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Consideration--Performance of Existing Legal Obligation as Consideration for a New Contract

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STUDENT NOTES

CONSIDERATION—PERFORMANCE OF EXISTING LEGAL OBLIGATION AS CONSIDERATION FOR A NEW CONTRACT.

In discussing this problem it is necessary to deal with prior legal obligation as consideration in the same manner as consideration is dealt with in forming any original contract. The courts in rendering their decisions have been content to base them upon the particular phase of consideration that each case presents. One court emphasizes benefit to the promisor, while another discusses primarily detriment to the promisee. This accounts for a diversity of opinion as to what really amounts to consideration.

It is the purpose of the writer to set forth the benefit to the promisor and detriment to the promisee phases of consideration. A further attempt will be made to show the interdependence of the two in constituting consideration.

A common definition of consideration requires that it shall be either a detriment to the promisee or a benefit to the promisor.[1] If this is to be accepted as the correct definition without any further qualification, it would seem that the two terms were intended to be used in the alternative. This would enable either to serve as consideration.[2] According to this usage the case of *McDevitt* v. *Stokes*[3] would have been decided differently. In this case the Plaintiff McDevitt was bound by contract to drive for one Shaw in the Kentucky futurity race for trotting horses. The defendant Stokes promised to pay McDevitt one thousand dollars if he would win the race with the particular horse he was under contract to drive. Stokes owned the sire of that horse, and its value would be increased by the winning of this race by the horse ridden by Plaintiff. McDevitt won the race and he contended that the benefit thus accruing to Stokes served as consideration for his promise to pay the one thousand dollars. The Kentucky Court held that fulfilling a prior legal obligation did not furnish consideration. This holding is in accord with the majority rule in the United States.[4]

The minority rule, however, is that performance of a prior legal obligation constitutes consideration for a new contract. This holding is based upon the fact that the promisor receives an economic benefit

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[1] Temple v. Brooks, 165 App. Div. 661, 151 N. Y. S. 490 (1915); McDevitt v. Stokes, 174 Ky. 515, 192 S. W. 681 (1917).

[2] Van Winkle v. King, 145 Ky. 691, 141 S. W. 46 (1911).

[3] 174 Ky. 515, 192 S. W. 681 (1917).

[4] See Day v. Gardner, 42 N. J. Eq. 199, 7 Atl. 365, 367 (1886).

from such performance.[5] This construction of the term "benefit" is incorrect without a further qualification. "Benefit" means that the promisor has in return for a promise acquired some legal right to which he would not have been otherwise entitled.[6] The promisor may receive an economic benefit from one's performance of an obligation. But if that benefit would have accrued incidentally to performance of a prior obligation it may be said that he is entitled to it whether or not he makes a promise.

There is another line of opinion concerning the performance or promise of performance of a prior legal obligation as consideration. It is based upon the contention that a party so bound has the privilege of performing the obligation, or of breaching it and paying damages.[7] The surrender of this right is viewed as furnishing consideration for a new promise.[8] This contention woud fall short as a general rule because the promisee in any valid contract is entitled to the promisor's fulfillment of his part of the contract. To hold otherwise would undermine the fundamental principle of contracts. If one is under contract to do an act or forbearance in the future, it may be said that he is not instantly legally bound to do the act. He is however obligated to hold himself in readiness to perform when the time for performance arrives. He may not of his own accord release himself from the obligation. To breach the contract and pay damages would not be a release from obligation.[9] The damages to be paid may be assessed commensurate with the loss sustained by the obligee. This loss would be equivalent to the effect of non-performance. Whichever course the obligor pursues carries with it a legal obligation of approximately an equal value.

Where one offers to fulfill an existing legal obligation as consideration for a promise made by a third party, no benefit would be conferred on the third party promisor by breaching and paying damages to the original obligee. Such failure to confer a benefit would defeat the idea of consideration based entirely upon benefit to the promisor. Should one legally bound forego the assumed right to breach and pay damages, he would still confer no benefit upon the third party promisor that the latter would not have incidentally received. Williston points out that to breach and pay damages is not a right, but a power of contract.[10]

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[5] 1 Williston, Contracts (1936) Sec. 131; Briskin v. Packard Motor Co., 269 Mass. 394, 169 N. E. 148 (1929).

[6] Page, Contracts (2d Edition 1920) Sec. 515; 1 Williston, Contracts (Student Edition 1938) Sec. 102a.

[7] Lattimore v. Harsen, 14 Johns. 330 (N. Y. 1817).

[8] Sargent v. Robertson, 17 Ind. 411, 46 N. E. 925 (1897); Munroe v. Perkins, 9 Pick. 298, 20 Am. Dec. 475 (1830); Tobin v. Kells, 207 Mass. 304, 93 N. E. 596 (1911); Restatement Law Contracts, Sec. 84(d): "Consideration is not insufficient because of the fact the party giving it is then bound by a contractual or quasi contractual duty to a third person to perform the act or forbearance given or promised as consideration."

[9] 3 Elliott, Contracts (1913) Sec. 2095.

[10] 1 Williston, Contracts (1936) Sec. 130.

Viewing consideration from the standpoint of a detriment to the promisee, one already bound would suffer no actual loss by performing his obligation. Such obligor has received or is to receive compensation for performing his obligation. The compensation springs from the transaction through which he became bound. It serves as an offset for any inconvenience he may suffer as a result of performing the act or forebearance.

A legal detriment need not be an actual pecuniary loss of something of present value.[11] It may consist of a forbearance which would be prejudicial to the promisee by effecting his reasonably anticipated economic status for the future. It may consist of an act which the promisee is not obliged to do.[12] Anything that from its nature would be a disadvantage to the party from which it moved would be a detriment.[13]

The terms "benefit" and "detriment", each used in relation to consideration, contains an element of the other. A benefit to the promisor would consist of something of value to the promisor, moving from the promisee or a third person. The value thus accruing to the promisor may not flow directly to him, but may flow to a third person.[14] The courts however place no less emphasis upon its validity as consideration. The promisor has in that instance received something which serves as consideration, founded upon the principle that he received what he bargained for.[15] The thing moving, in addition to moving *to* the promisor or some third party, moves *from* the promisee or some other party. But if it moves from a third party it may be said that it does so upon the initiative of the promisee, or at least with his sanction or approval. It matters not how insignificant the consideration, or how slight the inconvenience to the promisee; if it is susceptible of legal estimation it serves as consideration.[16]

Performance of an act which one is already legally bound to perform furnishes no consideration for a new contract with the original promisor,[17] nor with a third party.[18]

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[11] 1 Williston, Contracts (1936) Sec. 446.

[12] 1 Williston, Contracts (Student Ed. 1938) Sec. 102a; Pershall v. Elliot, 249 N. Y. 183, 163 N. E. 554 (1923).

[13] Wallace v. Cook, 190 Ky. 262, 227 S. W. 279 (1921).

[14] Luigart v. Fed. Parquartry Mfg. Co., 194 Ky. 213, 238 S. W. 758 (1922).

[15] Bromfield v. Trinidad Nav. Inv. Co., 36 F. (2d) 646, 71 A. L. R. 542 (1929); Williston, Contracts (Students Edition 1938) Sec. 113.

[16] Mullen v. Hawkins, 141 Ind. 363 (1895).

[17] Blake v. Blake, 7 Iowa (7 Clarke) 46 (1858). (Held: A *bona fide* agreement will be valid, no matter how insignificant the consideration, or how slight the inconvenience or damage appears to be to the promisee, provided it is susceptible of legal estimation.)

[18] Reynolds v. Nugent, 25 Ind. 328 (1865); Ford v. Crenshaw, 11 Ky. (1 Litt.) 68 (1822).

The writer contends that a valid consideration consists of a benefit to the promisor to which he is not already entitled, and a detriment to the promisee to which he is not already bound. Unless both these factors are present, there is no consideration, and *a fortiorari* no contract.[19]

WILLIAM R. KNUCKLES

NEGLIGENCE: THE STANDARD OF CARE REQUIRED OF PHYSICIANS

The standard of care generally required by the courts in negligence cases is the degree of care that would be exercised by a reasonable prudent man under the circumstances. The standard of care required of a physician is the care ordinarily exercised by an average physician in good standing practicing in the same or similar locality.[1]

The cases do not make it clear why this change has been made regarding physicians. There is a close analogy in the law pertaining to persons who are hindered with physical infirmities. The amount of care required of such persons takes into account their defects. Instead of holding that the physical defect is one of the circumstances, the courts have called the attention of the jury to those defects directly by requiring the standard of care as usually exercised by persons with like infirmities.[2] This departure from the general rule in the case of persons with physical defects was evidently made to insure the jury's consideration of these defects.

What then is the reason for the departure from the general rule in the case of physicians? The physician is required to have spent some time in preparing himself for his work. He is supposed to possess more knowledge about the practice of medicine than the layman. It is only fair then that the physician should be held to exercise a greater amount of skill than the layman. This requirement could have been fulfilled by requiring the degree of care exercised by a reasonable prudent man under the circumstances, one of the circumstances being that defendant is a physician. Such a standard however does not call the attention of the jury directly enough to the special skill and learning of the defendent. In order to impress the jury with the fact that defendent holds himself out to the public as a skilled man, the courts could have required the exercise of the degree of care generally exercised by an average physician. This requirement would have been

[19] Moore v. Kuster, 238 Ky. 292 (1931).

[1] Dunman v. Raney, 118 Ark. 337, 176 S. W. 339 (1915); Whitsell v. v. Hill, 101 Iowa 630, 70 N. W. 750 (1899); Wilks v. Black, 188 Mich. 478, 154 N. W. 561 (1915); Hales v. Raines, 146 Mo. App. 232, 130 S. W. 425 (1910).

[2] Ham v. City of Lewiston, 94 Maine 265, 47 Atl. 548 (1900); Carter v. Village of Nunda, 66 N. Y. Supp. 1059, 55 App. Div. 501 (1900). Plaintiff however in going about public places alone was called upon to exercise such reasonable care and caution for his own safety as an ordinary prudent person with a like infirmity would have exercised.