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## CONTRACTS - MORAL OBLIGATION AS CONSIDERATION - PROMISE TO PAY FOR BENEFITS PREVIOUSLY RECEIVED

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CONTRACTS — MORAL OBLIGATION AS CONSIDERATION — PROMISE TO PAY FOR BENEFITS PREVIOUSLY RECEIVED — Plaintiffs, assignees of an oil lease of land, after drilling a dry hole thereon, did not comply with the requirements of their agreement for further development within a stipulated time, in consequence of which there was a formal termination in accordance with the terms of the assignment. An extension of the lease, which the lessees obtained, was assigned to the defendants, who had knowledge of the foregoing circumstances and plaintiffs' claim of a property right in the dry hole. Defendants promised to pay plaintiffs for the use of the dry hole, but subsequently repudiated any liability on the promise. *Held*, that defendants' promise to pay for the use of the dry hole was not legally enforceable because made without consideration. *Kirchoff v. Morris*, 282 Mich. 90, 275 N. W. 778 (1937).

Although it is generally conceded that consideration is essential to make a promise enforceable,<sup>1</sup> the courts have at times in effect dispensed with the necessity therefor.<sup>2</sup> Where the enforceability of a pre-existing legal obligation has been barred or discharged by some technical rule of law, the courts, without denying that consideration is essential, have reached the desired goal of finding

<sup>1</sup> 1 WILLISTON, CONTRACTS, rev. ed., § 99 (1936).

<sup>2</sup> See cases cited in notes 3 and 7, *infra*. "Consideration, by its very definition, must be given in exchange for the promise, or at least in reliance on the promise." 1 WILLISTON, CONTRACTS, rev. ed., § 142 (1936); 1 CONTRACTS RESTATEMENT, § 75(1) (1932). So in those classes of cases where past consideration is considered sufficient, the courts logically must either redefine the terms, or else find a contract without consideration.

the subsequent promise to pay this debt legally binding by holding the "moral obligation" or "past consideration" sufficient to support the promise.<sup>3</sup> But there has been a decided reluctance toward extending this doctrine of moral consideration to situations other than those of the general class where there had been a former legal obligation.<sup>4</sup> Though it is doubtful whether the problem was even considered, the instant case refuses an application of this "exception"<sup>5</sup> to the consideration rule to a case where the subsequent promise is based upon the moral obligation to pay for past benefits conferred on the promisor by the promisee who was not intending a gratuity thereby.<sup>6</sup> The modern tendency, however,

<sup>3</sup> *Born v. La Fayette Auto Co.*, 196 Ind. 399, 145 N. E. 833 (1924) (moral obligation to pay a debt honestly owing, but uncollectible because of the operation of a rule of law taking away the remedy, is sufficient consideration for the execution of a note to secure it); *Mutual Reserve Fund Life Assn. v. Beatty*, (C. C. A. 9th, 1899) 93 F. 747 (moral obligation to pay a debt discharged in bankruptcy is good consideration for subsequent promise); *Baker v. Gregory*, 28 Ala. 544, 65 Am. Dec. 366 (1856) (new promise after attainment of majority); *Marshall v. Holmes*, 68 Wis. 555, 32 N. W. 685 (1887) (debt barred by the statute of limitations); *Muir v. Kane*, 55 Wash. 131, 104 P. 153 (1909) (bar of the statute of frauds); *Wilson v. Russell*, 13 Md. 494, 71 Am. Dec. 645 (1859) (bar of insolvency laws). See cases collected 17 A. L. R. 1299 at 1328 (1922); 79 A. L. R. 1346 at 1350 (1932); 53 L. R. A. 353 at 362 (1901); 26 L. R. A. (N. S.) 520 at 522 (1910); 16 MINN. L. REV. 808 (1932).

<sup>4</sup> See cases cited in note 5, *infra*. Also *Eastwood v. Kenyon*, 11 A. & E. 438, 113 Eng. Rep. 482 (1840); *In re McConnell's Estate*, 6 Cal. (2d) 493, 58 P. (2d) 639 (1936); *Warner & Co. v. Brua*, 33 Ohio App. 84, 168 N. E. 571 (1929) (past consideration of broker's services will not support new promise); *Pershall v. Elliott*, 249 N. Y. 183, 163 N. E. 554 (1928); *Strayer v. Dickerson*, 205 Ill. 257, 68 N. E. 767 (1903); *Gooch v. Allen*, 70 W. Va. 38, 73 S. E. 56 (1911); *Broad Street Nat. Bank of Trenton v. Collier*, 112 N. J. L. 41, 169 A. 552 (1933) (rule that there must be the "exchange" element for consideration has its exceptions, but only those cases in which there has been a prior legally binding obligation fall within the exception).

<sup>5</sup> Language has frequently been used to the effect that contracts enforced on the basis of moral obligation are exceptions to the rule that consideration is a requisite of contract. See *Broad Street Nat. Bank of Trenton v. Collier*, 112 N. J. L. 41, 169 A. 552 (1933).

<sup>6</sup> Of course, if it is possible to say that the defendants paid the lessees more for the assignment than they would have, had the dry hole not been on the land, then obviously they have paid for whatever benefits they have received from the use of the dry hole, and so are under no moral or equitable obligation to the plaintiffs. Hence, if this be the case, under no possible theory of moral obligation would the subsequent promise be obligatory.

It should be noted that there are a number of early land patent cases in which it has been held that a promise by the vendee of public lands to pay for improvements made thereon before his purchase is unenforceable as without consideration. But since, in these cases, knowledge of the plaintiff's claim was acquired and the promise was made after the contract of sale, it is probable that the benefits received had been paid for as included in the purchase price to the government. *Carson v. Clark*, 2 Ill. 113 (1833); *Townsend v. Briggs*, 2 Ill. 472 (1838); *Boston v. Dodge*, 1 Blackf. (Ind.) 19, 12 Am. Dec. 205 (1820) (language of this case indicates decision rests upon fact that court

is to enforce such subsequent promise.<sup>7</sup> This trend can be well supported by early statutory enactments in Georgia,<sup>8</sup> Louisiana,<sup>9</sup> and California<sup>10</sup> to the effect that a moral obligation is sufficient consideration for a promise. There would seem to be no logical or practical distinction between a promise founded on a former enforceable obligation,<sup>11</sup> and one based upon the receipt of past benefits not intended as a gratuity, the nature of which has been recognized by the subsequent promise<sup>12</sup>—both rely solely on the moral or equitable obligation.<sup>13</sup>

considered defendant paid the government for the benefits received, and thus was under no moral obligation to the plaintiff); *Carr v. Allison*, 5 Blackf. (Ind.) 63 (1838); *Frear v. Hardenbergh*, 5 Johnson 272, 4 Am. Dec. 356 (1810) (subsequent promise to pay for past improvements made on promisor's land, promisor being owner at all times); *Shaw v. Boyd*, 1 Stev. & P. (Ala.) 83 (1831) (promise here was made *before* the contract of sale). But see *Welch v. Bryan*, 28 Mo. 30 (1859), where court distinguished as to those promises made before and those made after the contract of sale, holding that in the latter case there is no consideration for the promise, while in the former the moral obligation is a sufficient consideration!

<sup>7</sup> *Webb v. McGowin*, (Ala. App. 1935) 168 So. 196, *affd.* 232 Ala. 374, 168 So. 199 (1936); *Holland v. Martinson*, 119 Kan. 43, 237 P. 1059 (1925); *State ex rel. Bayer v. Funk*, 105 Ore. 134, 209 P. 113, 25 A. L. R. 625 at 635 (1922); *Edson v. Poppe*, 24 S. D. 466, 124 N. W. 441 (1910); *Sutch's Estate*, 201 Pa. 305, 50 A. 943 (1902); *Park Falls State Bank v. Fordyce*, 206 Wis. 628, 238 N. W. 516, 79 A. L. R. 1339 at 1346 (1931); *Drake v. Bell*, 26 Misc. 237, 55 N. Y. S. 945 (1899); see discussion 16 MINN. L. REV. 808 at 814 (1932) and 26 L. R. A. (N. S.) 520 at 532 (1910).

<sup>8</sup> "A good consideration is such as is founded on . . . a strong moral obligation." Ga. Code (1933), § 20-303.

<sup>9</sup> La. Civ. Code (Dart, 1932), §§ 1758-1759. Natural obligations are declared to be sufficient consideration for a new contract and although the definition of a natural obligation is somewhat limited in the code, yet the Georgia court in *In re Atkins' Estate*, (C. C. A. 5th, 1929) 30 F. (2d) 761, held the enumeration to be illustrative, not exclusive, and defined a purely moral obligation, not based on any prior legal obligation, as a natural obligation within the code.

<sup>10</sup> ". . . a moral obligation originating in some benefit conferred upon the promisor, or prejudice suffered by the promisee, is also good consideration for a promise. . . ." Cal. Civ. Code (Deering, 1937), § 1606. But see *In re McConnell's Estate*, 6 Cal. (2d) 493, 58 P. (2d) 639 (1936), where the code provision was construed to apply only where good and valuable consideration had once existed!

<sup>11</sup> The courts have uniformly held that here the moral obligation is sufficient to support the subsequent promise. See cases cited note 3, *supra*, and cases collected 79 A. L. R. 1346 at 1350; 16 MINN. L. REV. 808 (1932).

<sup>12</sup> The judge in *Ferguson v. Harris*, 39 S. C. 323 at 332, 17 S. E. 782, 39 Am. St. Rep. 731 at 735 (1893), in a very able discussion said, "I am unable to perceive any just distinction between such case [where the subsequent promise was barred by some technicality of law] and one in which there never was a legal, but only a moral, obligation to pay. In the one case, the legal obligation is gone as effectively as if it had never existed. . . . In both cases, at the time the promise sought to be enforced is made, there is nothing whatever to support it except the moral obligation. . . . If, in the one case, the moral obligation, which alone remains, is sufficient to afford a valid consideration for the promise, I cannot see why the same obligation should not have the same effect in the other." See discussion in 16 MINN. L. REV. 808 at 817 (1932).

<sup>13</sup> "The remark . . . in *Eastwood v. Kenyon*, 11 A. & E. 438 [113 Eng. Rep.

482 (1840)], that the doctrine [that a pure moral obligation is sufficient "consideration"] . . . 'would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform,' is . . . specious . . . for it ignores entirely the distinction between a promise to pay money which the promisor is under a moral obligation to pay and a promise to pay money which the promisor is under no obligation, either legal or moral, to pay." *Ferguson v. Harris*, 39 S. C. 323 at 332, 17 S. E. 782, 39 Am. St. Rep. 731 at 735 (1893).