Rationale of Past Consideration and Moral Consideration

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RATIONALE OF PAST CONSIDERATION AND MORAL CONSIDERATION*

CONSIDERATION in Anglo-American law may involve three fact situations: first, contemporaneous facts; second, subsequent facts; and third, antecedent facts. Where contemporaneous facts are involved, the bargain theory of consideration, if any, is adopted. Where subsequent facts are involved, the injurious and justifiable reliance theory, if any, (or promissory estoppel) is adopted. Where antecedent facts are involved, the theory of moral consideration, if any, is adopted. ¹a

This article is concerned only with antecedent facts as consideration. Antecedent facts for such purpose may be classified as:

1. where there is a precedent debt still alive at the time the promise is given;
2. where there was a precedent debt but it is no longer alive at the time the promise is given;
3. where there were prior pecuniary benefits but no precedent debt for which the promise is given;
4. where there was past consideration but no pecuniary benefits or precedent debt for which the promise is given;
5. where the consideration, apparently past, was given at request; and
6. where antecedent privileges and powers are given up, or waived, by a promise. Each one of these antecedent fact situations will be discussed in the order named.

Where the precedent debt is still alive, the recovery is on such precedent debt. There is no need of a new contract. Even though a new promise is made, it adds nothing to the original liability. It is true that some early cases in the seventeenth century held that precedent debt was consideration for a new express promise to pay

* The Restatement of the American Law Institute, §§85-89, covers only classes one and two discussed herein. It simplifies the law by classifying these kinds of promises “as contracts without assent or consideration.” This classification gets a good result but it will have to be called simplification rather than rationalization. The cases do not rationally support this simplification and the Restatement itself gives no explanation. Of course it is apparent that in this type of case, there has been no agreement, but the courts have been in the habit of saying that there is moral consideration. Even though the Restatement correctly simplifies the law, rationalization is also needed.

¹a Cf. comment to §366, Restatement of Law of Contracts. (Ed.)
such debt, so that general assumpsit would lie on such promise.¹ But Slade’s Case² held that wherever there was a precedent debt the law would imply a promise to pay it, and that general assumpsit would lie. This case shows that the making of an express promise had no extra operative effect. The case of Rann v. Hughes³ held that a precedent debt would be consideration for no other promise than the law would imply; that is, it would be consideration for no promise to do any new and different thing from what a person was already under legal obligation to do,⁴ and such existing or precedent debt is not consideration for a promise of a third person to pay it.⁵ The effect of all of these cases was not to make precedent debt consideration for a new promise, whether express or implied, but to make the action of general assumpsit available where formerly debt only had been available; that is, to make the action of general assumpsit concurrent with debt on the old original debt. Both the promise and the consideration were fictitious. The form was seized upon to allow recovery in certain cases where it was desired not to use the action of debt.⁶ If precedent debt had really been the consideration and if recovery in general assumpsit had really been upon the new promise, express or implied, precedent debt should be held to be sufficient consideration for promises to do other things than to pay the precedent debt.

For this reason, this class of antecedent facts can be disregarded. They do not create any new contract, because the old contract adequately covers the ground of liability.

Suppose that the original precedent debt is one created by a voidable contract, either because made by an infant or because procured by fraud, duress or undue influence. What should be the rationalization? Is the person who has the power of avoidance liable after he makes a new promise to pay in spite thereof, because such new promise creates a new contract, or because of the original

¹ Edwards v. Burre, Dal. 104, pl. 45 (1573); Babington v. Lambert, Moore K. B. 854 (1617); Janson v. Colomore, 1 Rolle 396 (1617); Hodge v. Vavisor, 1 Rolle 413 (1617); Howlet’s Case, Latch 150 (1624); Barton v. Shirley, 1 Rolle’s Abr., 12, pl. 16 (1639).
² 4 Coke 92B (1602).
³ 7 T. R. 359 (1778).
⁴ Young v. Ward, 33 Me. 359 (1851).
contract? The better rationalization is that he is liable because of the original contract. Some cases have held him liable on the new promise. When they have done this, they have held the consideration to be moral consideration of Class 2, presently to be considered. But the better explanation is that the party is liable on his old original contract or promise. At the time of the making of this promise or contract, the law, because of infancy, fraud, duress, or undue influence, gave the party under legal incapacity or upon whom fraud, physical restraint or moral constraint were practiced, the privilege and the power of disaffirming such contract. This was a power created by the law not because of the contract, but because of these exterior circumstances. The contract itself still continued to be a contract, although a voidable contract. By the exercise of his power, the party having it could terminate the contract, of course; but so long as he did not exercise his power, the contract continued. By making a new promise, he gives us his power of avoidance or "waives" the defense of infancy, fraud, duress, or undue influence which the law gave to him. When he so gives up his power of avoidance or "waives" his defense, he is liable on his original contract, as he would have been if he had not pleaded such defense; only now he has lost his power to plead such defense or to avoid the contract. By this explanation, voidable contracts are assimilated to the cases classified together in Class 1, above discussed. It is true a new promise by the infant is required. A mere acknowledgment is not sufficient, although it would seem that under this explanation an acknowledgment ought to be enough. Probably the reason why it is not is because of the desire to favor infants. Of course, if the infant is discharged from liability by the running of the Statute of Limitations or by a discharge in bankruptcy and he should promise to pay his former debt or obligation, his liability would have to be grounded on his new promise supported by moral consideration, and in that case there would be another illustration of the situation discussed under Class 2 below. Suppose the infant should

7 Merriam v. Wilkins, 6 N. H. 432 (1833); Edgerly v. Shaw, 25 N. H. 514 (1852).
8 Hunt v. Massey, 5 B. & Ad. 902 (1834); Williams v. Moor, 11 M. & W. 256 (1843); West v. Penny, 16 Ala. 186 (1849); Hodges v. Hunt, 22 Barb. 150 (N. Y. 1856). See Class 6, supra. But cf. §89 of the Restatement.
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disaffirm his voidable contract while a minor and after becoming an adult should again promise to discharge his prior legal duty. For example, suppose that an infant should buy an automobile and promise to pay $3,000 for it, that the automobile is delivered to him and he, in a state of intoxication, should completely ruin it and should drop it into a river or quagmire where it cannot be found, and that thereafter he disaffirms his obligation to pay the $3,000, but after becoming of age, he changes his mind and promises to pay the man who sold him the automobile the $3,000 which he originally promised to pay. If he is to be held liable, it would have to be upon this new promise, and the consideration for it, if any, would be moral consideration where there once was a precedent debt. Would the law hold him liable on this promise? It would seem that it ought to hold him liable by analogy to the Statute of Limitations and bankruptcy cases. The case is not like the case of a gift to the promisor and a later promise by the promisor. This also would then be another illustration of Class 2.

The Uniform Negotiable Instruments Act requires value to be given as a condition of liability, but it defines value either as that which is consideration for an informal contract or a pre-existing or antecedent debt. The statement as to a pre-existing or antecedent debt is ambiguous. It might refer to an antecedent debt which is still alive or to one which is no longer alive or to both, but it is authority for the proposition that an antecedent debt in some form is recognized as consideration by the law of bills and notes.

Where there once was a precedent debt but it can not be sued on because it is no longer alive at the time of the promise because discharged by operation of law through the Statute of Limitations, or a discharge in bankruptcy, or a discharge of a surety, the person making a promise to pay such precedent debt is liable on this new promise because of the moral obligation still to pay such

11 Earle v. Oliver, 2 Ex. 71 (1848); Zavelo v. Reeves, 227 U. S. 625 (1913); Herrington v. Davitt, 320 N. Y. 162, 115 N. E. 476 (1917); Willis v. Cushman, 115 Ind. 100, 17 N. E. 168 (1888).
12 Hurlburt v. Bradley, 94 Conn. 495, 109 Atl. 171 (1920); Rindge v. Kimball, 124 Mass. 209 (1878); Matchett v. Winona etc. Ass'n, 185 Ind. 128, 113 N. E. 1 (1916).
precedent debt when it has been discharged by a rule of law. In most of these cases the promisor has also received pecuniary benefits, but apparently the receipt of pecuniary benefits is irrelevant because promisors are liable in surety cases and some other cases though they have not received any pecuniary benefits.

The cases now under consideration cannot be rationalized as the cases considered under Class 1 have been, although in the nineteenth century many courts undertook to rationalize them that way.\(^1\) To hold as these cases did, it would be necessary to take the position that the rule of law involved gives the promisor a privilege and power to take advantage thereof (which would make these cases other illustrations of the type of cases considered under Class 6 below), but that it does not affect the right-duty relations of the parties. To say that the rule of law bars the remedy but not the primary right would not seem to be correct, because a primary legal right without a remedial legal right is a legal solocism. A primary right and a remedial right are merely the two hemispheres of one right. But the correct position is that the rule of law does more than simply give the promisor a privilege and power. It discharges all legal obligation whether primary or remedial. This is proven (a) by the fact that the precedent debt is not consideration for a new collateral promise, either by the promisor\(^2\) or by a third person;\(^3\) (b) by the fact that if the promise is conditional, it can be enforced only with the condition;\(^4\) (c) by the fact that in the case of judgments,\(^5\) specialties,\(^6\) and tort liabilities,\(^7\) there is no liability on the old obligations, but if there is any liability, as a few

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\(^1\) Carshore v. Huyck, 6 Barb. 593 (N. Y. 1849); Trask v. Weeks, 81 Me. 325, 17 Atl. 162 (1889); Way v. Sperry, 6 Cush. 288 (Mass. 1850); State Trust Co. v. Sheldon, 68 Vt. 259, 35 Atl. 177 (1896); Gillingham v. Brown, 178 Mass. 417, 60 N. E. 122 (1901).

\(^2\) Earle v. Oliver, 2 Ex. 71 (1848).

\(^3\) 13 C. J. 364, Note 53.


\(^5\) Nibleck v. Goodman, 67 Ind. 174 (1879); Olson v. Dahl, 99 Minn. 433, 109 N. W. 1001 (1906).

\(^6\) Crawford v. Childress' Exec'r, 1 Ala. 482 (1840); Fuller v. Hancock, 1 Root 238 (Conn. 1791); Ludlow v. Van Camp, 7 N. J. L. 113 (1823). The American Law Institute allows recovery on a new promise to pay an antecedent debt due under a sealed obligation. Section 86, Restatement of the Law of Contracts.

courts hold, it has to be on the new promise; (d) by the fact that the Statute of Limitations, etc., cannot be waived ahead of time without consideration, which means, of course, that thereby one would be giving up a right; (e) by the fact that the law will not create a quasi-contract; (f) by the fact that a new promise or a memorandum made after an action has been brought is insufficient; (g) by the fact that in many other cases to be referred to hereafter recovery is allowed on a new promise where there never was any precedent debt; and (h) by the fact that to create liability after a discharge in bankruptcy there must be a new promise—part payment or acknowledgment is not enough—and to create liability after a discharge of the Statute of Limitations, there also must be a new promise, though it is held it may be inferred from an acknowledgment.

In the case of the Statute of Limitations, it has been a rule of long continuance that so far as concerns land it is a statute of repose and transfers the right of the former owner to the adverse claimant. The same thing has been held for over fifty years with reference to corporeal chattels. By analogy it would seem that it should be held that after the running of the Statute of Limitations a debt is also discharged and that the debtor has now become the owner of his debt and the creditor has lost his right.

In the case of a discharge in bankruptcy whether it is voluntary

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22 Bateman v. Pinder, 3 Q. B. 574 (1842); Thornton v. Nichols, 119 Ga. 50, 45 S. E. 785 (1899); Bird v. Munroe, 66 Me. 337 (1877).
26 Price v. Lyon, 14 Conn. 279 (1841); Percy Bordwell, "Disseisin and Adverse Possession," 33 Yale L. J. 1, 141, 285 (1924).
28 Brown v. Parker, 28 Wis. 21 (1871); Pierce v. Seymour, 52 Wis. 272, 9 N. W. 71 (1881); Danforth v. Groton Water Co., 178 Mass. 472, 59 N. E. 1033 (1901); Portugese-American Bank v. Welles, 242 U. S. 7 (1916); 29 Yale L. J. 91; Cooley, Constitutional Limitations (5th ed. 1927) 599. See also Yarlott v. Brown, 132 N. E. 599 (Ind. 1921); reversed, 192 Ind. 648, 138 N. E. 17 (1923); 22 Col. L. Rev. 451 (1922).
or involuntary bankruptcy, the rule should be as strong as in the case of the Statute of Limitations. There is still a moral obligation to pay the old debt, but the legal obligation is entirely wiped out. In the case of a composition of creditors the situation is a little different from what it is in a discharge in bankruptcy. In a composition of creditors, both the moral obligation and the legal obligation are discharged on the theory that the creditors have made a gift to the debtor, unless the debtor reserves the moral obligation.

There is more doubt about the situation where a surety is discharged by operation of law. The Uniform Negotiable Instruments Act has two inconsistent provisions on this subject. Section 89 seems to be based on the theory that the surety is discharged. Section 109 seems to be based on the theory that he is simply given a privilege.

To the cases already discussed should be added the case discussed in Class 1 of a promise by a former infant after disaffirmance.

Where prior pecuniary benefits have been conferred on the promisor but there is no precedent debt, the promisor is liable on his subsequent promise, according to a strong minority viewpoint, because of the moral obligation to pay for such benefits. Recovery is allowed by these courts where there is no illegality, and where there has been illegality if the thing illegal is malum prohibitum but not if it is malum in se.

Enough illustrations of this class will be given to show what is the fact situation. In Bentley v. Morse, a promisor obtained a judgment by default and collected a debt after the debt had already

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29 Warren v. Whitney, 24 Me. 561 (1845).
31Bentley v. Morse, 14 John. (N. Y. 1817) 468; Edson v. Poppe, 24 S. D. 466, 124 N. W. 441 (1910); Muir v. Kane, 55 Wash. 131, 104 Pac. 153 (1909); Holland v. Martinson, 119 Kan. 43, 237 Pac. 902 (1925); Bagaeff v. Prokopik, 212 Mich. 265, 180 N. W. 427 (1920); Park Falls State Bank v. Fordyce, 206 Wis. 628, 238 N. W. 516 (1931); 16 Minn. L. Rev. 808. The rule seems to include cases where one performs a duty for the promisor. 13 C. J. 364.
32Usury: Barnes v. Hedley, 2 Taunt. 184 (1809); Early v. Mahon, 19 John. 147 (N. Y. 1821); Sunday: Campbell v. Young, 9 Bush. 240 (Ky. 1872); Cook v. Porker, 212 Pa. St. 461, 44 Atl. 560 (1899); Brewster v. Banta, 66 N. J. L. 367, 49 Atl. 718 (1901); Statute of Frauds; Davis v. Moore, 13 Me. 424 (1836).
33Binnington v. Wallis, 4 Barn. & Ald. 650 (1821).
been paid. In *Muir v. Kansas*, a party was the procuring cause of a sale of property belonging to the promisor. In *Edson v. Poppe*, the promisee conferred pecuniary benefits upon the land of the promisor at the request of his tenant when the tenant had no authority to make such request. In *Early v. Mahon*, the defendant borrowed money from the plaintiff at usurious interest which made the entire contract void, but the defendant later agreed to repay the principal. In *Brewster v. Banta*, the defendant made a note on Sunday for pecuniary benefits received when the Sunday law made the note void, and he later made an express promise to pay the note. In the usury and Sunday contract cases, illegality prevented there being a precedent debt so that there was nothing left but the receipt of pecuniary benefits. Where the common law held a former wife liable on her promise to perform a promise made when she was such wife though she had never received any pecuniary benefits, there was no basis for liability other than the moral consideration involved in the making of the promise, because at the common law there was no precedent debt. In the case of *Eastwood v. Kenyon*, the plaintiff conferred pecuniary benefits upon the estate of a young woman who was a minor. After becoming of age she promised to pay for these benefits and after her marriage her husband promised to pay for them. The court correctly held that the husband was not liable on his promise, because as to him there was neither a precedent debt nor pecuniary benefits received; but it would seem that the wife, except for the common law rule as to the contractual capacity of married women, ought to be held liable on her original voidable contract on the theory that she had waived her power of disaffirmance. Where the Statute of Frauds makes a transaction void there is, of course, no precedent debt, but wherever a promisor has received pecuniary benefits, the courts would undoubtedly hold him liable on the subsequent promise to pay therefor.

The moral obligation to pay for pecuniary benefits is so great that it is remarkable that it is not the universal rule to enforce a promise to pay therefor. It is probably the chief reason for the liability in the precedent debt cases, only the courts forgot to put the liability upon this ground. The fact that there is this moral obligation is proven by the fact that the law will create a quasi contract to pay for such pecuniary benefits where no promise is given.²⁴

²⁴King v. Brown, 2 Hill 485 (N. Y. 1842); Van Duesen v. Blum, 35 Mass. 229 (1836); Bailey v. Bussing, 28 Conn. 455 (1859); White v. Franklin Bank,
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This liability is also required in order to give meaning to the usual definition of consideration as benefit to the promisor or detriment to the promisee. The only place where benefit to the promisor is consideration is in the case of moral consideration. Under the bargain theory and the theory of injurious reliance, it must be detriment to the promisee. Hence, this definition which has been repeated through the years seems to countenance the theory that the conferring of pecuniary benefits upon the promisor should be recognized as having operative effect to create liability and therefore it is a second kind of moral consideration.

Of course, where the pecuniary benefits have been conferred by a gift, there never can arise any moral obligation to pay for them. 4

Where there has been past consideration but it has not conferred pecuniary benefits on the promisor or been in the form of a precedent debt, there is no moral obligation and no legal liability to pay therefor, whether the situation has been legal or illegal. 5 Detriment to the promisee is not enough. 6 Such a situation raises no more moral obligation than the mere making of a promise. Lord Mansfield evidently thought that moral obligation alone was sufficient consideration for a promise, 7 and some cases have followed Lord Mansfield in this respect, 8 but this is not the general rule in the United States. 9

Where the consideration, though given in the past, was given at request, either with a later promise or without such later promise, the one making the request or promise is liable in contract, but not

22 Pick. 181 (Mass. 1839); Duval v. Wellman, 124 N. Y. 156, 26 N. E. 343 (1891); liability in quasi contract alone is not enough because sometimes the amount of recovery might differ and sometimes the law might refuse to create a quasi contract even though benefits have been conferred.


38 Hawkes v. Saunders, 1 Cowper 289 (1775).

39 Lee v. Muggeridge, 5 Taunt. 36 (1813); Goulding v. Davidson, 26 N. Y. 604 (1863); Sharpless’ Appeal, 140 Pa. St. 63, 21 Atl. 239 (1891).

40 13 C. J. 360, Note 10.
on the theory of moral consideration, but on the bargain theory. The courts had some difficulty at first in rationalizing this situation and they therefore extended the action of general assumpsit rather than the action of special assumpsit to it, but they finally rationalized it as a situation where either the consideration continued down to the time of the promise or the promise related back to the time of the consideration. Today, of course, these cases would not be rationalized by such fictions as these, but the law would infer a promise from the request.

Where antecedent privileges and powers rather than rights are involved, nothing more than a promise or waiver is required. That is, a person may give up or waive a privilege or power by a mere statement to that effect just as he may create a privilege or a power by a mere statement. Here is a field from which waiver has not been driven, or "distributed." Illustrations of such privileges and powers are found most frequently in the case of casual conditions in contracts. But other illustrations of this are found in the privilege and power of avoidance of voidable contracts and in the privileges and powers created by offers. Where a right as distinguished from a privilege or power is involved, consideration is required; that is, a person cannot give up or waive a right by a mere statement to that effect. Hence, where a right is involved there must be at least the moral consideration discussed in Classes 2 and 3 above.

The writer takes the position that the effect of the Statute of Frauds is to prevent the making of a contract. As the result of the operation of the Statute of Frauds, the defendant has the privilege not to perform. If he has the privilege not to perform, the plaintiff has no right to have him perform. A contract is an ante-

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41 Sidenham & Worlington’s Case, 2 Leo. 224 (1585); Riggs v. Bullingham, Cro. Eliz. 715 (1600); Bosden v. Thinne, Yel. 40 (1603); Lampleigh v. Braithwaite, Moo. K. B. 866 (1616).
42 13 C. J. 360, Note 17.
44 See n. 8 supra.
45 Foakes v. Beer, L. R. 9 A. C. 605 (1884); Ewart, Waiver Distributed.
cedent right in *personam*. It is a right-duty relation. If the plaintiff has no right, the defendant owes no duty. That means that the Statute of Frauds prevents any contract. Therefore, there can be no cedent debt. If pecuniary benefits have been conferred in connection with the transaction, there is an illustration of the type of cases discussed under Class 3 *supra*. But even if no pecuniary benefits have been conferred and though there is no cedent debt, the defendant may impose a liability on himself by signing a memorandum. How is this to be rationalized? The rationalization is the same as that given immediately above; that is, that the law of privileges and powers is outside of the law of consideration as well as the law of agreement. There are many other privileges and powers and immunities created by an oral agreement within the Statute of Frauds. For example, suppose that the owner of real estate makes two separate oral agreements to sell the same real estate to different vendees. If he executes a conveyance to the second vendee, the latter, though he has notice of the prior oral agreement with the other vendee and though the vendor should later execute a conveyance to such vendee, can retain his title, because the vendor had the privilege not to perform his oral agreement and he has transferred this to the second vendee. If, however, the first oral agreement is validated by a memorandum prior to the conveyance to the second vendee, the first vendee will be protected against the second vendee with notice, because the vendor has exercised his power and given the first vendee a right. This and all of the other privileges, powers and immunities created by an oral agreement within the Statute of Frauds are therefore only further illustrations of the types of cases considered under this last class of antecedent facts.

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47 Pickerell v. Morss, 97 Ill. 220 (1880); Van Cloostere v. Logan, 149 Ill. 588, 36 N. E. 946 (1894); Peck v. Williams, 113 Ind. 256, 15 N. E. 270 (1887).