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The Law of Charitable Subscription

Hugh Peter Mullen

prove the essential elements of the tort without alleging the contract.[82]

(Neither rule, of course, will tolerate the ingenuity of any "sharp practitioner" to escape the effect of the statute.)[83]

The entire problem would be obviated if Section 48, subdivision 5,[84] were amended to include, by specific reference, the action for fraudulent breach of contract. In such case, it may read as follows:

Any action to procure a judgment on the ground of fraud, or *of fraudulent breach of contract.* The causes of actions in such cases are not deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud.

BENJAMIN BARTEL.

THE LAW OF THE CHARITABLE SUBSCRIPTION.

There has always been among men a concept of charity, but one quite different from that known to the members of a modern, Christian, democratic state, for the concept of charity has grown with the state and with the church so that today the courts are faced with unprecedented problems, akin to, but different from, the problems of any other age.

"The life of the law has not been logic, it has been experience." [1] In common law subjects, especially subdivisions of the law of contracts,[2] "a page of history is worth a volume of logic" [3] for "very often the effect of history is to make the path of logic clear". Therefore, to understand the law of charities in general and more especially the law of the charitable subscription, it is necessary to consider briefly the growth of the concept of charity and its development.

Growth of the Concept of Charity.

Early and primitive charity was, like the primitive state, limited first to the family and later to the tribe, but the intercourse between

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[82] The rule in the *Brick* case does not apply because the first essential element is lacking, *i.e.,* the contract is the central theme of the fraud. See note 45, *supra.*

EDGAR AND EDGAR, *loc. cit. supra* note 40; (1937) 12 ST. JOHN'S L. REV. 135, 136; see notes 26, 62, *supra.*

[83] Brick v. Cohn-Hall-Marx, 276 N. Y. 259, 11 N. E. (2d) 902 (1937); Horowitz v. Horowitz, 132 Misc. 493, 230 N. Y. Supp. 139 (1920).

See Note, *The Statute of Limitations for Malpractice* (1938) 12 ST. JOHN'S L. REV. 330.

[84] See note 2, *supra.*

[1] HOLMES, THE COMMON LAW (1881) 1.

[2] Mr. Justice Holmes in N. Y. Trust Co. v. Eisner, 256 U. S. 345, 349, 41 Sup. Ct. 506, 508 (1920).

[3] Holmes, *The Path of the Law* (1897) 10 HARV. L. REV. 457, 465.

the various families and tribes led to the custom of feeding and lodging the stranger and the support of beggars. Thus hospitality became the first public charity.

With the rise of the city state, as in Greece, the government joined with the individual in the cause of charity by distributing corn [4] and providing a system of public relief for those who were unable to earn a livelihood on account of bodily defects and infirmities.[5] But charity in the pagan state was usually prompted by private or selfish motives, as the *annonia civica* [6] of Rome which was limited to the citizens, and the purpose of which was not so much to feed the starving (there were those who were starving who were not citizens) as to maintain the prestige of the ruling class and prevent the degradation of the more unfortunate amongst them into beggars. It was not until the advent of Christianity that charity became the dominant virtue. "And now abideth faith, hope, charity, these three; but the greatest of these is charity" [7] St. Paul tells us. Thus charity in its broadest implication became the highest virtue of the Christian church and the church lent its great proselytizing power to the propagation of this higher concept of charity. The ancient laws were changed so as to admit the broader concept.[8]

When, before the Norman Conquest, the clergy introduced into England the method of disposing of estates by will or testament, they naturally applied the only system of law with which they had any familiarity to gifts of charity. This system was the Roman law as it had been modified in Christian times.[9] However, before embarking

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[4] At Athens and later at Rome and Constantinople.

[5] This was limited to those whose worldly possessions were worth less than three minæ, about sixty dollars.

[6] The free supply of corn to the needy citizens.

[7] I CORINTHIANS 13, v. 13. "Though I speak with the tongues of men and of angels, and have not charity, I become a sounding brass, or a tinkling cymbal." (v. 1.) "And though I have the gift of prophecy, and understand all mysteries, and all knowledge; and though I have all faith, so that I could remove mountains, and have no charity, I am nothing." (v. 2.)

[8] Thus under early Roman law bequests to the poor generally, or to societies or groups which had no legal existence, or trusts for their benefits were void as devises to uncertain persons, and were not allowed by law; but under the influences of Christianity the pious purpose of the disposition gave validity to these donations and pious foundations were permitted to take as heirs (CODE OF JUSTINIAN 1, 2, 25, 1), or under a trust. The "Saviour", an archangel, or a martyr could be appointed heir and these were construed as gifts to the church or shrine in the place where the testator lived. (CODE OF JUSTINIAN 1, 2, 25, 2.)

[9] In Wright v. Trustees of Meth. Epis. Church, 1 Hoff. Ch. 201, 244 (N. Y. 1839) the Vice-Chancellor said: "It is not to be questioned that by the civil law all bequests, either of real or personal estate, made for the aid of religion or charity, are upheld, however indefinite the object of the gift. It is said that the doctrine of charities came into England through the influence of civilians and as a branch of the civil code; but we must remember that this principle was not the native growth of the civil law, but sprang from the Christian religion engrafted upon it. We find its traces from the time that Christianity dawned upon the throne of the Cæsars, and never before. In truth the charity taught in the Gospel "that most excellent gift" portrayed by the great apostle

on a discussion of the English law of the charitable subscription, it would perhaps clarify matters by defining more exactly the modern import of the terms "charity" and "charitable gift".

Definition of Terms.

A charitable gift in its legal sense may be defined as one given from altruistic motives for the benefit of an indefinite number of persons, to bring to them the benefits of religion, of education, relief from suffering, or to lessen the burdens of government. The most celebrated definition is that of Mr. Binney: "Whatever is given for the love of God or for the love of our neighbor—in the catholic and universal sense—given from these motives and to these ends, free from the stain of everything that is personal, private or selfish, is a gift for charitable uses." [10] Thus it is the spirit with which the funds are given as well as the purpose to which they are to be dedicated which constitutes them "charitable", although if their purpose be inconsistent with the fundamental principles of government and morality they will be declared invalid.[11]

Charities in the early days were administered through gifts in trust or through gifts to corporate bodies organized expressly to dispense some form of charity.[12] Within more recent times the method of subscription pledges to raise funds for charitable purposes has become a common means of procedure. Since the subscription agree-

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in language of unapproachable majesty, was a doctrine which it could not enter into the hearts of heathenism to imagine."

[10] Vidal v. Girard's Executors, 2 How. 127 (U. S. 1832).

[11] "Funds derived from the gift of the crown or the gift of the legislature, or from private gift, for paving, lighting, cleansing and improving the town are within the equity of the statute of Elizabeth and are charitable funds to be administered by a court of equity. But where Parliament passes an act for paving, lighting, cleaning and improving a town to be paid for wholly by the rates or assessments to be levied upon the inhabitants of the town the funds so raised are in no sense derived from the bounty of charity, in the most extensive sense of the term, and are not charitable funds to be administered by a court of equity." Att. Gen. v. Heelis, 2 Sim. & St. 67, 77 (1824).

The word "charity" does not characterize the work of a barber shaving his customer on Sunday, and therefore is not within the exception of a statute prohibiting work on Sunday, but excepting works of charity or necessity. State v. Fredrick, 45 Ark. 347, 348 (1885). But where an old man has been injured so that he cannot well shave himself, the act of another in shaving him in his own house on Sunday is not in violation of a statute prohibiting the doing of any manner of labor, business or work, excepting works of charity or necessity on the Lord's Day. Stone v. Graves, 145 Mass. 353, 13 N. E. 906 (1887).

A bequest to trustees "to be used by them according to their best judgment, for the attainment of woman suffrage in United States of America and its territories" is a valid charity. Garrison v. Little, 75 Ill. App. 402, 411 (1897). A gift for the promotion of temperance work in the city of Milwaukee is a charity. Harrington v. Pier, 105 Wis. 485, 82 N. W. 345 (1900).

[12] See O'Toole, Law of Trusts (1935) 63; Note (1934) 9 St. John's L. Rev. 114.

ment is neither a trust nor an outright gift it has become necessary to treat it from the viewpoint of a contract.

The English Law of the Charitable Subscription.

The English courts, in the absence of a substantial consideration, have refused to enforce charitable subscriptions. This was the reason why the court, in the leading case of *In re Hudson*,[13] refused to enforce the subscription. The English courts hold it an invariable rule that every contract must have consideration and they will not enforce any gratuitous promise even though the object intended to be promoted may be a worthy one. Thus, in England, the absence of consideration is an insuperable obstacle to the enforcement of the charitable subscription contract. The American courts also in their early decisions could not surmount this difficulty, and all such subscriptions were held null and void for want of consideration. The courts, however, had pronounced such a defense base and dishonorable as well as unjust, and soon found a way of declaring it invalid as well. Thus the courts of New York declared that "the sound public policy of enforcing liability on charitable subscriptions would not be abandoned to save the symmetry of a concept which itself came into our law, not so much for any reasoned conviction of its justice, as from historical accident of practice and procedure." [14]

The Problem of Consideration.

Thus we see that the problem of consideration is of primary importance in the law of the charitable subscription. For the courts, endeavoring to effect the public policy which recognizes the moral obligation of the charitable subscription and the necessity for its enforcement as the life blood of the eleemosynary institution, but unwilling to abandon that rule which declares gratuitous promises to be unenforceable, have developed an uncanny ability of finding consideration in these cases where they have refused to find it in similar non-charitable contracts. It would perhaps not be inaccurate to say that the courts have been anxious to invent a consideration.[15] This leads us to the various theories by which the courts of this country have enforced charitable subscriptions, and we find they may be classified under five heads.[16]

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[13] 54 L. J. Ch. 811 (—).

[14] Per Cardozo, J., in Allegheny College v. National Chautauqua County Bank, 246 N. Y. 369, 375, 159 N. E. 173, 174 (1927), quoting 8 HOLDSWORTH, HISTORY OF ENGLISH LAW (1926) 7 *et seq.*

[15] (1922) 8 CORN. L. Q. 57.

[16] Billig, *The Problem of Consideration in Charitable Subscriptions* (1926) 12 CORN. L. Q. 467.

The *first* of these is where consideration is found in an act done at the request, express or implied, of the subscriber. Jurisdictions so holding rely upon the theory that the subscription is an offer and becomes binding when accepted by the charity through the performance of an act in reliance thereon. This is accepted in most jurisdictions as the true basis for the enforcement of the subscription.[17] It is a development of such cases as *Trustees of Farmington Academy* v. *Allen*,[18] which held that although the payees named in the subscription paper could not recover on the original subscription for want of consideration, yet if relying thereon they had properly expended money for a common object, they might recover upon a count for money paid, laid out, or expended, especially if the defendant ratified the subscription paper after each outlay. This led to the theory above mentioned that under such circumstances a recovery can be had even on the original subscription. One of the earliest cases supporting this view was *McAuley* v. *Bellinger*.[19] In criticism of this theory it has been said: "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." [20]

The *second* theory is that which holds that the subscribers make a multilateral contract among themselves, and their promises, each running to the charity, are consideration for each other. Many states, such as New York, have refused to apply this rule.[21] Others, like Georgia,[22] by statute have made it the basis for the enforcement of all charitable subscriptions.[23] This rule has been severly criticized,

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[17] Keuka College v. Ray, 167 N. Y. 96, 60 N. E. 325 (1901) and cases cited (1938) 12 ST. JOHN'S L. REV. 339, 340, n.4. Pass v. First Nat. Bank of Oneonta, 25 Ala. App. 519, 149 So. 718 (1933); Fourth Presbyterian Church v. Continental Ill. Bank, 248 Ill. Rep. 132 (1936); Scott v. Triggs, 76 Ind. App. 69, 131 N. E. 415 (1921); University of Des Moines v. Livingston, 57 Iowa 307, 10 N. W. 738 (1881); Brokaw v. McElroy, 162 Iowa 288, 143 N. W. 1087 (1913); *Ex parte* Walker's Executor, 253 Ky. 111, 68 S. W. (2d) 745 (1933); Cottage St. Church v. Kendall, 121 Mass. 528 (1877); Robinson v. Nutt, 185 Mass. 345, 70 N. E. 198 (1904); Albert Lee College v. Brown, 88 Minn. 524, 93 N. W. 672 (1903); Hardin College v. Johnson, 226 Mo. App. 285, 3 S. W. (2d) 264 (1928); *In re* Chavez's Estate, 35 N. M. 130, 290 Pac. 1020 (1930); Love's Executor, 16 Ohio St. 20 (1864); Irwin v. Lombard Univ., 56 Ohio St. 9, 46 N. E. 63 (1864); *In re* Converse's Estate, 240 Pa. 458, 87 Atl. 849 (1913); University of Pa. v. Coxe's Executors, 277 Pa. 512, 121 Atl. 314 (1923); Furman Univ. v. Waller, 124 S. C. 68, 117 S. E. 356 (1923); Huron Lodge v. Hinckley, 50 S. D. 355, 222 N. W. 661 (1928); Rouff v. Washington & Lee Univ., 48 S. W. (2d) 483 (Texas Civ. App.) (1933); Y. M. C. A. v. Olds Co., 84 Wash. 630, 147 Pac. 406 (1915); Hodges v. Natty, 104 Wis. 464, 80 N. W. 726 (1899).

[18] 14 Mass. 171 (1817).

[19] 20 Johns. 89 (N. Y. 1822).

[20] (1922) 8 CORN. L. Q. 57.

[21] Presbyterian Church of Albany v. Cooper, 112 N. Y. 517, 20 N. E. 352 (1889).

[22] GA. CODE § 4246 (1910).

[23] Wells v. Costello, 189 Ark. 116, 70 S. W. (2d) 561 (1934); Christian College v. Hendley, 49 Cal. 347 (1875); Univ. of S. Cal. v. Bryson, 103

one writer saying: "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." [24] Again it must be remembered that nothing is consideration unless the parties have dealt with it on that footing.[25]

The *third* doctrine holds that the acceptance of the offer by the charity carries with it an implied counter-promise that the subscription will be applied to the object for which it was made.[26] Although at first blush the logic of this position seems conclusive, many courts have refused to apply it, saying that a motive is not consideration either legal or equitable,[27] and that when a subscription is made to "Aid and assist the Beth Israel Hospital Association in its humanitarian work", it merely expresses the motive of the donor, and the application of the money to that purpose is not consideration (although the New York courts have held it to be so).[28]

Estoppel, and not the sufficiency of the consideration, has been the ground for allowing recovery in a *fourth* class of cases, thus preventing the pleading of those defenses which have been called base and dishonorable. The courts thus give life to that public policy which calls for the enforcement of the charitable subscription because the public is interested in the support, growth and maintenance of charitable religious and educational institutions whose sole means of support is often the charitable subscription.[29] Stated briefly, the doctrine of promissory estoppel is that an action by the promisee in

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Cal. App. 647, 283 Pac. 949 (1929); Trustees of Berkley Divinity School v. Jarvis, 32 Conn. 412 (1865); Jackson v. Forward Atlanta Commission, Inc., 39 Ga. App. 647, 148 S. E. 356 (1929); Glass v. Grant, 46 Ga. App. 327, 167 S. E. 727 (1933). *Contra:* Cartwright v. Preacher's Aid Soc., 271 Ill. App. 168 (1933); Johnson v. Wabash College, 2 Ind. 555 (1851) (a promise to pay a sum for the support of a college is not without consideration); Higet v. Indian Asbury Univ., 53 Ind. 326 (1876); McDonald v. Gray, 11 Iowa 508, 79 Am. Dec. 509 (1861); Y. M. C. A. v. Coward, 213 Iowa 408, 239 N. W. 41 (1931); Cotner College v. Hyland, 133 Kan. 322, 299 Pac. 607 (1931); First Universalist Church v. Pungs, 126 Mich. 670, 86 N. W. 235 (1901); *In re* Stack's Estate, 164 Minn. 57, 204 N. W. 546 (1925); New Lindell Hotel Co. v. Smith, 13 Mo. App. 7 (1882); Homan v. Steele, 18 Neb. 652, 26 N. W. 472 (1886); Congressional Society v. Perry, 6 N. H. 164 (1833); George v. Harris, 4 N. H. 533 (1829); Depauw Univ. v. Ankeny, 97 Wash. 451, 166 Pac. 1148 (1917).

[24] 1 PARSON, CONTRACTS (8th ed. 1893) 454.

[25] HOLMES, *op. cit. supra* note 1, at 292; De Cicco v. Schweizer, 221 N. Y. 431, 117 N. E. 807 (1917).

[26] Upheld in Allegheny College v. Nat. Chautauqua County Bank, 246 N. Y. 369, 159 N. E. 173 (1927); Jackson v. Forward Atlanta Commission, Inc., 39 Ga. App. 647, 148 S. E. 356 (1929); Barnett v. Franklin College, 10 Ind. 103, 37 N. E. 427 (1894); Central Maine General Hospital v. Carter, 125 Me. 191, 132 Atl. 417 (1926); *In re* Griswold's Estate, 113 Neb. 256, 202 N. W. 609 (1925); Eastern States Agricultural & Industrial League v. Vial's Estate, 97 Vt. 995, 124 Atl. 568 (1924); see (1924) 34 YALE L. J. 99.

[27] 1 WILLISTON, CONTRACTS (Rev. ed. 1936) § 111.

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

[29] WHITNEY, THE LAW OF CONTRACTS (3d ed. 1936) 104.

justifiable reliance on the promise will make the promise binding.[30] Few are the cases in which a court has expressly declared that its decision is based on the doctrine of promissory estoppel,[31] but the decisions in many cases can be reconciled only by applying this doctrine to them.

The *fifth* concept is that which holds that no consideration is needed.[32] This represents a complete break from the doctrine of consideration which has imbedded itself so deeply into our law of contracts, and the courts have been reluctant to follow it. It is undoubtedly the cleanest and most clear-cut solution to the problem, for who, on making a charitable subscription contract intends to receive, expects, or even wants a *quid pro quo?*

Nature of the Charitable Subscription Contract.

Thus we see that the charitable subscription, an executory gift to a charitable institution intended for the benefit of the public, or which has some educational, charitable or religious end, usually represents two characteristics; it is permanent in operation and it is indefinite or uncertain in respect to the real or individual beneficiaries.

It is nevertheless a contract and the courts will not enforce it unless there is consideration and mutuality of obligation. It differs, however, from other contracts in that the test of mutuality is applied as of the time when the agreement is sought to be enforced, which is necessarily not the time of its formation, for in these cases if at the time of enforcement the promisee has done what was expected of

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[30] *Id.* at 106.

[31] First M. E. Church v. Howard, 133 Misc. 723, 233 N. Y. Supp. 451 (1929); Simpson College v. Tuttle, 71 Iowa 596, 33 N. W. 74 (1887); Beatty v. Western College, 177 Ill. 280, 52 N. E. 432 (1898); *In re* Stack's Estate, 164 Minn. 57, 204 N. W. 546 (1925); School District Kansas City v. Scheidley, 138 Mo. 672, 40 S. W. 656 (1897).

[32] "The cause of the unfortunate reasoning contained in the decisions is that there exists a sound public policy which requires the 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 down. The consideration may be fictional, the estoppel relied on 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." Billig, *op. cit. supra* note 16, at 479. To prevent this confusion Billig formulates the rule: "A written subscription to charity, signed by the subscriber or his agent and delivered to the charity shall not be invalid or unenforceable for want of consideration." Billig, *supra*, at 480.

Some courts do hold that consideration is not necessary and allow the charity to recover on the ground of public policy. Garrigus v. Home Frontier and Missionary Society, 3 Ind. App. 91, 28 N. E. 1009 (1891); Hooker v. Wittenburg College, 2 Cinn. Sup. Ct. Rep. 353 (Ohio 1873); or on moral grounds, as in Caul v. Gibson, 3 Pa. 416 (1846), where a subscriber to an agreement to pay a certain sum towards the erection of a church was liable, the court holding that the moral obligation of such subscribers to fulfill their engagements constituted a sufficient consideration to support such promise.

him, the consideration is furnished.[33] The subscription contract differs in another respect. Many of the charitable subscription contracts are unilateral, and although the rule in many states is that complete performance by the promisee is necessary to bind the promisor, yet these same states have found no difficulty in enforcing charitable subscriptions even though the offeree has performed only in part.[34] The majority of jurisdictions, however, have accepted the rule that although the offeror is bound after an act of part performance by the offeree, his obligation is conditioned upon the completion of the requested act.[35] There must be an offer and acceptance, and when time for acceptance is not specified a reasonable time under the circumstances has been allowed.[36] The contract must be made between competent parties, for a valid consideration and the subscription is automatically revoked by the death of the promisor before acceptance in all cases in which he could have revoked during his life time.[37] The subscription contract may be assigned [38] and is in all respects (except as above noted) similar to any other contract.

Evolution of the Law of the Charitable Subscription as Illustrated by the New York Cases.

The charitable subscription cases in New York have been called "well illustrative of the general confusion which prevails generally throughout the country" [39] yet upon close examination we find that they illustrate rather well the general trend from the English doctrine of a *nudum pactum* to the modern American doctrine of the enforceability of the charitable subscription as a binding contract. The increasing complexity of the social scheme and the resultant birth of numberless necessary benevolent organizations have created a difference between the present and the past. These factors, the growing sense of duty to provide for the less fortunate, coupled with a typical American feeling of sympathy for the unfortunate, have resulted in a new attitude of the courts and the enforcement of the charitable subscription under every possible circumstance.[40]

The early New York cases followed the English rule and although the Court of Errors in the case of *Hamilton College* v. *Stewart* [41] attempted to make a break by declaring that one subscription was consideration for another, it was nevertheless overruled by

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[33] (1925) 10 ST. LOUIS L. REV. 42.
[34] I & I Holding Co. v. Gainsburg, 276 N. Y. 427, 12 N. E. (2d) 532 (1938).
[35] (1938) 7 FORDHAM L. REV. 264.
[36] Waters v. Union Trust Co., 129 Mich. 640, 89 N. W. 687 (1902).
[37] Board of Missions v. Manley, 129 Cal. App. 541, 19 P. (2d) 21 (1933).
[38] Hopkins v. Upshur, 20 Tex. 89 (1857); I & I Holding Co. v. Gainsburg, 276 N. Y. 427, 12 N. E. (2d) 532 (1938).
[39] (1922) 8 CORN. L. Q. 57.
[40] (1925) 10 ST. LOUIS L. REV. 42.
[41] 2 Denio 403 (N. Y. 1845).

the Court of Appeals.[42] New York then continued under the English doctrine.[43] In the *Hamilton College* case a donation "the interest of which shall be applied to the payment of officers" of Hamilton College was held unenforceable on the ground of lack of consideration. In *Hammond* v. *Shepard* [44] an agreement to apply the money for college purposes was not considered sufficient consideration for a promise to pay the trustees of the college a specified sum. In *Stoddard* v. *Cleveland* [45] it was held that it did not help their (trustees of a church) case any that the trustees went on and purchased the building. This could not render a promise that was before void a valid one. A mere *nudum pactum* could not thus, by an act of one of the parties, be converted into a valid contract. But an attempt to adapt to our social relations a system of charity law which developed and matured in a country different in origin and form of government, habits, customs and religion of its people and property tenures was soon abandoned by our courts. In the case of *Barnes* v. *Perine* [46] the court adopted the theory that the subscription was an offer which becomes binding when accepted by the charity through the performance of an act in reliance upon it. All the later cases have upheld this theory which is the first heading previously considered.

In *Presbyterian Church of Albany* v. *Cooper* [47] the second theory was criticized as unsound and the courts of this state have ever since been consistent in their condemnation of it. The court refused to apply the third theory in *Hammond* v. *Shepard,*[48] but it was finally accepted in the case of *I. & I. Holding Co.* v. *Gainsburg.*[49] This change, however, is not indicative of confusion in the courts of this state, for one who has read these pages will realize how it fits in with the trend, and no further excuse need be made for it. In *Allegheny College* v. *Chautauqua Nat. Bank* [50] Judge Cardozo said:

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[42] 1 N. Y. 581 (1848).

[43] In a note to the case of Y. M. C. A. v. Estill, 140 Ga. 291, 78 S. E. 1075 (1913) in 48 L. R. A. (N. S.) 784 (1914), the commentator says, "In a very few of the earliest cases, as will be observed, a narrow view is taken, and an agreement of this character to pay money to a charitable fund was regarded as purely gratuitous, a promise without consideration, and unenforceable on any legal ground; * * * but the courts soon receded from that position. It would appear, however, that the courts in New York have been rather reluctant to follow the tendency, and have inclined to keep to a narrower view of the subject."

[44] 29 How. Pr. 188 (N. Y. 1865).

[45] 4 How. Pr. 148 (N. Y. 1849).

[46] 12 N. Y. 18 (1854).

[47] Presbyterian Church of Albany v. Cooper, 112 N. Y. 517, 20 N. E. 352 (1889).

[48] 29 How. Pr. 188 (N. Y. 1865).

[49] 276 N. Y. 427, 12 N. E. (2d) 532 (1938).

[50] 246 N. Y. 369, 159 N. E. 173 (1937). Other New York cases upholding this theory are Keuka College v. Ray, 167 N. Y. 96, 60 N. E. 325 (1901), where the founding of a college was held consideration for a promise to pay the treasurer of the college the sum of $500.00; Roberts v. Cobb, 103 N. Y. 600, 9 N. E. 500 (1886), where a promise

"Certain at least it is that we have adopted the doctrine of promissory estoppel as the equivalent of consideration in connection with our law of charitable subscriptions." The courts, except in estoppel cases, have been rigid in their determination to find some kind of consideration and have thus impliedly rejected the fifth and last theory. Nevertheless, if estoppel be applied, it is difficult to foresee any case in which this last theory might be needed.

Perhaps the best way to understand the law in New York today is to consider the application of these five theories by the court to a New York case. For this purpose we select the *Gainsburg* case. The following subscription was signed and delivered by the defendant to the plaintiff's assignor: "To aid and assist the Beth Israel Hospital Association in its humanitarian work, and in consideration of others contributing to the same purposes, the undersigned does hereby promise to pay to the order of the Beth Israel Hospital Association * * * the sum of $500. * * *. The undersigned further requests each and every other contributor to make his contribution in reliance upon the contribution of the undersigned herewith made."

1—The subscription was upheld on the theory that there was an implied request that the hospital continue with its humanitarian work and that such request constitutes an offer of a unilateral contract, which, when accepted by the charity by incurring liability in reliance thereon, became a binding contract.[51]

2—In regard to our second theory which holds that the subscribers make a multilateral contract among themselves and their promises, each running to the charity are consideration for each other, the court said: "It is unquestioned that the request that other subscribers make contributions in reliance on the appellant's contribution

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to pay $2,500.00 to help pay off the mortgage of a church on condition that the promisee would secure pledges for the balance ($15,000.00) was held to be enforceable when promisee was successful in securing pledges to the required amount. In Richmondville Union Seminary v. McDonald, 34 N. Y. 379(1866) the building of a seminary was held sufficient consideration for defendant's promise. The erection of a church at the request of a subscriber was held sufficient consideration for the enforcement of his promise to pay $150.00. Barnes v. Perine, 12 N. Y. 18 (1854). In Central Presbyterian Church v. Thomson, 8 App. Div. 565, 40 N. Y. Supp. 912 (4th Dept. 1896) the purchase of land and the erection of a church thereon was consideration for a promise to pay $300.00. In Matter of Reed's Estate, 133 Misc. 903, 233 N. Y. Supp. 450 (1929) a subscription to the Presbyterian Hospital of the city of New York was allowed as a claim against the estate of the deceased subscriber where the hospital agreed to construct and actually did construct a new hospital in reliance of the subscription.

[51] *Contra:* Hamilton College v. Stewart, 2 Denio 403 (N. Y. 1845). But as we have seen, this view was overruled when that case came before the Court of Appeals (1 N. Y. 581 (1848)) and has since been condemned as unsound in principle by Andrews, J., in Presbyterian Church of Albany v. Cooper, 112 N. Y. 517, 20 N. E. 325 (1889). See also Roberts v. Cobb, 103 N. Y. 600, 9 N. E. 500 (1886); Barnes v. Perine, 12 N. Y. 18 (1854).

stated as consideration in the subscription agreement, is not consideration which would support the appellant's promise".[52]

3—Here, too, we find support for our third theory, for the court found consideration in the application of the money by the hospital to the continuation of its work. Compare this with the old view held by the court in *Hammond* v. *Shepard* [53] where an agreement to apply the money for college purposes was not considered sufficient consideration for a promise to pay the trustees of the college a specified sum.

4—The doctrine of promissory estoppel was not applied in this case. The court said, per Hubbs, *J.*: "We need not go so far as to base our decision on the doctrine of promissory estoppel as stated in *Allegheny College* v. *Chautauqua County Bank*.[54] That doctrine need not be applied to save a subscription where a request or invitation that the promisee go on with its work can be implied from the subscription agreement." [55]

5—Of the last theory, which would dispose entirely with the need for consideration, we find no mention by the court; but it is doubtful if any necessity will arise for its application, due to the ability of the courts to find consideration and their willingness to apply the doctrine of promissory estoppel to charitable subscription cases.

HUGH PETER MULLEN.

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[52] I & I Holding Co. v. Gainsburg, 276 N. Y. 427, 432, 12 N. E. (2d) 532, 533 (1938).

[53] 29 How. Pr. 188 (N. Y. 1865).

[54] 246 N. Y. 369, 159 N. E. 173 (1927).

[55] I & I Holding Co. v. Gainsburg, 276 N. Y. 427, 434, 12 N. E. (2d) 532, 534 (1938).