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* May 7, 8.
* June 15.

THE GOVERNORS OF DALHOUSIE COLLEGE AT HALIFAX (CLAIMANT) ..... APPELLANT;

AND

THE ESTATE OF ARTHUR BOUTILIER, DECEASED ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Contract—Consideration—Subscription to fund to help college—Whether binding.

In the course of a canvass for raising a fund to increase the general resources and usefulness of a college, B. signed a subscription as follows: "For the purpose of enabling Dalhousie College to maintain and improve the efficiency of its teaching, to construct new buildings and otherwise to keep pace with the growing need of its constituency and in consideration of the subscription of others, I promise to pay" $5,000 to the treasurer of the college. B. died without making any payment, and the college claimed against his estate.

Held: The subscription was not binding. The only basis for sustaining it as a binding promise could be as a contract supported by a good and sufficient consideration; and such a consideration could not be found in the subscription paper itself, or in the circumstances as disclosed by the evidence.

The words "in consideration of the subscription of others" in the subscription were insufficient to support the promise if, in point of law, the subscriptions of others could not provide a valid consideration therefor; and the fact that others had signed separate subscription papers for the same common object or were expected to do so did not of itself constitute a legal consideration.

The statement in the subscription of the purpose for which it was made, and the acceptance of the subscription by the college, did not afford a ground based on the doctrine of mutual promises for holding B.'s promise binding. A reciprocal promise on the part of the college to do the thing for which the subscription was promised could not be implied from the mere fact of the acceptance by the college of such a subscription paper from B.'s hands. And the fact, even if established, that the college made increased expenditures or incurred liabilities on the strength of the subscriptions obtained in the canvass, would not constitute a consideration so as to make B.'s subscription binding, in the absence of anything further indicating a request on B.'s part resulting in expenditures made or liabilities incurred.

Cases reviewed and discussed.

Judgment of the Supreme Court of Nova Scotia *en banc*, 6 M.P.R. 229, affirmed.

* PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ.

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APPEAL by the Board of Governors of Dalhousie College, Halifax, claimant, from the judgment of the Supreme Court of Nova Scotia *en banc* (1) allowing the appeal taken by the representatives of the Estate of Arthur Boutilier, deceased, from the decision of His Honour W. J. O'Hearn, Judge of Probate for the County of Halifax, dismissing the Estate's appeal from the decision of the Registrar of Probate for the County of Halifax allowing the claim of Dalhousie College for $5,000 against the said estate. The Supreme Court of Nova Scotia *en banc* dismissed the claim. The claim was founded on a subscription by the said deceased to a fund for Dalhousie College.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

G. W. Mason K.C. and *W. C. Macdonald K.C.* for the appellant

C. B. Smith K.C. for the respondent.

The judgment of the court was delivered by

CROCKET, J.—This appeal concerns a claim which was filed in the Probate Court for the County of Halifax, Nova Scotia, in the year 1931, by the appellant College against the respondent Estate for $5,000, stated as having been "subscribed to Dalhousie Campaign Fund (1920)", and attested by an affidavit of the College Bursar, in which it was alleged that the stated amount was justly and truly owing to the College Corporation.

The subscription, upon which the claim was founded, was obtained from the deceased on June 4, 1920, in the course of a canvass which was being conducted by a committee, known as the Dalhousie College Campaign Committee, for the raising of a fund to increase the general resources and usefulness of the institution and was in the following terms:

(1) 6 M.P.R. 229; [1933] 1 D.L.R. 699.

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For the purpose of enabling Dalhousie College to maintain and improve the efficiency of its teaching, to construct new buildings and otherwise to keep pace with the growing need of its constituency and in consideration of the subscription of others, I promise to pay to the Treasurer of Dalhousie College the sum of Five Thousand Dollars, payment as follows:

Terms of payment as per letter from Mr. Boutilier.

A. 399.

Name Arthur Boutilier.

Date June 4th, 1920.

Make all cheques payable to the Treasurer of Dalhousie College.

So far as the record discloses, the subscription was not accompanied or followed by any letter from the deceased as to the terms of payment. He died on October 29, 1928, without making any payment on account. It appears that some time after he signed the subscription form he met with severe financial reverses which prevented him from honouring his pledge. That he desired and hoped to be able to do so is evidenced by a brief letter addressed by him to the President of the University on April 12, 1926, in reply to a communication from the latter, calling his attention to the subscription and the fact that no payments had been made upon it. The deceased's letter, acknowledging receipt of the President's communication, states:

> In reply I desire to advise you that I have kept my promise to you in mind. As you are probably aware, since making my promise I suffered some rather severe reverses, but I expect before too long to be able to redeem my pledge.

The claim was contested in the Probate Court by the Estate on two grounds, viz.: that in the absence of any letter from the deceased as to terms of payment, the claimant could not recover; and that the claim was barred by the Statute of Limitations. Dr. A. Stanley MacKenzie, who had retired from the Presidency of the University after 20 years' service shortly before the trial, and others gave evidence before the Registrar of Probate. Basing himself apparently upon Dr. MacKenzie's statement that in consideration of the moneys subscribed in the campaign referred to, large sums of money were expended by the College on the objects mentioned in the subscription card, between the years 1920 and 1931, the Registrar decided that there was a good consideration for the deceased's sub-

scription, citing *Sargent* v. *Nicholson,* a decision of the Appeal Court of Manitoba (1), and *Y.MC.A.* v. *Rankin,* a decision of the Appeal Court of British Columbia (2), and that no supplementary letter was necessary to complete the agreement. He further held that the deceased's letter of April 12, 1926, constituted a sufficient acknowledgement to take the case out of the Statute of Limitations.

An appeal to the Judge of the County Court sitting as Judge of the Probate Court was dismissed, but on a further appeal to the Supreme Court of Nova Scotia *en banc,* this decision was reversed by the unanimous judgment of Chisholm, C.J., and Mellish, Graham, Carroll and Ross, JJ., on the ground that the subscription was a mere *nudum pactum,* and that nothing was shewn either by the document itself or by the evidence which imposed any binding contractual obligation upon the deceased in connection therewith. This, I take it, to be the gist of the reasons for the judgment of the Appeal Court as delivered by the learned Chief Justice, and embodies the whole problem with which we have now to deal.

There is, of course, no doubt that the deceased's subscription can be sustained as a binding promise only upon one basis, viz.: as a contract, supported by a good and sufficient consideration. The whole controversy between the parties is as to whether such a consideration is to be found, either in the subscription paper itself or in the circumstances as disclosed by the evidence.

So far as the signed subscription itself is concerned, it is contended in behalf of the appellant that it shews upon its face a good and sufficient consideration for the deceased's promise in its statement that it was given in consideration of the subscription of others. As to this, it is first to be observed that the statement of such a consideration in the subscription paper is insufficient to support the promise if, in point of law, the subscriptions of others could not provide a valid consideration therefor. I concur in the opinion of Chisholm, C.J., that the fact that others had signed separate subscription papers for the same

(1) (1915) 25 D.L.R. 638; 26 Man. L.R. 53; 9 W.W.R. 883.

(2) (1916) 27 D.L.R. 417; 22 B.C. Rep. 588; 10 W.W.R. 482.

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common object or were expected so to do does not of itself constitute a legal consideration. Although there have been some cases in the United States in which a contrary opinion has been expressed, these decisions have been rejected as unsound in principle both by the Supreme Court of Massachusetts and the Court of Appeals of the State of New York. See *Cottage Street M.E. Church* v. *Kendall* (1); *Hamilton College* v. *Stewart* (2); and *Albany Presbyterian Church* v. *Cooper* (3). In the last mentioned case the defendant's intestate subscribed a paper with a number of others, by the terms of which they "in consideration of one dollar" to each of them paid "and of the agreements of each other" severally promised and agreed to and with the plaintiff's trustees to pay to said trustees the sums severally subscribed for the purpose of paying off a mortgage debt on the church edifice on the condition that the sum of $45,000 in the aggregate should be subscribed and paid in for such purpose within one year. The Court of Appeals held that it must reject the consideration recited in the subscription paper, the money consideration, because it had no basis in fact, and the mutual promise between the subscribers, because there was no privity of contract between the plaintiff church and the various subscribers.

A perusal of the reasons for judgment of the Appeal Court of Manitoba, as delivered by Cameron, J.A., in *Sargent* v. *Nicholson* (4), already referred to, shews that that court also rejected the contention that it was a sufficient consideration that others were led to subscribe by the subscription of the defendant. In fact Cameron, J.A.'s opinion quotes with approval a passage from the opinion of Gray, C.J., in *Cottage Street M.E Church* v. *Kendall* (1), that such a proposition appeared to the Massachusetts Supreme Court to be "inconsistent with elementary principles." The decision of the Appeal Court of British Columbia in *Y.M.C.A.* v. *Rankin* (5) fully adopted the opinion of Cameron, J.A., in *Sargent* v. *Nicholson* (6), and is certainly no authority for the acceptance of other sub-

(1) (1877) 121 Mass. 528.
(2) (1848) 1 N.Y. Rep. 581.
(3) (1889) 112 N.Y. Rep. 517.
(4) (1915) 25 D.L.R. 638; 26 Man. L.R. 53; 9 W.W.R. 883.
(5) (1916) 27 D.L.R. 417; 22 B.C. Rep. 588; 10 W.W.R. 482.
(6) 1915) 25 D.L.R. 638; 26 Man. L.R. 53; 9 W.W.R. 883.

scriptions as a binding consideration in such a case as the present one.

The doctrine of mutual promises was also put forward on the argument as a ground upon which the deceased's promise might be held to be binding. It was suggested that the statement in the subscription of the purpose for which it was made, viz.:" of enabling Dalhousie College to maintain and improve the efficiency of its teaching, to construct new buildings and otherwise to keep pace with the growing need of its constituency," constituted an implied request on the part of the deceased to apply the promised subscription to this object and that the acceptance by the College of his promise created a contract between them, the consideration for the promise of the deceased to pay the money being the promise of the College to apply it to the purpose stated.

I cannot think that any such construction can fairly be placed upon the subscription paper and its acceptance by the College. It certainly contains no express request to the College either " to maintain and improve the efficiency of its teaching " or " to construct new buildings and otherwise to keep pace with the growing need of its constituency," but simply states that the promise to pay the $5,000 is made for the purpose of enabling the College to do so, leaving it perfectly free to pursue what had always been its aims in whatever manner its Governors should choose. No statement is made as to the amount intended to be raised for all or any of the purposes stated. No buildings of any kind are described. The construction of new buildings is merely indicated as a means of the College keeping pace with the growing need of its constituency and apparently to be undertaken as and when the Governors should in their unfettered discretion decide the erection of any one or more buildings for any purpose was necessary or desirable.

It seems to me difficult to conceive that, had the deceased actually paid the promised money, he could have safely relied upon the mere acceptance of his own promise, couched in such vague and uncertain terms regarding its purpose, as the foundation of any action against the College Corporation.

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So far as I can discover, there is no English or Canadian case in which it has been authoritatively decided that a reciprocal promise on the part of the promisee may be implied from the mere fact of the acceptance by the promisee of such a subscription paper from the hands of the promisor to do the thing for which the subscription is promised. There is no doubt, of course, that an express agreement by the promisee to do certain acts in return for a subscription is a sufficient consideration for the promise of the subscriber. There may, too, be circumstances proved by evidence, outside the subscription paper itself, from which such a reciprocal promise on the part of the promisee may well be implied, but I have not been able to find any English or Canadian case where it has actually been so decided in the absence of proof that the subscriber has himself either expressly requested the promisee to undertake some definite project or personally taken such a part in connection with the projected enterprise that such a request might be inferred therefrom.

It is true that there are expressions in the judgments of the Manitoba Court of Appeal in *Sargent* v. *Nicholson* (1) and of Wright, J., of the Supreme Court of Ontario, in *Re Loblaw* (2), which seem to support the proposition that a request from the promisor to the promisee may be implied from the mere statement in the subscription paper of the object for which the subscription is promised and a reciprocal promise from the promisee to the promisor to carry out that purpose from the mere fact of the acceptance of the subscription, but an examination of both these judgments makes it clear that these expressions of opinion do not touch the real ground upon which either of the decisions proceeds.

There is no doubt either that some American courts have held that by acceptance of the subscription paper itself the promisee impliedly undertakes to carry out the purpose for which the subscription is made and treated this implied promise of the promisee as the consideration for the promise to pay. This view, however, has been rejected, as pointed out in 60 Corpus Juris, 959, on the ground that

(1) (1915) 25 D.L.R. 638; 26 Man. L.R. 53; 9 W.W.R. 883.

(2) [1933] 4 D.L.R. 264; [1933] O.R. 764.

the promise implied in the acceptance involves no act advantageous to the subscriber or detrimental to the beneficiary, and hence does not involve a case of mutual promises and that the duty of the payee would arise from trusteeship rather than a contractual promise, citing *Albany Presbyterian Church* v. *Cooper* (1), above referred to. No suggestion of mutual promises was made in the last named case, notwithstanding that the subscription there involved was expressly stated to be for the single purpose of erecting a designated church building; neither was it made in the leading New York case of *Barnes* v. *Perine* (2), where the subscription was also stated to be for the erection of a specific church edifice.

As to finding the consideration for the subscription outside the subscription itself, the only evidence relied upon is that of Dr. MacKenzie that increased expenditures were made by the College for the purposes stated between the years 1920 and 1931 on the strength of the subscriptions obtained in the canvass of 1920. It is contended that this fact alone constituted a consideration for the subscription and made it binding. The decisions in *Sargent* v. *Nicholson* (3); *Y.M.C.A.* v. *Rankin* (4); and the judgment of Wright, J., of the Supreme Court of Ontario, in *Re Loblaw* (5), adopting the two former decisions, are relied upon to sustain this proposition as well as some earlier Ontario cases: *Hammond* v. *Small* (6); *Thomas* v. *Grace* (7); *Anderson* v. *Kilborn* (8); and *Berkeley Street Church* v. *Stevens* (9), and several American decisions.

There seems to be no doubt that the first three cases above mentioned unqualifiedly support the proposition relied upon, as regards at least a subscription for a single distinct and definite object, such as the erection of a designated building, whether or not the expenditure would not have been made nor any liability incurred by the

(1) (1889) 112 N.Y. Rep. 517.
(2) (1854) 2 Kernan's Rep. (12 N.Y. Appeals) 18.
(3) (1915) 25 D.L.R. 638; 26 Man. L.R. 53; 9 W.W.R. 883.
(4) (1916) 27 D.L.R. 417; 22 B.C. Rep. 588; 10 W.W.R. 482.
(5) [1933] 4 D.L.R. 264; [1933] O.R. 764.
(6) (1858) 16 U.C.Q.B. 371.
(7) (1865) 15 U.C.C.P. 462.
(8) (1875) 22 Grant's Ch. Reports, 385.
(9) (1875) 37 U.C.Q.B. 9.

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promisee *but for the promise* or not. The earlier Ontario cases relied upon, however, do not appear to me to go that far. They all shew that there was either a direct personal interest on the part of the subscriber in the particular project undertaken or some personal participation in the action of the promisee as a result of which the expenditure or liability was incurred.

Regarding the American decisions, upon which *Sargent* v. *Nicholson* (1) appears to have entirely proceeded—more particularly perhaps on the dictum of Gray, C.J., in *Cottage Street M.E. Church* v. *Kendall* (2) than any other—it may be pointed out that there are other American cases which shew that there must be something more than the mere expenditure of money or the incurring of liability by the promisee on the faith of the promise. *Hull* v. *Pearson* (3), a decision of the Appellate Division of the Supreme Court of New York, in which many of the American cases are reviewed, should perhaps be mentioned in this regard. One W. subscribed a certain sum for the work of the German department of a theological seminary. There was no consideration expressed in the memorandum, and there was no evidence of a request on the part of W. that the work should be continued, or of any expenditures on the part of the theological seminary in reliance on such request. Such department had been continued, but there was no evidence that it would not have been continued as it had been for a series of years but for the subscription. It was held that the subscription was without consideration and could not be enforced. Woodward, J., in the course of his reasons, in which the full court concurred, said:

> It is true that there is evidence that the German department has been continued, but this does not meet the requirement. There is no evidence that it would not have been continued as it had been for a series of years if the subscription of Mr. Wild had not been made.

And further:

> He undoubtedly made the subscription for the purpose of aiding in promoting the work of the German department; but, in the absence of some act or word which clearly indicated that he accompanied his subscription by a request to do something which the corporation would not have done except for his subscription, there is no such request as would justify a constructive consideration in support of this promise.

(1) (1915) 25 D.L.R. 638; 26 Man. L.R. 53; 9 W.W.R. 883.

(2) (1877) 121 Mass. 528.

(3) (1899) 56 N.Y. Sup., 518.

These latter dicta seem to accord more with the English decisions, which give no countenance to the principle applied in *Sargent* v. *Nicholson* (1) and *Y.M.C.A.* v. *Rankin* (2) and in the earlier American cases, as is so pointedly illustrated by the judgments of Pearson, J., in *In Re Hudson* (3), and Eve, J., in *In Re Cory* (4). The head note in *In Re Hudson* (3) states:

A. verbally promised to give £20,000 to the Jubilee Fund of the Congregational Union, and also filled up and signed a blank form of promise not addressed to anyone, but headed "Congregational Union of England and Wales Jubilee Fund," whereby he promised to give £20,000, in five equal annual instalments of £4,000 each, for the liquidation of chapel debts. A. paid three instalments of £4,000 to the fund within three years from the date of his promise, and then died, leaving the remaining two instalments unpaid and unprovided for.

The Congregational Union claimed £8,000 from A.'s executors, on the ground that they had been led by A.'s promise to contribute larger sums to churches than they would otherwise have done; that money had been given and promised by other persons in consequence of A.'s promise; that grants from the Jubilee Fund had been promised to cases recommended by A.; and that churches to which promises had been made by the committee, and the committee themselves, had incurred liabilities in consequence of A.'s promise.

His Lordship held there was no consideration for the promise. "There really was," he said, "in this matter, nothing whatever in the shape of a consideration which could form a contract between the parties."

And he added:

I am bound to say that this is an attempt to turn a charity into something very different from a charity. I think it ought to fail, and I think it does fail. I do not know to what extent a contrary decision might open a new form of posthumous charity. Posthumous charity is already bad enough, and it is quite sufficiently protected by law without establishing a new principle which would extend the doctrine in its favour far more than it has been extended or ought to be extended.

In the *Cory* case (4) a gift of 1,000 guineas was promised to a Y.M.C. Association for the purpose of building a memorial hall. The sum required was £150,000, of which £85,000 had been promised or was available. The committee in charge decided not to commit themselves until they saw that their efforts to raise the whole fund were likely to prove successful. The testator, whose estate it was

(1) (1915) 25 D.L.R. 638; 26 Man. L.R. 53; 9 W.W.R. 883.

(2) (1916) 27 D.L.R. 417; 22 B.C. Rep. 558; 10 W.W.R. 482.

(3) (1885) 33 W.R. 819.

(4) (1912) 29 T.L.R. 18

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sought to charge, promised the 1,000 guineas and subsequently the committee felt justified in entering into a building contract, which they alleged they were largely induced to enter into by the testator's promise. Eve, J., held there was no contractual obligation between the parties and therefore no legal debt due from the estate.

Chisholm, C.J., in the case at bar, said that without any want of deference to eminent judges who have held otherwise he felt impelled to follow the decisions in the English cases. I am of opinion that he was fully justified in so doing, rather than apply the principle contended for by the appellant in reliance upon the decision in *Sargent* v. *Nicholson* (1), based, as the latter case is, upon the decisions of United States courts, which are not only in conflict with the English cases, but with decisions of the Court of Appeals of the State of New York, as I have, I think, shewn, and which have been subjected to very strong criticism by American legal authors, notably by Prof. Williston, as the learned Chief Justice of Nova Scotia has shewn in his exhaustive and, to my mind, very convincing judgment.

To hold otherwise would be to hold that a naked, voluntary promise may be converted into a binding legal contract by the subsequent action of the promisee alone without the consent, express or implied, of the promisor. There is no evidence here which in any way involves the deceased in the carrying out of the work for which the promised subscription was made other than the signing of the subscription paper itself.

I may add that, had I come to the opposite conclusion upon the legal question involved, I should have felt impelled, as Chisholm, C.J., did, to seriously question the accuracy of the statement relied upon by the appellant that "this work was done and the increased expenditures were made on the strength of the subscriptions promised," if that statement was meant to refer to all the increased expenditures listed in the comparative statements produced by Dr. MacKenzie. The statement relied on does not profess to set out verbatim the language of the witness. The record of the evidence is apparently but a brief

(1) (1915) 25 D.L.R. 638; 26 Man. L.R. 53; 9 W.W.R. 883.

summary taken down by the Registrar. That the summary is inaccurate was shewn by the admission made on the argument before us that it was not $220,000 which was subscribed in all in 1920, but $2,200,000. The statement produced of expenditures on buildings, grounds and equipment since 1920 shews a grand total for the more than ten years of but $1,491,687—over $700,000 less than the aggregate of the 1920 campaign subscriptions—and this grand total includes over $400,000 for Shirriff Hall, which it is well known was the object of a special donation contributed by a wealthy lady, now deceased, as a memorial to her father. In the light of this correction it becomes quite as difficult to believe that the College Corporation, in doing "this work" and making "the increased expenditures" did so in reliance upon the deceased's subscription, as if the aggregate of the subscriptions had been but $220,000, as the Registrar took the figures down, and the Nova Scotia Supreme Court supposed, and the total expenditures $1,491,687. This evidence would assuredly seem to shut out all possibility of establishing a claim against the deceased's estate on any such ground as estoppel.

The appeal, I think, should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. C. Macdonald.*

Solicitor for the respondent: *Thomas Notting.*