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Case in Brief: Allegheny College v. National Chautauqua County Bank**Enhanced Case Summary****Notable Case Analysis**

This case was notable because of Justice Cardozo's application of traditional contract principles to a charitable subscription to a college. The court found that a college's acceptance of a partial payment towards the subscription imposed a duty upon the college, creating an enforceable contract. The duty assumed by the college to perpetuate the name of the founder of a memorial was sufficient in itself to give validity to the subscription within the rules that defined consideration for an enforceable promise.

Enhanced Procedural Posture

Plaintiff college sought review of a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (New York), which unanimously affirmed a judgment in favor of defendant corporate executor entered upon a dismissal of a complaint. The complaint was dismissed by the trial court on trial at an equity term. The college had sought the enforcement of a decedent's promised bequest to the college. The corporate executor of the decedent's estate had rejected the college's claim.

Explanation of Parties

Plaintiff college

Allegheny College was an institution of liberal learning in Meadville, Pennsylvania.

Defendant corporate executor

National Chautauqua County Bank of Jamestown was the corporate executor of the estate of an individual who promised to donate \$5,000 to Allegheny College.

Parties' Arguments**I. Was the decedent's charitable subscription to the college valid and enforceable as a contract?**

Plaintiff college claimed that the decedent's promise to pay the balance of a \$5,000 gift to the college was enforceable as a contract. The college claimed that the balance was payable 30 days after the decedent's death, as specified in the decedent's written bequest to the college. [Link P. Arg. ▼](#)

Defendant corporate executor claimed that no valid and enforceable contract had been established when the decedent promised to bequeath \$5,000 to the college 30 days after the decedent's death. [Link P. Arg. ▼](#)

Holding: The court agreed with the college's claim that the decedent's subscription was enforceable against the decedent's estate. The court also held that the college's duty to create a scholarship with the subscription funds constituted sufficient consideration for the enforcement of the subscription. [Link P. Arg. ▼](#)

Quick Holding Bullets

- The moment that the college accepted \$1,000 as a payment on account, there was an assumption of a duty to do whatever acts were customary or reasonably necessary to maintain the memorial fairly and justly in the spirit of its creation. The college could not accept the money, and hold itself free thereafter from personal responsibility to give effect to the condition. [Link Quick Holding ▼](#)
- The duty assumed by the plaintiff to perpetuate the name of the founder of the memorial was sufficient in itself to give validity to the subscription within the rules that define consideration for a promise of that order. [Link Quick Holding ▼](#)
- When the promisee subjected itself to such a duty at the implied request of the promisor, the result was the creation of a bilateral agreement. [Link Quick Holding ▼](#)

Enhanced Overview

I. Background

Plaintiff college initiated a fundraising drive, and a decedent pledged \$5,000 to the college to be used to fund a scholarship for the benefit of students preparing for the ministry. The gift was payable 30 days after the decedent's death; however, \$1,000 was paid to the college prior to the decedent's death. The subscription was subsequently revoked, so the college filed a suit against defendant corporate executor to recover the \$4,000 balance. The trial court's dismissal of the college's complaint was unanimously affirmed by the appellate court. The college sought review.

II. Subscription Was Enforceable

On further review, the court reversed the appellate court's judgment. The college's acceptance of a charitable subscription pledged for the establishment of a memorial scholarship fund imposed a duty upon the college to act in accordance with the donor's wishes. The imposition of this duty provided sufficient consideration for the enforcement of the subscription. The court held that the moment that the college accepted \$1,000 as a partial payment of the decedent's subscription, the college had a duty to do whatever acts were customary or reasonably necessary to maintain the memorial fairly and justly in the spirit of its creation. The court further held that the college could not accept the money and hold itself free from personal responsibility to

give effect to the condition upon which the subscription was based. The court also held that the college's assumption of the duty to use the subscription to memorialize the decedent constituted sufficient consideration for the formation of an enforceable bilateral agreement to pay the balance of the subscription 30 days after the decedent's death.

Dissenting/Concurring Opinion Overview

Dissenting opinion by Justice Kellogg

[Link Concur/Dissent ▼](#) The dissent stood for the proposition that a valid enforceable contract was never formed. The dissenting opinion disagreed with the majority opinion's finding that a valid offer, acceptance, and consideration were present, so the decedent's promise was a mere gift, which was revocable by the decedent.

Expanded Headnote Coverage

LexisNexis Headnotes

[HN1] A promise of charitable subscription is unenforceable like any other if made without consideration.

[HN2] A classic form of statement identifies consideration with detriment to the promisee sustained by virtue of the promise.

[HN3] The promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting.

[HN4] New York has adopted the doctrine of promissory estoppel as the equivalent of consideration in connection with its law of charitable subscriptions.

[HN5] Decisions which have stood so long, and which are supported by so many considerations of public policy and reason, will not be overruled to save the symmetry of the concept of consideration.

[HN6] If a person chooses to make an extravagant promise for an inadequate consideration it is his own affair.

[HN7] When a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action.

[HN8] A bilateral agreement may exist though one of the mutual promises be a promise implied in fact; an inference from conduct as opposed to an inference from words.

[HN9] It is often difficult to determine whether words of condition in a promise indicate a request for consideration or state a mere condition in a gratuitous promise. An aid, though not a conclusive test in determining which construction of the promise is more

reasonable is an inquiry whether the happening of the condition will be a benefit to the promisor. If so, it is a fair inference that the happening was requested as a consideration.

Jurisprudential Analysis

Status of the Case

Allegheny College v. National Chautauqua County Bank (N.Y. App. Div.) (Apr. 13, 1927)

The Appellate Division of the Supreme Court in the Fourth Judicial Department (New York) affirmed a judgment of a trial court at Equity Term, which dismissed a complaint by plaintiff college to enforce a charitable subscription against defendant, a corporate executor of a decedent's estate.

Comparative Case Content

Topic: Enforceability of Charitable Subscription Contract

Holding that charitable subscription was enforceable:

Trustees of Baker University v. Clelland, [86 F.2d 14](#) [Shepardize](#) (8th Cir. 1936)

OVERVIEW: A voluntary subscription was supported by consideration where the college expended money to set up and maintain a Chair in honor of the donor's brother; there was consideration for the donor's relatives' note where it relieved the donor of liability.

In re Borden's Will, [41 N.Y.S.2d 269](#) [Shepardize](#) (N.Y. Misc. 1943)

OVERVIEW: Because the required amount of subscriptions to the endowment fund was pledged, and the claimant relied upon the funds paid in and upon the unpaid subscriptions, the claim by the noteholder was valid.

Liberty Maimonides Hospital v. Felberg, [4 Misc. 2d 291](#) [Shepardize](#) (N.Y. Misc. 1957)

OVERVIEW: Even though the payments under a charitable subscription agreement were to be made to the promisee's fund, the promisee was the real party interest and had the right to enforce the promisor's obligations under the agreement.

In re Estate of de Brabant, [197 Misc. 923](#) [Shepardize](#) (N.Y. Misc. 1949)

OVERVIEW: Two subscription agreements constituted a valid claim against decedent's estate for the last payment for the construction of a chapel where the decedent repeatedly acknowledged the obligation and expressed her intention to pay it.

In re Estate of Lord, [175 Misc. 921](#) [Shepardize](#) (N.Y. Misc. 1941)

OVERVIEW: Although the subscription agreement was a unilateral contract to assist the college, when the college accepted the offer and incurred liability in reliance thereon, it became a binding obligation.

Temple Beth AM v. Tanenbaum, [2004 NY Slip Op 24422](#) [Shepardize](#) (N.Y. Misc. 2004)

OVERVIEW: Where former members of congregation resigned from congregation after making unfulfilled commitment to pay certain membership dues, promise of former members to pay those dues was enforceable promise despite their resignation.

In re Estate of Field, [11 Misc. 2d 427](#) [Shepardize](#) (N.Y. Misc. 1958)

OVERVIEW: The court allowed two claims against an estate based on oral charitable subscriptions made by the decedent during his lifetime.

In re Estate of Kirby, [39 Misc. 2d 190](#) [Shepardize](#) (N.Y. Misc. 1963)

OVERVIEW: Bequest in will to an unincorporated religious society was valid and rector's claim for unpaid subscription amount was sustained as an enforceable charitable subscription in action for judicial settlement of the account of the executor.

First Methodist Episcopal Church of Mt. Vernon v. Estate of Howard, [133 Misc. 723](#) [Shepardize](#) (N.Y. Misc. 1929)

OVERVIEW: A church's claim against an estate was allowed where a decedent had signed a subscription card, promising to pay money to the church to complete a war memorial building; the church had assumed a duty to maintain the building.

Holding that charitable subscription was not enforceable:

von Kaulbach v. Keoseian, [783 F. Supp. 170](#) [Shepardize](#) (D.N.Y. 1992)

OVERVIEW: Where a trust agreement executed in Germany but not notarized by a German Notar or an equivalent promised a future act that would in effect confer a gift, but did not confer a gift in the agreement itself, the trust was unenforceable.

In re 375 Park Ave. Assocs., [182 B.R. 690](#) [Shepardize](#) (Bankr. D.N.Y. 1995)

OVERVIEW: Because museum council was commissioned for purpose of building museum, council's promise to construct museum archives was not consideration for debtor's pledge and thus, as of its execution, pledge agreement was a unilateral contract.

Jordan v. Mt. Sinai Hospital, Inc., [276 So. 2d 102](#) [Shepardize](#) (Fla. 3rd DCA 1973)

OVERVIEW: A recitation in a pledge for charitable contributions that it was made in consideration of and to induce the subscriptions of others did not provide sufficient consideration to make the promise enforceable against the subscriber's estate.

Trustees of Hamilton College v. Stewart, [1 N.Y. 581](#) [Shepardize](#) (N.Y. 1848)

OVERVIEW: Enforcement of a college endowment fund pledge failed for want of consideration; it was conditioned upon trustees investing a stated sum, but they were not bound to actively raise the stated sum; thus, there was no mutual promise.

Wesleyan Univ. v. Hubbard, [124 W. Va. 434](#) [Shepardize](#) (W. Va. 1942)

OVERVIEW: Lower court erred in awarding partial recovery to a pledgee in its action on a demand collateral note signed by a decedent's executors because the note could not be enforced if the promise of the decedent was not legally enforceable and the pledge given by the decedent to endow a chair did not constitute a legally enforceable contract.

Legal Analysis

Related Treatise Content

[1-3 Murray on Contracts § 60](#)

A promise had to induce the detriment, and the detriment had to induce the promise. A performance or return promise was bargained for if it was sought by the promisor in exchange for his promise and was given by the promisee in exchange for that promise.

[1-3 Murray on Contracts § 62](#)

In seeking consideration, some courts had stretched to find an implied promise on the part of a charity to continue its humanitarian work or to perpetuate the name of the donor in connection with a memorial fund she promised to establish. Often, a subscription fund drive would identify the purpose of the drive, leading some courts to discover an implied promise by the charity to use the funds in accordance with the terms of the subscription.

[2-5 Corbin on Contracts § 5.7](#)

In asking whether there was consideration for a promise, a distinction had to be drawn between the state of mind of the promisor, which could not be identified with consideration, and the result sought by the promisor, which could often be identified with consideration. The consideration for a promise was not the promisor's state of mind but the requested action or forbearance given in exchange. The act or forbearance which was the consideration for the promise had to be one for which the promisor manifested a desire to exchange the promise.

[2-5 Corbin on Contracts § 5.10](#)

[2-7 Corbin on Contracts § 7.9](#)

[3-8 Corbin on Contracts § 8.7](#)

[3-8 Corbin on Contracts § 8.12](#)

[1-2 Murray on Contracts § 43](#)

[1-2 Commercial Damages: Remedies in Business Litig P 2.03](#)

[12B-27 Purchase and Sale of Real Property § 27.03](#)

[3-32 Warren's Weed New York Real Property § 32.02](#)

[3-32 Warren's Weed New York Real Property § 32.26](#)

[1-4 Doing Business in the United States § 4.02](#)

[1-3 Murray on Contracts § 66](#)

Restatements and/or Model Codes

[Restat 2d of Contracts, § 90](#)

This section articulated the position that a charitable subscription or a marriage settlement was binding without proof that the promise induced action or forbearance.

[Restat 2d of Contracts, § 231](#)

This section stood for the proposition that performances were to be exchanged under an exchange of promises if each promise was at least part of the consideration for the other and the performance of each promise was to be exchanged at least in part for the performance of the other.

Related Law Review Articles

Roy Kreitner, *The Gift beyond the Grave: Revisiting the Question of Consideration*, [101 Colum. L. Rev. 1876](#) [Shepardize](#) (Dec. 2001).

This article examined the concept of consideration by both preclassical and classical theorists. The article stated that the classical school of thought eroded much of the association of duties implied by law, in part by the reformulation of the consideration doctrine. On the other hand, preclassical contract theory devoted most of its energies to the content of obligations among various parties to standardized relationships.

Arthur B. Schwartz, *The Second Circuit "Estopped": There Is No Promissory Estoppel in New York*, [19 Cardozo L. Rev. 1201](#) [Shepardize](#) (Dec. 1997).

This article summarized Justice Cardozo's rejection of the application of promissory estoppel to the facts of *Ripple's of Clearview, Inc. v. Le Havre Assoc.*, [88 A.D.2d 120](#) [Shepardize](#) (N.Y. App. Div. 1982). Instead, Justice Cardozo found consideration for the promise, thereby implying that the case was decided in accordance with the principles of traditional consideration theory, and not promissory estoppel. The court also noted that a promise to undertake a trust in futuro, without an exchange of consideration, would not be enforceable. Finally, the justice found that the acceptance of payment by the promisee constituted a promise to effectuate the benefit sought by the promisor.

Randy E. Barnett, *A Consent Theory of Contract*, [86 Colum. L. Rev. 269](#) [Shepardize](#) (Mar. 1986).

This article explored the theory that a promise needs to be accompanied by a form of consent. This consent theory legally protects a promisee's reliance on a promisor's consent even in some instances where a promisor did not subjectively

intend to be bound. The article further stated that a consent theory avoided the dangers of basing contractual obligation entirely on either bargain or reliance.

Daniel J. Klau, *What Price Certainty? Corbin, Williston, and the Restatement of Contracts*, [70 B.U.L. Rev. 511](#) [Shepardize](#) (May 1990).

James Gordley, *Enforcing Promises*, [83 Calif. L. Rev. 547](#) (Mar. 1995).

Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* [100 Colum. L. Rev. 94](#) [Shepardize](#) (Jan. 2000).

Phuong N. Pham, *The Waning of Promissory Estoppel*, [79 Cornell L. Rev. 1263](#) [Shepardize](#) (July 1994).

Mike Townsend, *Cardozo's Allegheny College Opinion: A Case Study in Law As an Art*, [33 Hous. L. Rev. 1103](#) [Shepardize](#) (Winter 1996).

Joshua P. Davis, *Cardozo's Judicial Craft and What Cases Come to Mean*, [68 N.Y.U.L. Rev. 777](#) [Shepardize](#) (Oct. 1993).

Christopher L. Eisgruber, *Great Contracts Cases: Teaching Law through Contracts and Cardozo*, [44 St. Louis L.J. 1511](#) [Shepardize](#) (Fall 2000).

Curtis Bridgeman, *Allegheny College Revisited: Cardozo, Consideration, and Formalism in Context*, [39 U.C. Davis L. Rev. 149](#) [Shepardize](#) (Nov. 2005).

Lawrence A. Cunningham, *Cardozo and Posner: A Study in Contracts*, [36 Wm And Mary L. Rev. 1379](#) [Shepardize](#) (Spring 1995).

Daniel Markovits, *Contract and Collaboration*, [113 Yale L.J. 1417](#) [Shepardize](#) (May 2004).

Wallace K. Lightsey, *A Critique of the Promise Model of Contract*, [26 Wm and Mary L. Rev. 45](#) [Shepardize](#) (Fall 1984).

Sidney W. DeLong, *Casebook Review: Review: An Agnostic's Bible: Contract and Related Obligation: Theory, Doctrine, and Practice, 3d Edition, by Robert S. Summers and Robert A. Hillman*, [20 Seattle U. L. R. 295](#) [Shepardize](#) (Winter 1997).

Related Bar Association & Journal Articles

Alan G. Gless, *A Simple Country Judges Musings on the Use of History by Trial Lawyers*, [7 Green Bag 2d 343](#) (Summer 2004).

This essay discussed the relevance of history in trial practice. The author quoted a statement from Justice Cardozo's opinion in *Allegheny County* regarding half-truths and whole truths.

Steven W. Feldman, *Promissory Estoppel: The Enforcement of Gratuitous Promises to Prevent Injustice*, [12 Tenn. B.J. 24](#) [Shepardize](#) (Dec. 2004).

This article discussed promissory estoppel as a remedy for compensating one who reasonably relied to his detriment on the gratuitous promise or representation of another party.

Other Legal Articles

Enforceability of Subscription under Conditional Charitable Pledge, [97 A.L.R.3d 1054](#) [Shepardize](#) .

This article discussed the enforceability of unpaid charitable subscriptions where some express condition agreed to by the parties had been violated

Russell G. Donaldson, Annotation, *Lack of Consideration As Barring Enforcement of Promise to Make Charitable Contribution or Subscription -- Modern Cases*, [86 A.L.R.4th 241](#) [Shepardize](#) .

This article addressed the recent cases in which the courts have addressed whether consideration or promissory estoppel, is necessary to the enforcement of an unconditional promise to make a charitable gift or subscription.

C. C. Marvel, Comment Note, *Promissory Estoppel*, [48 A.L.R.2d 1069](#) [Shepardize](#) .

This annotation discussed cases involving the extent of the doctrine of promissory estoppel, its nature, and what circumstances would give rise to its application.

Michael G. Walsh, Annotation, *Modern Status: Validity and Effect of Mortmain Statutes*, [6 A.L.R.4th 603](#) [Shepardize](#) .

C. T. Foster, Annotation, *Provision for Post-Mortem Payment or Performance As Affecting Instrument's Character and Validity As a Contract*, [1 A.L.R.2d 1178](#) [Shepardize](#) .

Tracy A. Bateman, Annotation, *Validity of Charitable Gift or Trust Containing Gender Restrictions on Beneficiaries*, [90 A.L.R.4th 836](#) [Shepardize](#) .

News

Recent News Coverage of the Issue

Pamela Claridge, *Donor-Restricted Gifts Can Mean Headaches for Charities*, Law. Wkly., Mar. 24, 2000.

This article explored the problems that could arise for a recipient charity when a donor-restricted charitable gift was not properly established or was incorrectly managed.

Lisa E. Oliphant, *Charitable Choice the End of Churches As We Know Them?*, Pol'y & Prac. of Pub. Hum. Services, June 1, 2000.

This article dealt with the so-called "charitable choice" provision. This provision clause of the new welfare law permitted "pervasively sectarian" groups, such as houses of worship, to compete for and receive tax money to provide social services whenever such opportunities were available to other nongovernmental organizations.

Patricia M. Annino, Commentary, *Art of Giving Has Some Donors Crying Foul*, Mass. Law. Wkly., June 18, 2007.

This article discussed the cases in which the conditions under which charitable donations became transitory. The article also stated that those considering making such donations should explore the charity and make certain it had the trustees and/or directors in place to sustain the gift.

Recent News Coverage of the Parties

Scott Hensley, *Fighting for a Name: Allegheny College Sues Aherf over Health School Moniker*, Mod. Healthcare, Mar. 3, 1997.

This article was about Allegheny College's lawsuit in the U.S. District Court in Erie, Pa., to get Allegheny Health and Research Foundation to rename its Philadelphia health sciences school. The college claimed that the foundation's Allegheny University of Health Sciences' name was commonly shortened to Allegheny University, causing confusion with the college and eliminating the option to someday use the name itself, if it started offering graduate programs.

Allegheny College and Allegheny University of Health Sciences Agreeing on Use of Names, PR Newswire, Mar. 28, 1997.

This article mentioned that Allegheny College and Allegheny University of the Health Sciences (AUHS) had agreed to settle the college's lawsuit against the university for trade name infringement, subject to final governing board approval. Settlement terms had been approved already by the AUHS board of trustees and the executive committee of the Allegheny College board.

Allegheny College an Energy Pioneer with Investment in Wind Power, PR Newswire, Apr. 15, 2002.

This article stated that Allegheny College announced that 7.5% of its electricity would come from wind power, a percentage higher than any other college or university in the eastern United States had invested thus far. Allegheny would

purchase a portion of New Wind Energy from Community Energy, Inc., a clean energy marketing company in Pennsylvania.

Teachers College Gives Special Consideration to Allegheny, AScribe Newswire, Jan. 8, 2004.

Allegheny College Receives Gift of \$22.2 Million, Bus. Wire, Feb. 13, 2001.

Allegheny College Launches \$105 Million Capital Campaign, PR Newswire, Oct. 18, 2002.

Allegheny College Attracts Extraordinary Class, AScribe Newswire, May 14, 2004.

Allegheny College Approves New Accelerated Master's in Management Program with Carnegie Mellon University, AScribe Newswire, Nov. 29, 2004.

Meadville, PA Institutions to Save Energy and Money through Facility Improvements from Vestar, Bus. Wire, July 12, 2001.

Allegheny College Establishes Center for Economic and Environmental Development, PR Newswire, July 23, 1997.

Oscar-Winning Filmmaker Benjamin Burt Challenges New Allegheny Graduates: Be Heroic, AScribe Newswire, May 10, 2004.

New Effort to Protect French Creek Announced; Western PA Conservancy, PA Environmental Council and Allegheny College Join Together to Protect French Creek, PR Newswire, May 2, 1995.

Pennsylvania Secretary of Aging to Receive Allegheny College Alumni Award, PR Newswire, May 30, 1996.

Innovative Science Buildings Open at Allegheny College, PR Newswire, Oct. 8, 1993.

Survey Reveals High Political Participation among Allegheny College Students, AScribe Newswire, Jan. 20, 2005.

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Allegheny College v. National Chautauqua County Bank

[246 N.Y. 369](#) [Shepardize](#)

Allegheny College, Appellant, v. The National Chautauqua County Bank of Jamestown, as Executor of Mary Y. Johnston, Deceased, Respondent

Court of Appeals of New York

[246 N.Y. 369](#) [Shepardize](#) ; [159 N.E. 173](#) [Shepardize](#) ; [1927 N.Y. LEXIS 886](#) [Shepardize](#) ; [57 A.L.R. 980](#) [Shepardize](#)

October 18, 1927, Argued November 22, 1927, Decided

PRIOR HISTORY:

Appeal, by permission, from a judgment the Appellate Division of the Supreme Court in the fourth judicial department, entered April 13, 1927, unanimously affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at an Equity Term.

Allegheny College v. Nat. Chautauqua County Bank, 219 App. Div. 852, reversed.

DISPOSITION:

Judgment accordingly.

Gift -- charitable subscriptions -- contract -- consideration -- bilateral agreement may exist though one promise be implied -- duty to perpetuate name of founder of memorial sufficient consideration for subscription -- acceptance of payment on account of subscription -- improper dismissal of complaint in action to recover balance where subscription directed that fund should be known by a certain name and proceeds used for a certain purpose.

COUNSEL: Clarence G. Pickard, C. A. Pickard and Arthur L. Bates

for appellant. The subscription paper executed by Mary Yates Johnston was founded upon a legal consideration. (Barnes v. Perine, [12 N. Y. 18](#) [Shepardize](#) ; Matter of Conger, 113 Misc. Rep. 129; Eliassof v. DeWandelaer, 30 App. Div. 155; Coyne v. Weaver, [84 N. Y. 386](#) [Shepardize](#) ; Ga Nun v. Palmer, [216 N. Y. 603](#) [Shepardize](#) ; Roberts v. Cobb, [103 N. Y. 600](#) [Shepardize](#) ; Mechanicville War Chest, Inc., v. Butterfield, 110 Misc. Rep. 257; Richmondville Union Seminary v. McDonald, [34 N. Y. 379](#) [Shepardize](#) ; Genesee College v. Dodge, [26 N. Y. 213](#) [Shepardize](#) ; Locke v. Taylor, 161 App. Div. 44.)Robert H. Jackson, Harry R. Lewis and Benjamin S. Dean for respondent. The instrument is only a promise to make a gift or subscription and lacks consideration which the law of New York requires for actionability. (Hamilton College v. Stewart, [1 N. Y. 581](#) [Shepardize](#) ; Presbyterian Church v. Cooper, [112 N. Y. 517](#) [Shepardize](#) ; Twenty-third St. Church v. Cornell, [117 N. Y. 601](#) [Shepardize](#) ; Holmes v. Roper, [141 N. Y. 64](#) [Shepardize](#) ; Dougherty v. Salt, [227 N. Y. 202](#) [Shepardize](#) ; Assets Realization Co. v. Howard, [211 N. Y. 430](#) [Shepardize](#) ; Tucker v. Alexanderoff, [183 U.S. 424](#) [Shepardize](#) ; Cottage Church v. Kendall, [121 Mass. 528](#) [Shepardize](#) ; Montpelier Seminary v. Smith, [69 Vt. 382](#) [Shepardize](#) ; New Jersey Hospital v. Wright, [95 N. J. L. 462](#) [Shepardize](#) ; U. of Penn. v. Coxe, [277 Penn. St. 512](#) [Shepardize](#) ; Galt v. Swain, 9 Geattan [Va.], 633.)

JUDGES: Cardozo, Ch. J. Pound, Crane, Lehman and O'Brien, JJ.,

concur with Cardozo, Ch. J.; Kellogg, J. dissents in opinion, in which Andrews, J., concurs.

OPINIONBY: CARDOZO

OPINION:

The plaintiff, Allegheny College, is an institution of liberal learning at Meadville, Pennsylvania. In June 1921, a "drive" was in progress to secure for it an additional endowment of \$ 1,250,000. An appeal to contribute to this fund was made to Mary Yates Johnston of Jamestown, New York. In response thereto, she signed and delivered on June 15, 1921, the following writing:

"Estate Pledge,

"Allegheny College Second Century Endowment

"Jamestown, N. Y., June 15, 1921.

"In consideration of my interest in Christian Education, and in consideration of others subscribing, I hereby subscribe and will pay to the order of the Treasurer of Allegheny College, Meadville, Pennsylvania, the sum of Five Thousand Dollars; \$ 5,000.

"This obligation shall become due thirty days after my death, and I hereby instruct my Executor, or Administrator, to pay the same out of my estate. This pledge shall bear interest at the rate of per cent per annum, payable annually, from till paid. The proceeds of this obligation shall be added to the Endowment of said Institution, or expended in accordance with instructions on reverse side of this pledge.

"Name MARY YATES JOHNSTON,

"Address 306 East 6th Street,

"Jamestown, N. Y.

"Dayton E. McClain Witness

"T. R. Courtis Witness

"to authentic signature."

On the reverse side of the writing is the following indorsement: "In loving memory this gift shall be known as the Mary Yates Johnston Memorial Fund, the proceeds from which shall be used to educate students preparing for the Ministry, either in the United States or in the Foreign Field.

"This pledge shall be valid only on the condition that the provisions of my Will, now extant, shall be first met.

"MARY YATES JOHNSTON."

The subscription was not payable by its terms until thirty days after the death of the promisor. The sum of \$ 1,000 was paid, however, upon account in December, 1923, while the promisor was alive. [Link P. Arg.▲](#) The college set the money aside to be held as a scholarship fund for the benefit of students preparing for the ministry. Later, in July, 1924, [Link P. Arg.▲](#) the promisor gave notice to the college that she repudiated the promise. Upon the expiration of thirty days following her death, this action was brought against the executor of her will to recover the unpaid balance.

The law of charitable subscriptions has been a prolific source of controversy in this State and elsewhere. [HN1] We have held that a promise of that order is unenforcible like any other if made without consideration (Hamilton College v. Stewart, [1 N. Y. 581](#) [Shepardize](#) ; Presb. Church v. Cooper, [112 N. Y. 517](#) [Shepardize](#) ; 23rd St. Bap. Church v. Cornell, [117 N. Y. 601](#) [Shepardize](#)). On the other hand, though professing to apply to such subscriptions the general law of contract, we have found consideration present where the general law of contract, at least as then declared, would have said that it was absent ([12 N. Y. 18](#) [Shepardize](#) ; Presb. Soc. v. Beach, [74 N. Y. 72](#)

[Shepardize](#); *Keuka College v. Ray*, [167 N. Y. 96](#) [Shepardize](#); cf. *Eastern States League v. Vail*, [97 Vt. 495, 508](#) [Shepardize](#), and cases cited; *Y. M. C. A. v. Estill*, [140 Ga. 291](#) [Shepardize](#); *Amherst Academy v. Cows*, 6 Pick. 427; *Ladies Collegiate Inst. v. French*, 16 Gray, 196; *Martin v. Meles*, [179 Mass. 114](#) [Shepardize](#); *Robinson v. Nutt*, [185 Mass. 345](#) [Shepardize](#); *U. of Pa. v. Cox*, [277 Penn. St. 512](#) [Shepardize](#); *Williston*, Contracts, § 116).

[HN2] A classic form of statement identifies consideration with detriment to the promisee sustained by virtue of the promise (*Hamer v. Sidway*, [124 N. Y. 538](#) [Shepardize](#); *Anson*, Contracts [Corbin's ed.], p. 116; 8 Holdsworth, History of English Law, 10). So compendious a formula is little more than a half truth. There is need of many a supplementary gloss before the outline can be so filled in as to depict the classic doctrine. [HN3] "The promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting" (*Wisc. & Mich. Ry. Co. v. Powers*, [191 U.S. 379, 386](#) [Shepardize](#); *McGovern v. City of N. Y.*, [234 N. Y. 377, 389](#) [Shepardize](#); *Walton Water Co. v. Village of Walton*, [238 N. Y. 46, 51](#) [Shepardize](#); 1 *Williston*, Contracts, § 139; *Langdell*, Summary of the Law of Contracts, pp. 82-88). If A promises B to make him a gift, consideration may be lacking, though B has renounced other opportunities for betterment in the faith that the promise will be kept.

The half truths of one generation tend at times to perpetuate themselves in the law as the whole truths of another, when constant repetition brings it about that qualifications, taken once for granted, are disregarded or forgotten. The doctrine of consideration has not escaped the common lot. As far back as 1881, Judge Holmes in his lectures on the Common Law (p. 292), separated the detriment which is merely a consequence of the promise from the detriment which is in truth the motive or inducement, and yet added that the courts "have gone far in obliterating this distinction." The tendency toward effacement has not lessened with the years. On the contrary, there has grown up of recent days a doctrine that a substitute for consideration or an exception to its ordinary requirements can be

found in what is styled "a promissory estoppel" (*Williston*, Contracts, §§ 139, 116). Whether the exception has made its way in this State to such an extent as to permit us to say that the general law of consideration has been modified accordingly, we do not now attempt to say. Cases such as *Siegel v. Spear & Co.* ([234 N. Y. 479](#) [Shepardize](#)) and *DeCicco v. Schweizer* ([221 N. Y. 431](#) [Shepardize](#)) may be signposts on the road. Certain, at least, it is that [HN4] we have adopted the doctrine of promissory estoppel as the equivalent of consideration in connection with our law of charitable subscriptions. So long as those decisions stand, the question is not merely whether the enforcement of a charitable subscription can be squared with the doctrine of consideration in all its ancient rigor. The question may also be whether it can be squared with the doctrine of consideration as qualified by the doctrine of promissory estoppel.

We have said that the cases in this State have recognized this exception, if exception it is thought to be. Thus, in *Barnes v. Perine* ([12 N. Y. 18](#) [Shepardize](#)) the subscription was made without request, express or implied, that the church do anything on the faith of it. Later, the church did incur expense to the knowledge of the promisor, and in the reasonable belief that the promise would be kept. We held the promise binding, though consideration there was none except upon the theory of a promissory estoppel. In *Presbyterian Society v. Beach* ([74 N. Y. 72](#) [Shepardize](#)) a situation substantially the same became the basis for a like ruling. So in *Roberts v. Cobb* ([103 N. Y. 600](#) [Shepardize](#)) and *Keuka College v. Ray* ([167 N. Y. 96](#) [Shepardize](#)) the moulds of consideration as fixed by the old doctrine were subjected to a like expansion. Very likely, conceptions of public policy have shaped, more or less subconsciously, the rulings thus made. Judges have been affected by the thought that "defences of that character" are "breaches of faith toward the public, and especially toward those engaged in the same enterprise, and an unwarrantable disappointment of the reasonable expectations of those interested" (W. F. Allen, J., in *Barnes v. Perine*, supra, page 24; and cf. *Eastern States League v. Vail*, [97 Vt. 495, 505](#) [Shepardize](#), and cases there cited). The result speaks for itself irrespective of the motive. [HN5] Decisions which have stood so long, and which are supported by so many considerations of public

policy and reason, will not be overruled to save the symmetry of a concept which itself came into our law, not so much from any reasoned conviction of its justice, as from historical accidents of practice and procedure (8 Holdsworth, History of English Law, 7 et seq.). The concept survives as one of the distinctive features of our legal system. We have no thought to suggest that it is obsolete or on the way to be abandoned. As in the case of other concepts, however, the pressure of exceptions has led to irregularities of form.

It is in this background of precedent that we are to view the problem now before us. The background helps to an understanding of the implications inherent in subscription and acceptance. This is so though we may find in the end that without recourse to the innovation of promissory estoppel the transaction can be fitted within the mould of consideration as established by tradition.

The promisor wished to have a memorial to perpetuate her name. She imposed a condition that the "gift" should "be known as the Mary Yates Johnston Memorial Fund." [Link Quick Holding▲](#) The moment that the college accepted \$ 1,000 as a payment on account, there was an assumption of a duty to do whatever acts were customary or reasonably necessary to maintain the memorial fairly and justly in the spirit of its creation. The college could not accept the money, and hold itself free thereafter from personal responsibility to give effect to the condition (*Dinan v. Coneys*, [143 N. Y. 544, 547](#) [Shepardize](#); *Brown v. Knapp*, [79 N. Y. 136](#) [Shepardize](#); *Gridley v. Gridley*, [24 N. Y. 130](#) [Shepardize](#); *Grossman v. Schenker*, [206 N. Y. 466, 469](#) [Shepardize](#); 1 Williston, Contracts, §§ 90, 370). More is involved in the receipt of such a fund than a mere acceptance of money to be held to a corporate use (cf. *Martin v. Meles*, [179 Mass. 114](#) [Shepardize](#), citing *Johnson v. Otterbein University*, [41 Ohio St. 527, 531](#) [Shepardize](#), and *Presb. Church v. Cooper*, [112 N. Y. 517](#) [Shepardize](#)). The purpose of the founder would be unfairly thwarted or at least inadequately served if the college failed to communicate to the world, or in any event to applicants for the scholarship, the title of the memorial. By implication it undertook, when it accepted a portion of the "gift," that in its circulars of information and in other customary ways, when making announcement of this scholarship, it would couple with the

announcement the name of the donor. The donor was not at liberty to gain the benefit of such an undertaking upon the payment of a part and disappoint the expectation that there would be payment of the residue. If the college had stated after receiving \$ 1,000 upon account of the subscription that it would apply the money to the prescribed use, but that in its circulars of information and when responding to prospective applicants it would deal with the fund as an anonymous donation, there is little doubt that the subscriber would have been at liberty to treat this statement as the repudiation of a duty impliedly assumed, a repudiation justifying a refusal to make payments in the future. Obligation in such circumstances is correlative and mutual. A case much in point is *N. J. Hospital v. Wright* ([95 N. J. L. 462, 464](#) [Shepardize](#)), where a subscription for the maintenance of a bed in a hospital was held to be enforceable by virtue of an implied promise by the hospital that the bed should be maintained in the name of the subscriber (cf. *Bd. of Foreign Missions v. Smith*, 209 Penn. St. 361). A parallel situation might arise upon the endowment of a chair or a fellowship in a university by the aid of annual payments with the condition that it should commemorate the name of the founder or that of a member of his family. The university would fail to live up to the fair meaning of its promise if it were to publish in its circulars of information and elsewhere the existence of a chair or a fellowship in the prescribed subject, and omit the benefactor's name. A duty to act in ways beneficial to the promisor and beyond the application of the fund to the mere uses of the trust would be cast upon the promisee by the acceptance of the money. We do not need to measure the extent either of benefit to the promisor or of detriment to the promisee implicit in this duty. [HN6] "If a person chooses to make an extravagant promise for an inadequate consideration it is his own affair" (8 Holdsworth, History of English Law, p. 17). It was long ago said that "when [HN7] a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action" (*Sturlyn v. Albany*, 1587, Cro. Eliz. 67, quoted by Holdsworth, *supra*; cf. *Walton Water Co. v. Village of Walton*, [238 N. Y. 46, 51](#) [Shepardize](#)). The longing for posthumous remembrance is an emotion not so weak as to justify us in saying that its gratification is a negligible good.

We think [Link Quick Holding▲](#) the duty assumed by the plaintiff to perpetuate the name of the founder of the memorial is sufficient in itself to give validity to the subscription within the rules that define consideration for a promise of that order. [Link Quick Holding▲](#) When the promisee subjected itself to such a duty at the implied request of the promisor, the result was the creation of a bilateral agreement (Williston, Contracts, §§ 60-a, 68, 90, 370; Brown v. Knapp, supra; Grossman v. Schenker, supra; Williams College v. Danforth, 12 Pick. 541, 544; Ladies Collegiate Inst. v. French, 16 Gray, 196, 200). There was a promise on the one side and on the other a return promise, made, it is true, by implication, but expressing an obligation that had been exacted as a condition of the payment. [HN8] A bilateral agreement may exist though one of the mutual promises be a promise "implied in fact," an inference from conduct as opposed to an inference from words (Williston, Contracts, §§ 90, 22-a; Pettibone v. Moore, [75 Hun, 461, 464](#) [Shepardize](#)). We think the fair inference to be drawn from the acceptance of a payment on account of the subscription is a promise by the college to do what may be necessary on its part to make the scholarship effective. The plan conceived by the subscriber will be mutilated and distorted unless the sum to be accepted is adequate to the end in view. Moreover, the time to affix her name to the memorial will not arrive until the entire fund has been collected. The college may thus thwart the purpose of the payment on account if at liberty to reject a tender of the residue. It is no answer to say that a duty would then arise to make restitution of the money. If such a duty may be imposed, the only reason for its existence must be that there is then a failure of "consideration." To say that there is a failure of consideration is to concede that a consideration has been promised since otherwise it could not fail. No doubt there are times and situations in which limitations laid upon a promisee in connection with the use of what is paid by a subscriber lack the quality of a consideration, and are to be classed merely as conditions (Williston, Contracts, § 112; Page, Contracts, § 523). [HN9] "It is often difficult to determine whether words of condition in a promise indicate a request for consideration or state a mere condition in a gratuitous promise. An aid, though not a conclusive test in determining which construction of the promise is more reasonable is an inquiry whether

the happening of the condition will be a benefit to the promisor. If so, it is a fair inference that the happening was requested as a consideration" (Williston, supra, § 112). Such must be the meaning of this transaction unless we are prepared to hold that the college may keep the payment on account, and thereafter nullify the scholarship which is to preserve the memory of the subscriber. [Link P. Arg.▲](#) The fair implication to be gathered from the whole transaction is assent to the condition and the assumption of a duty to go forward with performance (DeWolf Co. v. Harvey, [161 Wis. 535](#) [Shepardize](#); Pullman Co. v. Meyer, [195 Ala. 397, 401](#) [Shepardize](#); Braniff v. Baier, [101 Kan. 117](#) [Shepardize](#); cf. Corbin, Offer & Acceptance, 26 Yale L. J. 169, 177, 193; McGovney, Irrevocable Offers, 27 Harv. L. R. 644; Sir Frederick Pollock, 28 L. Q. R. 100, 101). The subscriber does not say: I hand you \$ 1,000, and you may make up your mind later, after my death, whether you will undertake to commemorate my name. What she says in effect is this: I hand you \$ 1,000, and if you are unwilling to commemorate me, the time to speak is now.

Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 13, 1927, unanimously affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at an Equity Term.

The conclusion thus reached makes it needless to consider whether, aside from the feature of a memorial, a promissory estoppel may result from the assumption of a duty to apply the fund, so far as already paid, to special purposes not mandatory under the provisions of the college charter (the support and education of students preparing for the ministry), an assumption induced by the belief that other payments sufficient in amount to make the scholarship effective would be added to the fund thereafter upon the death of the subscriber (Ladies Collegiate Inst. v. French, 16 Gray, 196; Barnes v. Perine, [12 N. Y. 18](#) [Shepardize](#), and cases there cited).

The judgment of the Appellate Division and that of the Trial Term should be reversed, and judgment ordered for the plaintiff as prayed for in the complaint, with costs in all courts.

DISSENT BY: KELLOGG**DISSENT:**

[Link Concur/Dissent](#)▲ Kellogg, J. (dissenting). The Chief Judge finds in the expression "In loving memory this gift shall be known as the Mary Yates Johnston Memorial Fund" an offer on the part of Mary Yates Johnston to contract with Allegheny College. The expression makes no such appeal to me. Allegheny College was not requested to perform any act through which the sum offered might bear the title by which the offeror states that it shall be known. The sum offered was termed a "gift" by the offeror. Consequently, I can see no reason why we should strain ourselves to make it, not a gift, but a trade. Moreover, since the donor specified that the gift was made "In consideration of my interest in Christian education, and in consideration of others subscribing," considerations not adequate in law, I can see no excuse for asserting that it was otherwise made in consideration of an act or promise on the part of the donee, constituting a sufficient quid quo pro to convert the gift into a contract obligation. To me the words used merely expressed an expectation or wish on the part of the donor and failed to exact the return of an adequate consideration. But if an offer indeed was present, then clearly it was an offer to enter into a unilateral contract. The offeror was to be bound provided the offeree performed such acts as might be necessary to make the gift offered become known under the proposed name. This is evidently the thought of the Chief Judge, for he says: "She imposed a condition that the 'gift' should be known as the Mary Yates Johnston Memorial Fund." In other words, she proposed to exchange her offer of a donation in return for acts to be performed. Even so there was never any acceptance of the offer and, therefore, no contract, for the acts requested have never been performed. The gift has never been made known as demanded. Indeed, the requested acts, under the very terms of the assumed offer, could never have been performed at a time to convert the offer into a promise. This is so for the reason that the donation was not to take effect until after the death of the donor, and by her death her offer was withdrawn. (Williston on Contracts, sec. 62.) Clearly,

although a promise of the college to make the gift known, as requested, may be implied, that promise was not the acceptance of an offer which gave rise to a contract. The donor stipulated for acts, not promises. "In order to make a bargain it is necessary that the acceptor shall give in return for the offer or the promise exactly the consideration which the offeror requests. If an act is requested, that very act and no other must be given. If a promise is requested, that promise must be made absolutely and unqualifiedly." (Williston on Contracts, sec. 73.) "It does not follow that an offer becomes a promise because it is accepted; it may be, and frequently is, conditional, and then it does not become a promise until the conditions are satisfied; and in case of offers for a consideration, the performance of the consideration is always deemed a condition." (Langdell, Summary of the Law of Contracts, sec. 4.) It seems clear to me that there was here no offer, no acceptance of an offer, and no contract. Neither do I agree with the Chief Judge that this court "found consideration present where the general law of contract, at least as then declared, would have said that it was absent" in the cases of *Barnes v. Perine* ([12 N. Y. 18](#) [Shepardize](#)), *Presbyterian Society v. Beach* ([74 N. Y. 72](#) [Shepardize](#)) and *Keuka College v. Ray* ([167 N. Y. 96](#) [Shepardize](#)). In the *Keuka College* case an offer to contract, in consideration of the performance of certain acts by the offeree, was converted into a promise by the actual performance of those acts. This form of contract has been known to the law from time immemorial (Langdell, sec. 46) and for at least a century longer than the other type, a bilateral contract. (Williston, sec. 13.) It may be that the basis of the decisions in *Barnes v. Perine* and *Presbyterian Society v. Beach* (supra) was the same as in the *Keuka College* case. (See *Presbyterian Church of Albany v. Cooper*, [112 N. Y. 517](#) [Shepardize](#).) However, even if the basis of the decisions be a so-called "promisory estoppel," nevertheless they initiated no new doctrine. A so-called "promisory estoppel," although not so termed, was held sufficient by Lord Mansfield and his fellow judges as far back as the year 1765. (*Pillans v. Van Mierop*, 3 Burr. 1663.) Such a doctrine may be an anomaly; it is not a novelty. Therefore, I can see no ground for the suggestion that the ancient rule which makes consideration necessary to the formation of every contract is in danger of effacement through any decisions of this court. To me that

is a cause for gratulation rather than regret. However, the discussion may be beside the mark, for I do not understand that the holding about to be made in this case is other than a holding that consideration was given to convert the offer into a promise. With that result I cannot agree and, accordingly, must dissent.