



1979

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## Recommended Citation

Connelly, Steven (1979) "An "Equivocal Estoppel": The Strange Career of Promissory Estoppel in Kentucky Contract Law," *Kentucky Law Journal*: Vol. 68 : Iss. 1 , Article 5.  
Available at: <https://uknowledge.uky.edu/klj/vol68/iss1/5>

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# COMMENTS

## AN "EQUIVOCAL ESTOPPEL": THE STRANGE CAREER OF PROMISSORY ESTOPPEL IN KENTUCKY CONTRACT LAW

### INTRODUCTION

Promissory estoppel<sup>1</sup> is an equitable doctrine of contract law under which promises that induce detrimental reliance on the part of a promisee are enforced despite a lack of traditional consideration. The extent to which this doctrine has developed in Kentucky is unclear. Promissory estoppel was first applied as an exception to the traditional equitable estoppel doctrine.<sup>2</sup>

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<sup>1</sup> RESTATEMENT (SECOND) OF CONTRACTS § 90 (1973) formulates the doctrine of promissory estoppel as:

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

(2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.

See J. CALAMARI AND J. PERILLO, *CONTRACTS* 202 n.2 (2d ed. 1977) [hereinafter cited as CALAMARI & PERILLO] and J. MURRAY, *MURRAY ON CONTRACTS* § 92 (2d rev. ed. 1974) [hereinafter cited as MURRAY] for a comparison of the formulations of promissory estoppel in the First and Second RESTATEMENT OF CONTRACTS.

<sup>2</sup> *Lawrence v. Lawrence*, 140 S.W.2d 36 (Ky. 1911). The Kentucky Court defined equitable estoppel as:

[t]he principle by which a party who knows or should know the truth is absolutely precluded, both at law and in equity, from denying, or asserting the contrary of, any material fact which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words or conduct, to believe and act upon them thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such denial or contrary assertion were allowed.

*Warfield Natural Gas Co. v. Marcum*, 193 S.W.2d 461, 463 (Ky. 1946) (citing 19 AM. JUR. *Estoppel* § 34).

The essential elements of equitable estoppel are:

(1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation that

Later, the doctrine was applied as promissory estoppel in a series of charitable subscription cases.<sup>3</sup> After that brief appearance, however, Kentucky courts stopped referring to promissory estoppel; rather, when deciding detrimental reliance cases, courts talked only in terms of equitable estoppel<sup>4</sup> or general notions of "fairness and equity."<sup>5</sup> As the doctrine continued to evolve in other states, expanding into the field of bargain transactions,<sup>6</sup> promissory estoppel remained in limbo in Kentucky and was never expressly extended beyond the charitable subscription cases.

In 1974 the Kentucky Court of Appeals<sup>7</sup> decided *Electric and Water Plant Board v. Suburban Acres Development, Inc.*,<sup>8</sup> and applied equitable estoppel in a way strikingly similar to promissory estoppel.<sup>9</sup> The results in *Suburban*, traditionally,

such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And, broadly speaking, as related to the party claiming the estoppel, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

*Electric and Water Plant Bd. v. Suburban Acres Dev. Corp., Inc.*, 513 S.W.2d 489, 491 (Ky. 1974); *Smith v. Howard*, 407 S.W.2d 139, 143 (Ky. 1966). Cf. *Henderson, Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 376 n.182 (1969) (another definition of equitable estoppel).

<sup>3</sup> *Lake Bluff Orphanage v. Magill's Ex'rs.*, 204 S.W.2d 224 (Ky. 1947); *Transylvania Univ. v. Rees*, 179 S.W.2d 890 (Ky. 1944); *Floyd v. Christian Church Widows and Orphans Home*, 176 S.W.2d 125 (Ky. 1943).

<sup>4</sup> *Urban Renewal & Community Dev. Agency v. Goodwin*, 514 S.W.2d 190 (Ky. 1974); *Electric and Water Plant Bd. v. Suburban Acres Dev. Corp.*, 513 S.W.2d 489 (Ky. 1974).

<sup>5</sup> *Meade Constr. Co. v. Mansfield Commercial Elec., Inc.*, 579 S.W.2d 105, 106 (Ky. 1979).

<sup>6</sup> See notes 24-32 *infra* for a discussion of this development.

<sup>7</sup> Prior to 1976, the Kentucky Court of Appeals was the highest appellate court in Kentucky. By a constitutional amendment effective January 1, 1976, the Kentucky Supreme Court was created as the highest state court, and the Kentucky Court of Appeals became an intermediate court of appeals. KY. CONST. §§ 109-111. References to the Court of Appeals in cases decided prior to 1976 will be to the high court; references to the court of appeals in cases following 1975 will be to the intermediate court.

<sup>8</sup> 513 S.W.2d 489 (Ky. 1974).

<sup>9</sup> See also *Urban Renewal & Community Dev. Agency v. Goodwin*, 514 S.W.2d 190 (Ky. 1974), decided a few months after *Suburban*, for another example of equitable

could have been achieved only by using promissory estoppel.<sup>10</sup> In the recent decision of *Meade Construction Co. v. Mansfield Commercial Electric, Inc.*,<sup>11</sup> however, the Court implied that promissory estoppel has yet to be recognized in Kentucky. Notwithstanding the implication of *Meade, Suburban* raises the question of whether the doctrine in its expanded form<sup>12</sup> has been adopted by the Kentucky courts in effect if not in name. This comment will analyze the development of promissory estoppel in Kentucky and suggest that Kentucky courts have formulated an "equivocal estoppel" doctrine that embodies a merging of the two traditional doctrines of promissory and equitable estoppel.

## I. HISTORICAL DEVELOPMENT OF PROMISSORY ESTOPPEL

Historically,<sup>13</sup> promissory estoppel was merely an excep-

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estoppel being applied in what has come to be the traditional promissory estoppel context.

<sup>10</sup> Equitable and promissory estoppel, in theory, are quite different. Equitable estoppel involves an affirmative misrepresentation of a past or present fact on which another relies to his detriment. In addition, equitable estoppel is a "shield not a sword;" it is available to the relying party only as a defense to a claim asserted by the misrepresenting party. Comment, *Estoppel: Status of Promissory Estoppel in Oklahoma*, 22 OKLA. L. REV. 89 (1969). It is not a basis for a cause of action. *Morgan v. Maryland Casualty Co.*, 458 S.W.2d 789, 790-91 (Ky. 1970) (estoppel does not create a new right of action); *Haubert v. Navajo Ref. Co.*, 264 P. 151 (Okla. 1928). See generally 28 AM. JR.2d *Estoppel and Waiver* §§ 28, 29, 48 (1966 & Supp. 1978).

Promissory estoppel, on the other hand, can be the basis of an action. It involves a promise of a future act or fact, not a misrepresentation of a past or present fact. Promissory estoppel can be either a sword or a shield. *Goodman v. Dicker*, 169 F.2d 684 (D.C. Cir. 1948); *Tiffany, Inc. v. W.M.K. Transit Mix, Inc.*, 493 P.2d 1220 (Ariz. 1972); *Graddon v. Knight*, 292 P.2d 632 (Cal. 1956); *Farmland Ser. Coop., Inc. v. Klein*, 244 N.W.2d 86 (Neb. 1976); *Wheeler v. White*, 398 S.W.2d 93 (Tex. 1965); *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267 (Wis. 1965); 28 AM. JR.2d *Estoppel and Waiver* § 29 (Supp. 1978); Comment, *Estoppel: Status of Promissory Estoppel in Oklahoma*, 22 OKLA. L. REV. 89, 90 (1969).

<sup>11</sup> 579 S.W.2d 105 (Ky. 1979). The Court stated: "We need not decide whether the doctrine of promissory estoppel applies in this state or whether, if so, it governs this case." *Id.* at 106.

<sup>12</sup> Since the doctrine of promissory estoppel was originally applied in charitable subscription cases, any utilization of that doctrine beyond the confines of charitable subscription cases is actually an application of promissory estoppel in its "expanded form."

<sup>13</sup> See CALAMARI & PERILLO, *supra* note 1, at 210; MURRAY, *supra* note 1, at 195-206; Boyer, *Promissory Estoppel: Principle from Precedents*, 50 MICH. L. REV. 639, 873 (1952); Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98

tion to traditional equitable estoppel doctrine;<sup>14</sup> as such, courts used the exception to enforce certain agreements based on misrepresentations relating to the future. Conversely, equitable estoppel usually only applied to misrepresentations of past or present facts.<sup>15</sup> Courts applied this exception to five categories of cases: (1) family promises,<sup>16</sup> (2) gratuitous promises to convey land followed by taking of possession and making of improvements,<sup>17</sup> (3) gratuitous bailments and agencies,<sup>18</sup> (4) promises to surrender existing legal rights,<sup>19</sup> and (5) charitable subscriptions.<sup>20</sup> This equitable estoppel exception was eventually christened promissory estoppel<sup>21</sup> and later accorded formal recognition in section 90 of the *Restatement (First) of Contracts*.<sup>22</sup> Many courts eventually began to apply section 90

U. PA. L. REV. 459 (1950); Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 343-50 (1969); See Annot., 48 A.L.R.2d 1069 (1956), for a general discussion of the doctrine of promissory estoppel.

<sup>14</sup> The doctrine of promissory estoppel emerged originally as an extension of the equitable concept of estoppel. The courts in applying the doctrine would look first to conventional theories of consideration in order to enforce the promise as a contract. If there was no evidence of a *quid pro quo*, the courts would in extraordinary circumstances enforce the promise based on the theory that there had been detrimental reliance and that to deny enforcement would serve to facilitate an injustice.

Comment, *Promissory Estoppel Marches On—Mooreburger*, 28 BAYLOR L. REV. 703, 704 (1976).

<sup>15</sup> See note 10 *supra* for a discussion of the proper application of equitable estoppel. See also *Marker v. Preferred Fire Ins. Co.*, 506 P.2d 1163 (Kan. 1973); *Loranger Constr. Corp. v. E.P. Hauserman Co.*, 374 N.E.2d 306 (Mass. App. 1978); *Clifton v. Ogle*, 526 S.W.2d 596 (Tex. Civ. App. 1975) ("difference of promissory estoppel from ordinary equitable estoppel is that the representation is promissory rather than as to an existing fact." *Id.* at 603).

<sup>16</sup> *E.g.*, *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898).

<sup>17</sup> *E.g.*, *Seavey v. Drake*, 62 N.H. 393 (1882). Cf. *Miller v. Laylor*, 66 N.W.2d 267 (Iowa 1954); see *Greiner v. Greiner*, 293 P. 759 (Kan. 1930).

<sup>18</sup> *E.g.*, *Siegel v. Spear & Co.*, 138 N.E. 414 (N.Y. 1923). See *Thorne v. Deas*, 4 Johns. 84 (N.Y. 1809), followed in *Comfort v. McCorkle*, 268 N.Y.S. 192 (Sup. Ct. 1933), *rev'd by implication*, *Speigel v. Metropolitan Life Ins. Co.*, 160 N.E.2d 40 (N.Y. 1959).

<sup>19</sup> *E.g.*, *Schroeder v. Young*, 161 U.S. 334 (1896); *May v. City of Kearney*, 17 N.W.2d 448 (Neb. 1945).

<sup>20</sup> *E.g.*, *Allegheny College v. National Chautauqua County Bank*, 159 N.E. 173 (N.Y. 1927).

<sup>21</sup> 1 S. WILLISTON, *CONTRACTS* § 139 (1st ed. 1920); Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459, 459 n.1 (1950).

<sup>22</sup> Boyer, *supra* note 21, at 459.

to the equitable estoppel exception categories.<sup>23</sup>

From the outset, promissory estoppel was used in conjunction with gratuitous promises.<sup>24</sup> If the promisee could show reasonable detrimental reliance, the courts would enforce such gratuitous promises despite the absence of traditional contract consideration. In fact, some courts recognized promissory estoppel as a substitute for consideration in the gratuitous promise context.<sup>25</sup>

Although courts became quite liberal in applying promissory estoppel to gratuitous promises, they were reluctant to expand the doctrine into the field of bargain transactions.<sup>26</sup> In time, however, the courts made this transition, and today the usual setting from which promissory estoppel emerges is commercial, not benevolent.<sup>27</sup> Promissory estoppel has been used in cases involving subcontractors' bids,<sup>28</sup> franchises,<sup>29</sup> and shopping center construction financing.<sup>30</sup> The progressive evolution of promissory estoppel has led one commentator to suggest that promissory estoppel might replace consideration as the

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<sup>23</sup> *E.g.*, *Danby v. Osteopathic Hosp. Ass'n*, 104 A.2d 903 (Del. 1954) (charitable subscriptions); *Greiner v. Greiner*, 293 P. 759 (Kan. 1930) (promise to make gift of land); *Lusk-Harbitson-Jones, Inc. v. Universal Credit Co.*, 145 So. 623 (Miss. 1933) (gratuitous bailment and agency); *Jackson v. Kemp*, 365 S.W.2d 437 (Tenn. 1963) (promise not to plead statute of limitations in tort case).

<sup>24</sup> "Gratuitous promise" traditionally meant the promise of a gift. Courts have tended to extend that definition to include all promises unsupported by consideration. *Henderson, Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 344 n.3 (1969).

<sup>25</sup> *Southeastern Sales and Serv. Co. v. T. T. Watson, Inc.*, 172 So.2d 239, 240 (Fla. 1965); *Friedman v. Tappan Dev. Corp.*, 126 A.2d 646, 652 (N.J. 1956).

<sup>26</sup> *James Baird Co. v. Gimbel Bros. Inc.*, 64 F.2d 344 (2d Cir. 1933).

<sup>27</sup> *Henderson, supra* note 24, at 344.

<sup>28</sup> *N. Litterio & Co. v. Glassman Constr. Co.*, 319 F.2d 736 (D.C. Cir. 1963); *Robert Gordon, Inc. v. Ingersoll-Rand Co.*, 117 F.2d 654 (7th Cir. 1941) (rejected *James Baird Co. v. Gimbel Bros., Inc.*, 64 F.2d 344 (2d Cir. 1933), but found insufficient detrimental reliance for promissory estoppel); *Reynolds v. Texarkana Constr. Co.*, 374 S.W.2d 818 (Ark. 1964); *Drennan v. Star Paving Co.*, 333 P.2d 757 (Cal. 1958); *Northwestern Eng'g Co. v. Ellerman*, 10 N.W.2d 879 (S.D. 1943).

<sup>29</sup> *Goodman v. Dicker*, 169 F.2d 684 (D.C. Cir. 1948); *Chrysler Corp. v. Quimby*, 144 A.2d 123 (Del. 1958); *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267 (Wis. 1965) (involving promises made in preliminary negotiations).

<sup>30</sup> *Wheeler v. White*, 398 S.W.2d 93 (Tex. 1965) (application of promissory estoppel where the contract would have failed for indefiniteness). *See also* Comment, *Promissory Estoppel Marches On—Mooreburger*, 28 BAYLOR L. REV. 703, 706-08 (1976) for a discussion of *Wheeler*.

main contract validation device<sup>31</sup> and that the *Restatement (Second) of Contracts*' formulation of the doctrine could give added impetus to the utilization of promissory estoppel as the basis of a cause of action that is not based on tort, contract, or quasi-contract theories.<sup>32</sup>

## II. THE DEVELOPMENT OF PROMISSORY ESTOPPEL IN KENTUCKY

### A. *The Equitable Estoppel Exception and Charitable Subscription Cases*

The early application of promissory estoppel in Kentucky followed the historical pattern. In *Lawrence v. Lawrence*,<sup>33</sup> a stepson who held a mortgage on property in which his stepmother had a homestead interest initiated foreclosure proceedings and induced his stepmother to acquiesce by telling her that she could continue to remain on the property in the future.<sup>34</sup> The stepson foreclosed, bought the property for one dollar more than the price that would have allowed a redemption, and then conveyed the property to his son. In reversing the trial court's decision in favor of the stepson, the Court held that, considering the relationship of the parties, these facts were sufficient to show estoppel or fraud, either of which would allow relief.<sup>35</sup> Since the Court in *Lawrence* applied estoppel to a situation involving the misrepresentation of a future act, that case is an example of the application of the equitable estoppel exception involving a family promise and the surrender of an existing legal right.<sup>36</sup>

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<sup>31</sup> MURRAY, *supra* note 1, at 206.

<sup>32</sup> CALAMARI & PERILLO, *supra* note 1, at 218.

<sup>33</sup> 140 S.W. 36 (Ky. 1911).

<sup>34</sup> *Id.* at 37-38.

<sup>35</sup> The court said:

If he acted in good faith [inducing her not to resist foreclosure] not intending to mislead her, he is estopped to say that he should be allowed to take the property and turn her out; and, if he acted in bad faith, the judgment was obtained by fraud and cannot be permitted to stand. In either view of the matter she is entitled to the relief sought.

*Id.* at 38.

<sup>36</sup> The legal right surrendered was the right to oppose the foreclosure. See *Urban Renewal and Community Dev. Agency v. Goodwin*, 514 S.W.2d 190 (Ky. 1974) for a recent case in which the Court applied the equitable estoppel exception to a future promise. In that case, the agency informed owners of condemned property that they

Some years later, in a series of three cases involving charitable subscriptions, the Kentucky Court of Appeals expressly approved promissory estoppel and section 90 of the *Restatement (First) of Contracts*. The first case, *Floyd v. Christian Church Widows and Orphans Home*,<sup>37</sup> involved the promise of a man and his wife to donate certain sums of money, payable sixty days after their deaths, to several charities. The Court examined the various theories that other jurisdictions had applied to enforce such subscriptions and concluded that the most logical was promissory estoppel and then cited section 90 for its definition of the doctrine. In ruling that the subscription was not enforceable by the charities because of the lack of valuable consideration, the Court said "that an actual, rather than an illusory consideration, or at least an estoppel of the promisor to object, is necessary to render a charitable subscription enforceable."<sup>38</sup> In *Floyd*, since there was no return promise by the charities for the subscription and no proven detrimental reliance by the charities, neither valuable consideration nor the proper circumstances for promissory estoppel existed to render the pledges enforceable.<sup>39</sup>

The following year, under similar facts, the Court enforced a pledge in *Transylvania University v. Rees*<sup>40</sup> because the charity, in return for the pledge, promised to pay the widow of the pledgee six per cent interest on the pledged amount after his death.<sup>41</sup> The Court again did not rely on promissory estoppel, but explained that such estoppel was not used in *Floyd* because the charities had not shown an affirmative reliance on the

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could retain it if they made certain improvements. The owners, relying on the representation, made substantial improvements and abandoned an appeal of the condemnation judgment. The Court said estoppel was appropriate when the agency tried to take the property despite the improvements.

<sup>37</sup> 176 S.W.2d 125 (Ky. 1943). See Note, *Validity of Charitable Subscriptions in Kentucky*, 33 Ky. L.J. 50, 50-51 (1944) for a discussion of the case.

<sup>38</sup> 176 S.W.2d at 131. The Court was willing to view promissory estoppel as a substitute for consideration in charitable subscription cases.

<sup>39</sup> Before applying promissory estoppel, courts usually look for the existence of conventional consideration. If it is not present, they determine if the elements for a promissory estoppel exist. CALAMARI & PERILLO, *supra* note 1, at 210. See also Annot., 48 A.L.R.2d 1069 (1956) for a discussion of how promissory estoppel can limit the enforcement of charitable subscriptions.

<sup>40</sup> 179 S.W.2d 890 (Ky. 1944).

<sup>41</sup> *Id.* at 892.

pledge.<sup>42</sup> Finally, in *Lake Bluff Orphanage v. Magill's Executors*,<sup>43</sup> the Court, citing *Floyd* and section 90, found sufficient detrimental reliance by the orphanage to render a pledge enforceable through promissory estoppel.<sup>44</sup>

Thus, by 1947 Kentucky had followed the historical pattern of the developing doctrine of promissory estoppel from its rudiments in the equitable estoppel exception to full recognition in section 90 of the *Restatement (First) of Contracts*.

### B. Suburban and Promissory Estoppel

A gap of more than thirty years separated the equitable estoppel exception applied in *Lawrence* and the formal recognition of promissory estoppel in the charitable subscription cases; another thirty years passed before the next step in the doctrine's development occurred. In that third evolutionary step, courts again applied the concept of promissory estoppel under the title of equitable estoppel, as if to bring the development of the doctrine full circle back to its origin.<sup>45</sup>

In *Electric and Water Plant Board v. Suburban Acres Development, Inc.*,<sup>46</sup> a development company acquired a tract of land on which to build an apartment complex outside the city of Frankfort. In order to secure the necessary financing for the construction, the company contacted the Water Plant Board and requested that the Board send it a letter stating that utility service would be available to the complex. The Board was informed of the reason for the letter. The following letter was sent to Suburban:

Pursuant to your request, be advised that an adequate supply of water and electricity can readily be made available to the plot of land indicated . . . .

Until we are fully informed as to the details of the contemplated development, we would not be in a position to indicate to you the cost that would be involved.

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<sup>42</sup> *Id.*

<sup>43</sup> 204 S.W.2d 224 (Ky. 1947).

<sup>44</sup> Relief was still denied, even though the pledge was enforceable, because no fund existed from which to pay the award. *Id.* at 228.

<sup>45</sup> *Urban Renewal and Community Dev. Agency v. Goodwin*, 514 S.W.2d 190 (Ky. 1974), discussed in note 36 *supra*, seems to reaffirm the Kentucky Court's view of the doctrine as an equitable estoppel exception even today.

<sup>46</sup> 513 S.W.2d 489 (Ky. 1974).

The matter of the Electric and Water Plant Board of the City of Frankfort supplying your electrical needs is being questioned by Kentucky Utilities Company. However, at this time we are unwilling to admit that we do not have the right to serve your property.<sup>47</sup>

Suburban used the letter to obtain a construction loan and began building. Six weeks later, after Suburban had requested water service, the Board voted to delay providing water until the issue of the electric service had been settled. Suburban then filed suit, requesting an injunction ordering the Board to furnish water. The trial court granted the injunction, holding that the Board was estopped to deny such service, and, in addition, ordered the Board to enter into a contract with the development company on terms compatible with the court's decision. On appeal the Kentucky Court of Appeals affirmed and held that the situation presented facts constituting estoppel. The Court explained that "[t]he Electric & Water Plant Board was informed that a letter of commitment for service was necessary to arrange for financing; the letter was furnished. Suburban in reliance on the letter made financial commitments and commenced construction."<sup>48</sup> The Court then quoted a definition of equitable estoppel, cited *Smith v. Howard*,<sup>49</sup> and

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<sup>47</sup> 513 S.W.2d at 490.

<sup>48</sup> *Id.* at 491.

<sup>49</sup> 407 S.W.2d 139 (Ky. 1966). See note 2 *supra* for the essential elements of equitable estoppel.

*Smith* involved zoning restrictions. In that case, a property owner wrote a letter to the local Zoning Commission, stating that, if he received permission to lease his building for one year as a non-conforming use, he would not use that permission as an excuse for seeking permanent rezoning of his building. The Commission granted permission for the one year lease.

Some years later the Commission attempted to deny this non-conforming use, contending that the owner should be estopped to claim permission because of his representations in the letter. The Court disagreed and held that "the representations contained in this letter being without consideration did not amount to an estoppel." *Id.* at 143. Furthermore, there was no detrimental reliance. The Commission "took no action as a result of the letter, which was of 'such character as to change its position prejudicially'." *Id.* Because the proper owner sought permission to continue his use by a gratuitous assertion that he would not ask for an extension, in doing so, he was not estopped.

The representation in *Smith* was really a promise. Because the promise concerned a future act and not a past or present fact, the estoppel the Court considered was promissory rather than equitable. In other words, the Court in *Smith* rejected a claim

concluded that the facts fell within the definition.

Even though promissory and equitable estoppel are often hard to distinguish,<sup>50</sup> the distinction was clear in *Suburban*. The letter, which the Board knew was for financing, contained an implicit promise to furnish water to *Suburban*.<sup>51</sup> To argue that the letter was merely a representation of a present fact, that the Board could *at that time* supply *Suburban* with water, is, at best, an argument of form over substance.<sup>52</sup> The tenor of the whole arrangement was for the future. Both *Suburban* and the bank wanted commitments for the future; this common desire was the essence of the arrangement. The remedy, therefore, was in the proper province of promissory, not equitable, estoppel. Furthermore, the estoppel in *Suburban* was the basis for a cause of action and not a defense to a suit by the Board. The Court forced the Board to furnish water and to enter into a contract upon terms the Court found dictated by the estoppel. By comparing the application of the two estoppels with the facts of *Suburban*,<sup>53</sup> it is clear that the doctrine the Court applied and called equitable estoppel was, in fact, promissory estoppel.

On the surface, the decision in *Suburban* indicated that, analytically speaking, the Court had indeed come full circle in its handling of detrimental reliance cases. Although it seemed that the Court had moved from applying an equitable estoppel exception to an application of promissory estoppel and then back to the use of the equitable estoppel exception, the Court had actually just broadened the doctrine of equitable estoppel

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of promissory estoppel by the Commission, not equitable estoppel, because of a lack of consideration and detrimental reliance. The Court in *Suburban* applied essentially the same definition of equitable estoppel and cited *Smith*, but achieved the opposite result because there was detrimental reliance. This fact suggests either a tacit recognition of promissory estoppel or a careless application of the doctrine of equitable estoppel.

<sup>50</sup> See note 10 *supra* for an analysis of the theoretical differences between promissory and equitable estoppel. See also Henderson, *supra* note 13, at 376-80.

<sup>51</sup> Mazer v. Jackson Ins. Agency, 340 So.2d 770 (Ala. 1976) (express promise unnecessary to establish promissory estoppel).

<sup>52</sup> See Seavey, *Reliance Upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913, 922-23 (1950) ("every statement of the future includes some statement of present facts." *Id.*).

<sup>53</sup> See generally notes 2 and 10 *supra* for an explanation of the proper use of promissory estoppel.

to include all cases of detrimental reliance. As a result, no distinction had to be drawn between promissory and equitable estoppel because both now would be classified as types of equitable estoppel.

### C. *Meade and the "Equivocal Estoppel" Doctrine in Kentucky*

Based on *Suburban*, it is possible to conclude that Kentucky's equitable estoppel doctrine represents a tacit adoption of promissory estoppel, in effect if not in name. In this light, equitable estoppel might more aptly be labeled "equivocal estoppel" since the acknowledged availability of promissory estoppel in Kentucky is ambiguous, but the benefits of the doctrine are attainable. Under "equivocal estoppel" a court can apply either traditional equitable estoppel or promissory estoppel.

This concept of an "equivocal estoppel" is illustrated in a recent case, *Meade Construction Company, Inc. v. Mansfield Commercial Electric, Inc.*<sup>54</sup> In *Meade*, a general contractor sued a subcontractor for failure to perform a subcontract. Mansfield Electric had submitted an electrical subcontractor's bid for the electrical work in the construction of a stadium press box to Meade Construction. Meade Construction used that bid in computing its bid for the total project. Before the project had been awarded, but after Meade Construction had irrevocably submitted its project bid, Mansfield Electric revoked its bid on the press box;<sup>55</sup> Meade Construction was forced to substitute the second lowest bidder, thus causing an increase in the cost of the project of approximately \$8,000.

Based on these facts, Meade Construction brought an action for damages against Mansfield Electric on the theory of promissory estoppel, arguing that Mansfield had made an implied promise not to withdraw its bid. Mansfield Electric argued, as an affirmative defense, that Meade Construction had never accepted its offer and that, since it had been re-

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<sup>54</sup> 579 S.W.2d 105 (Ky. 1979).

<sup>55</sup> Usually a subcontractor withdraws its bid because of a major error in computation or cost calculation. In *Meade*, however, Mansfield withdrew because it had not been paid for previous subcontract work done for Meade. *Id.* at 106.

voked, there had never been a binding contract.<sup>56</sup>

The trial court found that the parties had not entered into a binding contract and dismissed the case; the court of appeals affirmed. In reversing the court of appeals decision, the Supreme Court ruled that "under any conception of fairness and equity one who submits a quotation for the purpose of its being used in the computation of a bid for a contract should be bound, when the contract is awarded pursuant to a bid prepared in reasonably foreseeable reliance on that quotation, to accept an agreement in conformity with the quotation."<sup>57</sup> The Court expressly reserved the question of whether promissory estoppel applied in Kentucky or in the particular case at hand. Yet, after quoting a definition of that doctrine from the *Restatement (Second) of Contracts* section 90, the Court found that Mansfield should "reasonably have expected that quotation to be used in the preparation of the contract bid"<sup>58</sup> and that "Meade did rely upon Mansfield's offer."<sup>59</sup> This analysis is the same that would have been used and the result is the same that would have been achieved by an application of the doctrine of promissory estoppel. The conception of fairness and equity used to decide the case was Kentucky's "equivocal estoppel."

### CONCLUSION

Whether the embodiment of both equitable and promissory estoppel in one general concept of "equivocal estoppel" was by accident or design, such a combination is portrayed in Kentucky case law. Since the policies behind both doctrines

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<sup>56</sup> CA-1354-MR (Ky. Ct. App. March 10, 1978).

An offer unsupported by consideration is usually revocable, and, as a general proposition, promissory estoppel will not make an offer irrevocable. Ordinarily, an offeree is not justified in relying on an offer. To rely, the offeree need only accept. But a bid by a subcontractor to a general contractor is somewhat different. It is predictable that the general contractor will rely on the low bids received by him in computing his bid for the overall project. The majority of courts which have considered the problem of subcontractor bids have held that justifiable detrimental reliance on an offer will render it irrevocable. CALAMARI & PERILLO, *supra* note 1, at 212. See generally MURRAY, *supra* note 1, at § 93; Comment, *Promissory Estoppel and Louisiana*, 31 LA. L. REV. 84, 94-100 (1970).

<sup>57</sup> 579 S.W.2d at 106.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 107.

are the same, and since the distinction between the two is largely historical, there is no reason why equitable and promissory estoppel should not be merged into one doctrine. Theoretically, the only impact of the combination would be that equitable estoppel would now have an affirmative aspect; equitable estoppel would be available as a cause of action and not solely as a defense.<sup>60</sup> Both doctrines are based on detrimental reliance, and a general doctrine embodying both makes sense.

The only danger existing in Kentucky's approach to the estoppel issue is the confusion that an unenunciated doctrine can create.<sup>61</sup> The court of appeals decision in *Meade* illustrates this potential problem. In that case, two judges,<sup>62</sup> viewing promissory estoppel as unavailable in Kentucky, based their decision on a lack of traditional consideration; only one judge<sup>63</sup> would have applied promissory estoppel if he had found sufficient detrimental reliance. Such confusion about the availability of promissory estoppel is not resolved by the "equivocal estoppel" doctrine described above.

The status of promissory estoppel in Kentucky is still unclear. Outside the charitable subscription area, the doctrine has not been officially embraced, but judicial decisions have largely made that technicality moot. Kentucky courts have, in effect, created an equivocal doctrine of equitable estoppel that, by focusing on reasonable detrimental reliance, can operate as either traditional equitable or promissory estoppel.

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<sup>60</sup> See generally Henderson, *supra* note 13, at 376-80.

<sup>61</sup> Consider an analogous situation described in Henderson, *supra* note 13, at 352-53.

<sup>62</sup> CA-1354-MR (Ky. Ct. App. March 10, 1978) (Howard & Reynolds, J J.).

<sup>63</sup> *Id.* at 3 (Wilhoit, J., concurring).