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PROMISSORY ESTOPPEL: REQUIREMENTS AND LIMITATIONS OF THE DOCTRINE

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Promissory estoppel, as a contracts doctrine has been expressly acknowledged for less than thirty years. First formulated in 1920, by Samuel Williston,¹ the doctrine was included as Section 90 in the Restatement of Contracts, published twelve years later.² In the sixteen years between the publication of the Contracts Restatement and 1948, Section 90 was cited at least seventy-four times by American courts.³ From a consideration of these facts alone, one can well determine that promissory estoppel merits further discussion and study, for it is playing an important role in the development of present day contract law.

As a generalization or principle, promissory estoppel may be most readily studied for its present requirements, as well as its limitations, by an examination of what appear to be its constitutive elements. For such a study one should, at least in the beginning, accept as correct the statement of the doctrine as it is found in the Restatement of Contracts.⁴ A study of this statement indicates that the doctrine's

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1. The writer has made a careful search to discover the pioneer in the use of the term "promissory estoppel." Apparently the term was first used in I WILLISTON, *CONTRACTS* § 139 (1st ed. 1920). See Note, 13 *IOWA L. REV.* 332, 333 (1928).

2. *RESTATEMENT, CONTRACTS* (1932) (hereafter cited as *RESTATEMENT*). As is well known, Mr. Williston served as Reporter for the Restatement of Contracts and prepared the Commentaries on it, *AMERICAN LAW INSTITUTE, COMMENTARIES ON CONTRACTS* (1926). The Commentary on Restatement No. 2, pp. 14-20, contains Mr. Williston's rationale for what was then § 88 and is now § 90 of the Restatement of Contracts. For discussion of promissory estoppel at Fourth Annual Meeting of American Law Institute, see 4 *PROCEEDINGS A.L.I.* 85-114 (1926).

3. *RESTATEMENT IN THE COURTS* 367-371 (Permanent edition, 1932-44) gives 60 instances of court citation and 28 periodical references to the promissory estoppel doctrine as set out in § 90. *A.L.I. RESTATEMENT OF THE LAW 196-199* (Supp. 1948) includes reference to 14 judicial decisions citing the same section.

4. *RESTATEMENT* § 90 (Promise reasonably inducing definite and substantial action): "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."

elements number three. They can be phrased as separate questions in this wise:

(1) Was there 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?

(2) Did the promise induce such action or forbearance?

(3) Can injustice be avoided only by enforcement of the promise?

Thus stated, it becomes apparent that at least a threefold study is necessary to determine the requirements and limitations of the present-day doctrine of promissory estoppel. To make such a study is the purpose of this paper—which will consider in detail each of the three questions asked above and submit generalizations to be drawn from such an examination. It is hoped that the end result will be to make the doctrine more understandable and useful, for these generalizations can then be more readily applied to variant fact situations which require solution. Thus, too, some conclusions may be reached as to the future development which is likely to occur, or which should occur, in the proper application of the doctrine.

A word should be added, perhaps, on the definition of the terms used in this paper. "Contract" has been given varying meanings by those who have discussed the term. It has been used to express the following: (1) the acts which create legal relations between parties, (2) the physical writing containing the terms of an agreement, and (3) the legal relations resulting from operative facts.⁵ *Here* it means "a promise that is directly or indirectly enforceable at law."⁶ With such a definition of contract, one must also define "promise." That term is used here, as it is used in the Restatement of Contracts, as meaning "an undertaking, however expressed, either that something shall happen, or that something shall not happen, in the future."⁷

5. RESTATEMENT §1, Comment c; ANSON, CONTRACTS 13, note 2 (Corbin ed. 1930) (hereafter cited as CORBIN'S ANSON); SHEPHERD, CASES AND MATERIALS ON CONTRACTS (2d ed. 1946); see Llewellyn, *What Price Contract?*, 40 YALE L.J. 704, 708 (1931) for other definitions.

6. CORBIN'S ANSON 13, note 2; a similar definition is found in RESTATEMENT §1: "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." ACCORD, WILLISTON, CONTRACTS §1 (Rev. ed. 1937) (hereafter cited as WILLISTON).

7. RESTATEMENT §2(1). It is to be noted that "undertaking" is ambiguous, for it may indicate physical activity as well as the act of agreeing or expressing. Normally one might well incline to the adoption of Corbin's definition of a promise as "an expression leading another person justifiably to expect certain conduct on the part of the promisor." CORBIN'S ANSON 7, note 1. His definition, however, by its use of the words "justifiably to expect" assumes the very factors which must be discussed fully in any consideration of promissory estoppel.

PROMISE LIKELY TO INDUCE ACTION

Detailed consideration of the requirements and limitations of promissory estoppel may well begin with an examination and analysis of the first of the three questions asked above—"Was there a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial nature on the part of the promisee?"

If one begins thus, he will realize that he must first determine whether the words involved constitute a promise, as distinguished, for example, from an expression of good will or of anger or jest.⁸ If the words fall in the latter category, there will be no need to pursue the inquiry further for it is clear that there will be no contractual liability.⁹ But if there is a promise, one must then examine it further. In doing so, it will be observed that whether that promise is of such a nature that the promisor should reasonably expect it to induce some action or forbearance by the promisee is to be regarded from the viewpoint of the promisor. Hence, one seeking to apply the doctrine must test the promise in the light of all of the circumstances as they were known to the promisor. Once those circumstances are understood, the next step is to determine whether a reasonable man, acquainted with these circumstances, should have expected this promise to induce action by the promisee.

FORESEEABILITY

It must be noted at the outset that the use of the words "promisor should *reasonably* expect" makes the test of foreseeability an objective one. Therefore, situations may occur in which a promisor will be bound although he did not in fact foresee reliance. When this happens a very real hardship, financial or otherwise, may be imposed on the promisor. But this hardship is unavoidable if the promisee, who was reasonably induced to act in reliance on the promise, is to be protected. Hardship to the promisor, if there is enforcement, and to the promisee, if enforcement is denied, seems to create a dilemma. The solution to the dilemma, if there be one, is in testing the promise by an objective standard to determine whether or not the promisor

8. 4 PROCEEDINGS A.L.L., APP. 108-9 (1926).

9. WILLISTON § 21; GRISMORE, PRINCIPLES OF THE LAW OF CONTRACTS (hereafter cited as GRISMORE) § 19 (1947); CORBIN'S ANSON §§ 4 and 54, note 1; Keller v. Holderman, 11 Mich. 248 (1863); McClurg v. Terry, 21 N.J. Eq. 225 (1870); Higgins v. Lessig, 49 Ill. App. 459 (1893); Richard's Ex'rs v. Richards, 36 Pa. 78, 82 (1863); "Assurances of assistance accompanying kind advice are never intended as contracts. And conformance to advice is never intended to stand as legal *consideration* for the kind assurances that accompany the advice, though it is a *motive* for their fulfillment."

should have foreseen action by the promisee, in the light of all the facts and circumstances as they were then known to him. And the decision is not controlled by what the promisor actually did foresee. In this respect the test is the same one that is applied to determine contractual liability in commercial transactions.¹⁰

As Fuller and Perdue have pointed out, the use of the "reasonable man" standard does at least two things: it enhances the likelihood that a jury will ultimately decide the question of liability and, secondly, it creates "a bias in favor of exempting *normal* or *average* conduct from legal penalties."¹¹ There is a corresponding tendency on the part of the jury to impose liability for abnormal or unreasonable conduct. The courts, however, have provided themselves with a control over the assessment of damages by the jury in the "rule of *Hadley v. Baxendale*."¹² Under this rule damages for breach of contract "can be recovered only for such losses as were reasonably foreseeable, when the contract was made, by the party to be charged."¹³ As thus formulated, the rule prohibits the allowance of damages in excess of those which the "contract breaker" reasonably should have foreseen as likely to result from non-performance if he had given any thought to such a contingency at the time he made the agreement. Thus the rule can be said to diminish the risk of business enterprise.

Whether it is proper to apply such a limitation in the case of gratuitous promises may be questioned. It may be argued that the gratuitous promise plays no part in business transactions which normally involve bargain and exchange. The controls employed in commercial transactions should not apply. Therefore, any and all resulting loss by the promisee should be recoverable, not just those losses which reasonably should have been foreseen. On the other hand, it may be argued that there is no reason to apply different limitations to gratuitous promises than to those which are purchased for a price. The reasonable man test as to the foreseeability of resultant actions can work equally well with both types of promises. In addition, the requirement of foreseeability affords a justifiable protection to the promisor. It applies the pragmatic test of a weighing of the consequences of the actions¹⁴ and words of the promisor and

10. Williston, *Mutual Assent in the Formation of Contracts*, 14 ILL. L. REV. 85 (1919), reprinted in *SELECTED READINGS OF THE LAW OF CONTRACTS* 119 (1931).

11. Fuller and Perdue, *The Reliance Element in Contract Damages*: 1, 46 YALE L.J. 52, 86 (1936).

12. 9 Ex. 341 (1854).

13. MCCORMICK, *DAMAGES* § 138 (1935).

14. In at least one case the court was willing to enforce a promise which it said might be *implied*, from the defendant-intervenor's conduct, as a promise to abandon any title he might have in an "undistinguishable portion" of a herd of cattle, some of

makes him responsible only for those consequences which he should take into account in advance of the event.¹⁵ It would appear that those who drafted Section 90 of the Contracts Restatement inclined to the latter view when they described the gratuitous promise which would be enforced as one which "the promisor should reasonably expect to induce action or forbearance" by the promisee. By thus incorporating the element of foreseeability in the doctrine, a limitation is provided which tends to afford protection to the promisor, as well as the promisee.

What action should reasonably be expected to follow from the promise will of course depend on all the facts and circumstances and on the meaning which the party making the statement "should reasonably expect the other party would give to them."¹⁶ For example, where the seller of an automobile under a conditional sales contract repossesses the car for default in payment and then gratuitously promises the purchaser that the car will be retained for thirty days and may be reclaimed within that period on making the payments due but in default, the court held that the promise was calculated to and in fact did induce the purchaser to take action to raise the amount of the defaulted payments and that the promise was binding.¹⁷ On the other hand, when the statements said to have been relied upon were made by a sales manager as a part of a "pep talk" to discouraged dealers during the depression and were to the general effect that "dealers would get their losses back" and would "receive financial assistance from the company," such statements were construed as not to be a promise to the dealers by the company to surrender its right, under an existing contract to cancel the dealer's franchise without cause.¹⁸ Here are two illustrations which run the gamut from idle talk to serious promises. They indicate the range

which were mortgaged to plaintiff. *Hanna State and Savings Bank v. Matson*, 53 Wyo. 1, 77 P.2d 621, 623 (1938). While the owner of property may often lose title by standing by and permitting others to deal with it as their own, this case is unusual in that the court does not rely on such holdings as the basis for decision. It is willing to rest this decision on the doctrine of promissory estoppel.

15. This also seems to be the test adopted for tort liability by Cardozo, C.J., in *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

16. RESTATEMENT § 233. This is the standard of interpretation applicable to unintegrated agreements and is similar to the fifth standard mentioned in the Comment to § 227 of the RESTATEMENT.

17. *Brewer v. Universal Credit Co.*, 191 Miss. 183, 192 So. 902 (1940).

18. *General Electric Co. v. N. K. Ovale, Inc.*, 335 Pa. 439, 445, 6 A.2d 835, 838 (1939) (The statements could give rise to a promissory estoppel "only if they clearly expressed an intention on the part of the plaintiff to abandon the right of cancellation so that plaintiff should reasonably have expected that they would be so construed by the distributors and relied upon accordingly . . . In our opinion the statements will not reasonably bear any such construction . . . It is inconceivable that the distributors could have seriously thought that the statements of the plaintiff's representatives were so intended . . .").

of problems which may arise but they furnish no basis for holding that the standards of interpretation applicable to conventional contract situations should not ordinarily also apply to promissory estoppel.

The most common application of the doctrine of promissory estoppel has been in the charitable subscription cases. The courts have commonly felt that a person promising to contribute funds to a charity, for example for the construction of a new building, should expect the work to proceed in reliance upon the faithful payment of subscriptions.¹⁹ When it does, courts usually enforce his promise.²⁰ Is it also to be expected that the person to whom land is promised gratuitously and orally will spend a sizeable sum in making valuable improvements on that land? Certainly, if the donee is told that he is being given the land as a place for a home, the promisor should expect it to be treated as such and it is typical for improvements to be made on real estate so held.²¹

Sometimes the promisor should expect his promise to cause a change in the economic activities of the promisee. When the promise is to employ a man for ten years and the promisee resigns from the police force, thereby forfeiting his pension;²² or when a granddaughter resigns a position when told by her grandfather that none of his grandchildren have to work and she will not either because he is giving her enough money (*i.e.*, his promissory note) to live on;²³ these actions clearly were foreseeable. Indeed, these precise acts by the promisees were to be expected if they were to enjoy the fruits of the promise. So it is when the promisor tells a committee to go ahead with a banquet, that he will pay his share later,²⁴ or in a meeting of subscribers in Civil War days says that he will contribute to a fund to procure substitutes for drafted men.²⁵ If the holder of a gratuitous option makes an "expensive" examination and survey

19. *Christian College v. Hendley*, 49 Cal. 347 (1874) (After \$14,000 was subscribed, contracts totalling \$19,000 were let. Judgment for plaintiff reversed because suit was brought by wrong party).

20. *Trustees of Bridgewater Academy v. Gilbery*, 19 Mass. 578 (1824) (letting contract); *University of Southern California v. Bryson*, 103 Cal. App. 39, 283 Pac. 949 (1930) (beginning work is enough); *In re Stack's Estate*, 164 Minn. 57, 204 N.W. 546 (1925) (adding to buildings); *Ryerss v. Trustees*, 33 Pa. 114 (1859) (completing building); *Owenly v. Georgia Baptist Assembly*, 137 Ga. 698, 73 S.E. 56 (1912) (locating a college).

21. *Greiner v. Greiner*, 131 Kans. 760, 293 Pac. 759 (1930) (donor required to execute conveyance where donee had "moved on tract and made valuable improvements" in reliance on the parol gift). The court expressly adopted § 90 of the RESTATEMENT as the reason for its decision.

22. *Seymour v. Oelrichs*, 156 Cal. 782, 106 Pac. 88 (1909) (a statute of frauds case in which reliance on the promise was held to estop offeror; reversed on other grounds).

23. *Ricketts v. Scothorn*, 57 Neb. 51, 77 N.W. 365 (1898).

24. *Lasar v. Johnson*, 125 Cal. 549, 58 Pac. 161 (1899).

25. *McClure v. Wilson*, 45 Ill. 356 (1867).

of lands preliminary to acceptance of an offer,²⁶ or if the consignor of the contents of a freight car stands by in reliance on the gratuitous promise of the railroad's agent that the car will be delivered to a connecting road,²⁷ a court could say that the action and the forbearance were to be expected.

But, while it may appear proper to bind the promisor when he should reasonably expect the *promisee* to take action of a definite and substantial nature, what of those instances where the action is taken by others than the promisee? Should the fact that the promise induced others to subscribe to a charity be a reason for holding the promisor to his promise? The action or forbearance which results in legal consequences for the promise should be the action or forbearance of the promisee, for he is the person to whom the promise is made. It asks too much of a promisor to require that he consider whether or not his promise will induce action by a *third party*. Yet some courts have seen fit to enforce gratuitous promises because they were considered to have induced the making of similar promises by other subscribers to a charity,²⁸ or even because signing the subscription *may* have induced others to subscribe. Such decisions are bolstered by saying that if the promisor is permitted to withdraw, it "may be a fraud upon" the others.²⁹ Such a view seems to be erroneous. Promises are not made to the whole world, they are directed to specific individuals. Where an offer is concerned, contractual liability is imposed only if there is an acceptance "by or for the person to whom it is made."³⁰ There is no reason to treat the promissory estoppel cases differently. The other subscribers to a charity are not defrauded when the promisee is not held; there has been no misrepresentation of fact made to them. To hold a promisor because third parties have or may have changed position in reliance on his promise runs counter to the general trend of promissory obligations. The Restatement expressly limits the doctrine to action or forbearance on the part of the promisee.³¹ The limitation is a sound one for it tends to keep promissory estoppel within justifiable limits.

26. *Wilson v. Spry*, 145 Ark. 21, 223 S.W. 564 (1920). *Contra: Bancroft v. Martin*, 144 Miss. 384, 109 So. 859 (1926).

27. *Melbourne & Troy v. Louisville and N.R.R.*, 88 Ala. 443, 6 So. 762 (1889).

28. *Somers v. Miner*, 9 Conn. 458 (1833); *Robertson v. March*, 4 Ill. 198 (1841); *Brokaw v. McElroy*, 162 Iowa 288, 143 N.W. 1087 (1913); *Comstock v. Howd*, 15 Mich. 237 (1867).

29. *Snell v. Trustees*, 58 Ill. 290 (1871); *George v. Harris*, 4 N.H. 533 (1829).

30. RESTATEMENT § 54; WILLISTON § 80; GRISMORE § 38; CORBIN'S ANSON § 184; *Boulton v. Jones*, 2 H. & N. 564 (1857); *Boston Ice Co. v. Potter*, 123 Mass. 28 (1877).

31. RESTATEMENT § 90 (" . . . action or forbearance of a definite and substantial nature on the part of the promisee . . .").

TERMINATION OF PROMISEE'S POWER TO BIND PROMISOR

It is hornbook law that an offer may be revoked by the offeror and that (save in the exceptional case) the offeree may not thereafter accept so as to create contract liability.³² Should a different rule apply in cases of promissory estoppel? If the promise be considered as analogous to an offer, it would seem that revocation communicated before definite and substantial action in reliance upon it should be effective. The cases so hold.³³ At least one court, though, has been reluctant to permit revocation. In *Snell v. Trustees*,³⁴ before any work of remodeling a church was begun the subscriber said he "wouldn't pay unless X never spoke in the church." Here there would seem to be the creation of a condition intended to affect the force of the promise. The court nevertheless allowed recovery saying, "We do not think the defendant's notice of withdrawal of his subscription was sufficient to exonerate him from liability to pay it. The course of his action was so groundless and capricious a character" that his subscription would be enforced. The view permitting revocation is to be preferred. After notice of revocation or modification the promisee cannot justly contend that any action thereafter was taken because of the promise. Likewise, after notice of intent to revoke, the promisor may well claim that no person in his position would thereafter "reasonably expect" any action or forbearance by the promisee because of the promise.

There should be, however, reasonable limitations on the power of the promisor to revoke. He should be required to act within a reasonable time after giving his promise, if he desires to use revocation as a defense,³⁵ and at least before action taken by the promisee.³⁶ And, to be consistent, the same rules which apply to the acceptance

32. RESTATEMENT §§ 35(1) (e), 41. Exceptions are described in §§ 45-47. GRISMORE §§ 30, 32; WILLISTON §§ 50A, 55.

33. *Augustine v. Trustees of Methodist Episcopal Society*, 79 Ill. App. 452 (1898) (defendant withdrew subscription for church remodeling after congregation had voted to change projected repairs and before any actual work had been done); *George v. Harris*, 4 N.H. 533, 536 (1829) (*dictum*: He can escape liability "only by showing that before anything was done he notified the other subscribers that he withdrew."); *Sherwin v. Fletcher*, 168 Mass. 413, 47 N.E. 197 (1897) (*dictum*); *Williams v. Rogan*, 59 Tex. 438 (1883); *Rogers v. Galloway Female College*, 63 Ark. 627, 44 S.W. 454 (1898).

34. 58 Ill. 290 (1871).

35. *Missouri Wesleyan College v. Shulte*, 346 Mo. 628, 142 S.W.2d 644 (1940) (attempted revocation after 17 years comes too late); *Barnes v. Perrine*, 12 N.Y. 18, 23 (1854) (attempted revocation long after expenses had been incurred and work done).

36. Note, 17 Ann. Cas. 1076 (1910). "In determining whether a subscription is legally enforceable the courts have uniformly held that the subscription becomes irrevocable and enforceable when work is done or liabilities or expenses incurred on the faith of it and in pursuance of the object for which it was made." *Missouri Wesleyan College v. Shulte*, 346 Mo. 628, 639, 142 S.W.2d 644, 651 (1940).

of offers of unilateral contracts requiring time for performance³⁷ should also control in the application of the doctrine of promissory estoppel.³⁸ Once substantial action on the promise has begun, the promisor loses the power to withdraw the promise.

An even more interesting proposition is involved in cases where the promisor dies or becomes insane after making a promise of the character under examination here. Should the death or insanity prevent enforcement? The question illustrates the need for ready recognition of the general principles which should apply to the solution of any problems which arise in the application of the doctrine of promissory estoppel. The doctrine is framed with reference to contractual obligation. Indeed, it has even been referred to as "the safety valve for the subject of consideration."³⁹ Being so framed and described, it seems but logical to apply it in accordance with the principles generally applicable to any contracts problem. Let us, then, consider the effect of the death or insanity of the promisor in the light of those principles.

If a promise to make a gift to a charity is regarded as an offer, then the cases dealing generally with the effect of death on an offer will be in point. It was at one time thought that it was not possible to create a contract where either party died before an acceptance evidencing mutual assent to the creation of a contract had been given. Under such a theory, death of the offeror (whether known to the offeree or not) terminated the offer and the offeree's power to accept it. It is generally held, even today, that the death or insanity of the offeror terminates his offer.⁴⁰ It is here that the "will theory" of contractual liability still survives, for such a holding clearly exemplifies the subjective theory of mutual assent which that theory embodied. However, strong arguments have been made to the effect that notice of the offeror's death should be required to terminate an offer since, until notice, the offeree has the apparent opportunity to accept.⁴¹

37. RESTATEMENT § 45; WILLISTON § 60A.

38. The following cases so indicate: *Wilson v. First Presbyterian Church*, 56 Ga. 554 (1876); *Rouff v. Washington and Lee University*, 48 S.W.2d 483 (Tex. Civ. App., 1932); *Watkins, Treasurer v. Eames*, 63 Mass. 537 (1852).

39. Williston so described it at the Fourth Annual Meeting of the American Law institute. 7 PROCEEDINGS A.L.I., APP. 86 (1926).

40. RESTATEMENT § 48; WILLISTON § 62; GRISMORE § 34; CORBIN'S ANSON § 44; *Pratt v. Trustees of Baptist Society*, 93 Ill. 475 (1879); *Ritchie v. Rawlings*, 106 Kans. 118, 186 Pac. 1033 (1920).

41. Ferson, *Does the Death of an Offeror Nullify His Offer?* 10 MINN. L. REV. 373 (1926), reprinted in SELECTED READINGS ON THE LAW OF CONTRACTS 275, 281 (1931) ("The death of the offeror should not—on the grounds of either expediency or logic—revoke the offer, as long as the offeree is unaware of the death . . . Whether an acceptance, completing the contract, is possible in the particular case would depend on whether it involves the existence of the offeror."). Compare *Parks, Indirect Revocation and Termination of Offers by Death*, 19 MICH. L. REV. 152 (1920); *Parks, Attempted Acceptance of a Deceased Offeror's Offer*, 40 MO. L. BULL. 5 (1928).

A number of cases hold that the death of the subscriber to a charity, before the charity has acted in reliance on his gratuitous promise, terminates the charity's power to create promissory liability.⁴² The same result has been reached where the promisor becomes insane.⁴³ A rigid adherence to the subjective theory would require refusal to enforce a subscription where the charity had begun, but not completed, the work for which it sought the subscription. Yet there are a number of cases which enforce the promise despite lack of completion of the project.⁴⁴ This modification of subjective doctrine is desirable. Since reliance plays such a large part in the justification of promissory estoppel it would seem proper to protect that reliance, even, if necessary, by a resort to the theory now employed in cases of offers for unilateral contracts requiring time in performance,⁴⁵ as these cases seem to do.

If the promisee knows of the death or other incapacity of the promisor before any action is taken on the strength of the promise, it seems proper to deny recovery when he seeks to enforce a liability based on promissory estoppel. This is the rule now applied in cases of offers.⁴⁶ The promisee should not be privileged to believe, in the usual case, that the promisor intended to confer on the promisee the power to bind his estate. But, if the promisee has acted in reliance

42. *Grand Lodge v. Farnham*, 70 Cal. 158, 160, 11 Pac. 592, 593 (1886) ("Here it is not alleged in the complaint that the plaintiff entered any contract, incurred any liability, or expended any money before the death of Farnham. His subscription was therefore withdrawn."); *Pratt v. Trustees of the Baptist Society*, 93 Ill. 475, 478 (1889) ("the death of the promisor before the offer is acted upon, is a revocation of the offer."); *Helpfenstein's Estate*, 77 Pa. 328 (1875); *Reimensnyder, Admr. v. Gans*, 110 Pa. 17, 2 Atl. 425 (1885); *Twenty-third St. Baptist Church v. Cornwell et al.*, 117 N.Y. 601, 23 N.E. 177 (1890); *First Cong. Church v. Gillis*, 17 Pa. Co. Ct. 614 (1895); *Patchen's Estate*, 22 Pa. Dist. 56, 57 (1913); *First Trust & Sav. Bank v. Coe College*, 8 Cal.App.2d 195, 47 P.2d 481 (1935) (dictum).

43. *Beech v. First Methodist Church*, 96 Ill. 177, 179 (1880) (subscriber adjudged insane in 1875, construction of church begun in 1876, "There is nothing in the record tending to show that the church took any action upon the faith of this subscription until after Doctor Beech was adjudged insane . . . His insanity, by operation of law, was a revocation of the offer.").

44. *Baptist Female University v. Borden*, 132 N.C. 476, 44 S.E. 47, 1007 (1903) (subscriber died one month after signing; University had "incurred liabilities" to soliciting agents); *First M.E. Church v. Howard*, 133 Misc. 723, 233 N.Y.S. 451 (Surr. Ct., 1929) (Subscription signed in 1920, architect hired in February, 1921, subscriber died in May, 1921, building begun 1923); *In re Converse Estate*, 240 Pa. 458, 87 Atl. 849 (1913) (conditional subscription, court impounded sum equal to subscription pending acquisition of endowment fund in reasonable time after death of subscriber and then, finding the condition had been met, awarded the fund to charity). *Contra.*, *Stuart v. Second Presbyterian Church*, 84 Pa. 388 (1877).

See also *School District of Kansas City v. Sheidley*, 138 Mo. 672, 686, 40 S.W. 656, 659 (1897) ("The notes became valid and irrevocable contracts as soon as the district, relying upon their payment, expended money or incurred liability in promoting the general enterprise. This occurred before Sheidley was adjudged insane, and his insanity or death thereafter could not revoke them.").

45. RESTATEMENT § 45. See cases cited *supra*, note 38.

46. RESTATEMENT § 48; WILLISTON § 62; FERSON, RATIONAL BASIS OF CONTRACTS 110 (1949); *Gay v. Ward*, 67 Conn. 147, 34 Atl. 1025 (1895); *Buckeye Cotton Oil Co. v. Amrhein*, 168 La. 139, 121 So. 602 (1929).

on the promise and without knowledge of the promisor's death, liability should depend on the nature of the acts the promisor should reasonably have expected the promisee to perform, not on whether the promisor is dead.⁴⁷

Decisions as to the effect of the death of the promisor on the power of the gratuitous promisee are not numerous. And, as has been intimated, the rationale of those which mechanically rule that the death of the promisor terminates all power in the promisee to create liability is subject to question. The few cases on the point have assumed that a gratuitous promise is to be treated as an offer. Fundamentally, such an assumption is erroneous, for, as defined in the Restatement, an offer is "a promise which is in its terms conditional upon an act, forbearance or return promise being given *in exchange* for the promise or its performance."⁴⁸ An offer is only one type of promise—the type which is found when the transaction is cast in the context of bargain and exchange, a context which is not present in the true instances of promissory estoppel where the promise must be gratuitous. Thus it would seem that courts which are confronted with the question of the effect of the death of the promisor on the power of the promisee to create liability on a promissory estoppel theory need not feel themselves bound by cases dealing with commercial transactions (where a bargain and exchange was contemplated), or even by the subscription cases which falsely classified the subscriber's promise as an offer. Rather, the courts should be guided by a consideration of the nature of the action reasonably to be contemplated by the promisor. If that action is possible without the continued existence of the promisor, the court can enforce it if that is the only way to avoid injustice.⁴⁹

We have considered to this point certain characteristics which are found in those gratuitous promises which are enforced through the application of the doctrine of promissory estoppel. We have seen that, initially, there must be a promise, as distinguished from a statement of "intention or of opinion or from a mere prophecy."⁵⁰ An objective test of reasonable foreseeability must be met before liability will be imposed on the promisor through action in reliance on his promise. The requirement that the action or forbearance be

47. This is the intimation in *Pratt v. Trustees of the Baptist Society*, 93 Ill. 475, 479 (1879) ("The question that has been raised, in some cases, whether a party acting in good faith upon the belief that the principal is alive, may recover, does not arise here, as there is nothing in the evidence to authorize the inference that the bell here was purchased under the belief that Pratt was still alive.").

48. RESTATEMENT § 24.

49. Support for such a view is found in the cases imposing liability on the subscriber's estate where the promisee began to act in reliance on the promise before his death or insanity. Cases are cited at note 44, *supra*.

50. RESTATEMENT § 2, comment A.

that of the promisee, not of third parties, is also explicit in Section 90. In addition we have concluded that the promise may be recalled by the promisor, just as an offer may be revoked, and it is subject to being affected by the death or insanity of the promisor.

If a gratuitous promise meets the description contained in the preceding paragraph, it may afford the basis for contractual liability through promissory estoppel. That liability, however, will not follow unless certain other factors are present. One of these factors is next discussed.

ACTION OF A DEFINITE AND SUBSTANTIAL CHARACTER INDUCED BY THE PROMISE

Just as the preceding section opened with a question, so does this one. Did the promise induce action or forbearance of a definite and substantial nature on the part of the promisee?

It is explicit in promissory estoppel that before the gratuitous promise will be enforced there must be action "induced"⁵¹ by the promise. The reason for this is not hard to perceive. In contracts, as in torts, courts are confronted with the necessity of prescribing certain limitations on one's responsibility for the consequences of his conduct. These limitations may have their genesis in value judgments formulated by the tribunals which are asked to impose legal consequences on such conduct. Just as it may be neither wise nor advisable to go too far in enforcing promises believed to be worthy of legal sanction, so it may be just as desirable for courts to refuse to enforce at all certain other promises. As *Hadley v. Baxendale*⁵² furnishes one answer to "where shall we stop?" so the law of consideration, mutual assent and the rules governing the formation of contracts furnish an answer to the question "where shall we begin?"⁵³ In the field of torts analogous questions and answers are found in the subject of causation.⁵⁴ So it is with promissory estoppel. We begin with a promise, but before liability is imposed for non-performance the promisee must furnish the court with reasons for enforcement. One acceptable reason could be that the promise induced or brought about action or forbearance by the promisee. If one causes another to act in a particular way he furnishes a justifiable basis for inter-

51. "Induce" is defined as "to bring on or about, to effect, cause, to influence to an act or course of conduct, lead by persuasion or reasoning." *State v. Stafford*, 55 Idaho 65, 37 P.2d 681, 682 (1934).

52. 9 Ex. 341 (1854).

53. Fuller and Perdue, *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 84-85 (1936).

54. PROSSER, TORTS § 45 (1941) ("Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy."); McCORMICK, DAMAGES §§ 72-73 (1935).

vention by the court. Absent such cause-effect relationship there appears to be no acceptable justification for imposing contractual liability on the gratuitous promisor.

As a first step, then, in considering the second of the elements into which this paper divides the doctrine of promissory estoppel, we should consider what, if any, action is induced or brought about by the promise. The second step requires a determination of whether that action is definite and substantial. If it is, enforcement may result.

NO ACTION INDUCED BY THE PROMISE

It is logical to say that if the promise induced action there may be liability; absent such action, certainly no liability will be imposed. The cases bear out this conclusion and establish its validity. The charitable subscription provides a particularly fruitful source of instances in which recovery on a gratuitous promise failed because there was no proof of action induced by the promise. The reasons usually given for denying recovery are, as would be expected: "There was no reliance on the subscription paper,"⁵⁵ "the college failed to show it expended any money or incurred any enforceable liabilities in reliance upon the note,"⁵⁶ or "there is no showing that the church altered its position."⁵⁷ This same logical approach has been evidenced in some of the more recent cases involving the validity of charitable subscriptions. A charitable subscription, as such, is not sacrosanct. For enforcement to follow in its train, the charity, at the least, should show that the subscription induced it to change position. If no such change was caused, enforcement is properly denied.⁵⁸

55. *McCrimmon v. Cooper*, 27 Tex. 113 (1863) (didn't build on the strength of the subscription); *Presbyterian Church of Albany v. Cooper*, 112 N.Y. 517, 20 N.E. 352 (1889) (" . . . nor is there any evidence that the trustees did anything.").

56. *Trustees of La Grange College v. Parker*, 198 Mo. App. 372, 200 S.W. 663 (1918); *In re Tummond's Estate*, 160 Misc. 137, 290 N.Y.S. 40 (Surr. Ct. 1936).

57. *Matter of Taylor's Estate*, 251 N.Y. 257, 167 N.E. 434 (1929) (reversing judgment of surrogate, who had overruled an objection to the effect that the executors should be surcharged because they paid a charitable subscription of deceased, in order that evidence might be offered on the consideration for the subscription). It is worth noting that when the case was again heard, the surcharge was then refused because "church officials, relying on the pledge did maintain the church and assume obligations." *Matter of Taylor's Estate*, 236 App. Div. 571, 574, 260 N.Y.S. 836, 838 (Sup. Ct. 1932); *Trustees of Foxcroft Academy v. Favor*, 4 Me. 382 (1826) is an early example.

58. *Wesleyan University v. Hubbard*, 124 W. Va. 434, 441, 20 S.E.2d 677, 680 (1942) ("Wesleyan University is not shown to have altered its position in the least due the pledge of S. P. Hubbard; it created no chair of Economics and Social Science, incurred no obligations, made no expenditures, suffered no detriment and parted with nothing."); *Floyd v. Christian Church Widows and Orphans Home*, 296 Ky. 196, 176 S.W.2d 125, 128 (1943): "The evidence failed to show that any of the three institutions performed any act or incurred any obligation which it would not have performed or incurred had the pledges sued on not been made." (recovery on subscription, denied); *American University v. Collings*, 59 A.2d 333, 334 (Md. 1948): "In these

Particularly where the promisor expressly withdraws his promise before the promisee has acted upon it, recovery on the promise should be denied. In such an instance no reasonable promisee could be justified in claiming that he was thereafter induced to take any action because of the promise.⁵⁹ And without such an inducement, the court lacks any justification for enforcement. Similar rulings are found in other factual situations ranging from attempts to enforce gifts of realty,⁶⁰ through business transactions.⁶¹ However, as would be expected, occasional decisions are found which show that some courts ignore or fail to understand that unless the promise induced justifiable action by the promisee, enforcement is unjustified. Two of these cases merit discussion.

One of them is *Snell v. Trustees*,⁶² the other is *Tioga County Hospital v. Tidd*.⁶³ In the *Snell* case, defendant subscribed \$1,000 to assist in building a new church. Thereafter, and before any work had been done, the subscriber asked the trustees to promise him "that 'X' should never speak in the new church." They refused and he notified them that he "would never pay a cent of his subscription unless they would give such pledges."⁶⁴ At this point the trustees certainly knew that the subscriber desired, at the very least, to attach a condition to his subscription. The court "without meddling with the question of the right of revoking the subscription" enforced the subscription because his "action was so groundless and capricious a character, the notification being given only to the trustees, his generous subscription remaining at the head of the subscription list others might well have been led, notwithstanding such notice, to make expenditures and incur liabilities,

cases, however, the promisee had actually incurred obligations relying upon the promises. In the case before us, it is not claimed that any such obligations had been entered into." (Pledge held to violate Statute of Wills, recovery denied.)

59. *George v. Harris*, 4 N.H. 533 (1829) (the subscriber can escape liability only by showing that before anything was done he notified the others that he would withdraw); *Augustine v. Trustees of Methodist Episcopal Society*, 79 Ill. App. 452 (1898) (a voluntary subscription may be withdrawn at any time before money has been expended or liability incurred on the faith of it); *First Cong. Church v. Gillis*, 17 Pa. Co. Ct. 614 (1896) (no new obligation was incurred here. Nothing done in reliance, subscriber merely promised to pay an already existing debt of the church); *Ludwig v. Ludwig*, 170 Wis. 41, 172 N.W. 726 (1919).

60. *Allshouse's Estate*, 304 Pa. 481, 488, 156 Atl. 69, 72 (1931) ("An exception to this rule is that of a parol gift of real property, to which the statute of frauds is held to be no bar to enforcement if the donee has taken possession of the land and made improvements on it. Here the donee did not take possession or improve the premises, so as to entitle him to equitable relief.").

61. *Curtis Candy Co. v. Silberman*, 45 F.2d 451, 453 (6th Cir. 1930) ("But we do not consider this such a [§ 90] case. This growing doctrine of the law is founded upon the injustice and hardship arising from the justifiable reliance of the promisee upon the promise, should such promise be held unenforceable for want of consideration. Here the evidence discloses no such hardship upon or unfairness towards the plaintiffs, nor unremunerated services, nor expenditure by them of such substantial character as would justify the application of the principle referred to.").

62. 58 Ill. 290 (1871).

63. 164 Misc. 273, 298 N.Y.S. 460 (1937).

64. *Snell v. Trustees*, 58 Ill. 290, 292 (1871).

on the faith that his subscription would be made good." Two points seem to be included in the opinion: (1) revocation will not be effective if capricious and (2) the possibility that persons *might* have been induced to rely on a promise justifies enforcement. Neither reason is sound. In revocation, the question is not whether the promisor is justified in withdrawing, but whether the promisee was informed of the withdrawal.⁶⁵ If the promisee has been so informed, he no longer possesses the power to create contractual liability by subsequent actions. So far as third parties are concerned, the promise was not made to them. They were not privileged to act on the promise. Even if they have done so, that, in itself, furnishes no basis for permitting the promisee to recover on the promise. Recovery should only be possible when the *promisee* has acted in reliance on the promise. Thus the court ignored the fundamental principle that contracts arise out of assent and imposed liability despite all the promisor's efforts to withdraw.

In the second case,⁶⁶ the defendant signed a subscription card agreeing to pay \$7,200 for the X-ray room in a hospital as a memorial to his father. The next day he wired an explicit cancellation of his subscription. The court nevertheless enforced the promise on the theory of an implied agreement on the part of the promisee to build the hospital, thus creating a bilateral contract. There would be no quarrel with such a decision if the parties actually were trying to bargain. However, the context of the case shows that they were not. The solicitors were seeking a gift for a charity. They received a promise to make a gift in the future (evidenced by a subscription card), and that promise was withdrawn before any action had been induced by it. Certainly the court would have found no bilateral contract if the situation were reversed and the subscriber were attempting to force the hospital to build the X-ray room. So the quarrel is with the techniques used by the court; converting what was a gratuitous promise into a bargain and exchange.

Admittedly, this is a technique which has the stamp of approval of such an eminent jurist as Justice Cardozo,⁶⁷ but that does not justify its use in charitable subscription cases. It does not appear in the *Tidd* case that the charity did anything in reliance on the gift-promise or that it changed its position in any way. By holding that a bilateral

65. RESTATEMENT § 35(1): "An offer may be terminated by (e) revocation by the offeror." § 41: "Revocation of an offer may be made by a communication from the offeror received by the offeree which states or implies that the offeror no longer intends to enter into the proposed contract," WILLISTON § 55.

66. *Tioga County Hospital v. Tidd*, 164 Misc. 273, 298 N.Y.S. 460 (1937).

67. Cardozo, C.J., in *Allegheny College v. National Chautauqua County Bank of Jamestown*, 246 N.Y. 369, 159 N.E. 173 (1927) employed the device, though needlessly, for in that instance there had been action in reliance on the promise, an element that is lacking in the *Tidd* case.

contract had been created the court avoided the problem really presented by the revocation. The court should have treated the case for what it was—a promise to make a gift in the future—and should have dealt with the attempted revocation. Had it done so, a different and more appropriate decision might well have resulted.

The cases previously discussed indicate the validity of the requirement that the promise induce action in reliance by the promisee before enforcement of a gratuitous promise results. The last two cases point up some problems which are likely to arise in the future application of the promissory estoppel doctrine. Courts, motivated by a desire to aid what they regard as a worthy charitable institution, may be inclined to twist the factual situation to fit the mold of bargain, or they may ignore attempts at withdrawal by the promisor. Alert counsel can prevent such results by effective analysis of the fact-situation involved and by appropriate argument. In the long run, though, it seems likely that the courts will gain a clearer understanding of the essential elements of promissory estoppel and will tend to emphasize, more than their predecessors have done, the necessity of showing that the promise sued on induced a change of position. Such emphasis will give added clarity to the fundamentals of promissory estoppel. The likelihood of this development is indicated by the more recent decisions.⁶⁸

INSUBSTANTIAL ACTION INDUCED BY THE PROMISE

It should be clear by now that if the gratuitous promise does not induce some action or forbearance, it is not binding. The Restatement requires that the action or forbearance be "of a definite and substantial character." What of the cases in which "some action" was induced but it was relatively insubstantial? These cases are our next concern for they will indicate some of the factors affecting the value judgments of courts when they deal with promissory estoppel and will aid in determining the way in which the doctrine is likely to develop.

Here, in contrast with the cases last discussed, there is no question but what the action was caused or brought about by the promise. The inquiry, therefore, is not as to the *cause* of the action or forbearance, but as to the *amount*. Cases involving attempts to enforce parol promises to give land are illustrative.⁶⁹ Certainly, "taking possession" of the land is an action induced by the promise. But that is not

68. See note 58 *supra*.

69. It is not necessary here to explain the justifications for the part performance doctrine. Those interested may examine 2 CHAFEE AND SIMPSON, *CASES ON EQUITY*, 1111 (1st ed. 1934); HANDLER, *CASES AND MATERIALS ON THE LAW OF VENDOR AND PURCHASER* 27 (1933); McCINTOCK, *EQUITY* § 59 (2d ed. 1948). Here we are interested in actions that are not sufficiently substantial to motivate the court to grant relief, not in the rationale of the part performance doctrine.

enough.⁷⁰ Neither is the making of improvements of a "temporary character."⁷¹ And one line of cases attempts to determine the substantiality of the action by measuring the improvements against the rental value for the occupancy of the premises,⁷² though such a test has not met with unanimous approval.⁷³ If such a test is adopted, a litigant, by delaying the bringing of his suit, might build up a false "equity" in favor of his view, as would one who seeks to claim credit for improvements by him which actually were paid for with the promisor's own money.⁷⁴

The indicated tendency is to refuse enforcement of the gratuitous promise where the only action induced is "insubstantial." In the cases the term "insubstantial" seems to be characterized by triviality in an economic sense. One may say that if the promisee is out of pocket only a small sum, he really has not suffered harm serious enough to motivate the courts to action. Especially is this true where his expenditures were for his own temporary comfort. Support for such a holding may be found in the doctrine of *de minimis*. On the other hand, there seems to be no reason why the doctrine of promissory estoppel should be restricted, as such a view indicates, to instances of sizeable financial loss. Injuries to personality, to character and reputation, to expectations may equally well result from action induced by a promise. They seem to merit protection as much as do financial interests.

When considering the problem of insubstantiality, we really are passing on the justice of the result as well as measuring the action taken. The avoidance of injustice is considered later in this paper, hence further analysis is postponed. Suffice it to say here that the cases indicate that the courts tend to require proof of serious harm to the promisee before they will interfere. They probably will continue to do so. Enforcement of a gratuitous promise is so far outside the

70. *Bright v. Bright*, 41 Ill. 97 (1866) (no improvements, no liability incurred, simply took possession).

71. *Nugent v. Dittel*, 213 Iowa 671, 239 N.W. 559 (1931) (improvements consisted of papering, varnishing, some painting, the planting of some shrubs and providing the gas connection for the laundry stove. Those were "trivial outlays"). *Accord*, *Mitchell v. Redus*, 144 Ark. 332, 222 S.W. 47 (1920) (\$2 or \$3 spent in repairing a roof); *Bigelow v. Bigelow*, 93 Me. 439, 452, 45 Atl. 513 (1900) (promise not to foreclose a mortgage, slight improvements made for convenience, not because of the promise).

72. *Burris v. Landers*, 114 Cal. 310, 46 Pac. 162 (1896) (Expenditures of \$548; reasonable worth of occupancy for two years set at \$720. Enforcement refused); *Wooldridge v. Hancock*, 70 Texas 18, 6 S.W. 818 (1888).

73. Texas changed its ruling. *Hudgins v. Thompson*, 109 Tex. 433, 211 S.W. 586 (1919); *Rosek v. Kotzur*, 267 S.W. 759 (Tex. Civ. App. 1925) (expenditure must bear a reasonable proportion to the value of the land; this is a question of fact); *Barrett v. Calloway*, 66 S.W.2d 367 (Tex. Civ. App. 1934); *Young v. Overbaugh*, 145 N.Y. 158, 39 N.E. 712 (1895) (value of occupancy is not to be set off against the improvements made).

74. This was the situation in *Greer v. Goudy*, 174 Ill. 514, 51 N.E. 623 (1898) where the promisor's estate was protected.

bargain concept that the promisee who has not made a serious change of position is unlikely to induce courts to aid him. He is in the same category as the promisee who has not relied at all upon the promise.

ACTION OF A DEFINITE AND SUBSTANTIAL CHARACTER

To this point we have considered instances in which the promise either induced no action or action of only an insubstantial character. There remain for analysis the instances in which the induced action was of a "definite and substantial character." The importance of these cases is manifest, for it is this type of promise which the Restatement describes as "binding." Here the inquiry will be directed towards discovering what action will meet the dual requirement of definiteness and substantiality.

The construction of substantial improvements by the donee on real estate is generally accepted as satisfactory evidence of such a change of position as to justify the enforcement of a gratuitous promise to bestow it on him.⁷⁵ A similar holding is found where a mortgagor makes improvements in reliance on the mortgagee's promise to refrain from enforcing or foreclosing a mortgage.⁷⁶

Certainly the construction on land of improvements by the promisee is to be expected where the promisor puts the promisee in possession and tells the promisee that the land is his. It is customary for the owners of land to improve it, oftentimes by the erection of structures thereon. So the resultant action in these cases is reasonably to be expected. Can this particular sort of action by the promisee be considered substantial as well as definite? That will depend on the character and extent of the improvements. Whether it is substantial can be determined by examining the amount of economic expenditure. Whether it is definite, in the sense that it is specific and ascertainable, can be determined by examining what was done.

While the land-gift cases apparently restrict the sort of action which will create enforceability to the expenditure of time or money in improving the land itself and its appurtenances, the action in charitable subscriptions is not thus restricted. In the typical charitable subscription case, the promisor subscribes, *i.e.*, promises to pay in the

75. Illustrative cases include: *Akins v. Heiden*, 177 Ark. 392, 7 S.W.2d 15 (1928); *Greiner v. Greiner*, 131 Kans. 760, 293 Pac. 759 (1930); *Kurtz v. Hibner*, 55 Ill. 514 (1870); *Lindell v. Lindell*, 135 Minn. 368, 160 N.W. 1031 (1917); *Roberts-Horsfield v. Gedicks*, 94 N.J. Eq. 82, 118 Atl. 275 (1922), *aff'd* 96 N.J. Eq. 384, 124 Atl. 925 (1924); *Seavey v. Drake*, 62 N.H. 393 (1892). WILLISTON § 139, note 20, lists numerous cases in accord.

76. *Faxton v. Faxon*, 28 Mich. 159 (1873); *Herron v. Brinton*, 188 Iowa 60, 175 N.W. 831 (1920). *See* *Semble, Lembke v. Lembke*, 196 Iowa 136, 194 N.W. 367 (1923) (oral promise to give an easement enforced where land is purchased in reliance on the promise).

future, a specific sum of money to the charity. The charity then proceeds to make expenditures or incur obligations in reliance on the subscription. If these be the facts, it is the almost invariable rule to enforce the promise. Acts of charities which have been considered by the courts as definite and substantial enough to justify enforcement of the subscription include: commencing construction of an administration building, enlarging college courses and incurring other obligations;⁷⁷ erecting a church building;⁷⁸ borrowing money on the security of the subscriptions to pay an existing church debt;⁷⁹ and continuing the charitable work in which already engaged.⁸⁰

One encounters an occasional discordant note, as in *Cutwright v. Preacher's Aid Society*,⁸¹ where there is an implication that continuing the work of the charity is not sufficient action to make the promise enforceable. Yet what else is to be done by a charity presently in operation? One could not expect it to expand to new lines of charitable work any more than one would expect a symphony orchestra to which one has promised a sum of money to do other than continue its concerts.⁸² If the current activity continues there has been action which is both definite and substantial, as well as expected. Failure to recognize the reality of the induced activity subjects such cases to criticism.

Aside from the charitable subscription and parol gift of land cases, there are numerous others illustrating the sort of action that is definite and substantial enough to afford the promisee relief. Renting new quarters in reliance on a promise to excuse one from continuing to pay on an existing lease,⁸³ purchasing land in reliance on a promise to procure a mortgage loan,⁸⁴ becoming obligated to pay for a mill in reliance on a father's promise to provide five thousand dollars to apply on the purchase price,⁸⁵ or making other commitments of a business nature,⁸⁶ have all been considered sufficient.

77. *University of Southern California v. Bryson*, 103 Cal. App. 39, 283 Pac. 949 (1930) (pledge of \$200,000 enforced).

78. *McDonald v. Gray*, 11 Iowa 508, 79 Am. Dec. 509 (1861); *Lippincott's Estate*, 21 Pa. Super. 214 (1902); *In re Stack's Estate*, 164 Minn. 57, 204 N.W. 546 (1925).

79. *Erdman v. Trustees of Eutaw M.P. Church*, 129 Md. 595, 99 Atl. 793 (1917).

80. *Re Drain*, 311 Ill. App. 481, 36 N.E.2d 608 (1941); *I & I Holding Corp. v. Gainsburg*, 251 App. Div. 550, 558, 296 N.Y.S. 752 (1937), *aff'd* 276 N.Y. 427, 12 N.E.2d 532 (1938).

81. 271 Ill. App. 168, 177 (1933).

82. *Russian Symphony Society v. Holstein*, 199 App. Div. 353, 192 N.Y.S. 64 (1922).

83. *Fried v. Fisher*, 328 Pa. 497, 196 Atl. 39 (1938).

84. *Evers v. Arnold*, 210 S.W.2d 270 (Tex. Civ. App. 1948).

85. *Steele v. Steele*, 75 Md. 477, 23 Atl. 959 (1892).

86. *Martin v. Dixie Planing Mill*, 199 Miss. 455, 24 So.2d 332, 334 (1945) (promise to extend time in which to remove timber); *Terre Haute Brewing Co. v. Dugan*, 102 F.2d 425 (8th Cir. 1939) (expenditures in reliance on exclusive franchise for sale of beer); *Bassick Mfg. Co. v. Riley*, 9 F.2d 138 (E.D. Pa. 1925) (gratuitous license to use trade name in business).

In these instances the result produced could be demonstrated by competent evidence, thus it was "definite." And the action was considered by the court as being of a substantial character, at least in the sense that the promisee's financial status would be adversely affected by failure to enforce the promise. Perhaps another way of characterizing this requirement is to say that it demands of the promisee a showing of detrimental reliance on the promise before there will be enforcement, for as Mr. Williston has said, "the binding thread of principle in all these cases is the justifiable reliance of the promisee."⁸⁷

Even conceding that a detrimental change of position in reliance on a promise justifies enforcement, must the change of position always be "detrimental" in an economic sense? If the promisee has changed his mode of living he is not necessarily harmed, though he may fail to realize his expectations if the promise is not enforced. So, if a promisee marries in reliance on a promise gift, it would not follow that he has suffered detriment, though he has certainly changed his way of life. A court would find it difficult to adopt any formula by which to determine the pecuniary amount with which to compensate for the breach of such a promise. A much easier method is to enforce the promise, thus avoiding the difficulty of attempting to measure elements which are not easily susceptible of ascertainment.⁸⁸ It is to be observed that the doctrine of promissory estoppel, as formulated in the Restatement, does not require that the action or forbearance of the promisee be detrimental. Nor does that requirement seem necessary. If there has been such action on his part that the restoration of the *status quo* is difficult or impossible, it is unjust to the promisee to deny enforcement.⁸⁹ If the trier of fact determines that the action was because of and in reliance on the promise, there merely remains for measurement the *quantum* of the action. If it bulks large enough, enforcement should be considered.

The Restatement provides a measuring stick for determining the *quantum* of necessary action by requiring that the action be of a "definite and substantial character." There is, in Section 90, no

87. A.L.I. COMMENTARIES ON CONTRACTS, Restatement 2, 19-20 (1926).

88. This may be one explanation for cases like *Hamer v. Sidway*, 124 N.Y. 538, 27 N.E. 256 (1891), where plaintiff abstained from "drinking liquor, using tobacco, swearing, and playing cards" until he was twenty-one years old in reliance on his uncle's promise to pay \$5000. The promise was enforced. *Lamb v. Hinman*, 46 Mich. 112, 6 N.W. 675 (1881) uses this argument to support enforcement of an oral contract for the conveyance of land where the purchaser had taken possession and made improvements. The argument applies with equal force to parol promises to give land.

89. Language in a recent case overemphasizes "detriment" at the expense of "change of position." *Robert Gordon, Inc. v. Ingersoll-Rand Co.*, 117 F.2d 654, 661 (7th Cir. 1941) ("... But even so, the doctrine [of promissory estoppel] may not be invoked here. Justifiable reliance and irreparable detriment to the promisee are requisite factors among others. In the instant case the promisee has failed to show irreparable detriment.").

requirement that one *certain, specific* action necessarily be foreseen before there can be contractual liability, though Mr. Williston once said as much.⁹⁰ Foreseeability of some action certainly is a requisite,⁹¹ but the doctrine need not necessarily be restricted to those instances where the promisor enjoyed and exercised "second sight."

It is with regard to this requirement as to the character of the action induced by the promise that we may expect to see some development in the years just ahead. By using the words "definite" and "substantial" in the requirement, there is a studied attempt to narrow the applicability of promissory estoppel. Not just any action in reliance on any gratuitous promise is enough. The action must be of a particular sort in order for the court to feel justified in intervening. When the promisee has made a considerable outlay or has done serious acts which, unrewarded, might jeopardize his financial or economic status, his position is one which merits judicial intervention. There is, however, a danger that courts will not understand the doctrine and be fearful of applying it. Unless this requirement is formulated so that it is readily understandable and applicable, the doctrine may be strictly limited in its use, thus failing to provide a needed amount of flexibility in contract law. Indications of this tendency are already apparent in holdings that promissory estoppel is to be employed only in charitable subscriptions,⁹² and is not to be resorted to in commercial transactions.⁹³

As formulated by the American Law Institute promissory estoppel is not restricted in its application to specific compartments of our legal theory. It is intended to provide a general rule of contractual liability. The limitations requiring definite and substantial character in the actions induced afford an objective standard for its application which should not be imperiled by further limitations.

FORBEARANCE

Just as a person who induces one to take action of a particular kind and character thereby furnishes a court which is asked to enforce the gratuitous promise with a reason for acting,⁹⁴ so a promisor who induces one to forego action furnishes an equally good reason for the intervention of a court. This reasoning explains why Section 90 of the Restatement describes the gratuitous promise which may create

90. 4 PROCEEDINGS A.L.I., APP. 93 (1926).

91. See notes 52-54 *supra*.

92. *Comfort v. McCorkle*, 149 Misc. 826, 831, 268 N.Y.S. 192 (Sup. Ct. 1933) (refusing to apply the doctrine to a gratuitous promise to insure).

93. *James Baird Co. v. Gimbel Bros., Inc.*, 64 F.2d 344, 346 (2d Cir. 1933).

94. See notes 52-54 *supra*.

contractual liability as one which induces "action or forbearance of a definite and substantial character." Illustrative cases demonstrate that the importance thus given to forbearance is merited.

The economic loss which the promisee will suffer is apparent in instances in which there is a failure to institute suit because of a reliance on the gratuitous promise,⁹⁵ as well as in the instances in which, in reliance on another's gratuitous promise to procure insurance on property, the promisee fails to obtain it himself and fire thereafter causes loss.⁹⁶ In the first case the promisee will lose all opportunity for judicial enforcement of his claim, in the second he will suffer the damages to his property without opportunity of reimbursement for his loss, if the promise is not enforced.

In *W. B. Saunders Co. v. Galbraith*,⁹⁷ a widow promised to pay her deceased spouse's debt to plaintiff, who refrained from filing a claim against deceased's estate. Thereafter the widow gave a note and mortgage to secure the debt. When the plaintiff sued to foreclose, the defense was want of consideration. The court refused to entertain the defense, saying that the promise reasonably induced plaintiff to forbear asserting its claim against the estate at a time when it would have been effective. The court relied squarely upon Section 90 saying, "We are content, however, to take the restatement as the law of this state without exploring its soundness, and to hold that of its own vigor it is adequate authority. The facts of the case at bar come squarely within the terms of the section referred to."⁹⁸

In *Lusk-Harbison-Jones, Inc. v. Universal Credit Co.*,⁹⁹ plaintiff refrained from procuring insurance in reliance on a confidential pamphlet, distributed to it and other dealers, which said that when cars are repossessed by dealers from delinquent purchasers "insurance protection for dealer's interest will continue in force until the account is liquidated, after which the dealer should provide such insurance as he may require." Forbearance in reliance on the circular's representation was held sufficient to make the defendant liable when, as events turned out, the dealer had not provided other insurance and plaintiff's automobiles were destroyed by fire. This court, too, relied solely on Section 90 of the Contracts Restatement as authority for enforcement

95. *W. B. Saunders Co. v. Galbraith*, 40 Ohio App. 155, 178 N.E. 34 (1931); *Renackowsky v. Board of Water Commissioners*, 122 Mich. 613, 81 N.W. 581 (1900); *Armstrong v. Levan*, 109 Pa. 177, 1 Atl. 204 (1885).

96. *Lusk-Harbison-Jones, Inc. v. Universal Credit Co.*, 164 Miss. 693, 145 So. 623 (1933); *Siegel v. Spear & Co.*, 234 N.Y. 479, 138 N.E. 414 (1923); *Schroeder v. Mauzy*, 16 Cal. App. 443, 118 Pac. 459 (1911); *Barile v. Wright*, 256 N.Y. 1, 175 N.E. 351 (1931).

97. 40 Ohio App. 155, 178 N.E. 34 (1931).

98. *Id.* at 159, 178 N.E. at 36 (1931).

99. 164 Miss. 693, 145 So. 623 (1933).

of the promise.¹⁰⁰ Argument might be made as to the soundness of concluding that the forbearance was foreseeable, but the seriousness of the economic consequences of forbearance is beyond question.

These two cases indicate the weight given to forbearance in the application of promissory estoppel by courts which fully accept the doctrine. Additional illustrations include the promise to buy and hold property for the promisee, in reliance on which the promisee stands by and allows the promisor to purchase at a sale.¹⁰¹ In such an instance the economic loss suffered by the promisee, when the promisor refuses to convey, is clear. If justification is necessary for the enforcement of a promise which causes the promisee to respond only in a negative way (that is, by forbearance), it may be found in the realization that refraining from acting may be no different than action, in so far as the effect on the promisee is concerned. Whether the promise induced a college to build a dormitory, or a claimant to withhold the filing of his claim until the statute of limitations has run, each promisee is adversely affected by his reliance on the gratuitous promise. Action or inaction, so long as caused by the promise, are equated. Recognition of this has long been present in accepted rules of contract consideration.

Complaint may be made that a rule requiring the action or forbearance of the promisee to be of a "definite and substantial character" is too indefinite to furnish any assistance in adjudicating the rights of the parties. It must be admitted that the rule is indefinite as compared with many rules of law,¹⁰² but it is no more indefinite than the rule permitting a building contractor to recover on the contract when he has rendered "substantial performance,"¹⁰³ or the rule that a vendor, who is unable to convey all the land he agreed to convey, can have specific performance against the purchaser if the defect is "insubstantial."¹⁰⁴ It must be recognized that all such rules are but useful generalizations and that, as generalizations, they emphasize factors which are important but which may tend to defy measurement. A rule dealing with mailing of acceptances is specific, but only because the rule itself deals with a particular, exact and easily described act which will not usually be confused with other acts. In contrast, it is apparent

100. 145 So. 623, 624 (1933).

101. *Ellingson v. State Bank of Hoffmann*, 182 Minn. 510, 234 N.W. 867 (1931); *Tchula Commercial Co. v. Jackson*, 147 Miss. 296, 111 So. 874 (1927); *Wolfe v. Wallingford Bank & Trust Co.*, 124 Conn. 507, 1 A.2d 146 (1938).

102. An offer *inter absentes*, for example, is held to be "accepted" when a letter of acceptance is deposited in the mails. RESTATEMENT §§ 64, 67; WILLISTON § 81. Here it is possible for the court to establish a recognizable point in time as the instant when the contract arises.

103. *Jacob & Youngs v. Kent*, 230 N.Y. 239, 129 N.E. 889 (1921); WILLISTON §§ 805, 842; RESTATEMENT § 346.

104. *McCLINTOCK, EQUITY* § 66 (2d ed. 1948); *Poole v. Shergold*, 2 Bro. C.C. 118, 1 Cox. Eq. 273, 29 Eng. Rep. 68 (1786); *Tolchester Beach Improvement Co. v. Boyd*, 161 Md. 269, 156 Atl. 795 (1931).

that when one deals with the "substantial character" of the performance rendered in either erecting a building or tendering a deed to a tract of land, he has advanced to a higher level of thought and towards a generalization. In applying the generalization we will have to exercise judgment to determine whether the action performed rises to the dignity of substantiality. In law, one cannot avoid "questions where mathematics will not help."¹⁰⁵

In reality, then, this complaint of indefiniteness is unjustified. The cases show that there is value in requiring the promisee to prove that his action was more than ephemeral, more than trivial and, in actuality, was of some consequence to him, before the gratuitous promise will be enforced because of reliance on it. The line between these two is as clearly defined as possible by the phrase "definite and substantial."

We have seen that the first element of the doctrine of promissory estoppel is "a promise likely to induce action" on the part of the promisee. We have just considered a second element which requires that the promise have induced action or forbearance, and that this action be definite and substantial. The two requirements constitute necessary and desirable elements in the doctrine of promissory estoppel. We have yet to consider whether that doctrine includes a third requirement.

THE AVOIDANCE OF INJUSTICE BY ENFORCEMENT OF THE PROMISE

The Restatement's formulation of the doctrine of promissory estoppel concludes with the assertion that the gratuitous promise there described "is binding if injustice can be avoided only by enforcement of the promise."¹⁰⁶ Does this clause add an additional limitation to the doctrine or does it merely furnish a guide in applying the requirements discussed in the preceding portions of this article? The answer to this question is our next concern.

If the assertion adds an additional limitation to the doctrine, then every court which is asked to rule that a gratuitous promise is binding should consider at least three propositions before making its decision: (1) Was there a promise reasonably expected to induce action or forbearance, (2) Did the promise induce action or forbearance of a definite and substantial character, and (3) Can injustice be avoided only by the enforcement of the promise? If, however, the admonition as to the avoidance of injustice is only a guide to the application of the requirements already discussed, then courts will have only two questions to answer before rendering judgment: (1) Is it just to find that

105. 4 PROCEEDINGS A.L.I., APP. 101 (1926).

106. RESTATEMENT § 90.

the promisor made a promise which he should reasonably have expected to induce substantial action or forbearance, and (2) Is it just to hold that the promise did reasonably induce action or forbearance of a definite and substantial character?

In support of the view that the "avoidance of injustice" is merely a guide to be used in applying the more definite requirements of the doctrine, it may be urged that such an approach more nearly accords with the realities and actualities of the judicial process, because it is impossible to separate and isolate the element of "injustice" from the substance of a transaction. In *General Electric Co. v. N. K. Ovalle*,¹⁰⁷ for example, can it be said that the assertion made during a "pep talk" was not a "promise" because it would be unjust to the company to so hold, or should that case be regarded as deciding that since there was, to begin with, no promise, it was unnecessary for the court to consider whether there was any need to avoid injustice? This view assumes that it is extremely difficult, if not impossible, to separate the "injustice" of the refusal to enforce a promise from the factual context out of which the promise came. It is possible that the court decided that it would be unjust to enforce the assertion and, therefore, decided that there was no promise, as such.

The principle support for the belief that the avoidance of injustice is a separate element or requirement of promissory estoppel is the fact such an approach requires the judge to treat each case in an orderly, logical fashion. When confronted with a situation where he is asked to apply the doctrine, he goes through three distinct steps. First, he considers the conduct of the alleged promisor to determine whether there was a promise; if he finds no promise, the case ends right there. But if he does find a promise, he next examines the conduct of the promisee to determine what if any action or forbearance was induced by the promise. In this second step he must decide that the action or forbearance was substantial as well as in reliance on the promise. Then, and only then, does the judge consider whether injustice can be avoided only by enforcement of the promise. At this third stage he determines what other remedies may be available as well as the unfairness, if any, that will follow non-enforcement. Finally, having considered each of the three questions in turn, he can formulate a decision. His decision will be against enforcement of the promise unless he has answered in the affirmative all three of the questions posed for him under this approach.

This latter method has the advantage of being logical and systematic. Because it breaks the larger problem of the enforcement of gra-

107. 335 Pa. 439, 6 A.2d 835 (1939).

tuitous promises into smaller segments, it makes for orderly steps in judicial thinking and easier rational decision. Moreover, it requires the judge to weigh consecutively all of the individual factors which may be present. Hence, it is to be preferred to an approach which fails to insure careful consideration of all the factors involved.

The discussion of Section 90 which occurred at the annual meeting of the American Law Institute in 1926 supports this view. Throughout that discussion Mr. Williston referred to "the qualification (that) is necessary, if injustice can be avoided only by the enforcement of the promise."¹⁰⁸ The intent of those who formulated the Section deserves consideration in any attempt to interpret or analyze the doctrine, particularly when that intent is so clearly expressed both in the language of the Section itself and in the discussion concerning its approval. This expressed intent coupled with the arguments already advanced in favor of simplicity of approach indicate that "injustice" should be accepted as a separate element in the application of promissory estoppel. It is so treated here.

Regardless of which view is adopted, however, it must be realized that the emphasis which the Restatement places on the avoidance of injustice calls for the use of ethical standards in applying the doctrine of promissory estoppel. Judges often feel "the need for some ideal justification for what they are doing."¹⁰⁹ Appeals to the prevention of injustice afford to the jurist the opportunity to resort to ethical principles for justification of his decision. Hence, the use of such an ethical ideal as the avoidance of injustice aids in securing readier acceptance of the doctrine of promissory estoppel.

Because the term "injustice" of Section 90 is indefinite (*i.e.*, not defined within the Section) and "leaves a certain leeway one way or other to the judge,"¹¹⁰ it is apparent that it will be difficult to establish the criteria employed by the courts to determine its existence. The very subjectivity inherent in the term "injustice" makes it apparent that the effectiveness of the doctrine of promissory estoppel will depend upon the reaction of the courts which consider the doctrine in the light of the facts found in individual cases. On the other hand, this subjectivity appeals to the ethical sense of the courts and affords an opportunity for the application of community standards of conduct in determining liability.

108. 4 PROCEEDINGS A.L.I., APP. 91 (1926). For other comment on injustice, see *Id.* at 86, 92 ("I am willing to interpret injustice more widely than as . . . merely pecuniary loss"), 98, 103 ("I do not like that [suggestion that all reference to injustice be omitted] because then you say it is binding whether injustice can be avoided or not.")

109. PATTERSON, LECTURES ON JURISPRUDENCE 8 (1940); Pound, *The Ideal Element in American Judicial Decision*, 45 HARV. L. REV. 136 (1931).

110. 4 PROCEEDINGS A.L.I., APP. 86 (1926).

One of the first questions that comes to mind in considering this third requirement is injustice to whom? Shall the hardship and unfairness which are to be avoided be only the promisee's, or should hardship to the promisor also be considered? It may be argued that the injustice which is to be avoided should be, primarily at least, the hardship to the promisee. In any event, only he will seek to enforce the gratuitous promise. Only to him can a *denial* cause hardship. Apparently the American Law Institute accepted the view that the injustice or hardship with which the court should be concerned when applying the doctrine is only hardship or injustice to the promisee.¹¹¹ This concern solely with the promisee is the more readily understandable if it is recognized that the problem of avoiding injustice is to be considered separate and apart from the other elements and requirements of the doctrine. It is not that the promisor's position is totally ignored, for that has been considered in connection with determining the verity of his promise and the reasonableness of the action induced by it. Rather, it is that in the final step before deciding to impose promissory liability, it is proper to consider as a separate element the injustice to the promisee that will follow non-enforcement.

Whether injustice will result from refusal to enforce the gratuitous promise will depend both upon the character of the reliance evidenced by the promisee's acts and other remedies which are available to him. In many instances the promisee will have been induced to do some act or to make expenditures. If it is possible for the promisee to recover what he has paid or to secure reimbursement for his expenditures, then the *status quo* can be restored. Such restoration makes it unnecessary for the court to enforce the gratuitous promise and at the same time prevents an injustice to the promisee.¹¹² It is only when restoration of the *status quo* is impossible that there is need to resort to the doctrine.

Let us examine some typical examples of the gratuitous promise to discover the remedies, other than enforcement of the promise, that may be available to the promisee. Take, first, the case where in reliance upon an oral gift of land, the donee has gone into possession and made improvements. This is probably the most common case in which specific enforcement is granted.¹¹³ Notwithstanding the prevalence of enforcement, there are at least four jurisdictions in the United States¹¹⁴ which refuse enforcement but require the promisor to make

111. 4 PROCEEDINGS A.L.I., APP. 85 (1926): "Mr. Williston: I suppose the fair inference is that it means injustice to the promisee. . . ."

112. *Id.* at 91.

113. 2 A.L.I., COMMENTARIES ON CONTRACTS RESTATEMENT 15 (1926); WILLISTON § 139.

114. Kentucky (*Grant v. Craigmiles*, 1 Bibb 203 (1808)), Mississippi (*Beaman v. Buck*, 9 Sm. & M. 207 (1948)), North Carolina (*Albea v. Griffin*, 22 N.C. 9 (1838)),

restitution to the promisee. Usually this restitution is a sum of money equal to the value of the improvements made.¹¹⁵ In these states the courts, being unwilling to follow the majority of jurisdictions,¹¹⁶ which enforce such promises, still are impelled to grant some relief. Fuller would say that this minority is protecting the restitution interest and the majority the expectation interest of the promisee.¹¹⁷ His distinction indicates the range of relief that may be deemed appropriate in these cases.

The quasi-contractual remedies may be inadequate in this situation. Recovery for the unjust enrichment of the promisor because of benefits conferred on him by the justifiable action of the promisee does not altogether prevent an injustice to the promisee. Particularly is this true when it is held that the promisee's limit of recovery is the additional value these improvements have conferred upon the property.¹¹⁸ Obviously, the promisee's expenditures in making the improvements may exceed the enhancement in value of the land. In addition, where the donee has moved onto the promised land and devoted his labors to its improvement, how can merely paying him the amount of the enhancement prevent injustice? He has changed his way of life, he has forgone opportunities for employment elsewhere; to refuse him enforcement disappoints his expectations and presents an appealing claim to the court which decides his case.

In the land-gift cases when the court enforces the promise and perfects title in the donee it avoids all necessity of attempting to evaluate the worth to the promisor of the promisee's action. Thus the court takes the view that if the injustice to the promisee is serious enough to merit assistance, he receives all that he expected, and not just reimbursement.

In the charitable subscription cases, too, the courts are inclined to this same all-or-nothing view.¹¹⁹ Customarily, the charity either

and Tennessee (*Patton v. McClure*, Mart & Yerg, 333 (1828)). See Pound, *The Progress of the Law: Equity*, 33 HARV. L. REV. 929, 936-937, 949 (1919); Wilhoit, *The Statute of Frauds and Part Performance of Land Contracts in Kentucky*, 22 Ky. L.J. 434 (1933); Note, 1 N.C.L. REV. 48 (1922).

115. *Carter v. Carter*, 182 N.C. 186, 108 S.E. 765 (1921); *Usher's Executor v. Flood*, 83 Ky. 552 (1886).

116. *Lindell v. Lindell*, 135 Minn. 368, 160 N.W. 1031 (1917); *Seavey v. Drake*, 62 N.H. 393 (1882); *Freeman v. Freeman*, 43 N.Y. 34 (1870); *Roberts-Horsfield v. Gedicks*, 94 N.J. Eq. 82, 118 Atl. 275 (1922); *Greiner v. Greiner*, 131 Kans. 760, 293 Pac. 759 (1930).

117. Fuller and Perdue, *The Reliance Interest in Contract Damages: 2*, 46 YALE L.J. 373, 405 (1937).

118. *Pitt v. Moore*, 99 N.C. 85, 3 S.E. 389 (1888); *Wetherell v. Gorman*, 74 N.C. 603 (1876).

119. *Cotner College v. Hyland*, 133 Kans. 322, 299 Pac. 607 (1931); *Allegheny College v. National Chautauqua County Bank of Jamestown*, 246 N.Y. 369, 159 N.E. 173, 57 A.L.R. 980 (1927); *In re Stack's Estate*, 164 Minn. 57, 204 N.W. 546 (1925); *In re Drain's Estate*, 311 Ill. App. 481, 36 N.E.2d 608 (1941); *Trustees of University of Pennsylvania v. Cox*, 277 Pa. 512, 121 Atl. 314 (1923); *I & I Holding Corp. v. Gainsburg*, 276 N.Y. 427, 12 N.E.2d 532 (1938).

has judgment for the full amount of the subscription or it recovers nothing. Such a ruling may be acceptable in the usual case, for the charity will ordinarily require more than the sums subscribed to pay its obligations. But such a rigid view of the amount of recovery need not be accepted. There is an intimation in two older cases that when the promise has been to pay a sum of money for the accomplishment of a particular objective, an action by the charity will lie to recover the amount of the subscription *or such portion of it as will be equal to the subscriber's share of the expense actually incurred* in accomplishing the objective.¹²⁰ This modification of the usual rule is highly desirable, for it affords some leeway in administering the doctrine of promissory estoppel and seems likely to insure a fairer result.

Suppose a university desires to erect a new law building and obtains from a single subscriber a pledge to pay \$750,000, the estimated cost of the structure. Suppose further that, after the subscription is given and before any contracts are let, an economic depression occurs, as a result of which there is a reduction in construction costs. The university then lets contracts for the law building for a total of \$500,000. When the subscriber refuses to pay and is sued by the university, what will be the amount of the judgment? Will it be \$500,000 or will it be \$750,000? It is apparent that a judgment for \$500,000 should be recovered. Any less would harm the educational institution, any more would constitute a windfall to the institution as well as an injustice to the promisor. True, the American Law Institute was told that the recovery should be for the full amount promised,¹²¹ but this seems to ignore the very "injustice" which Section 90 purports to avoid. So far as the promisee is concerned, injustice to him is avoided when he is protected to the extent of his expenditures made in reliance upon the gratuitous promise. There is no impelling reason for him to receive more.

In the land-gift and charitable subscription cases, as we have seen, often the only way to avoid injustice and hardship to the promisee is to enforce the promise. Consider, however, the case where the landlord merely promises gratuitously to accept less rent than the lease requires. It is arguable here that refusing to enforce the promise will not cause injustice to the tenant-promisee. If the landlord accepts the lesser sum, the tenant has more money to spend elsewhere; if the landlord, however, still demands the original rent, it is not unjust to

120. *Pryor v. Cain*, 25 Ill. 292 (1861); *Miller v. Ballard*, 46 Ill. 377 (1868).

121. 4 PROCEEDINGS A.L.I., APP. 95-96, 98-99, 101-104 (1926) (Mr. Williston: "Either the promise is binding or it is not. If it is binding, it has to be enforced as made . . ."). These references are to the argument that ensued after a hypothetical case was put in which Uncle promised Johnny \$1000 to buy a new Ford car and Johnny was able to obtain one for \$500.

require the tenant to pay according to his bargain. It may reduce his economic resources to make him keep his bargain, but this is not injustice.¹²²

Gratuitous promises to secure insurance, to provide insurance, or to file papers with reference to insurance policies present some of the most difficult cases in which to determine whether the only way to prevent injustice is to enforce the gratuitous promise. The three cases of *Brawn v. Lyford*,¹²³ *Spillane v. Yarmalowicz*¹²⁴ and *Comfort v. McCorkle*,¹²⁵ may be taken as typical.

In the *Brawn* case the defendant promised to send a fire insurance policy to the company so that it could be transferred to plaintiff, but neglected to do so. When plaintiff's buildings were destroyed by fire and he discovered that he was not protected by the policy, he sued defendant in *assumpsit* to recover the amount of the insurance previously carried on the buildings, \$1350. Recovery was denied. Recovery was also denied in the *Spillane* case where the defendant promised to have his policy of fire insurance changed to include plaintiff's interest as mortgagee and plaintiff, relying on the promise, cancelled an existing policy which covered his own interest. In the *Comfort* case the defendant, a mortgagee, failed to file proofs of loss within the time allowed, though he had promised mortgagor's agent to do so. In each instance the promisor said he would do something. This statement caused the promisee to rely on it, as the promisor should have expected, and to fail to protect his own interests, as he could have done. Thus, in all these cases, the first two requirements of the doctrine of promissory estoppel are present. How about the third element—avoidance of injustice to the promisee? Certainly, the promisee has no remedy against the insurer; he has no contract of insurance with it. Under the facts we are justified in assuming that the fire was a non-negligent one, so there is no tort action available. Without question the promisee has suffered serious economic loss. Can injustice be avoided only by requiring the promisor to pay an amount equal to the face of the policy which would have been effective had the promise been kept?

The financial burden imposed on the promisor by enforcement will bulk quite large in comparison with the monetary value of the

122. A few courts have permitted the tenant to escape further liability on payment of the lesser sum, though for diverse reasons. *Julian v. Gold*, 214 Cal. 74, 3 P.2d 1009 (1932) (theory of completed gift); *Liebrich v. Tyler State Bank & Trust Co.*, 100 S.W.2d 152 (Tex. Civ. App. 1937) (discovery of a bargained-for exchange, coupled with economic depression); *Lindeke Land Co. v. Kalman*, 190 Minn. 601, 252 N.W. 650 (1934) (settlement of unforeseen contingencies); *Ten Eyck v. Sleeper*, 65 Minn. 413, 67 N.W. 1026 (1896) (unexpected change in economic conditions).

123. 103 Me. 362, 69 Atl. 544 (1907).

124. 252 Mass. 168, 147 N.E. 571 (1925).

125. 149 Misc. 826, 268 N.Y.S. 192 (1935).

services which were to have been performed by him. A reasonable fee for filing proof of loss in the *Comfort* case would not have exceeded twenty-five dollars; a sheet of paper, an envelope, some ink and a postage stamp would have been the outlay necessary in the *Brawn* and *Spillane* cases. In contrast the promisee seeks sums, equal to the insurance policies,¹²⁶ of more than one thousand dollars in each instance. It may be that the great disparity between the reasonable value of the performance by the promisor and the amount sought as damages was what moved the courts of Maine, Massachusetts and New York to refuse enforcement. Such a view, however, either overlooks the question of whether injustice to the promisee can be avoided only by enforcing the promise or else decides that the hardship to the promisor so far outweighs that to the promisee as to require non-enforcement.

Unless it can be said that the promisee was not entitled to rely on the promise, only two alternatives are available here; either allow plaintiff nothing, or give him the full amount that he seeks. Unfortunately, these three cases give him exactly nothing. Here there is no possibility of restoring the *status quo*; the economic loss resulting from justifiable reliance is readily determinable. Here the doctrine of promissory estoppel dictates recovery. Instead the decisions "stick in the bark" of the bargain concept and refuse enforcement. This is particularly regrettable in the *Comfort* case for the attention of the New York court was specifically called to Section 90 of the Restatement; the court mistakenly said the Section was applicable only to charitable subscriptions.¹²⁷

Yet in the same jurisdiction (New York) the case of *Siegel v. Spear*¹²⁸ allowed recovery on a gratuitous promise to insure that happened to be set in a context of bailment. Likewise, in New Jersey,¹²⁹ on facts similar to *Brawn v. Lyford*, a cause of action in favor of the promisee was created on a bailment theory. The enforcement of a gratuitous promise to procure insurance has, however, been rested squarely on Section 90 by the Mississippi court.¹³⁰

The latter cases are to be preferred by a court which is interested in correcting an apparent injustice and hardship. They recognize the

126. Judgment for \$1350 was sought in the *Brawn* case and for \$2000 in the *Spillane* case. The opinion in the *Comfort* case does not reveal the sum allowed plaintiff by the jury.

127. *Comfort v. McCorkle*, 149 Misc. 826, 268 N.Y.S. 192, 197 (1933) (" . . . We are not unmindful of Section 90 of the Restatement of the Law of Contracts . . . But the New York Annotations thereto say: 'This section announces a rule of promissory estoppel applicable to charitable subscription.'").

128. 234 N.Y. 479, 138 N.E. 414 (1923). *Accord*, *Schroeder v. Mauzy*, 16 Cal. App. 443, 118 Pac. 459 (1911).

129. *First National Bank and Trust Co. v. Evans*, 11 N.J. Misc. 19, 163 Atl. 667 (Sup. Ct. 1932).

130. *Lusk-Haribison-Jones, Inc. v. Universal Credit Co.*, 164 Miss. 693, 145 So. 623 (1933).

economic loss which has followed justifiable reliance on the promise and place that loss on the one who has induced the reliance. Such a decision has a strong ethical basis and appeal. Indeed, it has even more of an appeal than do the land-gift cases, where it might be possible oftentimes to reimburse the promisee for the benefits he has conferred by improving the real estate instead of, as is customary, conferring on him title to property worth far more than the improvements.

There are occasional instances where the courts have avoided injustice to the promisee without enforcing the promise in its entirety. Such a case is *Terre Haute Brewing Co., Inc. v. Dugan*,¹³¹ where defendant alleged that plaintiff promised him he would be given an exclusive franchise to sell beer as long as he "wanted to put his time to it." When the franchise was cancelled and plaintiff sued for goods sold and delivered, defendant counterclaimed for loss of anticipated profits. The court limited his recovery to the expenses he had incurred but had not yet been able to recoup. A more recent case is *Goodman v. Dicker*.¹³² There a gratuitous promise to issue a "dealer's franchise" and to make an initial shipment of thirty to forty radios induced the promisee to incur expenses and solicit orders. Neither the franchise nor the radios were forthcoming. In the trial court the promisee had judgment for cash outlays and for loss of anticipated profits. The Court of Appeals modified the judgment to eliminate the loss of profits but allowed recovery for the expenditures made in reliance upon the gratuitous promise.

Oddly enough, Section 90 was neither cited nor relied upon in either of these cases. Yet these courts held the gratuitous promises binding to the extent necessary to reimburse the promisees for their expenditures made in reliance on the promise. Thus the cases fit into the promissory estoppel category. To be noted is the fact that these courts did not find themselves impelled to give specific enforcement of the *entire* promise. They had precedents available in the cases dealing with the problem of the revocation of the gratuitous license to use land,¹³³ where the decisions range all the way from denying the creation of any rights in the licensee to holding that a permanent easement has been created,¹³⁴ but with a goodly number protecting the

131. 102 F.2d 425 (8th Cir. 1939).

132. 169 F.2d 684 (D.C. Cir. 1948).

133. The leading American case is *Rerick v. Kern*, 14 Serg. & R. 267, 16 Am. Dec. 497 (Pa. 1826).

134. Fuller and Perdue, *The Reliance Element in Contract Damages*: 2, 46 YALE L.J. 373, 402 (1937); CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 59-64 (2d ed. 1947), contains a full discussion of the better known cases.

promisee to the extent of his investment but no further.¹³⁵ Protection to the extent of the expenditure made in reliance on the promise avoids injustice to the promisee in the usual case and also tends to prevent hardship on the promisor.¹³⁶ That protection is just as desirable to one who has made expenditures preliminary to selling merchandise as it is to one who has spent money to improve an access road across the promisor's land. For this reason the decisions in the *Terre Haute Brewing Co.* case and the *Goodman* case seem correct. These two cases illustrate that it is possible for courts to do justice in a particular case, protecting the reliance which is the essence of promissory estoppel, by partial enforcement.

The reason for the failure of more courts to adopt such a solution in the promissory estoppel cases is, perhaps, to be found in the fact that Section 90 of the Restatement fails to indicate the extent to which the gratuitous promise is binding. The assumption seems to be that "the usual contracts remedies and rules of damages will apply."¹³⁷ Courts when faced with a request to enforce the entire promise may believe that complete enforcement would work an injustice to the promisor and deny any relief whatsoever. As a result patent injustice is often done to the promisee. They might well give *partial* enforcement instead, thus vitalizing the concept of the avoidance of injustice.

The cases involving "business transactions" serve to indicate the difficulties which the courts encounter in dealing with this problem of injustice. An oft-cited opinion on this aspect of the doctrine is *James Baird Co. v. Gimbel Bros., Inc.*¹³⁸ In that case plaintiff, a Washington, D. C. contractor, was preparing to bid on the erection of a public building at Harrisburg, Pa. The defendant, a New York firm, submitted to plaintiff and all other contractors interested, a bid for the linoleum required on the job, but it mistakenly underestimated the yardage involved by about fifty percent. This bid was sent to those interested on December 24th and provided, "If successful in being awarded this contract, it will be absolutely guaranteed, . . . and . . . we are offering these prices for reasonable [*sic*] prompt acceptance after the general contract has been awarded." Plaintiff received a copy of the bid on the twenty-eighth; on the same day defendant, Gimbel, learned

135. *Flick v. Bell*, 42 Pac. 813 (1895) (compensation must be made for licensee's change of position). The privilege lasts as long as the natural life of the improvements either with or without repairs. *Grinshaw v. Belcher*, 88 Cal. 217, 26 Pac. 84 (1891); *Wingard v. Tift*, 24 Ga. 179 (1858); *Clark v. Glidden*, 60 Vt. 702, 15 Atl. 358 (1888).

136. Professor Alfred F. Conard, now of the University of Illinois, has the best recent discussion of the license cases in his article, *Unwritten Agreements for the Use of Land*, 14 ROCKY MOUNT. L. REV. 153, 160, 294, 310 (1942).

137. *Shattuck, Gratuitous Promises—A New Writ?*, 35 MICH. L. REV. 908, 944 (1936).

138. 64 F.2d 344 (2d Cir. 1933).

of its mistake and telegraphed all contractors that the bid was withdrawn and a new one at about double the previous price would be submitted. Plaintiff received the withdrawal after its bid, quoting linoleum at the first Gimbel price, had been mailed to Harrisburg. Plaintiff's bid was accepted by the public authorities on December thirtieth. Plaintiff then, on January 2d, formally accepted the Gimbel bid of December 24th. When Gimbel refused to recognize the existence of a contract, plaintiff sued.

Recovery was sought on three grounds: (1) That there was an offer of a unilateral contract which was accepted by including the Gimbel price in the bid submitted to Harrisburg; (2) That defendant should be bound by the doctrine of promissory estoppel and, (3) That there was an option giving the plaintiff the right reasonably to accept but not binding it to do so. The court, in an opinion by Learned Hand, rejected all three contentions, and affirmed the judgment below for defendant. The first contention, that there was an offer for a unilateral contract was rejected¹³⁹ because the words of the offer "for prompt acceptance after the general contract has been awarded" demonstrated that defendant required acceptance by communication, rather than an act, *i.e.*, it sought a bilateral contract. The third ground, that there was an option, was denied because "there is not the least reason to suppose that the defendant meant to subject itself to such a one-sided obligation."¹⁴⁰ And the contention that promissory estoppel applied was denied because it can apply only to "a donative promise . . . The doctrine of 'promissory estoppel' is to avoid the harsh results of allowing the promisor *in such a case* (*i.e.*, of a donative promise) to repudiate, when the promisee has acted in reliance upon the promise."

There is no need to reject the application of promissory estoppel in commercial transactions. Certainly, there is no explicit restriction of the doctrine to "donative" promises to be found in the words of Section 90; neither is one justified in reading such an implication into its language, though the New York Annotations to the Contracts Restatement¹⁴¹ so intimate, and some New York courts so hold.¹⁴² Injustice can result where a gratuitous promise is given in connection with a commercial transaction as easily as it can in the instance of a

139. *Id.* at 346.

140. *Ibid.*

141. RESTATEMENT, CONTRACTS, N.Y. ANNOT., § 90 (1933), Comment: "This section announces a rule of promissory estoppel, applicable to charitable subscriptions promises to make gifts, etc."

142. Quincy & Co. Arbitrage Corp. v. Cities Service Co., 156 Misc. 83, 282 N.Y.S. 294 (Sup. Ct. 1935) ("The doctrine of promissory estoppel has been definitely limited in this state to cases involving charitable subscriptions."). *Comfort v. McCorkle*, 149 Misc. 826, 831, 268 N.Y.S. 192 (Sup. Ct. 1933).

charitable subscription. A court should not ignore the injustice that will result from non-enforcement of a gratuitous promise when clad in business garments, but recognize it when found in other clothes. The avoidance of injustice should be of prime concern, not just the avoidance of *some* injustice.

Indeed, the *Baird* case furnishes an apt illustration of possible injustice in an oft-recurring situation. As is well known, general contractors often solicit bids for portions of construction work from subcontractors. When such bids are received, the general contractor incorporates them in his own bid and subjects himself to the possibility of being required to perform his own contract (provided the general bid is accepted) at the bid price or pay damages. If the subcontractor "welsches," the general contractor suffers an economic loss equal to the difference between the subcontractor's bid and the actual cost of completing that portion of the work. To call this loss "unjust" seems proper, particularly where the subcontractor's bid induced the reliance of the general contractor. The failure to use promissory estoppel (by saying it does not apply to commercial situations) is both unnecessary and unwise. The decisions in *Robert Gordon, Inc. v. Ingersoll-Rand Co.*¹⁴³ and *Northwestern Engineering Co. v. Ellerman et al.*¹⁴⁴ seem preferable.

Both of these cases involved facts substantially the same as those in the *Baird* case. In the *Gordon* case the Seventh Circuit expressly refuted the reasoning of the *Baird* case, saying, "the mere fact that the transaction is commercial in nature should not preclude the use of promissory estoppel."¹⁴⁵ Recovery was denied, however, because other requirements of the doctrine had not been met. The South Dakota court in the *Northwestern Engineering* case also expressly rejected the *Baird* reasoning, and, believing "that reason and justice demand that the doctrine be applied,"¹⁴⁶ gave affirmative relief.

The injustice to be avoided should not be restricted to economic loss alone. If a church in reliance on subscriptions borrows money to pay off its existing indebtedness and the subscriber then refuses to pay, it is clear that the church is not in any worse financial condition than it was before. All that it has done is to substitute a new debtor for an old one. However, the church has been induced to change its position by acquiring a *new* creditor. In at least two cases courts have

143. 117 F.2d 654 (7th Cir. 1941).

144. 69 S.D. 397, 10 N.W.2d 879 (1943); a second appeal, 71 S.D. 236, 23 N.W.2d 273 (1946), involved only the validity of instructions on the measure of damages, not promissory estoppel.

145. *Robert Gordon, Inc. v. Ingersoll-Rand Co.*, 117 F.2d 654, 661 (7th Cir. 1941).

146. *Northwestern Engineering Co. v. Ellerman*, 69 S.D. 397, 10 N.W.2d 879, 884 (1943).

been willing to enforce a charitable subscription on this state of facts.¹⁴⁷ Financial hardship should not be the sole criterion. A loss of reputation and standing in the community that would cause far more harm than economic loss should serve as equal motivation for enforcement.

The cases discussed herein illustrate the desirability and feasibility of considering the avoidance of injustice as a separate element of the doctrine of promissory estoppel. It is desirable because such a procedure insures a step-by-step analysis of the facts at hand which, in turn, insures that the jurist will have the opportunity to weigh all of the facts against specified requirements as well as an opportunity to study the consequences which may follow his decision. Its feasibility has been demonstrated by courts which have so considered it. The fact that injustice may involve subjectivity in approach does not militate against this method. Rather, it insures that the courts, because of their awareness of the problem, will employ an objective approach to its solution.

As has been seen, there are limitations and requirements inherent in the avoidance of injustice, just as there are in connection with the elements of foreseeability and reliance. The promisee must demonstrate the injustice he will suffer if the promise is not enforced; the hardship to him must be evident. But the hardship and injustice should not be restricted to economic loss nor solely to non-commercial transactions. If the avoidance of injustice is accepted, as it should be, as a separate element and a third requirement of the doctrine of promissory estoppel, the courts will be able to apply that doctrine with more discrimination and an awareness of the problems really presented for decision when they are asked to enforce a gratuitous promise.

RETROSPECT AND PROPHECY

This paper began with a series of three questions said to be implicit in the doctrine of promissory estoppel as expressed in Section 90 of the Contracts Restatement. Then followed an analysis of each of these questions as well as discussion of the separate requirements which this analysis disclosed. It will be well to end this consideration of promissory estoppel with a summary of what has gone before as well as with a prophecy as to the developments which are likely to occur in the future application of the doctrine.

Unless there has been a promise which the promisor should reasonably expect to induce action of a definite and substantial character on the part of the promisee, there is neither place nor need for the employment of the doctrine of promissory estoppel. This promise,

147. *Trustees v. Garvey*, 53 Ill. 401 (1870). *Accord*: *United Presbyterian Church v. Baird*, 60 Iowa 237, 14 N.W. 303 (1882).

then is basic. Its existence is determined by the same tests which are employed to determine the existence of a promise in other contract situations. If there be a promise, it is subject to recall as are other promises and its continued existence will be affected, as are offers, by death or insanity of the promisor. A safeguard is provided by the use of an objective test to determine whether a reasonable man would foresee, as likely to result, the action induced by the promise. In essence, in this first step in the analysis of promissory estoppel, the sole concern is with determining the existence of a promise.

Once the existence of a promise is determined, the second requirement is considered. It is that the promise must have induced action or forbearance of a definite and substantial nature. Here, too, there is concern as to the foreseeability of the action actually taken in reliance on the promise. Thus, again, there is an attempt at providing an objective standard. But there is equal emphasis upon the reliance induced by the promise. This emphasis is evidenced by the words "definite and substantial character" which are used by the Restatement to describe the type of action required to justify the employment of the doctrine of promissory estoppel. Trivialities will not suffice; the action taken must bulk large enough to justify the intervention of the courts.

Given the promise and justifiable substantial action in reliance on it, there is still a third requirement which must be present before Section 90 can apply. Now the concern is with whether it is possible to avoid injustice in any way except by enforcement of the gratuitous promise. If it is, there is no need to apply promissory estoppel. But this can be determined only by a careful consideration of available remedies, particularly those that will protect the restitution and reliance interests of the promisee. If no other available remedy will avoid injustice, then there is a strong ethical basis for enforcement; the promise may be enforced. It is with this third element—the avoidance of injustice—that it is most difficult to provide an objective standard by which to determine the need for imposing contractual liability. At the least, however, one can expect the courts to react much as would the reasonable man under a similar state of facts.

A court which applies promissory estoppel, as analyzed above, must break down the factual situation into its constituent elements, then it must determine whether, in the case at hand, each of the three requirements of promissory estoppel (the promise, the action-in-reliance, and the need for avoiding injustice) is present. If all three requirements are present, the court will be justified in enforcing the promise. Nothing less will meet the requirements of the doctrine as it is formulated in Section 90 of the Contracts Restatement.

So much for retrospect, now as to prophecy. What difference in interpretation or emphasis is likely to occur in the application of the doctrine in the years ahead? As to the element of the "promise likely to induce action," one would not expect to find any considerable change, for the probabilities are that the courts will continue to determine whether or not a gratuitous promise has been expressed by the same tests which are applied to determine the existence of other promises. As to the elements "action of a definite and substantial character" and "the avoidance of injustice," however, one may predict a different course.

At present there is considerable leeway in determining the characteristics of the reliance necessary before courts will intervene to enforce the gratuitous promise. No precise yardstick is now available by which to measure the amount of action required. The only requirement is that the action be of a "definite and substantial character." In effect, each case is judged on its own merits. Here the decisions can go in either of two directions: towards the creation and application of a rigid formula with which the reliance must comply, or in accordance with the present practice of handling cases individually and in their own context. The probability of the former developing is remote. One of the few attempts to create a formula—in the land-gift cases by requiring that donee's expenditures exceed the rental value¹⁴⁸—failed.¹⁴⁹ There is no indication that similar future attempts would be any more successful. Such a trend would be undesirable for it would lead to automatic application of a rigid rule and would tend to ignore the facts of particular cases. The requirement that the action in reliance be both definite and substantial will sufficiently protect the promisor as well as the promisee. Furthermore, the separate "injustice" requirement would seem to preclude the adoption of any rigid formula.

There are limitations and requirements inherent in the avoidance of injustice just as there are in connection with the elements of promise and reliance. The promisee must demonstrate the injustice he will suffer if the promise is not enforced; his hardship must be evident and caused by his reliance. But since hardship is not restricted to non-commercial transactions, neither should enforcement be so restricted. The chances are that it will not.¹⁵⁰ In addition, we can expect clarification of the kinds of remedies that will be made available to the prom-

148. *Supra* note 72.

149. Cases are cited *supra* note 73.

150. *Supra* notes 143-144. Cases in which courts have restricted promissory estoppel to non-commercial transactions are listed in notes 161, 164, 165 *supra*. See also *R. P. Farnsworth & Co. v. Albert*, 79 F. Supp. 27 (E.D. La. 1948) (Defendant sub-contractor's bid held irrevocable after award of general contract to plaintiff).

isee. There is no real need for the courts to restrict themselves to giving only complete enforcement. It is to be hoped that the trend will be towards a protection of the reliance interest of the promisee, even though that may mean only restitution.¹⁵¹ In many cases, partial enforcement will prevent injustice to the promisee without the injustice to the promisor that is often patent when complete enforcement is granted. If such a trend toward partial enforcement requires the development of a new writ, so be it.¹⁵² If the courts concentrate their attention on the avoidance of injustice to a promisee who has acted justifiably in reliance on a gratuitous promise, such a trend seems inevitable.

In addition, we can expect an attempt on the part of some courts to formalize the fact-situations which they will recognize as creating injustice. While judicial recognition of hardship and injustice as a reason for enforcing a gratuitous promise is necessary if promissory estoppel is to develop and mature, formalization or the confining of its use to a few specific situations is neither necessary nor desirable. Should that occur, promissory estoppel would become as mechanical as the jurisprudence of which Pound once complained.¹⁵³ Rather, it is to be hoped that fluidity in the application of the concept will be maintained so that injustice may be avoided whenever it is encountered in connection with the gratuitous promises here discussed.

The doctrine of promissory estoppel does not purport to enforce *all* gratuitous promises. Only those promises which are likely to and have induced reliance of a substantial character are within the scope of the present doctrine, and then only when the need to avoid injustice demands their inclusion.¹⁵⁴ When the limitations and requirements of the doctrine, as discussed herein, are recognized, it is clear that it stands midway between those promises which have been bought and paid for with a price and those which are purely gratuitous. Purely gratuitous promises are not now enforced in the Anglo-American legal system.¹⁵⁵ It is unlikely that they will be, as is indicated by the

151. See notes 131-33, 135, 137 *supra*.

152. Shattuck, *Gratuitous Promises—A New Writ?*, 35 MICH. L. REV. 908, 941-945 (1937).

153. Pound, *Mechanical Jurisprudence*, 8 COL. L. REV. 605, 606 (1908): "The effect of all system is apt to be petrification of the subject systematized. Perfection of scientific system and exposition tends to cut off individual initiative in the future, to stifle independent consideration of new problems and of new phases of old problems, and to impose the ideas of one generation upon another."

154. 4 PROCEEDINGS A.L.L., APP. 93, 97, 98 (1926).

155. CORBIN'S ANSON § 119: "We find at the outset that bare words of promise do not so operate [to create legal rights and duties]"; § 121: "In each case we must ask, Was anything given in exchange for the promise as its agreed equivalent? If not, the promise is gratuitous, and is not binding unless it is within the exceptions discussed hereafter. WILLISTON § 112: ". . . A would not be liable on his promise because it was gratuitous."; § 116: ". . . Nor has the law as yet generally accepted the principle that reliance on a gratuitous promise makes the promise binding,

failure of any sizeable number of states to adopt the Uniform Written Obligations Act.¹⁵⁶ The consideration which is present when the promise is bought and paid for is apt to continue to furnish the justification for the majority of the promises which courts enforce, if only because people will continue to bargain for most of the promises they give.¹⁵⁷ To promissory estoppel, then, is to be left the gap between the mere promise and the bargain. In this gap the doctrine can operate rationally, logically and usefully as a means of protecting justifiable reliance and avoiding injustice.

although the modern doctrine of promissory estoppel has extended legal recognition to such promises where the promisee has incurred a substantial detriment which the promisor should reasonably have anticipated as a consequence of the promise." GRISMORE § 53: "As a general rule, an informal promise is not per se enforceable in our law even though it has been assented to by the promisee." RESTATEMENT §§ 85-94, recognizes five instances in which a promise is enforced though not supported by conventional consideration. They are: (1) Promise to pay debt barred by Statute of Limitations (§ 86), (2) Promise to pay debt discharged in Bankruptcy (§ 87), (3) Promise to perform a voidable duty, (4) Stipulations (§ 94) and, (5) Promissory Estoppel.

156. 9 U.L.A. 431. The Uniform Written Obligations Act was approved by the National Conference of Commissioners on Uniform State Laws in 1925. It was adopted in Pennsylvania in 1927, PA. STAT. ANN. (Purdon, 1949) tit. 33 §§ 6-8, and in Utah in 1929, Utah Laws 1929, c. 62, . . . but was later repealed, UTAH CODE ANN. tit. 88 §§ 1-2 (1943) (a fact which apparently has not been noted by the editors of Contracts casebooks). The attempts to solve the problem by making "firm offers" irrevocable when in writing (N.Y. PERS. PROP. LAW § 33(5), and N.Y. REAL PROP. LAW § 279(4)) fail to cover the entire field of gratuitous promises. In the first place the New York statute applies only to *offers*, not to all promises. In the second place, it does not apply to *oral* offers which may induce as much reliance as written ones. See Hays, *Formal Contracts and Consideration—A Legislative Program*, 41 COL. L. REV. 849 (1941). See also LAW REVISION COMMISSION OF NEW YORK, REPORT, RECOMMENDATIONS AND STUDIES 345-414 (1941), for extended discussion of rationale of this legislation. For similar provisions as to "firm" offers by a merchant to buy and sell goods, see UNIFORM COMMERCIAL CODE § 2-205 (May 1949 Draft).

157. FULLER, THE PROBLEMS OF JURISPRUDENCE 710 (1941).