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Charitable Subscriptions--Enforcement--Growth of Promissory Estoppel (Rector, Church Wardens, Vestrymen St Marks Church, Westhampton Beach v. Bankers Trust Co., 197 Misc. 32 (Sup. Ct. 1949))

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In the present case, the court adhered to the general well established rule concerning an adverse agency relationship. The plaintiff knew that the union was acting as agent for both the plants and voiced its dissent to the strike so as to repudiate the action of the union. Thus, it would be unjust to hold the plaintiff bound to the acts of the union, for although the plaintiff did have full knowledge, he did not freely consent to, or ratify the acts of the agent union.

CHARITABLE SUBSCRIPTIONS — ENFORCEMENT — GROWTH OF PROMISSORY ESTOPPEL.—The St. Marks Church, the plaintiff, desiring to build a new edifice, found that its funds were insufficient to meet the plans as drawn. The testator agreed to subscribe \$25,000 if the church would approve the plans without modification and obtain a loan of \$60,000 on a mortgage arranged by the testator. The church complied. The subscription was conditioned for cancellation upon written notice of change in the subscriber's financial condition, and ". . . that it shall not be considered binding upon my estate." The church commenced this action upon the agreement when the executor resisted the claim for the balance. *Held*, the agreement bound the estate. The testator knew that his subscription was the factor that induced the adoption of the plans without modification. The court stated that ". . . it must be held that Mr. Atwater had no desire or intention of limiting his pledge. There is no question that the defendant is well able to pay the sum in dispute, and its contentions, I am sure do not reflect the thoughts of its testate." *Rector, Church Wardens, Vestrymen St. Marks Church, Westhampton Beach v. Bankers Trust Co.*, 197 Misc. 32, 96 N. Y. S. 2d 554 (Sup. Ct. 1949).

A subscription is a written agreement to furnish a designated sum of money or its equivalent for a particular purpose.¹ A "charitable subscription" is in essence a promise to make a gift,² a promise not supported by consideration.³ Notwithstanding the absence of consideration, the need for enforcing such agreements was recognized as early as 1828.⁴ The resulting decisions ". . . indicate the presence

interests and both principals, having full knowledge of all the facts, give their free consent to the agency. *Bell v. McConnell*, 37 Ohio St. 396 (1881).

¹ BOUVIER'S LAW DICTIONARY 3171 (8th ed., Rawle, 1914); BLACK'S LAW DICTIONARY 1117 (3d ed. 1933).

² *Twenty-third St. Baptist Church v. Cornell*, 117 N. Y. 601, 23 N. E. 177 (1890).

³ "The very term 'charitable subscription' indicates that the subscriber's promise is made as a gift and not in return for consideration." 1 WILLISTON, CONTRACTS § 116 (revised ed., Thompson, 1936).

⁴ "It cannot be maintained that objects so important shall be frustrated . . . by the rights of individuals to withdraw their contributions or refuse to

of three different *rationes decidendi* for the attainment of this result, the *first* being the spelling out of an ordinary bilateral contract; *second*, the completion of a contract that was initially unilateral; and *third*, the invocation of an approximation of the equitable doctrine of estoppel."⁵

To find the consideration needed for a bilateral contract courts since 1854 have allowed the introduction of parol evidence to show the circumstances surrounding the agreement.⁶ The consideration is the mutual promises of the parties, the subscriber to pay and the institution to perform certain services or acts. The return promise of the institution is implied⁷ from the acceptance of the subscription which imports a promise to apply the funds for the purpose described in the subscription.⁸

The second *ratio decidendi*, a completed unilateral contract, finds the subscription to be an offer for a unilateral contract which becomes binding when acted upon by the promisee.⁹ By incurring liability in furtherance of the project, the promisee is deemed to have accepted the offer.¹⁰ It would appear that the offer, if an offer at all, would call for the completion of the act, *i.e.*, the purpose given in the subscription. However, the bona fide partial performance doctrine of the Restatement has strengthened the reasoning of the unilateral contract theory.¹¹

The third *ratio decidendi*, the invocation of the estoppel doctrine,¹² has been held to be applicable only when a bilateral or com-

comply with their promises, after the execution or during the progress of the work which they themselves set in motion." *Amherst Academy v. Cowls*, 23 Mass. 427, 433 (1828); *accord*, *Barnes v. Perine*, 15 Barb. 249 (1852), *aff'd*, 12 N. Y. 18 (1854).

⁵ *Matter of Lord*, 175 Misc. 921, 923, 25 N. Y. S. 2d 747, 749 (Surr. Ct. 1941).

⁶ *I. & I. Holding Co. v. Gainsburg*, 276 N. Y. 427, 12 N. E. 2d 532 (1938); *Keuka College v. Ray*, 167 N. Y. 96, 60 N. E. 325 (1901); *Presbyterian Church of Albany v. Cooper*, 112 N. Y. 517, 20 N. E. 352 (1889); *Barnes v. Perine*, 15 Barb. 249 (1852), *aff'd*, 12 N. Y. 18 (1854).

⁷ *Allegheny College v. Nat. Chautauqua Co. Bank*, 246 N. Y. 369, 159 N. E. 173 (1927); *Keuka College v. Ray*, *supra* note 6; *Tioga County General Hospital v. Tidd*, 164 Misc. 273, 298 N. Y. Supp. 460 (Sup. Ct. 1937); *Wash. Heights M. E. Church v. Comfort*, 138 Misc. 236, 246 N. Y. Supp. 450 (N. Y. Munic. Ct. 1930); *Central Maine General Hospital v. Carter*, 125 Me. 191, 132 Atl. 417 (1926).

⁸ *Allegheny College v. Nat. Chautauqua Co. Bank*, *supra* note 7; *Barnes v. Perine*, 15 Barb. 249 (1852), *aff'd*, 12 N. Y. 18 (1854); *Matter of Lord*, 175 Misc. 921, 25 N. Y. S. 2d 747 (Surr. Ct. 1941); *Wash. Heights M. E. Church v. Comfort*, *supra* note 7.

⁹ *I. & I. Holding Co. v. Gainsburg*, 276 N. Y. 427, 12 N. E. 2d 532 (1938).

¹⁰ *I. & I. Holding Co.*, *supra* note 9; *Matter of Metz*, 262 App. Div. 508, 30 N. Y. S. 2d 502 (1st Dep't 1941); *Matter of Lord*, 175 Misc. 921, 25 N. Y. S. 2d 747 (Surr. Ct. 1941); *RESTATEMENT, CONTRACTS* § 45 (1932).

¹¹ *RESTATEMENT, CONTRACTS* § 45 (1932).

¹² "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 in-

pleted unilateral contract cannot be found.¹³ Some courts, however, have predicated their decisions squarely upon both consideration and estoppel.¹⁴ The first and second *rationes decidendi* have been utilized in cases where all the elements of estoppel were present; nevertheless, lip service was paid to contract principles.¹⁵ It would appear, therefore, that unless these elements of estoppel are present there can be no enforcement.

The court in the instant case used no *ratio decidendi* by name but based its decision squarely upon the elements of estoppel.¹⁶ This decision may well establish a precedent for the enforcement of charitable subscriptions solely on the grounds of estoppel.

CONSTITUTIONAL LAW—ADMISSION OF EVIDENCE OBTAINED BY ILLEGAL SEARCH AND SEIZURE. — Appellant and another were convicted of conspiracy to commit abortion. The conviction was upheld in the State Supreme Court although evidence was obtained by means of an illegal search and seizure.¹ Appellant alleges that the admission of this evidence was a violation of the "due process clause" of the Fourteenth Amendment to the United States Constitution. *Held*, conviction sustained. The "due process clause" of the Fourteenth Amendment does not prohibit admission of illegally obtained evidence in state courts. *Wolf v. Colorado*, 338 U. S. 25 (1949).²

justice can be avoided only by enforcement of the promise." RESTATEMENT, CONTRACTS § 90 (1932); *Beatty v. Western College*, 177 Ill. 280, 52 N. E. 432 (1898); *Simpson Centenary College v. Tuttle*, 71 Iowa 596, 33 N. W. 74 (1887).

¹³ *I. & I. Holding Co. v. Gainsburg*, 276 N. Y. 427, 12 N. E. 2d 532 (1938).

¹⁴ *Matter of Lord*, 175 Misc. 921, 25 N. Y. S. 2d 747 (Surr. Ct. 1941); *First M. E. Church of Mt. Vernon v. Howard*, 133 Misc. 723, 233 N. Y. Supp. 451 (Surr. Ct. 1929), *aff'd without opinion*, 233 App. Div. 753, 250 N. Y. Supp. 906 (2d Dep't 1931).

¹⁵ *I. & I. Holding Co. v. Gainsburg*, 276 N. Y. 427, 12 N. E. 2d 532 (1938); *Allegheny College v. Nat. Chautauqua Co. Bank*, 246 N. Y. 369, 159 N. E. 173 (1927); *Keuka College v. Ray*, 167 N. Y. 96, 60 N. E. 325 (1901); *Barnes v. Perine*, 15 Barb. 249 (1852), *aff'd*, 12 N. Y. 18 (1854); *Central Maine General Hospital v. Carter*, 125 Me. 191, 132 Atl. 417 (1926).

¹⁶ RESTATEMENT, CONTRACTS § 90 (1932). In the instant case utilization of either the first or second *ratio decidendi* would have effected a new and different agreement due to the presence of negative clause in the subscription.

¹ *Wolf et al. v. People*, 117 Colo. 279, 187 P. 2d 926 (1947).

² *But cf. Lustig v. United States*, 338 U. S. 74 (1949), decided by the Supreme Court the same day. There state officials secured a warrant for arrest of petitioner, charging him with violation of a city ordinance requiring all known criminals to register with the police. When admitted to the suspect's rooms, they embarked on an illegal search. Uncovering evidence of counterfeiting, they called in a federal agent, who there and then examined the evidence although he did not participate in the search. Petitioner was convicted of counterfeiting. The Supreme Court reversed the conviction ruling that ad-