

DOES A PRE-EXISTING DUTY DEFEAT CONSIDERATION?—RECENT NOTEWORTHY DECISIONS

ARTHUR L. CORBIN
Professor of Law, Yale University

The problem of *Shadwell v. Shadwell*¹ has recently come before the New York Court of Appeals in the case of *Attilio De Cicco v. Schweizer*.² The facts of the two cases have much similarity. In the New York case a written document was prepared containing the following:

“Whereas, Miss Blanche Schweizer, daughter of Joseph Schweizer . . . is now affianced to and is to be married to Count Oberto Gulinelli. Now, in consideration of all that is herein set forth, the said Joseph Schweizer promises . . . to pay annually to his said daughter Blanche . . . the sum of two thousand five hundred dollars.”

This was delivered to the count, and four days later the marriage took place. For ten years the payment was made, and the present suit was brought to recover the eleventh annual instalment. The plaintiff sues as assignee of both the daughter Blanche and her husband. The court holds that there was sufficient consideration for the defendant's promise, thus agreeing with *Shadwell v. Shadwell*.

Some of the inferior courts of New York have failed to recognize the general distinctions between bilateral and unilateral contracts, speaking of the latter as if they were not contracts at all but were mere unenforceable unilateral promises, void for want of acceptance and consideration.³ In the present case the Court of Appeals makes no such mistake. The contract is plainly described as “unilateral,” and the defendant's promise is enforced because the acts of acceptance constituted a sufficient consideration. Neither the count nor the defendant's daughter made any promise, and the court assumes that the contract became binding upon the defendant only when the marriage was celebrated.

This decision deserves extended comment because the opinion by Mr. Justice Cardozo shows a clear understanding of a unilateral contract and familiarity with the best literature on the subject in both books and periodicals, because the decision is correct in principle and in policy, and because it very probably will be a starting point in the reversal of a large number of decisions and in the abandonment of a

¹ (1860) 9 C. B. N. S. 159, 30 L. J. C. P. 145.

² (1917, N. Y.) 117 N. E. 807.

³ See *Meade v. Poppenberg* (1915) 167 App. Div. 411, 153 N. Y. Supp. 182; *Fisk v. Batterson* (1914) 165 App. Div. 952, 150 N. Y. Supp. 242.

rule now generally prevailing in the United States. In some matters of detail the reasoning of the court will be criticised herein; but this must not be regarded as in any way intimating unsoundness in the decision, and in spite of such possible differences the opinion is one to be received with grateful appreciation.

It will not be denied in this article that when A has contracted with B for a certain performance, this creates a specific duty in A. A duty is a legal relation that exists whenever certain action or forbearance is expected of an individual, and in default of it the representatives of organized society will act in some predetermined manner injurious to the defaulting individual. In any case there is a possibility that this societal action will not in fact take place; for the default may not be discovered, or no one may care to start a proceeding against the defaulter, or he may by evasion or by force prevent any action. This possibility exists in the case of a secondary duty to pay damages or to make restitution, as well as in the case of a primary duty to perform specifically. Such a possibility, therefore, does not prove the non-existence of a duty in a particular case, for it is to be found in all cases.

Furthermore, A's duty is not in the alternative, to perform or to pay damages. The term *duty* describes one of the primary legal relations, existing from the moment a contract is made. With the occurrence of each subsequent operative fact, the existing legal relations change. One of this new group may be a duty to pay damages. This is a new legal relation, a *secondary* duty. If the fact that new legal relations follow each new operative fact justifies our calling the original duty an alternative duty, it justifies our calling the secondary duty to pay damages an alternative duty. Suppose a judgment for damages is given by a court; still the debtor does not have to pay. What will society do about it? In former times, the debtor would have been imprisoned. Was it then the duty of the contractor to perform or to pay damages or to lie in jail? To-day, the court will merely issue a writ of execution commanding the sheriff to seize goods of the debtor. If there are none to seize, there is little else that can be done. In such a case, it would then appear to be the contractor's duty to perform or to pay damages or to do nothing at all. If the sheriff finds goods and takes them, the duty of the contractor is merely the negative one not to interfere with possession and enjoyment. Thus his original duty appears to be either (1) to perform specifically, or (2) to pay damages, or (3) to forbear to interfere after his goods are seized, or (4) to pay damages for interfering, etc., *ad infinitum*. Duties change as new facts arise, but this does not justify the description of any particular duty as an alternative one.⁴

⁴ See comment by W. T. Barbour, *The "Right" to Break a Contract* (1917) 16 MICH. L. REV. 106; also comment by the present writer, *Part Payment of a*

The present decision, therefore, should not be justified by asserting that the daughter and her husband were under no duty to marry. Each was under such a duty to the other. It serves no useful purpose and may do positive harm to say that they were merely under the alternative duty to marry or to pay damages. The duty to pay damages may also be shown to be merely one of several alternatives. It is equally as justifiable to say that the duty of the count after marriage is to be faithful to Blanche or to pay alimony.

In the case now under discussion the court makes an effort to distinguish previous New York decisions⁵ on the ground that they were cases of "a promise by A to B to induce him not to *break* his contract with C," whereas this is a case of "a promise by A, not merely to B, but to B and C jointly, to induce them not to *rescind* or *modify* a contract which they are free to abandon." Such a distinction would seem to require an assumption that if the defendant offered his promise to both the count and the daughter instead of to the count alone, this in some way causes it to be no longer the duty of each to carry out the engagement contract. They are said to be "free to abandon," seeming to mean thereby that their marriage is no longer the performance of a pre-existing duty in each. This line of reasoning, it is submitted, is inaccurate.

In the first place the court is not entirely convincing in its effort to show that the defendant made his offer to the daughter as well as to the count, thus creating the relation commonly described as "privity." Either Blanche was a promisee or she was not one. This is to be determined, not by her subsequent action in reliance upon her father's promise to the count, but by the expressions used by the father. If she reasonably understood from what he said that the offer was to her as well as to the count, and that the power of acceptance was being intentionally conferred upon her, then she is a promisee. If she did not reasonably understand so, then it is hardly correct to say that "action on the faith of it put her in the same position as if she had been in form the promisee." The principle applicable here is identical whether the offer confers a power to make a unilateral contract or to make a bilateral one. The question whether the power to accept was conferred upon one person or upon two persons jointly is one of fact simply. This offer may well have been made to the count alone, and the fact that his power of acceptance was dependent upon his being able to induce Blanche to say yes at the wedding does not make the offer an offer to Blanche. It seems highly probable that the defend-

Debt as Consideration for a Promise (1908) 17 YALE LAW JOURNAL 470. A case adopting this erroneous conception of contractual duty is *Frye v. Hubbell* (1907) 74 N. H. 358.

⁵ *Arend v. Smith* (1897) 151 N. Y. 502; *Robinson v. Jewett* (1889) 116 N. Y. 40; *Seybolt v. New York, etc. R. R. Co.* (1884) 95 N. Y. 562; *Vanderbilt v. Schreyer* (1883) 91 N. Y. 392.

ant's promise in this case was to the count alone, and that the daughter was merely a donee-beneficiary. The court itself says: "though the promise ran to the count, it was intended for the benefit of the daughter." As such donee-beneficiary, the daughter would clearly have an enforceable right in nearly all of our states;⁶ but this does not make her a promisee and does not make her act a consideration for the defendant's promise.

But if we suppose the offer to have been to the count and Blanche jointly, their marriage in acceptance of the defendant's offer was nevertheless the performance on the part of each of them of an existing duty to the other. Neither one of them was at any instant "free to abandon" the engagement. The fact that the offer is to them both, and that the acceptance must consist of their joint action, does not cause their physical bodies to become one, nor should it cause us to imagine the existence of some fictitious legal personality, a *quasi*-corporation. Each still owes a duty to the other, even in the (frequently blind) "eye of the law." Neither one was privileged to break the engagement. Neither one was privileged not to marry, and would not become so privileged unless and until the consent of the other should be given. *Non constat* that such consent had been or could be obtained. The fact that each was willing to marry and thus to accept the father's offer is far from showing that in the absence of the father's offer either one would have been willing to rescind or modify their contract. The unity of husband and wife was the merest fiction; the notion was often productive of harm, and it no longer prevails to its former extent. The fiction of unity between joint contractors is also one that should not be indulged. Therefore, it serves no purpose to say that *they* were "free to abandon" their engagement, if at the same time we are bound to admit that *neither one* was free to abandon it. The fact that the father made an offer to both of them has no effect whatever upon their individual duties to each other. For our present purpose, their legal relations are the same as in a case where A has made a promise to B and C,—B being under a duty to X, and C being under a duty to Y. Very different would their legal relations have been if, at the time of the defendant's offer, the count and Blanche had not yet become engaged or had mutually rescinded their engagement. Then, indeed, they would have been "free" not to marry.⁷

⁶ No doubt it would now be so held in New York. *Buchanan v. Tilden* (1899) 158 N. Y. 109; *Pond v. New Rochelle W. Co.* (1906) 183 N. Y. 330. The doctrines of *Buchanan v. Tilden* were wholly disregarded in the earlier case of *Durnherr v. Rau* (1892) 135 N. Y. 219, and the two cases are reconcilable only with great difficulty. The present case of *DeCicco v. Schweizer* must be regarded as confirming *Buchanan v. Tilden*.

⁷ These two cases put for contrast and comparison were suggested by my colleague, Professor Hohfeld, whose analysis and definition of jural relations

If the foregoing argument is sound, the case stands just as it would if the defendant's promise had been to the count alone, the only consideration being the performance of the count's legal duty to Blanche. He was under this duty, and he was not free to abandon it or privileged not to marry. Blanche owed the same duty and lacked the same privilege. Each, it is true, had the *power to offer a rescission*—a relation of value, however uncertain it might be whether the other would exercise the power of rescission thereby conferred. Each one had this valuable power even though the defendant's promise was made to the count alone. This is of importance and will be discussed below.

Assuming, then, that the only consideration given by the count was the performance of acts which his existing duty to Blanche required, and that the only consideration given by Blanche was the performance of similar acts which her existing duty to the count required, is there any good reason why this should not be held a sufficient consideration and cause for the enforcement of the father's promise? It is submitted that there is none and that such performance fulfils the usual requirements as to consideration. Let us now consider these usual requirements.

CONSIDERATION AS AN INDUCING CAUSE

Where the new promise of C has been offered by him in return for the actual performance by A of his previous contract with B, the requested performance is certainly the object of C's desire and is, in this sense, the conventional inducement of C's promise. Likewise, the promise of C is one of the inducing causes of A's performance and is the conventional equivalent therefor. The fact that A had other inducements which might or might not have been sufficient in themselves to cause him to perform, is not material so far as the doctrine of consideration is concerned. The causes and motives of human action are always complex. The law does not define consideration as the sole inducing cause of a contractor's action, and if it were so defined a valid contract would seldom be made. Insofar, then, as the law requires consideration to be an agreed equivalent and a conventional inducement, the performance by A fulfils the requirement.⁸

In *DeCicco v. Schweizer* it is, perhaps, not entirely certain that the marriage ceremony of the count and the daughter was performed by them as the requested equivalent and conventional inducement of the

have been of the greatest service in the solution of complex problems. See his articles on *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 YALE LAW JOURNAL 16; (1917) 26 *ibid.* 710. The writer is also indebted to Professor Hohfeld for much valuable criticism.

⁸The term "inducing cause" is here used merely to describe the object of desire. The antecedent fact causing the defendant to make his promise is the defendant's subjective desire itself.

defendant's promise. The signed document merely recites the approaching event as a preamble to the promise.

"Whereas, Miss Blanche . . . is now affianced to and is to be married to Count Oberto Gulinelli. Now, in consideration of all that is herein set forth, the said Joseph Schweizer promises . . . to pay," etc.

This is not a direct statement that the act of marriage is to be the consideration for the promise. The preamble merely recites *the engagement contract*. It appears to be merely *in contemplation* of that fact and because of the pleasure afforded by that fact to the defendant that he makes the promise. He delivers the document as a sort of antenuptial gift and as a provision for his daughter's future support. As to this the court says:

"If they forbore from exercising that right and assumed the responsibilities of marriage in reliance on the defendant's promise, he may not now retract it. . . . If pressure, applied to both, and holding both to their course, is not the purpose of the promise, it is at least the natural tendency and the probable result. The defendant knew that a man and a woman were assuming the responsibilities of wedlock in the belief that adequate provision had been made for the woman and for future offspring. He offered this inducement to both while they were free to retract or to delay. That they neither retracted nor delayed is certain. It is not to be expected that they should lay bare all the motives and promptings, some avowed and conscious, others perhaps half-conscious and inarticulate, which swayed their conduct. It is enough that the natural consequence of the defendant's promise was to induce them to put the thought of rescission or delay aside."

It will be observed that in the foregoing the court expresses the opinion that the promise of the defendant was one of the inducing causes of the marriage, although not the sole inducing cause; but it does not consider whether the marriage was the inducing cause of defendant's promise. It would appear from this that, in the court's mind, consideration need not be the object of the promisor's desire for which he expressly offers his promise in exchange; but that, instead, it may be merely action or forbearance by the promisee as the result or natural consequence of the promise. Mr. Justice Holmes has recognized the possibility of this, though apparently without approval.

"Of course the mere fact that a promisee relies upon a promise made without other consideration does not impart validity to what before was void. There must be some ground for saying that the acts done in reliance upon the promise were contemplated by the form of the transaction either impliedly or in terms as the conventional inducement, motive, and equivalent for the promise. But courts have gone very great lengths in discovering the implication of such an equivalence, sometimes perhaps having found it in matters which would

seem to be no more than conditions or natural consequences of the promise."⁹

Two years later, in the United States Supreme Court, he said:

"But the other elements are that the promise and the detriment are the conventional inducements each for the other. No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting."¹⁰

There are altogether too many decisions enforcing a promise where the only consideration was some expected action in reliance upon it for us to adopt without reserve the statement last quoted from Mr. Justice Holmes. The previous statement quoted is considerably more guarded and accords more nearly with prevailing applications of the law. *DeCicco v. Schweitzer* therefore should not be disapproved on this ground. Moreover, the wording of the written document is not so definite and certain in meaning as to exclude extrinsic data indicating that the marriage was in fact the intended equivalent and actual inducement of the defendant's promise.

CONSIDERATION AS A BENEFIT TO THE PROMISOR

The commonest of all definitions of consideration requires that it shall be either a detriment to the promisee or a benefit to the promisor. In view of the fact that this definition is being constantly approved by the courts, expressed as it is in the alternative form, it should not be disapproved on any merely *a priori* ground or even for the purpose of justifying some historical hypothesis as to the origin of consideration. Recent writers have been willing to admit that a benefit to a promisor may be a sufficient consideration even in the absence of any detriment to the promisee.¹¹ In the case now under discussion it is

⁹ *Martin v. Meles* (1901) 179 Mass. 114. This case in itself goes far to justify the statement contained in the last sentence of the quotation.

¹⁰ *Wisconsin & Mich. R. R. Co. v. Powers* (1903) 191 U. S. 379, 386. This is quoted and approved by Mr. Justice McKenna in *Banning Co. v. California* (1915) 240 U. S. 142, 153. In 2 Street, *Foundations of Legal Liability* (1906) 81, it is said:

"Between the consideration and the promise there must be a causal relation. The consideration must draw the promise from the promisor, and the promise must be the inducement which causes the promisee to incur the detriment which constitutes the consideration."

¹¹ Samuel Williston, *Consideration in Bilateral Contracts* (1914) 27 HARV. L. REV. 518, 524; Edmund M. Morgan, *Benefit to the Promisor as Consideration* (1917) 1 MINN. L. REV. 383. A decision clearly in agreement is *Union Bank v. Sullivan* (1915) 214 N. Y. 332.

perfectly clear that the performance by Count Gulinelli was of some benefit to the defendant. Mr. Schweizer received all those benefits that are to be derived from alliance with a noble Italian family. Such an alliance carries with it social prestige, even though some not enjoying such an alliance may be inclined to scoff. This social prestige means power to influence the action of others in business affairs as well as in social life. The action of the count has money value, and the fact that this value cannot be determined with certainty is not material. The same can be said of many other matters the sufficiency of which as a consideration is not questioned, as, for example, a forbearance to compete in business or a forbearance to press a doubtful claim.

The existence of actual benefit to C from the performance by A is well shown in *McDevitt v. Stokes*, recently decided by the Kentucky Court of Appeals.¹² Here, the defendant (C) promised the driver (A) of a race horse owned by B that, in return for his driving in an important race, he would receive \$1,000 if he won the race. A was already under contract with B to drive the horse in this race.¹³ He drove with skill and was the winner. The defendant was the owner of the sire, the dam, and two full brothers of the horse to be driven by A. As such owner, he received a prize of \$300 from the racing association; and, in addition, the value of the four horses owned by him was increased by \$25,000, this fact being admitted by demurrer. The act of A in driving with skill was certainly one of the causes of C's increase in wealth. The act was therefore a benefit to C. As to the \$300, C received new property rights. As to the \$25,000, he received no new rights, powers, or privileges; and yet he received benefit. The winning of the race whetted the appetites of others for the horses already owned by C.

In *McDevitt v. Stokes* the court does not deny the existence of the above benefit, nor does it attack the definition of consideration as being either a detriment to the promisee or a benefit to the promisor; but

¹² (1917, Ky.) 192 S. W. 681. This case follows the prevailing rule that the promise of C cannot be enforced. The reasons upon which it is based are believed to be quite erroneous.

¹³ If in such a case A does at C's request any act not previously required by his contract with B, this is a sufficient consideration for C's promise. Such is not the case now under discussion. It may, indeed, be argued that A's duty to B is to do acts that are normally commensurate with the size of the promised reward, and that when C offers a larger reward A will necessarily be stimulated to make even greater efforts. This is certainly the view of the practical man, for that is why C offers a new reward. Stokes promised McDevitt \$1,000, not because he feared a breach by McDevitt of his previous contract with B, but in order to stimulate him to greater effort and to greater skill. Everyone knows that a man can and will do more in return for \$2,000 than for \$1,000. McDevitt owed to B only such skill and effort as the agreed salary normally induces. Stokes's new promise enabled both B and himself to obtain a considerably greater degree of skill and effort.

it quotes certain authors¹⁴ to the effect that by detriment and benefit is meant "legal detriment" and "legal benefit" and not mere financial detriment and benefit. It may not be an easy matter to determine with exactness the boundaries of the field properly described by the word benefit; but on the other hand it adds nothing to the definition to substitute for it the term "*legal benefit*." This indicates only that there may be certain benefits that are not a sufficient consideration, but gives no criterion for determining what they are. The court asserts that the benefit in this case is not sufficient because A's performance as legally required of him by his contract with B would inevitably have resulted in the benefit received by C, even though C had made no promise to the plaintiff. The statement as made is not necessarily true;¹⁵ but even if true, it does not show that the defendant did not receive a benefit in fact in return for his promise. If the defendant's promise was one of the inducing causes of the plaintiff's action, it is wholly impossible now to determine whether the plaintiff would have driven in the race at all without it or whether the race would have been won.

CONSIDERATION AS A DETRIMENT TO THE PROMISEE

No one now doubts that a detrimental act or forbearance by the promisee is a sufficient consideration, provided it was an agreed equivalent—one of the conventional inducing causes of the promise. There are many cases holding that such a detriment may be sufficient *cause* for the enforcement of a promise, even though it was wholly antecedent to the promise, or was subsequent thereto and a mere natural consequence of the promise. The present New York case should probably be included among these. The next question that must be determined, however, is whether performance by A of an act required by his duty to B is a detriment. There can be no doubt that it is in fact a detriment from both the practical and theoretical standpoints. A's performance of this duty requires the expenditure of time, strength and money. In *McDevitt v. Stokes* the plaintiff refrained from doing other things, he bore a considerable physical strain, and he risked bodily injury. In *DeCicco v. Schweizer* the count assumed all the marital relations by performing a ceremony that in itself cannot be contemplated without emotion. In both cases there were accompanying benefits. There are pleasure and physical stimulus in driving a racehorse. There are happiness and new valuable rights in marriage. In no case, however, does the law make an estimate of the comparative values of these detriments and benefits. It does not

¹⁴ E. g., Page, *Contracts* (1905) sec. 274.

¹⁵ See note 13, *supra*. Pollock admits that A's performance is a benefit to C, but denies that it is a detriment to A. Wald's Pollock, *Contracts* (Williston's ed. 1906) 206.

require a showing of a net loss in order to satisfy the requirement of consideration. Nor does the law require a showing that the performance now set up as a consideration was more detrimental than any other possible alternative line of action. If the count had failed to perform his duty to Blanche he might have been sued for breach of promise. It cannot now be determined whether or not she would have sued, nor can it now be determined whether or not such a suit would have damaged the count more than the marriage has damaged him. Forbearance to go to France is a sufficient consideration in spite of the fact that actually going might involve mutilation or death.

It is true that in performing such acts as are required by his pre-existing duty, A does not surrender any right, privilege, or immunity. In other words, he has not assumed any no-right, duty, or liability.¹⁶ Not only does he retain all of his old rights, privileges, and immunities, during the course of his performance and after its completion, but, also, he has gained some new ones, *e. g.*, the right to compensation from B. Instead of becoming burdened with new duties, he has discharged one that previously weighed upon him. For these reasons it is sometimes said that A's performance of his previous duty cannot be detrimental to him.

It happens, however, that prior to his performance A had certain valuable powers; and that after his performance they are extinguished. He had the power to break the contract with B, thereby creating in B new rights and privileges and at the same time preventing B from having the rights and privileges that performance would have given him. Thus, the count's breach of promise would have prevented Blanche from having a right of dower, although she would have a right to damages. She would still have the power to contract as a *feme sole*, but she would have no power to bind the count to pay millinery bills. It must be admitted that this power of the count is one that he was not privileged to exercise (although the courts spiritual no longer attempt to enforce his duty by a decree for specific performance). Nevertheless, the power in itself, even when unaccompanied by privilege, is of value to its possessor. If not, why does the engaged youth ever prefer a breach of promise suit and a new sweetheart to wedding bells with possible future alimony?

There is another valuable power possessed by A that is effectively extinguished by his full performance of the acts required by his duty to B, one that he is legally privileged to exercise. This is the power to offer a rescission to B. This is not a power to rescind; neither party to the contract has such a power. It is a power to create in B the power to rescind by accepting A's offer of rescission. Of course, it cannot be determined now whether or not B would have accepted;

¹⁶ For an explanation of this terminology see the articles by Professor Hohfeld, cited in note 7, *supra*.

but the probability of B's accepting affects merely the *value* of A's power to make the offer. In any case, B might accept; and this possibility gives some value to A's power.¹⁷ After full performance by A, if he says to B "let us rescind," his words are void of legal effect. A still has power to discharge B, if B has not yet performed his part; but he cannot confer upon B the power to discharge A. The relation is now a valueless disability in place of a valuable power.¹⁸ In *DeCicco v. Schweizer*, indeed, B has fully performed as well as A. They are man and wife and neither has the power to release or to make an effective offer of release.

It appears, therefore, that performance of a contractual duty owed to a third person satisfies the usual requirements of the law as to consideration. It is a benefit to the new promisor, C; it is a detriment to the one so performing, A; it is the conventional inducement and equivalent of C's act. Is there any imperious principle of public policy that forbids the courts to recognize it as sufficient and to enforce C's promise?

ARGUMENTS BASED UPON PUBLIC POLICY

It is perhaps generally believed that a rule approving as a sufficient consideration either a performance in accordance with a pre-existing duty, or the promise of such a performance, would operate to encourage the non-fulfillment of duties and the making of threats of non-fulfillment. Thus, it is conceivable that if policemen are allowed to enforce payment of a reward offered for the performance of official duty, or for promises of such performance, they will be tempted to postpone the performance of duty until some additional reward is offered. So too an unscrupulous contractor might threaten to break his contract or might improperly postpone performance for the purpose of inducing an offer of a greater compensation. If this general welfare argument is sound it justifies the prevailing American decisions, and it applies equally to bilateral and to unilateral contracts.

It must be admitted that the above argument has some weight. No

¹⁷ In *DeCicco v. Schweizer* Judge Cardozo asserts that the probability of acceptance by B of the offer to rescind is exceptionally high in engagements to marry. This is probably true, except in the case of the adventuress; but it is also immaterial, because it goes only to the question of adequacy of consideration.

¹⁸ It is not at all uncommon for legal theorists to say that consideration must always involve the surrender of some legal *right*. No doubt the term "right" is here used in an ambiguous sense; but the statement is altogether unsound for other reasons. Without attempting a complete definition, it may be pointed out that an act whereby a promisee surrenders a legal privilege or a legal power or a legal immunity will serve as well as one whereby a legal right is surrendered. In addition, many acts will serve as consideration when in themselves they create no new legal relations whatever. An exercise of simple *physical* power will serve, even though close analysis shows that the actor gave up no right, privilege, power, or immunity. The same is true of a simple forbearance to act.

doubt it should be regarded as conclusive in cases of policemen and other officials with *public* duties.¹⁹ It would have much weight, also, in cases where the pre-existing duty was a contractual one and was a duty owed by the promisee to the present promisor.²⁰ There may be some danger that dishonest contractors will attempt to blackmail *the other party to the contract* into promising a higher compensation. There is far less danger, however, that such blackmailing efforts will be directed against third persons who are strangers to the contract; and even where there was such a conscious and successful effort, it is much more difficult to see that anyone is wronged. Of course, if the effort to get a promise of compensation from a third party results in a breach of the pre-existing duty to a second party, this is a wrong not to be encouraged.

It would not be particularly difficult to classify cases of this sort along strictly moral lines, to separate the sheep from the goats, and to enforce the new promise in favor of an honest contractor while refusing to enforce it in favor of the blackmailer or the dishonest. There is reason to believe that a considerable part of the apparent conflict in the decisions can be explained on this ground. Such a distinction could not often be made in cases of public officials where the non-fulfillment of the pre-existing duty would be a tort or other public injury; and yet there are some cases holding that public officers can collect promised extra rewards. The distinction can often be drawn very properly in cases where there are only two parties involved and the previous duty was owed to the present promisor.²¹

The distinction is very easily drawn in cases like the present one

¹⁹ *Pool v. Boston* (1849, Mass.) 5 Cush. 219; *Stamper v. Temple* (1845, Tenn.) 6 Humph. 113.

²⁰ *Lingenfelder v. Wainwright Brewing Co.* (1890) 103 Mo. 578; *Stilk v. Myrick* (1809) 2 Campb. 317.

²¹ Thus, in *Munroe v. Perkins* (1830, Mass.) 9 Pick. 298, the plaintiff had done his best and had reached a point where his lack of credit was preventing further performance. It is not too much to say that the moral sense of the community would be shocked by allowing the defendant to break his new promise. On the other hand, in *Lingenfelder v. Wainwright Brewing Co.* (1890) 103 Mo. 578, the promise was extorted from the defendant by threats and other inexcusable conduct. This distinction seems to be adopted in effect in *King v. Duluth & M. Ry. Co.* (1895) 61 Minn. 482, in the following *dictum*:

"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 cast upon him the 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."

This distinction is approved by Brantly, *Contracts* (2d ed. 1912) sec. 40; by H. W. Ballantine, *Doctrine of Consideration* (1913) 11 MICH. L. REV. 434; by the present writer, *Part Payment of a Debt as Consideration for a Promise* (1908) 17 YALE LAW JOURNAL 470; and in *Linz v. Schuck* (1907) 106 Md. 220.

where the previous duty was a contractual duty to a third person. Indeed, it is believed that a great number of such cases would fall on the enforceable side, and the sheep would be far more numerous than the goats. In very many of these cases it would be shocking to the conscience and in conflict with the prevailing *mores* of society to refuse to enforce the new promise.²²

CONSIDERATION IN BILATERAL CONTRACTS

Neither the case of *DeCicco v. Schweizer* nor the case of *McDevitt v. Stokes* requires a discussion of the law as to *bilateral* contracts, but a brief discussion may be of service. This will be limited to cases similar to *DeCicco v. Schweizer*, except that the consideration for the defendant's promise is not merely a performance in accordance with the plaintiff's pre-existing contractual duty to a third person, but is a promise of such performance. A few of the writers, and perhaps one court, have made a distinction in these cases between unilateral contracts and bilateral contracts.²³ They assert that where A merely *performs* as required by his duty to B in return for a new promise by C, the consideration for C's promise is not sufficient; but that where A makes a new promise to C of such a performance, the consideration for C's promise is sufficient. They would enforce a bilateral agreement and refuse to enforce a unilateral one.

In cases actually decided, the courts are practically unanimous in making no such distinction. They either enforce both classes of contracts (as in England) or refuse to enforce either. The latter is the generally prevailing rule in the United States. This being true, if the decision in *DeCicco v. Schweizer* causes a re-examination and an alteration in the rule applied to unilateral contracts, the same result will be effected in the case of bilateral contracts.

Such a result will be found to be the correct one, both theoretically and practically; but, nevertheless, there are important logical distinctions between the two kinds of cases, and these will now be considered. In both cases the actual consideration for C's promise is the performance of an act by A; but in the unilateral case this act is the performance of service due to B—like the building of a bridge or the delivery of goods, and in the bilateral case this act is a promise—an expression of an intention to do other acts in the future, made in

²² This was undoubtedly true in the following cases: *Bagge v. Slade* (1616) 3 Bulstr. 162; *Shadwell v. Shadwell* (1860) 9 C. B. N. S. 159; *Abbott v. Doane* (1895) 163 Mass. 433; and in the case under present discussion, *DeCicco v. Schweizer*. In *Schuler v. Myton* (1892) 48 Kan. 282, where the court held the promise to be unenforceable, it did so with strongly expressed regret, but a regret that only accentuates the injustice of the decision.

²³ Langdell, *Summary of Contracts*, sec. 84; Wald's Pollock, *Contracts* (Williston's ed. 1906) 206-209; 2 Street, *Foundations of Legal Liability* (1906) 111 ff.; *Merrick v. Giddings* (1882, Dist. Col.) 1 Mackey, 394, 411. This distinction is referred to by Mr. Justice Cardozo.

the conventional form used to create obligation. In the one case, A's act is exactly the same as was required of him by his previous duty to B. In the other case, the new promissory act is one that was not required of A by any pre-existing duty. These differences would seem ample to justify the application of different rules to the two kinds of contracts, and the enforcement of the bilateral agreement even if the unilateral one is not enforced. If the unilateral contract is enforceable, as this article has already attempted to show and as was held in *DeCicco v. Schweizer*, it follows—almost *a fortiori*—that the bilateral contract should be enforced.

In the unilateral case the act of A, constituting the acceptance and the consideration, is of such a sort that it cannot give a special right *in personam* to C or create a special contractual duty in A. In the bilateral case the act of A is of such a sort that under ordinary conditions it would create a right in C and a duty in A. Does the fact that A was under a similar pre-existing duty to B prevent his promise to C from operating to create this new relationship of right and duty?

A word is necessary at this point in regard to bilateral contracts in general, in order to anticipate any possible charge of begging the question. It has been a favorite doctrine with a number of writers that for any consideration to be legally sufficient it must involve a detriment to the promisee. Having laid down this doctrine as a universal test, it became necessary to explain its application to bilateral contracts. It was thereupon said that a binding promise was a detriment, at the same time tacitly (and sometimes expressly) admitting that an unenforceable promise was not a detriment; and this was said to be the reason why a promise is a sufficient consideration for a return promise. It is obvious that this is reasoning in a circle. One promise is binding because the return promise is a detriment to its maker, and this return promise is a detriment because it is binding.²⁴

In order to avoid this vicious circle, it is necessary either to show that any promissory act is in itself sufficiently detrimental to satisfy the legal requirement as to consideration, whether it creates a legal duty or not, or to abandon the detriment theory of consideration altogether in the case of bilateral contracts. The first of these alternatives is not at all a hopeless one; but the second one is much to be preferred over the first. Mutual promises create a legal obligation because—in English-speaking countries, at least—the customary notions of honor and well-being cause men to perform as they have promised, and the lawmaking powers have decreed that in such cases

²⁴ Previous discussions of this problem are to be found as follows: Anson, *Contracts* (Huffcut's 2d Am. ed. 1906) sec. 143; Williston, *Successive Promises of the Same Performance* (1894) 8 HARV. L. REV. 27, *Consideration in Bilateral Contracts* (1914) 27 *ibid.* 503; Langdell, *Mutual Promises as a Consideration* (1901) 14 *ibid.* 496; Ames, *Two Theories of Consideration* (1899) 13 *ibid.* 29.

promise-breakers shall make compensation. Our prevailing credit system in business requires such a rule. The basis for the enforcement of bilateral contracts lies in mutual assent and fair dealing.

The fact is that "consideration" is an undefined and nebulous concept. Our efforts at definition have been inharmonious and unsuccessful for the reason that a great variety of facts must be included. This is an excellent illustration of the general truth that we do not have universal principles or mechanical rules or clean-cut definitions in the beginning. It is evident that we have a strong desire for such universal and mechanical tests so that we can predict societal action with greater certainty. Therefore, we continually construct exact definitions and general rules. Some thus "lay down the law" with dogmatic vigor, even asserting an *a priori* necessity, logical or divine.

In all contract law our problem is to determine what facts will operate to create legal duties and other legal relations. We find at the outset that bare words of promise do not so operate. Our problem then becomes one of determining what facts must accompany promissory words in order to create a legal duty (and other legal relations). We must know what these facts are in order that we can properly predict the enforcement of reparation, either specific or compensatory, in case of non-performance. We are looking for a sufficient *cause* or *reason* for the legal enforcement of a promise. This problem was also before the Roman lawyers, and it must exist in all systems of law. With us it is called the problem of consideration.

By the common law, the sealing and delivery of a writing are operative facts sufficient to create a legal duty. We do not call them "consideration," although to say that a seal *imports* a consideration^{24a} is next door to saying that a seal *is* a consideration. But among those facts that are judicially deemed to be a sufficient reason for the enforcement of a promise we find a return promise, and it is customarily described as a "consideration." If we are asked why this return promise is deemed to be a sufficient consideration, the answer is the same as the answer to the question why various detrimental acts are deemed to be sufficient. The answer lies in the prevailing notions of honor and well-being, notions that grow out of ages of experience in business affairs and in social intercourse. At all events, it is quite unnecessary to reply that a return promise is a sufficient consideration because it is a detriment. It is much better to answer: because the parties have expressed their mutual assent in conventional form.²⁵

^{24a} As used in modern times, this expression is quite erroneous; for a seal is not evidence of an agreed equivalent and never has been. Those who invented the expression in the sixteenth century used the term *consideration* in a much broader sense so as to include *deliberate volition* or *well-considered intention*. See the argument of Bromley in *Sharlington v. Strotton* (1565, K. B.) 1 Plow. 298, 308a.

²⁵ This view of bilateral contracts has been ably maintained in 2 Street, *Foundations of Legal Liability* (1906) ch. 12. See to the same effect W. S. Holdsworth, *Debt, Assumpsit, and Consideration* (1913) 11 MICH. L. REV. 347.

It does not follow from the foregoing that every return promise is a sufficient consideration, any more than it follows that every detrimental act is a sufficient one. Some exact and general rule is, indeed, desirable as a test of enforceability; but no attempt to formulate such a rule is necessary for the purposes of this article. Its formulation would require the analysis and classification of innumerable past cases. It will be sufficient if we can show that the test ought not to lie in the existence or non-existence of a duty to a third person. Many courts have adopted this test, it is true; but it is believed to be arbitrary and unsatisfactory. The case of *DeCicco v. Schweizer* shows that the authorities are not such as to make debate unprofitable. At least, it was not unprofitable to Count Gulinelli.

It should now be clear that the mutual promises of A and C to do acts not illegal are sufficient to create mutual rights and duties, without calling the promissory acts themselves either detriments or benefits. Does a pre-existing contract by A with B to perform the very same acts prevent such a legal result? One good reason why it should *not* prevent such a result is that there is no good reason why it *should* prevent it. No public interest will be damaged by giving to the mutual promises their normal operative legal effect. Instead, the refusal to enforce such promises gives a moral shock to the community; and uniformity of rule is in itself advantageous. The public interest here is the same as in the case of unilateral contracts discussed in the first part of this article.

In holding that A's new promissory act creates new contractual relations with C (that is, that the promises are *binding*), we are no more begging the question than in the case of any other bilateral contract. The fact that A's promises to B and C can be fulfilled by his doing one and the same act does not affect this particular problem in the least.

It can easily be shown that there is nothing impossible in the idea of two separate and independent duties in A to perform one act. Let us suppose a case based upon *McDevitt v. Stokes*. A has contracted with B to drive the latter's mare, Grace, in the "Futurity." Later, C procures A's new promise to drive Grace in this race by paying to A \$1,000 cash in advance. There can be no question that this is a valid and enforceable unilateral contract. C's cash is ample consideration for A's promise.²⁶ This being true, if A now fails to drive in the race as promised, he is bound to pay damages to both B and C. The right of B and the right of C are wholly independent of each other, however; likewise, A's correlative duty to B is wholly independent of and separate from his correlative duty to C. The fact

²⁶ It is immaterial whether A's promise is a valid consideration for the cash payment (although it would be one) because that payment is executed. The money no longer belongs to C, so it is certain that he has suffered a detriment. The money now belongs to A, and it is certain that he has received a benefit.

that A might have satisfied his duty to B and his separate duty to C by performing one and the same act is quite immaterial and shows no identity in the *legal relations*. A's new promise to C is an operative fact that lays a train of new consequences. It causes non-performance of the promised act to have new legal effect. The resulting duty to compensate C is not the same as his secondary duty to compensate B; these two duties cannot even be performed by making one payment.

Furthermore, if A and B now unite in rescinding their original agreement, this discharges A's duty to B, but it does not discharge A's duty to C; neither is this rescission in itself a breach of A's duty to C. A's new contract with C, absolutely binding though it was, did not deprive A of either the power or the privilege of joining with B in a rescission. It deprived him merely of the privilege, in relation to C, of not driving Grace. Such a rescission, absolutely valid though it was, leaves A's duty to C just as it was before; and A's subsequent failure to drive in the race will still create in C a secondary right to damages. All these facts go to show that A's promise to C has an operative effect different from that of his promise to B.

In many cases of this sort A's duty to B will be substantially different from his duty to C in another respect. His duty to B may be expressly or constructively conditional upon some performance by B. A's duty to B to drive in the race may be conditional upon B's payment of salary then due and his furnishing of board and lodging. The new duty to C may not be subject to these conditions. However, even if A should make his new duty to C expressly subject to the same conditions—of payment of salary by B, etc.,—the reasons given above are amply sufficient to show that it is a duty different from that owed to B. The fact is that a duty is a *legal relation* between two persons, and such a relation between A and B is not a relation between A and C.

Such being the legal relations of the parties in the case of a unilateral contract between A and C, where A has promised and C has paid, there is no impossibility in creating similar legal relations where the new agreement between A and C is bilateral. A's new duty to C, if created by the law, will be beneficial to C and detrimental to A, just as in the case of other bilateral contracts. Also, A's promissory act will be just as valuable and effective, *per se*, as in the case of other bilateral contracts. The fact that A may now receive a greater compensation than he would have received had C made no contract is immaterial. B and C both receive exactly what they desired: each of them obtains a separate promissory act from A; each also obtains from A's promised performance exactly the benefit that he expected; and if we hold that the new agreement is valid, each obtains an enforceable legal right against A. On the other hand, A has done wrong to no man and the public interest has been fully protected.

The new duty of A to C where C has paid A \$1,000 for his new promise to drive Grace in the "Futurity" is *not* a duty not to rescind his pre-existing contract with B. The same is true where the new contract between A and C is bilateral. After A has promised C that he will drive Grace in the "Futurity," he remains privileged, just as before, to accept an offer of rescission made to him by B. Such a rescission by A will be no breach of his promise to C. In spite of such a rescission, it is still quite possible for A to drive Grace. The only ways in which A can break his contract with C are to fail to drive Grace when the day arrives, or to send to C an unconditional anticipatory repudiation. The rescission of the contract with B is neither of these. This is true even in cases like *DeCicco v. Schweizer*; for a mutual rescission by the count and the daughter would be no breach of a promise by the count to the father. Blanche and the count might still appear before a magistrate and be married, and this would fulfill perfectly the count's promise.²⁷

It has been said of bilateral contracts that a *promise* is a sufficient consideration in all cases where the *performance* of the thing promised would be a sufficient consideration in a unilateral contract.²⁸ Probably no such test as this was consciously in the minds of the judges when they first began to enforce bilateral contracts, nor is it often consciously in the minds of the judges to-day. It may be, however, that the decided cases can be consistently explained on such a theory. If this is true, the doctrine may now be used to establish the validity of a bilateral contract between A and C similar to that discussed above. For, an actual payment by C to A of \$1,000 for A's new promise is clearly a sufficient consideration and makes A's promise to C a binding one. Then, by the above doctrine, C's *promise* of \$1,000 would likewise be a sufficient consideration, irrespective of the content of A's promise, and A's promise would create a legal duty to C.²⁹ Likewise, if the attempt in the earlier part of this article was successful to show that A's *performance* as required by his previous duty to B is sufficient consideration for a promise by C, then A's promise of such performance would be sufficient. The validity of the bilateral contract, however, need not rest upon this supposed doctrine, but may properly

²⁷ See in accord, Edmund M. Morgan, *Benefit to the Promisor as Consideration* (1917) 1 MINN. L. REV. 383, 391.

²⁸ 2 Street, *Foundations of Legal Liability* (1906) 110: "the promise in question must appear to be for the doing of some act which if actually performed would be a good consideration for a binding unilateral promise." Samuel Williston, *Consideration in Bilateral Contracts* (1914) 27 HARV. L. REV. 518, quoting Leake, *Contracts* (1st ed. 1867) 314, and *Thorp v. Thorp* (1701, K. B.) 12 Mod. 455.

²⁹ This is vigorously maintained by Sir Frederick Pollock: Wald's *Pollock, Contracts* (Williston's ed. 1906) 208. The American editor, however, is unwilling to hold that C's promise to pay \$1,000 would make A's new promise binding, in spite of the fact that C's payment would do so.

rest upon the fact that when making the promises the parties contemplate new and different legal relations. The acts of A and C are sufficient to create contractual relations in the absence of a previous contract between A and B; and the existence of such a previous contract is no adequate reason for depriving A and C of their ordinary powers.

It has been suggested that it is "intrinsically unreasonable" to make this distinction and to hold that a promise of future performance may be regarded as better and more effective legally than actual performance itself.³⁰ The same idea has been expressed in figure of speech by alleging that a bird in the hand must always be at least as good as the same bird in the bush.³¹ The homely answer to this suggestion is that in the two cases it is not the same bird. In the bilateral case the new promisor (C) requests and obtains a promissory act on the part of A—a statement of intention. In the unilateral case, C requests and obtains certain other action by A, not including any promise. The law should make no effort to determine the relative value of these two actions by A. Here, as in other connections, their value is to be measured by the appetite of C, who is agreeing to pay for them. It is to be remembered that in both cases it is A's immediate act that is requested by C as the return for his own promise. In the bilateral case this act is the immediate promissory act and not the remote performance of the promise.³² No doubt this remote performance is an object of C's desire; but it is desired only as an expected consequence of the contract now being made, and generally as only one of several such consequences. This remote performance may be known in advance to be very uncertain, just as other desirable consequences are. This is always true in the case of aleatory contracts. In such cases the remote performance is neither the requested consideration nor a condition precedent to the duty of the other party. In no bilateral case is the remote performance the requested equivalent of C's promise; it is not the "bird" he is buying. The requested acts in the two cases are known to be different, and the contemplated legal relations are different also. Whether in these cases we regard the "bird" as the requested *act* of A, or as the *legal relations* resulting therefrom, it is not the same bird.

In many instances a right to some future performance may be of a greater market value than is the performance itself. Thus, from the

³⁰ Samuel Williston, *Consideration in Bilateral Contracts* (1914) 27 HARV. L. REV. 524. "To hold that it is a better consideration than actual present performance seems extreme"; Wald's Pollock, *Contracts* (Williston's ed. 1906) 210, n.

³¹ J. B. Ames, *Two Theories of Consideration* (1899) 13 HARV. L. REV. 40; H. W. Ballantine, *Is the Doctrine of Consideration Senseless and Illogical?* (1913) 11 MICH. L. REV. 427.

³² See Ames, *Two Theories of Consideration* (1899) 13 HARV. L. REV. 29.

standpoint of benefit to the defendant, a right to the future delivery of a white elephant would be in many instances of great value, whereas by actual delivery he would often have nothing but an elephant on his hands. In *DeCicco v. Schweizer*, the defendant might easily discover that it was far more advantageous socially and financially to have the promise of a count in the family than to have actual possession and enjoyment of the count in person. From the standpoint of detriment to the plaintiff, it is equally conceivable that the count might find a mere engagement promise more detrimental to himself socially and financially than the final and irrevocable wedding ceremony itself. The very irrevocability of the latter makes for reconciliation with parents and for credit with tradesmen.

What the law has been in the past is to be determined solely by the sum total of its applications in actual cases. What it is to be in the future depends upon the desire of the community and the opinion of the courts. The courts strain after consistency, and their opinion will be swayed by legal theory and logic as well as by precedent. In future cases agreeing with *McDevitt v. Stokes*, the plaintiff will find that his performance as in duty bound to a third person is not a sufficient consideration. But because of the decision of the New York Court of Appeals in *DeCicco v. Schweizer*, a plaintiff in such a case may be encouraged to hope for a righteous decision in his favor.