforcement of the agreement which on its face is prejudicial to the creditor, yet it should be forgotten if its application would mean that the creditor is not to retain an otherwise invalid payment. Whatever the just solution of the instant case ought to be, the path chosen by the court is not precisely the one best suited to meet the demands of modern commerce. Businessmen have a peculiar approach as to what may constitute benefit or detriment. The transactions usually entered into, by their very nature reject distinctions as unrealistic as the one utilized by the court. What most of the courts fail to discover when dealing with pre-existing duties is that far from being in an area where the law is an inexorable command, they are within the realm of moral obligations.[21] Therefore, the element of *bargain* should prevail over the ambiguity of *benefit*. Consideration should not mean more than "any act or forbearance in exchange for a promise."[22]

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19. Adamson v. Bosick, 82 Colo. 309, 259 Pac.513 (1927); Frye v. Hubell, 74 N.H. 358, 68 Atl. 325 (1925).

20. Casa Marina Hotel Co. v. Barnes, 105 So. 2d 204 (Fla. App. 1958).

21. See Comment, 101 SOL. L.J. 292 (1957).

22. See Ames, *supra* note 3 at 539, which is also the view adopted by the English Law Revision Committee Recommendations, 6th Rep. (1937).