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Charitable Subscriptions--Consideration--Promissory Estoppel (Matter of Lord, 175 Misc. 921 (1941))

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highest state courts and the Supreme Court held that such "separate coach laws" were regulatory of intrastate commerce and therefore constitutional.[5] The long history of this subject evolving finally in victory for the negro race presents a confused and ironic picture at best. The earliest case on record, similar to the one under discussion, was *De Cuir* v. *Hall*[6] where a Louisiana statute which attempted to prohibit segregation of races in the state was declared unconstitutional. As it was pointed out, while the law assumed to regulate intrastate commerce only, it in effect would influence the conduct of those passengers traveling through several states on a journey. Yet, thirteen years later, when Kentucky passed her segregation statute the Supreme Court held it was not unconstitutional,[7] but that the regulatory measure was meant to be purely intrastate. Certainly such a reversal was irreconcilable. Cases which followed were disposed of in the same manner,[8] the Supreme Court holding: "* * * the construction of a state statute by the highest court of the state is conclusive in the United States Supreme Court."[9] It is for these reasons that the instant case proves so interesting. Regardless of the decisions of the high state courts, regardless of earlier narrow decisions, regardless of contentions that the demand for Pullman seats by negroes is negligible over this and other lines, the Supreme Court has at last seen fit to render a decision which took sixty-four years in its evolution.

G. M. P.

CHARITABLE SUBSCRIPTIONS — CONSIDERATION — PROMISSORY ESTOPPEL.—The decedent, who was interested in the welfare of Hillsdale College, the claimant here, consented to donate $1,000 towards the building of a new library. The decedent signed the subscription agreement in question with the understanding that two memorial windows would be placed in the building in honor of his parents. The

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the plaintiff, a colored woman traveling from New York to Tennessee. *Held,* she was an interstate passenger. Law, intrastate in purpose was unconstitutional as it sought to regulate interstate traffic).

[5] Cand. O. R. R. v. Kentucky, 179 U. S. 388, 21 Sup. Ct. 101 (1900) State v. Jenkins, 124 Md. 376, 92 Atl. 773 (1914).

[6] 95 U. S. 485, 4 L. ed. 547 (1877).

[7] Louisville, N. O. & Texas R. R. v. Mississippi, 133 U. S. 587, 10 Sup. Ct. 348 (1890) (with strong dissenting opinion by Justice Harlan: "* * * and where interstate carrier laws exist within different states, the one requiring segregation, the other forbidding it—each is an infraction of the United States Constitution, and both are unconstitutional.").

[8] McCabe v. Atchinson, 235 U. S. 151, 35 Sup. Ct. 69 (1914); State *ex rel.* Abbott v. Hicks, 44 La. Ann. 770, 11 So. 74 (1892); Alabama & Va. Ry. v. Morris, 103 Miss. 511, 60 So. 11 (1912).

[9] Louisville, N. O. & Texas R. R. v. Mississippi, 133 U. S. 587, 10 Sup. Ct. 348 (1890).

erection of the building has begun and is in progress. Petitioner, the executor of the estate of Rivington D. Lord, brought these proceedings to determine the validity or enforceability of a claim against the estate, predicated upon the agreement. *Held,* the subscription agreement signed by the decedent is clearly enforceable on any one of three theories. Firstly, the transaction shows the creation of a bilateral contract, *i.e.,* the decedent promised to pay a specified sum, and the college promised to erect two memorial windows. Secondly, the consummation of a unilateral contract may be deduced from the implied request of the decedent to the college to proceed with the erection of the library building, and its actions to this end. Thirdly, the elements of a promissory estoppel are present since the college sustained a legal detriment in justifiable reliance upon the promise of the decedent, and it would be inequitable to permit its repudiation. *Matter of Lord,* 175 Misc. 921, 25 N. Y. S. (2d) 747 (1941).

A subscription is a written agreement, according to the terms of which the subscriber promises to furnish a sum of money, or its equivalent, for a designated purpose.[1] A "charitable subscription", as the term indicates, is really a gift [2] or a donation to a charitable institution; the subscriber's promise to pay is not made in return for consideration; [3] there is no thought of bargain or of exchanging promises as a juristic act,[4] or of doing any act with the manifested purpose of affecting the jural relation.[5] Nevertheless, insofar as society has an interest in the welfare of these institutions affected, and therefore requires that charitable subscriptions be enforced, the courts in their desire to enforce them,[6] have undoubtedly relaxed the orthodox doctrine of consideration,[7] and have treated subscription agreements

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[1] BOUVIER'S LAW DICTIONARY 3171; BLACK'S LAW DICTIONARY 1117; BEACH, CONTRACTS (1897) § 205.

[2] The mere fact that there is a condition attached to the receiving of the bounty will not elevate the agreement to the dignity of a contract. Performing the condition, or promising to perform the condition, is not a consideration for the donor's promise, in spite of the fact that it may be argued that by performing the condition or promising to perform, the donee did something he had the absolute right not to do. Consideration must be deemed the price paid for a promise. Nothing is consideration that is not deemed as such by both parties. There must be present a contractual intent. See Carlson v. Krantz, 172 Minn. 242, 214 N. W. 928 (1927); Kirksey v. Kirksey, 8 Ala. 131 (1845).

[3] WILLISTON, CONTRACTS (1924) § 116; WHITNEY, CONTRACTS (3d ed. 1937) § 53(a).

[4] See ASHLEY, CONTRACTS (1911) § 40.

[5] See BOWMAN, ELEMENTARY LAW (1929) § 51; WHITNEY, CONTRACTS (3d ed. 1937) § 1, "An agreement which contemplates mere social or moral obligations is not a contract".

[6] "Very likely, conceptions of public policy have shaped, more or less subconsciously, the rulings thus made." Cardozo, Ch. J., majority opinion in Allegheny College v. Nat. Chautauqua County Bank of Jamestown, 246 N. Y. 369, 159 N. E. 173 (1927).

[7] See Allegheny College v. Nat. Chautauqua County Bank of Jamestown, 246 N. Y. 369, 159 N. E. 173 (1927) (concurring opinion). An extreme statement is found in a Louisiana case. "In contracts of beneficence the intention

either as contracts, or as offers to contract.

The first step towards the enforcement of subscription agreements was the determination that parol evidence is admissible to show the existence of a consideration for the subscriber's promise, and also to show the acts performed by the charitable institution in reliance thereon.[8] In those cases where the decisions were based on the law of contracts, the tendency has been either to imply a return promise as the consideration for the subscriber's promise,[9] or to imply a request for the performance of an act upon the strength of the promise,[10] even though neither the return promise nor the request for the performance of an act was expressed in the instrument.[11] Although it was intimated in *I & I Holding Corporation* v. *Gainsburg* [12] that the equitable doctrine of estoppel is to be invoked in these cases only when it is the court's policy to enforce the agreement, and it is impossible to find the existence of a contract either bilateral or unilateral, an analysis of the cases on this topic will reveal that almost invariably the existence of the elements of a promissory estoppel moved the court to enforce the agreement, and not the presence of a *consideration.* It is the changing of one's position by assuming or incurring liabilities in reliance upon the subscriber's promise that spells the obligation.[13] Until there is an alteration in the position of

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to confer a benefit is a sufficient consideration." Louisiana College v. Keller, 10 La. 164, 167.

[8] Barnes v. Perine, 15 Barb. 249, *aff'd,* 12 N. Y. 18 (1854); Presbyterian Church of Albany v. Cooper, 112 N. Y. 517, 20 N. E. 352 (1889); Matter of Taylor, 251 N. Y. 257, 167 N. E. 434 (1929); "* * * proof may be made of the consideration and of such facts, attending the making and delivery of the note, as are not inconsistent with the instrument", Keuka College v. Ray, 167 N. Y. 96, 60 N. E. 325 (1901); I & I Holding Corp. v. Gainsburg, 276 N. Y. 427, 12 N. E. (2d) 532 (1938).

[9] Barnes v. Perine, 15 Barb. 249, *aff'd,* 12 N. Y. 18 (1854); Keuka College v. Ray, 167 N. Y. 96, 60 N. E. 325 (1901); Allegheny College v. Nat. Chautauqua Bank of Jamestown, 246 N. Y. 369, 159 N. E. 173 (1927).

[10] I & I Holding Corp. 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, *aff'd,* 12 N. Y. 18 (1854); Trustees of Hamilton College v. Stewart, 2 Denio 403, 1 N. Y. 581 (1846).

[11] See note 10, *supra.* "Nor need a request to the promisee to perform the services be expressed in the instrument; it may be implied." Keuka College v. Ray, 167 N. Y. 96, 60 N. E. 325 (1901).

[12] "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. It is only when a request or invitation to carry on cannot be implied in fact that it is necessary to invoke that doctrine." I & I Holding Corp. v. Gainsburg, 276 N. Y. 427, 12 N. E. (2d) 532 (1938).

[13] RESTATEMENT, CONTRACTS § 90, "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"; see WORDS AND PHRASES, *Estoppel in Pais;* Hazard v. Wilson, 22 Misc. 397, 50 N. Y. Supp. 280 (1898); Grange v. Palmer, 56 Hun 481, 10 N. Y. Supp. 201 (1890); POMEROY, EQUITY JURISPRUDENCE §§ 804, 805.

the promisee, the subscription agreement is treated as a mere offer that may be revoked any time before it is accepted by the promisee.[14] In these cases, the unilateral contract is said to arise when the promisee *commences* performance as an acceptance, and the courts do not follow the well-established rule of contract law that only full performance of the requested act will be deemed an acceptance of the offer.[15] However, the position of the courts is in accord with the Restatement.[16]

Insofar as the noted policy of the courts to sustain the validity of these agreements whenever a counter promise of the promisee can be implied, or whenever the promisee has sustained any legal detriment in reliance upon the promised gift,[17] is a wise and a desirable one, it would seem advisable for the courts to state frankly that these cases form an exception to the strict rules of consideration, and that the doctrine, as applied to charitable subscriptions, has been modified and qualified by the doctrine of promissory estoppel.[18]

E. D. R.

COMMON CARRIERS—NEGLIGENCE—DUTY TOWARD PASSENGER UNDER DISABILITY.—Plaintiff's intestate was waiting for a train in defendant's subway station when he fell upon the tracks. A fellow passenger and two station agents removed the deceased from the tracks and assisted him to a bench some eight feet from the edge of the platform. It was apparent that the man was laboring under a physical disability, but when this fact was pointed out to the station agent, he declined to take any action. Subsequently, plaintiff's intestate once again fell upon the tracks, and this time was killed by one of defendant's trains. Plaintiff contends (a) that the station agents

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[14] Pratt v. Trustees, 93 Ill. 475 (1879) (subscriber's offer was revoked by his death); Cottage Street Methodist Church v. Kendal, 121 Mass. 528, 23 Am. Rep. 286 (1877) (promisee had incurred no liabilities).

[15] Peterson v. Pattburg, 248 N. Y. 86, 161 N. E. 428 (1928); Sonino v. Magrini, 225 App. Div. 536, 234 N. Y. Supp. 63 (1929); see WHITNEY, CONTRACTS (3d ed. 1937) § 34.

[16] RESTATEMENT, CONTRACTS § 45, "If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or if no time is stated therein, within a reasonable time."

[17] Incurring liabilities or sustaining a detriment in reliance upon a promise is not consideration unless that act or detriment was requested by the promisor as the price for his promise. See WHITNEY, CONTRACTS (3d ed. 1937) § 45; WILLISTON, CONTRACTS (1924) § 112.

[18] See Cardozo, Ch. J., concurring in Allegheny College v. Nat. Chautauqua County Bank of Jamestown, 246 N. Y. 269, 159 N. E. 173 (1927); ASHLEY, CONTRACTS (1911) § 40.