THE CONSIDERATION OF REQUEST

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Compared with the consideration of forbearance, explored in a previous paper,[1] the consideration of request raises many more fundamental questions: more fundamental because they are questions that agitate the very distinction between gifts and bargains. This latter distinction, furthermore, though deriving from a simple as well as very elementary idea, can become immensely complicated, especially in relation to promises of reward for services. How complicated we shall indeed see as we try to penetrate a rather dense conglomeration of historical detail. This investigation, one may add, if not an altogether exhilarating task, beckons to be done; for though at various times begun by scholars, it has never been carried through, not even with approximate completeness.

I.

Let us begin with *Hunt v. Bate*[2] which is not only our earliest case but also defines the general problem. The well-known facts there were that the defendant's servant, being arrested and imprisoned, was bailed out by the plaintiffs who, well acquainted with D (the defendant), intervened 'in consideration that the business of the master should not go undone'. Afterwards, before the servant's trial, D 'upon the said friendly consideration' promised the plaintiffs to reimburse them for any expense or costs incurred while acting as surety for the servant. It so happened that the plaintiffs did incur such costs; yet they failed in their action on D's promise. They failed because there was 'no consideration wherefore the defendant should be charged for the debt of his servant', and because 'the master did never make request to the plaintiff for his servant to do so much, but he did it of his own head'.[3] Had there been an initial request, D's subsequent promise would have been enforceable. So where, as in a later case, P declared that D had promised him twenty pounds 'in consideration that the plaintiff, at the special instance of the said defendant, had taken to wife the cousin of the defendant', D's promise was considered good though the marriage was executed before the promise 'because the marriage ensued the request of the defendant'.[4]

If all this may appear very simple, the underlying ideas need further clarification. Why, we first may ask, do we need a prior

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1 (1965) 5 M.U.L.R. 34.
2 (1568) 3 Dyer 272a, *pl.* 31.
3 *Ibid.* 272b: he did it 'for his neighbourly part': (1585) Godb. 31, 32.
4 (c1586) *Anon.* 3 Dyer 272b, *pl.* 32.

request to make the subsequent promise binding? The obvious and classical answer is that the former request converts a 'past' into a 'present' consideration. Or, putting this in another way, the request transforms (what *prima facie* seems) a promise of a gift into a promise to pay for (what now becomes) a bargained, because requested, service. As shortly we shall further see, however, a prior request is not always necessary, simply because certain services rendered by one person to another will, sometimes almost self-evidently, reveal their economic character, that is, they will reveal that they are meant, and can only be meant, to be given for reward rather than being services that must be taken to constitute a gratuitous favour. It follows that the presence of an initial request assumes vital importance only in the type of situation in which the services are, as it were, ambiguous, that is, services that might equally well be regarded as gratuitous or non-gratuitous. Yet even if a request thus becomes vitally important, the fact remains that, historically, the legal action was not on the request, but was, and had to be, on the subsequent promise. It had to be on the promise because the action being in *assumpsit* had to rest on a promise or undertaking; and a request was not a proper, even if it was often the beginning of an, undertaking. How, then, were the early request and the later promise connected with each other? Technically and formally, this connection was made through the notion of consideration, though this connection was by no means easily constructed. The difficulty was that whereas before consideration was meant to support an action against a promisor, on the specific ground that the promise itself had caused a detriment to the promisee by inducing the latter's misreliance, in the present situation this element of a direct detriment was of course quite absent, for such detriment as there was, was caused by the request, not by the promise. In consequence, the notion of consideration became involved with, and for the time being even largely submerged in the wider distinction between requested (*i.e.* non-gratuitous) and gratuitous (*i.e.* non-requested) services.

Some of the resulting tension can be perceived in *Sydenham v. Worlington*.[5] Here P, an attorney, became bound for, and on behalf of, D, his master, at his instance. Rather later D promised P to repay him what he was called upon to pay out for his (D's) purposes. When P sued on this promise, it was objected that *assumpsit* would not lie, because, it was said, the promise did not 'concur' or go together, the consideration being long executed, the subsequent promise might not be for the same consideration and, if so, was *nudum pactum*. This situation, the same objection further went, was quite unlike 'a consideration of marriage [which] is always a present consideration, and

[5] (1585) Godb. 31; 2 Leon. 224; Cro. Eliz. 42; 3 Dyer 272 b, *pl.* 32n.

always a consideration because the party is always married';[6] while here the promise is like a warranty in a sale, a warranty which will not be good unless given at the very moment of the sale, not later.[7] Since this last objection, especially, sounded formidable, Perriam J. felt obliged to distinguish between contract and *assumpsit,* because

> there is a great difference betwixt contracts and this action; for in contracts the consideration, and promise, and sale ought to concur, because a contract is derived of *con* and *trahere,* which is a drawing together: so as in contracts everything requisite ought to concur; as the consideration of the one side, and the promise or sale of the other side. But to maintain on *assumpsit,* it is not requisite, for it is sufficient if there be any moving cause or consideration precedent, for which cause or consideration the promise was made, and that is the common practice at this day.[8]

It is easily seen that Perriam's argument drew the relevant differences much too widely. For even if true that in a contract of sale, as made and executed between parties *inter praesentes,* the respective obligations would typically concur or go together, even in sale, payment of the price could (for example) precede delivery, a circumstance which made the transaction no less of a contract or bargain; in fact, it was precisely in this sort of case that *assumpsit* had seen its first 'contractual' application. Again, the novel contrast between contract and *assumpsit,* though it lent a special prominence to consideration, quite overlooked that the promise was enforceable not so much because it was supported by consideration as rather because the consideration by the promisee, consisting of the services earlier requested by the promisor, revealed the transaction to be one not of gift but contract. Thus Perriam's argument led to this paradox, that while he distinguished *assumpsit* from contract, the only reason (or 'consideration') for enforcing the *assumpsit* was the fact that there was a bargain or contract. Needless to say, the analogy with the warranty still had to be disposed of. However, the correct reason why a warranty, subsequent to a sale, was not enforceable had nothing to do with any differentiation between contract and *assumpsit,* it was far more simply explained by saying that a late warranty, being no longer (as a Year Book put it) *'sur le bargain'*.[9] would, without more, merely constitute a sort of gratuitous undertaking: gratuitous because a vendor would have no possible inducement to give an actionable undertaking with regard to goods once the original sale was over and done with. On this analysis, therefore, a purchaser would have no action, irrespective of whether the warranty was described as contract or as *assumpsit* or was framed as an action in deceit or case. Indeed, the real significance

6 (1585) Godb. 31. For this point see further below.
7 See *Andrew v. Boughey* (1552) 1 Dyer 75a.
8 (1585) Godb. 31, 32.
9 *Anon.* (1490) Y.B. 5 Hen. 7, f.41, *pl.* 7.

of *Sydenham v. Worlington* is that the court, though not unaware that the true distinction was one between gift and bargain, nevertheless drew the operative distinction in technically different terms, namely, terms supporting a difference between, on the one hand, a sufficient consideration which if 'precedent' yet remained 'present', and, on the other hand, consideration that was precedent and past and therefore insufficient.

There was another complication. If, as Rhodes J. said in the same case, P serve D for a year, and afterwards, at the end of the year, P promises D £10 for his good and faithful service ended, P may maintain an *assumpsit,* for it is a good consideration; but if P, the servant, has wages given him and D, the master, *ex abundantia,* promises him £10 after his service, the same promise will not maintain an *assumpsit;* for there is not any new cause or consideration preceding the *assumpsit.*[10] Now these examples call attention to a second side of the same problem. In the first example, where P renders services for D for a year after which D makes his promise, that promise is enforceable even without a prior request having to be found as supporting consideration, while in the second situation, where D promises *ex abundantia,* that promise would still be unenforceable even if there were a request for additional remuneration (and this for somewhat different reasons which at present need not be gone into).[11] In the first situation again, we can, if we wish, imply a request, but do not really have to: because the situation is such that there clearly must exist a tacit understanding that P is to get paid, although for one reason or another the parties never fix the amount payable. If so, two other things follow too. First, we can say that the services themselves, provided they are accepted by the other side, create a debt or indebtedness for which *assumpsit* would lie, the implication of which is that the subsequent promise of reward no longer represents the true basis of the action, but is merely a statement, certainly one very relevant that (so to speak) quantifies or liquidates the agreed but non-gratuitous benefit that the services have conferred. Something like this, in fact, has emerged as the modern view, in answer to the otherwise vexing question how such a later promise can be enforceable at all.[12] In the second place, once it is admitted that the agreed services create the indebtedness, a defendant can be made to pay for them even without a subsequent promise. And this, in fact, has been the whole basis of the familiar actions in *quantum meruit.*

[10] *Ibid.* [11] Fifoot, *History and Sources of the Common Law* (1949) 403-404.

[12] 'Probably, at the present day, such service on such request would have raised a promise by implication to pay what it was worth; and the subsequent promise of a sum certain would have been evidence for a jury to fix the amount': *Kennedy v. Broun* (1863) 13 C.B.(N.S.) 677, 740, *per* Erle C.J. See also, *Re Casey's Patents, Stewart v. Casey* [1892] 1 Ch. 104, 115, *per* Bowen L.J.

II.

The service situations of the kind just mentioned were not likely to cause much difficulty. For one thing, it would not often happen that a servant would commence lengthy labour without specifying in advance how much he was going to be paid, either periodically or on completion. For another, once the performance of services, at least of conventional services, was covered by *quantum meruit,* both the initial request and the subsequent promise ceased to be essential or even striking requirements. But another difficulty was to occur. Take the situation where work is done, work which is beneficial as well as clearly non-gratuitous, but work which also raises doubts as to whether it has been properly performed. Now here two things are possible. On the one hand, a court might well be tempted to hold against a plaintiff, if his claim rested only on a *quantum meruit.* On the other hand, the tendency might easily be the other way if the situation was fortified by elements of request and promise. The famous case of *Lampleigh v. Braithwait*[13] is an apposite example. L. brought *assumpsit* against B. for having laboured at B's request to procure a pardon from the King, for which B. later promised him £100.[14] B. argued that L. had not shown that he had obtained the pardon and that, in any case, the promise was supported only by a past consideration. The court agreed that 'a mere voluntary courtesy' cannot uphold an *assumpsit,* unless moved by a prior request, for then 'the promise, though it follows, yet is not naked, but couples itself with the suit [or request] before.'[15]

However, the more important and more difficult question was this. Even assuming the validity of B's promise, had L. really shown that it was he who obtained the pardon, or exactly what he had done to obtain it? In deciding for the plaintiff, the court was probably impressed not only by the fact that the plaintiff's services were not a 'voluntary courtesy', but also by the circumstance that the very existence of the subsequent promise furnished at least some evidence that the plaintiff had done something effective or, at any rate, had here done the only thing that could be done. It is mainly for this reason perhaps that the court was now concerned to establish that labour, even if unsuccessful, can be good consideration; that, in other words, it is enough for P. to endeavour to obtain a pardon, even if he does not obtain it, for 'the one [the pardon] is his end, and the other [the endeavour] his office.'[16] Again we should observe that, but for this subsequent promise, the transaction might very easily

[13] (1616) Hob. 105.
[14] Such a procurement would today, of course, constitute an illegal consideration: *Elliot v. Richardson* 1 Sm.L.C. 148.
[15] (1616) Hob. 105, 106. [16] *Ibid.*

have been construed the other way, especially where the mere endeavour to do something, by way of relatively brief acts rather than by continuing services, could be regarded as the doing of a favour, not as the doing of bargainable work. This is further shown in *Hardres v. Prowd.*[17] Here the declaration stated that whereas P. had undertaken to reconcile differences between D. and third parties, D. assumed to pay P. £100. The decision was that an action lay, P's act being regarded as something 'more than a voluntary courtesy', though the reason for this being so regarded was clearly greatly influenced by the fact that D. both requested P's act and later promised to pay for it.[18]

III.

So far we have been dealing with cases for which, as matter of theory if no longer of practice, debt could have lain, particularly where there was an initial request to show that the situation was one of debt, not of bounty, and there was as well a subsequent promise specifying the amount of the indebtedness. If this had been all, the total achievement would have been relatively small, and in any case would have been mainly procedural, namely, to replace debt by *assumpsit.* As we have seen, however, even this achievement, even if small from a substantive viewpoint, still required a concept of consideration by which the action on the promise or *assumpsit* could be justified. This consideration, we may repeat, was in this respect nothing more than a way of describing the relevant *quid pro quo*: which is to say that the consideration, though sounding like a new or special criterion, did not in fact significantly extend the range or kinds of transactions that already were, or quite easily might have been made, enforceable through the action of debt. Yet the same forces that had so successfully been pressing for a simplification of contract-liability, and more particularly for a simplification of debt- (or indebtedness-) liability, also brought to the fore other situations urging themselves upon the courts. It is as regards these newer situations that *assumpsit,* and only *assumpsit,* could be of help. For *assumpsit,* since it rested on a promissory liability, that is, on what the defendant had promised rather than on the facts of exchange, could now be resorted to in cases where a person had done something, or performed services, at the instance of another, without however conferring a benefit in a conventional sense.

Now despite a few scattered statements to the contrary,[19] the

17 (1655) Sty. 465.

18 For certain cognate situations, see *Onely v. Kent* (1575) 3 Dyer 355b; *Manwood v. Burston* (1588) 2 Leon. 203. See also, *Wilkinson v. Oliveira* (1835) 1 Bing. (N.C.) 490.

19 See the Year Book cases referred to in Fifoot, *op. cit.* 401.

applicable action here was *assumpsit,* and not debt. A case like *Baxter v. Read,*[20] makes this point explicitly. B. retained R. to be miller to his aunt at 10s. per week. The decision was that case not debt lies on such facts. For 'in debt it is requisite that [the benefit] come to the party who promises; and so, for the want of a *quid pro quo,* debt does not lie: but by the Court, this will support an action on the case, for although it is not beneficial to B. it is chargeable to R'. It is chargeable to the promisor because, as the same report further says, 'in *assumpsit* it is not necessary that they contract at the same instant; but it suffices if there be inducement enough to the promise, and although it is precedent it is not material; otherwise in debt it is requisite that the benefit come to the party, otherwise for want of a *quid pro quo* debt does not lie.'[21]

It is these situations, moreover, which give a special emphasis to the need for *both* a promise and a request. For we are now dealing not with situations that *might* be construed as situations of favour or gift, but with situations that are *necessarily* gratuitous, *unless* a request and a promise be shown. Because without a promise, the request might simply be the request for a favour, while without an initial request the subsequent promise would stand alone, and standing alone would amount to no more than a gratuitous undertaking, instead of amounting to a promise: one, so to speak, confirming and completing a bargain begun by the initial request. Thus both request and promise were necessary where P. tried to recover a sum of money paid to a stranger on behalf of D., so that P. had to declare that in consideration of the plaintiff giving £120 to a stranger, at the request of defendant, the defendant then undertook to repay him.[22] More telling is *Bosden v. Thinne.*[23] P. declared that at D's special instance he had procured credit for D. The third party recovered from P., and D. then promised to reimburse P. The objection that P's act of procurement amounted to 'past consideration' was overruled, for 'although on the first request only *assumpsit* does not lie, yet the promise coming after shall have reference to the first request.'[24] So far, apparently, a mere request by one person to another to act as a surety or guarantor, or to produce credit for him, was still regarded as a friendly act, so that a guarantor could not recover his outlay, unless he could rely on an express promise as well.[25] In these cases, therefore,

20 (1584) 3 Dyer 272b, *pl.* 32n. 21 *Ibid.*
22 *Foster's Case* (1596) 3 Dyer 272a, *pl.* 31n; see also *Harris's Case* (1594) *ibid.*
23 (1603) Yelv. 40, (1630) Cro. Jac. 18.
24 (1630) Yelv. 40, 41. See also, *Gale v. Golsbury* (1611) 3 Dyer 272b, *pl.* 32n, (1611) Palm 442; Viner's *Abridgment,* i, 286.
25 In the report in (1611) Cro. Jac. 18 the emphasis is put on the debtor's duty in conscience to reimburse P. At common law, it took in fact more than a century for promises of indemnity to be implied, a development that was later closely connected with that of the count of money paid.

it was neither the request alone, nor the promise alone, but the request coupled with the promise 'which is the difference'.[26] In these cases, again, the phrase 'past consideration' simply indicated the absence of these two elements, an absence which reduced the transaction from one of bargain to one of gift.

But this was not all. A transaction could be adjudged to be one of gift even where a defendant had requested the services as well as promised to pay for them. Take *Harford v. Gardiner*[27] where P. declared that D. had promised to give him £100, this in consideration that the father of P. had been employed by D's testator in his service about the business of the testator, as well as in consideration of love and affection. The court held that the consideration was past and executed, the services having been given by the father, not the son: 'Love [said the court] is not a consideration, upon which an action can be grounded; the like of friendship.'[28] On the other hand, even love might not stop an action against a father-in-law. *Marsh v. Rainsford*[29] shows this well. When Marsh was to marry Miss Rainsford, her father promised to give Marsh £200, but they could not agree when this payment was to be made. Meanwhile the couple eloped, after which the father made another promise of £100. Could Marsh recover the latter sum? It was contended that he could not, for, the consideration being past, no action could lie. Nor could it lie since there was no pertinent request by the father; or if there was Marsh's conduct nullified it. It is true that the father subsequently gave his consent, and then also promised the £100; but this had no reference to any act before. Still, the promise was held enforceable. In one report principally because the 'natural affection of the father to his daughter is sufficient matter of consideration.'[30] But in another report because the consideration 'continued' and so was not past.[31]

Obviously what 'continued' here meant was that the initial request 'continued', which however was merely another way of saying that the father's subsequent promise was still no purely benevolent gesture but part of a bargain with the son-in-law. A similar idea appears in some slightly earlier cases where the notion of 'continue' was first used. In *Beaucamp v. Neggin*,[32] where P. paid money to a stranger

[26] *Lampleigh v. Brathwait* (1616) Hob. 105, 106. 'The whole point of [the latter case] is, that the express subsequent promise, coupled with the previous request, gives a right of action, notwithstanding that the service itself is not one from which the law would imply a promise of reward': *Kennedy v. Broun* (1863) 13 C.B.N.S. 677, 688. (In argument.)

[27] (1588) 2 Leon. 30.

[28] *Ibid.*

[29] (1596) 2 Leon. III, (1596) Cro. Eliz. 59.

[30] (1596) 2 Leon. III. The court added the following example: 'if a physician, who is my friend, hearing that my son is sick, goes to him in my absence, and helps and recovers him, and I being informed thereof, promise him in consideration, etc. *ut supra*, to give him £20, an action will lie for the money.' But this is, of course, no longer true, see *Wennall v. Adney* (1802) B.B. & P. 247.

[31] (1596) Cro. Eliz. 59.

[32] (1592) Cro. Eliz. 282.

at D's request, and then a year later D. promised to repay P., the argument that the consideration was past was dismissed: 'when the payment is laid to be at his request, the consideration does continue, and so is the common course.' Again, in *Riggs v. Bullingham*[33] where P. made a grant of an advowson to D., at D's request, for which D. later undertook to pay £100, the court dismissed the contention that the consideration was past;

> for the grant being made at his request, it is a sufficient consideration, although it were divers years before; especially being to the defendant himself, the consideration shall be taken to continue. But if the grant had been to a stranger, and not at the defendant's request, it had peradventure been otherwise.

It would, without doubt, have been otherwise if (as we have earlier seen) the subsequent promise had consisted of a warranty, for such a warranty, however good its motives, would still have no bargain-connection with an earlier and past sale.[34]

IV.

Unfortunately the notions of 'past' and 'continuing' consideration contributed a new particle of confusion. Instead of it being perceived that these words merely fastened on certain aspects of the bargain-gift distinction, it began to be thought that they were notions signalling an independent doctrine, moreover one calling for strict and technical application. Again, the notion of past consideration began to be thought of being capable of applying to all contracts, not just contracts of service and not just services of an ambiguous kind that might be gratuitous or non-gratuitous. In *Hodge v. Vavisour*,[35] for example, where P. sued for the price of goods delivered to D. which D. had not only accepted but later expressly promised to pay for, it was moved in arrest of judgment that the delivery of the goods constituted a past consideration which could not support the subsequent promise. Had this argument succeeded, it would have stopped the whole development of *assumpsit* in this area of contract, an intervention which but a few years earlier, *Slade's Case*,[36] had so powerfully confirmed. Even so, the point about past consideration was felt to be a profoundly important objection, indeed one that (so it must have appeared) could only be met by an appeal to the notion of 'continuing' consideration: the defendant, it was now said, 'is clogged with a debt continually, and therefore this is here good consideration to raise a promise.'[37]

[33] (1599) Cro. Eliz. 715, (1599) 3 Dyer 272b, *pl.* 32n.
[34] *Andrew v. Boughey* (1552) 1 Dyer 75a; and see text of n.9.
[35] (1617) 3 Bulst. 222. [36] (1602) 4 Co. Rep. 91a.
[37] (1617) 3 Bulst. 222. To similar effect see *Howlet's Case* (1625) Latch 150, where

There were other cases, however, in which the distinction between past and continuing consideration was applied quite literally. Thus where D. requested P. to pay money to a stranger, on his (D's) behalf, and then promised to repay P., but only a year later, this was held not to be a good promise because supported by a past consideration.[38] Or where D. requested P. to lend him some money for which D. later promised to repay P., *assumpsit* was denied because supported by a consideration that was past and executed rather than continuing.[39] Or where a plaintiff declared that in consideration that he had formerly married defendant's daughter, at the latter's special request, the defendant had promised him an annuity which he had not paid, and the plaintiff had judgment, which, however, the Exchequer Chamber reversed, again on the ground that the marriage was executed before the promise was made, although this obviously overlooked the fact that the defendant had induced the plaintiff to marry his daughter in the first place.[40] Fortunately these results were somewhat isolated aberrations. Nevertheless they strengthened, if only through the force of repetition, the past-continuing distinction. But they were results which were to have no lasting effect otherwise.

V.

A second difficulty was to be a more long-lived matter. With the prolific emergence of *quantum meruit,* in which a claim could rest on an implied rather than an express request, considerable uncertainty arose as to when a request should be laid in a claim for services. By the time of *Osborne v. Rogers*[41] in 1667 a belief was gaining ground

P sold so much barley to D, part of which he delivered immediately, the remainder in the afternoon. D then promised to pay P's price, but later revoked this on the ground that the promise was given *after* the consideration performed, so that the promise was based on past consideration. The objection was dismissed, though apparently not without a little difficuty, *i.e.* only on the ground that the promise was made on the same day, the consideration thus being continuing. For a very different interpretation of *Hodge v. Vavisour, supra,* and related request-cases, see, however, Holdsworth, *'The Modern History of the Doctrine of Consideration'*, in Selected Readings on the Law of Contracts (1931) 61, 73.

38 *Barker v. Halifax* (1600) Cro. Eliz. 741.

39 *Docket v. Voyel* (1602) Cro. Eliz. 885. See also, *Jeremy v. Goochman* (1594) Cro. Eliz. 442 (perhaps a situation of mutual gifts which were held not to be enforceable *separatim*); *Riches v. Bridges* (1601) Cro. Eliz. 883.

40 *Sandhill v. Jenny* (1604) 3 Dyer 272b, *pl.* 32n.

41 (1667) I Wms. Saund. 264. Here P sued D's executor for work and labour, an action which the executor did not oppose on its merits except for the plea that P had served D for rather less time than P had stated. Indeed the case has mainly to do with the argument that the executor's plea was bad if it traversed what was not traversable, *i.e.* the fact that P *had* served for a substantial period, so that the plea went too far in that it would even deny recompense for this period. This argument of P's the court recognized, the more so since D's counsel 'could not say much to maintain the plea.' The question to what extent a claim for services could be traversed had been raised in *Lampleigh v. Brathwait* (1616) Hob. 105, 106, but was not seriously to be raised again until *Cutter v. Powell* (1795) 6 T.R. 320.

that all claims in respect of executed work or labour needed an express allegation of a prior request. This was to throw together two different claims, namely, (i) claims in respect of services for which a *quantum meruit* would lie, even without an express request or promise, with (ii) the kinds of service which did require to be based on an express request-cum-promise. This latter difference, it is true, long remained blurred, one reason being that the applicable actions, whether on an express promise or in *quantum meruit*, were not only actions in *assumpsit* but could sometimes completely overlap.[42] Yet a perhaps more important reason is that in any action for services rendered the plaintiff would ultimately have to show, if challenged, that the services were given on what was, at least conventionally, a non-gratuitous or remunerative basis. The idea thus arose that since a plaintiff would always have to prove a contract he would by the same token have to prove a request, although just this confused the difference between express and implied contracts.

Gradually, however, the difference between the two types of claim and contract began to be seen more clearly. *Hayes v. Warren*[43] is probably the beginning. Having performed work for D., P. then sued for work and labour; but he lost the action as he had failed to declare that he had done the work at defendant's request; for if the work were done at another's request, that other 'ought to be the paymaster and not the defendant.' Nor had the plaintiff shown that the defendant had been 'privy to the work done at the time of the doing it', so that no facts were presented from which a request might be implied. The court agreed that even a past consideration could still support a subsequent promise, provided a request was easily impliable; for some acts are of such a nature that a court would imply a request without great hesitation, e.g. acts such as performing the part of a servant where the master could be presumed to be 'privy' to the performance. It followed that acts not so 'privy' would permit no similar implication. Accordingly, in *Durnford v. Messiter*,[44] where P. claimed £20 from D. in respect of money laid out and expended for the use of D., P. having acted as his attorney and agent, but where the affidavit omitted to state that it was 'at the special instance

42 An interesting example is *Larkin v. Turner (1713)* Gilb. 53, where P declared he had done extra work for D, at his request, for which D later promised him additional remuneration, but without specifying the exact amount so payable. The court had little doubt that P had a good action. They said it was surely a 'proper promise' if it is declared that 'in consideration that you have done business for my friend in your office at my request, I will pay you as much as you deserve for your labour and fees in that behalf.' Secondly, the court said that P could also sue in *quantum meruit*, for 'the fees are for the work and labour, so that it is [a] promise to pay his fees and also his extraordinary labour over and above, and this is a reason also why a *quantum meruit* will lie in this case.'

43 (1731) 2 Barn. K.B. 55, 71, 140; 2 Strange 933.

44 (1816) 5 M. & S. 446.

and request of the defendant', the court would not allow that this omission was immaterial, for 'money paid to and for the use of the defendant does not necessarily raise a cause of action; because a man cannot, of his own will, pay another man's debt without his consent, and thereby convert himself into a creditor.' In short, to imply a request the defendant had at the very least to be acquainted with the transaction, for (as Serjeant Saunders had elsewhere put it) 'it is not reasonable that one man should do another a kindness, and then charge him with a recompense: this would be obliging him whether he would or not, and bringing him under the obligation without his concurrence.'[45]

Even in the latter case, to be sure, the defendant could adopt the services by way of ratification, so that the defendant would become liable to pay for them just as though he had initially requested them or had knowingly received their benefit. But even in this case, the prevailing view became that it was still necessary to aver a request, *i.e.* to aver that the services had been rendered, or that money had been paid and laid out for the defendant, at the latter's special instance and request.[46] Moreover, this insistence on a request, especially at a time when strict pleading was very much in fashion, could make room for purely technical objections, even in what were otherwise clear enough cases. Consider, for example, *Victors v. Davies*.[47] In *assumpsit* for money lent by P. to D., the demurrer was that the declaration omitted any mention of the loan being at D's request. This demurrer was fortunately overruled. The court cited with approval some words by Serjeant Manning who, a few years earlier, had shown a shrewd insight: 'Even where the consideration is entirely past, it appears to be unnecessary to allege a request, if the act stated as the consideration cannot, from its nature, have been a gratuitous kindness, but imports a consideration *per se*.'[48] Thereupon Parke B. continued: 'There cannot be a claim for money lent unless there be a loan, and a loan imports an obligation to pay. If the money is accepted, it is immaterial whether or not it was asked for. The same doctrine will not apply to money paid; because no man can be debtor for money paid, unless it was paid at his request.'[49] Just this

[45] (1667) I Wms. Saunders 264 notes (1). And see also, *Richardson v. Hall* (1819) 1 B. & B. 50, where a husband was held not liable for the use and occupation of a house by his wife *dum sola,* it not being shown that he had in any way requested the occupation. For a similar result see *Naish v. Tatlock* (1794) 2 H. Bl. 319.

[46] (1667) I Wms. Saund. 264 n. (1). One may observe in passing that it is just this insistence on the necessity for an initial request which probably so greatly strengthened the notion (which English law was then borrowing from the Roman mandate) that ratification had to operate retroactively.

[47] (1844) 12 M. & W. 758.

[48] *Fisher v. Pyne* (1840) 1 M. & G. 265n.

[49] (1844) 12 M. & W. 758, 760.

exception as to money paid reveals the whole particularity of claims for services, including the necessity or otherwise for a request. For only services can be performed for the benefit of another person without the latter having to consent or agree to them. With this point finally clarified, *Victors v. Davies* also laid to rest the prolonged difficulty as to when a request needed to be specially declared. In a real sense, the law thus returned to the position virtually established in *Slade's Case*,[50] but a position which subsequent developments had also managed to obscure.

VI.

The last debate about requests had also done something else. In a curious way it had revived the notion that past consideration constitutes a sort of special disability, as well as one quite independent of request. Take *Thornton v. Jenyns*.[51] D. had ordered, on behalf of a corporation, for P. to start certain work. This under a contract which included a term that in consideration that the plaintiffs would do all things required, the defendants *then* promised that they would do everything on their part. This word 'then' produced an almost incredible argument, the burden of which briefly was that the consideration here was past, since the defendants' promise could be said to come *after* the promise which the plaintiffs had made.[52] Utterly technical though this was, the court took the objection very seriously. The language of the declaration, they gravely said, 'is quite compatible with the supposition that the parties being together, the promises were then concurrently and mutually made.' Hence 'the fair and reasonable construction of this allegation is, that the word "then" relates to the same period of time in the case of both promises', so that notwithstanding that one promise was perhaps antecedent to the other, 'we may take them to have been simultaneously made.'[53] Of course the real problem in this case related to quite a different point, *i.e.* whether the defendants could be held to be personally liable, having done nothing to cause the necessary contracts to be prepared by the company on whose behalf the contract was made. The surprising fact nevertheless remains that past consideration could here be treated as a genuine and relevant difficulty which a dissenting opinion (held by Erskine J.) even regarded as a conclusive one.[54]

Again in *Jackson v. Cobbin* [55] the declaration stated that D. agreed to let certain premises to P. and that 'afterwards in consideration of the plaintiff promising to perform his part of the agreement, the

[50] (1602) 4 Co. Rep. 91a. [51] (1840) 1 M. & G. 166.
[52] *Ibid.* [53] *Ibid.* 189, *per* Tindal C.J.
[54] See also, *Tipper v. Bicknell* (1837) 3 Bing. N.C. 710.
[55] (1841) 8 M. & W. 790.

defendant promised to perform his part'. In this case the question turned upon whether a warranty of title could be implied, one suggestion being that D's promise to perform his part might perhaps be said to include an express warranty. To this, however, the reply was that even if so the consideration was executed and past. So it was also in several other cases where objections about past considerations were raised, usually only in an incidental manner or as a sort of extra argument that in any case never really represented the true merits of the case. Usually, again, these objections did little or nothing to affect actual results. In one case, for example, the words 'having agreed' and 'then promised' were urged to be past consideration, but the suggestion was easily dismissed.[56] In other cases the objection about past consideration appeared to be more successful, but the decisions themselves are explicable on other and more substantial grounds.

To give perhaps the strongest examples of this. In *Lattimore v. Garrard*[57] P. declared that in consideration of his becoming D's tenant as well as undertaking to make improvements, D. then promised to appoint, at P's request, an arbitrator to value these improvements at the termination of the tenancy. At the termination P. sued D. for not appointing a valuer. It was held that no action lay on the purely technical ground that no new promise could arise from the executed consideration. However, the substantial point here clearly was that P. had failed even to ask for the appointment of a valuer, before, or at any rate not a reasonable time before, actually commencing suit against D. Similarly in *Kennedy v. Broun*,[58] certainly a far more familiar case, where a grateful client subsequently promised to pay a barrister for his advocacy on his behalf. The promise was held to be of no effect, on one ground amongst others that the promise was for a past consideration, although the truer and simpler ground here was that a barrister could not enforce promises for fees, in whatever form the claim was put.[59]

Yet there remains one instance in which past consideration was not just an incidental but became, so to speak, the sole and principal ground of decision. This was *Roscorla v. Thomas*[60] where, according to the declaration, in consideration that P. had bought a horse of D. at a certain price, D. promised the horse to be free from vice. But

56 *Tanner v. Moore* (1846) 9 Q.B. 1. 'It would be absurd to suppose [said Denman C.J.] that the defendant bound himself to pay the money in consideration of the plaintiff merely having at a past time agreed to stay the proceedings': *ibid.* at 6-7. See also, *Leask v. Scott* (1877) 2 Q.B.D. 376.

57 (1848) 1 Ex. 809.

58 (1863) 13 C.B.(N.S.) 677.

59 Furthermore, a claim so absolutely void cannot be relied on in support of a count for an account stated. This also explains *Hopkins v. Logan* (1839) 5 M. & W. 241, where a promise to pay an existing, but reduced, debt was held unenforceable by way of an account stated because the account stated cannot be allowed to enforce an executory promise, if as here no contract could be valid with a married woman.

60 (1842) 3 Q.B. 234.

the horse was vicious. Could P. sue on the warranty? The objection was that the precedent, executed consideration (the completed sale) could not support a subsequent promise. And this objection the court upheld. The promise (said Denman C.J.) must be co-extensive with the consideration, while the precedent sale imposed only one obligation upon D., namely, to deliver the horse upon request. Thus, though the promise here was express, it could still not be supported by the precedent or past consideration, for the 'general rule' is 'that a consideration past and executed will support no other promise than such as would be implied by law.'[61] Taken by itself, one need not quarrel with this result, simply because (as we pointed out before) there is no reason to enforce a warranty no longer related to a bargain or a sale. Moreover, the practical effect of this result has been much reduced, not only because several important warranties now are implied by law, but also because such 'collateral' or subsequent warranties must be very rare, since a seller would have no inducement to give a warranty once a sale is complete. Nevertheless, the theoretical effect of *Roscorla v. Thomas* remains very great, if only because it is still the main authority for the view that past consideration constitutes a sort of separate invalidity, with its own exceptions and rules. This view, needless to say, differs considerably at least in emphasis, from the view argued here, according to which (to put this very briefly) past consideration, together with the requirement of request, do not constitute separate things but are contained in and entailed by the whole distinction between bargains and gifts.[62]

[61] *Ibid.* at 237. Denman C.J. did, however, recognize such exceptions as voidable contracts later ratified, barred contracts later revived as well as certain moral obligations which then could still support a subsequent promise, but no longer can.

[62] This latter view, it also seems, is sometimes more clearly recognized in equity than at common law: see *Re McArdle* [1951] Ch. 669.