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BENEFIT TO THE PROMISOR AS CONSIDERATION FOR A SECOND PROMISE FOR THE SAME ACT

NUMEROUS theories have been advanced to explain the origin of the common law doctrine of consideration. It has been denominated a modification of the Roman causa, adopted by courts of equity and borrowed therefrom by the courts of common law.[1] It has been said to be derived from the requirement of a quid pro quo in the action of debt.[2] It has been declared to have its antecedent in the requirement of damage to the plaintiff in the action on the case for deceit.[3] And finally it has been asserted to have evolved from both of the last mentioned requirements.[4] But whatever its source, it is certain that from the beginning of the seventeenth century, if not from an earlier time, benefit to the promisor received by him from the promisee in exchange for the promise has been at least as efficacious a support for such a promise as detriment suffered by the promisee.[5] Some modern com-

1. Salmond, Essays in Jurisprudence and Legal History, IV. But see Pollock, Principles of Contract, third Am. ed. 191.
2. Holmes, The Common Law, 285. But see Pollock & Maitland, History of English Law, II, p. 212.
3. Hare, Contracts, Ch. VII.
4. Ames, Lectures on Legal History, 129; 2 Harv. L. Rev. 1.
5. Pickas v. Guile, (1609) Yelv. 128. See also Riches v. Brigges, (1601) Yelv. 4.

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mentators, however, have attempted to simplify the definition of consideration by making detriment to the promisee suffered in exchange for the promise, the exclusive test,[6] partly because this test is historically more accurate,[7] and partly because a benefit to the promisor involves a detriment to the promisee.[8] It is not, and indeed, could not be, contended that the courts have consciously discarded benefit to the promisor as a test of consideration, for not only has no case been cited which declares detriment to the promisee to be the only test, but, on the contrary, practically every modern court which attempts to give a definition of consideration includes benefit to the promisor as an alternative test.[9]

The fact that the test of detriment may preserve "the historic connection between the modern simple contract and the ancient

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6. "At the present day, it is doubtless just and expedient to resolve every consideration into a detriment to the promisee incurred at the request of the promisor." Ames, Lectures on Legal History, 129; 2 Harv. L. Rev. 1.

"This definition makes what the promisee gives—that is, the detriment suffered by him—the universal test of the sufficiency of consideration, . . ." Williston, 8 Harv. L. Rev. 33.

7. "Professor Langdell has pointed out the irrelevancy of the notion of benefit to the promisor, and makes detriment to the promisee the universal test of consideration. This simplified definition has met with much favor. It is concise, and it preserves the historic connection between the modern simple contract and the ancient assumpsit in its primitive form of an action for damage to a promisee by a deceitful promisor." Ames, Lectures on Legal History, 323; 12 Harv. L. Rev. 515.

8. "It is said that any benefit conferred by the promisee on the promisor, or any detriment incurred by the promisee may be a consideration. It is also thought that every consideration may be reduced to a case of the latter sort, using the word 'detriment' in a somewhat broad sense." Holmes, The Common Law, 289, 290.

"The fact is, however, that the cases in which there is a benefit to the promisor invariably involve a detriment to the promisee." 6 R. C. L. 655.

9. "'Consideration,' says Mr. Justice Patterson in Thomas v. Thomas, (1842) 2 Q. B. 851, 'means something which is of some value in the eye of the law moving from the plaintiff; it may be some benefit to the defendant, or some detriment to the plaintiff.' At any rate, it must be some benefit to the plaintiff, or detriment to the person from whom it moves, and of some value in the eye of the law." Wilson, C. J., in New York, etc., Co. v. Martin, (1868) 13 Minn. 417, 419 (386, 388).

"To be a sufficient consideration it is necessary that plaintiffs' promise be a benefit to defendant, or an injury to plaintiffs." Berry, J., in Bailey v. Austrian, (1873) 19 Minn. 535, 538 (465).

"That consideration may consist of detriment or disadvantage to plaintiff, or waiver of a right by him, as well as of a benefit to defendant." Canty, J., in Grant v. Duluth, etc., Ry. Co., (1895) 61 Minn. 395, 397, 398, 63 N. W. 1026.

See also 6 R. C. L. 654, and cases cited in note 12; 2 Words and Phrases, 1444-47; 1 id. (N.S.) 902-6; Bennett, 10 Harv. L. Rev. 257; Williston, 27 Harv. L. Rev. 503, 522-4.

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assumpsit in its primitive form" is interesting but not, in any sense, controlling. Of course, if benefit to the promisor invariably results in detriment to the promisee, brevity and conciseness would dictate the adoption of detriment to the promisee as the exclusive test. But if situations may arise in which there is benefit to the promisor without detriment to the promisee, then the universally accepted definition of consideration should not be further limited. For however the doctrine of consideration came into our law, the justification for its retention lies in the general policy of refusing to enforce gratuitous promises.[10] And certainly a promise paid for by benefit to the promisor has as sound a basis, in policy and reason, for its enforcement as one resting upon detriment to the promisee.[11]

Before entering upon a discussion of the cases where the decision will turn upon the inclusion or exclusion of benefit to the promisor as a test of consideration, it will be expedient to clear the ground by establishing or admitting a few preliminary propositions. First, by benefit and detriment are meant legal benefit and legal detriment as distinguished from actual benefit and actual detriment. The terms are not synonymous. In fact, actual benefit may constitute legal detriment and vice versa.[12] The theory of Mr. Ames would make actual detriment as effectual as legal detriment, for he defined consideration as any act, promise or forbearance given in exchange for a promise.[13] But no courts have gone so far. Second, in bilateral contracts the contract is complete at the moment when the promises are exchanged, but not every exchange of promises will consummate a contract, for the courts look at the content and not at the form of the promise. Commentators have engaged in a spirited controversy concern-

10. "Form and consideration are two alternative conditions of the validity of contracts and of certain other kinds of agreements . . . They are intended as a precaution against the risk of giving legal efficacy to unconsidered promises and to levities of speech." Salmond, Jurisprudence, fourth ed., 316.

11. It must be admitted that the English rule which requires the consideration to move from the promisee is opposed to this conclusion. Dunlop, etc., Co. v. Selfridge Co., (1915) A. C. 847. But this rule does not prevail in America: Palmer Savings Bank v. Insurance Co., (1896) 166 Mass. 189, 44 N. E. 211; Rector, etc., of St. Mark's Church v. Teed, (1890) 120 N. Y. 583, 24 N. E. 1014.

12. Talbott v. Stemmon's Ex., (1889) 89 Ky. 222, 12 S. W. 297, 5 L. R. A. 856, 25 Am. St. Rep. 531; Devecmon v. Shaw, (1888) 69 Md. 199, 14 Atl. 464, 9 Am. St. Rep. 422; Hamer v. Sidway, (1891) 124 N. Y. 538, 27 N. E. 256, 12 L. R. A. 463, 21 Am. St. Rep. 693; White v. Bluett, (1853) 23 L. J. Ex. 36, 2 W. R. 75.

13. Ames, Lectures on Legal History, 323; 12 Harv. L. Rev. 515.

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ing the definition of consideration in such contracts. That suggested by Leake and amplified and explained by Mr. Williston makes the character of the act or forbearance promised, rather than the mere promise, the criterion; generally speaking, when the act promised would, if performed, constitute consideration, the promise to perform it will be consideration, unless such promise is made void by some rule of law other than that relating to consideration.[14] This, it is submitted, squares best with the decisions. It avoids the artificiality of the test of Mr. Ames,[15] and it is not open to the objection of question begging urged against the view of Mr. Langdell.[16] Third, whether benefit to the promisor be excluded from the definition of consideration or not, the same result will be reached in most cases, including that class of cases where A, in exchange for C's promise does, or promises C to do, something which A is already under legal obligation to C to do.

On account of the confusion by some courts of this class of cases, viz., those in which the previous obligation is from A to C, with those where A's previous obligation is to B, it will be advisable to examine them in some detail. They may be separated into three subdivisions: (1) Where the previous obligation of A to C is under a bilateral contract, which has not yet been fully performed on either side; (2) where the previous obligation of A to C is under a unilateral contract, or under an originally bilateral contract which has become unilateral by performance on C's part; (3) where the previous obligation of A to C is owed to C as a member of the public.

In cases of the first subdivision, it has been suggested that the second agreement between A and C amounts to a dissolu-

14. Williston, 27 Harv. L. Rev. 503, 527, 528. As pointed out by Mr. Williston, it is difficult to bring within any reasonable definition of consideration bilateral contracts in which one of the promises is voidable at the option of the promisor.

15. "The act of each promisee in the case of mutual promises is obviously the giving of his own promise animo contrahendi in exchange for the similar promise of the other. And this is all that either party gives to the other. This, then, must be the consideration for each promise; and it is ample on either of the two theories of consideration under discussion. For the giving of the promise is not only an act, but an act that neither was under any obligation to give. This simple analysis of the transaction of mutual promises is free from arbitrary assumptions and from all reasoning in a circle." Ames, Lectures on Legal History, 342, 343; 13 Harv. L. Rev. 31, 32.

16. See Williston, 8 Harv. L. Rev. 27, 34, 35; 27 id. 503, 505, 506. Langdell, 14 id. 496; Ames, 13 id. 30-32.

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tion of the first contract, whereby A relinquishes all his rights against C in consideration of C's relinquishing all his rights against A, and the formation of a new contract wherein A and C assume new mutual obligations. The only difficulty with this theory is that frequently it does not accord with the facts. As well said by the Minnesota Supreme Court:

"The doctrine of these cases as it is frequently applied does not commend itself either to our judgment or our sense of justice, for where the refusal to perform and the promise to pay extra compensation for performance of the contract are one transaction, and there are no exceptional circumstances making it equitable that an increased compensation should be demanded and paid, no amount of astute reasoning can change the plain fact that the party who refuses to perform, and thereby coerces a promise from the other party to the contract to pay him an increased compensation for doing that which he is legally bound to do, takes an unjustifiable advantage of the necessities of the other party. To hold, under such circumstances, that the party making the promise for extra compensation is presumed to have voluntarily elected to relinquish and abandon all of his rights under the original contract, and to substitute therefor the new or modified agreement is to wholly disregard the natural inference to be drawn from the transaction, and invite parties to repudiate their contract obligations whenever they can gain thereby.

"There can be no legal presumption that such a transaction is a voluntary rescission or modification of the original contract, for the natural inference to be drawn from it is otherwise in the absence of any equitable considerations justifying the demand for extra pay. In such a case the obvious inference is that the party so refusing to perform his contract is seeking to take advantage of the necessities of the other party to force from him a promise to pay a further sum for that which he is already legally entitled to receive. Surely it would be a travesty on justice to hold that the party so making the promise for extra pay was estopped from asserting that the promise was without consideration. A party cannot lay the foundation of an estoppel by his own wrong. If it be conceded that by the new promise the party obtains that which he could not compel, viz. a specific performance of the contract by the other party, still the fact remains that the one party has obtained thereby only that which he was legally entitled to receive, and the other party has done only that which he was legally bound to do. How, then, can it be said that the legal rights or obligations of the party are changed by the new promise? It is entirely competent for the parties to a contract to modify or to waive their rights under it, and ingraft new terms upon it, and in such a case the promise of one party is the consideration for that of the other; but where the promise to the one is simply a repetition of a subsisting legal promise there can be no

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consideration for the promise of the other party, and there is no warrant for inferring that the parties have voluntarily rescinded or modified their contract."[17]

In other words, the alleged dissolution is a mere fiction. The fact is, that usually neither party for a single instant releases the other so as to leave him entirely free; but one of the parties, C, merely assumes additional obligations.

Curiously enough, the Minnesota court is willing to give this fiction validity in certain cases.

"But where the party refusing to complete his contract does so by reason of some unforeseen and substantial difficulties in the performance of the contract, which were not known or anticipated by the parties when the contract was entered into, and which place upon him an additional burden not contemplated by the parties, and the opposite party promises him extra pay or benefits if he will complete his contract, and he so promises, the promise to pay is supported by a valid consideration. In such a case the natural inference arising from the transaction, if unmodified by any equitable considerations, is rebutted and the presumption arises that by the voluntary and mutual promises of the parties their respective rights and obligations under the original contract are waived, and those of the new or modified contract substituted for them. Cases of this character form an exception to the general rule that a promise to do that which a party is already legally bound to do is not a sufficient consideration to support a promise by the other party to the contract to give the former an additional compensation or benefit."[18]

If the unforeseen difficulties were such as to constitute a mutual mistake of fact, or were of such character as to form a basis for equitable relief from the terms of the contract, then, of course, by performing or promising to perform, A would undergo legal detriment and C would obtain a legal benefit; and there would be no question as to the sufficiency of the consideration. But this is not the basis of the court's dictum.

"What unforeseen difficulties and burdens will make a party's refusal to go forward with his contract equitable, so as to take the case out of the general rule and bring it within the exception, must depend upon the facts of each particular case. They must be substantial, unforeseen, and not within the contemplation of the parties when the contract was made. They need not be such as would legally justify the party in his refusal to perform

17. King v. Duluth, etc., Ry. Co., (1895) 61 Minn. 482, 63 N. W. 1105, per Start, C. J. The great weight of authority is in accord. The cases are collected in Pollock, Principles of Contract, third Am. ed., 203, note 15.
18. (1895) 61 Minn. 487, 488.

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his contract, unless promised extra pay, or to justify a court of equity in relieving him from the contract; for they are sufficient if they are of such a character as to render the party's demand for extra pay manifestly fair, so as to rebut all inference that he is seeking to be relieved from an unsatisfactory contract, or to take advantage of the necessities of the opposite party to coerce from him a promise for further compensation. Inadequacy of the contract price which is the result of an error of judgment, and not of some excusable mistake of fact, is not sufficient.

"The cases of Meech v. City of Buffalo, 29 N. Y. 198, where the unforeseen difficulty in the execution of the contract was quicksand, in place of expected ordinary earth excavation, and Michaud v. MacGregor, supra, p. 198, 63 N. W. 479, where the unforeseen obstacles were rocks below the surface of the lots to be excavated, which did not naturally belong there, but were placed there by a third party, and of the existence of which both parties to the contract were ignorant when the contract was made, are illustrations of what unforeseen difficulties will take a case out of the general rule."[19]

Since the court recognizes that in the usual cases any presumption as to dissolution of the first contract is a mere fiction, and in the extraordinary case raises such presumption out of the equity and justice of the situation it would seem to follow that the presumption would be irrebuttable, and an actual refusal to agree to a rescission or dissolution would be immaterial. Clearly there is no basis in logic or precedent for any such exception to the doctrine of consideration. It is merely a modification of the doctrine on so-called equitable grounds. It has been adopted in Maryland.[20]

In cases of the second subdivision,[21] there is no room for the operation of any fiction of dissolution or rescission, for C has fully performed. And it does not aid the situation to state it in terms of waiver, for if waiver and not estoppel is meant, there is still need for consideration. Yet the equity and justice of the situation are just the same whether C has fully, or only partially performed. It is difficult to see how any distinction could reasonably be drawn between the cases in the two subdivisions, where the Minnesota dictum prevails. Where the mere dissolution theory obtains, clearly no consideration for C's second promise can be found.[22]

19. Id. 488.
20. Linz v. Schuck, (1907) 106 Md. 220, 67 Atl. 286, 11 L. R. A. (N.S.) 789.
21. See page 386, supra.
22. But see Peck v. Requa, (1859) 13 Gray (Mass.) 407.

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Cases of the third subdivision[23] present no difficulty, for C's promise is unenforceable not only for lack of consideration, but also on grounds of public policy.[24]

It must be apparent that in this entire class of cases, neither detriment to A, the promisee, nor benefit to C, the promisor, is exchanged for the promise. A does nothing, forbears nothing, which he is not legally obligated to do or forbear; C receives nothing which he is not legally entitled to receive from A. Hence, these cases would furnish no basis for objecting to the exclusion of benefit to the promisor as a criterion of consideration.

From these cases has been drawn the rule that doing or promising to do what one is already legally bound to do is not sufficient consideration to support a promise. And it should constantly be borne in mind that this rule is not a statement of a primary principle, but merely a deduction from a particular class of cases, where the context remedies the obvious incompleteness of the statement. Legally bound to whom? To the other contracting party, C, or to the community of which C is a member, so that performance of the obligation or a promise to perform it results in no legal detriment to the promisee and in no legal benefit to the promisor, C. The idea intended to be emphasized by this phrasing is the distinction between actual benefit and detriment on the one hand, and legal benefit and detriment on the other. The majority of American courts, however, have failed or refused to recognize the limitations of this secondary rule, and have applied it to cases where the previous obligation of A was owed to B, and the later promise is made by C.[25] A respectable minority of our courts and the English courts do make a distinction and hold C's promise supported by a sufficient consideration.[26] Most of the commentators agree with the Eng-

23. See page 386, supra.

24. Cases of this class are collected in notes in 11 L. R. A. (N.S.) 1170, 48 id. 392, (rewards); Pollock, Principles of Contract, third Am. ed. 205, note 16, (rewards); Ames, 12 Harv. L. Rev. 517, note 1, (refraining from tort); Cyc., IX, 347, 348, notes 40, 41, 43, 46.

25. Havana, etc., Co. v. Ashurst, (1893) 148 Ill. 115, 35 N. E. 873; Harris v. Cassady, (1886) 107 Ind. 158, 8 N. E. 29; Newton v. Chicago, etc., Ry. Co., (1885) 66 Ia. 422, 23 N. W. 905; Schuler v. Myton, (1892) 48 Kan. 282; Putnam v. Woodbury, (1878) 68 Me. 58; Gordon v. Gordon, (1875) 56 N. H. 170; Arend v. Smith, (1897) 151 N. Y. 502, 45 N. E. 872; Sherwin v. Brigham, (1883) 39 Oh. St. 137; Wimar v. Overseers, (1883) 104 Pa. St. 317; Hanks v. Barron, (1895) 95 Tenn. 275, 32 S. W. 195; Kenigsberger v. Wingate. (1868) 31 Tex. 42; Davenport v. Congregational Society, (1873) 33 Wis. 317; Cyc., IX, 353, 354, note 73.

26. Bagge v. Slade, (1616) 3 Bulstr. 162; Shadwell v. Shadwell, (1860)

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lish decisions and attempt to explain them by finding detriment to C.

Mr. Ames finds detriment in "any act or forbearance given in exchange for a promise."[27] The difficulty with this definition is that it includes too much; it takes no account of the character of the act; the sole question is whether the act is referable to the promise. If the agreement between A and C is bilateral, then Mr. Ames would regard A's physical exertion in expressing the words of promise as constituting a detriment in that A was under no obligation to express them.[28] As pointed out above, the courts look to the content and not to the form of the promise. And what the parties desire is the thing promised, not the mere expression of promise. Of course, if what C really desired was to have A undergo this physical exertion, and to exchange his promise therefor, Mr. Ames' position would be unanswerable. Mr. Anson explains the situation by saying that A abandons or agrees to abandon his right to make an arrangement with B, whereby A and B shall put an end to their contract "by mutual waiver of promises" and "the abandonment of a right has always been held to be a consideration for a promise."[29] That is, Mr. Anson finds detriment to A in his abandoning his right to rescind the contract with B. The objection to this explanation is obvious. It does not fit the facts. So long as the final result bargained for by C is effectuated, C cares nothing about the existence or non-existence of contractual relations between A and B. How could this theory be applied where C had no knowledge of the contract between A and B, or where B had actually refused to rescind the contract with A, or where B had by a previous agreement with D expressly covenanted not to rescind his contract with A, or where there was no possibility of rescission? Yet in all these situations, so far as C is concerned, the thing which he

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9 C. B. N. S. 159, 7 Jur. N. S. 311, 30 L. J. C. P. 145, 3 L. T. N. S. 628, 9 W. R. 163; Scotson v. Pegg; (1861) 6 H. & N. 295, 30 L. J. Exch. 225, 3 L. T. .N. S. 753, 9 W. R. 280; Humes v. Decatur, etc., Co., (1892) 98 Ala. 461, 473, 13 So. 368; Hirsch v. Chicago, etc., Co., (1899) 82 Ill. App. 234; Donnelly v. Newbold. (1901) 94 Md. 220; Abbott v. Doane, (1895) 163 Mass. 433, 40 N. E. 197; Day v. Gardner, (1881) 42 N. J. Eq. 199, 203, 7 Atl. 365; Bradley v. Glenmary Co., (1902) 64 N. J. Eq. 77, 53 Atl. 49; Cyc., IX, 354, notes 74 and 75.

In Minnesota the point is still undecided. Grant v. Duluth, etc., Ry. Co., (1895) 61 Minn. 395, 398, 63 N. W. 1026.

27. 12 Harv. L. Rev. 531.

28. 13 id. 29, 32.

29. Anson, Law of Contracts, twelfth ed., 109.

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calls for in exchange for his promise is the same. And if that thing is furnished by C, could it be said that he had broken his promise by rescinding or modifying his contract with B? In short, while there can be no doubt that A would be undergoing a legal detriment by refraining from rescinding or promising so to refrain, he would not be doing so in exchange for C's promise. Mr. Justice Holmes begins his exposition of the problem by assuming that when A and B enter into their contract, A has the option of breaking his contract and paying damages therefor or of fulfilling its terms. If he gives up the former choice in exchange for C's promise, he undergoes a legal detriment. "A brilliant paradox," says Sir Frederick Pollock. And such it clearly is, since it asserts that to be a legal right for the doing of which the law will compel one to pay damages.

Where the contract between A and C is unilateral with C as promisor, Mr. Langdell supported the American cases; but where it was bilateral, he found consideration for C's promise in the detriment which A incurs by giving C the right to compel him to act or forbear, "or the right to recover damages against him for not doing it. One obligation is a less burden than two (*i. e.* one to each of two persons) though each be to do the same thing."[30] Anson[31] and Williston[32] both point out the obvious begging of the question in these statements. A comes under a legal obligation to C only in case the bilateral agreement is binding. It is true C promises to do something which he is not bound to A to do, and thereby prima facie incurs detriment. But C's promise is binding only if it is supported by consideration. Is A's promise consideration for C's promise? If A comes under a legal obligation to C, the answer must be in the affirmative. But A will not come under any obligation to C unless C's promise is supported by a consideration. Hence to say that A does come under a new obligation to C is to assume the very point at issue. The only judicial support of this theory is a dictum of the supreme court of the District of Columbia.[33]

From the standpoint of detriment to the promisee, then, it would seem impossible to find consideration either in A's promise or in A's performance. A does nothing, forbears nothing

30. Langdell, Summary of Contracts, Sec. 84.
31. Anson, Law of Contracts, twelfth ed., 110.
32. 8 Harv. L. Rev. 34, 35.
33. Merrick v. Giddings, (1882) 1 Mack. 394, 411 per James, J.

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which he is not legally bound to do or forbear. He parts with nothing which he is legally free to keep, does nothing which he is legally free to refrain from doing, refrains from doing nothing which he is legally free to do and consequently suffers no legal detriment.

Does C receive a legal benefit? When A becomes bound to B to act or to refrain from acting, B secures a chose in action against A. So exclusively does this chose in action belong to B, that originally it lacked the essential element of a property right, namely, transferability. Consequently, C has absolutely no rights in the contract between A and B, it matters not how much he may benefit or suffer by the performance thereof. His gain or loss in such case will be purely incidental or accidental. So far as C is concerned, A may break his contract with B with impunity. In other words, C has no right by virtue of the contract between A and B to have effectuated the act or forbearance stipulated for in such contract. If in exchange for C's promise, C does secure the effectuation of that act or forbearance, then C has secured something to which he was not theretofore entitled, in other words, a legal benefit. And if a legal benefit received in exchange for a promise by the promisor from the promisee constitutes sufficient consideration to support a promise, then C's promise is enforceable.

The only possible question is whether A's act or forbearance is properly referable to C's promise, that is, whether A's act or forbearance has been in reliance upon and in exchange for C's promise. This is, of course, a question of fact, which in the ordinary case is very easy of solution. It is, obviously, not essential that A's act be done solely in exchange for C's promise. It cannot be doubted that if X, Y and Z each separately promised A to pay him a fixed and separate compensation for doing a single designated act, A might earn the three separate compensations by one performance, for the single promise of X or Y or Z, or the combined promises of any two of them might not have been sufficient inducement. And if A is under legal obligation to B to complete a building or to do any other act, and is upon the point of breaking his contract with B, there can be no doubt in fact that when C promises him additional compensation if he will complete the building or do the other act, his action in so doing is actually partly in exchange for C's promise, and partly in exchange for the consideration furnished

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by B. In the dissenting opinion in *Shadwell v. Shadwell*,[34] Byles, J. suggested that A could not be permitted to say that his act was referable to C's promise, when he was already bound to B. This is merely saying that the policy of the law will estop A from showing the truth of the matter. Contracts of this sort are frequently made and generally performed by business men in the usual course of legitimate business; in the absence of fraud, duress or sharp dealing there is nothing immoral in them. Hence no considerations of public policy would seem to weigh against them, and Byles' suggestion should not be controlling. Where the latter agreement between A and C is bilateral, the referability of A's act or forbearance to C's promise is all the more apparent. And if the legal benefit conferred by such act or forbearance constitutes consideration, then the promise to confer it would likewise constitute consideration.

Here, then, is a class of cases in which legal benefit to the promisor may exist without legal detriment to the promisee, in which no sound reason of policy militates against the validity of the later promise, and in which the inclusion of benefit to the promisor as a test of consideration is essential to the enforceability thereof. It is, therefore, submitted that no reason exists for modifying the traditional definition of consideration by phrasing it in terms of detriment only.

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34. Shadwell v. Shadwell, supra, note 26.

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