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IS MORAL CONSIDERATION ON THE WAY OUT IN PENNSYLVANIA ?

By

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Both of our appellate courts appear to be making an effort to harmonize our terminology in regard to the requirement of consideration with that of the Restatement of Contracts, but this will be hard to do without overruling many Pennsylvania cases.

In *Stelmack v. Glen Alden Coal Co.*, 339 Pa. 410, (1940) the old definition of consideration as a benefit to the party promising or a detriment to the party to whom the promise is made is repeated, but is added that the detriment must be the "price" of the promise and the inducement for which it was made. It must be bargained for as the exchange for the promise. This is the gist of the Restatement definition in section 7. The Restatement then adopts the expedient of enumerating a limited list of informal promises which it concedes have always been enforceable, though nothing is bargained for when the promise is made. The list purports to be complete. It, however, does not nearly cover the exceptions recognized in the Pennsylvania cases.

The Restatement list of exceptions includes promises to pay a debt barred by the statute of limitations, or a debt discharged in bankruptcy, promises to perform a duty from which one has been discharged by the non-fulfillment of a condition, promises to perform a duty voidable for fraud, infancy, etc., but not those which are void or merely unenforceable as within the Statute of Frauds. Promissory estoppel is also recognized as an exception.

All of the promises mentioned are enforceable in Pennsylvania but it has been the practice to say that the promise had consideration in the moral obligation to do the thing promised. Justice Barnes now states in the *Stelmack* case that there must have been a pre-existing obligation which has become inoperative and there must have been an antecedent valuable consideration. The new promise must be the revival or creation of an obligation which before existed "*in natural law*", etc.

The Superior Court has since declared: "The rule that 'moral consideration' is sufficient to support an express promise is limited to cases in which there is a moral obligation founded upon antecedent valuable consideration." Citing the *Stelmack* case and the Restatement.¹

¹*Volkwein v. Volkwein, Ex'r.*, 146 Pa. 265, 271. (1941).

On the other hand, only four years before this decision, the same court had said:²

"Whatever may be the rule in other jurisdictions, in this state it has been held for many years that a woman, after the death of her husband, may legally bind herself by a note given in renewal of a note, on which she was accommodation maker or endorser, and which was during her coverture legally invalid as to her—the moral consideration being sufficient to support the renewal note made after her husband's death."

Such a promise is not founded upon any "antecedent valuable consideration" received by the wife and her original promise has always been held to be void and not merely voidable. But the opinion cites a long list of Pennsylvania cases supporting the statement above quoted.

In the leading case³ of this type, Justice Black had said:

"The law may say what it will about void and voidable contracts, but there is no code of ethics which says that the duty of not abusing the confidence of one who has honestly served you, is a void obligation upon the conscience. This is not a question to be settled by metaphysics. All judicial casuistry upon such subjects must be pernicious. We would be very sorry to tell the defendant that the sense of justice that impelled her to promise justice was all a mistake." He then expressed his admiration for "the plain rule, which says that a moral obligation is a sufficient consideration for a direct promise," and added, "and we affirm this to be a moral obligation, because the common sense of all mankind affirms that it cannot be violated without moral guilt."

In *Hassinger v. Solms*, 5 S. & R. 4, 15, (1824) Justice Duncan said: "That ties of conscience on an upright man are a sufficient consideration. However this doctrine has been shaken in England, I consider it as adopted in Pennsylvania to the extent of such consideration supporting an express promise."

In *Shenk v. Mingle*, 13 S. & R. 29, (1825) and in *Wyant v. Leshner*, 23 Pa. 338, (1854) it was held that "Past cohabitation has always been held sufficient to support a settlement or an agreement to pay money." "God forbid, where a man is bound in honor and conscience, that a court of law should say the contrary."

In *Pohl's Estate*, 136 S. Ct. 91, (1939) a son advised his mother in the investment of some of her funds in stocks and she promised him that, if the purchase proved profitable, she would pay him half the profits realized. It was held that the service rendered in connection with the purchase of the stock, though past when the promise was made, gave rise to a moral obligation sufficient to support the later promise.

²*Vineland Nat. B. & T. Co. v. Kotok*, 129 S. C. 309, 314. (1937).

³*Hemphill v. McClimans*, 24 Pa. 367, 391. (1855).

In *Ins. Co. v. Whitney*, 70 Pa. 248, 252, (1871) Justice Sharswood said:

"A benefit conferred or service rendered, though purely voluntary, is sufficient consideration to support an express promise: *Graves v. McAllister*, 2 Binn. 591; *Clark v. Herring*, 5 Binn. 33; *Cunningham v. Garvin*, 10 Pa. 366; *Lycoming v. Union*, 15 Pa. 166."

On the other hand in *Thomas v. R. J. Reynolds Tobacco Co.*, 350 Pa. 262, (1944) Justice Patterson said:

"The consideration necessary to establish a valid contract, express or implied in fact, must be an act, a forbearance, or a return promise, *bargained for and given in exchange for the promise*. Restatement, Contracts, section 75."

In *Hetkowski v. Dickson City Sch. Dist.*, 141 Pa. Superior Ct., 526, at page 531, (1940) Judge Hirt said:

"Consideration, as used in the phrase, failure of consideration, means merely an exchange in fact agreed upon. Failure of consideration, therefore, is failure to receive such an exchange. *In the formation of contracts, consideration is the exchange for a promise (s 75).*"

In *Anderson v. Best*, 176 Pa. 498, at page 501, (1896) Justice Mitchell said:

"Defendant had made a profit by breaking a contract of sale to plaintiff, and promised to pay her a due share of such profit,***** This promise was such as honesty required him to keep, and would have supported an action of assumpsit except for the technical objection that it was not in writing. But it is definitely settled in this state that moral obligation is a sufficient consideration to support an express promise; *Bailey v. Philadelphia*, 167 Pa. 569. The distinction sought to be made between considerations formerly good but now barred by statute, and those barred by statute in the first instance, is not substantial, and is not sustained by the cases."

In other words, a promise unenforceable because of the Statute of Frauds nevertheless creates a moral obligation to perform the promise and this moral obligation, if recognized by a second express promise, is deemed to supply the consideration required to make the latter promise enforceable.

In the *Bailey* case the same judge said:

"A moral obligation in law is defined as one 'which cannot be enforced by action but which is binding on the party who incurs it, in conscience and according to natural justice', and again, a 'duty which would be enforceable by law, were it not for some positive rule, which, with a view to general benefit, exempts the party in that particular instance from legal liability:' 15 Am. & Eng. Ency. of Law, 716. In this state it is held that such an obligation will sustain an express promise to pay, and a fortiori, an actual

payment: *Hemphill v. McClimans*, 24 Pa. 367; *Stebbins v. Crawford Co.*, 92 Pa. 289; *Leonard v. Duffin*, 94 Pa. 218; *Brooks v. Bank*, 125 Pa. 394; *Holden v. Banes*, 140 Pa. 63; *Kelly v. Eby*, 141 Pa. 176."

In a case like the *Bailey* case all of the last quotation was repeated and the principle was applied in *Walthour v. McDowell*, 109 Pa. Superior Ct. 118, at page 132.

As long ago as 1845 Chief Justice Gibson said in *Kennedy's Executors v. Ware*, 1 Pa. 445, at page 451:

"It was indeed said by Lord Mansfield and Mr. Justice Buller, in *Hawkes v. Sanders*, Cowp. 289, and repeated by Lord Mansfield in *Freeman v. Fenton*, Cowp. 544, 'that a legal or equitable duty is a sufficient consideration for an actual promise; that when a man is under a moral obligation which no court of law or equity can enforce and he promises, the honesty and rectitude of the thing is a consideration.' And it may be said that a man is morally bound to nourish and provide for his own children. But it is shown by a masterly review of all the cases in a note to *Wennall v. Adney*, 3 Bos. & Pull. 249, that Lord Mansfield's principle was intended for cases in which the promisor has received an actual benefit, but is protected from liability for it by some statute or stubborn rule of law."

In *Stebbins v. County of Crawford*, 92 Pa. 289 (1879), a case in which a fiduciary was protected by a judgment in his favor but made a new promise to pay the amount involved in "a clear mistake," the trial court made this statement, which has been recently quoted with approval by our Supreme Court in the *Stelmack* case:

"A moral obligation is sufficient to support an express promise, where there has been a pre-existing obligation which has become inoperative by positive law. Express promises, founded on pre-existing equitable obligations, may be enforced as founded on good consideration. They merely remove an improvement erected by law to the recovery of debts honestly due, but which the statute law and public policy protect the debtors from being compelled to pay. The case of debts barred by the Statute of Limitations, of debts incurred by infants, of debts of bankrupts, are illustrations of this rule. In all these cases there was originally a *quid pro quo*, and according to the principles of natural justice, the party receiving ought to pay, but the legislature has said he shall not be coerced. Then comes the promise to pay the debt that is barred; the debt of the infant, the debt of the discharged bankrupt, to restore to his creditor what by the law he had lost. In all these cases there is a moral obligation founded upon antecedent valuable consideration. Such promises, therefore, have a sound legal basis. They are not promises to pay something for nothing, not naked pacts, but the

voluntary revival or creation of obligations which before existed natural law, but which had been dispensed with, not for the benefit of the party obliged solely, but principally for the public convenience: per Parker, C. J., in *Mills v. Wyman*, 3 Pick. 207."

In *Bern's Estate, Gilpin's Appeal*, 171 Pa. 61, (1895) Justice Mitchell said:

"An effort is made to sustain the case on the ground of natural love and affection of the maker of the note for his granddaughter. But the argument falls into confusion from the indiscriminate use of the terms 'moral obligation' and 'moral consideration.' They are not convertible terms, even if there is any such thing as a moral consideration. Natural love and affection are a good consideration for an executed contract or gift, and in this state a moral obligation is a good consideration for an express promise, but natural love and affection are not a moral obligation in such sense as will support even an express promise to make a gift."

In *Paul v. Stackhouse*, 38 Pa. 302, (1861) the plaintiff made a loan to a third party on the verbal promise of the defendant to the debtor to go his security. This was communicated by the debtor to the lender but no promise in writing to pay the debt was made by the defendant to the plaintiff until more than a year thereafter, when the debt was overdue. It was held by Justice Woodward that the loan should be treated as having been made on the request of the defendant and that though the consideration was past, it would support the later promise of the defendant and, as this promise was in writing, the Statute of Frauds was satisfied.

Justice Woodward in the course of the opinion said:

"It is believed that in all cases which may be cited in support of the rule, there was an original consideration beneficial to the party promising, and which might have been enforced on an implied promise, had it not been for some statute provision, or some positive rule of law, which, with a view to the general good, exempted the party from legal liability in the particular instance."

It is apparent that there is a line of cases in which an effort has been made to restrict the doctrine of "moral consideration" to a limited list of situations but that another line of cases continues to ignore these limits.

The cases in which the original promise was unenforceable because of the Statute of Frauds are not cases in which there was a preexisting legal obligation which has become inoperative, as in the cases of the statute of limitations, discharge in bankruptcy, discharge by judgment or by a formal release. They are cases in which no legal obligation ever existed but the new promise has been enforced hitherto in Pennsylvania.

Nor has the other proposed limitation been observed, that there must have been an "antecedent valuable consideration," if by this is meant some benefit re-

ceived by the promisor. The cases of the married women who were merely sureties and whose promises were void ab initio but who are held to be bound by a promise made after divorce or the death of her husband, involve no benefit to the promisor.

A purely voluntary service rendered to another creates no legal obligation to pay for it but a long line of cases holds that the amount later promised can be collected. If the first proposed test is applied, all these cases must be overruled. If only the second test of "antecedent valuable consideration" is applied, they can be sustained but they cannot be harmonized, with the Restatement.

It will be interesting to observe how far the desire of our appellate courts to follow the Restatement will lead them to discard the language of Pennsylvania lawyers and judges and overrule well settled Pennsylvania doctrines.

It would clarify a student's understanding of contract law, if it were frankly conceded that there are five different kinds of contracts and that the rules applicable to each kind are quite different. The oldest kind of contract is the promise under seal. There are many rules applicable to such contracts which are inapplicable to any other kind of contract. A gift promise under seal requires neither acceptance nor consideration, but merely delivery. It is not within the Statute of Limitations. So also, if a written promise is followed by the express statement that the signer intends to be legally bound, the promise is enforceable though it was made without consideration.⁴

On the other hand, such promise is within the Statute of Limitations and it has not yet been decided as to whether or not such a promise requires delivery or acceptance or whether it becomes operative merely upon signing.

Two other types of enforceable promises have long been recognized, the one where the promise is part of a bargain and results from offer and acceptance and the other where the only consideration for the promise is past and a sense of moral obligation constitutes the motive for the making of the promise. Much more recently there has developed the gratuitous promise which is held enforceable because it reasonably induces definite and substantial action on the part of the promises and it is felt that injustice can be avoided only by the enforcement of the promise.⁵

⁴Uniform Written Obligations Act, Act of May 13th, 1927, P. L. 985, 33 P. S. sec. 6.

⁵*Freid v. Fisher*, 328 Pa. 497, 196 Atl. 39, 115 A.L.R. 147, 37 D.L.R. 141, 46 D.L.R. 25, 90 Pa. L. R. 881, 8 Pit. L. R. 192.

It is interesting to note that as recently as 1941 a statute was enacted in New York which provides:

"A promise hereafter made in writing and signed by the promisor shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed."

It is also worth noting that as recently as 1944 our Superior Court reaffirmed, what had been held in numerous earlier cases, that a discharge in bankruptcy is an absolute extinguishment of the obligation and that any action brought thereafter must be upon a new promise, for which the moral obligation, taken with the fact of the pre-existing liability, will furnish the consideration.⁶

⁶McDermott v. Sulkin, 154 Super. 81, 35 A (2d) 556.