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THE PROBLEM OF CONSIDERATION IN CHARITABLE SUBSCRIPTIONS

The recovery by the plaintiff university on a charitable subscription contract in the case of Rouff v. Washington and Lee University¹ is a recent decision supporting the contention that "under modern decisions the charity is bound to win every time".² A review of the cases decided during the past few years shows a marked unanimity on the part of courts in allowing a recovery without too much analysis of the fundamental rules governing consideration in contracts.

It is not the purpose of this note to trace historically the development of the law regarding such charitable subscription contracts or to present in great detail the problems raised by the decisions. The material dealing with these questions is plentiful.³ Rather the primary purpose here is to notice the trend of recent decisions and thus indicate the present condition of this interesting phase of contract law.

Professor Billig has classified the cases into four groups with regard to the approach employed by the various courts in allowing a recovery: (a) cases in which the subscription is held to be an offer of a unilateral contract wherein the promisee charity has performed labor or expended money in reliance thereon; (b) the "multi-lateral" contract group of cases in which the promises of the various subscribers are held to be consideration for each other; (c) the cases in which there is a counter-promise of the promisee charity that the money will be expended for the objects for which the subscription was made; and (d) promissory estoppel.⁴

A study of the recent cases reveals the fact that the courts often have been reluctant to base their decisions on one ground alone. Instead sometimes they support the result reached — presumably on some basis of so-called "public policy" — by enumerating other grounds than the one principally relied on, which

¹ 48 S. W. (2d) 483 (Tex. 1932).
⁴ Billig, op. cit. supra n. 2.
are equally questionable in the light of the accepted views of consideration. A majority of the cases show that courts are inclined to the first and second of the foregoing consideration theories. New York is definitely committed to the first view although there are judicial declarations that a promise on the part of the promisee is necessary to a recovery, even though this promise be implied. The decision in *In re Reed's Estate* is definitely placed on the ground of reliance on the promise of the promisor. Since the act on which the promise was conditioned was performed in the case of *Washington Heights M. E. Church v. Comfort* a valid contract resulted and the court was not faced with the necessity of implying a promise on the part of the promisee. The court in a *dictum* mentions the promises of the other subscribers as constituting consideration for each other, but this can be given little weight in view of the preponderating rule in that state. In the case of *First M. E. Church of Mt. Vernon v. Howard's Estate* the court first considers the orthodox New York rule and notes the implied promise of the promisee to maintain the War Memorial, but in conclusion states that this is a case of "promissory estoppel" and can be supported on that ground independently of the implied promise. This is giving decided effect to the efforts of Professor Williston and Mr. Justice Cardozo in their respective attempts to place the modern type of subscription contract almost in a class by itself with a conception of "consideration" peculiar to this particular alleged contractual relation.

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5 *Kenka College v. Ray*, 167 N. Y. 96, 60 N. E. 325 (1901) and cases cited.  
8 "It has sometimes been supposed that when several persons promise to contribute to a common object, desired by all, the promise of each may be good consideration for the promise of others, and this although the object in view is one in which the promisors have no pecuniary or legal interest, and the performance of the promise by one of the promisors would not in a legal sense be beneficial to the others. This seems to have been the view of the chancellor as expressed in *Hamilton College v. Stewart* when it was before the Court of Errors, 2 Den. 417 . . . . But the doctrine of the chancellor, as we understand, was overruled when the Hamilton College case came before this court, 1 N. Y. 581 . . . . The doctrine seems to us unsound in principle." Andrews, J., in *Presbyterian Church of Albany v. Cooper*, 112 N. Y. 517, 521, 20 N. E. 359, 3 L. R. A. 468 (1889).  
10 § 1 WILLISTON, CONTRACTS (1920) §§ 116, 139; CONTRACTS RESTATEMENT (Am. L. Inst. 1932) § 90.  
11 "... On the contrary there has grown up of recent days a doctrine that a substitute for consideration or an exception to its ordinary requirements can be found in what is styled "a promissory estoppel" . . . . Certain,
The recent decisions in other jurisdictions show interesting judicial reactions to the problem of the charitable subscription. In *Huron Lodge No. 444 B. P. O. E. v. Hinckley* the consideration is found in the expenditure of money and labor in reliance on the promise of the promisor, thus creating a binding contract. The case of *University of Southern California v. Bryson* can be included in the first category, although the court justifies its result by indulging in the New York presumption of a promise for a promise. The true ground of recovery, however, is clearly that of the offer of a unilateral contract with the promisee performing labor and expending money in reliance on promise.

In the case of *In re Chavez’s Estate* the court passes lightly over the problem of consideration by saying that reliance on the promise is sufficient whether it be called estoppel or not. The court, by its very obvious desire to allow a recovery, can be said to embrace the doctrine of promissory estoppel by dictum, for the point of consideration was not treated as a necessary element of the case. *Hardin College v. Johnson* is another case falling directly into this first group.

The foregoing resume indicates that many courts are finding the theory of an offer of a unilateral contract the most appealing rationale and the most adaptable device for deciding the usual type of case which arises.

Still other courts are using the theory of the multi-lateral contract as most ideally suited to the charitable subscription situation. In *Lagrange Female College v. Corey*, although the court was not deeply moved by the question of consideration, recovery was allowed on the theory that the promises of the various subscribers were consideration for each other. The same theory was followed in the recent case of *Greenville Supply Company v. Whitehurst* where, in allowing a recovery, the court said that “where several persons mutually agree to contribute to a com-

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at least, it is that we have adopted the doctrine of promissory estoppel as the equivalent of consideration in connection with our law of charitable subscription.” Cardozo, Ch. J., in *Allegheny College v. The National Clautauqua County Bank of Jamestown*, 246 N. Y. 369, 373-374, 159 N. E. 173 (1927). In view of the actual ground of the decision this expression is but obiter dictum.

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xv 35 N. M. 130, 290 Pac. 1020 (1930).
xxii 221 Mo. App. 275, 3 S. W. (2d) 264 (1928).
xxiii 168 Ga. 291, 147 S. E. 390 (1929).
xxiv 202 N. C. 413, 163 S. E. 446 (1932).
mon object then the promises are consideration for each other”. When the question of consideration arose in *Y. M. C. A. v. Cavard* the court was faced with no obstacle, for the subscription recited the consideration as being “the wiping out of an existing mortgage”; yet the court repeated the expression that the promises of the subscribers were consideration for each other. Finally, in *Cotner College v. Hyland,* Judge Burch, in holding the promisor subscriber to his contract, observed: “In this state there is no limitation on the right of a beneficiary of a subscription instrument to sue the subscriber, and the consideration for the promise of each subscriber is found in the promises of others. The doctrine may be sound or unsound, but it a wholesome one in practice, and the court will not now depart from it.”

As to the third suggested basis for supporting such contracts, no recent case has been found which can be placed definitely in that group. Perhaps it can be said that the present-day court is somewhat unwilling to go so far in its presumptions when more plausible theories are available.

The only case which goes squarely on the ground of promissory estoppel has been dealt with above. Although the promissory estoppel idea has been attacked on the ground that it is contrary to the orthodox view of estoppel, if the term is used with particular regard for the type of situation in which it occurs, and if it is given a meaning peculiar to these cases, it is submitted that it is the most plausible of all the theories of legal liability in the charitable subscription cases.

One court has said that “subscriptions are construed if reasonably possible to support recovery”. Another court, as previously noted, described the doctrine of protecting the charity as being “a wholesome one in practice”. The reason for this approach clearly is “public policy”, since worthy charities exist by virtue of such subscriptions. But, as has been suggested by one commentator, when we consider the highly systematized present-day subscription campaign methods, the high-pressure salesmanship tactics employed to secure “pledges”, and the great number of charities seeking funds, it is at least questionable

18 213 Ia. 408, 239 N. W. 41 (1931).
19 133 Kan. 322, 323, 299 Pac. 607 (1931).
20 First M. E. Church of Mt. Vernon v. Howard’s Estate, supra n. 9.
22 Huron Lodge No. 444 v. Hinckley, supra n. 12, at 222 N. W. 663.
23 *Cotner College v. Hyland, supra n. 19.
whether "public policy" demands that the courts give such zeal-ous regard to enforcing these contracts, even to the extent of over-stepping the crystallized rules of contract law in order to reach
the desired result."

-FREDERICK H. BARNETT.

SPECIFIC PERFORMANCE — FORCING RELEASE OF INCHOATE DOWER UNDER STATUTORY SCHEME

A husband desiring to sell property sought to avail himself of a statute providing for the compulsory release of inchoate
dower.\(^1\) The West Virginia Supreme Court of Appeals granted the relief sought, holding the statute in question not unconstitutional as impairing existing dower rights. Inchoate dower, being only a possibility of an estate, is subject to the control of the legislature (by dictum) even to the extent of destroying it. The statute, being a proper exercise of this legislative power, is not unconstitutional. \(\text{Ruby v. Ruby.}\)\(^2\) These principles are supported by the great weight of authority\(^3\) and require no further considera-
tion here.

\(^{24}\) Note (1928) 13 CORN. L. Q. 270.

\(^1\) W. VA. REV. CODE (1931) c. 43, art. 1, § 6. See text above n. 27, infra.

\(^2\) Ruby v. Ruby, 163 S. E. 717 (W. Va. 1922).

\(^3\) That a wife's dower is inchoate until the husband dies: McNeer v. McNeer, 142 Ill. 388, 32 N. E. 681 (1892) (overruling earlier Illinois deci-
sions to the contrary); Pritchard v. Savannah St. & RR. Co., 87 Ga. 294, 13 S. E. 493 (1891); State v. Probate Ct., 137 Minn. 233, 168 N. W. 285,
L. R. A. 1917F, 436 (1917); Bushnell v. Loomis, 234 Mo. 371, 137 S. W.
257 (1911); Thornburg v. Thornburg, 18 W. Va. 522 (1881).

That inchoate dower interests are completely subject to legislative control; Randall v. Kreiger, 23 Wall. 137, 23 L. ed. 124 (1875); Thornburn v.
S. Ct. 358, 20 L. ed. 124 and note (1922); Billings v. People, 189 Ill.
472, 59 N. E. 798 (1901); McNeer v. McNeer, supra; Buffington v. Gros-
vener, 46 Kan. 730, 27 Pac. 137 (1891); Hamblin v. Marchant, 103 Kan.
508, 175 Pac. 675 (1918); McAllister v. Dexter & P. R. Co., 106 Mo. 371,
76 Atl. 891 (1910); Griswold v. McGee, 102 Minn. 1/4, 112 N. W. 1020,
113 N. W. 382 (1897); Magee v. Young, 40 Miss. 164, 90 Am. Dec. 322
(1866); Chouteau v. Missouri P. Ry. Co., 122 Mo. 375, 22 S. W. 458, 30
S. W. 299 (1894); Miner v. Morgan, 83 Neb. 400, 119 N. W. 761 (1909);
Moore v. New York, 4 Sandf. 456 (1851); aff'd, 8 N. Y. 110, 59 Am. Dec. —
(1853); Weaver v. Gregg, 6 Ohio St. 547, 67 Am. Dec. 355 and note (1856);
(1919); Melizet's Appeal, 17 Pa. 449, 55 Am. Dec. 573 (1851); Shell v.
Duncan, 31 S. C. 547, 10 S. E. 330 (1889); Hamilton v. Hirsch, 2 Wash.
223, 5 Pac. 215 (1885); Thornburg v. Thornburg, supra; Bennett v. Harsm,