1939

Rationale of Bargain Consideration

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RATIONALE OF BARGAIN CONSIDERATION

HUGH EVANDER WILLIS*

IN ANGLO-AMERICAN law there have been and still are three kinds of consideration: (1) moral consideration,1 (2) injurious reliance or promissory estoppel,2 and (3) bargain consideration.3 It is submitted that a recognition of this truth is essential to any intelligent rationalization of the Anglo-American law of consideration. It is impossible to explain it according to any one theory. All attempts to do so can lead only to confusion. Two types of consideration involve detriment to the promisee. One type involves benefit to the promisor. One type involves antecedent facts, a second, contemporaneous facts; and a third, subsequent facts. Types of consideration with such dissimilarities cannot be defined as one kind of consideration, but each kind of consideration must be defined and considered separately.3*


1 Willis, Rationale of Past Consideration and Moral Consideration (1934) 19 Iowa L. Rev. 395.

2 Restatement, Contracts (1932) § 90; Willis, Rationale of the Law of Contracts (1936) 11 Ind. L. J. 227, 234.

3 Willis, Consideration in the Anglo-American Law of Contracts (1932) 8 Ind. L. J. 93, 110, 153, 171.

4Because this has not been done there are insolvable problems of consideration in both the Uniform Negotiable Instruments Act and the Uniform Sales Act.

The Negotiable Instruments Act apparently makes value, or consideration, a requisite for a negotiable instrument, though it does not name it in the list of requisites; and an "antecedent debt" and "any consideration sufficient to support a simple contract" will constitute value. But will injurious reliance, or prior pecuniary benefits constitute value?

The Sales Act requires "a consideration called the price" for a contract to sell (or a sale) and this without doubt includes a promise for a promise, but does it include an act for a promise, or injurious reliance on a promise, or a prior legal obligation, or prior pecuniary benefits?
Moral consideration owes its origin for the most part to Lord Mansfield. It had a great vogue for a time, but was almost abolished in the period of maturity, and now survives only where there are the facts antecedent to a promise of prior debts, or the receipt of prior pecuniary benefits without any antecedent legal obligation. Injurious reliance or promissory estoppel as consideration involves the facts subsequent to a promise of reasonable and justifiable reliance on the promise to one's pecuniary injury. This basis for contract law was at first rather extensive. But it was adequate only for promises followed by acts and not for bilateral agreements (involving contemporaneous facts), and it was nearly supplanted by bargain consideration invented to meet the need for a contract law of this kind but which could also take care of most cases of injurious reliance. Today only a few promises of this sort still survive although the American Law Institute restates the law in a way to make it capable of further development along this line.4

The Restatement of the Law of Contracts undertakes to simplify the law of consideration by abolishing moral consideration and injurious reliance as consideration and providing that promises based on such consideration are enforceable “as contracts without assent or consideration.”5 The Restatement’s position with respect to these matters simplifies the law of consideration, but it is doubtful if it is either any improvement or if it will definitely influence the course of judicial decisions.

Bargain consideration was invented for the sake of bilateral agreements and then was extended to unilateral agreements. Both bargain consideration and injurious reliance go back to special assumpsit. Bargain consideration was coined out of various materials. The injurious reliance, heretofore discussed, was given a twist so that the act was required to be given in exchange for a promise instead of to follow the promise, and it was made to include a promise as well as other acts. The other materials for the doctrine were found in the law of consideration developed by the equity courts and in the requirement of a quid pro quo for the action of debt.6 Bargain consideration is a modification of the law of objective agreement. It delimits this law so that not all objective agreements are contracts but only those which also have bargain consideration. This article will be concerned with bargain consideration only, and only from the standpoint of the formal, not the empirical science of the law.

4Restatement, Contracts (1932) § 90.
5Id. at §§ 85-93.
Bargain consideration may be defined as the act of giving, or the promise to give, in exchange for a promise, of any legal right, privilege, immunity, or power other than the power to do an illegal act; except that in the transfer of money, or fungible goods, the consideration given or promised by one person must be equivalent to that promised by another, and consideration under the bargain theory may (a) "be given to the promisor or to some other person," and (b) "be given by the promisee or by some other person."

This definition makes the bargain theory of consideration one theory rather than two theories. It does not adopt one theory for unilateral contracts and another theory for bilateral contracts, or one theory for valid contracts and another theory for voidable contracts, or one theory for pre-existing legal duty and forbearance to sue cases and another theory for all other cases. But whatever is sufficient consideration under the bargain theory for one type of case is made sufficient under the bargain theory for all other types of cases. It is true that this statement is modified by a doctrine of mutuality of consideration hereafter to be discussed and by the equivalent theory (an exalted form of the bargain theory) excepted in the definition, but these exceptions do not introduce any new theory.

This definition of bargain consideration differs from that of the Restatement of the American Law Institute. Section 75 (1) provides that "Consideration for a promise is (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification or destruction of a legal relation, or (d) a return promise, bargained for and given in exchange for the promise." Section 75 (2) has a statement as to who may give consideration and to whom it may be given, but this Section is not involved in this discussion. Section 75 (1) therefore without question defines consideration in the terms of an act or a promise. Section 76 provides that "Any consideration that is not a promise is sufficient... except the following: (a) An act or forbearance required by a legal duty that is neither doubtful nor the subject of honest and reasonable dispute if the duty is owed either to the promisor or to the public, or, if imposed by the law of torts or crimes, is owed to any person; (b) The surrender of, or forbearance to assert an invalid claim or defense by one who has not an honest and reasonable belief in its possible validity." Section 76 (c) has a provision with reference to the transfer of money or fungible goods which involves the equivalent

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1Willis, Comments: Restatement of the Law of Contracts of the American Law Institute (1932) 7 Ind. L. J. 429, 434.
2Restatement, Contracts (1932) § 76 (c).
3Id. at § 75 (2).
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theory and is also outside this discussion. Section 76 (a) (b) therefore states that any act in a unilateral contract is not sufficient consideration in forbearance to sue and pre-existing legal duty cases involving no third person. Section 78 and the comment thereon provides the same rule for a promise in a bilateral contract that is announced by Section 76 for an act in a unilateral contract. It states "A promise is insufficient consideration if the promisor knows or has reason to know at the time of making the promise that it can be performed by some act or forbearance which would be insufficient consideration for a unilateral contract," but that "wherever actual performance is sufficient consideration for a unilateral contract, a promise of that performance is sufficient consideration for a bilateral contract." Sections 76 and 78 do not state what will be sufficient consideration in the case of pre-existing legal duty cases and forbearance to sue on invalid claim cases, but the law is that in such cases the bargain theory requires a legal right, power, privilege, or immunity given or promised. Hence, it must be assumed that this is the consideration meant by Sections 76 and 78. That means, consequently, that in these two exceptional cases the Restatement makes the bargain consideration require a right, power, privilege, or immunity to be given or promised; but that in all other cases it makes the bargain theory of consideration require only an act or a promise. For this reason the Restatement adopts two different theories of bargain consideration, one for pre-existing legal duties and the surrender or forbearance to assert invalid claims (evidently a legal right, power, privilege, or immunity) and another for all other types of cases (any act or promise). This distinction of the Restatement follows an analysis of consideration made by James Barr Ames.

This article is written to rationalize the Anglo-American law of bargain consideration and the author will pursue this policy though it puts him in the position of attempting to prove that the Restatement's definition is wrong, and that the definition of bargain consideration set forth herein is right; in other words, that Section 75 (1) of the Restatement is incorrect and should be dropped and that Section 76 (a) (b) and Section 78 are correct with the theory of consideration implicit in them, and that these Sections should be expanded to cover the entire subject of bargain consideration. There are three lines of proof available for the accuracy of the definition of consideration championed by this article.

In the first place, there are the cases which hold that any right, power, privilege (or immunity), given or promised is sufficient consideration

10Id. at §§ 75, 76, and 77.
11Ames, Two Theories of Consideration (1899) 12 Harvard L. Rev. 515; (1899) 13 id. 29.
under the bargain theory. In the case of contemporaneous facts where
the bargain theory of consideration, if any, is required, the consideration
almost always consists either of some legal right bargained for and
given in exchange for a promise in the case of unilateral agreements,
or of the promise of some legal right bargained for and given in exchange
for a promise in the case of bilateral agreements. The safest way to
make a written contract legal is to draw it with this kind of consideration.
Legal rights are so numerous it would be both impossible and unneces-
sary to undertake to enumerate all of them; however, a few typical
rights which have been held to be sufficient consideration will be named.
Thus, the following legal rights have been held sufficient consideration:
the surrender of the right of possession, a promise to pay money to
which a person has a right on ground rent to a third person, a promise
to transfer one's right to chattels, a promise to transfer to another
bills receivable to which a person has a right. Many other illustra-
tions of consideration of this sort could be given, like the giving up of,
or the promise to give up, the legal right to particular tracts of land,
the legal right to a contract, the legal right to other incorporeal things,
the legal right to corporeal chattels, the legal right to safety, the legal
right to reputation, the legal right to liberty, so long as it is not against
public policy for one to give them up or promise to give them up.

Yet what is true of legal rights is also true of legal privileges, legal
powers, and legal immunities although they are not so frequently used
for bargain consideration as are legal rights. Among legal privileges
which have been held to be sufficient bargain consideration are the
following: the privilege of not buying coal from a particular person,
the privilege to drink intoxicating liquor, the privilege of trying to
get a husband to change the beneficiary in an insurance policy, and
the privilege of going through bankruptcy. In the same way the
surrender of, or the promise to surrender, a power, like the power of
acceptance of an offer, will amount to sufficient bargain consideration.

While there is no direct holding that the surrender, or the promise to

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28Bainbridge v. Firmstone, 8 A. & E. 743 (K. B. 1838).
29Thomas v. Thomas, 2 Q. B. 851 (1842).
6th, 1907).
31Murphy v. Hanna, 37 N. D. 156, 164 N. W. 32 (1917).
32(1917) 13 C. J. 308-320.
33Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 142 (1891).
37White v. McMath & Johnston, 127 Tenn, 713, 156 S. W. 470 (1913).
surrender, an immunity would be sufficient, there is no doubt that the courts would so hold. Thus, if a corporation were given an immunity against some form of taxation in its charter it could by giving this up, or promising to give it up, furnish consideration for another promise.

In the second place, there are the cases which hold that there is no consideration under the bargain theory unless a right, power, privilege (or immunity), has been surrendered. In the case of forbearance to sue on, or to assert, an invalid claim there is no consideration unless a person gives up or promises to give up a privilege or a right. If a person forbears to sue upon a doubtful claim, which is reasonably and honestly asserted, there is sufficient consideration because under such circumstances he has the privilege to sue. But if the circumstances are otherwise, the other party would have the right to have him refrain from suing, and he would be guilty of malicious prosecution if he did sue, and there would be no consideration. Apparently Dean Ames did not see that this is the explanation for Callisher v. Bischoffsheim.

In the case of pre-existing legal duty also there is no consideration under the bargain theory unless a person gives up a legal right, power, privilege or immunity. Where there is a doing or the promise to do what one person is already under legal obligation to do for another in consideration for a new promise by the other there is, therefore, no consideration because the promisee neither gives up nor promises to give up any right or privilege. A few courts have tried to find consideration under such circumstances by inferring a discharge of the old contract and the making of a new contract thereafter, but the reason for the courts doing this was in order to find consideration of the type we are now discussing. Where there is the doing of, or promise to do, what one is already under legal obligation to do for another, in consideration for a promise of a third person, the situation is different. In such case there is sufficient consideration under the bargain theory, because of the privilege of the person under legal obligation to offer a rescission to the other party to the contract, and the performance or the promise to perform his contract amounts to a giving up of, or a promise to give up, this privilege. This should have been the ration-

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39 Cook v. Wright, 1 B. & S. 559 (Q. B. 1861).
37 L. R. 5 Q. B. 449 (1870).
34 De Cicco v. Schweitzer, 221 N. Y. 431, 117 N. E. 807 (1917).
alization of the case of Shadwell v. Shadwell, but the court did not think of this explanation and Mr. Ames therefore thought it was authority for a second theory of bargain consideration.

In the case of an illusory promise there is no contract because there is neither bargain consideration nor even a promise. A promise to give up a right or a promise to do something which a person has a privilege not to do, if he chooses to give or do so, is not a promise to give up a legal right or privilege. Such a pretended promise does not even amount to a legal promise, as promise should be defined. Except for this fact illusory promise cases also are authority for the proposition that bargain consideration requires the giving up or the promise to give up of a right, power, privilege or immunity; and they are certainly authority for the proposition that illusory promises will not amount to sufficient consideration under the bargain theory.

In the third place, there are no cases holding that anything else than a right, power, privilege, or immunity, or the promise thereof, will amount to sufficient consideration under the bargain theory. Cases which are sometimes thought of as cases which hold that any act or promise will be sufficient consideration are the forbearance to sue and the pre-existing legal duty cases, heretofore considered, infants' and other voidable contract cases, conditional promise cases, compromise cases, and power to cancel cases. It has already been sufficiently shown that the forbearance to sue and pre-existing legal duty cases instead

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29 C. B. N. S. 159 (1860).

The Restatement, without giving the reason, recognizes that there is consideration in the case of a promise to a third person, but it must be assumed that it regards the case as an illustration of "any act or promise." See also Ames, LECTURES ON LEGAL HISTORY (1913) 327, 340.

Mr. Morgan has rationalized (Benefit to the Promisor as Consideration for a Second Promise for the Same Act (1917) 1 M.M. L. Rev. 383), and Mr. Williston now rationalizes this type of case [1 Williston, CONTRACTS (Rev. ed. 1936) § 131A.], as a case of bargain consideration created by benefits to the promisor. If the parties had not in such case dealt in terms of bargain the case could be rationalized on the basis of moral consideration created by a promise for pecuniary benefits received; but since they have dealt in terms of bargain, it is submitted Mr. Morgan and Mr. Williston are wrong. In such case, detriment to the promisee can be found; and there is no reason for trying to explain the cases on any benefit theory. Willis, Consideration in the Anglo-American Law of Contracts (1932) 8 Ind. L. J. 93, 104. Judge Cardozo has seen this, DeCicco v. Schweitzer, 221 N. Y. 431, 117 N. E. 807 (1917). Cf. also Orr v. Orr, 181 Ill. App. 148 (3d Dist. 1913). For this reason the explanation of benefit to the promisor should be confined to moral consideration cases and not introduced into any bargain consideration cases.

30Restatement, CONTRACTS (1932) §§ 2 (b) and 79.

31Great Northern Ry. v. Witham, L. R. 9 C. P. 16 (1873); Strong v. Sheffield, 144 N. Y. 392, 39 N. E. 330 (1895).
of being authority for any act or promise theory are authority for the legal right, power, privilege, and immunity theory so that nothing further need be said about these cases. In the case of an infant's promise it is said that he always promises to give or do something only if he chooses to do so. If this were in truth the nature of the infant's promise, his promise would be illusory and the infant's attempted contract would be no contract at all; whereas his contract is really a voidable contract. It is true that an infant has the power to avoid his voidable contract; but this power has nothing whatever to do with consideration for the adult's promise. Consideration is not the legal obligation resulting from objective agreement and bargain consideration. Legal obligation is only the effect of objective agreement and consideration. Bargain consideration is what is given as the price for a promise. There is nothing illusory about the infant's promise. The power of avoidance is no part of his promise but an independent power given him by the law for other social reasons. If an adult made the same promise, which is called illusory, when an infant makes it, nobody would think of calling it an illusory promise. Nor should it be called an illusory promise when an infant makes it. Thus, an infant, like an adult, has the privilege of single blessedness. If he promises to give this up in consideration for the promise of an adult to marry him, he has promised to give up a privilege and immunity just as much as the adult has promised to give up a privilege and immunity. The consideration, therefore, which the infant promises to give in his voidable contracts, is not any act or promise but a legal right, power, privilege, or immunity. What is true of infants' promises is true with reference to all voidable promises. The persons upon whom fraud, duress, and undue influence have been practiced have the power to avoid their contracts, given to them independently by the law for other social reasons. If they make any contracts at all they have to promise to give up some legal right, power, privilege, or immunity. They must not promise to give up a right, power privilege, or immunity if they choose to do so, or if they do not choose to avoid their contract.

In the case of conditional promises also, the fact of condition does not make the promise illusory. The condition relates not to the consideration but to performance. So far as bargain consideration is concerned, in such cases the parties must either give up, or promise to give up, a legal right, power, privilege, or immunity to each other.

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31 Wellston, Contracts (Rev. ed. 1936) § 105.
33 Restatement, Contracts (1932) § 84 (e).
34 Coleman v. Eyre, 45 N. Y. 38 (1871).
If they do not there is no sufficient consideration whether or not their promises are conditional; if they do, there is sufficient consideration even though their promises are conditional. Compromise cases must be rationalized in much the same way. In such cases, if there is sufficient bargain consideration a person must give up, or promise to give up, a part of his right, or at least the privilege of suing to learn whether or not he has such right. Conclusive precedent for the rationale herein is found in a case where a plaintiff agreed to buy five special cases of plate glass in consideration for the promise of the defendant to sell them at one dollar per square foot, provided the plaintiff might cancel his order before shipment (power of avoidance), and the court held that there was sufficient consideration and the promise was not illusory because the plaintiff's privilege and power were not unconditional.

It has been suggested that consideration under the bargain theory may be either legal detriment to the promisee, as heretofore discussed, or legal benefit to the promisor. Benefit to the promisor is required for moral consideration, but historically it has not been sufficient for bargain consideration. Usually benefit to the promisor accompanies detriment to the promisee, but this is accidental. What is required by bargain consideration is detriment to the promisee because he must pay something to the promisor as a price for his promise. There are many cases where detriment to the promisee alone, without benefit to the promisor, has been held to be sufficient consideration, and many cases where benefit to the promisor without detriment to the promisee has been held not sufficient consideration. This eliminates benefit to the promisor as a part of the bargain consideration.

In the case of bilateral contracts, there is one further word which should be said to make a full statement of bargain consideration, and that is that, in such contracts, mutuality of consideration is required because the parties deal on the mutual assumption that unless both parties furnish sufficient consideration, neither party shall be bound on his promise. It should be noted that this is a doctrine of mutuality of consideration and not a doctrine of mutuality of obligation. Mr. Oliphant is right in his contention that there is no requirement of

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8Cook v. Songat, 1 Leo. 103 (K. B. 1588); Seward & Scales v. Mitchell, 1 Cold. 87 (Tenn. 1860).
9Gurfein v. Werbelovsky, 97 Conn. 703, 118 Atl. 32 (1922).
10Morgan, Benefit to the Promisor as Consideration for a Second Promise for the Same Act (1917) 1 Minn. L. Rev. 383.
11McDevitt v. Stokes, 174 Ky. 515, 192 S. W. 681 (1917); Willis, Consideration in the Anglo-American Law of Contracts (1932) 8 Ind. L. J. 93, 108.
12Restatement, Contracts (1932) § 80; 1 Williston, Contracts (Rev. ed. 1936) §§ 103, 106, 139, 140.
mutuality of obligation in bilateral contracts.42 But the doctrine of mutuality of consideration does not change the essential nature of what is required under the bargain theory.

The three lines of proof which we have pursued have, we think, abundantly proven that, in Anglo-American law, consideration under the bargain theory must always consist of a legal right, power, privilege, or immunity given or promised. This means that the bargain theory of consideration is one theory, as the writer has been contending, and not two theories, as the Restatement of the American Law Institute contends. In this matter, the Restatement is not undertaking to simplify or reform the law; it simply has made a mistake as to the law. The statement of the law which the writer has given makes the law simpler than the statement which is found in the Restatement. Very fortunately, also, it is a restatement of the law. The Restatement oversimplifies the law in defining all consideration in the terms of bargain theory, but it does not simplify the law enough in defining bargain consideration in the terms of two theories.

While the writer contends that for the sake of accuracy the bargain theory of consideration must be stated as it has in this article, he does not in this article champion the requirement of bargain consideration. It may well be that the requirement of bargain consideration has become a mere form and technicality; that the empirical differs from the formal science of the law of bargain consideration; and that at least a part of it should be dispensed with. If the American Law Institute had, by way of reform, proposed the abolition, not only of all forms of consideration, but also of the requirement of the seal and agreement for all promises in writing signed and delivered, the writer would heartily have approved of its proposal. This would have confined bargain consideration to oral agreements. But to do what the American Law Institute has done, to wit: require two different bargain theories of consideration for oral and written agreements, is neither reformation nor restatement and the writer cannot approve of the American Law Institute's position.

Perhaps it will make little difference in judicial decisions whether the law is stated one way or the other, but it will make a great deal of difference in the rationale of the decisions, and, if the writer is correct, it would seem that the language of the Restatement should be amended or reformed.