IN SUPPORT OF FOAKES v. BEER

> ... payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to the Judges that by no possibility, a lesser sum can be a satisfaction to the plaintiff for a greater sum:

This is, of course, the rule which was laid down by all the judges of the Common Pleas in *Pinnel's Case*[1.] and which was applied by the House of Lords in *Foakes* v. *Beer.*[2.] Although *Pinnel's Case* was an action in debt, the rule is now generally regarded as an elaboration of two contractual rules: first, that a contract cannot be discharged by agreement unless the agreement is supported by consideration, and secondly, that performance of an existing contractual duty owed to the promisor is no consideration.[3.]

Cheshire & Fifoot,[4.] Anson[5.] and Pollock[6.] each condemn the rule in *Pinnel's Case.* Judicial hostility is evidenced by the development of the *High Trees House* doctrine which, in the form in which it is propounded by Lord Denning,[7.] carves substantial and uncertain exceptions out of the rule. However there have been recent indications that the *High Trees* doctrine may in the future be confined within more manageable limits;[8.] it is therefore appropriate to examine afresh the rule in *Pinnel's Case.*

The following are the criticisms which are commonly advanced against the rule:

1. It is based on a mistake of fact.[9.]
2. It is undesirable on grounds of policy.[10.]
3. It ignores commercial convenience.[11.]
4. It is illogical.[12.]
5. It is harsh.[13.]

Each will be considered in turn.

In *Foakes* v. *Beer,*[14.] it will be recalled, the facts were these: Mrs Beer had obtained a judgment against Dr Foakes. He asked for time to pay and she agreed in writing that, if he paid the debt by instalments, she would "not take any proceedings whatever on the said judgment". Dr Foakes paid the whole amount of the debt by the agreed instalments, but not the interest which was payable by statute on

judgment debts; Mrs Beer applied to the Court to proceed on the judgment for the interest. The House of Lords held that Mrs Beer's promise was ineffective as a discharge because it was given without consideration. Their Lordships applied the rule in *Pinnel's Case:* a debt cannot be discharged by payment of a lesser sum on (or after) the day.

1. IS THE RULE BASED ON A MISTAKE OF FACT?

Lord Blackburn's speech in *Foakes* v. *Beer* [15] sets out at length his reasons for considering that the rule in *Pinnel's Case* could and should be overruled. In his view the rule was based on a mistake of fact: [16]

> What principally weighs with me in thinking that Lord Coke made a mistake of fact is my conviction that all 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 is often so. Where the credit of the debtor is doubtful it must be more so.

Nevertheless Lord Blackburn concurred in the House's motion because his reasons "were not satisfactory to the other noble and learned Lords who heard the case". [17] Nor are they satisfactory to the present 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. It is the latter fact upon which the rule in *Pinnel's Case* is based.

2. IS THE RULE UNDESIRABLE ON GROUNDS OF POLICY?

> Suppose that:
> Debtor owes £20 to Creditor. Debtor has £15 available to pay the debt. He approaches Creditor with this proposal: "I shall pay you £15 if you will let me off the balance of my debt; otherwise I shall pay you nothing".

It is submitted that the law should not be too anxious to uphold this kind of transaction. If Debtor has £15, he should pay it to Creditor; he should not use the money as a device for bargaining a concession from Creditor.

> Suppose that:
> Supplier contracts to supply a quantity of scarce building materials to Builder who is constructing a building under contract and relying on the materials.

Supplier, finding that he can sell some of the materials at a higher price elsewhere, tells Builder that he is only prepared to supply 75% of the full quantity. But, adds Supplier, "I demand the full contract price and, if you will not agree, I shall supply no materials at all".

Builder might well feel that he has to yield to this demand. Some materials would enable construction to continue and might prove more profitable, or, rather, less disastrous, than a right of action for damages against Supplier. (Precisely the same kind of pressure could be used by Supplier to extract a higher price for the correct quantity of materials.) Under the rule in *Pinnel's Case*, if Builder does accept the proposal, the law will not hold him to the arrangement because the consideration is illusory. Once again, it is not at all clear that the law should be changed to authorise this kind of extortion.

In the last example, Supplier is in the better bargaining position. Critics of the rule in *Pinnel's Case* seem to assume that the creditor is always in the better bargaining position. In fact this is rarely true. Not only are some debtors (e.g., insurance companies) financially strong, but those who are financially weak retain a powerful bargaining advantage, namely, the difficulty of enforcing a debt against a determined debtor. Because of this difficulty, creditors eventually feel bound to accept virtually any terms as to payment which their recalcitrant debtors offer. The law need not provide any more weapons for the debtors' armoury: it should not encourage debtors to bargain for a reduction of their debts.

It has been suggested that, if the rule in *Pinnel's Case* were abolished, the more unsavoury agreements could be held invalid as being contrary to public policy.[18] But the "unruly horse" of public policy is a notoriously uncertain method of control. The existing certainty of the rule in *Pinnel's Case* is not a quality to be lightly discarded.

3. DOES THE RULE IGNORE COMMERCIAL CONVENIENCE?

It would of course be deplorable if it were impossible for a creditor to make a gift of part of a debt to his debtor.[19] But a gratuitous reduction of debt is effective if given by deed or for a nominal consideration. In New Zealand, in addition, s. 92 of the Judicature Act 1908 provides that where there is a written acknowledgment by the creditor of the receipt of a part in satisfaction of the whole debt, the debt is discharged. The law permits the transaction so long as a simple formality is complied with; "nor is it really unreasonable or practically inconvenient that the law should require particular solemnities to give a gratuitous contract the force of a binding obligation". This comment by the Earl of Selborne L.C. in *Foakes* v. *Beer* [20] is as relevant today as it was in 1884.

It has been argued by S.J. Stoljar [21] that the rule in *Pinnel's Case* does not preclude a debtor from making a gift of the debt without any special formalities. According to Stoljar, "in *Foakes* v. *Beer* Julia Beer had certainly no intention of making a gift to her debtor; had she expressly made such a gift, there would have been enough authority to hold her to it". [22] The footnote which accompanies this statement is disappointing: Stoljar admits that "such gift-discharges are more recognised in American than in English law" and he cites only 5 *Corbin on Contracts* s. 1247. [23] Turning to Corbin one finds that, although Corbin argues for the validity of informal gift-discharges, he is able to produce only slender American authority. Furthermore, Corbin's and Stoljar's reasoning is quite unconvincing. It may be accepted that Julia Beer had no intention of making a gift to her debtor. [24] But the *ratio decidendi* of *Foakes* v. *Beer* proceeds on the basis that the agreement which she signed, on its true construction, did expressly forgive the interest; only on this basis was there any need to consider the rule in *Pinnel's Case*. Corbin and Stoljar, therefore, are urging that the effectiveness of a document which purports on its face to be a discharge depends on the subjective intention of the putative donor.
Stoljar says:

> Thus there is a clear distinction between (i) a creditor who accepts less than the sum due either somewhat unwillingly or *faute de mieux*, and (ii) a creditor who accepts a lesser amount yet accepting this quite deliberately either by way of a gift to the debtor or by deliberately or formally [*sic*] releasing the debt. [25]

Any document which purports to be a discharge is therefore ineffective if it was signed "somewhat unwillingly or *faute de mieux*," but is effective if it was signed "deliberately either by way of a gift to the debtor or by deliberately or formally releasing the debt". Stoljar does not indicate what the law is in cases (perhaps the most frequent) where the forgiveness is unwilling **and** deliberate. In fact Stoljar's "clear distinction" is thoroughly obscure. It is submitted that the distinction will not and should not be accepted by the courts; under the guise of merely recognising a gift, it introduces subjective refinements into the English law of contract which the law has hitherto steadfastly eschewed. It may be safely surmised that the courts will continue to deny effect to an accord without satisfaction: an informal release or reduction of a debt is ineffective unless some new consideration is given by the debtor.

4. *IS THE RULE ILLOGICAL?*

The requirement of consideration for the discharge of contracts by agreement has been assailed as illogical. Cheshire and Fifoot's approach is typical: [26]

> A plaintiff who sued in assumpsit was required to prove consideration

> for the defendant's undertaking, but there was no logical need to lay a similar burden upon a party who sought to use a promise only by way of defence. The presence of consideration was vital to the formation of a contract but irrelevant to its discharge.

Cheshire and Fifoot even imply that *Foakes* v. *Beer* was wrongly decided because of failure of the House of Lords to grasp this self-evident truth. They point out that Dr Foakes [27].

> was setting [the agreement] up by way of defence to her application for leave to proceed on the judgment. He was therefore under no necessity to establish a contract and the question of consideration was irrelevant. The learned lords concentrated upon the wrong issue.

But, although Dr Foakes was a defendant, he still had to establish that his liability to pay interest had been discharged. Cheshire and Fifoot never explain why an agreement designed to **discharge** an obligation should be governed by different rules from an agreement designed to **create** an obligation. It is submitted that the House of Lords was right in holding that both kinds of agreements are governed by the same rules: as long as the English law of contract does not allow a gratuitous promise to create an obligation there is no logical reason for allowing a gratuitous promise to discharge an obligation.

5. IS THE RULE HARSH?

Was the result in *Foakes* v. *Beer* harsh? Surely not: all Dr Foakes asked from Mrs Beer was time to pay and this he received – it seems clear that the question of interest was overlooked by both parties. [28] It is hard to see why Dr Foakes should not pay interest. Even if there had been a deliberate waiver of interest by Mrs Beer, the case for relieving Dr Foakes from payment is still not very strong. There is no obvious reason why the law should favour a man who is excused money which he is bound to pay, any more than a man who is promised money which he has not earned. [29]

Of course, there are cases where a gratuitous concession has been acted on in such a way that it is impossible for the actor to resume his former position. In such cases the law certainly should, as it does, [30] provide a defence to the person who cannot now resume his position. But in cases where the only detriment suffered by the debtor is that he has to fulfil a legal obligation, from which he thought he was excused, it is submitted that the rule in *Pinnel's Case* is the best solution.

P. W. HOGG.

Since this article was submitted for publication, the Court of Appeal in England has pronounced on the question at issue. In *D & C Builders Ltd* v. *Rees* [31]. a debtor offered his creditor £300 in settlement of a debt for £482. 13. 1d. Otherwise the debtor refused to pay anything. The creditor who was in financial difficulties accepted settlement on these terms, but later sued to recover the balance outstanding.

The Court of Appeal unanimously held that the creditor was entitled to succeed. Lord Denning (with whom Danckwerts L.J. agreed) delivered the leading judgment and took an approach which has been critized by the writer of this article. He distinguished his earlier pronouncements in the *High Trees Case* on the grounds that the creditor's forgiveness of the debt was involuntary – the result of pressure from the debtor, and there was therefore no true accord. Winn L.J. on the other hand took the view advocated in this article that an agreement releasing the debtor from part of his obligation must be binding either under seal or because it is supported by consideration.

——————— – **Editor.**

FOOTNOTES

1. (1602) 5 Co. Rep. 117a; 77 E.R. 237.
2. (1884) 9 App. Cas. 605.
3. See, e.g., Cheshire & Fifoot, *Law of Contract*, N.Z. ed. (1961), 75.
4. *Law of Contract*, N.Z. ed. (1961), 76.
5. *Law of Contract*, 22nd ed. (1964), 104.
6. *Principles of Contract*, 13th ed. (1950), 150.
7. *Central London Property Trust Ltd.* v. *High Trees House Ltd.* [1947] K.B. 130; *Combe* v. *Combe* [1951] 2 K.B. 215, C.A.; A.T. Denning, *Recent Developments in the Doctrine of Consideration* (1952) 15 Mod. L.R. 1.
8. The most recent case is *Ajayi* v. *R.T. Briscoe (Nigeria) Ltd.* [1964] 1 W.L.R. 1326, P.C.; the most recent article is I.D. Campbell, *Gratuitous Waiver of Contractual Obligations* (1964) Vol. 1, No. 2, N.Z.U.L.R., 232.
9. *Foakes* v. *Beer* (1884) 9 App. Cas. 605, 622 *per* Lord Blackburn.
10. Anson, *Law of Contract*, 22nd ed. (1964), 104.
11. *Idem;* Cheshire & Fifoot, *Law of Contract*, N.Z. ed. (1961), 77.
12. Cheshire & Fifoot, *Law of Contract*, N.Z. ed. (1961), 76; Pollock, *Principles of the Law of Contract*, 13th ed. (1950), 150.
13. Atiyah, *Introduction to the Law of Contract* (1961), 71 ("extreme injustice"); *Chitty on Contracts*, 22nd ed. (1961), 68 ("the seemingly harsh rule"); Leys and Northey, *Commercial Law in New Zealand*, 2nd ed. (1961), 59 ("most unfortunate results").
14. (1884) 9 App. Cas. 605.
15. *Ibid.*, 614.
16. *Ibid.*, 622.

17. *Ibid.*, 623.

18. Law Revision Committee, *Sixth Interim Report*, Cmnd. 5449, para. 36; see also C. J. Hamson, *The Reform of Consideration* (1938) 54 L.Q.R. 233, 240 and K. O. Shatwell, *The Doctrine of Consideration in the Modern Law* (1954) 1 Sydney L.R. 289, at p. 308.

19. Atiyah seems to regard this point as the main criticism of the rule: *Introduction to the Law of Contract*, (1961), 71.

20. (1884) 9 App. Cas. 605, at p. 613.

21. *The Discharge of Contracts by Agreement* (1959) 3 U. of Qld. L.J. 356, 375.

22. *Idem.*

23. *Ibid.*, n. 129

24. *Foakes* v. *Beer* (1884) 9 App. Cas. 605, at p. 610 *per* Earl of Selborne L.C. Lords Watson and FitzGerald not only considered that Mrs Beer did not intend to relinquish her right to interest, but also refused to so construe the agreement: (1884) 9 App. Cas. 605, 623 (Lord Watson) and 626-627 (Lord FitzGerald). However, on the basis that the agreement should be so construed, they each held that the rule in *Pinnel's Case* should be applied.

25. *The Discharge of Contracts by Agreement* (1959) 3 U. of Qld. L.J. 356, at p. 375.

26. Cheshire & Fifoot, *Law of Contract*, N.Z. ed. (1961), 76. This view is reiterated on pages 78 and 83.

27. *Ibid.*, 84

28. See n. 24, *ante.*

29. This point is made, but rejected, by Anson: *Law of Contract*, 22nd ed. (1964), 104.

30. *Ajayi* v. *R.T. Briscoe (Nigeria) Ltd.* [1964] 1 W.L.R. 1326, P.C.

31. [1966] 2 W.L.R. 288; [1965] 3 All E.R. 837.