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Charitable Subscriptions--Enforceability-- Common-Law Consideration

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RECENT CASE COMMENTS

CHARITABLE SUBSCRIPTIONS — ENFORCEABILITY — COMMON-LAW CONSIDERATION. — *D's* decedent, "in consideration of contributions and gifts to be made by others to the endowment and equipment funds of Wesleyan University", agreed to give to the trustees of the University gifts to the amount of eighty-nine thousand dollars, to be applied toward the endowment, in the name of decedent's father, of a Chair of Economics and Social Science. Decedent's executors later executed a note for the unpaid portion of the pledge. The personalty being insufficient to satisfy the note, suit was brought to subject the decedent's specifically devised realty thereto. *Held*, two judges dissenting, that under the present state of the pleadings and evidence the subscription is unenforceable. *Wesleyan University v. Hubbard*.¹

Charitable subscriptions have been a prolific source of litigation, their enforceability usually being questioned upon the ground of insufficiency of consideration.² Those courts which have enforced such pledges resort to various arguments, some tending toward the unorthodox, in order to find consideration where in ordinary circumstances by the general law of contracts there would be none.³ There are four theories sustaining enforceability, three of which support the sufficiency of consideration, and one of which dispenses with the necessity for it.⁴ Three of these approaches are recognized, expressly or impliedly, in the instant case.

Some cases have held that the promises or performances of other subscribers are consideration for the promise under scrutiny.⁵ The court in the present case, while unable to find in the record that other gifts were promised or made, implies that if promised or made they would have constituted sufficient consideration for the pledge in question. The case was remanded with leave to amend the bill. The dissenting opinion finds that other subscriptions were actually paid, and submits that the subscription under review should be held enforceable on that ground. In the usual

¹ 20 S. E. (2d) 677 (W. Va. 1942), Rose, J., dissenting, and Fox, J., concurring.

² Note (1933) 39 W. VA. L. Q. 159.

³ See *Allegheny College v. National Chatauqua County Bank of Jamestown*, 246 N. Y. 369, 372, 159 N. E. 173, 174 (1927).

⁴ Billig, *The Problem of Consideration in Charitable Subscriptions* (1927) 12 CORN. L. Q. 467.

⁵ *Watkins v. Eames*, 9 Cush. 537 (Mass. 1852); *Higert v. Trustees of Indiana Asbury University*, 53 Ind. 326 (1876); *University of Southern California v. Bryson*, 103 Cal. App. 39, 283 Pac. 949 (1930).

case, as here, the promise is made to the charity, not to the other subscribers, and neither induces, nor is induced by, the other promises. To regard such promises as being consideration for each other is the result of fallacious reasoning.⁶

More justifiable is the view that the subscription is a continuing offer, to ripen into a binding contract upon the performance, or upon the beginning of performance, of the acts which the subscription contemplates.⁷ Similar to this view is that adopted in the instant case, the pledge being regarded as a continuing offer to become binding upon the procuring by the University trustees of additional pledges, or upon the establishment by them of the chair requested.⁸ Upon the face of the written subscription, however, there is no such express request to the trustees, and this interpretation can prevail only upon a request found by implication. Even were this conclusion supportable, the continuing offer would be revoked upon the death of the subscriber, if not acted upon prior to that time.⁹

A third theory employed in the quest for consideration is sometimes found in a counter-promise of the charity or its trustees, implied by acceptance of the pledge, to administer and apply the funds promised according to the terms of the subscription.¹⁰ This reasoning is expressly adopted in the dissenting opinion of the present case. Whether or not such a promise may properly be found by implication, it is yet a questionable proposition that it is given in exchange for, and in consideration of, the promise in the pledge.¹¹

Perhaps the most satisfactory doctrine upon which enforceability may be sustained is that of promissory estoppel.¹² This doctrine does not purport to find a common-law consideration, but operates in substitution thereof. Some decisions have sustained en-

⁶ See *Wisconsin & Michigan Ry. v. Powers*, 191 U. S. 379, 386, 24 S. Ct. 107, 48 L. Ed. 229 (1903). See HOLMES, *THE COMMON LAW* (1881) 293.

⁷ *Keuka College v. Ray*, 167 N. Y. 96, 60 N. E. 325 (1901); *Robinson v. Nutt*, 185 Mass. 345, 70 N. E. 198 (1904); *University of Pennsylvania's Trustees v. Coxe's Exr's*, 277 Pa. 512, 121 Atl. 314 (1923).

⁸ *Washington Heights Methodist Episcopal Church v. Comfort*, 138 Misc. 236, 246 N. Y. Supp. 450 (1930).

⁹ 1 *WILLISTON CONTRACTS* (1936) § 62 and § 116, at page 405.

¹⁰ *Barnett v. Franklin College*, 10 Ind. App. 103, 37 N. E. 427 (1894); *Allegheny College v. National Chautauqua County Bank of Jamestown*, 246 N. Y. 369, 159 N. E. 173 (1927); *Tioga County General Hospital v. Tidd*, 164 Misc. 273, 298 N. Y. Supp. 460 (1937).

¹¹ 1 *WILLISTON, CONTRACTS* § 116.

¹² *RESTATEMENT, CONTRACTS* (1932) § 90.

forceability on this ground,¹³ and the doctrine has been applied in West Virginia,¹⁴ although not recognized by name. In concluding that subscriptions not based upon a common-law consideration, of benefit to the promisor or of detriment to the promisee, are unenforceable, the court cites the case of *Banner Window Glass Co. v. Barriat*.¹⁵ It is doubtful that this conclusion is a repudiation of the doctrine of promissory estoppel as applicable to pledges, since neither in that case nor in the present one do the facts fall sufficiently within the scope of the doctrine to render it applicable.¹⁶

Falling generally within the third category enumerated is the suggestion in the dissenting opinion that the pledge is supported by a counter-promise to establish the chair, thereby forming a bilateral contract. But the consideration expressed on the face of the pledge is promises or performances of other parties. It is doubtful that parol evidence is admissible to establish that the real consideration is a promise other than that recited in the written instrument.¹⁷ The subscription might as easily be regarded as a gift upon a condition, *viz.*, that the trustees establish the chair. A condition in itself is not a consideration.¹⁸

It is an interesting observation that the rule as stated in the syllabus by the court reads as follows: "A written pledge to make future contributions to an institution of learning *which does not show plainly on its face the purpose to become legally bound* is unenforceable unless shown to be based upon a common-law consideration." Both opinion and syllabus ignore the fact that the parties, by reciting a consideration in the pledge, whether or not fictitious, recognized the necessity therefor in order to form a legally binding

¹³ *School District of Kansas City v. Sheidley*, 138 Mo. 672, 40 S. W. 656 (1897); *In re Estate of Drain*, 311 Ill. App. 481, 36 N. E. (2d) 608 (1941).

¹⁴ *McKinney v. Rhinehart*, 102 W. Va. 531, 135 S. E. 654 (1926). See RESTATEMENT, CONTRACTS, W. VA. ANNOT. (1937) § 90.

¹⁵ 85 W. Va. 750, 102 S. E. 726 (1920). But see 1 WILLISTON, CONTRACTS § 116, page 406, n. 10. In this case, *A* and *B* mutually agreed to pay to *C* the dividends on certain stock owned by *A* and *B*. After four years, during which time performance of the agreement was continued, *A* refused to permit further payments. *A*'s promise was held unenforceable for lack of consideration. The decision appears to be unsupportable, and is criticized in (1920) 27 W. VA. L. Q. 91.

¹⁶ RESTATEMENT, CONTRACTS § 90, defines promissory estoppel as follows: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." There is no evidence in the principal case that injustice would be done the university by a failure to enforce the promise.

¹⁷ 1 WILLISTON, CONTRACTS § 115B.

¹⁸ *Id.* at § 112.

obligation. Had the subscriber not intended to be legally bound, there would have been neither an occasion for, nor point in, reciting a consideration. It therefore appears that the subscription does show plainly on its face—albeit not as an express statement—the purpose to become legally bound. The clause of qualification in the syllabus, not adverted to in the text of the decision, follows closely the language of the Uniform Written Obligations Act,¹⁹ which has not been adopted by the West Virginia legislature. Does the syllabus state the law?²⁰ If so, it is arguable that the court has gone far toward adopting the rule pronounced by the Act, without action by the legislature.

From an examination of the case, it seems that the charitable subscription was held unenforceable because under the pleadings and evidence the facts did not fall within the scope of the possible approaches suggested. It is not clear that in a proper case an opposite result might not obtain, predicated either upon a common-law consideration, or upon the doctrine of promissory estoppel. The decision cannot properly be considered an absolute rejection of the enforceability of charitable subscriptions.

It is suggested that the problem of enforceability of charitable subscriptions might best be resolved by wise legislation designed both to protect the primary source of income of charitable institutions, and to preserve from further effacement the orthodox principles of consideration.

K. J. V.

NEGLIGENCE — RAILROADS — DUTY OWING TRESPASSERS AND LICENSEE — EFFECT OF EXCEEDING LICENCE. — *P*'s decedent, while sitting or lying on *D*'s railroad track in an intoxicated and unconscious condition, was struck and killed, at a point commonly used by pedestrians, by *D*'s coal train as it slowly backed around a reverse curve. The lookout maintained by the conductor and brakeman failed to reveal in time the decedent's peril. On appeal from

¹⁹ Uniform Written Obligations Act, § 1, quoted in 1 WILLISTON, CONTRACTS § 219A as follows: "A written release or promise hereafter made and signed by the person releasing or promising shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound." This section is intended to remedy the gap in the law of jurisdictions where by statute the common-law effect of the seal is abolished.

²⁰ Hardman, "The Law — in West Virginia (1940) 47 W. VA. L. Q. 23; "The Syllabus Is The Law" (1941) 47 W. VA. L. Q. 141; "The Syllabus Is The Law" — Another Word (1941) 47 W. VA. L. Q. 209.