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The Performance of "What One is Already Bound to Do" as a Consideration in Wisconsin

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THE PERFORMANCE OF "WHAT ONE IS ALREADY BOUND TO DO" AS A CONSIDERATION IN WISCONSIN

The reason for the rule "that the performance of what one is already bound to do" cannot be a consideration is bound up with the history of the doctrine of consideration for which many theories have been advanced by the learned writers. It is noteworthy that prior to the fifteenth century, simple promises were not enforceable at Common Law. They were enforceable in equity, however, hence the theory has been advanced that consideration is a modification of the Roman principle, *causa,* i. e. motive, adopted by equity and later transferred into the Common Law. But the fact remains, however, that the modern doctrine of consideration seems to have grown up through the technical development of an innovation upon two Common Law actions, namely debt and the action on the case for deceit.[1]

The desire of the Common Law judges to bring an action upon simple promises within their jurisdiction led to the development of assumpsit. The action on the case for deceit sounded in tort. The wrong being conceived as a sort of trespass, the action was not contested by a wager of law. The damages were the detriment incurred by the plaintiff upon the assumpsit of the defendant through *malfeasance* only. Gradually it was held that the action would lie for a *nonfeasance.* The action became the proper *remedy* for a nonperformance of a promise and was known as *assumpsit.* The damages were the *detriment* suffered by the promisee at the request of the promisor.

This new remedy proved so efficacious, that soon debt on simple contract was brought within its scope. When a debt was created, the transaction was regarded as reciprocal grants, i. e. the *quid pro quo* passing between the parties. The debt itself was deemed as a sort of chattel in the hands of the defendant and involving a legal duty to pay it to the plaintiff. The defendant could contest the action of debt by wager of battle. Moreover the action of debt involved many extremely technical requirements. Gradually it was held, that assumpsit would lie for debt by parol, i. e. *a promise*

[1]Sources: Salmond's *History of Contracts; Select Essays in Anglo-American History,* Vol. 3, p. 320; Ames' *History of Assumpsit, ibid.,* p. 259; Holmes, *The Common Law,* p. 289; Jenk's *Short History of English Law,* p. 132; Ames, *Lectures on Legal History,* p. 323.

to pay a precedent debt. Soon after it was declared that assumpsit would lie upon any simple debt, without proof of any subsequent promise, supported by the *quid pro quo* of the original transaction.[2] Thus *indebitatus assumpsit* was the proper remedy upon a parol promise, express or implied, (a) Bro. Act. at Law, 317, to pay a debt, though generally restricted to an implied promise; (b) Stephan Pl. 318. In it, the damages were the *benefit* to the promisor, upon his request, express or implied.

The modern theory of consideration, then, reflects the *quid pro quo* of the action in debt and *detriment* in the action upon the case for nonperformance. Its test is something of benefit to the promisor or some detriment or loss to the promisee, and although both are always present theoretically, yet the idea of but one of the requirements being actually present is not excluded.

The Supreme Court of Wisconsin has repeatedly laid down the doctrine of consideration in this state. Where A promised in consideration of B's entering certain land, that such land would sell for $200 or more on a certain day, held no consideration.[3] So where A gave a note secured by mortgage for a mere squatter's claim likely to be defeated by a sale of the land by the United States government, the court held the note void for want of consideration, saying there must be some benefit arising to the defendant or some loss or injury to the plaintiff.[4] And where A promised to pay B a certain sum of money provided the promisee should erect a hotel within a specified time and upon a certain site, held that there was a consideration. The court said: "It must be some matter of benefit to him who makes the promise or of some loss or disadvantage to whom it is made: and in addition to this it must appear that it arose or was moved at the express or implied request of the promisor."[5] So where A alone agreed to raise a four-acre crop of tobacco at a stated price per pound, the court said: "It therefore appears that no consideration moved from the plaintiff to the defendant either by way of money or things of value or of promise at the time the agreement was signed. It is elementary that there must be a consideration either by way of

[2]Slade's case, 4 Croke 92 B; Sunderland's Case on Common Law Pleading; 2 Street Foundations of Legal Liability 62-66, *ibid.*, on note, p. 139

[3]Stevens v. Coon, 1 Pin. 356; *Lathrop v. Knapp*, 27 Wis. 214.

[4]*Messenger v. Miller*, 2 Pin. 60; *Drovers Dep. Bank Co.* v. *Tichenor*, 156 Wisconsin 251.

[5]*Eyclesheimer v. Van Antwerp*, 13 Wis. 346; *Dohr v. Wolfgang*, 151 Wis. 95.

money or things of value or by way of promises, to constitute a valid contract."[6]

From the foregoing it is obvious that where A has delivered goods or performed work at B's request and by agreement of the parties or by implication of law, a promise to pay has been raised, a subsequent promise by B to perform can neither be a benefit to A nor a detriment to B. Neither could the payment of this debt be a detriment to B even though induced by a promise on the part of A. And on principle it would seem that where A has promised to B to do a certain thing, then a subsequent promise to perform made by A to B could not be a benefit to B, nor would the performance by A moved by a subsequent promise on part of B be a detriment to A.

We may distinguish, for the purpose of this article, between the performance of a public duty and a duty arising out of a contract relation; between the payment of a debt, liquidated or unliquidated, and performance or nonperformance; between contracts executed on one side and contracts wholly executory.

That the performance of an obligation imposed by public law cannot be a valid consideration has been universally recognized on grounds of public policy. So a sheriff's promise to perform his duties with "reasonable diligence" was held to be no consideration.[7] But where A promised a reward to a fireman for the rescue of A's wife or her body, the court held that there was a consideration in the absence of a provision in the municipal charter requiring a fireman to save human life at the risk of his own life.[8] Where a husband promised to care for, nurse and support his wife after marriage, she being blind, the court held that, "neither the doing of what he is bound in law to do nor the promise so to do is a consideration for his wife's promise to bequeath him her property."[9]

The question whether the performance of a pre-existing contractural duty to the promisor will support a promise arises chiefly in cases of promises in consideration of the payment of a part or the whole of a debt. As the rule in the first class of cases is stated: "the part payment of an admitted, liquidated debt in the

[6]*Jones v. Wixom*, 170 Wis. 314; *Hopkins v. Racine M. & W. I. Co.*, 137 Wis. 583.
[7]*Padden v. Tronson*, 45 Wis. 126.
[8]*Reif v. Paige*, 55 Wis. 496; *Ring v. Devlin*, 68 Wis. 384.
[9]*Ryan v. Dockery*, 134 Wis. 431; *Perkinson v. Clarke*, 135 Wis. 584; Estate of Simeonson, 164 Wis. 590.

same mode, place or time as provided in the original agreement can not be a satisfaction of the whole." This rule is as old as the doctrine of consideration itself and has been firmly established down through a long line of judicial decisions and has been strictly adhered to in Wisconsin. Thus where A was indebted to B on two accounts but paid B less than the aggregate sum of the two accounts and both were receipted for in full, held that the whole indebtedness was not extinguished. The court said: "Ever since the case of *Cumber v. Wane,* 1 Strange 426, it has been the settled law, that a bald promise by a creditor, for no other consideration or benefit than the mere payment in money of a part of an admitted debt, to accept such part in satisfaction of the whole was void for want of consideration."[10]

But in spite of their steadfast adhesion to this rule in face of the demands and needs of a much greater business and more extensive mercantile dealings, the courts have criticised and condemned the unreasonableness of the rule. But while the courts still hold the doctrine of *Cumber v. Wane,* yet they will bend backwards to see if there is the least possible quantum of additional consideration present. In a leading case the court said:

"The rigorous rule of the Common Law, permitting a person to receive part of an undisputed, presently due indebtedness, pretending to accept the same in satisfaction of the whole indebtedness, the debtor parting with the amount paid with that understanding, and then change front and sue for the balance of such indebtedness on the ground that the release thereof was void for want of consideration, is so little favored by the courts that it is commonly held not to apply where anything, whether of advantage to the creditor or of disadvantage to the debtor, can be reasonably said to stand for that part of the indebtedness not measured by an equivalent in money actually paid to the creditor." The court after a further discussion added: "It is said that there is sufficient consideration moving with the part payment to release an indebtedness to take the transaction out of the Common Law rule, if the debtor does anything which he is not bound by law to do, or omits to do anything which he has a right to do, to the advantage, in any appreciable degree, of the creditor or the disadvantage of himself; that the consideration in addition to money

[10]*Otto v. Klauber,* 23 Wis. 471; See *Foakes v. Beer,* 9 App. cases 605, 36 Eng. Reports 194; *Jaffray v. Davis,* 124 N. Y. 164.

paid 'may consist of anything which might be a burden to the one party or benefit to the other.' "[11]

The decisions in Wisconsin from an early date are in accord with these principles. Thus where A the mortgagee by parol agreement promised to release the mortgagor upon payment of a sum less than the whole of the mortgage money due, held that such agreement cannot be enforced for want of consideration.[12] But it was held otherwise where an unsecured debt was paid by a secured mortgage,[13] or a draft,[14] or any other negotiable instrument of a less amount than due.[15] But not where the debtor's own unsecured note for a less sum was given in full payment.[16] Where part payment is made or a note is given by a third person, held to be sufficient consideration.[17] So where certain property of an insolvent debtor was held as collateral security, the giving of an absolute title to the creditor, and the debtor's agreement not to take advantage of the Federal bankruptcy law, held to be ample consideration to support an agreement to accept a less sum than due.[18]

The question sometimes arises whether the acceptance of a check by the creditor from the debtor for a lesser sum than claimed will be an accord and satisfaction. But it has been decided in Wisconsin that where the amount due is undisputed, the mere acceptance by the creditor of a check for a lesser sum, but containing the words "paid in full" did not in the absence of any consideration for a release of the balance operate as a settlement or an accord and satisfaction.[19]

There is a very important class of cases, wherein an insolvent debtor enters into an agreement with *more* than one of his creditors whereby the latter agree, for the sake of immediate payment, to relinquish a part of their claims upon the debtor and to accept a sum less than the amount due, distributed *pro rata,* in discharge

[11]*Herman v. Schlesinger,* 114 Wis. 382. See notes to 11 L. R. A. (N. S.) 1018.
[12]*Stone v. Lannon,* 6 Wis. 497.
[13]*Continental Bank Co. v. McGeogh,* 92 Wis. 286. See note to *Fuller v. Kemp,* 20 L. R. A. 785.
[14]*Reid v. Hibbard,* 6 Wis. 175.
[15]*Continental Bank Co. v. McGeogh,* 92 Wis. 286.
[16]*Hooker v. Hyde,* 61 Wis. 604.
[17]*Continental Bank Co. v. McGeogh,* 92 Wis. 286.
[18]*Herman v. Schlesinger,* 114 Wis. 382; See 11 L. R. A. (N. S.) 1019 in notes.
[19]*Prairie Grove Cheese Mfg. Co. v. Luder,* 115 Wis. 20. But see *Ossowski v. Wiesner,* 101 Wis. 238.

of their claims. The consideration is found in the mutual relinquishment on part of the creditors. These agreements or compositions have been found to be conducive of the needs of the business world and are rigidly enforced in Wisconsin.[20] So it was held that where a creditor after entering into a composition, sued upon the original claim, he could recover only the rate fixed in the composition agreement.[21] And that a debtor may set up such an agreement as a defense.[22] And where one creditor entered into a secret agreement with the debtor, whereby the former received payment in full of his original demand, held to be fraud which would invalidate the composition agreement.[23]

These cases are to be distinguished from cases of compromise wherein a single creditor enters into an agreement with his debtor, in settlement of an unliquidated or a doubtful or a disputed claim in consideration of the mutual surrender of some counterclaim.[24] But the payment of that part of the claim which is undisputed cannot be a sufficient consideration in settlement or compromise to bar an action for the balance of the claim.[25]

Since the part payment of an undisputed debt cannot be a sufficient consideration to extinguish the whole, then the foregoing is clearly applicable to the payment or the promise to pay the whole of the debt. Where A sold a certain number of sheep to B who agreed to pay for them in wool and sheep at a later date, and B gave a mortgage upon his land as a security for the payment of this debt, and subsequently, the parties agreed to wind up this transaction and B promised to pay a certain sum of money in lieu of the sheep and wool, but A did not surrender the mortgage held as a security nor did B ever pay the promised money, whereupon A sued to foreclose the mortgage, and B set up his promise to pay in money as a discharge of the debt, held that if such promise to pay in money was intended to be received in discharge of the debt A could not foreclose the mortgage. The court said: "When a debt is due by one contract, the parties may abolish it and substi-

[20] *Continental Bank Co. v. McGeogh*, 92 Wis. 286.
[21] *Mellin v. Goldsmith*, 47 Wis. 573.
[22] *Davenport v. First Cong. Society*, 33 Wis. 387.
[23] *Musgat v. Wyboro*, 33 Wis. 515.
[24] *Continental Bank Co. v. McGeogh*, 92 Wis. 286.
Reid v. Hibbard, 6 Wis. 175.
Collins v. State, 13 Wis. 398.
Kercheval v. Doty, 31 Wis. 476.
Hewit v. Currier, 63 Wis. 394.
[25] *Weidner v. Standard Life and American Ins. Co.*, 130 Wis. 20. See *Ripley v. Sage L. and I. Co.*, 138 Wis. 304 in dissenting opinion.

tute another in its place. In such case if the substituted contract is founded upon any new or sufficient consideration, or if made upon the compromise of a doubtful or a disputed claim, the original debt is extinguished, and no action can be maintained upon it. And this is so, whether the substituted contract be kept and performed or not. A new or sufficient consideration arises when the substituted contract is advantageous to the creditor, that is when he derives a distinct benefit from it, something of value to which he would not have been entitled under the original contract."[26]

So it has been decided that where there is a mere request for the extension of the due date of a debt, and the debtor promises to pay interest on an existing contract according to its terms during a delay in performance, or to pay the principal, such promise does not constitute a consideration for an extension since it is only a promise to do that what the debtor is bound to do without a promise.[27] But the payment of interest before the mortgage is due is a sufficient consideration for the extension of time.[28]

The question of whether the performance of a pre-existing contractural obligation at the request of a third party may be a valid consideration has been decided in Wisconsin. Thus where A promised to remit the debt owing by B to A, if B should pay its debts to C, the court said: "It might cause the defendant some trouble and inconvenience to pay its debts, but we are not aware of any principle of law which would make such payment alone a sufficient consideration for a promise on the part of its creditors to relinquish his claim."[29]

Where A, a district superintendent, promised to make good losses through defalcations of a sub-agent, supposing himself legally responsible, held not be such a benefit to him to support a promise by the company to pay its own debts or perform its obligations to third persons.[30]

But where a debt has been barred by the statute of limitations or by proceedings in bankruptcy, a subsequent promise to pay

[26] *Palmer v. Yager*, 20 Wis. 91.
[27] *Fanning v. Murphy*, 126 Wis. 538; See *Goll v. Fehr*, 131 Wis. 141; *Murtha v. Donohoo*, 149 Wis. 481.
[28] *Ready v. Somers*, 37 Wis. 265; *Grace v. Lynch*, 80 Wis. 166; *Welch v. Kukuk*, 128 Wis. 419; see notes to 52 L. R. A. (N. S.) 583.
[29] *Davenport v. First Cong. Society*, 33 Wis. 387.
[30] *McKone v. Metrop. Ins. Co.*, 131 Wis. 243. 259.

such debt is a valid consideration, since all legal obligation to pay it has been extinguished by operation of law.[31]

While the rule that the performance or promise to perform a pre-existing contractural duty cannot be a consideration, as illustrated in the foregoing cases, holds true generally in respect to contracts wholly executed on one side, yet in the application of this principle to contracts wholly executory the courts are not, by any means, in accord. Thus where a party to an agreement finding the contract more onerous than was expected, refuses to perform unless the other party to the contract will agree to give extra compensation or to alter or modify the contract, the question of whether such modification, alteration or additional benefit is supported by a valid consideration, is decided upon different principles in the various jurisdictions of this country.

Some courts hold that such promise for extra compensation is not supported by sufficient consideration, since the plaintiff has agreed only to do that which he was already under legal obligation to do.[32] But in many jurisdictions these cases seem to have been decided upon another principle. In some of these, they are decided upon the theory, that the party by refusing to perform his contract thereby subjects himself to an action for the recovery of damages, and that the opposite party has an election to bring an action for the recovery of such damages or to accede to the demands of his adversary and make the promise, and if he does so it is a relinquishment of the original contract and the substitution of a new one.[33] In others, this doctrine is limited to cases wherein the party refusing to complete does so by reason of some unforeseen and substantial difficulty in the performance of his contract, and which cast upon him an additional burden not foreseen; in such case the promise to coninue is held to be a sufficient consideration for the additional compensation promised.[34] But Wisconsin has steadily held, down through a long line of decisions, that the parties to any contract, if they continue interested and act upon any sufficient consideration while it remains executory and before a breach of it occurs, may rescind it in whole or

[31] *Marshall v. Holmes,* 68 Wis. 555.

[32] *Ayres v. Chicago R. I. & R. Co.,* 52 Iowa 478; *Lingenfelder v. Wainwright Brewing Co.,* 103 Mo. 578; *Reynolds v. Nugent,* 25 Ind. 328.

[33] *Munroe v. Perkins,* 9 Pick. 305; *Lattimer v. Harsen,* 14 John. 330; *Rogers v. Rogers,* 139 Mass. 440; *Lenz v. Brown,* 40 Wis. 172.

[34] *King v. Duluth, M. & N. R. Co.,* 61 Minn. 482; see Williston on *Contracts,* Vol. 1, Sect. 130, 130a; *Abbot v. Grant Marble Works,* 142 Wis. 279. See L. R. A. 1915 B. 1, for full discussion of this class of cases.

in part, alter or modify it in any respect, add to or supplement or replace it by a new and later agreement.[35]

Where A the owner of an half interest in a steam vessel agreed to sell one-sixth of his interest to B for six hundred and seventy-five dollars who paid four hundred dollars down and fifty dollars at a later time; and subsequently such vessel was wrecked in a collision with another steamer, and A commenced action for damages and promised B to pay him the sum he had invested in the vessel with interest, if B should assist him in the recovery of such damages, which B did; and after the recovery of such damages A renewed such promise to pay when he should collect the amount of recovery, and upon suit on such promise, A contended that the consideration for such promise was merely that which A was already bound to pay B as a copartner, the court said, "We take it to be well settled that the parties to a contract may by a mutual agreement vary or modify its terms, or rescind it, without any new consideration therefor. In the case of a modification or change of a contract, the consideration for the original agreement is imported into the new agreement which is substituted for it."[36]

So where A contracted to do certain work for B, but after such agreement and before doing the work under the contract A insisted that the contract was contradictory, and absolutely refused to do any work thereunder unless the same be modified and B by a parol agreement promised additional compensation to A for the performance of some parts of the contract, held that the consideration existing in the original executory contract was imported into the modification by the subsequent parol agreement, and became binding upon the parties without any new consideration.[37]

And where A contracted with B to perform certain work in the construction of a railway and finding himself unable to carry out his agreement without further loss, informed B that he would discontinue his work, whereupon B orally agreed to furnish him with more implements and to pay him what his labor was reasonably worth if A should continue; held that the parties could modify their contract without any new or further consideration.[38]

[35]*Palmer v. Yager*, 20 Wis. 91; *Brown v. Everhard*, 52 Wis. 205; *Kelly v. Bliss*, 54 Wis. 187, citing *Stead v. Dauber*, 10 Ald. and El. 57; *Goss v. Nugent*, 5 Boorn and Ad., 58; *Snell v. Bray*, 56 Wis. 156.
[36]*Kelley v. Bliss*, 54 Wis. 187; *Ruege v. Gates*, 71 Wis. 634.
[37]*Lynch v. Henry*, 75 Wis. 631.
[38]*Foley v. Marsch*, 162 Wis. 25.

Where A assigned certain patents to B and agreed to assign all such further inventions to B during the life of the patent and subsequently the parties entered into another agreement substantially the same as the previous one, except for an enlargement in the duration of the time of assignments for future patents, and the payment of a nominal consideration, and upon suit on the substituted contract for specific performance, the adequacy of the consideration to support the enlargement upon the previous contract was attacked, held that since the purpose of the substituted contract was to carry out the original intention of the parties, there was a sufficient consideration for the original contract to support the modification by the substituted contract, and that the payment of an additional consideration was unnecessary.[39]

It is essential however for the effectiveness of this rule in this class of cases, that where a written contract is modified by parol, that such parol negotiations take place after the written instrument is executed and in effect, lest they become part and parcel of the contract, and further, that such parol or oral agreements fall without the Statute of Frauds.[40]

Upon a recapitulation of the cases discussed in this article, it may be concluded, that in Wisconsin, the performance or the promise to perform a duty imposed by public law can never be a benefit to the promisor nor a detriment to the promisee;[41] that where the contract has been executed on one side, the performance or the promise to perform by or to the other party or a third person cannot be a benefit to the promisor nor a detriment to the promise without something additional, by way of advantage or of disadvantage to either party;[42] and lastly, that where the contract is wholly executory, the rule "that the performance of what one is already bound to do" is obviated by the application of another principle: "that a contract which is based upon a sufficient consideration, and which is wholly executory or substantially so, and before a breach of it occurs, may be modified, altered or substituted by the mutual consent of the parties thereto without any new consideration, and that the consideration of the old agreement is imported into the new one."[43]

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[39] *Miller Saw-Trimmer Co. v. Cheshire,* 172 Wis. 278, 293, 304.
[40] *Schoblasky v. Rayworth,* 139 Wis. 115; *Brown v. Everhard,* 52 Wis. 205; *Wis. S. F. Co. v. D. K. Jeffries Lumber Co.,* 132 Wis. 1.
[41] *Padden v. Tronson,* 45 Wis. 126; *Estate of Simeonson,* 164 Wis. 590.
[42] *Palmer v. Yager* 20 Wis. 91; *Herman v. Schlesinger,* 114 Wis. 382.
[43] *Brown v. Everhard,* 52 Wis. 205; *Kelley v. Bliss,* 54 Wis. 187.