

Stilk v Myrick (1809) 170 ER 1168

<https://www.lawteacher.net/cases/stilk-v-myrick.php>

Performance of an existing duty is no consideration.

Introduction

Stilk v Myrick is a case that was decided over 200 years ago but nonetheless the principle that it developed remains a core feature of the law of contract and more particularly that of consideration. The formation of a valid contract requires an offer and acceptance in which “the acceptance – [must represent] a final and unqualified expression of assent to the terms of an offer”. However, underlying the offer and acceptance is consideration, without which the contract cannot be formed. This requires that each party must give something in return for the bargain they receive under the contract and without which the contract will not be valid. Stilk v Myrick determines that agreements cannot be altered without the provision of fresh consideration to underpin the promise and contractually bind the parties.

Issues Raised

One of the key difficulties raised is that there are two conflicting reports of the case. Espinasse bases his account on the principles of public policy seeking to prevent duress, whilst Campbell identifies that the underlying principle of the case is one of consideration. Each doctrine operates in profoundly different ways. If Espinasse’s account of the case was taken as the correct interpretation, as opposed to the Campbell account, the application of Stilk v Myrick would have resulted in a very different contractual doctrine emerging. This doctrine would be based upon the principles of public policy which today would amount to economic duress as opposed to a failure of

consideration. It is therefore the promise to undertake contractual duties that a party is already bound by the contract to complete, and the provision of additional benefit for the completion of those duties is what the doctrine seeks to prevent. Nonetheless there are those that argue fresh consideration can often be located in the circumstances surrounding the case.

The Facts

A return voyage between London and the Baltics was in peril when two of the crew abandoned the ship. The seamen were due to receive wages of £5 per month during the voyage. The captain offered the remaining crew an equally divided share of the deserted seamen's salary if they could return sail the ship to London with reduced crew. The ship was returned to London by the remaining seamen however, the additional payment was not made.

The Decision

Espinasse's case report based the decision on the grounds that public policy should prevent seamen from demanding extra payment for duties that they were already obligated to do. In this context he uses the example of accident or death during the voyage where the seamen have no option but to continue the journey. The concept of duress is not straightforward here as the promise for additional payment was made whilst the ship was docked and the concept of economic duress was at that time not recognised. Duress at that time was thought to consist of physical violence or a threat of violence. Alternatively Cambell identified that the issue was one where there was no fresh consideration for the promise of additional payment and therefore the claim failed.

There are suggestions that both accounts of the case may offer a more complete reflection of the court's actual decision. In this context, Waddams identifies that "Campbell might have strayed somewhat beyond the role of reporter" by emphasizing "the reason that seemed to him the more principled". Campbell was, in this respect, highly regarded and his reports are described as frequently going beyond that of mere reporting of the facts and decision. It is most likely that this is the reason his account of the case is the preferred option, and thus has formed the basis for the doctrine of fresh consideration.

The Outcome

The requirement of fresh consideration in order to vary the contract can itself be problematic as consideration can come in the form of many guises. Consideration essentially represents an obligation on a contractual party for the receipt of the benefit under the contract. It does not therefore require monetary remuneration although it must be capable of having economic value. Nonetheless, there is no requirement for the consideration in a contract to be adequate in representing a fair contractual bargain. Thus criticisms of the *Stilk v Myrick* case are that the sailors did not demand additional payment, it was offered to the crew in recognition that they would be required to work harder to achieve the same result. This could also be construed as a greater benefit to the captain that the ship was returned to London as opposed to being docked overseas. The court in *Williams v Roffey Brothers* took the view that fresh consideration was present, in a promise for additional payment to the contractor in order to ensure the completion of the original contract. The offer was made in light of the contractor's financial difficulty, the original contractual price was deemed to be too low and that the main contractor was liable to penalties for delays in completion. In this context the court concluded

that the “practical benefits” that the promise gave was sufficient to amount to consideration where there was no evidence of duress.

In this context, *Williams v Roffey* limits the effects of *Stilk v Myrick* by allowing variation of the contract terms if the parties of the agreement have agreed to undertake additional duties or accept additional risks that were not originally anticipated under the contract. It suggests that the performance of the contract under *Stilk v Myrick* could have amounted to fresh consideration and thus it may have been wrongly decided. Whilst it developed the concept that a contractual amendment requires fresh consideration from each of the parties; it is arguable that a promise made without any duress ought to be enforceable when the parties have acted upon it and where the circumstances suggests that consideration may have been present. Nonetheless, what is clear is that the requirement of fresh consideration remains a valid feature of contract law. *WRN Ltd v Ayris* is a recent case which again emphasises that it is well established that a promise to perform an existing contract will not be sufficient to constitute consideration.

Bibliography

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