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The Problem of Consideration In Charitable Subscriptions

T. C. BILLIG*

Section 88 of the tentative *Restatement No. 2* of the Law of Contracts reads:

“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.”

In the *Commentaries on Contracts*, tentative *Restatement No. 2*, at page 16, Professor Williston discusses Section 88 in its application to charitable subscriptions:

“Charitable subscriptions are generally enforced in the United States at least after action in reliance upon them has been taken. Cases are collected in *Treatise*, section 116 It is of course possible to have a subscription made for technical consideration, and thereby avoid any difficulty; but in fact, in most at least of the cases cited in Section 116 the subscriptions were not made for consideration but were intended as gifts. Though various arguments are put forward to support the liability of the subscriber, by far the most common line of argument is that where acts have been done in reliance on the subscription the acts so done furnish consideration. It is obvious, however, that such acts are not consideration in any true sense; they are acts done in justifiable reliance on the promise. There is what I have called in the *Treatise* ‘promissory estoppel’—reliance not on a statement of fact, but on a promise. Occasionally the court has frankly stated this”

Professor Williston then asks some thought-provoking questions:

“If this doctrine is to be accepted, what are the limits to be placed upon it? Is a promise by one man, of money to build a church, to be held invalid after work has been begun in reliance upon it, though the promise of two men, each to give a specified sum for the purpose, is binding under similar circumstances?

“If such a promise to a church is binding, is a promise by a father to his son, or several promises by a father and father-in-law to the young man, of a sum of money with which to build a house invalid when he has made similar commitments with architects and builders?”

These comments and questions raise once more the whole problem

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of consideration in the charitable subscription cases. As Professor Williston points out, such promises to charities¹ usually *are* enforced, "at least after action in reliance upon them has been taken." But perhaps there is no other group of cases in the entire law of contracts which the student leaves with a feeling of greater dissatisfaction.² The writer believes that one reason for this unfortunate result is that the courts, in their desire to enforce charitable subscriptions, attempt to place the latter in the same legal pigeonhole with subscriptions for business purposes, without much regard for their respective factual similarity or dissimilarity.³ The subscription for a business purpose usually involves a set of facts to which the orthodox "benefit-detriment" rule of consideration can be applied without indulging in judicial contortions.⁴ The trouble starts when the court, wishing to reach a "just" result, applies the reasoning used in a business subscription case to a charitable subscription fact situation.⁵

The charitable subscription in question may range all the way from the loosely drawn promises of the earlier cases⁶ to the legally

¹A much quoted definition reads: "A charity in the legal sense may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds and hearts under the influence of education or religion, by relieving their bodies from disease, suffering or restraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burden of government."—Gray J, in *Jackson v. Phillips*, 96 Mass. 539, 556 (1867).

²"An attempt to reconcile all the cases which have been adjudged, touching the validity of voluntary engagements to pay money for charitable, educational, religious or other public purposes, would be fruitless; for, while circumstantial differences in the cases will explain and satisfactorily account for some of the diversities in the decisions, it will be found that there is, to some extent, a want of harmony in the principles and rules applied as tests of validity to that class of undertakings"—Allen J, in *Barnes v. Perine*, 12 N. Y., 18, 23, (1854).

³The following is a typical definition of the term "subscription contract", which is used as a sort of blanket under which to tuck both types of fact situation: "A subscription contract is a legal obligation to make a payment in money or its equivalent in furtherance of a charitable, business or other undertaking."—37 Cyc. 482.

⁴1 WILLISTON, CONTRACTS, (1920) § 117 and cases cited.

⁵This quotation illustrates the usual approach: "But while it is well established that voluntary subscriptions are, when considered alone and unsupported by any other element, unenforceable, the necessary consideration to support such contracts is usually found in the expenditure of money, the performance of work, or the incurring of some liability by the promisee on the faith of the subscription." I ELLIOTT, CONTRACTS (1913) § 228.

⁶In *Trustees of Farmington Academy v. Allen*, 14 Mass. 171, (1817) the action was brought upon the following paper: "Town of Farmington, county of Kennebeck, December 1805. Whereas the establishment of an academy in this part of the county for instruction in the different branches of useful learning is rendered necessary by our distance from any literary institution of this kind, and will meet with the approbation of all friends to the public good, by affording the means of diffusing knowledge to the rising generation; and whereas the raising of a suitable fund by the voluntary donations of individuals is requisite, before the necessary assistance of the legislature can be obtained;—we, the subscribers, hereby engage to be accountable for the payment of the respective sums set

"bullet proof" subscription blank used in present day drives for endowment funds.⁷ But the approach of the American court in either instance often varies little. The court must find some consideration for the subscriber's promise in order to saddle contractual liability upon him.⁸ This fore-ordained result is reached in one of several ways. And a study of the cases reveals that some courts are not always clear in their opinions as to which theory they are applying. Hence, numerous decisions embody a jumble of the various methods of finding consideration hereafter discussed.

I

The court may regard the charitable subscription as the offer of a unilateral contract. Under this view, as soon as the promisee charity, relying on the subscription, does anything towards carrying out the project for which the subscription was given, or "spends money," or "incurs liability" in that connection, contractual legal relations arise.⁹ If there is an express request by the subscriber for the act in

against our respective names, as a fund for and to be applied to the purpose aforesaid; to be payable to such persons as shall or may be by the legislature appointed trustees to any academy situated near the centre of the town of Farmington, as may be granted by virtue of the funds hereby raised; and also to pay the interest yearly on such respective sums, to commence from the time of the grant of such academy."

"Subscribers to the fund for building the Cathedral of Learning at the University of Pittsburgh signed a blank reading: "In consideration of the University of Pittsburgh obtaining subscriptions from others, I promise to pay to the University of Pittsburgh, or order, to enable the University to inaugurate its building program, the sum of . . . dollars as follows: . . . If not paid in full, balance payable in . . . equal installments beginning June 30, 1925. Name . . . (Seal), Street, . . ., City . . . Make checks payable to the order of R. B. Mellon, Treasurer, 314 Smithfield St., Pittsburgh, Pennsylvania."

In the Matter of Conger, 113 Misc. 129, 184 N. Y. Supp. 84 (1920) recovery was allowed on the following subscription signed by the decedent: "Centenary Estate Pledge for the Board of Home Missions and Church Extension and for the Board of Foreign Missions of the Methodist Episcopal Church. (Manly W. Conger) March 20, 1919. In consideration of my interest in Christian Missions, and on condition that the above named boards secure other subscriptions for this cause, and for value received, I hereby promise and agree to pay to the Board of Home Missions and Church Extension and the Board of Foreign Missions of the Methodist Episcopal Church, at 150 Fifth Ave., New York City, the sum of One Thousand Dollars (\$1,000.00) which shall become due one day after my death, payable out of my estate, interest at the rate of . . . per annum from date."

⁷See notes: (1925) 38 A. L. R. 868; (1914) 48 L. R. A. (n. s.) 784; (1922) 8 CORNELL LAW QUARTERLY 57; (1925) 23 MICH. L. REV. 910; (1914) 62 U. PA. L. REV. 296 (1925); 3 WIS. L. REV. 275; (1924) 34 YALE L. J. 99.

⁸Stone v. Prescott Special School Dist. 119 Ark. 553, 178 S. W. 399 (1915); Y. M. C. A. v. Estill, 140 Ga. 291, 78 S. E. 1075, 48 L. R. A. (n. s.) 783, Ann. Cas. 1914 D. 136 (1913); Miller v. Oglethorpe University, 24 Ga. App. 388, 100 S. E. 784 (1919); Scott v. Triggs, 76 Ind. App. 69, 131 N. E. 415 (1921); Brokaw v. McElroy, 162 Iowa 288, 143 N. W. 1087, 50 L. R. A. (n. s.) 835 (1913); Erdman v. Trustees of Eutaw M. P. Church, 129 Md. 595, 99 Atl. 793 (1917); Cottage St. Church v. Kendall, 121 Mass., 528 (1877); *In re Stack's Est.*, 164 Minn. 57, 204 N. W. 546 (1925); Irwin v. Lombard Univ., 56 Ohio St. 9, 46 N. E. 63, 36 L. R. A. 239, 60 Am. St. 727 (1897); Univ. of Penn'a's Trustees v. Coxe's

question the court is faced with less difficulty.¹⁰ But such a fact situation is the exception, for generally the request must be implied.¹¹ This theory of regarding the act of the promisee as accepting the offer of the promisor, thereby forming a binding contract, seems to be the single approach of the New York courts,¹² although the cases say that, unless at least an implied request for the act can be found, the doing of the act itself is not enough. However, in the more recent decisions from that jurisdiction the court is most ingenious in finding the necessary implication. In the much cited *Keuka College v. Ray*,¹³ the Court of Appeals lays down the prevailing New York rule:

EXRS., 277 Pa. 512, 121 Atl. 314 (1923); *Furman Univ. v. Waller*, 124 S. C. 68, 117 S. E. 356, 33 A. L. R. 615 (1923); *Eastern States Agr. and Ind. League v. Vail's Est.* 97 Vt. 495, 124 Atl. 568 (1924); *Y. M. C. A. v. Olds Co.* 84 Wash. 630, 147 Pac. 406, L. R. A. 1917 F. 1132 (1915); *Y. M. C. A. v. Rankin*, 22 B. C. 588, 27 D. L. R. 417 (1916); *Y. M. C. A. v. Wood*, 22 B. C. 588, 27 D. L. R. 420 (1916) *Sargent v. Nicholson*, 26 Man. L. R. 53, 25 D. L. R. 638 (1915).

¹⁰*New Jersey Orthopaedic Hosp. v. Wright*, 95 N. J. L. 462, 113 Atl. 144 (1921).

¹¹See (1925) 38 A.L.R. *supra* note 8, at 887. "Yet while the courts rather than violate an old and established rule of law hold that a naked promise to pay money for a public object cannot be enforced for the want of consideration, they have also decided with great unanimity that if the promise itself, or any other promise upon which it is founded, contains a request, or that which by any fair construction can be construed as a request to the trustees or others representing the institution for whose benefit the promise is made, to do any act, or to incur any expense, or to undergo any inconvenience, and such institution does the act, or incurs the expense, or submits to the inconvenience, this request and performance on behalf of the institution is a sufficient consideration to support the promise"—*Watson J.*, in *Philomath College v. Hartless*, 6 Or. 158, 164 (1876).

¹²The attempt of Chancellor Walworth in *Stewart v. The Trustees of Hamilton College*, 2 Denio, 403, (N. Y. 1845) to inject into the law of New York the rule that the promises of the various subscribers shall be consideration for each other seems to have met with immediate disfavor. "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. 352, 3 L. R. A. 468, 8 Am. St. Rep. 767 (1889).

¹³167 N. Y. 96, 100, 60 N. E. 325 (1901). It is difficult to determine where the courts of New York stood on the question prior to the *Keuka College* case. See 8 CORNELL LAW QUARTERLY *supra* note 8. In *Trustees of Hamilton College v. Stewart*, 1 N. Y. 581, (1848) the subscribers signed the subscription paper on condition "that the moneys collected on it shall be permanently invested in a productive fund, the interest of which shall be applied to the payment of the salaries of the officers," and, on condition that two attorneys named therein should certify that responsible subscriptions totalling \$50,000 had been obtained by a certain date. The plaintiff college alleged performance of the conditions precedent and showed that professors had been hired on the strength of the fund "pledged". The Supreme Court found for the plaintiff. The Court of Errors reversed, largely on the grounds that *bona fide* subscriptions for \$50,000 had not been raised by the date named. (2 Denio 403). Subsequently the Court of Appeals

“In this peculiar class of agreements to pay money, those which are conditioned merely upon all subscriptions for a like purpose

approved the decision of the Court of Errors, but on the ground that as the transaction showed no request, express or implied, by the subscribers that, the plaintiff should do anything, consideration for the several subscriptions was lacking. In *Barnes v. Perine*, *supra* note 2, the defendant subscribed \$150 of a \$5,000 fund for building a new church. The court found that the plaintiff had done acts and incurred obligations “upon the strength of the promise of the defendant and at his request.” The request consisted in the attendance of defendant at congregational meetings during which he failed to register any protest to the building program there formulated. In *Presbyterian Society v. Beach*, 74 N. Y. 72 (1878) the defendant signed a paper in which the subscribers bound themselves for the amounts set opposite their respective names, provided \$6,000 be subscribed. The object was the building of a church. The subscription was enforced on the ground that work was begun on the strength of the several subscriptions and that the plaintiff had expressed no dissent at congregational meetings. The court makes no specific mention of the need for a request by the promisor. In *Roberts v. Cobb*, 103 N. Y. 600, 9 N. E. 500 (1886) the subscriber promised to contribute \$2,500 towards the payment of a church mortgage if the pastor of the church “would secure pledges for the balance, \$12,000.” The remaining sum was subscribed. The subscriber died after part payment, and her estate was held. Consideration for her promise was found in the acts of the pastor in obtaining the additional subscriptions. Again the court did not mention specifically the need for a request.

Three years later the leading case of *Presbyterian Church of Albany v. Cooper*, *supra* note 12, was decided by the Court of Appeals. The defendant's intestate signed a paper in which the subscribers promised to pay the amounts set opposite their respective names on condition that \$45,000 be subscribed within a year. Here again the object of the subscription was the paying off of a church mortgage. The court, relying on *Hamilton College v. Stewart*, refused to enforce the subscription, stating that “neither the church nor the trustees promise to do anything, nor are they requested to do anything, nor can such a request be implied.” The previous cases of *Barnes v. Perine* and *Roberts v. Cobb* were disposed of by saying “there was, as was held by the court in each of these cases, a subsequent request by the subscriber to the promisee to go on and render service or incur liabilities on the faith of the subscription, which request was complied with, and services were rendered or liabilities incurred pursuant thereto. It was as if the request was made at the very time of the subscription, followed by performance of the request by the promisor.”

The cases of *Presbyterian Church of Albany v. Cooper* and *Roberts v. Cobb*, decided within three years of each other, seem to the writer difficult to reconcile. The former case was used as a precedent in denying recovery upon a subscription paper where the request was lacking in *Twenty-third St. Baptist Church v. Cornell*, 117 N. Y. 601, 23 N. E. 177 (1890). Then came *Keuka College v. Ray* in 1901 and, despite the desperate effort of the court to distinguish it from the *Presbyterian Church of Albany v. Cooper*, the writer believes that the Court of Appeals only was keeping abreast of the times and could no longer deny recovery on a subscription to a charity, especially after the charity had acted upon it. The court showed the necessary request in the *Keuka College* case by admitting the testimony of the president of the trustees of the proposed college, who obtained the subscription, as to what was said and done at the time the “pledge” was made. From these acts and words the court implied a request by the promisor. Recent New York inferior court decisions acquiesce in the rule of the *Keuka College* case. The action in the *Matter of Conger* was brought on the subscription paper set out in note 7 *supra*. The surrogate's court of Albany County held that the act of the missions boards in soliciting subscriptions subsequent to Conger's furnished sufficient consideration for his promise to pay. The court sets out the rule of the *Keuka College* case but does not discuss where it finds the necessary request. The war chest cases, *Mechanicville War Chest Inc. v. Ryan*, 110 Misc. 448, 181 N. Y. Supp. 576 (1920) and *Mechanicville War Chest Inc. v. Butterfield*, 110 Misc. 257, 181 N. Y. Supp. 428 (1920) bring in the additional fact that the first payment of twelve installments was to admit the

aggregating a certain amount by a certain day, are deemed to lack the legal consideration to make them enforceable. The doctrine, however, may be regarded as well established that, if money is promised to be paid upon the condition that the promisee will do some act, or perform certain services, then the latter, upon performance of the condition, may compel payment. Nor need a request to the promisee to perform the services be expressed in the instrument; it may be implied."

The action in this case was based on a promissory note for \$500, given in "consideration of the founding of a college at Keuka Park, Yates County, N. Y."

The fallacious reasoning in this type of case has been exposed many times, yet the courts continue to indulge in it. In the first place, the subscriber knows that he is making the promise of a gift and nothing more.¹⁴ The charity knows that it is not buying a promise in

promisor subscriber to membership in the promisee corporation. These cases were decided by the Saratoga County court.

In the Butterfield case, where the defendant had paid part of his "pledge," the court found for the plaintiff charity, ruling that "it can make little difference in the determination of the present case whether such liability shall be predicated upon the contract of a member to pay his dues . . . or upon a consideration of the promise as an enforceable subscription contract." The Keuka College case is cited. The decision seems based on the fact that funds were expended and liabilities incurred upon the strength of the subscriptions, but nothing is said concerning the need for a request. In the Ryan case the subscriber had not paid anything and so was not a member of the corporation. But the court found for the War Chest, again citing the Keuka College case. This time the court suggested that the promisor, by subscribing, had requested the promisee to assume the burden of relieving him from numerous scattered calls for contributions, as the War Chest had centralized the work of sundry war charities in Mechanicville. In *Russian Symphony Society, Inc. v. Holstein* (1922) the action was upon a subscription paper, the undersigned "desiring to help the Russian Symphony Society to produce and conduct a series of high class orchestral, concerts . . .". The defendant subscribed \$50. The Appellate Term (113 Misc. 344) found for the defendant on the grounds (1) that the agreement was void for want of mutuality because "neither the plaintiff nor any other party undertakes any promise reciprocal to the agreement of the defendant to pay the \$50," and (2) that the agreement could not be construed "either as an offer or request on the part of the defendant so as to make it binding in the event of performance by the plaintiff." The Appellate Division (199 App. Div. 353, 192 N. Y. Supp. 64) reversed and held the plaintiff bound, reasoning that there "was an express request on the part of the subscribers to the plaintiff to give the concerts, and an express agreement in the event that the concerts were given, to pay each year the amount subscribed; and when the subscription agreement was accepted and acted upon by the plaintiff, there arose an implied agreement on its part to produce the concerts in accordance with the agreement . . ."

¹⁴"The very term charitable subscription indicates that the subscriber's promise is made as a gift and not in return for consideration. There is no bargain between the parties. Even if one were attempted it is open to doubt whether the acceptance or promise to accept a pure benefit—as a sum of money—can legally be sufficient consideration for a promise to confer the benefit; but this point need not be troublesome because no bargain of the sort is contemplated." I WILLISTON, *op. cit. supra* note 4, § 116.

"It is an alchemist's art of strange order which transforms a promise to make a purely voluntary donation into a contractual offer, upon the election of the promisee to suffer a detriment." (1922) 8 CORNELL LAW QUARTERLY 57, 58.

"A charitable subscription, by its very name, is a gratuitous offering. But

the mercantile sense.¹⁵ But the court, in order to fulfill the requirements of a contract, searches for some condition in the transaction which bears a resemblance to valuable consideration in the "detriment" sense, and the predestined result is reached. Again, as Professor Williston points out, "if the subscription could be treated as requesting a consideration, the consideration requested is certainly not beginning work or incurring liability, but doing the whole work towards which the subscription was made. Therefore, if the subscription was an offer at all, it would not ripen into a contract until the work had been done."¹⁶ But the courts continue to talk about "beginning work" and "incurring liability" as being sufficient to bring into existence contractual legal relations.¹⁷ The *Los Angeles Traction* case¹⁸ has been the objective of several stormy assaults. The attack upon it charges that the California court was flying in the face of established rules governing acceptance of the offer of a unilateral contract.¹⁹ A charitable subscription "accepted" in similar fashion, and the promisor adjudged bound upon his promise, no longer excites more than a surface ripple on the judicial sea.²⁰

rather than discard the strained rule of thumb of benefit and detriment, the courts, in these cases, have with extraordinary discernment discovered consideration in the bargain sense in legal technicalities. But the explanations are not satisfactory. If the courts go outside the written agreement to find a consideration in a mere peppercorn, it is not rash to predict that a subscription put into the form of a bargain will be enforced." (1924) 24 COL. L. REV. 896, 899.

¹⁵The TENTATIVE RESTATEMENT adopts the "bargain" theory of consideration. "Consideration for a promise is (a) an action other than a promise, or (b) a forbearance, or (c) the creation or destruction of a legal relation, or (d) a return promise, bargained for and given in exchange for the promise." CONTRACTS, TENTATIVE RESTATEMENT, No. 2, § 73.

¹⁶1 WILLISTON, *loc. cit. supra* note 14.

¹⁷See cases *supra* note 9.

¹⁸*Los Angeles Traction Co. v. Wiltshire*, 135 Cal. 654, 67 Pac. 1086 (1902).

¹⁹See *Ashley, Consideration Other than a Counter Promise* (1910) 23 HARV. L. REV. 159, 163; *Wormster, The True Conception of Unilateral Contracts* (1916) 26 YALE L. J. 136, 141; (1902) 2 COL. L. REV. 417; (1918) 3 CORNELL LAW QUARTERLY 290, 291.

²⁰What suffices legally as an "acceptance" of the subscription, when regarded as the offer of a unilateral contract, varies in the different jurisdictions. See 38 A. L. R. *supra* note 8, at page 890. It has been held that the act of the promisee in obtaining other subscriptions subsequent to that of the promisor is sufficient to turn the offer into a binding contract. *Converse's Est.*, 240 Pa. 458, 87 Atl. 849 (1913); *De Pauw Univ. v. Ankeny*, 97 Wash. 451, 166 Pac. 1148 (1917). In *Board of Trustees v. Noyes*, 165 Iowa 601, 146 N. W. 848 (1914) the use of the promisor's subscription as an inducement to others to subscribe was held to make it binding. In *Brokaw v. McElroy*, *supra*, note 9, at page 291, the court says: "If it is within the contemplation of the contributor that the fact of his contribution may be announced to others as an inducement to contributions by them, and if additional contributions be made by reason of such inducement even in part, it operates as a sufficient consideration for the promise of the first contributor." Similar suggestions appear in the Pennsylvania and Washington cases above cited. *Contra*, *Cottage Street Church v. Kendall*, *supra*, note 9; *Methodists' Etc., Assn. v. Sharp's Exec'r.*, 6 Mo. App. 150 (1878).

Where the subscription is to become binding upon the raising of a certain

II

In another much smaller group of cases, the courts endeavor to leap the consideration hurdle by finding that the various subscribers to a charitable project make a multi-lateral contract among themselves and that their mutual promises, each running to the charity, are consideration for each other.²¹ In *Higert v. Trustees of Indiana Asbury University*,²² a typical fact situation is presented. The promisors were citizens living in or near the city of Greencastle, Ind. The promisee was the already organized Indiana Asbury University. The amount to be raised was \$15,000 to be used as a building fund, and each subscriber, including the defendant, promised to give "one per cent on the amount of property held by us, severally, in said city and township, as shown by the tax duplicate of said county. . . ." The court, in finding for the plaintiff promisee, cited with approval the reasoning found in the California case of *Christian College v. Hendley*:²³

"If a number of persons subscribe to a paper in which they promise to contribute money for the accomplishment of an object of interest to all, as the erection of a building for a college, and which object cannot be accomplished, save by their common performance, their mutual promises constitute mutual obligations, and are a sufficient consideration to support the promise of each."

This approach is found more often in the earlier cases and it is by no means limited to those fact situations where the promisors place

amount by the charity, it has been held frequently that when the stipulated sum is subscribed the promisor is bound. *Thompkins v. Dinnie*, 21 N. D. 305, 130 N. W. 935 (1911). *Contra*, *Keuka College v. Ray*, *supra* note 13; *Hamilton College v. Stewart*, *supra* note 13.

²¹*Christian College v. Hendley*, 49 Cal. 347 (1874) [Judgment for plaintiff college reversed on another ground.]; *Owenby v. Georgia Baptist Assembly*, 137 Ga. 698, 74 S. E. 56, Ann. Cas. 1913 B, 238 (1912) [The court applied § 4246 of the Georgia Civil Code (1910): "In mutual subscriptions for a given object, the promise of the others is good consideration for the promise of each." The court found also that the plaintiff charity had "expended large amounts of money" in reliance upon the subscription]; *Willingham v. Benton*, 25 Ga. App. 412, 103 S. E. 497 (1920) [Also applying the Georgia Civil Code *supra*. This section, however, does not apply to oral promises and in *Y. M. C. A. v. Estill*, *supra* note 9, the court found consideration in the "liabilities incurred" by the charity in reliance upon the oral promise.]; *Higert v. Trustees of Indiana Asbury Univ.* 53 Ind. 326 (1876); *Petty v. Trustees of Church of Christ*, 95 Ind. 278 (1883); *Watkins v. Eames*, 9 Cush. (63 Mass) 537 (1852) [Said to be *dictum* in *Cottage Street Church v. Kendall*, *supra* note 9. The "meeting house" in the *Watkins* case "was commenced and completed on the faith of the several subscriptions"]; *Waters v. Union Trust Co.*, 129 Mich. 640, 89 N. W. 687 (1902); *Congregational Society v. Perry*, 6 N. H. 164 (1833); *Baptist Female Univ. v. Borden*, 132 N. C. 476, 44 S. E. 47 (1903); *Edinboro Academy v. Robinson*, 37 Pa. 210, 78 Am. Dec. 421 (1860).

²²*Supra* note 21.

²³*Ibid.*

their names on a single paper.²⁴ But, as one commentator suggests, "a review of the cases which have been decided upon the principle that the mutual promises of the subscribers raise a sufficient consideration, shows that very few squarely decide that mutual promises alone are enough."²⁵

One concludes after reading this group of cases that the courts reached the desired result by reasoning even less convincing than that contained in those where consideration is found in work begun or liability incurred.²⁶ X and Y each *may* make a promise direct to the other that he will pay a certain amount to Z College. The agreement may be so drawn as to make the parties mutually bound to each other.²⁷ In jurisdictions where a donee beneficiary is allowed to sue, Z College might recover as against one or the other promisor. But this usually is not what happens. Ordinarily, X makes no promise to Y, or Y to X. Instead, each makes a promise direct to the Z College. And when the Z College sues X, it requires a considerable stretch of judicial imagination to visualize in the promise of Y to Z a consideration for the promise of X to Z.²⁸

²⁴Baptist Female Univ. v. Borden, *ibid.*

²⁵(1925) 3 WIS. L. REV. 275, 277.

²⁶The early New Hampshire cases show clearly that the courts in that jurisdiction recognized the problems arising out of this type of fact situation. In *George v. Harris*, 4 N. H. 533, (1829) twenty-nine persons subscribed to a fund for erecting a court house in the town of Plymouth. One subscriber died and another, the defendant, refused to pay. In an action by the twenty-seven other survivors recovery was allowed, the court finding that "the consideration upon which the promise of each is founded is the promise of the rest to contribute to an object, which all were desirous to accomplish." In *Reg congregational Society v. Perry* (1833), *supra* note 13, the court extended the principle of *George v. Harris* to cover a charity case where the charity itself, apparently a corporation, sued in its own name. In allowing a recovery on a subscriber's promise, the court said: "When several agree to a common object, which they wish to accomplish, the promise of each is good consideration for the promises of the others." But in *Moore v. Chesley*, 17 N. H. 151 (1845) the court refused to allow a committee chosen from among thirty-four subscribers to a church building fund to maintain an action against a delinquent fellow-subscriber, on the ground that "the cases in which others than the parties to the contract are authorized to sue . . . (are) . . . those only in which the contract is made for the express benefit of such third parties." On the authority of *George v. Harris*, the court said that an action could be maintained only by *all* the other subscribers joining as parties plaintiff. And in *Curry v. Rogers*, 21 N. H. 247 (1850), a similar result was reached when an action was attempted by a building committee which had been named by the subscribers from persons who had not joined in the subscription paper.

²⁷*In re Leigh's Est.*, 186 Iowa 931, 173 N. W. 143 (1919); *Masonic Assn. v. Coleman's Est.*, 222 Mich 599, 193 N. W. 219 (1923).

²⁸*Cottage Street Church v. Kendall*, *supra* note 9, at 530.

"Indeed the earlier subscriptions would be open to the objection of being past consideration so far as a later subscription is concerned"—I WILLISTON, *loc. cit. supra* note 14.

"The very question is, are the promises binding, for if not, then they are no consideration for each other. To say that they are binding because they are such considerations, is only to say that they are binding because they are binding; it assumes the very thing in question"—I PARSONS, *CONTRACTS*, (8th ed.

III

There is a small group of cases in which charitable subscriptions have been held binding contractually on the theory that the acceptance of the offer by the trustees of the charity carries with it an implied counter-promise that the subscription will be applied to the object for which it was made; and this implied counter-promise is deemed consideration for the promise of the subscriber to pay.²⁹ Seemingly, under this theory, no actual expenditures need be made by the trustees in order to bind the promisor. But the cases where such facts appear are few and "some at least of these decisions are probably no more than a very liberal application of the rule that doing work, incurring liabilities, etc., on the faith of the subscription, supplies the consideration."³⁰ Professor Williston makes short work of this group of cases by stating that "a promise to give a trustee money in trust for another is no more binding than a promise to give the money directly to the beneficiary."³¹ And it is obvious that the trustees by applying the subscription to purposes of the trust are doing nothing more than is required of them legally by the very nature of their office.

IV

The doctrine of consideration in contract law grew up in an age not faced with the legal problems arising out of charitable subscriptions totaling millions annually. It is, therefore, not surprising to

1893) 454. See Corbin, *Non Binding Promises as Consideration* (1926) 26 COL. L. REV. 550.

"One of the numerous ways of making out a fictitious consideration for charitable subscriptions is to regard the promises of the subscribers as mutual promises to pay the beneficiary, who is then allowed to sue as on a contract made for its benefit. In fact in such subscriptions the promise on a fair construction almost always runs directly to the beneficiary or to trustees representing it."—Williston, *Contracts for the Benefit of a Third Person* (1902) 15 HARV. L. REV. 767, 784.

²⁹Johnson v. Wabash College, 2 Ind. 555 (1851), Roche v. Roanoke Classical Seminary, 56 Ind. 198 (1877), Barnett v. Franklin College, 10 Ind. App. 103, 37 N. E. 427 (1893); Collier v. Baptist Education Society, 8 B. Mon. 68 (Ky. 1847); Trustees Ky. Female Orphan School v. Fleming, 10 Bush. 234 (Ky. 1874); Ladies' Collegiate Inst. v. French, 16 Gray 196 (Mass. 1860); *In re Griswold's Est.*, 113 Neb. 256, 202 N. W. 609, 38 A. L. R. 858 (1925); Troy Acad. v. Nelson, 24 Vt. 189 (1852). The following cases also are cited frequently in support: Maine Central Institute v. Haskell, 73 Me. 140 (1882); Helfenstein's Est., 77 Pa. 328 (1875); Board of Foreign Missions v. Smith, 209 Pa. 361, 58 Atl. 689, (1904). In the Haskell and Smith cases the promisee charity had "incurred liability" upon the faith of the subscription to such an extent that it is difficult to divorce these decisions from the group appearing in note 9 *supra*. Helfenstein's Est. contains a *dictum* only upon the point.

³⁰(1925) 38 A. L. R. 868, 878.

³¹WILLISTON, *loc. cit. supra* note 14. "A promise to give money to one to be used by him according to his inclination and for his personal ends is prompted only by motive. But a promise to pay money to such an institution to be used for such defined and public purposes rests upon consideration." Shauck, J., in *Irwin v. Lombard Univ.*, *supra* note 9 at page 21.

find that some courts, wearying at the task of pouring new wine into old bottles, have sought a substitute process. There are a few cases which apply the doctrine of *Ricketts v. Scothorn*³² to this type of fact situation and allow the promisee charity to recover, on the theory that the promisor subscriber is "estopped" from setting up the lack of consideration for his promise after the promisee has acted upon it.³³ It will be seen at once that these courts are reaching the same result as those whose decisions already have been discussed under the "incurring liability" theory. One group labels the act of the promisee "consideration" for the subscriber's promise. The other group describes the same act as "sufficient to estop" the promisor from dodging his obligation by setting up lack of consideration for his promise.

The difficulty with this latter view is that it stretches the orthodox legal concept of estoppel almost as far as the previous approach extended the equally orthodox legal concept of consideration in order to cover a set of facts to which neither concept has any application. Ordinarily, what actually happens is that A signs a sub-

³²57 Neb. 51, 77 N. W. 365, 42 L. R. A. 794, 73 Am. St. Rep. 491 (1898).

³³*Beatty v. Western College*, 177 Ill. 280, 52 N. E. 432, 42 L. R. A. 797, 60 Am. St. Rep. 242 (1898); *Simpson Centenary College v. Tuttle*, 71 Iowa 596, 33 N. W. 74 (1887) [The court in this case approved the "estoppel" principle, but found for the defendant promisor because the promisee charity had failed to carry out the purpose for which the subscription was made.]; *School Dist. v. Sheidley*, 138 Mo. 672, 40 S. W. 656, 37 L. R. A. 406, 60 Am. St. Rep. 576 (1897) [The court said, p. 684: "If the expense was incurred and the liability created in furtherance of the enterprise the donor intended to promote and in reliance upon the promises, they will be taken to have been incurred and created at his instance and request, and his executors will be estopped to plead want of consideration."]; *Trustees of Third Pres. Church v. Caldwell*, 4 Tenn. C. C. A. 30 (1913); *Troy Academy v. Nelson*, 24 Vt. 189 (1852) [While the court found consideration for the subscriber's promise in the duty of the trustees to apply the fund raised "as directed by the subscribers to this fund," the suggestion is made that, even if such consideration did not exist, the promisor should be estopped from pleading lack of same.]

Some of the Pennsylvania cases show a tendency to adopt the "estoppel" principle. In *Reimensnyder v. Gans*, 110 Pa. 17, 20, 2 Atl. 425 (1885) the Supreme Court says by way of *dictum*: "A subscription to a charity embodies in it no previous consideration; hence, . . . it can be operative only by way of estoppel; and unless others have been thereby induced to subscribe, or some undertaking has been commenced or continued on the faith of it, it cannot be regarded as a binding contract." In *Patchen's Est.* 22 Pa. Dist. 56, 57 (1913) the following *dictum* appears: "The present rule adopted by our courts seems to be a promise to give to a charity must be supported by consideration or some element of estoppel be shown." Similar expressions are found in *Cohen v. Congregation*, 30 Pa. Co. Ct. 623 (1905) and in *First Cong. Church v. Gilles*, 17 Pa. Co. Ct. 614 (1895). However, in all these Pennsylvania cases either the subscription failed because the beneficiary had not acted in reliance upon it, or the acts which it did do were deemed to satisfy the requirements of consideration.

The Harvard War Memorial subscription blank seems drawn to meet the requirement of "promissory estoppel." It reads: "To enable Harvard College, in reliance upon this and other subscriptions, to build and endow a University Church as a memorial to the Harvard men who lost their lives in the World War, I agree to give to the President and Fellows of Harvard College \$. . ."

scription blank promising to pay a certain sum of money to the B Hospital or to the C University at some future date. A fully intends to carry out his promise at the time he makes the subscription. But before the due date A changes his mind for reasons sufficient unto himself. Meanwhile, the B Hospital or the C University has incurred certain obligations, relying on the payment of A's "pledge" when due. Just how A, when sued, is "estopped" to deny that any consideration was given for his promise to make a future gift is difficult to reconcile with certain firmly grounded rules as to what constitutes an estoppel.³⁴ Says Bigelow: "The representation in order to work an estoppel must be of a nature to lead naturally, *i. e.*, to lead a man of prudence to the action taken. Hence, in the first place it must generally be a material statement of *fact*."³⁵ A, in the hypothetical situation assumed above, makes a promise of a future gift which is relied upon and which at the time of making in most cases he intends to carry out. It is upon this promise to pay in the future, rather than upon any present existing fact, which B relies. Even if A's mental state at that moment is regarded as the "fact"³⁶ upon which the promisee relied, A has not deceived the promisee by mis-stating the "fact" in question.

If "estoppel" is to be used as the reason for allowing the promisee to recover in these charitable subscription cases, then the only logical method for attaining this result is to broaden our present-day

³⁴*Ins. Co. v. Mowry*, 96 U. S. 544, 547 (1877); *White v. Ashton*, 51 N. Y. 280 (1873); *Jorden v. Money*, 5 H. L. Cas. 185 (1854). Cf. *Freeman v. Freeman*, 43 N. Y. 34 (1870).

"Were we to get away from the solid ground that a representation to be binding must be either as to a present fact, or else amount to a contract, it would be difficult to formulate any principle of action." EWART, ESTOPPEL, (1900) 71. Mr. Ewart, at page 69, using *White v. Walker*, 31 Ill. 422 (1863) as an illustration, shows the fallacy of attempting to apply an estoppel to a representation of intention, unless a contractual relation exists between the parties. In the charity cases, if all the elements of a contract are present, then there is no need for falling back upon an estoppel.

"I have always understood it to have been decided in *Jorden v. Money* . . . that the doctrine of estoppel by representation is applicable only to representations as to some states of facts alleged to be at the time actually in existence, and not to promises *de futuro*, which, if binding at all must be binding as contracts."—Earl of Selbourne in *Maddison v. Alderson*, 8 App. Cas. 467, 473, 52 L. J. Q. B. 737 (1883).

³⁵BIGELOW, ESTOPPEL, (6th ed. 1913) 634. At page 636 the same author continues: "The representation or concealment must, in the second place, like a recital in all ordinary cases have reference to a present or past state of things; for if a party make a representation concerning something in the future, it must generally be a mere statement of intention or opinion, uncertain to the knowledge of both parties, or it will come to a contract, with the peculiar consequences of a contract, or to a waiver of some term of a contract or of the performance of some other kind of duty.

³⁶"The state of a man's mind is as much a fact as the state of his digestion."—Bowen, L. J. *Edgington v. Fitzmaurice*, 29 Ch. D. 459, 483; 55 L. J. Ch. 650 (1885).

concept of that term and introduce "promissory estoppel" or "quasi-estoppel."³⁷ In other words, the "estoppel" relied upon in these few charity cases is not a true estoppel at all but something else, just as the consideration relied upon in the New York charity cases is not our orthodox "benefit-detriment" consideration at all but something else. If the term "quasi-estoppel" is necessary to reach the desired result, why not coin a new legal term, "quasi-consideration," in order to bring about a like result?

V

It has been the aim of this discussion thus far to point out the fact that if the American courts had adhered to the generally accepted rules of either consideration or of estoppel, they would have been forced (1) to reach the result of the English courts which refuse to enforce gratuitous subscriptions,³⁸ or (2) to hold these subscriptions enforceable, but upon other reasoning than that contained in the cases. It is conceded generally that the English rule is not a happy one and fails to meet the ever pressing need of holding subscribers to charities legally bound upon their promises. And the hundreds of American charitable subscription cases attest the fact that our courts intend to enforce these promises, even though they are compelled to warp either the doctrine of consideration or that of estoppel in order to reach the desired result. The cause for the unfortunate reasoning contained in the decisions is that there exists a sound public policy which requires these subscriptions to be enforced, and the courts do not intend to permit promisors to go scot free because prevailing common law doctrines lack the breadth necessary to hold them bound. The consideration found may be fictional, the estoppel relied upon may be a mere "statement of a result" which the court wishes to reach, but under modern decisions the charity is bound to win every time.

The question then arises as to how harmony may be effected between the foreordained holdings of charitable subscription cases

³⁷This suggestion is made by WILLISTON, *op. cit. supra* note 4, § 139, and in COMMENTARIES ON CONTRACTS, TENTATIVE RESTATEMENT No. 2, 16 *et seq.*

³⁸*In re Hudson*, 54 L. J. Ch. 811 (1885); CHITTY, CONTRACTS (17th ed. 1921) 34. The Canadian courts have attempted to distinguish *In re Hudson*. *Sargent v. Nicholson*, *supra* note 9, 25 D. L. R. at page 639; *Y. M. C. A. v. Rankin*, *supra* note 9, 27 D. L. R. at page 418.

"A promise to contribute money to charitable purposes is a good example of the class of promises which, though they may be laudable and morally binding, are not contracts." POLLOCK, CONTRACT (9th ed. 1921) 178.

The early American cases held charitable subscriptions unenforceable. *Foxcroft Acad. v. Favor*, 4 Me. 382 (1826); *Phillips Limerick Acad. v. Davis*, 11 Mass. 112 (1813); *Trustees of Farmington Academy v. Allen*, 14 Mass. 171, 7 Am. Dec. 201 (1817); *Brigewater Acad. v. Gilbert*, 2 Pick. 578, 3 Am Dec. 457 (Mass. 1824); *Stoddard v. Cleveland*, 4 How. Pr. 148 (N. Y. 1849).

which will come before American courts in the future, and sound legal principle? Should our prevailing doctrine of consideration be so extended as to bring these cases within it? Perhaps an affirmative answer is to be implied from the following words of Professor Corbin, not, however, written with reference to the charitable subscription case: "We must start anew, therefore, and construct inductively from the collected decisions down to date a new definition of 'consideration', a new definition of 'sufficient consideration' and a new rule determining the enforceability of promises."³⁹ However, the tentative *Restatement No. 2* of the Law of Contracts adheres to the "bargain theory" of consideration, and, if the foregoing analysis contained in this paper is sound, such a theory leaves the charitable subscription cases entirely outside.

Should our prevailing doctrine of estoppel be so extended as to bring these cases within it? This seems to be the solution offered by the tentative *Restatement*. For, after defining consideration in section 73 it enumerates in sections 84 to 88 a group of "informal contracts" which require neither an expression of assent nor a consideration for their formation. But, seemingly, when section 88 is reached,⁴⁰ the Restators have in mind the incorporation therein of the "promissory estoppel" theory advanced by Professor Williston in section 139 of his treatise on *Contracts*. The *Commentaries* to said *Restatement* suggests⁴¹ that section 88 is offered as a solution for the problem of the charitable subscription cases. If so, it appears to the writer that as far as the charitable subscription cases are concerned, the tentative *Restatement* has jumped out of the frying pan of consideration into the fire of estoppel.

To the end of harmonizing these cases with sound legal principle, the following rule of law is submitted:

A written subscription to a charity, signed by the subscriber or his agent,⁴² and delivered to the charity, shall not be invalid or unenforceable for want of consideration.⁴³

³⁹Corbin, *op. cit. supra* note 28, at 557.

"It is submitted that there should be recognized at the present day three distinct forms of consideration or grounds why it is unjust to break a promise and why a promise should be binding: (1) the usual one, the reciprocity of bargains or exchange; (2) cases of quasi estoppel or justifiable reliance on a gratuitous promise and (3) an existing obligation, legal, equitable and also moral if based on value received and co-extensive with the promise." Ballantine, *Is the Doctrine of Consideration Senseless and Illogical?* (1913) 11 MICH. L. REV. 423, 426.

⁴⁰See page 467, *supra*.

⁴¹*Ibid.*

⁴²In almost all the cases the subscriber himself signed the subscription. A few decisions appear where he acted through an agent. *Cartwright v. Dennis*, 163 Ark. 503, 260 S. W. 424 (1924); *Lewis v. Durham*, 205 Ky. 403, 265 S. W. 934 (1924). See also *Arkansas Christian College v. Malone*, 168 Ark. 1167, 271 S. W. 964 (1925).

⁴³There seems to be a current of thought in the direction of modifying the requirement of consideration for a promise. "A written release or promise hereafter made and signed by the person releasing or promising shall not be

Such a rule escapes the charge of "judicial legislation" because it is in substance simply a frank statement of the principles underlying the decision in almost every close case on the question which has been before the courts in the last two decades. The rule as suggested here is confined to a written subscription. That this represents the "law in action" is demonstrated by the fact that of the host of charitable subscription cases read in the preparation of this paper some half dozen only involved an oral promise.⁴⁴ As a practical matter, the present day charity, realizing the difficulty of proving an oral promise, requires the subscriber to sign "on the dotted line." These considerations would seem to obviate the necessity for legislative action, the solution offered by several commentators.⁴⁵

The rule submitted does not require the charity to "act on" the promise. It is in this action that the courts say they find the "consideration" or the "estoppel." However, despite all the talk in the cases of the need for the charity's "beginning work" and "incurring liability," the decision is rare⁴⁶ in the last twenty years where the want of formal consideration has been a bar to recovery. Professor Williston in turning to "promissory estoppel" seems to confine this solution to the fact situation "where detriment had been incurred" in reliance on the promise.⁴⁷ The Nebraska court in *Re Griswold*⁴⁸ said frankly that "it seems proper further to observe that,

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."—Uniform Written Obligations Act, § 1 (1925). "Without accepting the will theory may we not take a suggestion from it and enforce those promises which a reasonable man in the position of the promisee would believe to have been made deliberately with intent to assume a binding relation. The general security is more easily and effectively guarded against fraud by requirements of proof after the manner of the Statute of Frauds than by requirements of consideration which is as easy to establish by doubtful evidence as the promise itself." POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) 281, 282.

⁴⁴Such a promise, of course, is not within the Statute of Frauds and its oral nature has not of itself barred recovery in jurisdictions which have passed upon the matter.—Y. M. C. A. v. Estill, *supra* note 9; Lewis v. Durham, *supra* note 42; Ryerss v. Trustees of Pres. Cong., 33 Pa. 114 (1859); Stewart v. Second Pres. Church, 84 Pa. 388 (1877)—See Ann. Cas. 1914 D. 138n.

⁴⁵The remedy lies with the legislature. (1922) 8 CORNELL LAW QUARTERLY *supra* note 8, at 61; (1901) 15 HARV. L. REV. 312, 313; (1914) 62 U. PA. L. REV., *supra* note 8, at 298.

⁴⁶Among the few cases decided in the last twenty years where consideration was squarely at issue and where the charity lost, is Trustees of LaGrange Male and Female College v. Parker, 198 Mo. App. 372, 200 S. W. 663 (1918). See also St. Paul's Epis. Church v. Fields, 81 Conn. 670, 72 Atl. 145 (1909).

⁴⁷1 WILLISTON, *loc. cit. supra* note 14.

⁴⁸*Supra* note 29. Here the subscriber "pledged" \$5,000 to Nebraska Wesleyan University, payable at his death. This subscription was the last obtained during the campaign. The consideration was found in the university's acceptance of the subscription and in its assuming impliedly to keep its endowment fund intact and to apply the income thereof to the payment of salaries and other expenses. In *Irwin v. Lombard University*, *supra* note 9 at 22, the Ohio court said: "It is

while the evidence does not show that the college did any specific act in reliance upon the instrument in question, this was rightly said to be unnecessary by Shauck, J., in *Irwin v. Lombard University*.⁴⁹ In *Converse's Estate*,⁴⁹ the Pennsylvania court concluded "as other subscriptions were secured on the faith of Mr. Converse's promise, something had been done, money paid by others, and that consequently his promise had in his lifetime become a contract based on valuable consideration." In the former case, the court admits that no act whatever had been done on the strength of the promise, other than to accept it. In the latter, the only act done by the charity was to keep on raising money. Yet, both subscriptions were enforced against the respective estates of the promisors.

The outstanding reaction one gets in reading these close decisions is that the American courts have become convinced so thoroughly of the policy necessitating the enforcement of charitable subscriptions, that, unconsciously or otherwise, they have been attaching gradually to these written promises the great incident of the sealed instrument at common law—its enforcement regardless of consideration. At least one court recently has said that there is a special presumption of consideration in the unconditional "pledge" to pay money made by a member to his church.⁵⁰ There are a few decisions, mostly from

not contemplated by the parties, nor is it required by law that in cases of this character the institution shall have done a particular thing in reliance upon the promise. . . . The requirements of law are satisfied, the objects of the parties secured and the perpetration of frauds prevented by the conclusion that the consideration for the promise in question is the accomplishment, through the university, of the purpose for which it was incorporated and in whose aid the promise was made."

⁴⁹*Supra* note 20. The subscriber wrote: "I will . . . agree to give \$10,000 towards the endowment fund of \$200,000 and pay the same when the entire amount is covered by valid pledges or payments." He died when only \$14,000 had been raised. The charity, Park College, had accumulated \$197,227.99 in cash and pledges by the time the case reached the Supreme Court of Pennsylvania which affirmed for the college without opinion. In *Albert Lea College v. Brown*, 88 Minn. 524, 93 N. W. 672, 60 L. R. A. 870 (1903) the subscriber gave the college his promissory note for \$25,000 payable on or before one year from date "to be used as an endowment." The trustees voted to accept the gift. The subscriber died before anything was paid. His estate was held, consideration being found in the fact that the trustees had accepted the note, had assumed the obligations imposed by it and had carried on the work of the college which otherwise would have had to suspend operation.

⁵⁰"It is not unreasonable, therefore, to say that an unconditional written promise of a member to pay a stated sum of money to a church to which he is at least morally pledged to render service and support, carries with it a presumption of consideration, in addition to the presumption attaching generally to every written promise to pay."—Weaver J. in *First Pres. Church v. Dennis*, 178 Iowa. 1352, 1363, 161 N. W. 183, L. R. A. 1917 C, 1005 (1917). It has been held in Missouri that a subscription to an educational or religious charity is within the statute providing: "All instruments of writing made and signed by any person or his agent whereby he shall promise to pay to any other or his order or unto his bearer any sum of money or property therein mentioned shall import a consideration and be due and payable as therein specified."—*Caples v. Branham*, 20 Mo. 244, 64 Am Dec. 183 (1855); *Christian Univ. v. Hoffman*, 95 Mo. App. 488, 69 S. W. 474 (1902).

inferior courts, holding flatly that consideration in these cases is not necessary,⁵¹ and *dicta* are not lacking to the effect that public policy requires the court to find some consideration in order to support the promise.⁵² Is it not possible that in types of cases, such as these,

⁵¹In *Garrigus v. Home Frontier and Missionary Soc.*, 3 Ind. App. 91, 28 N. E. 1009, 50 Am. St. Rep. 262 (1887) the court held that "the promise of the decedent under the decisions of this state cannot be held void for want of consideration", citing *Johnson v. Wabash College*, *supra* note 29, and *Roche v. Roanoke Classical Seminary*, *ibid.* The two latter cases are close to the line but in each the consideration seems to be "the accomplishment of the object in aid of which the money was promised."

Suit was brought against an administrator on a bond under seal convenanting to pay \$2000 to Wittenberg College in *Hooker v. Wittenberg College*, 2 Cin. Sup. Ct. Rep. 353 (Ohio, 1873). The Ohio rule permitted want of consideration to be set up as a defense to a sealed instrument. The Superior Court of Cincinnati said that "we do not know" from the proof submitted whether the college had incurred any liabilities relying on the obligation or not. However, as public policy favors charities, and as funds often are needed to commence, carry on and complete the undertaking, the court concluded that "it is difficult to perceive why such claims are not, from the time they are incurred, enforceable according to their terms."

Burnside J., in *Caul v. Gibson*, 3 Pa. 416 (1846) enforced a charitable subscription on moral grounds as follows: "When the inhabitants of a village or neighborhood sign a subscription authorizing the building of a church for the public worship of God, and the persons so authorized proceed to erect the house, there is a moral obligation in all the subscribers to fulfill their engagements. A moral obligation has ever been held a sufficient consideration to support an express promise but not an implied one The erection of a church is of value to all who worship in it I think the subscriptions to all kinds of Christian churches, school houses, academies and colleges when the buildings are erected in pursuance of the subscription, the highest moral duty is placed upon the subscribers to faithfully fulfill their engagements." The rule of *Caul v. Gibson* is limited in *Reimensnyder v. Gans*, *supra* note 33, and in *Patehen's Est.*, *supra* note 33, it was said that the doctrine of *Caul v. Gibson* never had been reaffirmed by the Supreme Court of Pennsylvania, nor had it been adopted by any other appellate court.

Two New York cases appear to find consideration expressed in the subscription paper itself. They are *First Baptist Society v. Robinson*, 21 N. Y. 234 (1860), and *Reformed Protestant Dutch Church v. Hardenbergh*, 48 How. Pr. 414 (N. Y. 1874). See also *Louisiana College v. Keller*, 10 La. 164 (1836).

⁵²"It is a matter of common knowledge that in a large measure private schools and colleges depend on donations for their maintenance. When a donor gives his note and later seeks to avoid payment on the ground that the note lacked consideration, the courts have usually found a way of holding him to his promise.—*Lees, C. in Re Stack's Est.*, *supra* note 9, at 59.

"In this class of cases where public and charitable interests are involved, the courts lean towards sustaining such contracts sometimes on consideration which in a purely business contract might be regarded as questionable."—*Parker J. in New Jersey Orthopedic Hospital v. Wright*, *supra* note 10, at 464. "It would be a fraud upon the numerous other subscribers and members of the congregation who have contributed and cooperated and carried to fruition the purpose to erect a church, to relieve defendant of his promise to pay. It is for this reason that the inclination of all courts is to allow recovery by the trustees of the donee or payee. . . The germ of this liability had its origin among the Romans. The civil law term used to express it was *pollicitatio*, which, translated, means a vow or an offer to give some thing to the public. The offer became irrevocable if accepted or acted upon by a substantial number of the class or community to whom it was addressed."—*Higgins J. in Trustees of Third Pres. Church v. Caldwell*, *supra* note 33 at 35. "The objection of a want of consideration for promises like the one before us has not always been regarded with favor; and judges, considering defences of

we are reaching the end of the "bargain cycle" of promise enforcement which came into the law with the birth of consideration, that commercial-age offspring of dubious parentage? The charitable subscription situation emphasizes that the now despised sealed instrument, or some substitute for it, is needed to render enforceable certain kinds of "non-bargain" promises.

It may be objected that the rule of law suggested is too far reaching.⁵³ Obviously this objection is deserving of consideration insofar that it demands the rule to be confined strictly to the type of case underlying this discussion.⁵⁴ Thus limited, the rule *does* possess a validity which is borne out by recognized analogies in other fields of the law when a charity is a party litigant. The institution ordinarily called a charity is so far *sui generis* in nature that the application of the rule here laid down would give it no greater immunity in contract law from the strict rules applied to organizations for profit than it now enjoys in torts and property. The courts have seen fit on policy grounds⁵⁵ to create a sweeping exception to the

that character as breaches of faith towards the public, and especially towards those engaged in the same enterprise, and an unwarrantable disappointment of the reasonable expectations of those interested, have been willing, nay apparently anxious, to discover a consideration which would uphold the undertaking as a valid contract; and it is not unlikely that some of the cases in which subscriptions have been enforced at law, have been border cases, distinguished by slight circumstances from agreements held void for want of consideration"—Allen J. in *Barnes v. Perine*, *supra* note 2, at 24. For other cases containing similar *dicta* see *Brokaw v. McElroy*, *supra* note 9, *Board of Trustees v. Noyes*, *supra* note 20, and *Irwin v. Lombard Univ.*, *supra* note 9.

⁵³"Some intimation has been made in *obiter* that a promise for religious or charitable purposes needs no consideration but there is little authority and less reason for this view unless the entire doctrine of consideration is to be abandoned."—1 PAGE, *CONTRACTS*, (2d ed. 1919) § 559.

⁵⁴That there is historical justification for placing the charitable subscription in a distinct category, see Roscoe Pound, *Consideration in Equity* (1918) 13 *ILL. L. REV.* 667, 684: "Similar ideas may be seen in our books as far back as 'Doctor and Student.' The Doctor puts the question what promises are binding in conscience, and lays down three eases, (1) a vow, (2) a promise upon consideration, and (3) a promise made to a corporation or to the clergy 'to the honor of God, or such other cause like, as for maintenance of learning of the commonwealth, or of the service of God, or in relief of poverty, or such other'. The word 'consideration' is used in 'Doctor and Student' in two senses. Sometimes it means the presupposition of a transaction, the reason for it, so that in the passage cited the Doctor's meaning would be that a promise made for a reason is morally binding. Often the phrase 'upon consideration' is used in the sense of 'after deliberation'. Thus we have the other idea that a promise deliberately made is morally binding. Indeed in his third category, promises to charity, the reason for enforcement is that the promisor intended a binding promise; that he made it as a legal transaction."

⁵⁵"The fundamental question is one of expediency or of public policy—whether the preservation of charitable trust funds is more desirable than a right to compensation from such funds for an injury. We think it is. Few things are more desirable or more beneficial to the public than charitable foundations, and certainly the right of some one to recover damages from a particular source is not one." Denison J. in *St. Mary's Academy v. Solomon*, 77 *Colo.* 463, 466, 238 *Pac.* 22 (1925).

established doctrine of *respondeat superior* in favor of a charity principal.⁵⁶ Since *Christ's Hospital v. Granger*⁵⁷ it has been settled that a limitation over from one charity to another may vest at a period too remote within the Rule against Perpetuities.⁵⁸ The law is a jealous guardian of the trust fund of a charity. And it is here that the policy underlying the enforcement of charitable subscriptions links up with the policy—sound or unsound—which is responsible for the exception to the *respondeat superior* rule,⁵⁹ and with the policy modifying the Rule against Perpetuities⁶⁰ in the tort and property cases respectively. As previously emphasized, neither the subscriber who fills in the blank nor the charity promisee contemplates a bargain. The promisor intends to make a gift, peculiar in the sense that *the donee is compelled to rely upon just such gifts for its very existence.*

⁵⁶The liability of a charity for the torts of its agents and servants is an unsettled question of such magnitude that a passing reference to it is all that is possible in this discussion. The cases are collected in (1925) 34 YALE L. J. 316. The following are recent discussions: Zollman, *Damage Liability of Charitable Institutions* (1921) 19 MICH. L. REV. 395; McCaskill, *Respondeat Superior as Applied in New York to Quasi-Public and Eleemosynary Corporations* (1920) 5 CORNELL LAW QUARTERLY 409; (1920) 6 *ibid.* 56; Borchar, *Government Liability in Tort (Charitable Trusts)* (1925) 34 YALE L. J. 229, 248; (1925) 11 CORNELL LAW QUARTERLY 62; (1918) 31 HARV. L. REV. 479; (1921) Woodward, 20 ILL. L. REV. 373; (1925) 23 MICH. L. REV. 905.

⁵⁷1 Macn. & G. 460 (1849)

⁵⁸The cases are collected in (1924) 30 A. L. R. 594.

⁵⁹Compare the two following quotations. The first is from *Vermillion v. Women's College*, 104 S. C. 197, 200, 88 S. E. 649 (1916). The court applied the "universal exemption" rule in a tort case involving a charity principal. "The exemption of public charities from liability in actions for damages for tort rests not upon the relation of the injured person to the charity, but upon grounds of public policy, which forbid the crippling or destruction of charities which are established for the benefit of the whole public for injuries inflicted by the negligence of the corporation itself, or of its superior officers or agents, or of its servants or employees. The principal is that in organized society, the rights of the individual must, in some instances, be subordinated to the public good. It is better for the individual to suffer injury without compensation than for the public to be deprived of the benefit of the charity." The other quotation is from *Brokaw v. McElroy*, (Iowa 1913) *supra* note 9, at 293. The court enforced a charitable subscription. "Such notes are frequently, if not usually, executed not as evidence of a promise to make a future gift, but for the specific purpose of creating a present asset for its beneficiary. A very substantial part of the assets of such institutions (charities) exist in this form. To lightly withhold judicial sanction from such obligations would be to destroy millions of assets of the most beneficent institutions in our land, and to render such institutions helpless to carry out the purpose of their organization."

⁶⁰"The gift of property first to one charitable use and then to another upon the determination of the first trustee no longer to use, as was done in this case, does not offend the statute of perpetuities. The law favors charitable uses. It does so with knowledge that in most cases they are intended to be practically perpetual; and it is willing to permit what of evil results from the devotion of property to such length of use in consideration of the beneficial results flowing therefrom. As one charitable use may be perpetual, the gift to two in succession can be of no longer duration nor of greater evil. The property is taken out of commerce, but it instantly goes into perpetual servitude to charity.—"Pardee J. in *Storr's Agric. School v. Whitney*, 54 Conn. 342, 345, 8 Atl. 141 (1887).

As long as charities are a part of the social order this charitable subscription problem will confront our courts. Has not the time arrived when the law of contracts should relinquish these attempts to disguise its actual and economically necessary protection of the life sources of charities?