EXISTING DEBT AS CONSIDERATION

By K. C. T. SUTTON*

I

IT is a general rule of English law that the mere existence of a debt cannot be consideration for a promise by the debtor, nor can a promise to pay or the payment of an existing debt support a fresh promise by the creditor.[1] It would appear however that a promise by a debtor to pay his debt can still be enforced as a contract, the consideration for the promise being, apparently, the existing debt.[2]

The explanation of this is of course historical. The action of Indebitatus Assumpsit, which was well established in the Court of King's Bench before the end of the sixteenth century and which was finally sanctioned in *Slade's* case,[3] had as its basis a promise to pay a debt made by a person who was already indebted. *Slade's* case settled that the precedent debt was consideration for the subsequent promise. As early as 1617, in *Hodge v. Vavisour,*[4] the objection was raised that this kind of consideration was difficult to reconcile with the rule that a consideration could not be past, but it was overruled on the ground that, as the debt always continued, the consideration could not be past.

The modern explanation for the rule[5] is that no new cause of action arises. There is no new contract, but the fresh promise, which corresponds with the original promise, operates to revive the debt. It 'continues' or 'renews' or 'establishes' the original promise. As Lord Sumner said, referring to authorities which appeared to indicate that a new cause of action arose: 'It is quite impossible that so many judges should have spoken of the old debt being the consideration for the new promise without their being fully aware that if a new cause of action is meant this is contrary to long settled rules of law as to consideration. They must have spoken of the new

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[1] See *Wigan v. English & Scottish Life Assurance Assn.* [1909] 1 Ch. 291, 297, per Parker, J.; *Vanbergen v. St. Edmunds Properties Ltd.* [1933] 2 K.B. 223, 231-2, per Lord Hanworth; *semble, Foakes v. Beer* (1884) 9 App. Cas. 605. But cf. *Taylor v. Blakelock* (1886) 32 Ch. D. 560, 570, per Bowen L.J. (discussed *infra*). And see *Bob Guiness Ltd. v. Salomonsen* [1948] 2 K.B. 42, 47, per Denning J.

[2] Holdsworth, *History of English Law*, viii, 39. *Spencer v. Hemmerde* [1922] 2 A.C. 507, 537, per Lord Wrenbury. But the existing debt is not sufficient consideration to support a promise to do any collateral thing, such as to supply goods etc. *Earle v. Oliver* (1848) 2 Ex. 71, 90.

[3] (1602) 4 Co. Rep. 92b.

[4] 3 Bulstr. 222.

[5] *Spencer v. Hemmerde* [1922] 2 A.C. 507, 524-5, per Lord Sumner.

promise as something different from a new contract, binding in law as such.' But a learned writer[6] points out that even on this view of the law the consideration for the express promise must still lie in the existing debt. And note the later criticisms of Lord Sumner's view by Lord Wright[7] and C. A. Wright.[8]

II

It is perhaps on the ground that there is a promise to pay an existing debt, the consideration for which is the existing debt, that certain cases of account stated can be supported. It is usual at the present day to divide accounts stated into two forms – where there is, at most a mere acknowledgment of a debt; and where there are items on both sides and the parties have agreed that there shall be a set-off and that only the balance shall be paid. In the former case, Lord Atkin, speaking for the Judicial Committee of the Privy Council, pointed out in *Siqueira v. Noronha*[9] that there was a promise to pay, and the existence of a debt might be inferred, but the inference could be rebutted and if it turned out that there was no real debt at all, there would be no consideration and no binding promise.[10] In the latter case, said his Lordship, there was a promise for good consideration to pay the balance arising from the fact that the items had been set off against each other.[11]

It would appear that cases of the former class can be supported only on the ground of the enforceability of the action of indebitatus assumpsit; while the consideration in cases of the latter class would seem to be a rather artificial one. The promise to pay cannot be made until the various items have been set off against each other and the balance of liability determined, and would therefore appear to be based on a past consideration – unless of course it can be said that there is a conditional promise by each party to strike a balance and to pay if money be found owing to the other.

[6] Professor W. S. Holdsworth (1923) 39 L.Q.R. 146.
[7] (1939) 55 L.Q.R. 189, 201.
[8] (1936) 1 *University of Toronto Law Journal* 17, 36.
[9] [1934] A.C. 332, 337.
[10] This is at least a recognition by the Judicial Committee that, if there is a debt, then that will be consideration for the promise.
[11] See too the distinction made by Blackburn J. in *Laycock v. Pickles* (1863) 4 B. & S. 497, 506-7. His Lordship seemed to think in that case that in a real account stated, as he called it, a mere moral obligation might be brought into account. See too *Executor Trustee & Agency Co. (S.A.) Ltd. v. Thompson* (1919) 27 C.L.R. 162, 170, per Isaacs J. Again the implication seems to be that, in so far as the account stated is an acknowledgment of a debt, the existing debt is consideration for the promise to pay. But His Honour held that such a promise, though a distinct cause of action, did not arrest the running of the Statute of Limitations.

The definition of account stated given by Halsbury[12] covers both types of action. It reads: 'Where parties mutually agree that a certain sum is due from one to the other an "account stated" is said to arise, and the law implies a promise on the part of the one from whom such sum has been agreed to be due to pay the same, on which the other party may sue without being put to the proof of the correctness of the account.' In *Howard v. Brownhill*[13] Crompton J. held that where money was due under a trust and the trustee stated an account concerning it with the cestui que trust, it might be recovered in an action on an account stated. The contention that there was no consideration was begging the question. If parties met together to state a balance, that was laid down in *Roper v. Holland*[14] to be a sufficient consideration to maintain the action.

But, with respect, a perusal of that case as reported in both Adolphus and Ellis and the Law Journal King's Bench reports[15] discloses that the question of consideration was not mentioned by either counsel or the Court. On the facts, *Howard v. Brownhill* would appear to be an instance of a mere acknowledgment of a debt.[16]

In *Cocking v. Ward*[17] it was held that, where the defendant promised orally to pay £100 if the plaintiff would vacate a farm as tenant and would try to persuade the landlord to accept the defendant as tenant in her place, the plaintiff was entitled to recover on an account stated, it being shown that the defendant had repeatedly promised to pay after he had obtained possession of the farm; although the Statute of Frauds prevented the plaintiff from succeeding on the original contract.[18] Tindal C.J., speaking for the Court, said[19] that 'after the debt has formed an item in an account stated between the debtor and his creditor, it must be taken that the debtor has satisfied himself of the justice of the demand, that it is a debt which he is morally if not legally bound to pay, and which therefore forms a good consideration for a new promise.'

In *Irving v. Veitch*[20] Lord Abinger C.B. said that 'the account

[12] *Halsbury's Laws of England,* (2nd ed., 1933) vii, 294.
[13] (1853) 23 L.J.Q.B. (N.S.) 23.
[14] (1835) 3 Ad. & El. 99.
[15] 4 L.J.K.B. (N.S.) 156.
[16] See too *Prouting v. Hammond* (1819) 8 Taunt, 688, and the cases cited in argument in *Topham v. Morecraft* (1858) 8 El. & Bl. 972, 979. In that case Erle J. said there was consideration to support an account stated but did not specify what it was. The implication is that the existing debt was the consideration.
[17] (1845) 1 C.B. 858.
[18] On this aspect see (1925) 41 L.Q.R. 79; *James v. Thomas H. Kent & Co. Ltd.* [1951] 1 K.B. 551; and *Turner v. Bladin* (1951) 82 C.L.R. 463, 474-5.
[19] (1845) 1 C.B. 858, 870.
[20] (1837) 3 M. & W. 90, 107.

stated is nothing more than the admission of a balance due from one party to another; and that balance being due, there is a debt; and when a man is indebted there is always a good consideration for his promise. The very statement of the account, and the admission of the balance, implies a promise in law to pay it.' This passage along with the decision in *Cocking v. Ward* was cited with approval by Street C.J. speaking for the Full Court of the New South Wales Supreme Court in *Longobardi v. Larkin.*[21] And this was in spite of the contention by counsel that the admission of a debt did not amount to an account stated, to establish which it was necessary to prove an agreement with consideration to pay a certain amount.[22]

Evans v. Heathcote,[23] a decision of the English Court of Appeal, is further authority for the view here propounded. In that case there was no dispute as to the amount due to the plaintiffs, the claim being for an amount which had been stated by the defendant's agent to be due. Scrutton L.J.[24] referred to the rule that it was open to examine the *debt or consideration* in respect of which an account was stated, and he found the consideration for the account stated in the case before him in the executed consideration under a prior unenforceable agreement which, by the doctrine of *Lampleigh v. Braithwait,*[25] was good consideration for a promise to pay implied from a subsequent account stated. With respect, it is submitted that it is artificial to relate the subsequent promise to pay back to acts done under an unenforceable agreement, especially as in this case it was not known at the time the acts were done whether the defendant would be indebted to the plaintiff or not.

Finally, attention must be drawn to the views of Williston who impliedly admits that the consideration for an account stated is the previous debt[26] and Keith who regards accounts stated as an exception to the rule that contracts must be based on consideration. They are, he says, contracts based on the existence of a debt ascertained and agreed to exist.[27]

III

In spite of the generally accepted view that the validity of an existing debt as consideration is restricted to promises by the debtor to pay that debt, there are decisions which appear to establish that an existing debt may be consideration for other types of

[21] (1928) 28 S.R. (N.S.W.) 248, 251-2
[22] *Ibid.* 249. See too *Re Stock* (1896) 75 L.T. 422, 424.
[23] [1918] 1 K.B. 418. [24] *Ibid.* 434-6.
[25] (1616) Hob. 105.
[26] *Williston on Contracts* (Rev. ed., 1936) s. 1864, p. 5237.
[27] *Elements of the Law of Contracts* (1931), 25-6.

promises. Thus, in *Lilly v. Hays*[28] the facts were that W owed the plaintiff money and gave the amount to the defendant to whom he was also indebted. The defendant promised to pay this amount to the plaintiff and when he failed to do so, was sued on the promise. He pleaded want of consideration therefor, but Patteson J. rejected the plea. There was a consideration if the money was sent to a general agent for the creditor and received by him, he informing the creditor of it. Coleridge J.[28a] said that the agency supplied the consideration.

In *Walker v. Rostron*[29] the plaintiff sold goods to B delivering them to B's agent C who sent them abroad for sale. B gave the plaintiff a bill of exchange for the value of the goods. While the bill was running, the plaintiff, doubting B's solvency, obtained an assignment from him whereby he (B) and C agreed that the moneys coming to C from the sale of the goods should be sent to the plaintiff. B became bankrupt before the money came to hand, and, on its receipt, C refused to pay the plaintiff and was sued on his promise. For the plaintiff it was argued *inter alia* that if the plaintiff had acted in reliance on the assignment and altered his position for the worse, that would have been consideration. Lord Abinger C.B., in delivering the judgment of the Court of Exchequer, held that 'the existence of a debt, although it be not due instanter, is a good consideration'.[30] The defendant C was therefore liable.

In *Earle v. Oliver*[31] where there was a promise made by a bankrupt before his discharge to pay the plaintiff a debt together with interest thereon when he was able, if the plaintiff should be called upon to meet the debt under a guarantee given by him for the bankrupt's benefit, Parke B. held that the mere liability to repay the plaintiff was an equally good consideration as an existing debt. But the learned Baron went on to state the qualification that it did not follow that a debt would be a sufficient consideration to support a promise to do a collateral thing such as to supply goods or perform work or labour. Notwithstanding this, Parke B. held that the promise to pay interest was binding, being supported by the same consideration as the original promise. This, with respect, would seem to be an inconsistency.[32]

Romilly M. R. was of the opinion in *Chowne v. Baylis*[33] that where a clerk guilty of embezzlement gave an equitable security over

[28] (1836) 5 Ad. & El. 548.
[28a] *Ibid.*, 551.
[29] (1842) 9 M. & W. 411.
[30] *Ibid.* 420.
[31] (1848) 2 Ex. 71.
[32] Legislation would now appear to have altered the position in circumstances such as these. See *Heather v. Webb* (1876) 2 C.P.D. 1, 8.

certain insurance policies and lands in partial restitution, on the theft being discovered, the debt owing by the clerk to his employers constituted a good consideration to support the assignment of the property. In *Middleton v. Pollock*[34] Jessel M.R. regarded a security given by a debtor to secure payment of a debt, although the making of the security was not communicated to the creditor, as having been given for good consideration so as to defeat a claim made under the statute 13 Eliz. c. 5. It would appear that the Master of the Rolls regarded the debt as forming the consideration.

In *Davies v. Bolton & Coy.*[35] Vaughan Williams J., asked to find whether a debenture given by a company had been given for valuable consideration or not, was of the opinion that 'if there had been no other circumstances beyond the fact of the debenture having been issued for the sum due but not payable, the debenture would nevertheless have been issued for value.' But his Lordship did not base his judgment on this point as he found consideration in the variation of the terms on which the loan was made.

These last two cases were cited in argument in *Wigan v. English & Scottish Law Life Assurance Assn.*[36] and were distinguished by Parker J. It is respectfully submitted that his Lordship's attempts to distinguish these decisions were not happy. All he could say of *Middleton v. Pollock* was that, in the particular circumstances of that case, Jessel M.R. concluded that there was good consideration. Of *Davies v. Bolton & Coy.* his Lordship declined to infer that Vaughan Williams J. thought in that case that the mere existence of a debt was consideration for a security without any actual forbearance or promise to forbear. In any case, it was an *obiter dictum,* and Parker J. declined to follow it in face of all the authorities the other way.

Walker v. Rostron has been followed in a number of cases. In *Griffin v. Weatherby*[37] Blackburn J. said: 'Ever since the case of *Walker v. Rostron* it has been considered as settled law that where a person transfers to a creditor on account of a debt, whether due or not, a fund actually existing or accruing in the hands of a third person, and notifies the transfer to the holder of the fund, although there is no legal obligation on the holder to pay the amount of the debt to the transferee, yet the holder of the fund may, and if he does promise to pay to the transferee, then that which was merely an equitable right becomes a legal right in the transferee, founded on

[33] (1862) 31 Beav. 351.
[34] (1876) 2 Ch. D. 104.
[35] [1894] 3 Ch. 678.
[36] [1909] 1 Ch. 291.
[37] (1868) L.R. 3 Q.B. 753, 758.

the promise. . . .'[38] In *Gregory v. Bank of Australasia*[39] it was held that if a debtor appropriated to his creditor money, whether actually in the hands or thereafter to come to the hands of a third party, and the third party consented to it, that appropriation was irrevocable as a debt was sufficient consideration for such an appropriation. The case of *Walker v. Rostron* was conclusive on the subject.[40] In *McPherson v. Andrew Lees Ltd.*[41] Sim J., while referring to the existence of the debt from the third party to the plaintiff-respondent as consideration for the defendant-appellant's promise to pay, regarded the respondent's claim as based on an action for money had and received by the appellant to the use of the respondent by virtue of the appellant's promise to pay, and not on the fact that the respondent was the assignee of the debt from the third party.[42]

In *In re Legge*[43] L. wrote a letter to a bank promising 'in consideration of the sum of £280 now due and owing by me' to execute a mortgage in favour of the bank whenever called upon so to do, and Chapman J. held that this amounted to a contract for valuable consideration that L. should mortgage certain land to the bank. Similarly, in *Peter v. Shipway*[44] Griffith C.J. was of the opinion that 'a conveyance of property by a debtor to his creditors in consideration of his debts' was not without consideration. In *Thomas & Co. v. Thureau*[45] an assignment of his wages was given by one G. to the plaintiff firm in consideration of his indebtedness to them, and Clark J. regarded the assignment as a good one in spite of argument by counsel that the consideration of indebtedness was past, and so not valuable.

To sum up, the *Walker v. Rostron* type of case would seem to establish either that a pre-existing debt of a third person to the promisee is good consideration for a promise to pay the debt or that the pre-existing debt of the promisor to the third party is good consideration for the promise. The cases not covered by *Walker v. Rostron* are to the effect that the pre-existing debt furnishes good consideration for the giving of a security or the making of an assignment by the debtor. There is no evidence of forbearance to sue

[38] See too: *Noble v. National Discount Co.* (1860) 5 H. & N. 225.
[39] Reported in the *Argus*, 1 April 1858.
[40] See too *Henderson v. Smith* (1884) N.Z.L.R. 2 S.C. 414.
[41] [1926] N.Z.L.R. 523.
[42] This would appear to place the rationale of the action, not on the ground of assignment, but on that of quasi-contract.
[43] (1872) Mac. 1009 L.
[44] (1908) 7 C.L.R. 232, 244.
[45] (1905) 1 Tas.L.R. 58.

by the creditor either actual or bargained for, and indeed in some cases there could be none as the debt was not yet due. Further, the dicta of the various judges indicate that the question of forbearance is irrelevant.

On the other hand, many of the cases discussed above can be classed as cases of assignment of a chose in action. Winfield[46] gives three exceptions to the rule than an antecedent debt cannot constitute consideration for a promise, but says that, apart from these exceptions, an existing debt is not *per se*, at the present day, consideration for a subsequent promise. One of the three exceptions is the assignment of a chose in action.[47] But the creditor must be informed of the assignment and must give forbearance with respect to his claim for the debt, even if such forbearance is subsequent to the giving of the security, and the learned writer cited *Wigan v. English etc. Assn., Glegg v. Bromley*[48] and *Re Wethered*[49] in support of his statement. With respect, it is submitted that, on the authority of the cases discussed above, the question of forbearance would appear to be irrelevant.

The other two exceptions mentioned by Winfield are that an existing debt is consideration for the giving of a negotiable security, and that on the authority of *Leask v. Scott Bros.*[50] an existing debt is consideration for the transfer of a bill of lading so as to defeat the right of stoppage *in transitu*. In that case the plaintiff lent a third person money on the faith of his promise to give security. He (the third person) later handed over a bill of lading. On the third person becoming bankrupt, the defendant who had sent the goods covered by the bill of lading sought to apply a stoppage *in transitu*. The consideration for the transfer of the bill of lading was past and it would appear that a bill of lading is not a negotiable instrument in the ordinary sense so that a past consideration can normally be regarded as good consideration.[51] The Court of Appeal declined to follow *Rodger v. Comptoir d'Escompte de Paris*[52] where the Judicial Committee of the Privy Council distinguished between past and present consideration in such a case and held that the plaintiff was entitled to succeed as an assignee for value.

[46] Editing Pollock, *Principles of Contract* (13th ed., 1950), 154-5.
[47] The question whether an equitable assignment of a chose in action requires consideration at all is a difficult one and differing opinions are held. See e.g. Marshall, *Assignment of Choses in Action* (1950), 109.
[48] [1912] 3 K.B. 474.
[49] [1926] Ch. 167.
[50] (1877) 2 Q.B.D. 376.
[51] See *Scrutton on Charter Parties* (15th ed., 1948), 184.
[52] (1869) L.R. 2 P.C. 393.

As regards the exception existing in the case of the giving of negotiable instruments, the matter merits further study in a separate section particularly in view of the recent case of *Oliver v. Davis*.[53]

IV

It was established by the law merchant that an antecedent debt or liability was sufficient consideration for a bill of exchange, and a series of decisions laid it down that the debt of a third person was good consideration therefor. Thus, in *Poplewell v. Wilson*[54] a case which is very briefly reported, the Court of Exchequer held that a promissory note given by A to pay B a debt due from C to B was within the statute 3 Anne c. 9 (which made promissory notes assignable and endorsable over in the same manner as if they were bills of exchange), being an absolute promise and as negotiable as if it had been generally for value received. Admittedly, the decision does not say in as many words that an existing debt is good consideration. It is implied perhaps from the language of the Act which declared that a promisee could maintain an action on a note in the same manner as could be done on a bill according to the custom of the merchants. The necessity for showing a consideration for a bill of exchange must have arisen before the presumption became established some time in the seventeenth century that consideration existed for the bill.[55] It must also be admitted that the equally badly reported decision of *Garnet v. Clarke*[56] is in conflict with *Poplewell v. Wilson*. In that case, Holt C.J. held that a promissory note to pay so much on account of a third person was bad as not being within the statute 3 Anne c. 9. The consideration implied in the statute was that when a party promised on his own account it must be presumed that he was indebted, but this presumption did not apply where the promise was to pay on account of a third person.

Be that as it may, Bayley B. approved and followed *Poplewell v. Wilson*[57] in his judgment in *Ridout v. Bristow*[58] where a widow had given a note 'for value received by my late husband'. The objection was made that the note was without consideration but the Court of Exchequer held the note good. The learned Baron regarded *Poplewell's* case as deciding that a note was binding although it purported to be for the debt of a third person. But he seemed to be influenced by ideas of moral obligation, by the fact that a

[53] [1949] 2 K.B. 727.
[54] (1719) 1 Str. 264.
[55] Holdsworth, *History of English Law*, viii, 167.
[56] (1709) 11 Mod. 226.
[57] *Ibid.*
[58] (1830) 1 Cr. & J. 231.

promissory note imported a consideration, and by the fact that the note might have induced forbearance by the creditor. He said:[59] 'It is just that a promise to pay that which I am under no legal or moral obligation to pay should be considered as nudum pactum; but this does not apply to an instrument importing a consideration, and which may induce forbearance to the party.'[60]

In *Sowerby v. Butcher*[61] the same learned judge held that there was consideration where the brother of a drawer of a bill of exchange signed it to accommodate the holder thereof without receiving any consideration and having no knowledge of the transaction. 'The debt of a third person is a good and valid consideration for which a party may bind himself by a bill; and the consideration need not of necessity be such as would enable the plaintiffs to sue on a special contract,' said his Lordship.[62] In *Baker v. Walker*[63] Parke B. approved *obiter* the decision in *Poplewell v. Wilson* that a note given for a debt of a third party was sufficient consideration, and remarked that the principle had been acted upon in many other cases.[64]

With the rejection of the notion of moral obligation and past consideration as good consideration in *Eastwood v. Kenyon*,[65] the judicial attitude appears to have undergone a gradual change, emphasis being placed on the idea of bargain, the bargaining-point being the forbearance of the creditor to sue the debtor. This can be seen by comparing the decision in *Sison v. Kidman*[66] with the later case of *Crofts v. Beale*.[67] In the former case, the defendant signed a note as principal although the facts showed that he was only a surety, the debt being owed by a third party, and it was held that there was good consideration for the note.

[59] *Ibid.* 235

[60] See too *Bowerbank v. Monteiro* (1813) 4 Taunt. 844, where the executrix of a testator who had died leaving debt due to the plaintiff, accepted a bill of exchange drawn by the plaintiff. The consideration proved was the debt due by the deceased to the plaintiff and this was apparently accepted by the court as being good. On the facts, it is probable that there was consideration in the promise of the plaintiff to renew the bill from time to time until sufficient assets were received from the estate, but this was not considered by the court.

[61] (1834) 2 Cr. & M. 368. [62] *Ibid.* 372.

[63] (1845) 14 M. & W. 465, 468.

[64] *Cook v. Long* (1842) Cr. & M. 510 which is sometimes cited as authority for this view, is not, it is submitted, anything of the sort. The note sued on was given by the defendant in respect of a debt due by his father and Wightman J. held that there was consideration for the defendant's original liability in family affection.

[65] (1840) 11 Ad. & El. 438. [66] (1842) 11 L.J.C.P. 100.

In the latter case, the facts were similar and the trial judge directed the jury that there would be consideration for the note if it had been given to stop legal proceedings against the debtor. The jury's verdict negatived this. On appeal, the Court refused to disturb the verdict holding that there were no grounds for doing so. Maule J. was forced to rely on a technicality to distinguish *Sison's* case. There, he said, the defendant by his plea admitted that consideration had been given for the note but alleged that he had received none. Here there was no such admission.

The same tendency is seen in *Crears v. Hunter*[68] where the defendant signed a note whereby he promised to pay the plaintiff the amount of a loan given to his father together with interest. The question was whether any consideration existed. No mention was made of the pre-existing debt to the father forming a consideration. It was not adverted to by the Court, although counsel for the defendant argued that such a debt was no consideration, the judges being concerned with whether an agreement to forbear by the plaintiff could be spelt out of the facts. But the implication is that the existing debt of the third party was not regarded as consideration by the Court of Appeal.

Dealing with these cases, Byles in his work on Bills[69] says that the earlier decisions 'appear to assume' that the debt of a third person would be consideration to support an action on a bill or a note, but adds that in the later cases in which a bill given for the debt of a third person has been recovered upon, there was consideration in the shape of forbearance to sue or the release of the original debtor. But apart perhaps from *Crofts v. Beale,* there does not seem to be any *direct* authority (at least up to 1949) supporting Byles' view that the existence of a debt of a third person was not good consideration.

No express disapproval of *Ridout v. Bristow* and the other supporting decisions was made by Chapman J. in giving judgment in *Pratt & Co. v. McAlley,*[70] but on the other hand it is undeniably true that His Honour showed no desire to extend their scope. In the case before him a promissory note had been given by the wife of a debtor to a debt collector who was collecting a doctor's accounts. The collector sued on the note. The learned judge held that there was no consideration for the note since the evidence showed no more than that the plaintiff was authorized to collect the debt. There was nothing to suggest that he had authority to issue a summons for it or to ascertain by agreement the amount due or that he had any

[67] (1851) 11 C.B. 172.
[68] (1887) 19 Q.B.D. 341.
[69] (20th ed., 1939), 133.
[70] (1912) 14 G.L.R. 272.

interest in it. *Ridout v. Bristow* and similar cases were to be distinguished on the facts. In each case, the debt had been due to the *payee* of the note, while here there was only the note of a third party given to a fourth party.

In *Ayres v. Moore*[71] the defendant was induced to accept bills of exchange on the fraudulent representation of one F. that the plaintiff had advanced money to a company of which the defendant was chairman and that the bills were required as security. In fact, F. was personally indebted to the plaintiff and used the bills to secure his debt. The bills were dishonoured and the plaintiff sued the defendant as acceptor. The defendant alleged want of consideration therefor but Hallet J. held[72] that, although there was no evidence of agreement between F. and the plaintiff that the latter would forbear to press F. for repayment in consideration of being given the bills, yet there was a good consideration for the bills. 'Here there is unquestionably on the accepted facts an antecedent debt or liability. There was an antecedent debt or liability to the plaintiff to the amount of £3,780, and although there may have been no express agreement to forbear, I think that in the present state of the authorities there can be no doubt there was sufficient consideration for the giving of the bills.'

The whole line of authority beginning with *Poplewell v. Wilson*[73] and culminating in *Ayres v. Moore* was, in effect, overruled by the decision of the Court of Appeal in *Oliver v. Davis*[74] where it was held that the antecedent debt or liability referred to in s. 27 (1) (b) of the Bills of Exchange Act 1882 must be either that of the promisor or drawer of a bill or, if of a third party, then that there must be some relationship between the receipt of the bill or cheque and the antecedent debt or liability, such as forbearance or a promise to forbear express or implied, on the part of the recipient in regard to the third party's debt or liability.

The facts in the case were that D. borrowed £350 from the plaintiff and gave in return a post-dated cheque. He was in difficulty in meeting this cheque and fraudently induced the defendant to write out a cheque in favour of the plaintiff. This was handed to the latter, but the defendant, discovering the fraud of D., stopped payment on the cheque. The plaintiff sued defendant on the cheque alleging as consideration the promise to release D. from liability on the earlier cheque. The trial judge found that there was consideration for the cheque in the antecedent debt due to the plaintiff.

[71] [1940] 1 K.B. 278.
[72] *Ibid.* 282.
[73] *Supra*, n. 54.
[74] [1949] 2 K.B. 727.

On appeal, *Poplewell v. Wilson, Sowerby v. Butcher, Cook v. Long, Baker v. Walker, Crofts v. Beale,* and *Ayres v. Moore* were cited for the plaintiff. Evershed M.R. was of the opinion that the antecedent debt referred to in the Act was inserted to get over the common law rule that the giving of a cheque for an existing debt of the promisor was no consideration as the obligation was past and had been already incurred.[75] The Master of the Rolls cited *Crears v. Hunter* in support of his view that an existing debt to a third person was not consideration, and said that this much at any rate was plain, that if the debt of a third person was to be relied on as consideration for a bill there must be some relationship between receipt of the bill and the debt. Just what the relationship was his Lordship did not say, but he expressed the view that, practically, there could be no distinction between a case where such a relationship existed and a case in which, as a result of that relationship, there was consideration in the ordinary sense passing from payee to the drawer of the bill. Otherwise, the creditor might recover both on the debt from the third party and the cheque from the drawer.[76]

His Lordship proceeded to distinguish the cases cited for the plaintiff on the ground that 'it quite plainly emerges that in each of those cases the plaintiff in the action had in fact forborne or promised either expressly or impliedly to forbear from pursuing his claim against the debtor as a consequence of, and, therefore, as consideration for, the giving of the bill which was sued upon; and that the decision in each of those cases depended upon that fact.' Even the judgment of Parke B. in *Baker v. Walker* was strictly in line with the general conclusion.

With the greatest respect for the learned judge, it is submitted that the dicta of the judges in those cases did not hinge on the fact that there had been forbearance to sue in fact or that a promise of such forbearance could be spelled out of the circumstances. And to regard forbearance in fact as a consequence of the giving of a bill as

[75] But it might equally well have been inserted to clarify the existing common law position regarding the existing debt of both the promisor and the third party as consideration. At the time the Act was passed, it is submitted that the current of authority was still in favour of the view that the debt of a third person was good consideration and the subsection may have been inserted to remove all doubt about the matter.

[76] But the court would not permit the creditor to recover where, in fact his debt had already been satisfied. The Master of the Rolls seems in effect to be saying that the debt of a third party can support a promise only where there is an arrangement between creditor and promisor to give the bill in lieu of the debt or in consideration of forbearance to sue. In such a case of course the forbearance or the release of the debtor is the consideration, not the debt.

amounting to consideration goes far to accept the notion of 'promissory estoppel'[77] which was adumbrated in *Central London Property Trust v. High Trees House.*

Evershed M.R. went on to remark that the Bills of Exchange Act did not say that where there was an antecedent debt or liability even on the part of the giver of the cheque, that was, without more, in every case and necessarily valuable consideration. (There must apparently be in addition either actual forbearance or a promise to forbear.) With respect, the writer would have thought that the Act was clear on the point, and indeed that the plain and literal meaning of the words of s. 27 (1) (b) was that any antecedent debt or liability whether of the giver of the negotiable instrument or of a third party, was deemed to be good consideration.

But Somervell L.J. in his judgment took the opposite view. He was of the opinion that the natural construction of 'antecedent debt' was that it meant a debt due from the giver of the instrument. Assuming however that there was ambiguity, he considered that the issue was decided by *Crears v. Hunter* in favour of the view taken by the Master of the Rolls. Denning L.J. agreed, and cited Byles on Bills, *Crofts v. Beale* and *Crears v. Hunter.* If *Ayres v. Moore* contained anything to the contrary, his Lordship could not agree with it. The learned Lord Justice did not refer to the other cases cited by the respondent's counsel in which the debt of a third party had been held consideration.

Oliver v. Davis establishes then that so far as negotiable instruments are concerned the pre-existing debt of a third person is not consideration. In so far as *Walker v. Rostron* and similar cases can be said to support the view that the promise to pay the debt of a third person is enforceable because the debt forms a good consideration, it would appear that negotiable instruments form an exception to that rule. The writer would respectfully agree that the decision of the Court of Appeal in *Oliver v. Davis* was, in the circumstances, a just one, and Evershed M.R. seemed to be alive to the injustice that would have resulted if judgment for the plaintiff had been upheld. But it would not be difficult to envisage circumstances in which the application of the rule thus laid down would be productive of injustice. However, the general acceptance of the principle of 'promissory estoppel' mooted by the Court would go far to alleviate such injustice.

[77] [1947] 1 K.B. 130.

V

On principle, it would seem that if a pre-existing debt is deemed good consideration for a promise to pay that debt, it should be equally good consideration for other types of promises. However, it is true that there is scarcely any authority to support the view that promises other than promises to pay one's own or a third party's debt or to give security therefor, are supportable on the consideration of an existing debt. The liberal views of such judges as Robinson C.J. in *Belcher v. Cook*[78] have not found general support in the common law. In that case a promise by the defendant that, in consideration of his being indebted to the plaintiff for £11 5s., he would pay him that amount in carpenter's work upon the plaintiff's request, was held binding. In an exhaustive judgment the Chief Justice held that the existence of the debt was a continuing consideration and would support a special promise to discharge the debt by doing certain work. He said: 'It is impossible to read them [i.e. the relevant authorities] without being satisfied that the idea that a binding special promise cannot be made in consideration of a continuing debt, is a subtle refinement discountenanced by the courts in those days. . . . Tracing down the point as well as I have had time to do since the argument, through the intervening period, I find nothing that would warrant me in holding that the law had in modern times been placed on any new footing in this respect.'

These remarks were directed specifically at the decision in *Hopkins v. Logan*[79] which Robinson C.J. considered should be restricted to its particular facts. In that case, there was an account stated and the plaintiffs sued on an express promise by the defendant to pay the debt at a certain date. Judgment was given for the defendant the Court basing its decision on a finding that the law implied a promise to pay at once out of an account stated and the existing debt as consideration would not also support an express promise to pay in the future. The existing consideration was exhausted by the implied promise.[80]

It would perhaps be a fitting conclusion to this study to quote the remarks made by Bowen L.J. in *Taylor v. Blakelock*.[81] He said: 'By the Common Law of this country the payment of an existing debt is a payment for valuable consideration. That was always the

[78] (1848) 4 U.C.Q.B. 401. [79] (1839) 5 M. & W. 241.

[80] See too *Liversidge v. Broadbent* (1859) 4 H. & N. 603 (where the court attempted, unsuccessfully it is submitted, to distinguish *Walker v. Rostron*, and *Lilly v. Hays*); and *Deacon v. Gridley* (1854) 15 C.B. 295 (where the court expressed the opinion that a mere promise to pay an existing debt was unenforceable), the decision in which would appear to be historically unsound.

Common Law before the reign of Queen Elizabeth as well as since. Commercial transactions are based upon that very idea. It is one of the elementary legal principles, as it seems to me, which belong to every civilized country; and many of the commercial instruments which the law recognizes have no other consideration whatever than a pre-existing debt.' His Lordship was referring to the meaning of the term 'purchaser for value' but his remarks appear to have general application. Is it so great an extension thereof to hold that payment of an existing debt is good consideration to support a promise made by the creditor?

[81] (1886) 32 Ch. D. 560, 570.