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NOTES

A SUBSCRIPTION TO A CHARITY CONSIDERED AS AN ENFORCEABLE CONTRACT.

For a number of years in all civilized countries, certain of our institutions of inestimable but possibly indirect benefit to society have been provided with no certain means of financial support, or at least with insufficient funds, by those receiving their direct benefits. The foregoing is especially

true of certain universities, colleges and academies, as well as those organizations of a religious or eleemosynary nature not publicly supported, and the numberless, miscellaneous charities of our day. Most of these admittedly fill a useful niche in the great scheme of modern life.

What agency supplies the financial deficiencies of such organizations? The answer is obvious; the individuals themselves, out of pocket, otherwise charities. From the time of the alms and charities of history to the present day subscription list, circulated through the congregation or office building with the request to "let me put your name down for a hundred," donations to charities have been an important source of income as well as a very fruitful cause of litigation. The increasing complexity of the social scheme, and the resulting birth of numberless necessary benevolent organizations, have created a difference between the present and past. These factors, the growing sense of duty to provide for the less fortunate, coupled with a typically American feeling of sympathy for the "under dog," have resulted in a greater interest in charities and some increase in the amount of litigation in connection therewith.

In an attempt to establish the validity of certain charitable subscriptions we are compelled to look entirely to American decisions. In England, such promises have generally been held unenforceable. Under the Civil Law of the continent, consideration is so much less a vital element that European decisions will furnish no light on our problem.

The discussion in these notes must of necessity be confined to subscriptions in aid of some matter of public or general interest. It will not include gifts to individuals, nor subscriptions to enterprises for entertainment, for commerce nor for business purposes. Our scope precludes a discussion of questions of procedure and admissibility of evidence.

It is elementary that a valid consideration is necessary to render binding any simple executory contract, and nearly

every subscription to a charity is of that sort. If we are able in a given case to discover a legally adequate consideration, the problem is usually solved. Consideration is the backbone of the whole discussion. A want of it will vitiate any executory contract not under seal.

It would seem not to be very difficult to apply these few rules to any given case, and quickly determine whether or not the facts present a valid contract. But an analysis of decisions shows that in many cases the defense of want of consideration has been unfavorably regarded by the courts. It has sometimes been looked at as a breach of good faith toward the public, as an inexcusable disappointment of the reasonable expectations of others interested. However much in accord with public policy, however laudable may be such a judicial attitude, it indicates the difficulty of reconciling some of the decisions with the strict rules of contract consideration.

A purely unilateral promise to make a gift at a future time, or to donate a certain sum to a charity is considered only as a continuing offer so to do. Until such offer is followed by an acceptance by the promisee, or is acted upon in such a way that the acts of the promisee can be held to amount to a consideration, the promise may be withdrawn and is unenforceable, since until acceptance it is without mutuality of obligation as between promisor and promisee. This rule has been applied in a variety of circumstances. The gist of decisions examined where no consideration was found, is that to indicate an acceptance there must be some act on the part of the promisee whereby some legal liability is incurred or money expended on the faith of the promise. Without one of these elements the subscriber is not bound.¹

In line with the purpose of this discussion, an examina-

1. 53 Ill. 401; 110 Ill. 125; 113 Ill. 618; 177 Ill. 280; 38 Mo. 147; 95 Mo. App. 488; 138 Mo. 672; 165 Mo. App. 511.

tion and analysis of those decisions on the positive or affirmative side of the rule will prove more fruitful.

A brief summary of the guiding principles of these cases seems to be: that to render valid, binding and enforceable a subscription to a charity, the promisee must perform some act, or incur enforceable liabilities, expend money or deliver something of value. Whatever is so done must be in pursuance of the enterprise the promissor intended to assist, and must be done in reliance on the subscription.²

The next natural inquiry is as to what acts, under this rule, are sufficient to constitute a valid consideration. A number of these it is not possible to classify exactly. The borrowing of money by a church congregation to pay off existing debts, in reliance upon subscriptions for the purpose, is a sufficient consideration for such subscriptions.³ Where a promissory note is given as a subscription to a charity and discounted, the proceeds being used for the intended purpose, the maker is unable to plead want of consideration.⁴ A note given to aid in founding a perpetual scholarship in a college following a written offer by the college so to do if the note was executed, is a valid contract enforceable against the maker of the note.⁵ A college receives endowment fund notes and applies them to various liabilities incurred in conducting the school, a going institution. This application of these funds was held sufficient consideration.⁶ In a number of cases of subscriptions given for the purpose of locating a new school, college or church at a given place, when the subscriptions so conditioned are accepted by representatives of the promisee and such location definitely decided upon, the contract between the subscriber

2. 6 Mo. App. 150; 57 Iowa 307; 93 Ill. 475; 96 Ill. 177; 79 Ill. App. 452.

3. 53 Ill. 401.

4. 27 Ill. App. 263.

5. 84 Pac. 1000.

6. 23 Ill. App. 494; 28 Ill. App. 629.

and the promisee is consummate. The offer cannot thereafter be retracted.⁷

As distinguished from the possibility of mutual promises constituting a valid consideration, when the subscription is conditioned on obtaining a certain total, or on the securing of so many additional donors, the time, expense and labor of obtaining the remainder have in many cases been held to provide consideration.⁸ Thus in a case in which the subscription was conditioned on a stipulated total, when that amount had been met, the estate of the subscriber was liable.⁹ Numerous other cases are in line with this doctrine.

Often the consideration is found in the erection of buildings as a part or complete accomplishment of the object for which the subscriber intended to give. It is not necessary that the building be completed.¹⁰ The purchase of land by a university corporation, the building of a college hall thereon and maintaining the institution for a number of years furnished consideration for a subscription to an endowment fund.¹¹ The construction of a Y. M. C. A. building according to the terms and on faith of a subscription thereto is good consideration for the donor's promise.¹² This generally holds as true of school, college or church buildings when the building fund has at least in part been provided by charitable subscription.¹³ Without further attempting to classify the different means by which we can satisfy the necessity of having a legal consideration, it is enough to say that if there is an actual accomplishment of the object for which the donor subscribed, the matter is settled. No other consideration need be found.

The test of mutuality in these cases is to be applied as of the time when the agreement is sought to be enforced,

7. 64 Ark. 627.

8. 72 Ill. 247.

9. 108 Iowa 500; 167 N. Y. 96.

10. 35 Ill. 518.

11. 38 Mo. 147.

12. 140 Ga. 291.

13. 177 Ill. 280; 4 Ill. 198; 25 Ill. 292.

necessarily not at the time of subscribing. If, as of the time of enforcement, if the promisee has done what was expected of him, the contemplated consideration is furnished.

Another definite group of decisions comprises those in which consideration is sought to be established under the doctrine of "a promise for a promise." This is in reference however to promises between co-subscribers. The cases in this group are in conflict. Often those in the same jurisdiction are hopelessly irreconcilable. This doctrine from its nature can apply only where there are several subscriptions for the same purpose, and not to one standing alone. It seems to the writer to be begging the question to consider that a promise of one subscriber to pay money can furnish adequate consideration for the promise of another to contribute to a common enterprise. It would seem that the courts in many instances in their anxiety to help some worthy cause had slightly overstepped the usual rules of contract consideration by so holding. Missouri repudiated this doctrine in an early case.¹⁴ The import of the court's remarks is to the effect that if the promise of one subscriber could be a consideration for the promise of another there would be much less difficulty in this group of cases, but that it seems this cannot be said without reasoning in a vicious circle. The very question in this case was whether any of the promises were binding. Certainly a void promise cannot be consideration for another promise. To somewhat the same effect is Parsons on Contracts, although the statements in point therein probably apply only to cases wherein no definite person is named as payee to expend or use the fund in a certain way.¹⁵ In at least one of the states by statute, in mutual subscriptions for a common object, the promise of the others is good consideration for the promise of each.¹⁶ But this does not apply to oral promises.¹⁷ The cases hold-

14. 6 Mo. App. 150.

15. 1 Parsons on Contracts, 378.

16. Georgia Code, Sec. 4246.

17. 140 Ga. 291.

ing that the subscribers' mutual promises satisfy the requirements, are numerous. Some so holding are to be found in most jurisdictions.¹⁸

More often in the case of a single subscription than in cases involving a number of subscribers, we find some condition annexed to the promise of the donor. Assuming an otherwise valid agreement, the promisee obligates itself to comply with the condition in the same way as in any other conditional contract. Almost universally in this class of cases, a substantial compliance is sufficient to constitute performance. A literal compliance seems rarely necessary. When the subscription is made on a condition precedent, a previous at least substantial compliance is essential to a recovery. For example, a subscription to a church building fund to be paid when the building was inclosed, was held to be due and payable although the building being practically inclosed, certain connecting towers were not yet completed.¹⁹ When the time for compliance is not specified, the time is held to be a reasonable time under the circumstances. What is such is for the jury.²⁰ It is not unusual that a promised payment is due when a certain building is erected. The erection of the walls or inclosure of the structure is usually sufficient in the absence of a specific condition otherwise.²¹ Probably most often is a subscription conditioned on a certain amount being "raised" or subscribed. In practically all of these cases examined the condition is fulfilled when the stipulated total is assumed by responsible and solvent co-subscribers, and it is not necessary to the fulfillment of the condition that the amount has actually been paid in cash.²² In a few cases, the condition is fulfilled only by payment of money or obligations legally enforceable aside from the subscription.²³ The variation is chiefly between different jurisdictions.

18. 49 Cal. 347; 127 Ind. 42; 126 Mich. 670.

19. 58 Ill. 290.

20. 129 Mich. 640.

21. 35 Ill. 518.

22. 42 Mo. 411.

23. 135 Mass. 487.

The effect of insanity or death of a promissor has practically the same effect in this class of contracts as in any other. A subscription by a person non compos is of course a nudum pactum. Death or insanity subsequent to the subscription usually has the same effect. If a charity subscriber dies before his promise has been acted on in some way, it is of course not binding on his estate. No contract, in the true sense was made with him. The logic of this is that a continuing offer is in the nature of a constant repetition of that offer. This can no more be done by an insane or dead person than can an offer be originally made by such a one.²⁴

The rule that death or insanity operates as a revocation applies only to cases in which the subscriber might have revoked during life or competency.²⁵ The insanity of a subscriber renders him as completely incapable of continuing or repeating an offer as if he were dead.²⁶ But insanity occurring after an offer is rendered effective and binding by the incurring of definite obligations by the promisee, will not vitiate the contract.²⁷

The number of cases on the subject of charity subscriptions is legion. Due to the necessarily restricted scope of these notes, the treatment is of course only suggestive of the field and by no means exhaustive. Cases cited to illustrate points or rules are for the most part Missouri and Illinois decisions as being of more immediate interest and value.

There seems to be prevalent a lay notion that about all charity subscriptions are unenforceable; that they are always mere gratuities, retractable at will. Herein it was attempted to show that it is easily possible and not at all unusual that such promises may by subsequent acts of the receiving party, be made as binding as any other form of contract.

ROBERT B. TERRY, '26.

24. 93 Ill. 475; 96 Ill. 177.

25. 23 Ill. App. 494.

26. 96 Ill. 177.

27. 138 Mo. 672.