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Enforceability of Charitable Subscriptions in Wisconsin

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COMMENTS

ENFORCEABILITY OF CHARITABLE SUBSCRIPTIONS IN WISCONSIN

Charitable organizations are assuming a prominent role in our daily lives. The Red Cross, the Community Chest, various fraternal organizations and churches are but a few of those who seek donations to be expended on a worthy cause. To what extent a legal obligation attaches to the pledge or so-called charitable subscription which one often signs when donating to these organizations is a timely question. The following is a survey of the Wisconsin law on chariable subscriptions.

Subscription contracts for charitable organizations have been upheld by American courts on three distinct grounds: (1) as a bilateral contract, the promise of each subscriber being the consideration for the promise of the other;[1] (2) as a unilateral contract, obligatory upon the commencement or completion of that for which the donation was offered;[2] and (3) promissory estoppel, the theory being that the subscriber has made a gift promise which induced a forseeable change of position.[3]

Wisconsin decisions present an interesting chronological study of the struggles of a single state court with the problem of charitable subscriptions. In an early case, *Lathrop v. Knapp*,[4] subscribers agreed to contribute certain sums to be used in purchasing a tract of land which would prove satisfactory to a committee selected by all of the subscribers. The land was purchased for less than the contemplated amount. Sufficient money had been paid in by subscribers other than the defendant to meet the purchase price. In a suit by a trustee to obtain the amount subscribed by the defendant the Court found the promise to be enforceable. Chief Justice Dixon, writing the majority opinion, stated:

> "* * * and the question is, shall the agreement fail for want of consideration? I say, clearly not. In my judgment it is emphatically one of those cases in which it has been held, and rightly held, where several promise to contribute to a common object, that the promise of each is a good consideration for the promise of the others. It seems to be clear beyond doubt that such was the consideration, or one of the considerations upon which each subscriber put down his name, and that the same is plainly to be inferred from the terms and obvious import of the paper."

The mutual promises were likened to a composition of creditors. Such a composition is not binding when one creditor agrees with the debtor

[1] Owenby v. Georgia Baptist Assembly, 137 Ga. 698, 74 S.E. 56 (1912).
[2] 1 Williston on Contracts, sec. 116.
[3] Restatement of Contracts, sec. 90.
[4] Lathrop v. Knapp, 27 Wis. 214 (1870).

to mitigate his debt and no new consideration is given,[5] but where several creditors agree with the debtor, each knowing of the promise of the other, the promise of each is the consideration for the promise of the others and the contract is binding upon all.[6]

The *Lathrop* case might have established for all time the bilateral contract approach in Wisconsin. However, Justice Dixon went on in the same opinion to lay the foundation for a unilateral contract theory:

> "This advancement of money by the other subscribers and purchase of the lands did, within all the authorized operate to bind the defendant, if he was not bound before."

Later Wisconsin decisions upholding charitable subscriptions have put primary emphasis on this second principle of the Lathrop decision,[7] namely:

> "* * * where something has been done or some liability or duty assumed, in reliance upon the subscription, in order to carry out the object, the promises are binding and may be enforced although no pecuniary advantage is to result to the promisors."[8]

In the *La Fayette Monument* case defendant promised to give a certain sum of money if an additional amount was raised by the county board through taxes. The promise was held enforceable where the county board procured the stipulated sum. The court said the subscription was conditional, the condition was performed in reliance on the promise, and this was consideration sufficient to support the contract.[9] This is clearly the unilateral contract approach.

Gibbons v. Ginsel[10] is also cited as authority in Wisconsin for this proposition:

> "Where * * * the persons to whom the subscriptions run have expended money or incurred obligations on the faith of such subscriptions, it is sufficient consideration to support the promise to pay."

In the *Gibbons* case the subscriptions were offered to the assignors of the plaintiff if they would construct a certain building. That which was bargained for was completed, namely, the building, and the promise was held enforceable as a unilateral contract. The same principle has been applied in subsequent cases.[11]

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[5] Otto Klauber, 23 Wis. 471 (1868); Perkins v. Lockwood, 100 Mass. 249 (1868).
[6] Eaton v. Lincoln, 13 Mass. 424 (1816).
[7] Supra, note 4.
[8] Quoted in Lathrop v. Knapp, supra, note 4, from Metcalf on Law of Contracts, page 185.
[9] LaFayette Monument Corporation v. Magoon, 73 Wis. 627, 42 N.W. 17 (1889).
[10] Gibbons v. Ginsel, 79 Wis. 365, 48 N.W. 255 (1891).
[11] The Board of Trustees of The Seven Day Baptist Memorial Fund v. Saunders, 84 Wis. 570, 54 N.W. 1094 (1893); Superior Consolidated Land Co. v. Beckford, 93 Wis. 220, 67 N.W. 45 (1896).

At this point a curious meander in the Wisconsin decisions should be noted. A subscription contract may not be enforced if it has not been accepted for the promise by someone with actual authority. This is so even though acts have been performed by the promisee relying on the promise. In the *Church of un Prairie* case a promise to "give the last hundred dollars" was not held binding despite the fact that some of the funds collected from other subscriptions simultaneously made had been expended to reduce the debt of the plaintiff.[12] The promise had been given to the minister of the congregation and he had not received the actual authority to solicit or accept such offers for the church by a vote of the corporate trustees. Not having been formally accepted no binding contract arose. *Leonard v. Lent* cited and followed the foregoing case on a similar set of facts.[13]

However, in the *Consolidated Land* case where an agent had procured a subscription from the defendant, the latter was bound on the contract after the corporation for whom the subscription was procured had performed relying on the contract, despite the fact that there had been no formal acceptance by the principal.[14] No formal acceptance was deemed necessary, the court considering such work expended on the faith of the promise sufficient acceptance. The *Church of Sun Prairie* decision[15] and the *Leonard* case[16] were dismissed in the following language:

> "The cases of Methodist Episcopal Church v. Sherman, 36 Wis. 404 and Leonard v. Lent, 43 Wis. 83, where subscriptions to assist in paying off church debts were held not binding because never accepted by the church corporation or by any authorized agent of the corporations in any way, have no bearing on this case."

It is submitted that the two cases dismissed so summarily differ from the *Consolidated Land* case only in that the solicitor of the subscriptions was not actually authorized to solicit the subscriptions in the former. In the *Consolidated Land* decision there is no showing that the agent had any actual authority to accept the subscriptions, but actual authority to solicit is assumed in the decision. In all three cases acts were done or money expended on the faith of the subscription promise. Thus it would seem where the agent is not actually authorized to solicit or accept subscriptions, the corporate acceptance must be formal by a vote of the trustees and merely acting on the faith of the agreement will not suffice. But where the agent is actually authorized to solicit

[12] The Methodist Episocpal Churcs of Sun Prairie v. Sherman, 36 Wis. 404 (1874).
[13] Leonard v. Lent, 43 Wis. 83 (1877).
[14] Superior Consolidated Land Company v. Beckford, 93 Wis. 220, 67 N.W. 45 (1896).
[15] Supra, note 12.
[16] Supra, note 13.

the subscriptions, action taken relying on the promise will be a sufficient acceptance.

In Re McCanna's Estate[17] in one way clarifies Wisconsin law and in another leaves many questions still to be answered. There the deceased promised "in consideration of the mutual promises and subscriptions of other persons made for said purposes" to subscribe a specified sum solicited by the pastor. However, the pastor had not received the actual authority to solicit or accept such subscriptions from the corporate trustees. Subsequent to the death of McCanna the trustees "accepted" the offer. In a suit against the estate to collect the amount subscribed, the court held the subscription unenforceable because no action had been taken on the faith of the promise prior to his death. Up to this point the decision is consonant with the foregoing cases, that if the solicitor had no actual authority to solicit or accept, formal acceptance plus action would be necessary to bind the subscriber. The problem was then raised whether the promises of the subscribers could make the subscription binding prior to death:

> "In support of the objection filed to the claim, the defense contends that the mutual promises of other subscribers to agreements to the same effect as McCanna's agreement do not constitute good consideration to render the subscription enforceable as a contractual obligation. The question raised by that contention has not been definitely decided by this court. It was involved in Lathrop v. Knapp[18] in which Chief Justice Dixon considered such mutual promises sufficient as consideration * * *. Subsequently, the question was raised in several cases, but was not decided, on the ground that the party to whom it ran had on the faith thereof, made expenditures or incurred obligations which were held to constitute sufficient consideration to support the promised subscription.
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> There are no such grounds, however, in the case at bar. There is no proof that either St. Judes Church or any subscriber advanced any money or incurred any obligation on the faith of McCanna's subscription prior to his death. In discussing the conflict in the authorities as to whether the promise of a subscriber constitutes sufficient consideration for the promise of the other subscribers it is stated in 1 Page, Contracts, p. 943, par 561, that,
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> > 'In jurisdictions in which the consideration may move from from a third person, the mutual promises of the subscribers, if actually intended by them as consideration should be held to be sufficient consideration for the promise to pay such subscription to the charitable organization, if such organization, or the representative thereof, is a party to such con-

[17] In Re McCanna's Estate: Roesch v. St. Jude's Church, 230 Wis. 561, 284 N.W. 502 (1939).

[18] Supra, note 4.

> tract. The great weight of authority is to the effect that if the contract is made between the subscriber and the beneficiary, so that the beneficiary is a party to the contract, the beneficiary may maintain an action upon such contract in all jurisdictions in which the consideration need not move from the promisee.'
>
> Under the majority rule, *which can be considered applicable in this jurisdiction,*[19] in view of our rule that a stranger to a contract who is a beneficiary thereunder may maintain an action thereon, even though the consideration did not move from him (Tweeddale v. Tweeddale, 116 Wis. 517, 93 N.W. 440) there is in this case still the question as to whether it can be held that the agreement for the subscription was made between St. Judes Church and McCanna so that the Church was a party thereto as a matter of law. Whether the Church was legally a party to and bound by the agreement depends on the effect in law of Rev. Hanz's action in writing the words "Saint Judes Church, by Joseph E. Hanz." after the word "accepted" at the foot of the agreement."

It was decided that the pastor had received no actual authority from the corporate trustees to solicit or accept the conract for the church and therefore the church was not a party to the conract. The majority rule, cited by the court, envisions the following situation: A promises C in consideration of B's promise to C. C here can be considered the promisee provided that C makes himself a party either by his own acceptance of the promise or by receiving the promise through an agent authorized to solicit it. In this manner C becomes a party to the contract, although he has neither furnished any consideration, nor can he be sued. Under this rule where a duly authorized agent solicits subscriptions and the mutual promises of the subscribers are in consideration of the promises of the other subscribers running to the charity, an enforceable contract will then result without the necessity of the charity having done anything on the faith of the promise.

The doctrine of *Tweeddale v. Tweeddale*[20] cited by the court to sustain the foregoing rule does not seem apposite. That case is applicable to the following example: A promises B for the benefit of C in consideration of B's promise to A for the benefit of C. The rights of C vest immediately as donee beneficiary. Although not a party to the contract C has a right to sue thereon. No acceptance or acts on the part of C are required. Had the principle of the *Tweeddale* case been applicable the church would not have been required to become a party to the contract. If the contract was made for the benefit of the church, and the subscribers had actually made promises to each other, the subscribers would be the parties to the contract and as such could not

[19] Italics ours.
[20] Tweeddale v. Tweeddale, 116 Wis. 517, 93 N.W. 440 (1903).

have relieved themselves from the obligation without the consent of the beneficiary. The doctrine of the *Tweeddale* case is perverted, and it is not quite clear just what the court means unless it intends to use that decision merely as authority for the proposition that the consideration need not move from the charity. The use of the word "party" in discussing the *Tweeddale* case is confusing.

In other jurisdictions, notably New York, a third ground has been developed for the enforcement of these types of subscriptions.[21] Commonly known as promissory estoppel, the rule is best framed in the Restatement of Contracts:

> "A promise which the promisor would 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."[22]

This doctrine has not gained a foothold in Wisconsin. An examination of the Wisconsin cases cited reveals that the promises are generally sustained on the theory of a unilateral contract since that which was performed was always bargained for.

The following is offered as a summary of the Wisconsin decisions, with the qualification that the court has at no time drawn its lines as precisely as this summary would seem to indicate. A charitable subscription is binding when the following two elements concur: 1) Consideration in the form of a unilateral act which can move from the charity to the promisor or from a third person to the charity, and 2) the charity is made a party to the contract either by formal acceptance of the promise or by solicitation through an authorized agent. The word party, as used here, merely establishes privity of contract and must not be confused with a bilateral contract. Of course, the possibility of a bilateral contract between the charity and the subscriber is not foreclosed if the subscription agreement is appropriately drafted,[23] or if the subscribers can be brought together in such a way that mutual promises are exchanged between them, the charity may be vested with rights as a true donee beneficiary.

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[21] Snyder, Promissory Estoppel In New York, 15, Brooklyn Law Review (1948).
[22] Supra, note 3.
[23] In Re Wheeler's Estate: The Congregation of the Fourth Presbyterian Church of Chicago v. Continental Illinois National Bank and Truck Company of Chicago, 284 Ill. App. 132, 1 N.E. (2d) 425 (1936).