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CHARITABLE SUBSCRIPTION CONTRACTS AND
THE KENTUCKY LAW

By ROBERT L. TAYLOR*

In two closely related types of cases, the right to revoke or withdraw an offer has proved to be a serious problem which has caused the courts no end of difficulty. In the case of an offer to enter into a unilateral contract, the question frequently arises as to whether the offeror may withdraw his offer after the offeree has commenced, but before he has completed, the requested performance. In the case of subscription agreements, the right of the subscriber to withdraw from his promise to subscribe, and the problem of termination of the offer by death, have been the source of much litigation, and of considerable conflict. Before considering the problem of charitable subscriptions in Kentucky, it should prove of value to consider briefly the views which the courts of the several states have generally taken with respect to the aforementioned problems. Their similarity makes a somewhat cursory discussion of the former an aid to a more thorough understanding of the latter.

THE UNILATERAL CONTRACT

In the case of an offer to enter into a unilateral contract, where performance by the offeree was requested, rather than a promise of performance, the question often arises as to whether the offer may be withdrawn before performance is complete. The classic classroom problem, whether the offeror, just before the offeree has finished climbing the pole or walking across the bridge, may withdraw his offer of reward for the feat, applies to

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1 Note, Restatement, Contracts (1932) No. 31, which provides: "In case of doubt it is presumed that an offer invites the formation of a bilateral contract by an acceptance amounting in effect to a promise by the offeree to perform what the offer requests, rather than the formation of one or more unilateral contracts by actual performance on the part of the offeree." Also see 1 Williston, Contracts (rev. ed. 1936) sec. 60.
many cases which are arising continually in the courts. The orthodox view has been that such an offer may be withdrawn at any time before acceptance is complete, although the offeree has already commenced performance of the act requested, or has even substantially completed it. This view is based upon the theory that, inasmuch as no consideration could be found to prevent withdrawal prior to complete acceptance, the offeror cannot be bound in contract. This rule inevitably led to much hardship on the part of the offeree, especially in the cases where the offeror had received no benefit from the part performance, upon which a quasi-contractual action might be based. Sensing the harsh results arising under the application of the orthodox rule, the courts have created exceptions and modifications.

2 But see Llewellyn, "Our Case-Law of Contract: Offer and Acceptance, II" (1939) 48 Yale L.J., 779, 805 where it is said: "Hence, the question recurs in the classrooms of the country: 'Did he ask for a promise or for an act—for an act or for a promise?'—with the eternal suggestion that only one is normally asked for, and that only the one will do. This makes, as we all know, for superb classroom theatrics; I know of none which has ever given me personally equal fun. But the fun comes at a high cost to students' real understanding."

3 Alexander Hamilton Institute v Jones, 234 Ill. App. 444 (1924); Stensgaard v. Smith, 43 Minn. 11, 44 N.W. 669 (1890); Kolb v. Bennett Land Co., 74 Miss. 567, 21 So. 233 (1897).


5 In Elliott v. Kazajian, 255 Mass. 459, 152 N.E. 351 (1926) the court, however, stated that the offeror had no such right of withdrawal if he acted in bad faith to defeat the offeree's earning his commission. And see Roberts v. Mays Mills, Inc., 184 N. C. 406, 114 S.E. 530 (1922). Also see Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 N.W. 769 (1912), where the court said: "It is true, as a general proposition, that a party making an offer of a reward may withdraw it before it is accepted. But persons offering rewards must be held to the exercise of good faith, and cannot arbitrarily withdraw their offers, for the purpose of defeating payment, when to do so would result in the perpetration of a fraud upon those who, in good faith, attempted to perform the service for which the reward was offered."

6 See Llewellyn, "Our Case-Law of Contract: Offer and Acceptance, II" (1939) 48 Yale L.J., 779, 805 where the author says: "In a word, the older orthodox conception of 'the unilateral,' when it sought to equate the minimum effective acceptance-in-law with full performance, was not only unjust and inequitable. It was worse: it was so improbable as to scandalize good sense." Also see Shattuck, "Gratuitous Promises—A New Writ" (1937) 35 Mich. L. Rev. 908, 935.

7 But see the opposite view expressed by Wormser, "The True Conception of Unilateral Contracts", (1916) 26 Yale L.J., 136, 142 where the author states that he can see no injustice in the operation of the doctrine of unilateral contract.

tions⁹ to such an extent that little remains of the orthodox view in the more recently decided cases.¹⁰

Various suggestions have been made as to the solution of this problem, both in article and decision. It has been suggested¹¹ that the use of an implied-in-fact contract might solve the difficulty, since it would compensate the offeree for what he has already done for the offeror at the latter’s request, and before the revocation. This would not depend, as would a remedy in quasi-contract, upon any actual benefit being conferred upon the offeror by the partial performance.

Some courts have held that after partial performance on the part of the offeree, a binding bilateral contract is formed which obligates both parties.¹² Thus, the offeree, by his partial performance, impliedly accepts the offer and promises to complete the performance.

Another view suggested is that from such circumstances a collateral offer to keep the main offer open may be implied, and this offer is accepted and becomes binding upon the commencing of performance by the offeree.¹³ Thus by the withdrawal of the offer before complete performance, the offeror would subject himself to a suit for damages for breach of the subsidiary contract. Ordinarily the damages for such breach would amount to the damages suffered because of the offeror’s refusal to permit the complete acceptance of the original offer, i.e., the value of the performance promised by the offeror.

A further solution is that a contract arises upon partial performance by the offeree, but the offeror is not bound to per-

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⁹See 1 Williston, Contracts (rev. ed. 1936) sec. 60A; Comment, (1919) 17 Calif. L. Rev. 153, 158.

¹⁰In Ruess v. Baron, 217 Cal. 83, 10 P. (2d) 518 (1932), the court said: “Whatever the logical difficulties involved, the growing tendency among American courts, working through the more realistic medium of litigated cases, has been to ameliorate the hardships inherent in holding that such an offer may be revoked at any time before full performance and to hold that such an offer cannot be revoked after the offeree has done some substantial act looking to performance.”


¹²Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 Pac. 1086 (1902); Hayes v. Clark, 85 Conn. 510, 111 Atl. 781 (1920); Braniff v. Blair, 101 Kan. 117, 165 Pac. 816 (1917); Lapham v. Flint, 86 Minn. 376, 90 N.W. 780 (1902); Little Rock Surgical Co. v. Bowers, 227 Mo. App. 749, 42 S.W. (2d) 367 (1931).

form until performance in full has been rendered by the offeree.\textsuperscript{14} This view, which appears to be equitable from the standpoint of both parties, has been adopted by the Restatement of the law of Contracts.\textsuperscript{15}

It is submitted that there might also be grounds for the operation of a promissory estoppel, where the act was performed at the request of the offeror and in reliance upon his promise, and to the prejudice of the offeree.\textsuperscript{16} If consideration by estoppel is ever to be countenanced, it should be favored here.\textsuperscript{17}

There is also the possibility that the offeree might be allowed to recover damages in an action of tort, not for the loss of his bargain, but as compensation for his loss of time and expenses incurred prior to the revocation, upon the faith that the offeror would carry out his promise.\textsuperscript{18}

Thus by a process of judicial legislation, the courts have been modifying the strict doctrine in favor of a result which is much more equitable to all of the parties concerned. This has even been done where the justification for the modification of the orthodox rule is not present. For example, in Grossman v. Calonia Land and Improvement Co.,\textsuperscript{19} where the defendant's liability depended upon the time when the contract became complete, the court held that the contract came into being when the plaintiff undertook the work requested and proceeded to take measures toward performance, although

\textsuperscript{14}Ballantine, "Acceptance of Offers for Unilateral Contracts by Partial Performance of the Service Requested" (1921) 5 Minn. L. Rev. 94. Also see Brackenbury v. Hodgkin, 116 Me. 399, 102 Atl. 106 (1917) and Corbin, "The Formation of a Unilateral Contract" (1918) 27 Yale L.J. 382, 384 where it is suggested that the court in the above case probably adopted this view.

\textsuperscript{15}Restatement, Contracts (1932) No. 45 provides: "If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time." But note criticism of this view in Whittier, "The Restatement of Contracts and Mutual Assent" (1920) 17 Calif. L. Rev. 411, 450.

\textsuperscript{16}See Restatement, Contracts (1932) No. 90; Note (1928) 13 Iowa L. Rev. 332; Note (1938) 22 Minn. L. Rev. 843; Note (1938) 115 A.L.R. 152.

\textsuperscript{17}See 1 Williston, Contracts (rev. ed. 1936) sec. 139.

\textsuperscript{18}See Welch v. Lawson, 32 Miss. 170 (1856); G. Ober & Sons Co. v. Katzenstein, 160 N.C. 439, 76 S.E. 476 (1912).

\textsuperscript{19}103 N.J.L. 98, 134 Atl. 740 (1926).
it was not yet completed. There was no question in the case of an attempt on the part of the offeror to withdraw before acceptance became complete.20

**CHARITABLE SUBSCRIPTIONS IN GENERAL**

The charitable subscription problem is similar to that of unilateral contract in that it, too, involves the right of withdrawal from a promise, where no consideration can be found to make the agreement binding. In certain instances, where the charity has entered upon some undertaking or incurred a liability in reliance upon such promise, the similarity continues in that a definite hardship may result to the promisee if the agreement is unenforceable. In addition, in the case of the charitable subscription, where there has been no actual reliance upon the promise, there exists the doctrine of public policy which appears definitely to favor the charity recovering on the subscription agreement. The fact that charities of this nature are so largely dependent upon private contributions makes this result all the more desirable from the standpoint of the general welfare.

In spite of the desirability of this result, there has been considerable conflict in the decisions attempting a solution of the difficulty.21 Here again the orthodox rule would defeat the enforcement of a gratuitous promise to donate a sum of money to a charity,22 if the promisor voluntarily withdrew his offer or died, before the transaction had been completed by the actual presentation and acceptance of the money. If the gift had been finally executed there could, of course, be no recovery from the charity of the amount so given. But where the

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21 In Tioga County General Hospital v. Tidd, 164 Misc. 273, 298 N.Y.S. 460 (1937), the court said: "Confusion has long existed relative to the rules to be applied to charitable subscriptions. The law has been unsettled. A naked promise to give without consideration not being enforceable, the doctrine of contractual relationship was evolved to sustain liability upon a promise if there was any consideration whatever for the promise, and lately has been supplemented and extended by the doctrine of so-called promissory estoppel."

22 Even if the subscription agreement stated that it was given "for value received," this may be questioned by evidence of the entire transaction tending to show that in fact no such consideration was ever given. See In re Griswold's Estate, 113 Neb. 256, 202 N.W. 609 (1925).
promise is still executory, the courts of England, of Canada, and of the United States in some of the earlier decisions have followed the orthodox view that the promisor may withdraw at any time before the acceptance has become complete, unless there has been some consideration to make the agreement binding. Although most of the more recent decisions in this country seem to favor the upholding of the agreement upon one ground or another, a number of comparatively recent cases may be found which still deny a recovery in this situation. However, the process of judicial legislation again appears to be at work, and the weight of authority in the United States now enforces the subscription agreement under one or more of the various theories that have been adopted by the courts. Before examining the Kentucky cases, it should prove helpful to note the

23 In re Hudson, 54 L.J. Ch. 811 (1885).
25 The Trustees of Phillips Limerick Academy v. Davis, 11 Mass. 113 (1814); The Trustees of Hamilton College v. Stewart, 1 N.Y. 581 (1848); Presbyterion Church of Albany v. Cooper, 112 N.Y. 517, 20 N.E. 352 (1889); Twenty-third St. Baptist Church v. Cornwell, 117 N.Y. 606, 23 N.E. 177 (1890); In re Smith's Estate, 69 Vt. 382, 23 Atl. 96 (1897).
26 The courts are even more likely to reach this result, of course, where the subscription is not to a charity, and there is no question of public policy involved. See Culver v. Banning, 19 Minn. 303 (1872).
27 Cutwright v. Preacher's Aid Society, 271 Ill. App. 168 (1933); Trustees of LaGrange College v. Parker, 198 Mo. App. 372, 290 S.W. 663 (1918); In re Barker's Estate, 249 App. Div. 336, 293 N.Y.S. 199 (1937). In the case of American University v. Todd, 1 A. (2d) 595 (Del. 1938), the acknowledgment of one dollar paid as consideration was held insufficient, since a consideration of one dollar will not usually support a promise to pay a larger sum of money. Also see 1 Williston, Contracts (rev. ed. 1936) sec. 115. In the case of In re Tummonds' Estate, 160 Misc. 137, 290 N.Y.S. 49 (1936), the court held that the subscription was unenforceable for lack of consideration, inasmuch as nothing was done by the promisee with the knowledge of the promisor, in reliance thereon, which in any way altered its position. However, even though a subscription is considered as based upon a sufficient consideration when made, it may become unenforceable where the promisee charity, before the subscription has been paid, becomes insolvent and is liquidated, so that it is unable to hold and use such a fund. In this situation it is doubtful whether there is any question of public policy involved. See Rutherford College v. Payne, 209 N.C. 792, 184 S.E. 827 (1936).
29 For a general discussion of the problem, see Billig, "The Problem of Consideration in Charitable Subscriptions" (1927) 12 Corn. L. Q. 467.
general trend of the decisions throughout the country with respect to this problem.

Where the subscription agreement is in the form of a promise to make a loan of money, rather than an outright gift, such as in the case of a promise to buy a bond to be issued by the recipient charity, it seems as if the general problem of charitable subscriptions would not be involved. The promisor should not be held to the full amount of his subscription, and his liability should be limited to the payment of only nominal damages, as in the usual case of failure to comply with an agreement to loan a sum of money. Although it has been so held, the courts do not always make such a distinction, and have allowed a recovery of the full amount so subscribed. Under such decisions, the general problem remains as to whether the charitable subscription may be enforced.

In dealing with the general problem of upholding subscription agreements, the view adopted by most of the courts seems to be that if it can be found that work has been undertaken, or liability has been incurred, as a result of the promise to subscribe, the promise becomes binding upon the subscriber. It thus partakes of the nature of a unilateral contract, the acceptance occurring upon the undertaking of the work or the incurring of the liability. It has even been held that, where the subscription was conditioned upon the raising of an

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31 See Eaton v. Reich, 258 N.Y. 262, 179 N.E. 385 (1932).
33 Trustees of Baker University v. Clelland, 86 F. (2d) 14 (C.C.A. 8th, 1936); Commissioner of Internal Revenue v. Bryn Mawr Trust Co., 87 F. (2d) 607 (C.C.A. 3rd, 1936); In re Estate of Wheeler, 234 Ill. App. 132, 1 N.E. (2d) 425 (1936); Trustees of Farmington Academy v. Allen, 14 Mass. 172 (1817); Hardin College v. Johnson, 221 Mo. App. 285, 3 S.W. (2d) 264 (1923); I. & I. Holding Corporation v. Gainsburg, 276 N.Y. 427, 12 N.E. (2d) 532 (1938); Trustees of Uni. of Pa. v. Cadwalader, 277 Pa. 512, 121 Atl. 314 (1923); University of Vermont v. Buell, 2 Vt. 45 (1829); Eastern States Agricultural and Industrial League v. Vail's Estate, 97 Vt. 495, 124 Atl. 563 (1924). In Erdman v. Trustees of Eutaw M.P. Church, 129 Md. 595, 99 Atl. 793 (1917), the borrowing of money to pay off a past debt was deemed a sufficient liability to supply the consideration necessary to uphold the subscription. But see University of Des Moines v. Livingston, 57 Iowa 307, 10 N.W. 738 (1881), where the court inferred that there was no consideration for subscriptions given for the purpose of paying off a past debt, where no new liability was incurred as a result of such subscriptions.
additional sum of money, the time, labor and expense of rais-
ing such amount should constitute good consideration for the
promise. 34 In reaching this result, which binds the subscrip-
tion upon the commencing of the work and before completion, it again
is necessary to overthrow the orthodox doctrine of contracts,
requiring that for the offer to become irrevocable, the per-
formance called for must have been completed. However, if
the courts can modify the rule as to unilateral contracts in
general, there seems to be no reason why subscription agree-
ments should not also be so treated. 35 Another difficulty with
the above view is that when the promise was made, the parties
ordinarily had no intention that acceptance, by means of some
partial performance or assumption of liability, should supply
the consideration necessary to make the promise irrevocable. 36
The courts adopting this view are thus interpreting the instru-
ment in the light of events occurring subsequent to the making
of the pledge. On the contrary, any intention of the parties
with respect to the subscription, should be shown as of the time
of the making of the promise. 37

Closely resembling the cases which have adopted this result
are those which have enforced charitable subscriptions by find-
ning a promissory estoppel as a substitute for consideration. 38
In accord with this view, the Restatement of the law of Contracts 39
provides: "A promise which the promisor should reasonably
expect to induce action or forbearance of a definite and sub-
stantial character on the part of the promisee and which does
induce such action or forbearance is binding if injustice can be

34 Baptist Education Society v. Carter, 72 Ill. 247 (1874).
35 See Restatement, Contracts (1932) No. 45, footnote 15 supra.
36 See infra, footnote 52.
37 See 3 Williston, Contracts (rev. ed. 1936) sec. 826.
38 Miller v. Western College, 177 Ill. 280, 52 N.E. 432 (1898); South-
western College of Winfield v. Hawley, 144 Kan. 652, 62 P. (2d) 850
(1936). In Allegheny College v. National Chautauqua County Bank
of Jamestown, 246 N. Y. 369, 159 N. E. 173 (1927), the court said:
"Certain, at least, it is that we have adopted the doctrine of promissory
estoppel as the equivalent of consideration in connection with our law
of charitable subscriptions." Also see Simpson Centenary College v.
Tuttle, 71 Iowa 596, 33 N.W. 74 (1887). For a general discussion of
promissory estoppel see: Note (1938) 115 A.L.R. 152; Note (1928)
13 Iowa L. Rev. 332; Note (1938) 22 Minn. L. Rev. 545. And also see
Ricketts v. Scotchorn, 57 Neb. 51, 77 N. W. 365 (1898); Fluckey v.
Anderson, 132 Neb. 664, 273 N.W. 41 (1937); Fried v. Fisher, 323 Pa,
497, 196 Atl. 39 (1938).
39 Restatement, Contracts (1932) No. 90.
avoided only by enforcement of the promise.” This situation, however, should hardly be considered as coming within the classification of estoppel, inasmuch as the promisor merely indicates an intention to fulfill his agreement, and the promisee who knows that fact, or should know it, is not justified in relying upon the statement. It is entirely different from the case where the misrepresentation is of an existing fact, where the other party may justifiably rely upon it and be protected from injury by means of an estoppel.

The difficulty with the application of either of these first two views is that frequently there has not yet been any work undertaken, nor any liability or detriment incurred, before revocation, so that neither consideration by acceptance, nor consideration by estoppel may be invoked.

Some jurisdictions have followed the view that each subscriber’s promise may be considered as adequate consideration for each other subscriber’s promise. This view is difficult to support, inasmuch as a promise is ordinarily not made to the other subscribers, but directly to the charity, often without any knowledge of the identity of the other subscribers and without

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\[40\] In the early case of Caul v. Gibson, 3 Pa. 416 (1846), the court seemed to base its decision on the presence of moral consideration, rather than on estoppel. The court said: “When the inhabitants of a village or neighborhood sign a subscription authorizing the building of a church for the public worship of God, and the persons so authorized proceed to erect the house, there is a moral obligation in all the subscribers to fulfill their engagements. A moral obligation has ever been held a sufficient consideration to support an express promise, but not an implied one.” However, a moral obligation generally is not recognized as sufficient consideration in the United States. See 1 Williston, Contracts (rev. ed. 1936) sec. 148. In the later case of Gans v. Reimensnyder, 110 Pa. 17, 2 Atl. 425 (1885), the Pennsylvania court suggested that such a contract should be enforced by way of estoppel rather than on the ground of consideration in the original undertaking.

\[41\] See 1 Williston, Contracts (rev. ed. 1936) sec. 139.


\[43\] See American University v. Todd, 1 A. (2d) 595 (Del. 1938); Cottage Street Church v. Kendall, 121 Mass. 528 (1877); Orphans’ Home Ass’n. v. Sharp’s Exec., 6 Mo. App. 150 (1878); I. & I. Holding Corporation v. Gainsburg, 276 N. Y. 427, 12 N. E. (2d) 532 (1938).
being induced by any other subscriptions. In addition, even if it were admitted that the promise was made directly to the other subscribers and in reliance upon their subscriptions, there could be no recovery by the charity in those jurisdictions where a donee beneficiary still is not permitted to sue upon a contract made for his benefit. The courts which have followed this general view have, by means of a fiction, enforced a contract among the various subscribers themselves, which they probably had no intention of making. In most of the cases, the intention of the subscriber has been to deal with the charity alone and not with the other subscribers. There might possibly be some justification for upholding this view in cases where the multi-lateral arrangement has been brought to the attention of the subscribers by means of subscription blanks stipulating that each subscriber agrees to pay in consideration of like promises on the part of other subscribers. But even then, it is doubtful

“See I Williston, Contracts (rev. ed. 1936) sec. 116. Even where the subscription is made conditional upon the subscribing of a certain amount, such a requirement should ordinarily be construed as a condition of the offer and not as consideration. Thus the offer might be revoked prior to performance of the condition. See Beach v. First M. E. Church, 96 Ill. 177 (1880). However, the effort made in fulfilling the condition by securing other subscriptions has been held to be sufficient consideration. Roberts v. Cobb, 103 N. Y. 600, 9 N. E. 500 (1886). Also, if there has been a request by the subscriber, that certain designated subscribers be secured, the securing of such subscribers is sufficient consideration. In re Conger's Estate, 113 Misc. 129, 134 N. Y. S. 74 (1920); Washington Heights M. E. Church v. Comfort, 138 Misc. 236, 246 N. Y. S. 450 (1930).


“See I Williston, Contracts (rev. ed. 1936) sec. 116. Even where the subscription is made conditional upon the subscribing of a certain amount, such a requirement should ordinarily be construed as a condition of the offer and not as consideration. Thus the offer might be revoked prior to performance of the condition. See Beach v. First M. E. Church, 96 Ill. 177 (1880). However, the effort made in fulfilling the condition by securing other subscriptions has been held to be sufficient consideration. Roberts v. Cobb, 103 N. Y. 600, 9 N. E. 500 (1886). Also, if there has been a request by the subscriber, that certain designated subscribers be secured, the securing of such subscribers is sufficient consideration. In re Conger’s Estate, 113 Misc. 129, 134 N. Y. S. 74 (1920); Washington Heights M. E. Church v. Comfort, 138 Misc. 236, 246 N. Y. S. 450 (1930).


“It was so held in University of Southern California v. Bryson, 103 Cal. App. 39, 283 Pac. 949 (1929). The subscription agreement read: “In consideration of my interest in Christian education and in consideration of others subscribing toward raising of a Million Dollars for endowment and equipment for the University, I hereby subscribe and will pay to the University of Southern California, at Los Angeles, California, the sum of etc.” Allowing a recovery on this agreement after the death of the subscriber, the court said: “Construing the entire instrument in this manner, it is quite apparent the note was not intended as a mere gift without consideration, . . . It was
whether the subscribers had any intention of dealing with, or in relation to, the other subscribers, although they signed a subscription blank which so indicated.

It has been provided in at least one jurisdiction, by statute, that the subscribers' promises may be considered as consideration for each other,\(^47\) so that the charity may be allowed a recovery on that basis alone, without the necessity of showing any other consideration.\(^48\)

Another view, which has been adopted in a somewhat smaller number of cases, is that when the beneficiary accepts the subscription, such acceptance implies a promise to use the funds in the manner desired by the subscriber, and this implied promise constitutes sufficient consideration to support the subscriber's agreement.\(^49\) Thus the contract becomes bilateral, and is binding upon both parties at the time when the subscription is accepted, so that the subscriber cannot thereafter executed and delivered with the express reciprocal condition that other subscribers would execute similar notes with the object of raising a million-dollar fund for the 'endowment and equipment' of the University of Southern California. This would furnish a consideration for the note. A gift is a voluntary transfer of property without consideration, but a donation may be founded on a consideration.” Also see (1937) 22 Wash. U. L. Q. 434. But see contra, Presbyterian Church of Albany v. Cooper, 112 N. Y. 517, 20 N. E. 352 (1889) where the court said that the mutual promises between the subscribers, recited as consideration in the subscription agreement, could not be considered as such because there was no privity of contract between the charity and the promisors.

"Ga. Code (1933) sec. 20-304 provides: "A promise of another is a good consideration for a promise. In mutual subscriptions for a common object, the promise of the others is a good consideration for the promise of each."

See Owenby v. Georgia Baptist Assembly, 137 Ga. 698, 74 S. E. 55 (1912); Miller v. Oglethorpe University, 24 Ga. App. 388, 100 S. E. 784 (1919); Glass v. Grant, 46 Ga. App. 327, 167 S. E. 727 (1933). But note Young Men's Christian Ass'n v. Estill, 140 Ga. 291, 78 S. E. 1075 (1913) where it was stated that the statutory provision had application to mutual subscriptions, which meant written promises entered into by the subscribers, and that it was not broad enough to include oral promises.

The difficulty with this view, is that, although there may be an implied promise to use the funds according to the terms of the subscription, still such promise was ordinarily not intended as the consideration for the promise of the subscriber. In order to find a consideration, it is necessary that there be some intended exchange requested in return for the promise. This is all the more true, where there has been no limitation as to use annexed to the gift. In addition, since the authorities appear to hold that the charitable uses designated by the donor cannot be changed, so long as the fund can be applied to such purposes, the implied promise of the donee to so use such fund does not supply any additional consideration for the promise of the donor unless such performance differs in some respect from that which was already due. Of course, under certain circumstances, the acceptance of the subscription by the charity may include an expressed undertaking or promise on its part to use the fund as designated. In such case, the promise itself supplies the requisite consideration, and the subscriber becomes bound upon such acceptance. Also, if a memorial requested by the subscriber has already been established by the charity, then the creation of the memorial would, in

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50 In Trustees of Baker University v. Clelland, 86 F. (2d) 14, 20 (C. C. A. 8th, 1936) the court said: "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. . . . 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. 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."


52 See Clark, Contracts (4th ed. 1931) sec. 27; 1 Williston, Contracts (rev. ed. 1936) secs. 111, 112. Also see Fire Insurance Association v. Wickham, 141 U. S. 594, 12 Sup. Ct. 54 (1891); Kirksey v. Kirksey, 8 Ala. 131 (1846).

53 See In re Smith's Estate, 69 Vt. 382, 38 Atl. 66 (1897).

54 See State ex rel. Crutze v. Toney, 141 Or. 406, 17 P. (2d) 1105 (1933).

55 Restatement, Contracts (1932) sec. 84 provides: "Consideration is not insufficient because of the fact . . . (a) that the party giving the consideration is then bound by a duty owed to the promisor or to the public, . . . to render some performance similar to that given or promised, if the act or forbearance given or promised as consideration differs in any way from what was previously due."

56 Williams College v. Danforth, 29 Mass. 541 (1832); New Jersey Orthopaedic Hospital & Dispensary v. Wright, 95 N. J. L. 462, 113 Atl. 144 (1921).
itself, constitute sufficient consideration for the promise, and the subscriber could not thereafter retract.\textsuperscript{57}

In a number of decisions, the courts have recognized more than one of the aforementioned views,\textsuperscript{58} and indeed in some of the cases all of them have been discussed.\textsuperscript{59} In so doing, the court in question may perhaps deem itself somewhat more justified in departing from the orthodox view and in allowing a recovery against the subscriber who has attempted to revoke.

From time to time, various other suggestions have been made reaching the same result, although by different methods of reasoning. For example, it has been asserted\textsuperscript{60} that through the satisfaction for contemporary recognition, the subscriber has received a benefit which he was otherwise not entitled to receive, and therefore that might supply the necessary consideration. Even more broadly, it has been claimed in a number of cases\textsuperscript{61} that consideration may be found in the prospect of the public good resulting from the charity, which itself constitutes value to the subscriber. In addition, the charity has been favored by the suggestion\textsuperscript{62} that in the case of a written promise to subscribe, there was a presumption of consideration which must be overcome by the defendant, thus placing the burden of proof as to lack of consideration upon the subscriber and giving a definite advantage to the promisee.

Probably the soundest solution of the difficulty would be to allow the charity to recover on the basis of public policy alone, without attempting to find any consideration for the promise.\textsuperscript{63} This could be done on the theory that, in this par-

\begin{itemize}
\item \textsuperscript{57} See First Trust & Savings Bank of Pasadena v. Coe College, 8 Cal. App. (2d) 195, 47 P. (2d) 481 (1935).
\item \textsuperscript{58} University of Southern California v. Bryson, 103 Cal. App. 2d, 233 Pac. 949 (1929); In re Estate of Wheeler, 284 Ill. App. 132, 1 N. E. (2d) 425 (1938); Trustees of Troy Conference Academy v. Nelson, 24 Vt. 139 (1852).
\item \textsuperscript{59} Furman University v. Waller, 124 S. C. 68, 117 S. E. 356 (1923). But note that in Dalhousie v. Boutiller, S. C. R. 642 (Can. 1934) the court discusses and rejects all of these views.
\item \textsuperscript{60} Note (1928) 27 Mich. L. Rev. 88, 91.
\item \textsuperscript{61} Barnett v. Franklin College, 10 Ind. App. 103, 37 N. E. 427 (1894); Simpson Centenary College v. Tuttle, 71 Iowa 596, 33 N. W. 74 (1887); Board of Trustees v. Noyes, 165 Iowa 601, 146 N. W. 848 (1914); Underwood v. Waldron, 12 Mich. 73 (1863).
\item \textsuperscript{62} First Presbyterian Church v. Dennis, 178 Iowa 1352, 161 N. W. 183 (1917).
\item \textsuperscript{63} In accord with this view, see Billig, "The Problem of Consideration in Charitable Subscriptions" (1927) 12 Corn. L. Q. 467, 479. Also
\end{itemize}
ticular type of fact situation, no consideration is necessary. This would be a happy solution to the problem, especially where the subscription agreement was in writing, giving it the attributes of a sealed instrument at common law. In two comparatively recent cases, the courts have recognized, not only that public policy should play a part in such decisions, but also that it does actually influence the court substantially in arriving at such a conclusion. In the case of *In re Wheeler's Estate*, the court said: "Fundamentally, defendant's argument is based upon the proposition that no enforceable pledge to leave a bequest to a philanthropic organization can be made. For the courts to sustain this position would substantially injure, if not destroy, all endowment funds, which, as is well known, are universally created in this country by such pledges. The injury to churches, schools, hospitals, and similar agencies for good would be irreparable. We cannot give our assent to this." In *Allegheny College v. National Chautauqua County Bank of Jamestown*, Cardozo, C. J., said: " 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 'defenses of that character' are 'breaches of faith towards the public, and especially towards those engaged in the same enterprise, and an unwarrantable disappointment of the reasonable expectations

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This result could be achieved by an adoption of the Uniform Written Obligations Act, which in Sec. 1 provides: "A written release or promise hereafter made and signed by the person releasing or promising shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound." See Note (1923) 28 U. of Pa. L. Rev. 642, 646. Also see Note (1928) 28 Col. L. Rev. 642, 646.

*This* result *could be achieved by an adoption of the Uniform Written Obligations Act, which in Sec. 1 provides: "A written release or promise hereafter made and signed by the person releasing or promising shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound." See Note (1923) 28 U. of Pa. L. Rev. 642. Also it has been held that, where there is a statute providing that instruments in writing promising to pay a sum of money shall import a consideration, a charitable subscription comes within such a provision. Trustees of Christian University v. Hoffman, 95 Mo. App. 488, 69 S. W. 474 (1902).

"At common law a sealed instrument or covenant was binding by its own force." 1 Williston, Contracts (rev. ed. 1936) sec. 109. Also Plunkett, "A Concise History of the Common Law" (1929) p. 402.

*284 III. App. 132, 1 N. E. (2d) 425, 431 (1936).*

*246 N. Y. 369, 159 N. E. 173, 175 (1927).*
of those interested.' " Even as early as 1870, a progressive Illinois court \(^6\) said: "As a matter of public policy, courts have been desirous of sustaining the legal obligations of subscriptions of this character, \(* \* \* \)." And in a recent dissenting opinion, \(^6\) it was suggested that "Recognizing the fact that a charitable subscription is intended as a gift and not as a bargain, it may well be that the time has come for the Legislature to say that a charitable subscription requires no consideration to make it enforceable." The public policy aspects of the problem were also ably treated by Shauck, J. in the case of Irwin v. Lombard University, \(^7\) where he said: "The general course of decisions is favorable to the binding obligation of such promises. They have been influenced, not only by such reasons as those already stated, but in some cases, at least, by state policy as indicated by constitutional and statutory provisions. The policy of this state, as so indicated, is promotive of education, religion and philanthropy. In addition to the declarations of the constitution upon the subject, the policy of the state is indicated by numerous legislative enactments providing for the incorporation of colleges, churches, and other institutions of philanthropy, which are intended to be perpetual, and which, not only for their establishment, but for their perpetual maintenance, are authorized to receive contributions from those who are in sympathy with their purposes and methods,—the only source from which, in view of their nature, their support can be derived. Looking to the plainly declared purpose of the lawmakers department, promises made with a view to discharging the debts of such institutions, to providing the means for the employment of teachers, to establishing endowment funds to give them greater stability and efficiency, and whatever may be necessary or helpful to accomplish their purposes or secure their permanency, must be held valid. A view which omits considerations of this character is too narrow to be technically correct." \(^1\) It is noteworthy that

\(^6\) Trustees of the Methodist Episcopal Church v. Garvey, 53 Ill. 401, 403 (1870).


\(^1\) 56 Ohio St. 9, 46 N. E. 63, 65 (1897).

\(\) See Note (1928) 28 Col. L. Rev. 642, 644, footnote 15, where, in commenting on this statement, it is said: "The court here shows a drift towards enforcing such subscriptions on the grounds of public policy, rather than as bargains."
as early as 1897 an opinion should foretell so clearly what trend the decisions would take during the next four decades. All of these statements indicate the strong influence of public policy in decisions sustaining the charity's right of action on the subscription agreement, whether or not specifically recognized by the court as such.

It is thus apparent that the tendency today, even more than in the earlier cases, is to enforce the subscription agreement, by whatever means, usually giving it the force of a binding contract from its inception. It is evident that this result is desirable, however illogical may be the reasoning of the courts in reaching this conclusion. It would, however, be preferable to say that, since this is a desirable result to be achieved, and most of the courts admit this, the situation calls for the adoption of a new principle of law, such as that suggested where contracts have been made for the benefit of third persons, and consequently, in this type of case, consideration is unnecessary. Inasmuch as most subscription agreements are in writing, or could easily be so made, it might be advisable to limit this result to those cases where the agreement is in writing and signed by the subscriber, and thus may be readily proved. If the present trend of these decisions continues, and there is no reason to doubt that it will, it is likely that the courts will reach some such conclusion, and will cease striving to find the justification for a result which they know to be desirable. The present confusion in the various cases will then no longer exist, and the law will be clarified as well as simplified.


In I. & I. Holding Corporation v. Gainsburg, 276 N. Y. 427, 12 N. E. (2d) 533, 534 (1938), the court stated: "We realize that the principles upon which courts of differing jurisdictions have placed their decisions sustaining subscriptions for charitable purposes are all subject to criticism from a legalistic standpoint."

See 2 Williston, Contracts (rev. ed. 1936) sec. 357; Restatement, Contracts (1932) Sec. 135.

For example, in the case of Aetna Life Insurance Company v. Maxwell, 89 F. (2d) 988, 994 (C. C. A. 4th, 1937) involving the right of recovery of a third party beneficiary, the court said: "... but, in view of the numerous decisions in which the right has been recognized irrespective of statute in both federal and state courts, it must now be considered as firmly established as a principle of general commercial law."
THE KENTUCKY CASES

It is unfortunate, in considering the Kentucky law on the subject, that so few cases involving the specific problem of charitable subscriptions have reached the Kentucky Court of Appeals. However, this tends to accentuate, rather than diminish, the importance of giving thought to the Kentucky charitable institution, and its right to enforce a subscription agreement. Because of this dearth of reported cases, it is necessary to also consider some other types of subscription agreements, inasmuch as the problems are in many ways parallel as to issue and treatment.

Ordinarily, the subscription is in writing and in some instances it may prove difficult to determine whether the writing constitutes an actual subscription agreement, or merely evidences an intention to subscribe in the future. It may be necessary to look at other statements of the alleged subscriber, and other circumstances surrounding the issuance of the writing, to determine what the intention really was. It is not necessary that the subscriber, in order to be bound, shall have signed the paper himself. That may even be done by his solicitor, provided it can be clearly shown that the subscriber authorized the solicitor to sign as his agent. Indeed, it is not even required that a valid and binding subscription agreement shall be in writing. An oral subscription is a valid and enforceable contract, although the problem of proof may present some difficulties and would involve a question of fact to be submitted to the jury. The provision of the statute of frauds, that contracts not to be performed within a year must be in writing to be enforceable, does not apply to such verbal subscriptions, inasmuch as it is usually possible that such a contract may be completely performed within a year.

One of the problems seemingly encountered with subscription agreements in Kentucky involves the conditional pledge, the agreement conditioned upon some performance or

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77 Baskett v. Ohio Valley Banking and Trust Co., 125 S. W. 1066 (Ky. 1910).
78 Lewis v. Durham, 205 Ky. 403, 265 S. W. 934 (1924).
79 Bullock v. Falmouth & Chipman Hall Turnpike Road Co., 85 Ky. 184, 3 S. W. 129 (1887).
event which the defendant claims has not yet occurred. This condition usually takes the form of an express qualification in the written agreement. For example, in the case of Goff v. Winchester College, the paper which was signed contained a provision that until, in the judgment of the subscribers, a sum sufficient to effectuate the objects of the association had been subscribed, they were not to be liable upon their subscriptions for any debts contracted by the promise. Frequently, the subscription is conditioned upon a certain amount of money being subscribed or raised. Where subscriptions are for the purpose of constructing a road or highway, the agreement may contain a condition that the road shall be of a certain type of construction, built within a certain time or prior to the construction of some other road, or that it should be located along a certain designated route. Sometimes the condition is in the form of a verbal limitation, and it is effective even though the subscription agreement itself was in writing. Oral testimony may be admitted to show that the written subscription was delivered upon a condition, inasmuch as the testimony does not contradict or vary the terms of the writing, but merely shows that the writing never became effective as a binding obligation. In such a situation the parol evidence rule does not apply.

Less often, a condition may be implied as a provision of the subscription agreement, as in the case where the court decided that the subscription for the purpose of constructing a railroad could not be enforced until such railroad company had become incorporated and established in business. But

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69 Ky. 443 (1869).
61 Kentucky Live Stock Breeders' Ass'n v. Miller, 119 Ky. 393, 84 S. W. 301 (1905).
63 Livingston County v. Evans, 220 Ky. 137, 284 S. W. 1044 (1927).
65 Eagles, Treasurer v. Hafendorfer, 204 Ky. 696, 265 S. W. 35 (1924).
66 Vance v. Dobson, 205 Ky. 640, 266 S. W. 368 (1924).
67 Brooksville R. R. v. Byron, 20 Ky. L. Rep. 1941, 50 S. W. 530 (1899). But see Central University of Kentucky v. Walters' Ex'rs, 122 Ky. 65, 70 S. W. 1066 (1906) where it was held that a charitable corporation, other than the one to whom the pledge had been made, could sue upon the promise where the promisee corporation had become consolidated with the plaintiff corporation, so long as the
where a subscription is made to a corporation, such as a college, before actual incorporation, such subscription may be accepted or enforced after it becomes incorporated, since the implied condition requiring incorporation has been complied with.

Except in the case of the implied condition, it must be clearly shown that there was a mutual understanding of the parties as to the existence and provisions of the condition, and not merely that it was the understanding on the part of the subscriber alone. Also, the subscriber who has signed a paper, mistakenly thinking that certain conditions are appended thereto, may be estopped to set this up, in cases where obligations have been incurred or money has been expended, or where other subscribers have been secured, upon the faith of his particular subscription.

Where the presence of a condition limiting the effect of the subscription has been admitted or proved, the subscriber's liability is dependent upon the performance of such condition. Therefore, if the condition provides that the subscribers shall not be bound until a certain amount is subscribed, no liability can accrue until that amount has been subscribed. Likewise, a subscription made for carrying out one specific purpose cannot be enforced by a corporation incorporated and operated for an entirely different purpose. A condition, that the road contemplated must be the first built, or completed within a certain period, must be complied with before

latter undertook to do the thing originally undertaken and the original subscription was not conditioned and limited to the original charity.

Anderson v. West Kentucky College, 10 Ky. L. Rep. 725 (1889).


Lackey v. Richmond and Lancaster Turnpike Road Co., 56 Ky. 43 (1866).

Wilgus v. Trustees of Cincinnati Southern R. R., 10 Ky. Opin. 566 (1880).


See 3 Williston, Contracts (rev. ed. 1936) sec. 666A; Restatement, Contracts (1932) Sec. 250.


Livingston County v. Evans, 220 Ky. 187, 294 S. W. 1044 (1927).

liability can attach. Also, unless made otherwise binding, a subscriber’s promise may be revoked at any time prior to the performance of the condition. On the other hand, the liability of the subscriber is established when the condition is fulfilled, providing the agreement is otherwise enforceable. It is not necessary, however, that the condition shall be strictly complied with, as ordinarily substantial compliance has been considered sufficient. What amounts to substantial compliance sufficient to satisfy a condition in a particular case is dependent, of course, upon the circumstances surrounding the case involved. Substantial compliance, which is considered adequate in one case, may not fulfill the requirement in another case where the facts are somewhat different.

Any discussion of charitable subscriptions must necessarily involve an investigation of the problem of consideration. For without consideration, the subscription agreement could ordinarily be revoked or terminated at any time prior to execution, in the absence of some doctrine of policy favoring the charity as against the individual subscriber. Kentucky is no exception in this respect, and the Kentucky cases, for the most part, have fallen in line with the general American view sanctioning a recovery on the part of the charity by finding some consideration, fictitious or otherwise and thus obviating the necessity of overthrowing the orthodox view by embarking upon an uncharted, though desirable, course.

Consideration may clearly be present where the charity has expressly agreed to perform some act, such as the construction of a building, especially where the subscription agreement indicates that such promise was intended to be consideration for the subscription. A fortiori, the actual performance of the re-

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99 McMillan v. Maysville and Lexington R. R., 54 Ky. 218 (1854); Paint Lick Turnpike Co. v. Wallace, 6 Ky. Opin. 316 (1873); Anderson v. West Kentucky College, 10 Ky. L. Rep. 726 (1889); Kentucky Live Stock Breeders’ Ass’n v. Miller, 119 Ky. 398, 84 S. W. 391 (1905).
100 Baskett v. Ohio Valley Banking and Trust Co., 125 S. W. 1066 (Ky. 1910); Webb v. Dunn, 198 Ky. 111, 248 S. W. 840 (1923); Eagles, Treasurer v. Hafendorfer, 204 Ky. 696, 265 S. W. 35 (1924); Gaines v. Hume, 215 Ky. 27, 284 S. W. 119 (1926); Brown v. Farmers’ Deposit Bank, 223 Ky. 171, 3 S. W. (2d) 215 (1928); Wickliffe’s Ex’rs. v. Smith, 225 Ky. 796, 10 S. W. (2d) 291 (1928).
101 Ex parte Walker’s Ex’r., 253 Ky. 111, 68 S. W. (2d) 745 (1934).
quired act would, in itself, constitute sufficient consideration to make the subscription thereafter irrevocable.\(^{102}\)

Where a negotiable instrument has been given for the amount of the subscription, it is presumed to have been issued for a valuable consideration,\(^{103}\) and it is unnecessary for the plaintiff, when suing upon it, to allege that any consideration was paid.\(^{104}\) On the other hand, a lack of consideration for the note may be shown by the defendant,\(^{105}\) providing it has not come into the hands of a holder in due course, thus making such a defense unavailable. If the defendant does allege a lack of consideration, he must assume the burden of proving it.\(^{106}\) However, where a note was given by a person as a pledge to be paid upon the death of the signer, the court has considered such a transaction as completely executed, and therefore irrevocable notwithstanding the lack of consideration. The instrument could only be annulled in equity where there was convincing proof of an equitable defense.\(^{107}\) This might presumably be the result in any case where the promissory instrument was drawn in the form of a negotiable note. It is also unnecessary for the plaintiff to aver consideration in the case of any other kind of promissory writing,\(^{108}\) although it may also be impeached by a

\(^{102}\) Chambers v. Baptist Educational Society, 40 Ky. 215 (1841); Central University of Kentucky v. Walter's Ex'rs., 122 Ky. 65, 90 S. W. 1066 (1906). And see Meddis & Southwick v. Board of Park Com'rs., 19 Ky. L. Rep. 817, 42 S. W. 98 (1897); Sparks v. Moore, 212 Ky. 720, 279 S. W. 1107 (1926); Gaines v. Hume, 215 Ky. 27, 284 S. W. 119 (1926); Brown v. Farmers' Deposit Bank, 223 Ky. 171, 3 S. W. (2d) 216 (1928); Wiclkifte's Ex'rs. v. Smith, 225 Ky. 796, 10 S. W. (2d) 291 (1928).


\(^{104}\) Torian et al. v. Caldwell et al., 178 Ky. 509, 199 S. W. 35 (1917). But where one suing upon a note importing a consideration, unnecessarily alleges that it was executed for a valuable consideration, the burden is upon him to prove it. Cobb v. Farmers and Merchants Bank, 267 Ky. 744, 103 S. W. (2d) 264 (1937).


\(^{106}\) Richardson's Adm'r. v. Morgan, 233 Ky. 540, 26 S. W. (2d) 32 (1930); Michel v. Rembold, 238 Ky. 260, 37 S. W. (2d) 66 (1931); Cobb v. Farmers & Merchants Bank, 267 Ky. 744, 103 S. W. (2d) 264 (1937).

\(^{109}\) McDonald's Ex'r. v. Transylvania University, 274 Ky. 168, 118 S. W. (2d) 171 (1937).

proof of lack of consideration on the part of the defendant.\footnote{109}

In many cases no actual consideration can be found, and even where the subscription agreement is in writing and consideration may be presumed, the defendant may still prove that consideration was actually lacking. It is in this situation that the Kentucky cases, with similar reasoning, to those found in other jurisdictions, have adopted various theories for holding the subscription irrevocable.

A few Kentucky cases\footnote{110} have advanced the view that where some work has been undertaken, or some liability has been assumed, as a result of the subscription, the requisite consideration is thereby provided. In the case of \textit{Ex parte Walker’s Ex’r.},\footnote{111} one of the several subscription agreements involved in the case stated that it was made in consideration of the Board of Trustees planning for a church to cost not less than Two Hundred Thousand Dollars, and also entering into a financial campaign for that purpose within three months. The validity of this pledge was conceded, inasmuch as an architect had been employed to draw up plans for a new church building, and a campaign to raise funds for its construction had been inaugurated, although nothing had yet been done toward the actual construction of the church. Even without the express provision as to consideration in the pledge agreement, its validity would have been upheld. This view is very similar to the doctrine of promissory estoppel, although the Kentucky court apparently avoids a specific application of that principle, if possible.\footnote{112} In some instances, however, the court has expressly recognized estoppel as a substitute for consideration in subscription cases.\footnote{113}

The theory that mutual subscriptions may provide the requisite consideration for each other, as declared in many of the
\footnote{109}Ky. Stat. (Carroll’s, 1936) sec. 472, Bronston’s Adm’r. v. Lakes, 135 Ky. 173, 121 S. W. 1021 (1909).
\footnote{110}Collier v. Baptist Education Society, 47 Ky. 68 (1847); Ellinger’s Adm’r. v. Brown, 9 Ky. Opin. 514 (1877). And see Hatcher-Powers Shoe Co. v. Hitchins, 232 Ky. 87, 22 S. W. (2d) 444 (1929).
\footnote{111}253 Ky. 111, 68 S. W. (2d) 745 (1933).
\footnote{112}See Ky. Annotations, Restatement, Contracts (1938) sec. 90.
\footnote{113}See Bullock v. Falmouth & Chipman Hall Turnpike Road Co., 85 Ky. 184, 3 S. W. 129 (1887); Curry v. Kentucky Western Ry., 25 Ky. L. Rep. 1372, 78 S. W. 435 (1904). Also see Morton v. Fletcher, 9 Ky. 137 (1819).}
cases in other jurisdictions, does not seem to have been recognized by the Kentucky court as applicable in the case of a charitable subscription.

This is peculiar, inasmuch as the court has considered the promise of one subscriber as consideration for the subscription of another, where the subscription involved the donation of land for the construction of a railroad, and a donation for the construction of a highway for the benefit of the public.

Even more readily has the court recognized this mutuality as sufficient consideration, where dealing with the enforceability of various types of stock subscription agreements. It is submitted that there is no reason why the charitable subscription should not also be enforced upon this theory, if the court is willing to recognize the validity of other types of subscriptions on this basis. As a matter of policy, the former should be more readily enforceable than the latter. This is all the more true, where the subscription agreement expressly states that it is being made in consideration of the like subscriptions of others, and is thus directly called to the attention of the subscriber.

A few early Kentucky cases have considered the obligation of the charity to apply the fund subscribed for carrying out the

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114 See, supra, footnote 42.

115 For example, in the early case of Goff v. Winchester College, 69 Ky. 443 (1869), involving the subscription for stock for the purpose of erecting a school, the court said: "Appellants did not undertake by the writing subscribed to pay the 'Winchester College', nor did they agree mutually with others to pay the sums named; etc."


117 Eagles, Treasurer v. Hafendorfer, 204 Ky. 696, 265 S. W. 35 (1924). And see Warwick Turnpike-Road Co. v. Hutchinson & Wilham, 22 Ky. L. Rep. 201, 56 S. W. 806 (1900), where the court said: "If the road had been macadamized by popular subscription and left a free county road, probably the paper would have bound its signers on the ground of a mutual subscription for a public good; etc."

118 Tully v. Cane Run & Kingsmill Turnpike Road Co., 5 Ky. Opin. 330 (1871); Twin Creek and Colemansville Turnpike Road Co. v. Lancaster, 79 Ky. 552 (1881); Chicago Bldg. & Mfg. Co. v. Peterson, 133 Ky. 598, 118 S. W. 384 (1909); Gannon v. Grayson Water Co., 254 Ky. 251, 71 S. W. (2d) 433 (1934).

119 For an example of a provision in a subscription agreement that the pledge was made in consideration of other pledges, see McDonald's Ex'r. v. Transylvania University, 274 Ky. 163, 113 S. W. (2d) 171 (1937). Another example may be found in the Jefferson County Community Chest subscription cards for the year 1940, which read: "In consideration of the subscriptions of others to the Community Chest of Jefferson County, Ky., I promise to pay the sum of etc."
charitable and benevolent purpose of the institution, or to use the money for the specific purpose for which it was subscribed, as providing sufficient consideration to render the promise legally enforceable. Thus, the implied promise of the promisee, at the time when the subscription is made, to use the funds in a certain manner, whether expressly so designated or not, makes the agreement immediately irrevocable, so that neither the death nor change of mind of the donor can in any way affect its validity. Surprisingly enough, there seem to have been no recent Kentucky cases upholding this theory.

After the validity of the subscription contract has been established with respect to performance of conditions and sufficiency of consideration, liability may still be avoided by the subscriber on the ground of false representations or a suppression of the truth by the solicitor, or in a case where the required conditions were performed through some fraudulent means. In order to avoid the contract on the ground of fraud or mistake, the evidence of such must be clear and convincing, and the fraud must have resulted from the misrepresentation as to a material fact, as distinguished from an opinion or promise for the future. In addition, the misrepresentation must have been made with knowledge of its falsity, and also must have been relied upon by the subscriber. Also, where the agreement is in writing, the presumption is in favor of the writing, and the person who attempts to avoid it on the ground of fraud or mistake must bear the burden of proof, and must establish it by means of satisfactory and substantial evidence.  

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120 Collier v. Baptist Education Society, 47 Ky. 68 (1847); Trustees Kentucky Female Orphan School v. Fleming, 73 Ky. 234 (1874).
123 Sigler v. R. W. Winstead & Co., 125 S.W. 272 (Ky. 1910). And under these circumstances, not only may the subscriber refuse to comply with his promise to subscribe, but if he has already made his contribution under such an agreement, such contribution may be recovered. See Jenkins & Crane v. R. W. Winstead & Co., 143 Ky. 473, 136 S.W. 899 (1911).
126 Western Mfg. Co. v. Cotton & Long, 126 Ky. 749, 104 S.W. 758 (1907); Teater v. Teater, 159 Ky. 111, 166 S.W. 797 (1914).
CONCLUSION

It is somewhat doubtful just what course the Kentucky Court of Appeals will take when the question of charitable subscriptions arises in the future, because of the scarcity of precedent upon this specific problem. It is encouraging to note that there are apparently no cases which have declared against the sustaining of a charitable subscription agreement because of lack of consideration, although there also appear to be no recent cases directly favoring such a recovery. Inasmuch as the tendency of the decisions throughout the country seems to be so predominantly in favor of the charity, and since there is no expression to the contrary in the reported Kentucky cases, it is probable that when the occasion arises, the Kentucky Court will follow the present trend and allow a recovery upon one justification or another. Here is an opportunity which should not be overlooked, and the Court would do well to recognize, not only that public policy should be an important factor to consider, but indeed that such policy, in itself, should be enough to control its decision. By so doing, it would avoid the precarious course that some courts have taken, and would establish itself as a court unafraid to legislate judicially, when considering a problem which so vitally involves the public welfare.