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Charitable Subscriptions--Assignability--Consideration--Sufficiency of Complaint (I & I Holding Corp. v. Gainsburg, 276 N.Y. 427 (1938))

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and carrier should be treated as a question of fact to be determined by the evidence.[10]

In the instant case the question of fact was settled in favor of the plaintiff. He had made a prior oral agreement with the defendant, but no choice of rates was offered to him. To find for the defendant would be to nullify the rule requiring the carrier to afford the shipper a choice of rates in order to limit his common law liability. To find for the plaintiff is to reaffirm the well established rule that an agent has no authority to modify a contract made by his principal.[11]

T. G.

CHARITABLE SUBSCRIPTIONS—ASSIGNABILITY—CONSIDERATION —SUFFICIENCY OF COMPLAINT.—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 Building * * * the sum of $5000 * * *. The undersigned further requests each and every other contributor to make his contribution in reliance upon the contribution of the undersigned herewith made." The plaintiff alleges that the hospital "upon said subscription * * * proceeded with its humanitarian work, obtained other like subscriptions, expended large sums of money and incurred large liabilities. * * *" Defendant contends (1) that the complaint is insufficient as the subscription does not allege specific acts of consideration and being merely a general donation should not be enforced by the courts of this state;[1] (2) that such agreements are not assignable. On appeal, *held,* judgment for plaintiff affirmed. There is an implied request that the hospital continue with its humanitarian work. Such request constitutes an offer of a unilateral contract, which, when accepted by the charity by incurring liability in reliance

[10] In Waldron v. Fargo, 170 N. Y. 130, 62 N. E. 1077 (1902), the plaintiff sued to recover the value of horses destroyed in transportation. The defendant carrier set up a valuation agreement, claiming to have made it with the plaintiff's shipping agent. Notwithstanding that the plaintiff gave evidence of a prior oral agreement by which the defendant assumed his common law liability, the trial court directed a verdict in favor of the defendant. The Court of Appeals reversed, holding that it was for the jury to find whether or not the prior agreement claimed by the plaintiff had been made.

[11] See note 7, *supra.*

[1] Trustees of Hamilton College v. Stewart, 1 N. Y. 581 (1848) (a donation "the interest of which shall be applied to the payment of the officers" of Hamilton College was held unenforcible on the ground of lack of consideration); Hammond v. Shepard, 29 How. Pr. 188 (N. Y. 1865) (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).

thereon, became a binding contract. A contract of this nature is assignable. *I & I Holding Corp.* v. *Gainsburg,* 276 N. Y. 427, 12 N. E. (2d) 532 (1938).

While the courts of England have, in the absence of substantial consideration, refused to enforce charitable subscriptions,[2] the weight of authority in this country, under various theories, recognizes and enforces such agreements.[3] The courts in New York 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 upon it.[4] The courts, however, will not enforce a gratuitous promise although the object intended to be promoted may be a worthy one,[5] for an agreement without consideration is a *nudum pactum;* "but any degree of reciprocity will prevent the pact from being nude." [6] Acts of consideration need not be specified, but may be implied even from facts outside the subscription agreement,[7] and the subscription becomes binding when accepted by the consummation of the requested act.[8] The theory which holds that the request of one subscriber that others make contributions on the strength of his subscription is sufficient consideration to support his promise, has never been accepted by the courts of this state,[9] although other states have seen fit to sus-

[2] *In re* Hudson, 54 L. J. Ch. 811. Followed in the United States in Trustees of Hamilton College v. Stewart, 1 N. Y. 581 (1848); Phillips Limerick Academy v. Davies, 11 Mass. 113 (1814).

[3] The courts of this country when dealing with charitable subscriptions have found consideration in an act performed by the charity at the request, express or implied, of the subscriber (n.4 *infra*); or that the various subscriptions running to the charity are consideration for each other (n.10 *infra*); even the fact that the subscription will be applied to the object for which it was made has been held consideration (Note 48 L. R. A. [N. S.] 784). In some states the courts have adopted the doctrine of promissory estoppel (n.15 *infra*) and others have gone so far as to hold that consideration in charitable subscription cases is not necessary (n.13 *infra*). Billig, *The Problem of Consideration in Charitable Subscriptions* (1926) 12 CORN. L. Q. 467.

[4] Keuka College v. Ray, 167 N. Y. 96, 60 N. E. 325 (1901); Roberts v. Cobb, 103 N. Y. 600, 9 N. E. 500 (1886); Richmondville Union Seminary v. McDonald, 34 N. Y. 379 (1866); Barnes v. Perine, 12 N. Y. 18 (1854); Central Presbyterian Church v. Thomson, 8 App. Div. 565, 40 N. Y. Supp. 912 (4th Dept. 1896); *In re* Reed's Estate, 133 Misc. 903, 233 N. Y. Supp. 450 (1929).

[5] Pershall v. Elliot, 249 N. Y. 183, 163 N. E. 554 (1928); Presbyterian Church of Albany v. Cooper, 112 N. Y. 517, 20 N. E. 352 (1889); Trustees of Hamilton College v. Stewart, 1 N. Y. 581 (1848).

[6] 2 BL. COMM. 445.

[7] Matter of Taylor, 251 N. Y. 257, 167 N. E. 434 (1929); Doughert v. Salt, 227 N. Y. 200, 125 N. E. 94 (1919); 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. 325 (1889).

[8] See cases in n.4 *supra.* Also see Note 48 L. R. A. 787, RES. L. CONTRACTS § 90, 1 WILLISTON, CONTRACTS (Rev. ed. 1936) § 116. For the view taken by the federal courts see Commissioner of Internal Revenue v. Bryn Mawr Trust Co., 87 F. (2d) 607 (1936).

[9] *Contra:* Hamilton College v. Stewart, 2 Denio 403 (N. Y. 1845). 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. See opin-

tain it.[10] However, where certain other subscriptions are secured at the express request of a subscriber there is sufficient consideration.[11] Judge Lehman dissenting in the instant case contends that, "Mere continuance of the charitable work, as it might have done even if no promise had been made, does not constitute consideration for the promise, or give rise to a promissory estoppel." However, it would seem that the test for consideration is not whether the promisee would or would not have performed the requested act from other motives; but that the law is satisfied if the act requested of him be performed in reliance upon the request, and the promisee was not already legally bound to do it. Whether the promisee had already intended to do the act or would have done it even though the promisor had not made the offer has no bearing on its sufficiency as consideration.[12]

The courts, endeavoring to effect that public policy which recognizes the moral obligation of a charitable subscription and the necessity for its enforcement as the life blood of the eleemosynary institutions,[13] yet, unwilling to abandon that rule which declares gratuitous promises to be unenforcible,[14] have evolved the doctrine of promissory estoppel [15] and adapted it to these cases. It need not be in-

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ion of Andrews, J., in Presbyterian Church of Albany v .Cooper, 12 N. Y. 517, 20 N. E. 325 (1889) at p. 522. See also Roberts v. Cobb, 103 N. Y. 600, 9 N. E. 500 (1886); Barnes v. Perine, 12 N. Y. 18 (1854).

[10] See Note 48 L. R. A. (N. S.) 794. Georgia recognizes this theory by statute—GA. CIV. CODE 1910, § 4246, Glass v. Grant, 46 Ga. App. 327, 167 S. E. 727 (1933).

[11] Roberts v. Todd, 103 N. Y. 600, 9 N. E. 500 (1886); Washington Heights M. E. Church v. Comfort, 138 Misc. 236, 246 N. Y. Supp. 450 (1930); Kentucky Baptist Educational Society v. Carter, 72 Ill. 247 (1874); (4) University of Des Moines v. Livingston, 57 Iowa 307, 10 N. W. 738 (1881); Troy Conference Academy v. Nelson, 24 Vt. 189 (1852).

[12] Fourth Presbyterian Church v. Continental Illinois Bank, 284 Ill. App. 132 (1936) (mere maintenance of the usual church activities was sufficient reliance); Brokaw v. McElroy, 162 Iowa 288, 143 N. W. 1087; Furman University v. Waller, — S. C. —, 117 S. E. 356 (1923), discussed in (1936) 31 ILL. L. REV. 264; 25 R. C. L. 1402. "It is not essential for the sufficiency of the consideration that the promise of the subscriber be the sole inducement to the activities and expenditures of the beneficiary."

[13] "No doubt conceptions of public policy shape more or less subconsciously the decision of the courts in these cases. Public policy calls for the enforcement of charitable subscriptions because the public is interested in the support, growth and maintenance of charitable, religious, and educational institutions and often their principal source of support comes from charitable subscriptions," WHITNEY, THE LAW OF CONTRACTS (3d ed. 1936) 104. See also BILLIG (1926) 12 CORN. L. Q. 467, at 479, where it is said: "A written subscription to charity signed by the subscriber or his agent and delivered to the charity shall not be invalid or unenforcible for want of consideration." *Id.* at 480. Some courts 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 Cin. Sup. Rep. 353 (Ohio 1873); or on moral grounds, Caul v. Gibson, 3 Pa. 416 (1846).

[14] *Ex nudo pacto non oritur actio.*

[15] Stated briefly the doctrine of promissory estoppel is that action by the promisee in justifiable reliance on the promise will make the promise binding.

voked, however, to save a subscription where the request or invitation that the promisee go on with his work can be implied from the subscription agreement.[16]

The old concept which regarded a contract as creating a strictly personal obligation and was, therefore, not assignable, has long been abandoned by common law [17] and by statute.[18] The rule at present is that any property right, not necessarily personal is assignable.

H. P. M.

CONSTITUTIONAL LAW—LEGISLATIVE POWERS—IMPAIRMENT OF THE OBLIGATION OF CONTRACTS—DEFICIENCY JUDGMENTS—SECTIONS 1083-A AND 1083-B CIVIL PRACTICE ACT CONSTRUED.—Plaintiff was the assignee of a bond and mortgage executed prior to the mortgage moratorium legislation of 1933.[1] On September 22, 1933, a foreclosure action was commenced and after the sale of the property plaintiff duly made a motion for the resulting deficiency. The trial court denied the motion [2] whereupon the plaintiff discontinued the foreclosure action as against the defendant and brought the present action on the bond for the deficiency. The dismissal of this complaint by the lower court on the ground that it failed to state a cause of action [3] was affirmed by the Appellate Division and the Court of Appeals.[4] Upon certiorari to the Supreme Court of the United States, the appellant argued that Sections 1083-a and 1083-b of the Civil Practice Act were unconstitutional as they impaired the obliga-

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WHITNEY, *op. cit. supra,* at p. 106. "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," per Cardozo, J., in Allegheny College v. National Chautaugua County Bank, 246 N. Y. 369 at p. 374, 159 N. E. 173.

[16] Instant case.

[17] Hopkins v. Upshur, 20 Tex. 89 (1857) (charitable subscription case).

[18] PERS. PROP. LAW § 41; Rosenthal Paper Box Co. v. National Folding B. & P. Co., 226 N. Y. 313 (1919); Oconto Chamber of Commerce Co. v. Gradwell, 175 Wis. 447, 185 N. W. 544 (1921). The duties created by such a contract are non-assignable. Langel v. Betz, 250 N. Y. 159, 164 N. E. 890 (1928); Smith v. Morin Bros., Inc., 233 App. Div. 562, 253 N. Y. Supp. 368 (4th Dept. 1931).

[1] Laws of 1933, c. 793 and 794, in effect Aug. 28, 1933.

[2] CIV. PRAC. ACT § 1083-a provides that a deficiency judgment may not be obtained where the market value of the mortgaged premises exceeds the amount of the judgment plus other liens, encumbrances and expenses of the action.

[3] CIV. PRAC. ACT § 1083-a provides an exclusive manner for the granting of a deficiency judgment and it must be granted in the foreclosure action.

[4] 271 N. Y. 562, 3 N. E. (2d) 186 (1936), *aff'd,* on reargument 271 N. Y. 662, 3 N. E. (2d) 473 (1936) (where the remittitur was amended to state that "a Federal question was presented and necessarily passed upon" in order to facilitate an appeal to the Supreme Court).