

1947

Contracts: Is a Promise to Perform That Which Is Due a Third Party Sufficient Consideration to Support a Promise?

Bruce C. Babbitt

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Recommended Citation

Bruce C. Babbitt, *Contracts: Is a Promise to Perform That Which Is Due a Third Party Sufficient Consideration to Support a Promise?*, 8 Mont. L. Rev. (1947).

Available at: <https://scholarworks.umt.edu/mlr/vol8/iss1/6>

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**CONTRACTS: IS A PROMISE TO PERFORM THAT
WHICH IS DUE A THIRD PARTY SUFFICIENT
CONSIDERATION TO SUPPORT A PROMISE?**

From a dictum in the recent decision of the Montana Supreme Court in the case of *Hewitt v. Novak*¹ an interesting study of the sufficiency of consideration arises. Among other problems involved in the case, the court considered the question of whether a promise to do that which a person is already obligated to a third party to do is sufficient consideration for a promise in return.

In that case the suit was upon a promissory note made by the defendants payable to the order of the plaintiffs. Prior to the making of the note the plaintiffs had purchased a farm, and being unable to pay the full purchase price, had executed a mortgage in favor of the vendor, giving the vendor the right in case of default, of peaceable re-entry and possession. After making a considerable down payment on the purchase contract, the plaintiffs defaulted and were given thirty days notice to vacate. The plaintiffs then requested that the vendor give them sufficient time to find a purchaser of their interest. This request was granted. The plaintiffs then succeeded in interesting the defendants in the property and through the local agent of the vendor a deal was closed whereby the plaintiffs agreed to vacate the premises by a certain date and to transfer their interest in the property to the defendants. The defendants gave in return the note in question. At the time specified for the plaintiffs to vacate the premises, the plaintiffs breached that much of the agreement, and as a consequence the defendants refused to honor the note when it came due. Upon suit on the note, the defendants relied upon the fact that the plaintiffs were already under a duty to the original vendor to vacate the property and that, as a consequence, there was no consideration for the note. Although the court decided that the plaintiffs were under no duty to the vendor to vacate and that, therefore, there was consideration; it said:

“The rule is well established that the promise to do what a person is already obligated to do is not sufficient consideration for a promise made in return. (Citing authority).

“Pursuant to this principle of law it is well established that an agreement to surrender possession of property which the promisor is already under legal obligation to

¹ (1945)Mont....., 158 P. (2d) 627, 629.

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surrender is not sufficient consideration to support a promise. (Citing authority).

"If, therefore, the plaintiffs were already under an obligation to surrender the possession of the property, the defendants contention would be meritorious. (Citing authority)."

There is no indication that the court considered the difference between the case where the promisee is already under a duty to the promisor and where he is under a duty to a third person. The cases and texts which it cites refer to the former and do not fit the facts of this case, however.

It should be admitted at this point that the great weight of authority in the United States supports this view.¹ Laying aside the question of whether the minority view is preferable or not, it is submitted that under our code provisions the Montana courts should follow the minority view.

R.C.M. 1935, §7503, defines consideration as follows:

"Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise. (Italics the author's).

It is with the meaning of the first clause of this section that we are presently concerned.

Before going further, however, it would be well to make a few distinctions so that the problem under consideration will emerge more sharply. In the first place, there is no doubt of the invalidity of a second promise made to one already under an obligation, if the promise is made by the original promisee to perform his original obligation. Neither benefit to the promisor, that is, a benefit to which he is not already lawfully

¹ WILLISTON, CONTRACTS (Rev. Ed. 1936) 131, p. 454, and cases cited in note 3 thereon. A study of the cases cited in this note will reveal that in a number of jurisdictions the courts have failed to see the distinction between a second promise between the original parties and a promise made by a third party. *Havana Drill-Press Co. v. Ashurst*, (1893) 148 Ill. 116, 35 N.E. 873; *Alley v. Turk*, (1896) 8 App. Div. 50, 40 NYS 433; *Petze v. Leary* (1907) 117 App. Div. 829, 102 NYS 960; *Hamilton v. Oakland School District of Alameda County*, (1933) 219 Cal. 322, 26 P. (2d) 296. One California case, however, recognized the distinction but held that "A promise by one to fulfill his own contract with another is no consideration for a promise by a third party"; *Tipton v. Tipton* (1933) 133 Cal. App. 500, 24 P. (2d) 525.

entitled, nor detriment to the promisee would exist in such a situation and the lack of consideration of any sort is obvious. But in *Hewitt v. Novak*⁶ such was not the case, as the pre-existing duty was to the vendor and not to the defendant. The defendant was clearly a stranger to the original contract.

Secondly, the problem at hand can be distinguished from the case of a duty imposed by law. In such a case the promise is insufficient consideration although the original obligation does not run directly to the promisee of the later agreement. However, the obligation does run to the public of which the promisee is a member, and as such he is "lawfully entitled" to the performance of the duty in question.⁷ But duties imposed by law apply to officers of the law or to certain individuals whose business is such that it is subject to the control of the state. The distinction between such a duty and the one owed by the plaintiff in *Hewitt v. Novak*⁸ is obvious, as the plaintiff's duty was imposed by contract between plaintiff and vendor, and not by law, so that prior to the subsequent promise only the vendor was "lawfully entitled" to have the plaintiff remove from the premises.

Returning, then, to a consideration of the statutory definition of consideration in Montana, we must look to the historical background of the section to interpret the clause relating to "benefit to the promisor."⁹ §7503 was adopted verbatim from the Field Civil Code of New York, §780.⁷ In the original report of the Field Code the Code Commissioner's discussion of the terminology used shows that the clause ". . . to which the

⁶See note 1, *supra*.

⁷1 WILLISTON, CONTRACTS (Rev. Ed. 1936) 132, p. 463. In *Hewitt v. Novak* the court cited this section as sustaining its view. It is clearly not in point.

⁸See note 1, *supra*.

⁹The only cases that have arisen prior to *Hewitt v. Novak* that called for a consideration of the question were cases where the second promise was made by the original parties to the first promise, and are therefore not in point. See *Kinna and Ming v. Woolfolk*, (1882) 4 Mont. 318, 1 P. 401, where the consideration furnished by the two promisees was the joining with the promisor in borrowing money to pay an obligation owed by all three to a creditor. The promisees were thus under an obligation to the promisor to pay their respective shares. In *Northwestern National Bank v. Great Falls Opera House*, (1899) 23 Mont. 1, 57 P. 440, the court held that when the promisee, an employee of the bank, loaned the money of the bank, the bank and not the promisee furnished the consideration and his act was that of the bank. See also *Baker v. Citizens State Bank of St. Peter, Minn.* (1928) 81 Mont. 543, 264 P. 675.

⁷§1605 of the California Civil Code is also identical.

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promisor is not lawfully entitled, . . ." is based directly upon the English case of *Scotson v. Pegg*.⁸

The case of *Scotson v. Pegg* involved a suit upon a promise made to a carrier of coal that if he would unload the coal so that the defendant vendee might obtain delivery of the cargo the defendant would give him additional compensation. At the time the promise was made the plaintiff was already under a contractual duty to the vendor of the coal to unload the cargo. In sustaining the plaintiffs suit upon the promise, Marin, B., said:

"(The plea) is bad in law because the ordinary rule is that any act done whereby the contracting party receives a benefit is a good consideration for a promise by him The defendant gets a benefit by the delivery of the coals to him, and it is immaterial that the plaintiff had previously contracted with third parties to deliver their order."

In a concurring opinion, Wilde, B., said:

"Here the defendant who was a stranger to the original contract, induced the plaintiffs to part with the cargo, which they might not otherwise have been willing to do, and the delivery of it to the defendant was a benefit to him. . . . To say, (in such a case) that there is no consideration is to say that it is not possible for one man to have an interest in the performance of a contract made by another."

Using this case as the basis for the statutory language it is indeed difficult to see how a result as that suggested by the case in question can be sustained under R. C. M. 1935, §7503, if the meaning that was originally imported to the words is followed. The "benefit" clause of the section is directly applicable to the facts of *Hewitt v. Novak*.⁹

It becomes even more difficult to sustain the view of the court when it is realized that the only reason for having the "benefit to the promisor" provision in the definition of consideration is to take care of such cases. This is the only situation where it is possible for the promisor to receive a benefit to which he was not previously entitled, moving from the promisee, and yet the promisee suffer no detriment. The promisor has certainly received something to which he was not previously "lawfully entitled" but the promisee has done nothing which he

⁸(1869) 6 H. & N. 295.

⁹See note 1, *supra*.

was no already bound to do." As a matter of fact, the only reason that the accepted definition of consideration still retains the "benefit to the promisor" clause is because of the influence upon the law of *Scotson v. Pegg*,²¹ and its companion case of *Shadwell v. Shadwell*,²² and those few cases which have followed the rule therein stated in the United States.²³ Shortly before the turn of the century there was a scholastic movement afoot to modify the traditional definition of consideration that was continually being used by the courts. It was thought at that time by those who supported the proposed modification²⁴ that a simplification in the law of contracts would result if a test of consideration involving only detriment to the promisee was adopted. However, after a flurry of legal writing upon the subject, those who would have modified the definition gradually swung around to accept the prevailing theory of consideration,²⁵ with a realization that the "benefit to the promisor" clause was necessary to validate such contracts as *Hewitt v. Novak*.²⁶

One of the most recent pronouncements of the position urged by this article is in the Restatement of the Law of Contracts, which provides for the same result as reached in England. §84 (d) provides:

"Consideration is not insufficient because of the fact that . . . (d) the party giving the consideration is then bound by a contractual or quasi-contractual duty to a third person to perform the act or forbearance given or promised as consideration."

The position thus taken by the Restatement of the Law of Contracts has been acclaimed as one of its greater departures from the numerical weight of authority in favor of a better and more just rule of law.²⁷

²⁰Williston, *Successive Promises of Same Performance*, 8 HARV. L. REV. 27 (1894); particularly at page 33.

²¹See note 9, *supra*.

²²(1860) 30 L. J. C. P. (N. S.) 145.

²³1 WILLISTON, CONTRACTS (Rev. Ed. 1936) 131 p. 455, and cases cited thereon, notes 4 and 5.

²⁴Williston, *Successive Promises of Same Performance*, 8 HARV. L. REV. 27 (1894); particularly at pages 36, 38. In this article Williston criticized the rule as it stood then, and as it still stands, on the basis that it was more logical to set up a test of ". . . what the promisee has given, not what the promisor has received."

²⁵Williston, *Consideration in Bilateral Contracts*, 27 HARV. L. REV. 503. (1914); particularly at page 524. It is interesting to note the change in the position taken by Mr. Williston within a twenty year period.

²⁶See note 1, *supra*.

²⁷Whittier, *The Restatement of Contracts and Consideration; Two Angles of Approach*, 18 CALIF. L. REV. 611 (1929); particularly at page 621.

Therefore, in view of the codification of the rule of *Scotson v. Pegg*,² that appears in R. C. M. 1935, §7503, and in view of the many expressions that the rule thus codified is the proper definition of consideration, it is submitted that the Montana Supreme Court in the case of *Hewitt v. Novak*³ failed to give effect to the pertinent Montana statutory provisions and that if the question should arise again the Supreme Court should follow the minority rule.

Bruce C. Babbitt

²See note 9, *supra*.

³See note 1, *supra*.

NATURE AND SCOPE OF DOWER RIGHTS IN MONTANA

At common law the widow was entitled to a life interest in one-third of the lands which her husband owned during coverture, as her dower. As she took this interest under the law and not by succession to him, her husband's will could not deprive her of it. She took no forced share in the personality. While some jurisdictions retain common law dower, in most states legislation has given the widow a forced share of her husband's property, which provision is more favorable to her.¹ "These statutory substitutes generally allow her a share in fee of which she may not be deprived by will, rather than a mere fractional life interest," says Atkinson,² eminent authority on Wills. Usually our statutes provide that the survivor shall have an absolute interest in one-third of the realty and the personality of the deceased. This interest to which the surviving spouse is entitled by statute, and which the deceased cannot take away by deed or will, is statutory dower.³ In some jurisdictions the widow takes her entire intestate share in spite of contrary provisions of her husband's will. In many jurisdictions her forced share extends to her husband's personality as well as realty, though the laws generally restrict this to personality owned by the husband at his death, and

¹ATKINSON, WILLS (1st ed. 1937) p. 81.

²28 C.J.S. *Dower* §5; *op. cit.* Skelly Oil Co. v. Murphy (1930) 180 Ark. 1023, 24 S.W. (2d) 314; Schoellkopf v. De Vry (1937) 366 Ill. 39, 7 N.E. (2d) 757, 110 A.L.R. 511; Wilson v. Hilligoss, 278 Ill. App. 564; McCulley v. Hardeman (1920) 143 Tenn. 1, 223 S.W. 146.

³ATKINSON, WILLS (1st ed. 1937) p. 82.

⁴Sayre, *Husband and Wife as Statutory Heirs*, 42 HARV. L. REV. 331 (1928-29).