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Contracts--Enforceability of Charitable Subscriptions in Kentucky

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which theory to base his case in order that he will not mislead himself or the court by using a theory which might lead to a great injustice. Second, it is important for the court to emphasize and describe accurately the significance of what it is doing in order that reasonable uniformity may be achieved in the cases presented to it under the statute.

PAUL E. DECKER

CONTRACTS—ENFORCEABILITY OF CHARITABLE SUBSCRIPTIONS IN KENTUCKY

The enforcement of charitable subscriptions has been the subject of extensive comment throughout the country. Much of the difficulty appears to stem from an attempt to reconcile a strong moral feeling that, as a matter of social policy, such a subscription to a worthy cause should be enforced, with the traditional requirement of law that in order for a promise to be enforceable it must be supported by a consideration which is in fact bargained for. The term “charitable” itself is the antithesis of “bargain.” The subscriber does not intend, in most cases, that the promisee exchange another promise for the one in the subscription or that the promisee do some act of forbearance in return. “Charitable” immediately suggests the idea of a mere donation or gift without anything to be given in return. Nevertheless, courts trying to overcome this difficulty continue to enforce charitable subscriptions by one means or another because the encouragement of a worth-while institution, such as a church or a hospital, is socially desirable.

Some courts in their enthusiasm to support the enforceability of charitable subscriptions have visualized the subscription, not as a mere donation, but as an offer for a unilateral contract made by the subscriber. This offer becomes a binding contract as soon as the offeree accepts by undertaking to perform a part of the act on the faith of that offer or promise.1 For example, a subscription made to a hospital to aid in their “humanitarian work,” was held to be an offer which became enforceable after the hospital had expended large sums in the furtherance of its “humanitarian work.” The theory of enforceability was that part performance transformed the unilateral offer into a binding contract.2

1 Beginning of performance is sufficient to make the promise irrevocable, Restatement, Contracts sec. 45 (1933); Williston, Contracts Vol. 1, p. 403 (Rev. Ed. 1936).
Other courts, with equal enthusiasm, have found sufficient consideration for a contract in the mutual promises of those who subscribe. In fact the typical written subscription starts with words to that effect, for instance, "In consideration of the gifts and pledges of others . . . we hereby promise . . . ." Even though these words are contained in the subscription and one might think that the subscriber actually had the return promises of others in mind when he made the promise, there is an obvious fallacy. The other subscriptions, in most cases, were not in fact bargained for, but were only a motive for making a gift. Thus, by refusing to look at the facts as they really are, courts have employed a fiction to enforce subscriptions to charities or other desirable institutions.

Kentucky cases will be found supporting both of the above approaches, but in the case of Floyd v. Christian Church Widows and Orphans Home of Kentucky the Court of Appeals, recognizing the weaknesses of logic in these theories, stated that the doctrine of "promissory estoppel" was "more logically" suited to the charitable subscription cases. The court reiterated such a feeling by refusing to apply the "invented considerations" of treating the express or implied undertakings of the charity to do what it was already obligated to do in its charter as a sufficient consideration. The theory of mutual subscriptions previously applied by the Kentucky Court was also held to be inapplicable. Thus, Kentucky in this decision refused to find an "illusory consideration" in order to enforce charitable subscriptions, and by so doing disrupted years of generally accepted precedent in this field. In the opinion it stated that "an actual, rather than illusory consideration, or at least an estoppel of the promisor to object, is necessary to render a charitable subscription enforceable. . . ." The doctrine of estoppel is the "promisory estoppel" as stated in the Restatement of Contracts. It is as follows:

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

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1 Supra note 5 at 206, 176 S.W. 2d at 131.
2 Restatement, Contracts sec. 90 (1923).
3 Example taken from Floyd v. Christian Church Widows & Orphans Home of Kentucky, 296 Ky. 196, 176 S.W. 2d 125 (1943).
4 Hyden et al. v. Scott Lees Collegiate Institute, 291 Ky. 139, 163 S.W. 2d 295 (1942) (Mutual promise doctrine, semble); Ellinger's Adm'r. v. Brown, 9 Ky. Opin. 514 (1877) (Offer doctrine).
5 296 Ky. 196, 202, 176 S.W. 2d 125, 129 (1943).
6 This seems to be the view of others also. See WILLISTON, CONTRACTS sec. 116 (Rev. Ed. 1936).
The Court of Appeals in the Floyd case refused to apply the doctrine to enforce the subscription there involved because the evidence failed to show that the institution performed any act that it would not have otherwise performed. But the court made it clear that it would enforce the validity of charitable subscriptions by the application of the doctrine "in any case where the facts disclosed by the pleadings and proof justify its application." It further remarked that charitable subscriptions are enforceable by the doctrine "only where it is shown that the charity was thereby induced to incur obligations or undertake enterprises in reliance thereon."  

The case which the Kentucky Court of Appeals thus foreshadowed was presented to the court in *Lake Bluff Orphanage v. Magill's Ex'rs et al.* The facts showed that in 1929 Henry P. Magill executed an estate note which read as follows:

In consideration of my interest in the services being rendered by the Methodist Deaconess Orphanage at Lake Bluff, Ill., and in consideration of others subscribing to a Fund for Replacement of Buildings. . . . I hereby pledge and will pay to the Methodist Deaconess Orphanage the sum of Five Thousand Dollars.

It was established that the estate note was given during a campaign for funds. In the campaign $375,000 in subscriptions was raised, of which $325,000 had been paid. The orphanage had borrowed $50,000 in addition to the amount which the subscribers had paid, and at the time of suit $25,000 remained unpaid. Also, it had erected a building and purchased equipment at the cost of $350,000. The court held that this action by the orphanage was sufficient to show it had relied upon the payment of the note of Magill and others to satisfy the expense of improving their property. In the words of Commissioner Stanley, "The orphanage would not have embarked upon this program or made expenditures or borrowed money except in reliance upon the note of Magill and other persons and in belief that it would be paid." The element of reliance by the promisee was shown by the fact that the institution had done something which would not otherwise have been

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8 Without considering in detail the problem of whether the reliance of the promisee was justified, the court answered the question by implication. The court said that the right of the promisee to rest faith on the promise would depend on whether the court could find that the promisor could have reasonably expected action of such a substantial character to follow. By applying *Restatement of Contracts* sec. 90, *supra* note 8, to the facts at hand it must have answered the question of the promisor's foreseeability of action or forebearance by the promisee in the affirmative, and thus, if the promisor could reasonably expect action of such a nature to follow, the promisee had a right to incur the expense.

9 305 Ky. 391, 204 S.W. 2d 224 (1947).

10 *Id.* at 392, 204 S. W. 2d at 225.

11 *Id.* at 393, 204 S.W. 2d at 226.
performed without the promise in the subscription, and made the
subscription binding under the theory of "promissory estoppel" even
though the theory of mutual subscriptions would have in all prob-
ability applied to the facts at hand. In further disposal of the case,
although the subscription itself was binding, the orphanage did not
receive the amount promised in the subscription because the funds
were not sufficient to satisfy other prime bequests in the testator's
will.

These two cases establish clearly for Kentucky the enforceability
of charitable subscriptions on the "promissory estoppel" basis. They
serve to emphasize that courts recognize that subscriptions are im-
portant to charities, but in order to receive the amounts in the sub-
scriptions, the institution must make it clear that action was taken as
a result of the inducement contained in the subscription.

In the light of the Floyd case and the Lake Bluff Orphanage case,
is this the only basis on which a charitable institution can hope to en-
force such a subscription in Kentucky? Another possibility seems to
have been left open by the Kentucky Court in its decision in Trans-
sylvania University v. Rees, decided just a year after the Floyd case.
In that case the subscription was as follows:

For the purpose of promoting Christian Education, and in considera-
tion of the gifts of others, the undersigned hereby agrees to pay to
Transylvania University, Five Thousand 00/ Dollars ($5000.00) pay-
able as follows: 30 days after my death to create and endow the
Dr. W. S. and Elva Rees Memorial Fund. Should the said Elva
Rees survive me, an annuity of 6% shall be paid her on the amount
paid so long as she shall live.

The court held that when the institution accepted the writing con-
taining the condition to create a memorial fund and conditionally to
pay the promisor's widow a 6% annuity on the promised amount, it
agreed to comply with that condition and thereby obligated itself to
do so. This implied promise by the promisee was sufficient considera-
tion to enforce payment of the subscription. The "implied promise"

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13 The court expressly states that it refuses to "regard" the subscriptions of
others, 305 Ky. 391, 394, 204 S.W. 2d 224, 226 (1947).
14 On the back of the subscription Mr. Magill wrote: "Under the wills of Mrs.
Magill and myself ... after certain requests [bequests] to be immediately paid
and discharged, the residue of our estate goes during their lives ... to our niece
and her husband...." Supra note 11. Upon their death the remainder was to be
divided between certain institutions including the Lake Bluff Orphanage. The
court held that the orphanage accepted the paper subject to the life estates of
their niece and her husband and any bequests which might be made by will.
Because Mr. Magill unfortunately thought when he made his will that he had
more funds than he did, the will consumed his estate, and there was no remainder
for his obligation to the Lake Bluff Orphanage.
15 297 Ky. 246, 179 S.W. 2d 890 (1944).
16 Ibid.
theory was recognized in several early cases and was not new to the Rees case.\textsuperscript{17} It is also recognized in other jurisdictions throughout the country.\textsuperscript{18}

In the Rees case there was a condition written in the subscription which the institution agreed to comply with by the acceptance of the paper containing the condition. In the early Kentucky cases which use the "implied promise" theory,\textsuperscript{19} there was no express condition set out in the subscription as there is in the Rees case. Thus, the Kentucky Court of 1944, in contrast with its earlier decisions, construed the "implied promise" theory more narrowly by finding it necessary that there must be words written in the subscription that create a condition to be complied with by the promise. But in this same Rees case there was also an extension of the law of charitable subscriptions in Kentucky. The court in the Floyd case held that "promissory estoppel" could only be used in a charitable subscription case if the promise induced action or forebearance by the promisee which it would not have otherwise performed but for the promise made by the subscriber. The "implied promise" theory of the Rees case may be applied to a subscription case where the promisee has not yet taken any affirmative action on the faith of the promise.

\textit{Conclusion.} Kentucky through the Floyd and Lake Bluff cases has definitely established itself among those jurisdictions that favor the use of "promissory estoppel" as the basis for the enforcement of charitable subscriptions. Vestiges of the older fictions remain as evidenced by the application of the theory of an implied promise in the Rees case. It is submitted that although the court in the Floyd case attempted to close the door to the use of fictions as a way of enforcing subscriptions to charities,\textsuperscript{20} they again opened this door through the application of an implied promise by the promisee to make a bilateral contract in the Rees case.

At what point does this leave the law of charitable subscriptions in Kentucky? In the Lake Bluff case the doctrine of "promissory estoppel" is applied if the promisee has performed some act or acts which

\textsuperscript{17}Trustee Ky. Female Orphan School v. Fleming, 73 Ky. 234 (1847). (Obligation of the charity to apply the funds to the purpose of the institution is sufficient to imply a promise necessary for the consideration). Bramlett's Adm'x v. Bryce, 4 Ky. L. Rep. 196 (1882). (Duty of the promisee to apply the funds to the purpose for which it was promised makes the promise irrevocable).


\textsuperscript{19}Collier v. Baptist Educational Society, 47 Ky. (8 B. Mon.) 68 (1847); Trustees Ky. Female Orphan School v. Fleming, 73 Ky. (10 W.P.D. Bush) 234 (1874).

\textsuperscript{20}See Note, 33 Ky. L. J. 50 (1944).
it would not have otherwise performed without the subscription, and in the Rees case the fiction of an implied promise is applicable where there has been no affirmative action, provided that there is an express condition written in the subscription.

Are either of these two principles sufficient to give a satisfactory solution to the problems involved in enforcing charitable subscriptions in Kentucky? Should enforcement be extended further to include subscriptions to a worthy cause even though there is neither an express condition nor affirmative action by the promisee in reliance on the subscription? The "implied promise" resulting from the condition in the subscription is a fiction, and the use of fictions has been the cause of much criticism in the past. "Reliance" is a broad term, and some courts have not given as narrow an interpretation to it as was given by the court in the Floyd and Lake Bluff cases.\(^2\) Subscriptions to give money to a cause advocated by public policy will arise which will not satisfy the requirements laid down by the Kentucky Court of Appeals, and these limitations will not in all probability solve the confusion of earlier decisions.

What might the possible solutions be? Some advocate that charitable subscriptions be recognized as a special class of promises enforceable without consideration.\(^2\) Others suggest that the state legislatures enact statutes making charitable subscriptions binding regardless of consideration.\(^2\) It has also been submitted that a statute be enacted giving charitable subscriptions the same status as instruments under seal so that they could be enforced, even though gratuitous, so long as the promisor expresses an intention to be bound.\(^4\) Whatever solution might be chosen, a promise deliberately made and motivated by an underlying moral obligation will nevertheless find its way into the light of recognition.

J. ARNA GREGORY, JR.

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\(^2\) Cases where the institution did nothing it would not have done otherwise: Re Estate of Griswold, 113 Neb. 256, 202 N.W. 609, (1925) (continuance of existing college functions is sufficient reliance); I. & I. Holding Corp. v. Gainsburg, 251 App. Div. 550, 296 N. Y. Supp. 752 (1937) (continued operation of the general activities of a hospital in reliance upon the subscription furnished consideration for the promise to pay and created "promissory estoppel"), Murtaugh, Charitable Subscriptions in Illinois, 4 U. of Chi. L. Rev. 430, 434 (1937) (suggesting action giving rise to liabilities on a promise to defray expenses on the future building of a school is sufficient future liability to make the promise binding).

\(^3\) Note, 31 ILL. L. REV. 264 (1936); Note, 15 N. Y. U. L. Q. REV. 129 (1937); Murtaugh, Charitable Subscriptions in Illinois, 4 U. of Chi. L. Rev. 430 (1937).

\(^4\) 13 CAN. BAR REV. 751 (1935); Such a statute has been enacted, note 2.