

# NOTES

## CONTRACTS

### INADEQUACY OF FACTUAL BASIS FOR ENFORCING CHARITABLE SUBSCRIPTIONS

Under facts strikingly similar to those involved in the leading New York case of *Allegheny College v. National Chautauqua County Bank of Jamestown*,<sup>1</sup> the Court of Appeals of Maryland has reached a directly opposite result.

A charitable subscription signed by Lidie M. Voshell read in part as follows: "In consideration of my interest in Christian Education and in consideration of the mutual promises of other subscribers to the American University fund of \$6,000,000 for endowment, buildings, betterments, equipment, liquidation, and expenses, I hereby promise and will pay to the American University . . . the sum of One Third Of My Estate . . . (\$1/3 of my estate) . . ." This standard form, which is substantially a copy of the one involved in the *Allegheny* case,<sup>2</sup> provided that the subscription was to become due on the date of death and to be paid within one year thereafter. There was also a clause providing that the donation was to be known by the donor's name. After the death of Mrs. Voshell, the university made a demand on her administrator for one-third of the estate. The claim was rejected and in the university's action for the payment, the administrator's demurrer to the complaint was sustained. On appeal the judgment was affirmed. The court, brushing aside the question of consideration, held that this was an attempted testamentary disposition and hence void under the Wills Act.<sup>3</sup> Care was taken, however, to point out that the university had not incurred obligations or taken substantial

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1. 246 N. Y. 369, 159 N. E. 173 (1927).

2. In the *Allegheny* case the pledge was for the specific sum of \$5,000 while in the present case the pledge was for one-third of the pledgor's estate. Also in the *Allegheny* case the deceased pledgor had paid \$1,000 of the pledge before repudiating it. Neither of these factors would seem sufficient to require that opposite results be reached.

3. At page 335 of the opinion the court said in effect that it is unnecessary to decide the question of consideration since the pledge is testamentary in character. This is obviously untrue, for as the court itself points out in the following paragraph, had a binding contract been completed (in other words had there been consideration) the Wills Act would have no application.

action in reliance on the subscription, and previous Maryland cases<sup>4</sup> were distinguished on this ground. *American University v. Collings*, 59 A.2d 333 (Md. 1948).

Almost without exception courts have avowed that consideration is necessary to the enforceability of charitable subscriptions.<sup>5</sup> It is a much-remarked fact however, that the "consideration" required to make charitable subscriptions enforceable would often not have been sufficient to support other contracts.<sup>6</sup> This becomes apparent from a brief review of the devices by which courts have held subscription promises binding.

One judicial device for finding consideration is to hold that the subscriptions of others provide the necessary consideration.<sup>7</sup> The difficulty with this approach is that the promise in charitable subscription cases is made directly to the organization, and no case has been found where it was established that the subscriber even knew of the other subscriptions. Thus from a factual standpoint the finding of consideration in promises of others cannot be justified.<sup>8</sup>

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4. *Erdman v. Trustees of Eutaw Church*, 129 Md. 595, 99 Atl. 793 (1917); *Gittings v. Mayhew*, 6 Md. 113 (1854).

5. In nearly every case on the subject, there is a statement to the effect that consideration is required: *e.g.*, *I & I Holding Corp. v. Gainsburg*, 276 N. Y. 427, 12 N. E.2d 532 (1938); *Baker University v. Clelland*, 86 F.2d 14 (8th Cir. 1936). The Indiana courts have come as close as any court to repudiating this doctrine. In *Roche v. Classical Seminary*, 56 Ind. 198, 202 (1877), the Supreme Court states, "No consideration is necessary except the accomplishment of the purpose for which the subscription is taken." Even this statement implies that accomplishment of the purpose or promisory estoppel is necessary.

6. In the vast majority of cases, the courts find some form of consideration and hold the subscriptions legally enforceable. For collections of the cases see annotations, 151 A. L. R. 1238 (1944); 115 A. L. R. 589 (1938); 95 A. L. R. 1305 (1935); 38 A. L. R. 868 (1925). The courts themselves have recognized that this result would not be attained had the strict law of contract been applied. See the opinion of Judge Cardozo in *Allegheny College v. National Chautauqua County Bank of Jamestown*, 246 N. Y. 369, 372, 159 N. E. 173, 174 (1927): ". . . though professing to apply to such subscriptions the general law of contract, we have found consideration present where the general law of contract . . . would have said that it was absent." See also the periodicals cited note 15 *infra*.

7. *Christian College v. Hendley*, 49 Cal. 347 (1894); *Bryan v. Watson*, 127 Ind. 42, 26 N. E. 668 (1890); *Higert v. Trustees of Indiana Asbury University*, 53 Ind. 326 (1876); *Irvin v. Lombard University*, 56 Ohio St. 9, 46 N. E. 63 (1897).

8. 1 WILLISTON, CONTRACTS § 116 (Rev. ed. 1936). This idea is found for the most part in very early cases, and even then it was seldom that a court relied entirely on this ground. Billig, *The Problem of Consideration in Charitable Subscriptions*, 12 CORN. L. Q. 467, 475 (1927). Several Indiana cases, while declaring that the promises of

Another method, somewhat more defensible than the first, is to find consideration in the accomplishment of, or implied promise to accomplish, the purpose for which the subscription was taken.<sup>9</sup> The basic objection to this approach also is factual: such accomplishment of purpose or implied promise is not bargained for by the subscriber in exchange for his promise.<sup>10</sup> The very idea of charity negatives the idea of bargaining for charitable subscriptions. It suggests rather "benevolence" or "assistance given without return."<sup>11</sup>

Probably the method most often used by courts to hold subscriptions enforceable is to resort to the doctrine of promissory estoppel.<sup>12</sup> If reliance is admitted to be either sufficient consideration or a recognized substitute for consideration, there is still the general requirement that the promise relied upon must be such that the promisor should have reasonably expected it to induce substantial action or

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others are sufficient consideration, take care to point out that there are other elements of consideration present. *Scott v. Triggs*, 76 Ind. App. 69, 131 N. E. 415 (1921); *Petty v. Trustees of the Church of Christ*, 95 Ind. 278 (1883); *Pierce v. Ruley*, 5 Ind. 69 (1854).

9. In this analysis the subscription is regarded as an offer subject to the acceptance of the organization. See, e.g., *First Trust and Savings Bank v. Coe College*, 8 Cal. App.2d 195, 47 P.2d 481 (1935); *Board of Home Missions v. Manley*, 129 Cal. App. 541, 19 P.2d 21 (1933); *Cutwright v. Preachers' Aid Society*, 271 Ill. App. 168 (1933); *Twenty-third Street Baptist Church v. Cornell*, 117 N. Y. 601, 23 N. E. 177 (1890); *Eastern States Agricultural and Industrial League v. Vail*, 97 Vt. 495, 124 Atl. 568 (1924). The courts have then said that a unilateral contract is completed on the accomplishment of the purpose of the subscription, or that the acceptance of the subscription raises an implied promise to carry out that purpose, thereby forming a bilateral contract. *Commissioner of Internal Revenue v. Bryn Mawr Trust Co.*, 87 F.2d 607 (3rd Cir. 1936); *First Trust and Savings Bank v. Coe College*, 8 Cal. App.2d 195, 47 P.2d 481 (1935); *Barnette v. Franklin College*, 10 Ind. App. 103, 37 N. E. 427 (1893); *Roche v. Roanoke Classical Seminary*, 56 Ind. 198 (1877); *Hyden v. Scott-Lees Collegiate Institute*, 291 Ky. 139, 163 S. W.2d 295 (1942); *Re Lord*, 175 Misc. 921, 25 N. Y. S.2d 747 (1941); *Allegheny College v. National Chautauqua County Bank of Jamestown*, 246 N. Y. 369, 159 N. E. 173 (1927); *Irwin v. Lombard University*, 56 Ohio St. 9, 46 N. E. 63 (1897).

10. It is generally accepted that consideration is something which is bargained for in exchange for the promise in question. And the authorities agree that while that is the general requirement, it does not exist in the charitable subscription cases. ANSON, CONTRACTS § 126a (Corbin's 5th Am. ed. 1936); 1 WILLISTON, CONTRACTS § 116; RESTATEMENT, CONTRACTS § 75 (1932).

11. Charity is usually defined as giving to promote the welfare of others in need. E.g., 6 WORDS AND PHRASES 640 (1940); 10 AM. JUR., CHARITIES §§ 2, 3.

12. *Baker University v. Clelland*, 86 F.2d 14 (8th Cir. 1936); *Landwerlen v. Wheeler*, 106 Ind. 524, 5 N. E. 888 (1886); *I & I Holding Corp. v. Gainsburg*, 276 N. Y. 427, 12 N. E.2d 532 (1938). For other cases see annotations cited *supra* note 6.

forbearance on the part of the promisee.<sup>13</sup> The courts usually have assumed reliance instead of requiring it to be shown,<sup>14</sup> and in no case has reliance been required to be justified.

The apologists for the results achieved in most of the charitable subscription cases freely admit that the legal reasoning laid down in the cases is strained and tenuous.<sup>15</sup> The only justification advanced is that an assumed<sup>16</sup> public policy requires that charitable subscriptions be legally enforceable. No inquiry seems ever to have been undertaken by courts or commentators to determine whether there are factual reasons for the creation of a public policy which requires special treatment of charitable subscriptions. Yet that inquiry is the fundamental question in the charitable subscription cases.

It is of course true that charities depend for their existence upon gifts and subscriptions. But it does not necessarily follow that the existence or even the best interests of charities require that subscriptions be legally enforceable, since the long-range advantage of legal enforceability is extremely doubtful. Many leading charitable organizations follow a policy of never taking legal action,<sup>17</sup> apparently upon the theory

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13. RESTATEMENT, CONTRACTS § 90 (1932); 1 WILLISTON, CONTRACTS § 140.

14. The courts point to the organization's undertaking a project or continuing its work and say that that is sufficient reliance to constitute consideration. As a matter of fact, as was pointed out in the testimony in the principal case and referred to in the dissenting opinion at p. 336, an organization makes plans on the basis of the aggregate of subscriptions, *estimating the percentage of loss*. Thus in no real sense can it be said that there is any substantial reliance upon any one subscription.

15. See *e.g.*, Billig, *The Problem of Consideration in Charitable Subscriptions*, 12 CORN. L. Q. 467, 479 (1927); Murtaugh, *Charitable Subscriptions in Illinois*, 4 U. OF CHI. L. REV. 430, 441 (1937). It is revealing to contrast the majority of American cases with a case which treats all the issues in a strictly legal manner. See the Canadian case of *Dalhousie College v. Boutilier*, [1934] Can. Sup. Ct. 642.

16. *But see* Note 13 CORN. L. Q. 270, 275 (1929), where the author does suggest that perhaps the courts could well reconsider the policy.

17. In a letter to the INDIANA LAW JOURNAL, dated December 30, 1948, Charles G. Roswell, Comptroller of the United Hospital Fund of New York, states categorically, "We do not resort to legal action in attempting to collect unpaid pledges." Similar statements were made by Royal C. Agne, national director of fund raising for the American Red Cross, in a letter dated January 13, 1949, and Laurence G. Tighe, treasurer of Yale University, in a letter dated December 28, 1948. Of the reported cases, by far the greater number have involved churches and small colleges and universities. The large, established charities apparently follow the policy of not suing on subscriptions.

that such litigation may well cost more by discouraging new subscriptions than it will gain through collections. The formal subscription, once made, creates a powerful moral compulsion apart from its possible legal implications. There is a desire to keep one's word, buttressed by the fear of community censure for the refusal to do so. All available evidence indicates that even without legal action a very large percentage of such subscriptions are paid.<sup>18</sup> And in England charities have managed a satisfactory existence though English courts do not enforce charitable subscriptions.<sup>19</sup>

Even assuming, however, that the facts did reveal that the best interests of charity would be served by the legal enforceability of subscriptions, that alone does not justify the judicial creation of a public policy in favor of enforcing them. Preferential treatment under the law is not a thing to be dealt out every time the word charity is mentioned.<sup>20</sup> Such treatment should result only from a searching inquiry of wide scope, an inquiry of the type which legislatures are far better adapted to accomplish than are courts. In other areas the legislatures have not always seen fit to favor charities. Statutes have included provisions voiding gifts made to charity within a brief period before the death of the donor<sup>21</sup> and limitations on the proportion of a testator's estate which may be devised to charity when there are near relatives surviving.<sup>22</sup>

Another foundation on which courts have constructed

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18. In the letters cited *supra* note 17, for example, the United Hospital Fund of New York reports that in the 1946 campaign only about .1% of the pledges were written off as uncollectible; and in the 1947 campaign less than .2% were so written off. Mr. Agne estimates that about 1% of the amounts pledged in the Red Cross campaigns remains unpaid. In 1926 in an endowment drive Yale University obtained subscriptions for about \$20,000,000. Despite the fact that during the depression of the 1930's no contact was made with those who did not pay, approximately \$19,000,000 has been collected and some of the subscribers are still paying on their pledges, according to Mr. Tighe.

19. In *Re Hudson*, 54 L. J. Ch. 811 (1885).

20. This is an extremely controversial issue. For a discussion of statutory preferences see Paulsen, *Preferment of Religious Institutions in Tax and Labor Legislation*, 14 LAW & CONTEMP. PROBLEMS 144 (1949). For a discussion of the problem as it arises in tort cases see *Welch v. Frisbie Memorial Hospital*, 90 N. H. 337, 9 A.2d 761 (1939).

21. CAL. PROBATE CODE ANN. §§ 41-43 (1944); GA. CODE ANN. § 113-107 (1933); IDAHO CODE ANN. § 14-326 (1932); MONT. REV. CODE § 7015 (1935).

22. *Ibid.* See also N. Y. DECEDENT ESTATE LAW § 17.

their public policy is seldom articulated, but is nevertheless implicit in the cases and in the comment attempting to justify the cases. It is the feeling that one should be required to fulfill his promise to a charitable organization because of the moral obligation to do so. The objection to such reasoning is that, even if it could be assumed that courts should enforce moral obligations,<sup>23</sup> whatever those words may mean, there are many instances where there may be little or no moral obligation to pay a subscription. Present day charity is not always a matter of voluntary giving or promising to give. The professional "fund raising consultant" has made his appearance on the American scene. Funds are often solicited in drives or campaigns conducted by these experts who use every possible device of psychology and modern advertising to encourage giving.<sup>24</sup> One standard technique is to use business and social connections to apply pressure upon potential givers.<sup>25</sup> Such pressure can easily result in subscriptions which are neither wholly spontaneous nor within the means of the giver. These facts alone should cast doubt upon the desirability of the public policy in question.

Nor does the policy favoring subscriptions find its support in the reasonable expectations of the subscriber. It is extremely unlikely that the layman signing a subscription believes that he is entering into a legally binding relationship.<sup>26</sup> It would, of course, be foolish to contend that the

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23. The whole doctrine of consideration assumes that courts do not enforce mere moral obligations. See ANSON, CONTRACTS, § 127.

24. Fund raising has really become "big business." There are several large firms which specialize in managing fund raising campaigns; for example, one of the largest is Howard T. Beaver and Associates in Chicago. At the top level these firms are organized into a national organization—The American Association of Fund Raising Counsel. It is strongly recommended to charitable organizations that the services of fund raising consultants be used if a fund campaign is to be successful. David L. Gaffill, *Dollar Diplomacy*, 24 CHANNELS, No. 5 (1947) (a publication of the National Publicity Council).

25. It is agreed by the experts on fund raising that the personnel and organizations enlisted to aid in the campaign to raise money are of the utmost importance. The more contacts (from which pressure can be applied) an organization has, the more chance its drive for funds has for success. *Ibid.* One fund raising consultant goes so far as to say that "Money is contributed not so much in ratio to the worth of the cause as in ratio to the strength of the personalities. . . ." HOWARD T. BEAVER, RAISING MONEY—SOME CURRENT PROBLEMS, TRENDS, SOLUTIONS (1936) (pamphlet published by Howard T. Beaver and Associates, 612 N. Mich. Ave., Chicago 11, Ill.)

26. A person's actual belief is, of course, immaterial under the objective theory of contracts. 1 WILLISTON, CONTRACTS, § 21. Belief is

average person thinks in terms of legal consideration, but it is equally foolish to contend that he makes no distinction between a gratuitous promise to give and that which may in effect become a lien on his possessions. For most people the moral obligation engendered by the subscription may well disappear if circumstances change unexpectedly.<sup>27</sup>

The factors which have actually influenced the courts to decide against the charity in the few modern cases which have reached that result<sup>28</sup> can only be conjectured.<sup>29</sup> Yet the methods of big business have moved into the field of charities. The magnitude and pressure tactics of these operations warrant reconsideration of the public policy which has accorded to charitable subscriptions a preferential position in the law.

## FEDERAL COURTS

### EFFECT OF STATE STATUTE ON JURISDICTION OF FEDERAL COURTS

A Tennessee corporation acted in Mississippi as realty agent for a Mississippi resident, without having qualified to

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mentioned here only because it does have a substantial bearing on the strength of the moral obligation. A person who believes that he is making a conditional promise certainly does not feel as great a moral obligation as the person who knows that he is making a binding contract.

27. As pointed out *supra* note 18, Yale University did not even contact those who did not pay their subscriptions during the depression of the 1930's.

28. *American University v. Todd*, 39 Del. 449, 1 A.2d 595 (1938); *American University v. Conover*, 115 N. J. L. 468, 180 Atl. 830 (1935); *Floyd v. Christian Church Widows and Orphans Home*, 296 Ky. 196, 176 S. W.2d 125 (1943).

29. In *American University v. Conover*, *supra* note 28, as well as in the principal case, there was present both an "implied promise" of the organization and the recited promises of others. The decisions in both cases clearly imply that the courts did not believe these factors to constitute consideration capable of supporting a contract. In each case the court took care to point out that there was no evidence that the organization had taken any substantial action in reliance upon the subscription despite the general allegations of reliance, which had been held sufficient in previous cases. This would seem to indicate that the courts are tending to be less liberal in finding consideration for charitable subscriptions. However, no recent American case has been found where a charitable subscription has been held unenforceable solely for want of consideration while the subscriber was still living. Since the subscription has always been considered in contract terms whether the subscriber has died should make no difference. But it is possible that the courts are influenced by the policy of the Wills Acts and hence are more critical toward so-called contracts which resemble testamentary dispositions.