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Contracts - Promissory Estoppel - Charitable Subscriptions

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The policy reflected by the instant case in refusing to uphold a use clearly not public and in restricting an even greater expansion of the "public use" concept is encouraging to that ever diminishing minority which remains steadfast in its dedication to the proposition that individual rights are of far greater and more lasting worth than governmental aid. "The law of each age is ultimately what that age thinks should be the law." [23] That the courts, with certain notable exceptions, have made the most perspicacious choice in the field of eminent domain is open to question.

H. M. PIPPIN

CONTRACTS — PROMISSORY ESTOPPEL — CHARITABLE SUBSCRIPTIONS. — Plaintiff signed as guarantor several notes of a hospital building association, blank except for amount, so that it might make loans and secure building contracts. The association, relying on plaintiff's promise, had entered into the contracts when plaintiff became dissatisfied with the type of hospital being built, and demanded back the unused notes. The association refused to return them. In an action to enjoin negotiation of the notes judgment was entered for the defendants. On appeal it was *held,* that the judgment be affirmed. Plaintiff's promise of guaranty became binding when the charity, in reliance thereon, put itself into a position from which it could not extricate itself without substantial injury.[1] *Danby v. Osteopathic Hospital Association,* 104 A.2d 903 (Delaware 1954).

The early English and American cases regarded promises of money made to charitable organizations as nudum pactum since the very nature of the undertaking indicates a gift with no expectation of consideration.[2] Later decisions, however, have tended to enforce the promises whenever possible as a matter of policy.[3] Courts have sought refuge in a variety of theories in order that they might find consideration.[4] Some courts have found a consideration in the donee's "promise" to apply the subscriptions to the purposes of the institution.[5] Others hvae considered the promise as a unilateral offer which becomes binding as soon as the subscription has been accepted and liabilities incurred by the charity,[6] and a few courts have held that the promise of each subscriber is consideration for the promise of the

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23. *See* People *ex rel* Durham Realty Corp. v. La Fetra, 230 N.Y. 429, 450, 130 N.E. 601, 608 (1921).

1. The doctrine of promissory estoppel invoked by the court has been defined as. "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." Restatement, Contracts §90 (1933).

2. Phillips Limerick Academy v. Davis, 11 Mass. 113(1814); See 1 Williston on Contracts 403(Rev. ed. 1936).

3. *In re* Lord's Will, 175 Misc. 921, 25 N.Y.S.2d 747 (1941); More Game Birds in America Inc. v. Boettger, 125 N.J.L. 97, 14 A.2d 778(1940).

4. At least one early case held that a moral obligation was sufficient. Caul v. Gibson, 3 Pa. St. 416(1846).

5. Rogers v. Galloway Female College, 64 Ark. 627, 44 S.W. 454(1898); Rothenberger v. Glick, 22 Ind. App. 288, 52 N.E. 811 ,1899); Albert Lea College v. Brown, 88 Minn. 524, 93 N.W. 672(1903).

6, I & I Holding Corporation v. Gainsburg, 276 N.Y. 427, 12 N.E.2d 532(1938); Kueka College v. Ray, 167 N.Y. 96, 60 N.E. 325(1901); *See In re* Lord's Will, 175 Mcsi. 921, 25 N.Y.S.2d 747,751 (1941).

others.[7] Another theory, and the one adopted by the court in the instant case is that the promisor may be estopped to assert want of consideration.[8] The present discussion will be limited to this concept of promissory estoppel.[9]

It has been said that the purpose of the doctrine of promissory estoppel is to avoid the harsh consequences resulting from allowing the promisor to repudiate, after the promisee has acted in reliance upon the promise.[10] In most cases before estoppel applies, the promisor must contemplate some specific act to be performed by the beneficiary acting in reliance upon the pledge,[11] but at least one case[12] extended the scope of the meaning of reliance to include general charitable acts. In that case a promise of money was made to aid a hospital in its humanitarian work. The promisor was held liable even though the hospital had in the past been engaged in charitable work and probably would have continued to do such work even if the promise had not been made.

In the usual "gift to charity" case, a promise of money is made.[13] In the instant case, however, the plaintiff promised his credit. The court felt there was no practical difference between the two. Ordinarily, in an action on a guaranty, the controversy is between the guarantee (lender) and the guarantor.[14] In that situation, the rule is that an offer of guaranty may be revoked if the guaranty has been signed without previous request of a guarantee, and in his absence, for no consideration except future advancements to be made to the principal debtor, unless there has been notification of acceptance by the guarantee.[15] Thus, while it may well be that the guarantee has relied on the guarantor's promise to his detriment, it is doubtful if the doctrine of promissory estoppel would be applied, for

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7. Allen v. Duffy, 43 Mich. 1, 4 N.W. 427(1880); *See* Rothenberger v. Glick, 22 Ind. App. 288, 52 N.E. 811, 812 (1899). *Contras* Presbyterian Church of Albany v. Cooper, 112 N.Y. 517, 21 N.E. 352(1889). "It proceeds on the assumption that a stranger both to the consideration and the promise, and whose only relation to the transaction is that of a donee of an executory gift, may sue to enforce the payment of the gratuity for the reason that there has been a breach of contract between the several promisors and a failure to carry out, as between themselves their mutual agreement." *Id.* at 353.

8. Miller v. Western College of Toledo, 177 Ill. 280, 52 N.E. 432(1898); School District of City of Kansas v. Stocking, 138 Mo. 672, 40 S.W. 656 (1897). "That doctrine [promissory estoppel] need not be applied . . . where a request . . . can be implied from the subscription agreement." I & I Holding Corporation v. Gainsburg, 276 N.Y. 427, 12 N.E.2d 532, 534(1938).

9. Promissory estoppel is said to be distinguished from ordinary estoppel in that the promisee relies on a promise and not on a misstatement or misrepresentation of existing fact. 1 Williston on Contracts 494(Rev. ed. 1946). Since the detriment incurred is not, in fact, the motive for the promise, the concept of promissory estoppel would seem to be a substitution for consideration or an exception to its ordinary requirements. Allegheny College v. National Chautauqua County Bank of Jamestown, 246 N.Y. 369, 159 N.E. 173 (1927).

10. See James Baird Co. v. Bimbel Bros., 64 F.2d 344 (8th Cir. 1933).

11. *E.g.*, Miller v. Western College, 177 Ill. 280, 52 N.E. 432 (1898) (erection of boarding hall); Kueka College v. Ray, 167 N.Y. 96, 60 N.E. 325 (1901) (to found a college).

12. I & I Holding Corporation v. Gainsburg, 276 N.Y. 427, 12 N.E.2d 532 (1938).

13. *E.g.*, Rothenberger v. Glick, 22 Ind. App. 288, 52 N.E. 811 (1899); I & I Holding Corporation v. Gainsburg, 276 N.Y. 427, 12 N.E.2d 532 (1938); Kueka College v. Ray, 167 N.Y. 96, 60 N.E. 325 (1901).

14. *E.g.*, Rogers Lumber Co. v. Clark, 52 N.D. 607, 204 N.W. 184 (1925); Standard Sewing Machine Company v. Church, 11 N.D. 420, 92 N.W. 805 (1925).

15. Davis Sewing Machine Company v. Richards, 115 U.S. 524 (1885); Standard Sewing Machine Co. v. Church, 11 N.D. 420, 92 N.W. 805 (1925). See also Rogers Lumber Co. v. Clark, 52 N.D. 607, 204 N.W. 184 (1925).

to do so would abridge the guarantor's right of revocation, a right often expressly protected by statute.[16]

But in the instant case, the controversy is between the principal debtor and the guarantor. Undoubtedly the principal debtor could bind the guarantor to his promise to make future advancements, if there were a consideration running between them. The doctrine of promissory estoppel may serve as a substitute for a consideration, if the principal debtor has acted in reliance on the promise.[17] The result of the application of these two rules, while logical, does create a limitation on the privilege of revoking from the promisor's standpoint, as the instant case illustrates. The same ruling could be applied in a commercial transaction, since the promissory estoppel rule, by definition, is not limited to charitable transactions.[18] It should be pointed out, however, that the courts have been reluctant to apply that rule to commercial transactions, the argument being that in such cases mere reliance upon a gratutitous promise is not a sufficient consideration to bind the promisor.[19] The result reached, in any event, seems to be in line with the hyper-generous attitude of the courts when dealing with charitable subscriptions.

GERRY GLASER

NEGLIGENCE — INVITEES AND LICENSEES — DUTY OF OWNER OR OCCUPIER OF LAND TO THIRD PERSON ACCOMPANYING CUSTOMER. — Plaintiff's husband parked his car near an unguarded grease pit on defendant's service station lot; the pit was obscured by another auto which blocked off the station lights. After completing his business, the husband waited in the station office for the plaintiff. She crossed the street and walked toward the wrong car, whereupon he directed her toward his car. She then changed her direction, took a few steps and fell into the pit. The Supreme Court, in affirming a directed verdict for the defendant, held that since the plaintiff was not within the class of business visitors, defendant had no duty to protect her from hidden defects. When her husband completed his business his status reverted to that of a licensee, and she had no greater rights than he. ROBILLARD v. TILLOTSON, 103 A.2d 524 (Vt. 1954).

Most authorities agree that a business invitee must be someone on the premises with an express or implied invitation, and must benefit the owner actually or potentially.[1] The licensee, in contrast, is on the premises by permission or sufferance only; anticipated benefit to the owner from his presence is not necessary.[2] The duty of the landowner to a business invitee

16. N.D. Rev. Code (1943) §22-0106 provides: "A mere offer to guaranty is not binding until notice of its acceptance is communicated by the guarantee to the guarantor. An absolute guaranty is binding upon the guarantor without notice of acceptance."

17. *See* Florida Asphalt Pavement Co. v. Federal Reserve Bank of Atlanta, 76 F.2d 326 (5th Cir. 1935); Restatement, Contracts §75(2) (1933).

18. See note 1 *supra*.

19. Kirksey v. Kirksey, 8 Ala. 131 (1845). ". . . If generally applied it [promissory estoppel] would much extend liablility on promises, and that it is at present opposed to the great weight of authority." 1 Williston on Contracts 502 (Rev. ed. 1936).

1. *See* Restatement, Torts §332 (1934); Prosser, Torts §79 (1941); 65 C.J.S., Negligence §43(1).

2. *See* Restatement, Torts §330 (1934); Prosser, Torts §78 (1941); Cooley, Torts §340 (Throckmorton's ed. 1930).