

## WHAT IS CONSIDERATION IN THE ANGLO-AMERICAN LAW OF CONTRACTS?

### A Historical Summary.

What is the theory of consideration in contract law under the Anglo-American legal system?

In order properly to answer this question it will be helpful to consider, first, contract law in England prior to the sixteenth century, and, second, contract law in England and the United States since the sixteenth century.

### CONTRACT LAW IN ENGLAND PRIOR TO SIX- TEENTH CENTURY.

Prior to the sixteenth century there was no contract law in England except as it was associated with the action of covenant, with the action of debt, and with the procedure in equity.

#### COVENANT.

Covenant was available before the year 1201, and it has survived up to the present time, except as it has been supplanted by debt and assumpsit. In the beginning it is said to have been an action for the breach of every kind of promise, oral or written, both real and personal; and if it had continued as it began, it might today cover the entire field of contract law. But by the close of the reign of Edward I (1307) it had become the law that, in order to be valid, a covenant must be in writing and under the seal of the covenantor. Since that time, consequently, the action of covenant has only lain to recover damages for breach of a sealed promise to do some particular act.<sup>1</sup>

In covenant no consideration was necessary to give a cause of action. All that was required, even after the reign of Edward I, was writing, sealing and delivery, and, in more modern times, signing. Yet, unlike debt and assumpsit, as we shall soon see, covenant was from the first a remedy for breach of promise; and if it had not been for the limitation on its scope imposed

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<sup>1</sup> 111 Street, Foundations of Legal Liability, 114-126.

by the law of evidence, that writing—which at that time meant a writing under seal—should be the only admissible proof, it would have become co-extensive with the law of agreement. Then we should have had, not only certain contracts—*i. e.*, covenants—requiring no consideration, but we should have had no contracts requiring consideration. When we realize that it was only because of what might be called a historical accident that this threatened consummation did not result, we begin to realize how uncertain, to say the least, is the foundation for the requirement of consideration in Anglo-American contract law. But, since covenant was restricted to a class of agreements which every day became narrower and narrower, it was finally supplanted by another action (*assumpsit*) which more nearly conformed to the demands of society.<sup>2</sup>

#### DEBT.

Debt is thought of as a common law action for the recovery of money or chattels, due and made certain in amount by contract, by custom, or by record;<sup>3</sup> it is an action even older than covenant.<sup>4</sup> Later it was broken up into debt for money and detinue for other chattels, but at first no such distinction was made. In its early history debt was available in two classes of cases, surety cases and “delivery-promise” cases.<sup>5</sup>

In the original surety cases the promisee (pursuer) gave up his right to take revenge on the pursued at the request of the surety promisors. The surety took the place of the earlier hostage, and became personally liable for the debt, or composition, substituted for revenge. By the twelfth century the engagement of the surety had largely lost its early formal character, and yet it had not as yet taken on the requirements of writing

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<sup>2</sup> Salmond, *History of Contract*, 3 *Select Anglo-American Essays* 325. Equity also was an accomplice before the fact of the demise of covenant by its refusal to grant specific performance thereof, although it did not always strictly adhere to its refusal. *Jefferys v. Jefferys*, Craig & Phillips 139; *Ames' Cases in Equity*, 261, 431-435.

<sup>3</sup> III Street, *Foundations of Legal Liability*, 127.

<sup>4</sup> *Stokes v. Trent*, A. D. 1200, *Seldon Soc. Pub.*, Vol. 1, Case 38.

<sup>5</sup> Henry, *Consideration in Contracts*, 26 *YALE L. JOUR.* 679-681.

and seal. It constituted a simple debt, and was enforced by the action of debt.<sup>6</sup>

In these early surety cases, the Anglo-Saxons did not look for detriment to the promisee, but it existed and was the ground for the liability of the surety, unless such cases are to be explained on the ground of benefit to the one for whom the surety made his promise. Hence there was a possibility that detriment to the promisee might in debt have been required for the enforcement of a promise, and therefore have developed into consideration. But this did not occur, because, in the reign of Edward III, the surety contract was merged into the covenant, or contract under seal, and perhaps to some extent into the "delivery-promise" or "real" contract.<sup>7</sup> Hence detriment to the promisee, or consideration, did not become a requirement for contracts through the action of debt. This result was left for another action (special assumpsit), which was developed later.

In the "delivery-promise" cases different conceptions entered. The exchange was a typical transaction of this sort. In the exchange, if one man delivered chattels for other chattels or money, which another man agreed to return therefor, but the latter failed to perform, the latter owed to the former the chattels or money which he had agreed to return, and debt would lie to recover the same. This law of exchange was extended to bargain and sale, to contracts of hiring, to obligations of record and of statute, and to promises under seal, on the theory in the last case that the sealed promise was a grant which took effect by its form only. In all cases, except the last three named, there was a possibility of finding either detriment to the promisee in the thing surrendered for the promise, or benefit to the promisor in the thing received therefor. If the courts had adopted the first view, we again might have had introduced early into English law the idea of detriment to the promisee as consideration for a promise. But the courts, as the ground for recovery, did not adopt this view, but took the view of benefit to the promisor, as found in the *quid pro quo* doctrine. According to

<sup>6</sup> II Street, Foundations of Legal Liability, 7-8.

<sup>7</sup> Henry, Consideration in Contracts, 26 YALE L. JOUR. 688; II Street, Foundations of Legal Liability, 45-47.

this doctrine, something had to be given or done on one side for something to be given or done on the other side, so that the defendant always received something (a benefit) from the plaintiff, in return for which he owed something to the plaintiff.<sup>8</sup>

Whether or not this requirement of *quid pro quo* might have come to be called consideration and perhaps might have become the sole consideration required by the common law for contracts, had the action of debt grown with the growth of the law of contracts, there is no means of knowing, because the action of debt did not have this history. It placed the law of contracts in a worse straight-jacket than did the action of covenant, and it finally had to go the way of covenant. For one thing, because of the common law notion of *quid pro quo*, promises as such were not enforceable. In addition, the method of trial in actions of debt was by wager of law (a system of proof by oath with or without the supporting oath of compurgators). These two burdens were too much for debt, and it went down, so that it could not be revived even by the abolition of wager of law in England in 1833.<sup>9</sup> The action of debt may now be regarded as practically obsolete both in England and in the United States. The obligations formerly enforced as contracts by means of the action of debt are now for the most part enforced by general assumpsit in its varied forms, as quasi contracts. The notions of *quid pro quo* and of benefit to the promisor may have survived to some extent in modern contract law, but, if so, it is in connection with the actions of assumpsit, and any further consideration of such notions will be postponed until such actions are considered.

### EQUITY.

Equity at one period in English history assumed jurisdiction over contracts in a way different from its modern jurisdiction. How extensive this ancient jurisdiction was it is impossible to say, although there is some evidence that it was at one

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<sup>8</sup> Henry, Consideration in Contracts, 26 YALE L. JOUR. 683; III Street, Foundations of Legal Liability, 127-143; Salmond, History of Contract, 3 Select Anglo-American Essays, 323.

<sup>9</sup> 3 and 4 Wm. IV, c. 42, s. 13.

time very extensive. Lord Mansfield apparently obtained from this source, or from a common source, his views in regard to moral consideration and motive as consideration. There is definite proof that equity introduced some of its theories of consideration into the Anglo-American law of conveyancing. The theories of consideration, which were adopted by the chancellors, former ecclesiastics, who developed the law of equity, were taken from the canon, or ecclesiastical, law. These theories were not exactly like the theories of consideration (*causa*) which obtained in the Roman law, but they were similar to them and developed from them. In conveyancing, equity required either what was called a valuable consideration for a bargain and sale or what was called a good consideration for covenants to stand seized. For simple promises equity seems to have required other kinds of *causa*.

The dissatisfaction with the law of covenant and with the law of debt was so great, that in the course of time the chancellors might have succeeded in introducing into English law most of the principles of the Roman law of contracts, had it not been for one thing, and that was the development of the action of assumpsit, to which we have already referred in connection with covenant and debt. The action of assumpsit had the same effect upon the development of the law of consideration in equity that it had upon the development of the law of consideration in covenant and debt, but for very different reasons. It is true that the requirements of equity did not become obsolete, at least so far as concerns the doctrine of valuable consideration and the notion that an enforceable promise must have some cause for it (a notion which has had some influence both in general assumpsit and in special assumpsit); but they did not continue their special and independent development because the equity courts did not continue their special and independent development. As a result, whatever influence equity might otherwise have had upon the law of contracts was checked and henceforth whatever development there was in the law of contracts occurred in the common law courts.<sup>10</sup>

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<sup>10</sup> Salmond, *History of Contract*, 3 *Select Anglo-American Essays*, 329-337.

## CONTRACT LAW IN ENGLAND AND THE UNITED STATES SINCE THE SIXTEENTH CENTURY.

With the sixteenth century the law of contracts began an independent history. For the reasons already set forth, the law of contracts prior to that time had been becoming more and more unsatisfactory, except for the ameliorations which equity afforded. At about this time the action of trespass on the case and the other actions on the case were having a marvelous development, both because they, like trespass, were tried by a jury instead of by wager of law, and because thereby the common law courts were enabled to keep litigants out of the chancery court. One of these actions on the case was special assumpsit, generally regarded as an action on the case in the nature of deceit. This action soon lent itself to the enforcement of promises as such, oral as well as written; and thereby afforded the common law courts a substitute for the dying action of covenant on the one hand and for the threatening jurisdiction of equity on the other. Special assumpsit was allowed in the sixteenth century in cases of unilateral agreements,<sup>11</sup> and in the seventeenth century in cases of bilateral agreements<sup>12</sup> (though these terms were not used until they were coined and given currency by Judge Dillon and Dean Langdell). Another one of the actions on the case was general assumpsit, generally regarded as an action on the case in the nature of debt. General assumpsit supplanted debt. It was first allowed in the sixteenth century for recovery upon an express promise to pay a simple precedent debt,<sup>13</sup> but it was allowed in the early seventeenth century in the case of an implied promise,<sup>14</sup> which meant that one could sue in general assumpsit wherever there was a simple debt.

What, if any, was the law as to consideration both in general assumpsit and in special assumpsit?

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<sup>11</sup> Keilw. 77, pl. 25; 69, pl. 2; 3 Leon. 88.

<sup>12</sup> Strangeborough and Warner's Case, 4 Leon. 3.

<sup>13</sup> Edwards v. Burre, Dal. 104, pl. 45.

<sup>14</sup> Slade's Case, 4 Coke 92b.

## GENERAL ASSUMPSIT.

The consideration, if any, in general assumpsit was precedent debt. If this meant anything before the time when general assumpsit was allowed without an express promise, it meant nothing thereafter, except that general assumpsit was concurrent with debt. Of course, a promise was made in the creation of the debt, and in the true debt cases it was made for what the old law called the consideration of *quid pro quo*. But this was not the consideration for the assumpsit since it was a new liability predicated upon the promise implied by law in addition to the liability involved in the creation of the debt. The action of general assumpsit was extended until it was allowed on inferred contracts and on contracts wholly performed except for the payment of money, because in all these cases there was a debt, and the real basis for the plaintiff's recovery was the debt and not the alleged promise.<sup>15</sup> Both the promise and the consideration were fictitious. The form was seized upon to allow recovery in certain cases where it was desired not to use the action of debt.<sup>16</sup> If precedent debt had been a real consideration and if recovery in general assumpsit had really been upon the promise, express or implied, precedent debt should have been sufficient consideration for a promise other than that which the law would imply, and past consideration should have become as sufficient consideration as present; but in England at any rate it has been decided that precedent debt is no sufficient consideration for any promise other than that which the law would imply,<sup>17</sup> and past consideration, with one exception, has been everywhere repudiated.

The exception to which reference has been made includes those cases where the Roman theory of consideration unmodified was, under the guise of moral consideration,<sup>18</sup> introduced into

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<sup>15</sup> 3 Stand. Encyc. of Pro. 166.

<sup>16</sup> McKelvey, Common Law Pleading, 26.

<sup>17</sup> Rann v. Hughes, 7 T. R. 350.

<sup>18</sup> Lee v. Muggeridge, 5 Taunton 36.

English law in precedent debt cases.<sup>19</sup> These cases were promises to pay debts barred by a discharge in bankruptcy,<sup>20</sup> promises by a discharged surety,<sup>21</sup> promises by a former infant,<sup>22</sup> promises by a widow to pay an indebtedness which she incurred when incapacitated to contract,<sup>23</sup> promises to pay a debt barred by the statute of limitations,<sup>24</sup> and promises to rectify a previous mistake or illegality.<sup>25</sup> This was done through the influence of Lord Mansfield, who disliked the common law, and approved of the civil law, doctrine of consideration, although he apparently introduced his theory of consideration only into cases of general assumpsit, where precedent debt was called the consideration, and not into cases of special assumpsit, where, as we shall see, detriment to the promisee was generally held to be the consideration; but in introducing this innovation into the law of general assumpsit he made the consideration the moral obligation rather than the precedent debt.<sup>26</sup>

Recovery is still allowed in the cases above enumerated. However, now it is frequently said that recovery is on the original obligation, and that the new promise amounts only to a waiver of a defense which the party could have theretofore interposed.<sup>27</sup> This new explanation is not sound in the case of

<sup>19</sup> Account stated may be another exception: Williston, *Contracts*, Sec. 1862.

<sup>20</sup> *Trueiman v. Fenton*, Cowper 544; *Zavelo v. Reeves et al.*, 227 U. S. 625; *Earle v. Oliver*, 2 Exch. 71; *Herrington v. Davitt et al.*, 220 N. Y. 162.

<sup>21</sup> *Rindge v. Kimball*, 124 Mass. 209; *Hurlburt v. Bradley et al.*, 94 Conn. 495.

<sup>22</sup> *Edmond's Case*, 3 Leon. 164; *Williams v. Moor*, 11 M. & W. 256; *Merriam v. Wilkins*, 6 N. H. 432; *Edgerly v. Shaw*, 25 N. H. 514.

<sup>23</sup> *Lee v. Mugeridge*, 5 Taunt. 36.

<sup>24</sup> *Little v. Blunt*, 9 Pick. 488; *Clark v. Jones*, 233 Mass. 591; *Carshore v. Huyck*, 6 Barb. 583; *Trask v. Weeks*, 81 Me. 325; *Barber v. Heath*, 74 N. H. 270.

<sup>25</sup> *Barnes v. Hedley*, 2 Taunt. 184; *Early v. Mahon*, 19 Johns. 147; *Brewster v. Banta*, 66 N. J. L. 367; *Muir v. Kane*, 55 Wash. 131.

<sup>26</sup> It should be noted that certain problems in cases of promises to pay debts barred by the statute of limitations, discharges in bankruptcy, etc., can be explained only by reference to general assumpsit with its requirement of precedent debt. This explanation is rarely given but it is important to remember it. Williston, *Contracts*, Secs. 160, 201.

<sup>27</sup> *Dusenbury v. Hoyt*, 53 N. Y. 521; *Carshore v. Huyck*, 6 Barb. 583; *Trask v. Weeks et al.*, 81 Me. 325; *Way v. Sperry*, 16 Cush. 238; *Ilsley v. Jewett*, 3 Metc. 439; *State Trust Co. v. Sheldon*, 68 Vt. 259; *Gillingham v. Brown*, 178 Mass. 417.

a promise to rectify a mistake or illegality or in the case of the promise of a married woman;<sup>28</sup> and the validity of the new explanation given for the decisions is beginning to be questioned in all cases.<sup>29</sup> If the suit is on the original obligation, why is the extent of the liability governed by the new promise? And why is it necessary to have a new promise rather than a mere admission? Again, under our present law of consideration, how can there be a waiver of a defense unless such waiver is itself supported by a consideration, or creates an estoppel? The new explanation may have to be abandoned. In that event what will be the next explanation? The courts will not want to overrule their earlier decisions and deny recovery. If they do not, and the waiver theory is not tenable, it would seem that the courts would either have to go back to the old theory of precedent debt as consideration, or to the theory of moral obligation (*causa*) as consideration,<sup>30</sup> or that they would have to abandon the requirement of consideration in such cases. If the last course were taken, it would naturally raise the question, why consideration should be required in any cases. Of course, if both the law of consideration and the law of agreement, as developed in connection with the action of special assumpsit, were thrown overboard, and promises were enforced simply as promises, there would be no difficulty in enforcing such promises as are referred to herein.

Is it possible then to say that the different kinds of consideration developed in connection with the action of general assumpsit are now obsolete, and we need pay no further attention to them? It is possible to explain the cases where general assumpsit will lie on inferred contracts and on contracts wholly performed except for the payment of money on the ground that

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<sup>28</sup> *Easby v. Mahon*, 19 Johns. 147; *Brewster v. Banta*, 66 N. J. L. 367; *Lee v. Muggeridge et al.*, 5 Taunt. 36; *Williston, Contracts*, Sec. 150.

<sup>29</sup> 29 *YALE L. JOUR.* 94; *Williston, Contracts*, Secs. 148-166.

<sup>30</sup> *Merriam et al. v. Wilkins et al.*, 6 N. H. 432; *Edgerly v. Shaw*, 25 N. H. 514; *Clark v. Jones*, 233 Mass. 591; *Barber v. Heath*, 74 N. H. 270; *Zavelo v. Reeves et al.*, 227 U. S. 625; *Earle v. Oliver*, 2 Exch. 71. In some United States jurisdictions the doctrine of moral obligation as consideration is still well recognized. *Williston, Contracts*, Secs. 149-150.

there is consideration in the original contract and that general assumpsit is simply an additional remedy. It is possible to explain most other problems in general assumpsit as quasi contracts, where no law of consideration is involved.<sup>31</sup> But so long as the problems referred to in the preceding paragraph remain and so long as the requirement of consideration remains in our law, is it possible to say that precedent debt and moral obligation are no longer consideration in Anglo-American law? It is submitted that no one knows.<sup>32</sup>

#### SPECIAL ASSUMPSIT.

Special assumpsit was at first regarded as a tort action, and the root of liability therefor was damage done by deceitful artifice. This damage was a detriment to the promisee, but it followed the promise (or assumpsit); it was not given in exchange for the promise. In the beginning of the history of this action the courts did not think of enforcing promises. If, in any case, the action appeared to be one merely for breach of promise, they refused to allow the action to be maintained,<sup>33</sup> and remitted the plaintiff to his action of covenant or to no action at all. Yet, little by little, the courts retreated from their first position until at last they began to allow special assumpsit for breach of promises. At first they allowed it when a person undertook to do something and was guilty of malfeasance, and then when he was guilty of misfeasance, and finally when he was guilty of nonfeasance merely. By going this far they changed the action of special assumpsit from a tort action into a contract action, and they at first apparently enforced promises simply because they were promises.<sup>34</sup> If this practice had continued, Anglo-American law would have reached the point finally reached by the Roman law and the point which Anglo-American law would

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<sup>31</sup> This, of course, eliminates benefit to promisor as consideration so far as the action of general assumpsit is concerned, with the exceptions named.

<sup>32</sup> It should be noted that if there is contract liability in general assumpsit, the doctrine of consideration is not the only anomaly therein. The general principles of agreement are lacking.

<sup>33</sup> *Walton v. Brinth*, Y. B., 2 Hen. IV. 3, pl. 9.

<sup>34</sup> *Hurford v. Pile*, Cro. Jac. 483.

have reached through the route of covenant if it had been released from the handicap of the seal; but this practice did not continue. Something happened to make the courts think that, if they were to enforce promises, those promises must be embodied in a contract and that contract must possess a consideration. If the courts had continued the development of special assumpsit as they began it, or if they had been influenced by the law of covenant, they would not have worried about finding consideration. But, evidently, other influences prevailed. Perhaps the influential factor was the notion of *quid pro quo* in the law of debt. Perhaps it was the equity notions of consideration. At any rate the courts took the position, after they came to regard special assumpsit as a contract action, that one of its prerequisites was that some consideration should be given for a promise. Injury following a failure to keep a promise was not enough. Hence, in special assumpsit, the doctrine became established that some consideration was necessary for the enforceability of a promise.<sup>35</sup>

But what theory of consideration did the courts adopt for special assumpsit cases? What did they require to be given for the promise? Did they seize hold of the notion of detriment to the promisee, which had always been required in the tort action of special assumpsit and with which they were familiar, and require this to be given for the promise? Or did they seize hold of the notion of benefit as it existed in debt? Or did they adopt the theory that it might be either detriment to the promisee or benefit to the promisor? Or did they adopt the theory that it must be both detriment to the promisee and benefit to the promisor? Or did they adopt the equitable theory of consideration? Or did they adopt a combined theory of some sort? It will be noticed that there are three conceptions running through this list of questions: (1) detriment to the promisee, (2) benefit to the promisor, and (3) whether it is one or the other or both, it is something given in exchange for a promise. It will conduce to clearness to consider these ideas separately.

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<sup>35</sup> Ames, *History of Assumpsit*, 2 HARV. L. REV. 4-7, 53; "Assumpsit," 3 *Stand. Encyc. of Pro.* 170-175, 192.

## BENEFIT TO THE PROMISOR.

Was benefit to the promisor in any form adopted by the courts as sufficient consideration for a promise? So far as I know, no one contends that the courts of the sixteenth and seventeenth centuries, or the courts of the subsequent centuries, adopted as the theory of consideration in special assumpsit either the theory that only benefit to the promisor could be sufficient consideration, or the theory that there would have to be both benefit to the promisor and detriment to the promisee. If the benefit theory has been adopted at all, it has been in the form that consideration could be either detriment to the promisee or benefit to the promisor.

If the courts, at the time when they made over the action of special assumpsit into a contract action from a tort action and began to require consideration, adopted the theory that benefit to the promisor, as well as detriment to the promisee, could be a consideration for a promise, they found this part of their theory, not in anything peculiar to the action of special assumpsit, but in something extraneous to it. The roots of special assumpsit are found in the tort law of deceit (or perhaps trespass). The origin of the requirement of detriment to the promisee may be found in this territory, but not any such requirement as benefit to the promisor. If the law of contracts, as it was found in debt, had continued in its two-fold application to surety cases and to "delivery-promise" cases, it is easy to conceive how such a two-headed consideration as we are discussing might have resulted;<sup>36</sup> but we know that no such development occurred. Did the courts go outside of special assumpsit and import from this or another source the notion of benefit to the promisor as consideration? Apparently they imported from some source the notion that consideration, whatever it was, must be the inducement for, or given in exchange for, the promise. Perhaps they also imported this other notion of benefit.

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\* Henry, Consideration in Contracts, 26 YALE L. JOUR. 694-698.

How stands the law on this point? The books are full of statements that consideration may be either benefit to the promisor or detriment to the promisee. But unless there are cases where benefit to the promisor alone has been held sufficient consideration, these statements will have to be put down as mere dicta, probably erroneous dicta, and explicable on the ground of the confusion of special assumpsit with general assumpsit in the minds of the judges in the seventeenth and eighteenth centuries, and because of the uncertainty caused by removing the law of consideration from the old foundations of debt and equity to the new foundation of special assumpsit (and general assumpsit). Are there any such cases? *Shadwell v. Shadwell*<sup>37</sup> is sometimes referred to as such a case, and if there are any such cases, they are of its type. In this case an uncle promised to pay a certain sum of money for a certain time to his nephew if he would marry a certain young lady. They were already engaged to be married, and later the nephew married the young lady. The court held the uncle's estate liable on his promise, and found consideration both in the loss which the nephew sustained and in the benefit which the uncle derived.<sup>38</sup> If there was detriment to the promisee, it was not necessary to find also benefit to the promisor. The process by which the court found detriment to the promisee was somewhat far-fetched, but no more so than that by which it found benefit to the promisor. As a matter of fact, if the assumptions of the court were true, it probably found detriment to the promisee but not benefit to the promisor, and this and subsequent cases which have followed it

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<sup>37</sup> 30 L. J. Rep. C. P. 145. See also the early case of *Reynolds v. Pinhowe*, Cro. Eliz. 429, which of course has been overruled so far as benefit is concerned.

<sup>38</sup> "I am aware that a man's marriage with a woman of his choice is in one sense a boon, and in that sense the reverse of loss; yet, as between the plaintiff and the party promising an income to support the marriage, it may be a loss. The plaintiff may have made the most material changes in his position, and have induced the object of his affections to do the same, and have incurred pecuniary liabilities resulting in embarrassments, which would be in every sense a loss if the income which had been promised should be withheld." "The marriage primarily affects the parties thereto; but in the second degree it may be an object of interest with a near relative, and in that sense a benefit to him."

should be thus interpreted.<sup>39</sup> But probably both the fact of benefit and the fact of detriment were pure assumptions, and if the case is authority for anything, it is authority for some other theory of consideration than that of detriment to the promisee or benefit to the promisor.<sup>40</sup> Most American cases deny recovery in such cases as that of *Shadwell v. Shadwell*, on the ground that there is no consideration of any sort.<sup>41</sup>

However, either because of statutory enactment or because the courts have themselves adopted the theory, though we cannot help wondering what reasons moved both legislatures and courts, some modern American courts have evidently applied the theory that benefit to the promisor may be sufficient consideration,<sup>42</sup> and some text-writers have taken the same position.<sup>43</sup>

This is the situation so far as there is authority in support of the proposition that benefit to the promisor is a sufficient alternative to the requirement of detriment to the promisee. Is there any authority against this proposition?

Before answering this question it will be well, if possible, to get a definition of the term "benefit to the promisor." Benefit has been defined as the acquirement by the promisor of a legal right to which he would not otherwise have been entitled.<sup>44</sup> But this definition is given by those courts which define detriment as forbearance by the promisee of some legal right which he otherwise would have been entitled to exercise. Other authorities do not agree upon this definition of detriment. Hence they might not agree upon this definition of benefit. Mr. Williston

<sup>39</sup> *Scotson v. Pegg*, 6 Hurl & N. 295; *Abbott v. Doane*, 163 Mass. 433; *DeCicco v. Schweizer et al.*, 221 N. Y. 431.

<sup>40</sup> Ames, *Lectures on Legal History*, 327-8, 340.

<sup>41</sup> Ames, *Lectures on Legal History*, 328.

<sup>42</sup> *Saunders v. Carter*, 91 Ga. 450; *Ryon v. Trimble*, 22 Ky. Law Rep. 1444; *Union Bank v. Sullivan*, 214 N. Y. 332. The last case committed the error of holding that a promisor can give himself consideration for his own promise. See Williston's criticism, *Williston, Contracts*, Sec. 102a.

<sup>43</sup> Morgan, 1 MINN. L. REV. 383; Williston, *Contracts*, Sec. 131a; Corbin, 27 YALE L. JOUR. 368.

<sup>44</sup> *Harkness v. McKee-Brown Lbr. Co.*, 17 Okla. 624; *Harp v. Hamilton* (Tex. Ci. A.) 177 S. W. 565.

contends that "benefit correspondingly must mean the receiving as the exchange for his promise of something which the promisor was not previously entitled to receive," following the analogy of his definition of detriment, which he would define as the giving or the promise to give something to which a person has a legal right. That is, with him, benefit means legal benefit, just as detriment means legal detriment.<sup>45</sup> Mr. Corbin, however, maintains that "it adds nothing to the definition to substitute for it the term 'legal benefit.'"<sup>46</sup> In the law of quasi contracts the term "benefit" means actual pecuniary benefit. Is this the notion of benefit which Mr. Corbin adopts? If so, why should he not prefer to leave the entire matter of recovery for such conferred benefits to the law of quasi contracts, and, if recovery is not there as yet sufficiently broad, to develop the law of quasi contracts to meet the situation, instead of trying to introduce the notion of benefit into the law of consideration?<sup>47</sup> It is doubtful if at the present time there has been or can be formulated a definition of "benefit to the promisor" which would be generally accepted. This is probably in itself some evidence against the theory of benefit as consideration.

In the sixteenth and seventeenth centuries, when our modern law of contracts was in the making and when lawyers were familiar with the notion of benefit as consideration because of the *quid pro quo* requirement of debt, there were no cases in actions of assumpsit which held that benefit alone could be sufficient consideration; but there were many cases which held that detriment alone could be sufficient consideration.<sup>48</sup> Since lawyers at that time were familiar with the requirement of benefit, they urged it upon the courts, but the courts said, "It is not ma-

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<sup>45</sup> Williston, Contracts, Sec. 102a.

<sup>46</sup> 27 YALE L. JOUR. 370.

<sup>47</sup> It would seem that the territory of recovery for conferred benefits is sufficiently covered by the law of quasi contracts, so that there is no need of extending the notion into the law of contracts. The mere fact that the law will create an obligation without a contract is no argument that it should also make the obligation a contract. The law imposes upon a minor an obligation to pay for necessities, but it would not be contended that he should be liable on his express promise to pay therefor.

<sup>48</sup> Webb's Case, 4 Leon. 110; Smith v. Smith, 3 Leon. 88; Folly and Preston's Case, 1 Leon. 297; Sir Anthony Sturlyn v. Albany, Cro. Eliz. 67; Sands v. Trevilain, Cro. Car. 193; Wheatley v. Low, Cro. Jac. 668; Coggs v. Bernard, 2 Ld. Ray. 920.

terial whether the consideration be for the plaintiff's benefit; for if it be any charge or trouble to the defendant, it sufficeth." <sup>49</sup> "Though the party promising hath no benefit by this, yet this is a good consideration and the party liable to an action upon the case." <sup>50</sup> Hence in *assumpsit* the law of consideration was not placed upon the old foundation of debt but was placed upon a new foundation found in tort law.

Of course the mere fact that detriment has been held to be sufficient consideration and that there are no early cases holding that benefit might be sufficient consideration, would not prove that benefit could not be consideration. In order to prove this there must be cases holding that benefit is not sufficient consideration. Are there any such cases? There have been many such. Where the courts have held that there was no consideration because there was no detriment to the promisee, though if they had looked for it they might have found benefit to the promisor in one or both of the senses above referred to, the courts have repudiated the notion of benefit to the promisor as consideration just as truly as though they had expressly so said.<sup>51</sup> Where the courts have held that there was consideration because of detriment to the promisee but have shown that if they had not found detriment to the promisee they would have held that there was no consideration, they also have repudiated the theory that consideration might be benefit to the promisor.<sup>52</sup> There have been a great number of cases of both of these classes. Some of these are cited in the notes below. Illustrations of the first class of cases are found where a third person, because of some benefit such performance would be to him, makes a promise to a person already under legal obligation to perform a certain act or acts for another.<sup>53</sup> There have been many decisions

<sup>49</sup> *Knight v. Rushworth*, Cro. Eliz. 469.

<sup>50</sup> *Freeman v. Freeman*, 2 Bulst. 269.

<sup>51</sup> *White v. Bluett*, 23 L. J. (N. S.) Exch. 36; *Stilk v. Myrick*, 2 Camp. 370; *Miles v. New Zealand*, 32 Ch. Div. 266; *Keith v. Miles*, 39 Miss. 442; *Springstead et al. v. Nees et al.*, 125 App. Div. (N. Y.) 230. Note also *Foakes v. Beer*, L. R. 9 A. C. 605, and other cases of discharge.

<sup>52</sup> *DeCicco v. Schweizer*, 221 N. Y. 431; *Haigh v. Brooks*, 10 Adol. & El. 309; *Devecmon v. Shaw*, 69 Md. 199; *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449. Note also cases of forbearance to sue and forbearance to complain.

<sup>53</sup> *Ame's Lectures on Legal History*, 328.

of this sort,<sup>54</sup> and recent decisions show no tendency to depart from the old rule.

One recent case of this sort was that of *McDevitt v. Stokes*.<sup>55</sup> In this case M was under contract with X to drive a certain mare in the Kentucky Futurity. S was the owner of other horses related to this mare, whose value would be increased to the extent of \$25,000 if this mare won the race. By the mare's winning the race he also would be entitled to a prize of \$300 as the owner of her dam. Because of these considerations S offered to pay M \$1000 if he won the race, and M did. According to most of the American cases there was no detriment to the promisee here, but there was benefit to the promisor according either to Mr. Williston's and the court's definition or to Mr. Corbin's. The court held that there was no consideration and that S was not liable to M, thereby repudiating the theory of benefit to the promisor. It is true the court tried to distinguish between actual benefit and legal benefit and said that there was no legal benefit, but, when before the contract S had no legal right against M, the writer is unable to see how he did not acquire a legal right by his contract. Hence there was legal benefit, as well as actual benefit, in this case, but the court held it not sufficient consideration, and the case must therefore be held to be direct authority against benefit as consideration.

Another illustration of the first class of cases is found in such recent cases as *Masline v. New York etc. R. Co.*,<sup>56</sup> and *Soule v. Bon Ami Co.*<sup>57</sup> In the *Masline* case the defendant railway company offered to pay the plaintiff 5 per cent. of the gross receipts to be derived from the use of information of value which the plaintiff said he possessed but whose nature was not yet disclosed. Plaintiff, by way of acceptance of defendant's offer, gave the following information: "The selling of advertis-

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<sup>54</sup> *Johnson's Adm'r v. Seller's Adm'r*, 33 Ala. 265; *Havana Press Drill Co. v. Ashurst*, 148 Ill. 115; *Schuler v. Myton*, 48 Kan. 282; *Putnam v. Woodbury*, 68 Me. 58; *Sherwin v. Brigham*, 39 Ohio St. 137; *Gordon v. Gordon*, 56 N. H. 170; *Wimer v. Overseers of Poor*, 104 Pa. 317; *Hanks v. Barron*, 95 Tenn. 275; 13 C. J. 356-357.

<sup>55</sup> 174 Ky. 515.

<sup>56</sup> 95 Conn. 702.

<sup>57</sup> 195 N. Y. S. 574.

ing space and the displaying of advertisements by defendant on its railway stations, depots, rights of way, cars and fences." The question in the case was whether this was sufficient consideration for defendant's promise. The court held that it was not, because the plaintiff did not give up anything to which he had a legal right, that is, there was no legal detriment, "because the idea was not new nor exclusively within the plaintiff's knowledge, but was perfectly obvious and well known to all men, and it could have no market value so as to form the consideration for a contract." Yet the defendant received actual benefit, if not legal benefit. Hence the court held that benefit alone could not be sufficient consideration.

A majority of text-writers have taken the position, not only for themselves but as the position of the courts, that benefit to the promisor is not sufficient consideration for a promise.<sup>58</sup>

What, then, is the law as to whether or not benefit to the promisor may be consideration for his promise? Historically there seems to be no argument for it. The decisions against it are overwhelming in number as compared with those in its support. The term has not even been acceptably defined. Yet the books are full of dicta to the effect that it may amount to consideration. Judges seem never to be able to find any benefit sufficient to be called consideration but they always seem to hold out the hope that sometime they may be able to do so. Some states have given these dicta the force of law by incorporating them into statutes. A few recent writers have begun to champion the doctrine. Under such circumstances, is benefit to the promisor consideration, or is it not consideration, in Anglo-American law? Again, it is submitted, that no one knows.

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*(To be Concluded.)*

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<sup>58</sup> Langdell, *Contracts*, Sec. 64; Pollock, *Contracts* (3d ed.), pp. 9, 185, 189; Harriman, *Contracts*, Sec. 91; Elliott, *Contracts*, Sec. 203; *11 Street, Found. of Leg. Lia.*, pp. 67-69, 110.

"The principle, however, must be considered established that the element which alone gives efficacy to the assumptual promise is detriment to the promisee." *11 Street, Found. of Leg. Lia.*, 68.