



1990

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Recommended Citation

Folsom, Thomas C. (1990) "Reconsidering the Reliance Rules: The Restatement of Contracts and Promissory Estoppel in North Dakota," *North Dakota Law Review*: Vol. 66 : No. 3 , Article 1.
Available at: <https://commons.und.edu/ndlr/vol66/iss3/1>

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RECONSIDERING THE RELIANCE RULES: THE RESTATEMENT OF CONTRACTS AND PROMISSORY ESTOPPEL IN NORTH DAKOTA

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I. INTRODUCTION AND OVERVIEW

Almost 60 years ago, the American Law Institute's Restatement of Contracts opined that the formation of a contract required both a manifestation of assent by the parties and a sufficient consideration.¹ And yet it also advised that:

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.²

Some 50 years later, the American Law Institute published its revision of the Restatement of Contracts.³ It reinforced its earlier view that assent and consideration were necessary to the formation of a contract, adding that contract formation requires that there be a bargain,⁴ but retained the rule of § 90, with slight modifications, so as to provide that:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. *The remedy granted for breach may be limited as justice requires*⁵ (emphasis

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1. "The requirements of the law for the formation of an informal contract are: (b) A manifestation of assent by the parties [and] (c) A sufficient consideration." RESTATEMENT OF CONTRACTS § 19 (1932) [hereinafter RESTATEMENT]. The omitted passages in clauses (b) and (c) of § 19 each admonish, 'except as otherwise stated.' Clauses (a) and (d) relate to parties and to permissible transactions.

2. RESTATEMENT, *supra* note 1, § 90.

3. RESTATEMENT (SECOND) OF CONTRACTS (1981) [hereinafter RESTATEMENT SECOND].

4. "[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration." RESTATEMENT SECOND, *supra* note 3, § 17. Omitted language in § 17 provides that '[w]hether or not there is a bargain a contract may be formed under the rules stated in §§ 82-94.' RESTATEMENT SECOND, *supra* note 3, § 17.

5. RESTATEMENT SECOND, *supra* note 3, § 90. The portion of the 1981 version quoted is identical to the 1932 version of § 90 except for the new language added (emphasized in the text) and the deletion of the expression "of a definite and substantial character" which

added).

For the purposes of this article, it will be assumed that the rule of section 90 was, or is, a rule properly abstracted from the cases.⁶ Further, it will be assumed that the interest such a rule protects is the promisee's reliance interest (that is, having acted or having forborne from acting in reliance upon the promise, the promisee is interested in seeking enforcement of the promise).⁷ Thus, we

had followed, and qualified, the expression "action or forbearance" in the 1932 version. See *supra* note 1 and accompanying text.

6. This article could, of course, start from the beginning, and try to derive the rule of section 90 from the cases. But that is what the American Law Institute has already undertaken to do in the Restatements. If it be true that "pygmies sitting on the shoulders of giants may see further than the giants," see C. BERNARD, *AN INTRODUCTION TO THE STUDY OF EXPERIMENTAL MEDICINE* (H.C. Greene trans., reprint 1927), Pt. I, Chap. II, Div. IV, at 42 ("[g]reat men have been compared to giants upon whose shoulders pygmies have climbed, who nevertheless see further than they") accord Letter from Isaac Newton to Robert Hooke (Feb. 5, 1675), *reprinted in* 1 *THE CORRESPONDENCE OF ISAAC NEWTON* 416 (H. Turnbull ed. 1959) ("[i]f I have seen further it is by standing on [the] shoulders of Giants"), it is also true that we must start by climbing aboard, however provisionally. At the very least, it saves time, paper and the reader's patience simply to accept some common starting point for analysis.

7. The reliance interest is generally compared or contrasted to two other interests: the expectation interest (by which, having entered into a profitable agreement, the promisee is interested in enforcement of the other's promise in order to realize the expected gain), and the restitution interest (by which, having rendered goods or services to the other person, the promisee is interested in enforcement of the other's promise in order to avoid the forfeit of the value of the benefits rendered). See Fuller and Perdue, *The Reliance Interest in Contract Damages* (pt. 1), 46 *YALE L.J.* 52 (1936).

Examples of the three interests are as follows:

(a) If A and B should agree that A will paint B's house for \$100, A's costs being \$90 (assuming \$20 for paint and \$70 for labor), then, should B breach immediately after the agreement is made, but before A does anything, A's expectation is \$10, A's reliance is \$0, and A's restitution interest is \$0. (A's interests have reference to B's promise; it is B who promised to pay \$100, it is B who has not performed, and it is now a matter of our accounting for the various interests that A might have in seeking to enforce B's promise).

(b) Assume the facts are otherwise the same as in example (a), but B breaches after A has bought \$20 of paint and before A has applied any of it. A's expectation is \$30 (the same \$10 profit, plus the \$20 of costs incurred), A's reliance is \$20 (simply the costs incurred), and A's restitution interest is \$0 (A has rendered no benefit to B; B is not enriched merely by A's purchase of the paint).

(c) Assume the facts are otherwise the same as in example (b), but A not only buys the \$20 of paint, but also applies half of it, and incurs \$35 of labor doing so prior to B's breach. A's expectation is \$65 (the same \$10 profit, plus the \$55 of costs incurred), A's reliance is \$55 (simply the costs incurred, which now include the \$20 for paint, and also \$35 of labor), and A's restitution interest will be whatever is the reasonable value of a half painted house (the application of paint to B's house has now, finally, provided some arguable benefit to B for which he can recompense A).

The examples illustrate that the expectation interest usually has the highest monetary value (because it counts profits as well as costs), that the restitution interest is lowest in value (because it counts neither profits nor so much of the costs as confer no benefit), and that the reliance interest is somewhere between the other two (lower than expectation because it does not include profit, but higher than restitution because it does include even those costs that did not enrich the other party). It follows, then, that the interest most promisees want to protect is the expectation interest. Since the ordinary measure of recovery in a contract action protects the expectation interest, it may be said to be both generous and somewhat subtle. It is a generous measure because it already gives A more than the value of any benefit realized by B (no need, in example (b) above, to fret over whether there might not be some way to conceive of A's mere purchase of the paint as constituting some benefit to B so as to raise the restitution interest above \$0), and more,

have identified an interest which exists, and a rule that is designed to protect it, but neither the scope nor the meaning of the rule is clear from the text of section 90 itself. Indeed, section 90 goes against the grain of rules elsewhere established which say that promises are enforceable if bargained for, if accepted, if sufficiently definite, if (for those promises that are within the statute of frauds) in writing, and then only if all the conditions to the performance contemplated by the promise have occurred or been excused.⁸ All of those rules, based on something other than reliance, have a reason and justice of their own which must be both preserved and accounted for by any reliance theory.⁹

even, than any out of pocket loss suffered by A herself. It is a somewhat subtle measure because, while restitution recovers an amount which is both a loss to A and a gain to B, and while reliance recovers all that plus the additional increment which is a loss to A even though not a gain to B, the expectation measure, instead, represents a 'recovery' by A of something (anticipated profit) she either never 'had' at all, or had in an intangible way.

8. For the Restatement (Second) analysis of these, see RESTATEMENT SECOND, *supra* note 3, §§ 71-81 (the requirement of consideration), §§ 17-70 (the formation of contracts and mutual assent), §§ 110-150 (the statute of frauds), and §§ 224-230 (conditions and similar events). See *infra* note 38 and accompanying text for a thumbnail guide to these rules' place in the Restatement (Second) of Contracts. The absence of impediments (that is, the absence of incapacity, fraud, duress, mistake, unconscionability, illegality and the like) is assumed in this discussion of enforceability. Thus, if there is bargained for consideration, assent (including offer and acceptance where called for, and including sufficient definiteness), and satisfaction of the statute of frauds (if the promise is within the statute of frauds), a promise will be referred to as being enforceable (that is, presumptively enforceable, granting the absence of impediments); if any of those elements is absent, a promise will be referred to as being presumptively unenforceable (that is, presumptively unenforceable, unless something like section 90 serves to tip the scales). In thus isolating the elements of bargained for consideration, assent, and satisfaction of the statute of frauds, this article is concentrated on those elements, the absence of which would have rendered a promise presumptively unenforceable, but whose absence has been excused by one or more courts using analyses more or less closely patterned after section 90 in order to fashion a recovery for the relying promisee. Of course, there are other doctrines, exceptions and techniques (outside of promissory estoppel) by which recoveries may be fashioned for a promisee to whom a presumptively unenforceable promise has been made; but, though this article will deal with some of those other doctrines, its main scope is limited to promissory estoppel and section 90.

9. Accounted for, that is, on the assumption that it was never the intention of the drafters of the Restatement, nor of the courts which have adopted the section 90 analysis, simply to reduce all of contract law to one exception destined to devour all the other rules. For a not altogether fanciful exploration of a different set of assumptions, see C. GILMORE, *THE DEATH OF CONTRACT* 61 (1974) (treating the bargain theory of consideration, rather than promissory estoppel, as the innovation of the Restatement, diagnosing the bargain theory's coexistence with § 90 as evidence of the Restatement's "schizophrenia"). It was then asked:

And what is that all about? We have become accustomed to the idea, without in the least understanding it, that the universe includes both matter and antimatter. Perhaps what we have here is Restatement and anti-Restatement or Contract and anti-Contract. The one thing that is clear is that these two contradictory propositions [section 90 reliance, and the notion of bargained for consideration] cannot live comfortably together: in the end one must swallow the other up.

Id. at 61. But see J. DAWSON, *GIFTS AND PROMISES* 3, 199-207 (1980), cited by E. FARNSWORTH, *CONTRACTS* 98 n. 49 (1982) (for the proposition that Dawson disagrees with Gilmore's 'exaggerated' account of the reabsorption of contract into tort), and C. FRIED, *CONTRACT AS PROMISE* 30 n. 12 (1981) (for the proposition that Dawson disagrees with

When might a promisor, under section 90's rule, have a 'reasonable expectation' that some one else will rely upon a promise that is not otherwise enforceable? How can there be an 'injustice' when a promise that is not enforceable because of another rule and, presumably, for good reason, is not enforced? These questions, when and as answered, can provide the basis for a theory of reliance. This theory could be expected to go beyond a statement of the interest to be protected and beyond a recital of a 'rule.' The theory would explain the reason for the rule, the purpose it serves, the harm that it relieves, and its relationship to other rules. In short, a reliance theory would provide a basis for predicting when and how the reliance interest will be protected.

If we can assume generally that the Restatement gives us rules correctly abstracted from cases that have arisen in some one or more jurisdictions, then the first particular order of business is to determine whether there had been, in North Dakota, any corresponding cases from which such rules could have been derived in this state. The second task is to determine whether, with or without any pre-Restatement promissory estoppel cases in this state, North Dakota has adopted any of the various formulations of, and suggested applications of, the several reliance-based rules of the Restatement. After having read and analyzed every promissory estoppel case decided in North Dakota, I conclude that there was no pre-Restatement case support in this state for a rule like that of section 90, and that the post-Restatement cases in this state do not apply the rules set forth in the Restatement of Contracts. Further, North Dakota has no independent history of promissory recoveries based upon any determinate reliance rule, and, hence, no dependable material from which to construct any unique reliance theory of its own. Instead, the North Dakota Supreme Court has decided each of the cases on its own facts without articulating any general set of rules, and without seeking to impose any theory. This leaves the court with an extraordinary opportunity either to fashion freely its own set of reliance-based rules or to refrain from doing so at all. Since there has been more than 50 years of debate, trial and error, and episodic development of a more or less elaborate set of reliance-based rules outside of North Dakota, but none of it has left much of a mark on the decisional law in this state, the North

Gilmore's 'surprising suggestion' that the bargain theory was invented by Holmes). As to the actual state of affairs, let the reader take it one way or the other, but in any event, and from either direction, there are a great number of cases for which *some* account must be given.

Dakota Supreme Court has all of the benefits of a clean slate coupled with all of the benefits of vicarious wisdom and experience.

It is generally presumed that North Dakota is favorably inclined to the Restatement's view of reliance-based recovery under section 90.¹⁰ But there are three difficulties with that supposition.

First, the North Dakota cases that seem to embrace a Restatement style of reliance-based recovery sketch a line, and a supporting rationale, that is faint and wavering at best. The cases contain a generous portion of obiter dicta; they waver between formulations of a rule somewhat akin to that expressed in section 90 of the original Restatement and somewhat like that expressed in section 90 of the Restatement (Second), though, in fact, materially different from either; they often express no rationale for electing to protect the reliance interest at all, or for adopting any particular formulation of a reliance rule; they fail to distinguish possible differences in treatment of the several distinct transaction types that present the questions of reliance; and they, far more often than not, reach actual holdings by which the plaintiff promisee loses rather than wins.¹¹ As a result, it is hard to determine where the North Dakota Supreme Court actually stands on the question. The most likely answer is that it is premature to say that the court has embraced the Restatement. Though the court may be inclining towards the Restatement, it has not yet decided cases on the basis of the Restatement's formulation.

Second, North Dakota is a Field code state,¹² and David Dud-

10. See, e.g., Smith, *Recent Developments in North Dakota Contract Law*, 60 N.D.L. REV. 227-28 (1984) (asserting that contract law in North Dakota is becoming "increasingly flexible," and that the "court has been increasingly willing to recognize promissory estoppel or reliance, both as a substitute for consideration, and as a device to estop one party from taking advantage of another in the contract context"). *But cf. id.* at 230-34 (discussing four estoppel cases, in none of which the North Dakota Supreme Court actually enforced any promise because of promissory estoppel); *id.* at 235 (noting that, among the issues remaining for the North Dakota Supreme Court to address is "whether a party may raise promissory estoppel as an independent action in North Dakota"). See also R. LORD, *BASIC NORTH DAKOTA CONTRACT LAW 12-13* (1979) (suggesting that North Dakota adheres to section 90 of the Restatement).

11. See *infra* notes 132-34 and accompanying text. These results are tabulated in Chart 1 at A-1 (appendix to this article).

12. Muus, *The Origin of the North Dakota Civil Code*, 4 DAK. L. REV. 103 (1932). In 1865, the Legislative Assembly of the Territory of Dakota (then including the present states of North and South Dakota) enacted into law, effective on January 12, 1866, the codes of substantive civil law known as the Field Code. The code itself had only been submitted to the New York legislature in final form (the ninth and final report of David Dudley Field and Alexander W. Bradford, Commissioners of the Code) on February 13, 1865. Field himself, in a letter urging leaders of the California Bar to seek adoption of the code, recognized that the "honor of being the first to enact a code of the common law of England belongs, not to England nor to New York, but to Dakota, one of the youngest, but most vigorous, of our Territories." D. Field, *Codification of the Law*, 1 SPEECHES, ARGUMENTS AND

ley Field's code may forbid adoption of section 90, or at least raise serious questions about the necessity or legitimacy of section 90 in North Dakota.¹³ Since the North Dakota Supreme Court has never explicitly faced the question whether the code is a barrier to adoption of the Restatement's view, it is hard to predict what it would do if the issue were squarely raised by a litigant.¹⁴

Finally, the Field Code radically altered the common law of contracts when it provided that promises are enforceable, not only where supported by consideration, but also if supported by "cause," a civil law term which Mr. Field imported from the Louisiana and Napoleonic Codes.¹⁵ Since it is hard to imagine any

MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 349-50 (1884) [hereinafter SPEECHES AND PAPERS] (letter from Mr. Field to the California Bar, November 28, 1870).

13. The Field Code is intended to be a comprehensive codification of the substantive law. It contains a section which provides that "there is no common law in any case where the law is declared by the [code]," and another which repeals "all statutes, laws and rules inconsistent with the provisions of this Code." THE CIVIL CODE OF THE STATE OF NEW YORK REPORTED COMPLETE BY THE COMMISSIONERS OF THE CODE (9th and Final Report 1865) [hereinafter FIELD CODE] §§ 6 and 2033. Section 6 of the Field Code is codified at N.D. CENT. CODE § 1-01-06 (1987). A provision substantially equivalent to § 2033 of the Field Code is codified at N.D. CENT. CODE § 1-02-19 (1987) (codifying for general purposes the repealer language, but deriving it from Field's code of civil procedure rather than from his substantive civil code).

The Field Code states, as a matter of positive law, that "[i]t is essential to the existence of a contract that there should be: (1) Parties capable of contracting; (2) Their consent; (3) A lawful object; and, (4) A sufficient cause or consideration." FIELD CODE, § 745, codified at N.D. CENT. CODE § 9-01-02 (1987).

The Field Code contains nothing like section 90 of the Restatement of Contracts that might excuse the absence of consent or that might excuse the absence of cause or consideration. Although the code, as amended in several jurisdictions subsequent to Field's work on it, does contain an equitable estoppel provision, there is still no promissory estoppel provision. See *infra* note 354 and accompanying text for a discussion of the North Dakota statutory provisions relating to equitable estoppel as elaborated by the North Dakota Supreme Court.

It is doubtful whether the Field Code, as originally authored, or as amended, permits any application of section 90, and arguable that, in light of its different orientation towards the enforceability of promises, it does not need anything like section 90.

14. This is a situation for which we must all take some responsibility. At the threshold, the Civil Field Code is not generally available, and copies of the Field Code containing the Code Commissioner's annotations are rarer still. Moreover, it is likely that the Code is not generally taught in the 'national law schools,' and that it is, by and large, neglected even in the law schools situated in Code states. Cf. J. Muus, *The Influence of the Civil Code on the Teaching of Law at the University of North Dakota*, 4 DAK. L. REV. 175 (1932) (indicating that, though the civil code "has made changes in the common law to an extent which is greater than often assumed," the existence of the code has not caused the methods of teaching at the University of North Dakota School of Law to deviate from those used in common law jurisdictions).

If neither taught, nor readily available to those who would be inclined to teach themselves, it should not be surprising that the Field Code is neither known nor generally followed, except by accident.

15. FIELD CODE, *supra* note 13, § 745(4). Section 745 is set out in full at note 13, *supra*. The annotations to § 745 of the Field Code prepared by the Commissioners of the Code (and generally assumed to have been the work of Mr. Field himself) include references to Art. 1772 of the 1825 Louisiana Code, and to Art. 1108 of the Code Napoleon. *Id.* Both the Louisiana and French code provisions incorporate the concept of cause. LOUISIANA CIVIL CODE, Compiled Edition (1972) (reconstructing the older Louisiana article 1772 and article 1108 of the Code Napoleon in the annotations following Art. 1779).

deliberate promise as lacking sufficient cause,¹⁶ it is hard to resist the conclusion that every deliberate promise is already enforceable in North Dakota, whether anyone has relied upon it or not. But the North Dakota Supreme Court has not faced the question at any time in one hundred years of statehood,¹⁷ and since there is no record of anyone ever having asserted the right to enforce a deliberate promise on the basis that it, though lacking consideration, was made for sufficient cause, perhaps even this conclusion is not free from doubt.

Of these three difficulties, this article is limited to the first.¹⁸ Section 90 of the original Restatement of Contracts probably did not restate the law of North Dakota as it existed in 1932, and section 90 and the various other reliance-based rules of the Restatement (Second) of Contracts did not restate the law of North Dakota as it existed in 1981. There are, however, some cases in North Dakota, many of them relatively recent, that contain dicta about protecting the reliance interest, and a smaller number of cases (both recent and older) that may actually protect the reliance interest under some indeterminate set of circumstances.¹⁹ These are cases that seem to coexist uneasily within the Field Code, and do not, as yet, suggest any particular reason for embracing reliance rules that seem to be contrary to, or at least not obviously within, the governing statutory law. Moreover, they do not contain any considered rationale explaining what defect is to be remedied, or what purpose is to be served, by sporadically granting ad hoc recoveries on the basis of some sort of reliance.

This unsettled state of affairs is by no means a bad thing, because it serves to provide the North Dakota Supreme Court with an extraordinarily valuable amount of freedom to fashion the reliance based rules, if any, which are appropriate to North Dakota. In short, the North Dakota Supreme Court has not yet articulated a reliance theory. If it were to elect to do so, it may

16. It appears that a promise was given for sufficient cause, within the meaning of the Napoleonic Code, if it was made deliberately with a definite end in view. T. Plucknett, *A CONCISE HISTORY OF THE COMMON LAW* 652-53 (5th ed. 1956). See also J. Domat, *Les lois civiles dans leur order naturel* (1689) Part I, Bk. I, tit. I, Sec. I, Art. 5 and 6 (Nos. 148 and 149); R. Pothier, *Obligations*, (circa 1761) (Nos. 42 and 43). This result is explained at somewhat greater length in e.g., J. Denson Smith, *A Refresher Course in Cause*, 12 LA. L. REV. 2, 4 (1951).

17. This is a phenomena not limited to North Dakota. California also has acted as if its version of the statute did not exist. See generally Keyes, *Cause and Consideration in California—a Re-Appraisal*, 47 CALIF. L. REV. 74 (1959).

18. Future articles of mine may discuss the second and third problems as they exist, not only in North Dakota, but in other states influenced by the Field Code (including California, Montana, Oklahoma and South Dakota).

19. These results are tabulated in Chart 1 at A-1.

benefit from a careful reading of its own cases in comparison to those that influenced the Restatement, and freely fashion a theory that adapts the best of each, in light of the special circumstances of law, policy and social structures existing in this state. At least as justifiably, the court might elect not to accept any reliance theory at all because (a) the Field Code generally discourages it from doing so, while, at the same time (by the concept of "cause,") both rendering it unnecessary to do so, and providing the outlines of another, and better theory,²⁰ and (b) there are many barriers to the articulation of a coherent reliance theory anywhere, and particularly on a case-by-case basis in a state like North Dakota in which there are few cases. Moreover, the presence of the Field Code allows the court to avoid importing alien, outmoded and awkward reliance-based theories to explain its results.

This article also observes that promissory estoppel is not a unitary rule, and is not, at least as practiced in this one particular state, quite the same thing as is described in the Restatement of Contracts.²¹ Finally, it is the purpose of this article, not only to account for all of the promissory estoppel cases in North Dakota, and to suggest a method for solving the problems presented by the cases, but also to desynonymize the term "promissory estoppel," and to create a vocabulary of analysis by which it is possible to discuss various promissory estoppels as they actually are in any given jurisdiction, starting with this one.

II. PROMISSORY ESTOPPEL ANALYSIS: FOUNDATIONS AND FOLKLORE

A. MODERN AMERICAN CONTRACT LAW: THE RESTATEMENTS

The modern era of American contract law dates from 1932, the year in which the Restatement of Contracts appeared.²² The

20. For the proposition that it is unnecessary to develop a reliance theory in a civil code system which already incorporates the concept of cause as a basis for enforceability of promises, see 1 A. CORBIN, CORBIN ON CONTRACTS § 196 (1963) (not distinguishing the Roman 'causa' from the Napoleonic Code's 'cause.' Corbin made the following observation:

[i]t may well be, also, that "causa" includes so many antecedent reasons for making a promise that it would make enforceable every promise on which it would be reasonable to rely. *If such is the case, it would be unnecessary for the Roman and Continental jurists to develop a reliance doctrine.*

Id.

For an outline of the Field Code's approach to consensual obligations, and an introduction to the concept of cause, see *supra* notes 12-17 and accompanying text.

21. These results are tabulated in Charts 2 and 3 at A-2 to A-6.

22. See RESTATEMENT, *supra* note 1 and accompanying text.

publication of this work, which had been in progress since 1923, marked the completion by the American Law Institute of its work on "the first of a series of volumes designed to cover the restatement of the principal subjects of the law."²³ In stating the object and character of the Restatement, Professor William Draper Lewis, Director of the Institute, observed that it was the function of the courts to "decide controversies brought before them" and that it was the function of the American Law Institute to "state clearly and precisely in the light of the decisions the principles and rules of the common law."²⁴ Professor Lewis both predicted that "there is reason to expect" that the restatement would be accepted by the courts and legal profession generally as "prima facie a correct statement of what may be termed the general common law of the United States,"²⁵ and also cautioned that "there are instances in which the law in one or more States may vary from the law stated in a particular section."²⁶

23. RESTATEMENT, *supra* note 1, Introduction, vii.

24. *Id.* at xi.

25. *Id.* at xiv. This confidence was probably based upon the quality of the persons who participated in the project, coupled with the procedures observed. The reporter was Professor Samuel Williston, "the foremost legal expert on the subject," and Professor Arthur L. Corbin, another respected authority on contracts, was one of his five advisors. *Id.* at ix. The Institute charged the reporter with primary responsibility for the preparation and presentation to his advisors of preliminary drafts of the different chapters; for presentation of these drafts to a Council of the ALI (in 1933, for example, the council was composed of some 30 persons, including Benjamin Cardozo, Learned Hand, the Elihu Root, junior and senior, and John W. Davis); and for presentation to the annual ALI meetings of tentative drafts and proposed final drafts. *Id.* at x. Thus, the procedure contemplated the progression of work from the Reporter and advisors, first to the Council, and thence to the ALI itself.

The successive preliminary drafts were the product of a committee consisting of Mr. Williston and his advisors. *Id.* During the nine years of the project, there were 51 of these preliminary drafts. *Id.* No "final" preliminary draft was presented to the Council until the committee was satisfied with it, and so the committee presented to the Council only 17 "final" preliminary drafts. *Id.* The Council itself submitted ten "tentative" drafts of various parts of the work to the ALI for consideration and discussion at eight of the ALI's annual meetings between 1923 and 1932. *Id.* at ix-xi.

26. *Id.* at xiv. The Institute contemplated that the Restatement of Contracts would be supplemented by a set of annotations, one for each state, prepared by the several State Bar Associations with the assistance of the faculties of local law schools. *Id.* The State Annotations would, for each state, and for each section of the Restatement, indicate whether the Restatement did or did not accord with actual state law, "set[ting] forth the pertinent local decisions and statutes." *Id.* As of the June 30, 1932 date of his introduction to the Restatement, Professor Lewis was able to announce what seemed to be the near-completion of the annotation project, noting that, in a majority of the states, the state annotations for the Restatement of Contracts "will be available soon after the publication of [the Restatement of Contracts]" and that, in "practically all the remaining States," the state annotation projects are "in progress, and publication should not be long delayed." *Id.* at xv.

Whatever may have happened to the State Annotations in the other states, the only sections of the Restatement of Contracts that ever approached annotation in North Dakota were those pertaining to the statute of frauds (the 1932 Restatement of Contracts consisted of 609 sections, organized into 18 chapters; Chapter 8, §§ 178 to 225, treated the Statute of Frauds). The University of North Dakota Law Review ran a series of articles between 1928 and 1930 which compared existing North Dakota authorities to the tentative drafts of

In 1981, the American Law Institute published the Restatement (Second) of Contracts, which had been in preparation since 1962.²⁷ In his forward to the Restatement (Second), Professor Herbert Wechsler, Director of the American Law Institute, said that it is "implicit in the concept of restatement that the work should be kept current by periodic reexamination and revision."²⁸ Observing that the original Restatement of Contracts had been a "legendary success, exercising enormous influence," and that it had become a "classic," which the new reporters, their advisors and the Institute approached with "respect and tenderness,"²⁹ Professor Wechsler nonetheless pointed to several changes. The work now included commentary explaining and expounding the "black letter" of the Restatement formulations, and included the Reporter's Notes describing the authorities supporting the Restatement formulations.³⁰ Other changes involved the mode of presentation: "matters of organization, where changes in the ordering or scope of topics enhanced clarity or reduced redundancy, and matters of drafting, where revision served the interest of compression, simplification, precision or refinement of analysis."³¹ The result is a revised Restatement which is "indeed, very

Chapter 8 of the Restatement, and so provided a local annotation to this portion of the Restatement. *The Statute of Frauds Restatement with North Dakota Annotations, Part One*, 2 DAK. L. REV. 373 (1928); *The Statute of Frauds Restatement with North Dakota Annotations, Part Two*, 2 DAK. L. REV. 438 (1928); *The Statute of Frauds Restatement with North Dakota Annotations, Part Three*, 3 DAK. L. REV. 373 (1930).

Despite a commitment to a full State Annotation project on the part of the North Dakota Bar Association and the University of North Dakota School of Law, no further work was ever completed. See generally N.D. STATE BAR ASSOCIATION BAR BRIEFS, Vol. 7, No. 1, 77-78 (Dec. 1930) ("Resolved that the faculty of the University of North Dakota Law School be officially recognized as the representative body of the North Dakota State Bar Association to annotate the Restatements to the North Dakota Laws"); *Id.* Vol. 8, No. 1, 105-06 (Dec. 1931) ("In many states the Bar Associations have agreed to contribute from \$1,000 to \$5,000 a year for state annotations. In many schools the teaching load is reduced so as to give the teachers an opportunity. . . . To aid them, one or more student assistants are often provided. . . . This is a serious and big task"); *Id.* Vol. 10, No. 1, 15 (Dec. 1933) ("Very little can be performed on the problem of North Dakota annotations by the University law faculty with its limited budget, reduced faculty, and heavier teaching load the committee will have to wait until conditions are more favorable"). As a result, Professor Draper's cautionary warning was never fully tested in North Dakota.

27. RESTATEMENT SECOND, *supra* note 3 and accompanying text.

28. RESTATEMENT SECOND, *supra* note 3, Forward, vii.

29. *Id.* at vii-viii. The work proceeded from 1962 through 1979. *Id.* at vii. The reporter for approximately the first half of the Restatement (Second) was Professor Robert Braucher of the Harvard Law School. *Id.* Professor Braucher resigned upon being appointed a Justice of the Supreme Judicial Court of Massachusetts in 1971, and was succeeded as reporter by Professor E. Allan Farnsworth of Columbia University. *Id.* Professor Corbin served as Consultant until his death in 1967 and left "elaborate written notes." *Id.* During the 17 years of the project, there were fourteen tentative drafts presented to the American Law Institute. *Id.*

30. *Id.* at viii.

31. *Id.* For example, the Restatement (Second) of Contracts is reduced to 385 sections (a substantial reduction of the 609 sections contained in the original Restatement). And,

close to a new work."³² The remainder of this introduction to the Restatement is based upon the Restatement (Second).

Discourse begins with words, and the Restatement (Second) begins with some observations on words and language. It is true that the words significant to the law of contracts "often have different meanings to the speaker and the hearer," and are "commonly used in more than one sense. . . ." ³³ But this "persistent source of difficulty in the law of contracts" ³⁴ might be avoided by attempting to give words a single definition and then using them only as defined.³⁵ Hence, when the reliance theory is discussed in this article in the context of *those promises that may be enforceable because of reliance*, the discussion will be with reference to basic terms as defined in the Restatement (Second).³⁶

Words serve as terms in propositions. And the propositions relevant to the law of contracts can be constructed in more than one fashion so as to afford more than one theory that accounts for the reported cases and predicts the outcome of the as yet unde-

although there is no significant reduction in the number of chapters (16 chapters in the new Restatement, 18 chapters in the original), there is such a substantial reordering, recaptioning, and rearranging of the chapters as to make any numerical comparison unhelpful. See RESTATEMENT SECOND, *supra* note 1 and RESTATEMENT SECOND, *supra* note 3.

32. RESTATEMENT SECOND, *supra* note 3, Forward, viii. Professor Wechsler did, however, view the new Restatement as having proceeded on the basis that there was "relatively little need for major substantive revision, in the sense of changing the positions taken on important issues. . . ." *Id.* This perhaps exemplifies the paradox that the two Restatements of Contracts must be thought of, on the one hand, as being completely different works, and yet, on the other hand, as being deeply related and similar to one another. Thus, the reader of the two Restatements must be on notice of the necessity of carefully comparing the two.

33. RESTATEMENT SECOND, *supra* note 3, ch. 1, Introductory Note.

34. *Id.*

35. While there are many ways to define the words and concepts that have significance to the law of contracts, it is helpful to choose one way and stick with it. To a North Dakota lawyer, three choices of definition would be those given in the Field Code, in North Dakota decisional law, or in the Restatement (Second) of Contracts. The Restatement (Second) of Contracts offers the advantage of an internally unified set of definitions which is fairly authoritative, fairly recent, and generally available to most practitioners. Accordingly, not only in this discussion of the Restatement (Second) itself, but in the discussion of contract law in general, either the definitions of the Restatement (Second) will be used or the reader will be alerted to some other usage.

36. "A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." RESTATEMENT SECOND, *supra* note 3, § 2(1). Here, the Restatement (Second) separates an act (the promise) from any resulting legal relationship. See RESTATEMENT SECOND, *supra* note 3, § 2, comment a. The corresponding comment amplifies by explaining that "[i]f by virtue of other operative facts there is a legal duty to perform, the promise is a contract; but the word 'promise' is not limited to acts having legal effect." *Id.* (emphasis added).

To say that a promise is "enforceable" is to say that there is a legal remedy for its breach, which means that the promise is a contract under that branch of the Restatement's definition of contract which provides that a contract is "a promise or set of promises for the breach of which the law gives a remedy." *Id.* § 1. Therefore, if a promise is legally enforceable against the promisor, then the promise is a contract.

cided cases. Again, some difficulty may be avoided by fastening upon a single theory and using it as our reference.³⁷ Thus, when the reliance theory is discussed in this article in the context of *those promises that may be enforceable because of reliance*, the discussion will be with reference to the common theory which makes the discussion meaningful (that is, the Restatement's theory that explains the enforceability of promises generally in terms of bargain, and in light of which certain promises become significant).³⁸

While the defined terms of the Restatement (Second) can provide common ground for the beginning of analysis, they do not go far enough to permit sustained analysis. Assuming the usage of the Restatement (Second) succeeds in permitting discourse (including disagreement as well as agreement) by pointing to clear and consistent terms, and assuming that those terms can be used profitably to compare and contrast the various reliance-based transaction types exemplified in the Restatement (Second) with the North Dakota cases, it does not follow that the same terms can be used to build a theory that accounts for the cases that form the subject matter of contract law, or can succeed in doing that which the Restatement does not even attempt. It does not attempt to define broader terms. There is no definition of such terms or concepts as 'law' or 'justice,' and, accordingly, no theory that explains the end (or purpose) of law, no theory that explains the ideal (or goal) of justice, and no theory that predicts whether (much less one that accounts for why, or how) law and justice might come into conflict with one another. If the Restatement were complete without such terms or theories, their omission might be no loss; and if we could fashion a reliance theory in North Dakota without reference to

37. The Restatement (Second) of Contracts presents a theory or set of theories which, by apparent design, is intended to be comprehensive, and to account for the cases in a self-consistent manner. Accordingly, I will either use the theory of the Restatement, or alert the reader to some other usage.

38. In general, and with exceptions, the theory of the Restatement is that "the formation of a contract requires [1] a *bargain* in which there is [2] a manifestation of *mutual assent* to the exchange and [3] a *consideration*." RESTATEMENT SECOND, *supra* note 3, § 17 (emphasis added).

"A *bargain* is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances." *Id.* § 3.

A "[m]anifestation of *mutual assent* to an exchange requires that each party either make a promise or begin or render a performance" it "ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties." *Id.* §§ 18, 22 (emphasis added).

Consideration consists in any performance or return promise which is "bargained for," and "[a] performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise." *Id.* §§ 71(1), 71(2).

such terms or theories, we would not long lament their loss. But the operation of the reliance-based rules of the Restatement do require the use of such terms. In particular, they require us to define, or else abandon, the word and the concept of "justice."³⁹

In these closing years of the 20th century, it seems commonplace to say that it is extremely unlikely that there is any agreement on what "justice" means, and very likely that it means different things to different readers.⁴⁰ In the interest of brevity, this article will not explore the several meanings that might attach to the word.⁴¹ For now, in this part of the article, it will be sufficient to list and categorize the various reliance-based transaction types that are, in fact, set forth in the Restatement. The "theory," if any, can wait.

B. THE RELIANCE INTEREST AND THREE KINDS OF RELIANCE

The reliance *interest*, has already been described.⁴² The reliance interest, conceived of as a reason why a promisee might want to urge a claim for enforcement, is a unitary interest. The original Restatement contained one reliance-based rule, section 90, and the drafters of the rule seemed to have contemplated the one particular *kind* of reliance which is reliance in the absence of consideration.⁴³ In contrast, the Restatement (Second) contains at least

39. Section 90 of the Restatement, the fountainhead of promissory estoppel, assumes an understanding of the term "justice," since justice is an essential element to the recovery. "A promise which the promisor should reasonably expect to induce action or forbearance is binding if *injustice* can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as *justice* requires." RESTATEMENT SECOND, *supra* note 3, § 90 (emphasis added).

40. In this regard, we seem to have an affinity with the Athenians whom Socrates, perhaps ironically, characterized as differing markedly from the citizens of Thessaly in their lack of wisdom. Cf. Plato, MENO, in which, at the outset, Socrates compliments Meno on the fame for wisdom then possessed by the Thessalians, observes that any wisdom once possessed in Athens must have emigrated to Thessaly, and then states that:

I am certain that if you were to ask any Athenian whether virtue was natural or acquired, he would laugh in your face and say: 'Stranger, you have far too good an opinion of me, if you think that I can answer your question. For I literally do not know what virtue is, and much less whether it is acquired by teaching or not.'

Id.

Likewise, if any American lawyer were to be asked whether promissory estoppel promotes justice, and, if so, how, he or she would first have to consider whether they know what justice is, much less whether it is promoted by promissory estoppel or not.

41. Cf. *infra* note 50 and accompanying text (suggesting that justice may be related to fairness, to human happiness, and to following the law). See generally Aristotle, NICOMACHEAN ETHICS, Bk V (justice as the fair and the lawful); *Id.* Bk I, Bk V, Bk X (universal justice, and virtue in its entirety, as politically ordered activities directed towards human happiness).

42. See *supra* note 7 and accompanying text.

43. RESTATEMENT SECOND, *supra* note 3, § 90. To be sure, one of the categories of

seven additional sections containing reliance-based rules and at least two other sections setting forth doctrines that are closely related to the reliance based rules.⁴⁴ Though the reliance *interest* (considered as the promisee's, or society's, motive, reason, or desire that the promise be enforced) is the same throughout, it no longer serves to think exclusively of that one, single reliance interest, but it becomes helpful, from time to time, to distinguish several contexts, or *kinds* of reliance from the reliance interest itself. This means that there are several contexts, and several kinds of things that a promisee might do which create in that promisee a desire that the reliance interest be protected. Broadly speaking, there are three kinds of reliance contexts under one or another of which all of the reliance-based rules can be clustered: (1) reliance in the absence of consideration, (2) reliance in the absence of mutual assent, and (3) reliance in the absence of a required writing.

The several reliance-based rules can be conceived of as exceptions, or substitutes, for each of three presumptive rules of the restatement, two of which are substantive rules, and one of which is formal.⁴⁵ The reliance-based rules can, thus, be thought of in terms of transaction types that are outside of the presumptive rules but which, nonetheless, raise some claim for recovery which

cases relied upon by the drafters may have to do, as well, with reliance in the absence of a writing that satisfies the statute of frauds, and the examples given in illustration of section 90 of the original Restatement included one that has to do with reliance in the absence of acceptance. See *infra* notes 64-66 and accompanying text. However, the actual discussion and defense of the provision in front of the American Law Institute was put almost exclusively on the basis of cases (real and assumed) of reliance in the absence of consideration. *Id.*

44. RESTATEMENT SECOND, *supra* note 3. In addition to § 90, the Restatement (Second) contains these additional sections which set forth separate reliance-based rules: § 84(2)(c) (reliance upon a promise which takes the form of a waiver of conditions); § 87(2) (reliance on a promise which takes the form of an offer); § 88(c) (reliance on a promise which takes the form of a guaranty/suretyship arrangement); § 89(c) (reliance on a promise which modifies an executory contract — one of the 'preexisting legal duty' complex of problems); § 139 (reliance upon a promise which is within the statute of frauds, but is not embodied in a writing sufficient to satisfy the statute); § 273(1) (reliance on a promise which takes the form of a discharge of a duty — including discharges by substituted agreement, accord, release, covenant not to sue, and the like); and § 332(4) (reliance on a promise which takes the form of a gratuitous assignment of contract rights).

Among the sections which set forth related doctrines are: § 34(3) (reliance on a promise which, having originally been too indefinite to enforce, becomes sufficiently definite by virtue of performance); § 45(1) (a rule approaching reliance on a promise which takes the form of an offer that must be accepted by performance — where the reliance consists in beginning performance). See also, *id.* § 153 comment (d) (suggesting that reliance on a promise which is unconscionable, because mistaken within the meaning of § 153(a), may be a basis for enforcement) and § 158(2) (related provision, concerning relief in the case of mistaken promises).

45. The Restatement (Second) proceeds generally on the basis that consideration and mutual assent are substantive rules. See *supra* note 38 and accompanying text (consideration and assent); *infra* note 102 and accompanying text (consideration).

at least one court has answered (and so must be accounted for in the Restatement's formulation), and which recur with such regularity as to justify separate treatment. Those transaction types, in turn, can be categorized in terms of the substantive or formal rule whose observance would otherwise be required for the enforceability of the promise in question.

Consideration and mutual assent, the two most general substantive rules set forth in the Restatement are both contained in the section which provides that "the formation of a contract requires a *bargain* in which there is a manifestation of mutual *assent* to the exchange and a *consideration*."⁴⁶ The most pervasive formality is that which requires certain promises to be in writing.⁴⁷ Thus, if B makes a promise to A which is part of a transaction in which there is consideration for B's promise, in which A and B manifest mutual assent (typically by way of an offer and acceptance),⁴⁸ and in which, if the promise is within the statute of frauds, the statute is satisfied, then B's promise is a contract. As such, B's promise is binding upon him, and A may enforce it even if she has not relied upon it (and especially without regard to whether she has relied upon it — which is one of the principal points of contract law).⁴⁹

However, since A and B are human beings, and the law is a human creation, it could be guessed that A and B can so contrive their affairs as to fail to meet any, all, or some combination of the requirements otherwise necessary to make B's promise to A enforceable; and it could be imagined that the law, as it attempts to make people happy,⁵⁰ would find some means of enforcing at

46. RESTATEMENT SECOND, *supra* note 3, § 17. Elaborations of consideration and of mutual assent occupy some 60 additional sections in the Restatement (Second) (assent: §§ 18 to 70, and consideration: §§ 71 to 81).

47. The usage that will be followed in this article is as follows: If a promise, otherwise enforceable, must be in writing in order to be enforced, it is said to be a promise "within" the statute of frauds; if a promise is within the statute of frauds and is expressed in a sufficient writing, the statute of frauds is said to be "satisfied." See E. FARNSWORTH, CONTRACTS 373 (1982).

48. RESTATEMENT SECOND, *supra* note 3, §§ 18, 22.

49. A is awarded damages for B's breach, even if B breaches immediately and prior to any reliance by A, and both A and B can know this prospectively. Further, the damages are calculated against her expectation interest, which is, in the usual case, a more generous recovery than an award that recompenses only to the extent of reliance. See *supra* note 7.

50. Cf. A. CORBIN, CORBIN ON CONTRACTS § 1 (1963) ("The underlying purpose of law and government is human happiness") and *e.g.*, T. Aquinas, SUMMA THEOLOGICA, Part I of Second Part, Q. 90, Art. 2, Ans. ("the last end of human life is happiness. Consequently the law must regard principally the relationship to happiness.") citing ARISTOTLE, ETHICS, Bk V., Ch 1, 1129b17). Of course Aquinas follows Aristotle in conceiving of human happiness as being both deontological (obligatory and categorical) and teleological (directed towards an end and, thus, 'utilitarian'), while Corbin goes on to equate human happiness with mere contentment, and supposes that contentment can be brought about by the "satisfaction of

least some of the promises made in at least some of the failed transactions between all of the A's and B's of this world. Hence, if B makes a promise to A in which there is no consideration for B's promise, or in which A or B do not manifest mutual assent (either because A never accepts, or because B never actually gets around to making an offer which A could accept; or because the promise that B makes, even if offered and accepted, is not sufficiently definite enough to be intelligible), or in which, the promise being within the statute of frauds, B never executes a writing sufficient to satisfy the statute of frauds — then, in each event there is a transaction involving a promise (B's promise to A) which is, presumptively, unenforceable by A against B. Should A rely upon any such promise, A will certainly stand to risk the loss of all of the expenses incurred by her which did not confer any benefit upon B.⁵¹

And so it is that A might have relied upon a promise (1) presumptively unenforceable because of the absence of consideration, or (2) presumptively unenforceable because of the absence of assent, or (3) presumptively unenforceable because of the absence of formality (failure to satisfy the statute of frauds). Each of these three possibilities frames a set of transaction types that may be

human desires to the highest practicable degree," CORBIN, *op. cit.*, but at least there is nominal agreement that "happiness" (even though differently conceived) is the end or purpose of law. Thus, the only remaining step is to determine what human happiness is (not a difficult task, but one which is beyond the scope of this article).

51. As to those expenses suffered by A and which *do* confer a benefit upon B, there is always the likelihood of a restitutionary recovery in favor of A, to the extent of the reasonable value of the benefit rendered. See *supra* note 7 and accompanying text. However, this discussion is concerned with those expenses which are a loss to A and which, being no gain to B, are expenses which A stands to forfeit.

Using the same hypothetical facts set forth in note 7, *supra*, and on the further hypothesis that there is, for whatever reason, no presumptive contract, the stakes are these:

In example (b) in note 7, A has purchased paint which provides no benefit to B. A stands to lose \$20. A does not have a claim against B in restitution (no benefit). A does not have a claim against B under presumptive rules of contract law (per hypothesis).

In example (c) in note 7, A has purchased paint, and applied half of it. A stands to lose so much of A's expenses as provided no benefit to B. A does have a claim against B in restitution (to the extent of the benefit, but probably less than the full extent of A's costs and expenses). A does not have a claim against B under presumptive rules of contract law (again, per hypothesis).

In either event supposed, and assuming that A and B have so ordered their affairs as to be without a contract under presumptive rules of contract law, A has incurred a loss greater than can be recompensed by principles of restitution. The question is: will there be a recovery because of these losses suffered in reliance upon a promise not otherwise enforceable? If so, the next question is: will the recovery be to the full extent of the promise? or will the recovery be diminished? (If the recovery be to the full extent of the promise, A would recover \$30 in example (b) and \$65 in example (c); but if the recovery be diminished, A would recover only to the extent of the reliance interest which impelled us to fashion a recovery in the first place, so that A would recover \$20 in example (b) and \$55 in example (c) — it is for the sake of approving this lower recovery that the additional sentence was appended to section 90 in the 1981 version of the Restatement).

separately considered, and to which a separate response may be required.

C. FIVE RESPONSES TO THE RELIANCE INTEREST

Five main responses to the reliance interest, as exemplified in any of the three kinds of reliance, are possible. These responses are as follows: (1) *all* relying promisees lose, in a direct reinforcement of the presumptive rule (this response will be referred to as "either/or"),⁵² (2) *some* relying promisees win, but only if it is possible to recharacterize the facts so that they fit within the presumptive rule (this response will be referred to as "recharacterization"),⁵³ (3) *some* relying promisees win, but only if it is possible to reanalyze the law so that it embraces the case within the presumptive rules ("reanalysis"),⁵⁴ (4) *some* relying promisees win, but only if they come within a reliance-based rule which is an alternative to the presumptive rule ("promissory estoppel"),⁵⁵ and (5) *all* promisees win, whether they have relied or not, in a direct overthrow of the presumptive rule ("overthrow").⁵⁶ While the first and last are mutually exclusive, representing terminus points of analysis, there are interesting possible coexistences among the various intermediate responses. The coex-

52. Either, that is, the presumptive rule is met, or it is not. If not, then no recovery. *See, e.g., James Baird Co. v. Gimbel Bros., Inc.*, 64 F.2d 344 (2d Cir. 1933) (Judge Learned Hand observed that the promisees had 'a ready escape from their difficulty' by insisting upon a contract prior to relying upon the promise, and stated that 'in commercial transactions it does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves.')

53. This refers to recharacterization of the facts. *See, e.g., Allegheny College v. Nat'l Chautauqua County Bank of Jamestown*, 159 N.E. 173 (N.Y. 1927) (though the facts might have been supposed to suggest a gift, Justice Cardozo was able to recharacterize them to suggest a bargain, in addition to approving promissory estoppel by way of something like dicta).

54. This refers to reanalysis of the law. *See, e.g.,* the orthodox solution to the Brooklyn Bridge hypothetical, discussed *infra* at notes 272-274 and accompanying text.

55. This desynonymization of the responses to the reliance interest, only one of which is promissory estoppel, avoids the potential for confusion when recharacterization, reanalysis and promissory estoppel are used interchangeably. The possibilities for confusion are multiplied when the reliance interest and the several different kinds of reliance are also used interchangeably (*see* text at notes 42-51, *supra*). Certainly I cannot compel usage, but I am advising the reader my analysis distinguishes among (a) the one reliance interest, (b) the three kinds of reliance, (c) all of the non-promissory estoppel responses to any of the kinds of reliance, and (d) promissory estoppel. It will become apparent, further, that there are as many different promissory estoppels as there are reliance-based alternatives to the presumptive rules. That is, if there is a reliance-based recovery available to those who rely upon a promise (in the form of an offer) prior to accepting it, that is one kind of promissory estoppel; if there is a reliance-based recovery available to those who rely upon a promise (otherwise enforceable) in the absence of a required writing, that is another kind of promissory estoppel; and so on.

56. This refers to the overthrow of the presumptive rule itself. *See, e.g., U.C.C. § 2-209* (1988) (an "agreement modifying a contract within this Article needs no consideration to be binding").

istence of more than one response in a single jurisdiction is one of the many reasons why it is difficult enough to account for the cases, let alone propose a theory that embraces them all.⁵⁷

These five responses, ordered somewhat differently, can be classed as those which amount to (1) a rejection of the reliance interest altogether (the "either/or" response), or (2) a means of indirectly protecting the reliance interest, but doing so without any necessary invocation of promissory estoppel itself as a separate or independent doctrine (the "recharacterization," "reanalysis," and "overthrow" responses, any of which can be considered as responses to the reliance interest *outside of promissory estoppel*), or (3) a means of protecting the reliance interest by direct application of promissory estoppel.

In the analysis of cases in this article, discussion will be organized by reference to the kind of reliance involved, and by the various responses to that kind of reliance. There will be a separate discussion of those cases that dispose of the reliance problems presented, but outside of promissory estoppel. Those cases that address the reliance problems presented, using a promissory estoppel rationale, will be distinguished from the former cases. Cases outside of promissory estoppel can be difficult to spot, and almost as difficult to analyze. They are either precursors to promissory estoppel (for example, a case that purports to recharacterize the facts may, to the extent the recharacterization seems too strained for credulity, be subsequently read as one that actually pointed the way to promissory estoppel), or not at all (that is, for example, a case which reanalyzes the law might actually be a fresh way of looking at the presumptive rules and have little or nothing to do with promissory estoppel).⁵⁸ Finally, the overthrow cases, if not based upon statute, seem to point to some new direction, perhaps not clearly seen, and, usually not fully articulated, which present yet another obstacle in the way of analysis.

57. See *infra* notes 58-71 and accompanying text for the difficulties of accounting for the cases. The more significant North Dakota formulations are tabulated in Charts 1, 2 and 3 at A-1 to A-6.

58. For purposes of discussion, and without yet being concerned about drawing any line, it will be assumed that there is some point at which recharacterization is an honest reading of the facts, another point at which recharacterization is a doubtful reading of the facts over which reasonable persons may disagree, and yet another point at which recharacterization is a deliberate distortion of the facts in order to skew the result. The cases which approach or exceed the last point will be called "borderline" cases of recharacterization. Further, it will be assumed that there is a set of reanalysis cases which might be called "borderline" cases of reanalysis. At or near the borderline is the shadowy place where a non-promissory estoppel's jurisdiction's process of becoming a promissory estoppel jurisdiction often takes place, and "borderline" is a serviceable word which will be used to refer to that domain.

D. THE MANY KINDS OF PROMISSORY ESTOPPEL

As indicated, there are five main responses to any of the kinds of reliance, only one of which is promissory estoppel. The development of promissory estoppel began with certain precursor cases (all of which were generally understood as being confined to reliance in the absence of consideration, and many of which involved borderline recharacterizations) from which the drafters of the Restatement deduced or rediscovered⁵⁹ the principles included in section 90 of the original Restatement. The revised section 90 and the other reliance-based rules of the Restatement (Second) were the result of developments over the next fifty years.⁶⁰ As a result, in the mature stages of promissory estoppel there are many kinds of promissory estoppel. These several kinds can and ought to be distinguished for purposes of discussion.

Precursors to Section 90. It is commonly taught that, "even during the nineteenth century, reliance on a gratuitous promise came to be recognized as a basis for recovery in a few categories of cases."⁶¹ These categories are: gratuitous promises made within the family, promises to make gifts to charitable institutions, gratuitous promises made by a bailee in possession, and promises relating to the conveyance of land which were followed by entry and improvements upon the land.⁶² It is commonly supposed that there were too many instances in which such promises had been enforced, and that those instances were too forcibly urged upon the reporter of the original restatement, for them to be ignored.⁶³ Hence, section 90 of the original restatement was created. It should be assumed, then, that section 90 of the original Restatement was meant to account for those four categories of cases which had spawned it.

In addition, it was clear that many promissory modifications of contractual duties, waivers of conditions, and discharges of con-

59. See generally E. FARNSWORTH, CONTRACTS § 2.19 (1982) and *cf. id.* at n. 5 (reliance rediscovered in the twentieth century, both as a basis for enforcing promises and as an historical influence in the development of the doctrine of consideration, after having "played no important role for some four centuries").

60. See *supra* notes 3 and 44 and accompanying text.

61. E. FARNSWORTH, CONTRACTS § 2.19 at 90 (1982).

62. *Id.*, at 90-92 (reviewing the four categories). And see *infra* notes 64-66 and accompanying text (discussing these four, and two other, categories).

63. See generally G. GILMORE, THE DEATH OF CONTRACT (1974). But *cf.* Professor Williston's remarks made to the ALI during the debate on what was to become § 90 *infra* notes 64-66 (by which time, at least, Williston appears to be advancing, rather than resisting, the cause of § 90). Professor Linzer has noted this counterpoint to the common perception of Professor Williston's role in the development of § 90. See P. LINZER, A CONTRACTS ANTHOLOGY 221-22 (1989).

tractual duties were enforced in the absence of consideration. Indeed, if it should be supposed that the core cases that spawned section 90 can be categorized, then to the four categories we have already seen must be added a fifth category so that the basic list reads as follows: (1) gratuitous promises made within the family, (2) promises to make gifts to charitable institutions, (3) gratuitous promises made by a bailee in possession, (4) gratuitous promises relating to the conveyance of land which were followed by entry and improvements upon the land, and (5) promises of modification, waiver, and discharge. The fifth category rounds out, and completes, the enumeration of the categories of cases in which promissory estoppel was conventionally applied in the absence of consideration, and prior to the original restatement.⁶⁴

Of course, section 90 of the Restatement was not explicitly limited to those five classes of cases, but was cast in terms of general applicability.⁶⁵ In addition, the illustrations to the original section 90 were not put in terms of those five classes of cases.⁶⁶ As

64. Categories 1 through 4 are explicitly enumerated by Professor Farnsworth, one of the reporters of the second Restatement, in his 1982 treatise. See *supra* note 61.

In 1926, during the debate on section 90 (then numbered § 88), Professor Williston, the reporter of the original restatement, gave examples of all five categories, as well as another category, promises to make marriage settlements. The famous Johnnyandthecar hypothetical, whereby, as Williston puts it, "Johnny says, 'I want to buy a Buick car.' Uncle says, 'Well, I will give you \$1,000'" illustrates category one (the gratuitous family promise). See, *Debate on Section 88 (Later Section 90) of the Restatement of Contracts*, 4 AMERICAN LAW INSTITUTE PROCEEDINGS Appendix 85-114 (1926), reprinted in P. LINZER, A CONTRACTS ANTHOLOGY 223 *passim* (1989) [hereinafter *Debate on Section 90*].

Professor Williston referred also to "the charitable subscription cases" as ones in which "[t]here is no bargain, but there is recovery." *Id.* at 229 (category two as used in this article). He referred also to the class of cases illustrated by one in which a "promise was made by a gratuitous bailee to take out insurance on the bailed property" and where the promise was enforced though there was no consideration. *Id.* (category three as used in this article). Williston's further adventures of Johnny included the Johnny-and-Blackacre hypothetical, whereby a "promisor promises Blackacre to Johnny and Johnny goes and builds a house on it." *Id.* at 227-28 (a situation which illustrates our category four).

With respect to our fifth category (promises concerning waivers and the like), Professor Williston said "A lot of cases that go under the name of waiver, are really cases of promises falling within [the description of the rule of section 90]. They are promises to perform in spite of some nonperformance of a condition or requirement of the contract. Relying on a promise, the condition is not complied with, and yet the promisee recovers." *Id.* at 229. And, reported Williston, "[p]romises to make marriage settlements form another class" in which there is no bargain, just a promise, but a recovery nonetheless. *Id.*

65. Professor Williston explained: "You can enumerate all the classes of cases which I have enumerated and have a number of special instances. The first thing that seemed possible was to take these different sets of cases and say, simply grouping them together, that [they] were exceptions to the rule and that a contract required consideration at the time [the promise was made]." *Debate on Section 90, supra* note 64, at 229-30. But, he said, the reporter and his advisors decided against that approach, concluding, instead, that "[i]f the law is to be simplified and clarified, it can be done only by general rules, not by stating empirically a succession of specific cases without any binding thread of principle." *Id.* at 230.

66. Illustration 1 to section 90 of the original Restatement involved a promise not to foreclose a mortgage for a specified time, following which the promisee made improvements on the land. RESTATEMENT, *supra* note 1, § 90. Illustration 2 involved an

a result, the original section 90 became, itself, an engine for the development of additional section 90 cases.

And so the story is set in motion, with a unity of theme (reliance on a promise), and a forward thrust. The actual cases, the five categories which were the precursors to section 90 were, first, translated by the drafters into the general language of section 90. Next, section 90 was, over the years, applied in contexts far removed from the decided cases, as if it, rather than they, were the law.⁶⁷ As a result, and as derived from that kind of promissory

employer's promise to pay a lifetime annuity to an employee who resigns, "in the meantime becoming disqualified from again obtaining good employment." *Id.* Illustration 3 involved a promise to pay a sum of money if "B will go to college and complete his course," which the promisor revoked after B had gone to college and "nearly completed his course." *Id.* Each of the promises in those illustrations is said to be binding. *Id.*

Illustration 4 involved a promise to pay \$5,000 "knowing that B desires that sum for the purchase of Blackacre." *Id.* "Induced thereby," B secures a gratuitous option to purchase Blackacre. The promise to pay \$5,000 to B is said to be not binding. *Id.*

67. It is hard to resist the conclusion that the pre-Restatement cases rested upon earlier cases (even when going beyond them), but that the post-Restatement cases rest upon the Restatement, rather than upon any of the cases which spawned it. Compare *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898) (enforcing an unbargained-for family promise to make a gift) (analyzing the issues in the following style):

The instrument in suit was nothing more than a promise to make a gift in the future. Ordinarily, such promises are not enforceable. But *it has often been held* that an action on a note given to a church, college, or other institution, upon the faith of which money has been expended or obligations incurred, could not be successfully defended on the ground of a want of consideration. *In this class of cases* the decision is generally put on the ground that the expenditure of money or the assumption of liability by the donee on the faith of the promise constitutes a valuable and sufficient consideration. It seems to us that the true reason is the preclusion of the defendant, under the doctrine of estoppel, to deny the consideration.

Id. at 366 (emphasis added) with *Drennan v. Star Paving Co.*, 333 P.2d 757 (Cal. 1958) (enforcing a subcontractor's offer to do paving work, even though the sub had revoked it prior to the general's acceptance) (analyzing the issues in the following style):

Section 90 of the Restatement of Contracts states [quoting section 90] *This rule applies* in this state. It is true that in the case of unilateral contracts *the Restatement finds* consideration for the implied subsidiary promise [to leave the offer open for a reasonable period of time in which the offeree might accept it] in the part performance of the bargained-for exchange, but its reference to section 90 makes clear that consideration for such a promise is not always necessary. The very purpose of section 90 is to make a promise binding even though there was no consideration.

Id. at 760-61 (emphasis added).

This is illustrative of the different attitudes of those who were responsible for drafting section 90 of the original Restatement. See generally *supra* notes 64-66 and accompanying text (debates on the original section 90). Indeed, Professor Williston's attitude was a careful one. During the debate on section 90 he said:

Now, there is *no* broad doctrine that wherever a man makes a promise, a gratuitous promise, and the other relies upon it, the promisee can recover on the promise, and *we do not dare* in Section [90] make any such broad statement that is going far beyond the law and *far beyond what we should dare to say*.

Debate on Section 90, supra note 64, at 226 (emphasis added). It is at least interesting that many of the courts that applied the original section 90 have seemed prepared to do precisely what Professor Williston did not dare to do. Of course, Professor Williston was only trying to state what the law was while modern judges, on the contrary, act as if they are free

estoppel which protects certain instances of reliance in the absence of consideration, there developed a kind of promissory estoppel that protects reliance generally in the absence of consideration, a kind of promissory estoppel that protects reliance in the absence of assent, and a kind of promissory estoppel that protects reliance in the absence of satisfaction of the statute of frauds.⁶⁸ This is the folklore of promissory estoppel.

The Many Kinds of Promissory Estoppel. As the scope of promissory estoppel grows, so does the difficulty of dealing with it as if it were a unitary concept (notice that "section 90" now covers not one, but three, of the presumptive rules of enforceability — consideration, assent, and satisfaction of the statute of frauds — and since each of those three rules may serve different ends or policies, so must the application of the promissory estoppel doctrine to each be appropriately adopted).⁶⁹ Indeed, even to distribute promissory estoppel among the three-fold reliance interests seems inadequate as soon as each of those interests is seen in its full dimensions.

To speak of reliance in the absence of consideration as if it were a unitary concept is to ignore the real difference between reliance based upon one of the enumerated, constrained classes of cases which are at the core of section 90, and all of the other — unrestricted, generalized — instances which are the synthetic progeny of section 90 as it metastasizes. Likewise, to speak of reliance in the absence of assent, simply, is to ignore the real difference between reliance based on a failure of assent caused by (a) failure of the promisee to accept an offer before relying upon it, (b) failure of negotiations between the parties, such that the "promisee" would appear to be relying upon a "promise" that no one ever made, or (c) failure of the promise to be sufficiently definite that it is possible of intelligible enforcement. These are circumstances so different from one another as to compel a different application of promissory estoppel notions to each. In a similar manner, there is more than one way to rely upon a promise against the statute of frauds.

to make it up as they go along and so may not even notice the constraints felt by Professor Williston.

68. Accordingly, by the time of the Restatement (Second), the number of reliance-based rules had multiplied so as to cover (at least) these categories. See *supra* note 44 and accompanying text.

69. Assuming, that is, that section 90 and its brood of offspring were never intended simply to set aside all of the presumptive rules indifferently, as if there were (for example) no better reason for requiring the promisor's assent than for requiring her signature on a written memorandum.

In the remainder of this article, keeping in mind not only the three kinds of reliance, but also their origin (as either one of the enumerated, constrained forms that preceded the original Restatement's formulation of section 90; or as one of the generalized, free forms that come after the first Restatement's formulation of section 90), the many kinds of promissory estoppel which have built up by accretion will be summarized as follows:

1. Reliance in the absence of consideration. . .
 - a) Family promises; charitable subscriptions; gratuitous bailments; promises concerning land followed by entry and valuable improvements; and marriage settlements (precursors to generalized § 90, and usually in the absence of an existing contractual relationship between the parties);
 - b) Modifications, Waivers and Discharges (precursors to generalized § 90, but against the background of an existing contractual relationship between the parties); and
 - c) Generalized section 90 promises (the original generalized § 90 and its progeny, severed from their more particular precursors).
2. Reliance in the Absence of Assent. . .
 - a) No acceptance — offeror wanted acceptance by performance, and the promisee relies by commencing (but not yet completing) the performance;
 - b) No acceptance — offeror wanted acceptance by promise, but the promisee relies by using the offer in some way short of giving the return promise requested; and
 - c) No assent; no promise (failed negotiations), or promise not sufficiently definite.
3. Reliance in the Absence of a Required Writing. . .
 - a) Statute of Frauds — reliance without a writing where the promisor promised one;
 - b) Statute of Frauds — reliance without a writing where the promisor promised none; and
 - c) Non-Statute of Frauds writings — reliance without a writing where the writing serves a non-statute of frauds purpose. The typical example is a writing that cures some other substantive defect, such as lack of consideration.

It should be noted that the several transaction types enumerated do not exhaust all of the possible bases for reliance-based recoveries.⁷⁰ They do, however, serve to illustrate my point that "promissory estoppel"⁷¹ is not a unitary concept; instead of signifying one thing, it might signify any of nine somewhat different things. These nine types also represent those that are most relevant to this article's discussion of the North Dakota case law as it has thus far developed.

E. GENERAL PROBLEMS OF PROMISSORY ESTOPPEL

Given the reliance interest, the different kinds of reliance, and the possibility of a recovery because of reliance, it is necessary for promisors (at least for those who care to plan the scope of their liability ahead of time) to know when, exactly, promissory estoppel is appropriate. Remembering that a promisee might try to protect

70. It is certainly possible to make the argument for a reliance-based recovery where there has been reliance upon a promise which has been rendered unenforceable because of a combination of force majeure and judicial dispensation, as in the case of promises discharged by supervening impracticability of performance or frustration of purpose. So also, there is an argument for a reliance-based recovery where the promise relied upon might otherwise be voidable for mistake. See RESTATEMENT SECOND, *supra* note 3, § 153 comment (d) (suggesting that reliance on a promise which is excusable, because mistaken within the meaning of § 153(a), may be a basis for enforcement). It is also possible to make such an argument even in the case of promises voidable because of infancy or other lack of capacity on the part of one of the parties, which lack of capacity was not reasonably apparent to the other. See *id.* § 14 comment (c) (discussing various approaches, including by way of estoppel, to an infant's misrepresentation of age and the other party's reasonable reliance upon it). Others have argued that there may be a promissory estoppel argument in the face of the parole evidence rule. See M. Metzger, *The Parole Evidence Rule: Promissory Estoppel's Next Conquest?*, 36 VAND. L. REV. 1383 (1983). It might also be argued that a promise, unenforceable because contrary to public policy as articulated by the legislature, might nonetheless be rendered enforceable by virtue of reliance. See *Dakota Bank & Trust Co. v. Funfar*, 443 N.W.2d 289, 293 (N.D. 1989) (rejecting such a reliance argument where it would have the effect of rendering the promisor liable for a deficiency after foreclosure in the face of specific statutes prohibiting deficiencies).

Although each of these cases presents room for comparison with the promissory estoppel transaction types discussed in this article, they also raise special problems beyond the scope of this article.

71. The term, said to have been coined by Williston (Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459 (1950), cited in E. FARNSWORTH, *CONTRACTS* 92 n. 23 (1982)), is at once misleading, imprecise, and inelegant, but hard to avoid. "Promissory estoppel" is inelegant because it signifies what? That A, having made a promise to B is estopped from denying that A made the promise? In almost every case of any real interest, A is, of course, fully prepared to admit that she made the promise. A's point is that the admitted promise is unenforceable. What then? Shall A be estopped from denying that there is no consideration, or no acceptance, or no writing? Perhaps. The term is imprecise for the same reasons. And it is misleading because it doubly oversimplifies: it oversimplifies once because it hints that all which is needed is a promise, followed by reliance (rather than the constellation of additional factors that might make reliance reasonably foreseeable, and that might make failure of enforcement unjust); and it oversimplifies a second time because it suggests that there is one, single problem (instead of at least nine different problems). And yet for all that, the term seems serviceable enough, provided it be treated with a healthy skepticism. See generally *Debate on Section 90*, *supra* note 64, at 224 (Professor Williston's confession that he uses the term himself in his treatise, although steadfastly keeping it out of the Restatement).

the reliance interest simply by forming a contract, and remembering that section 90 enforcement follows where there is both no presumptively binding promise, and also an injustice if the promise is treated as being not binding, it becomes necessary to identify the reasons why justice should require the enforcement of a promise which the law declares to be unenforceable.

Obvious answers, given in support of the promissory estoppel response,⁷² might well be that, (a) where the defect is lack of bargained-for consideration in the context of a family or an ongoing business relationship, society wants to teach or encourage persons not to bargain; or (b) where the defect is lack of bargain, because there is nothing, in fact, over which the parties could bargain (as in pure gratuities, or, perhaps, modifications or waivers of existing contracts), we are able to identify certain promises which, either because of necessity or otherwise, society wants to enforce. Likewise, where the defect is lack of acceptance, there should be, one would imagine, some reason why the promise might be enforced; where the defect is that the party to be bound has not agreed to be bound until negotiations are completed, and the other party nonetheless desires to bind the 'promisor,' there ought to be some reason before doing so. Where the defect is that, though the law requires a writing, the parties have acted without one, it must be fair to ask why, exactly, the law is prepared to enforce a promise without a writing.

There are, no doubt, reasons to enforce promises in the foregoing situations. The text of section 90 does not, however, state those reasons explicitly. The remainder of this article will explore the question whether the cases in an actual jurisdiction supply the explicit rationale that may be implicit in section 90. If not, and if section 90 is applied in a wooden manner, promissory estoppel could well be converted into a talismanic device that hinders, rather than advances the cause of justice. Hence, it seems, there is a need to articulate some reason for protecting the reliance interest.

Reliance in search of a reason can defy analysis.⁷³ When that

72. Answers just as obvious, but given in support of the non-promissory estoppel responses include these: justice never requires enforcement, or justice always requires enforcement. With obvious, and reasonable, answers on both sides, it becomes apparent that someone has to decide which to embrace and then needs to articulate a reason why. Only by so doing will there be the possibility of finding neutral principles of contract law against which men and women can plan their conduct in advance of judicial intervention.

73. Reliance in search of a reason, means the continuing effort to refute (or, if not to refute, to explain why the absence of a refutation makes no difference) the supposition that promissory estoppel has nothing to do with justice, or with anything else that can be

happens in respect of any question, it usually signifies that there is something wrong with the question — typically, that (1) some one or more of the terms lack definition, (2) are laced with ambiguity, (3) have been used in a metaphorical sense, or (4) are not far enough removed from first principles for there to be any argument or discussion.⁷⁴ All of these problems and their related amplifications attend to promissory estoppel, but, since this is not a theoretical paper, the actual cases in a particular jurisdiction will be examined against the model of the Restatement and the well known hypotheticals or leading cases. After doing so, the question of what, exactly, the reason(s) might be for the promissory estoppel rules can be addressed with a common basis of understanding, both of the cases that have actually presented themselves in North Dakota, and of the sort of cases that have formed the basis of the Restatement's analysis. Thus a basis will be created to suggest how to formulate a set of promissory estoppel rules that are practical for this state and which solve the problems which have arisen here. Those suggestions will appear in a companion piece to this article, to be published separately.

III. THE RESTATEMENT COMPARED TO THE NORTH DAKOTA CASES

In the following sections, the most important North Dakota cases which present issues relating to a reliance-based recovery will be discussed. The three main categories are: reliance in the absence of consideration; reliance in the absence of assent; and reliance in the absence of a required writing.⁷⁵

In each category, and in most of the subcategories, it may be

articulated. I also mean the effort to deal with either reliance or promissory estoppel when either notion is put in the form of a question that looks for affirmation or denial. By way of example: Is it good to protect the reliance interest? Has promissory estoppel been properly applied? Do you approve of promissory estoppel? Don't you agree that promissory estoppel lies at the heart of justice? The examples could be drawn out at greater length. If one elects to answer any of these questions, or if one elects not to, and, in either case, seeks to explain the reason behind the answer and finds it difficult to do so, then curiosity alone, if not the need to have something to advise a client, might impel someone on a search for the reason why this is so.

74. Aristotle, TOPICS, Bk. VIII, Chap. 3, 158a31-1589a14. The questions in note 73, *supra*, contain among them samples of at least one of each of the difficulties. On the other hand, the difficulty of analysis could be caused, not by error, but by the nonexistence, self-contradiction, or impossibility of the things being talked about, *cf.* T. Hobbes, LEVIATHAN, Part One, ch. 5, (giving examples of "insignificant speech"), or by the indeterminacy of the matter, *cf.* Neitzche, BEYOND GOOD AND EVIL (suggesting that the desire for truth is the last value to fall in the revaluation of all values — "it is not improbable that I am not un-mistaken, but what of that?"). This article will assume that the difficulties lie where Aristotle places them, and will explore what follows from that supposition.

75. For an overview of these categories and the subcategories under each, see Chart 1 in the appendix of this article.

helpful to understand certain assumptions concerning the presumptive rules and promissory estoppel that seem implicit in the Restatement. Accordingly, the presumptive rule (as embodied in the Restatement) which underlies the particular kind of promissory estoppel in issue will be introduced. Further, examples from the Restatement or well known cases or hypotheticals will be introduced to illustrate the situations that test the presumptive rules. These cases (sometimes referred to herein as "school cases" because they are so commonly included in current casebooks) have an importance to the folklore of promissory estoppel precisely because many law students (and, hence, lawyers) take them as having established the limits of promissory estoppel. There is a certain predisposition to see the actual cases decided in any one jurisdiction against the expectations raised by these school cases. Therefore, it is crucial to include an explicit reference to them as an aid to understanding the expectations raised by promissory estoppel.⁷⁶

A. RELIANCE IN THE ABSENCE OF CONSIDERATION

General. There are three subcategories of reliance in the absence of consideration: (1) generalized reliance, of the sort recognized by the general rule of section 90 of the Restatement, (2) reliance upon promises enumerated as family promises, charitable subscriptions, gratuitous bailments, land promises followed by entry and improvement, and marriage settlements (precursors to the generalized section 90), and (3) reliance upon promises enumerated as modifications of duties, waivers of conditions, and discharges of duties (precursors to the generalized section 90, but against the background of existing contractual relationships).⁷⁷

There is only one case in which the North Dakota Supreme Court has awarded a recovery because of reliance upon a promise in any of these categories, and that case involved a modification of duties in the face of a statute which permitted a modification with-

76. The following sections account for many cases, divided into categories and subcategories, accompanied by commentary and examples. In addition to the overview already given *supra* at notes 67-71 and accompanying text, the reader may also find it helpful to refer to the appendix which follows this article and which includes three tables.

Chart 1 presents the cases by result (recovery/no recovery). Chart 2 presents those cases which contain the "standard" formulation of the North Dakota version of the elements of promissory estoppel. Chart 3 presents cases containing "non-standard" North Dakota formulations, glosses and other apparatus. Each of the cases included in the tables is discussed in the following sections.

77. See *generally supra* notes 64-65 and accompanying text. See *also* text preceding note 70.

out consideration if there were a writing or if the party relying upon the modification has "incurred a detriment [which he was] not obligated by the original contract to incur."⁷⁸ In several other cases, the North Dakota Supreme Court has denied recovery while assuming that a reliance-based rule might apply.⁷⁹

Before discussing reliance in the absence of consideration, it would be instructive to review the implications of the Restatement's position that consideration must be bargained.

Formulation of the Rule (Consideration). The Restatement provides, subject to special rules, including the rule set forth in section 90, that the formation of a contract requires a consideration, that consideration is a bargain, and a bargain consists of an exchange.⁸⁰ Since those transaction types in which there is reliance on a promise in the absence of consideration are to be discussed next, instances at the boundaries of bargained for consideration will be discussed first.

Observations and School Cases (Consideration). In order to make the discussion more concrete, two famous hypotheticals and two well known cases will be used as illustrations. The hypotheticals are Williston's "the benevolent man and the tramp,"⁸¹ and Farnsworth's "the estranged father and daughter."⁸² The cases are those of Antillico Kirksey⁸³ and Anna Feinberg.⁸⁴

Williston put his problem this way:

If a benevolent man says to a tramp, — 'if you go around the corner to the clothing shop there, you may purchase an overcoat on my credit,' no reasonable person would understand that the short walk was requested as consideration for the promise, but that in the event of the tramp going to the shop, the promisor would make him a gift. Yet the walk to the shop is in its nature *capable* of being consideration. It is a legal detriment to the tramp to take the walk, and the only reason why the walk is not consideration is because on a reasonable interpretation, it must be held that the walk was not requested as the price of

78. *Mitchell v. Barnes*, 354 N.W.2d 680, 682 (1984). Because there was, in fact, no written modification, the case also stands as a reliance-based recovery in the absence of a required writing, and is discussed in a later section of this article as well.

79. See Chart 1 of Appendix.

80. RESTATEMENT SECOND, *supra* note 3, §§ 17(1), 17(2), 71(1), 71(2).

81. 1 S. WILLISTON, CONTRACTS § 112, at 445-46 (3rd ed. 1957).

82. E. FARNSWORTH, CONTRACTS § 2.9 at 62 n. 7 (1982).

83. *Kirksey v. Kirksey*, 8 Ala. 131 (1845).

84. *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163 (Mo. App. 1959).

the promise, but was merely a condition of a gratuitous promise⁸⁵ (emphasis added).

As a matter of reasonable interpretation of intention, this is not a bargain, but only a gift put in the form of a conditional promise, and the promise is not enforceable. Farnsworth, after reviewing the case of Williston's tramp, put this contrasting case:

Compare this promise by a father to his daughter: 'If you will meet me at Tiffany's next Monday at noon, I will buy you the emerald ring advertised in this week's New Yorker.' If one supposes that the father and daughter are estranged and that the daughter had refused to see the father, it is possible to make the case for bargain.⁸⁶

Here is, quite possibly, a bargain. Perhaps the price is a tad steep, but that is another difficulty, and quite possibly irrelevant to enforcement.

Between the poles of the tramp's walk for the coat and the daughter's meeting for the diamond, consider the case of Antillico Kirksey, who received this letter from her brother-in-law:

Dear Sister Antillico — Much to my mortification, I heard that brother Henry was dead, and one of his children. I know that your situation is one of grief and difficulty. You had a bad chance before, but a great deal worse now. If you will come down and see me, I will let you have a place to raise your family, and I have more open land than I can tend; and on account of your situation, and that of your family, I feel like I want you and the children to do well.⁸⁷

She abandoned her homestead, moved the sixty or seventy miles to her brother-in-law's residence, and lived there for two years "in comfortable houses" with land to cultivate; but then the brother in law put her in a house "not comfortable, in the woods," and finally required her to leave.⁸⁸ Although a judgment of \$200 had entered for Ms. Kirksey upon a jury verdict, the Alabama Supreme Court reversed, on the grounds that "the promise on the part of [Mr. Kirksey] was a mere gratuity, and that an action will not lie for its breach."⁸⁹

85. 1 S. WILLISTON, CONTRACTS § 112, at 44546 (3rd ed.1957).

86. E. FARNSWORTH, CONTRACTS § 2.9 at 62 n. 7 (1982).

87. Kirksey v. Kirksey, 8 Ala. 131 (1845).

88. *Id.*

89. *Id.* Despite (or, perhaps because of) the fact that the opinion of the court was

In this light, consider also the case of Anna Feinberg, who had begun working for a pharmaceutical company in 1910, when she was 17 years old.⁹⁰ Thirty-seven years later, the company resolved to pay her an annuity for life, to commence whenever she might chose to retire.⁹¹ A resolution adopted by the board of directors expressed these sentiments:

. . . Mrs. Anna Sacks Feinberg, has given the corporation many years of long and faithful service . . . all of the officers and directors sincerely hoped and desired that Mrs. Feinberg would continue in her present position for as long as she felt able, nevertheless, in view of the length of service which she has contributed provision should be made to afford her retirement privileges and benefits which should become a firm obligation of the corporation to be available to her whenever she should see fit to retire from active duty, however many years in the future such retirement may become effective . . . Mrs. Feinberg would be given the privilege of retiring from active duty at any time she may see fit so to do . . . with the distinct understanding that the retirement plan is being adopted at the present time in order to afford Mrs. Feinberg security for the future and in the hope that her active services will continue . . . for many years to come.⁹²

There had, however, been no bargaining over the resolution.⁹³ Mrs. Feinberg later testified that she had had no prior information that any pension plan was contemplated, that it came as a surprise to her, and that she would have continued working for the company with or without any pension plan.⁹⁴ She had never threatened to leave, nor had she ever contemplated leaving the employ of the company.⁹⁵ The court found that she had neither promised to work for any particular period of time after the resolution, nor had the company asked her to stay and work for any particular period of time after the resolution, but that she was, and

delivered by a judge who said that he disagreed (or, that it was his "inclination" to disagree) with the result reached, the opinion adds little beyond the grounds quoted in the text.

90. Feinberg v. Pfeiffer Co., 322 S.W.2d 163, 164 (Mo. App. 1959).

91. *Id.* at 164-65.

92. *Id.*

93. *Id.* at 16465, 167. The testimony made it clear that there was nothing exchanged by Mrs. Feinberg in order to induce the company's promise to her, nor was the company seeking anything from Mrs. Feinberg.

94. *Id.* at 165.

95. *Id.*

always remained, an employee at will.⁹⁶ She did, in fact, work for another 18 months and then she retired.⁹⁷ The company paid the pension for almost seven years, but then, under new management, and on the advice of a new accounting firm which questioned the validity of the payments, it decided to reduce the amount, and a lawsuit resulted.⁹⁸ The court concluded that there was no bargained for consideration on the ground that the company had asked nothing of Mrs. Feinberg in exchange for its promise to pay the pension.⁹⁹

These cases illustrate two propositions concerning bargained for consideration. In the first place, one of its intended effects is to render gift promises unenforceable.¹⁰⁰ In the second place, the difference between a gift and a bargain is more than one of form,¹⁰¹ but is one of substance,¹⁰² and the substance is determined by evident intention. In addition, those cases suggest the available leeway within which consideration *might* be found in a doubtful situation.¹⁰³ For our purposes, however, it is time to

96. *Id.*

97. *Id.*

98. *Id.* Although not explicitly stated in the opinion, it is not unlikely that the accountant raised the issue that gratuitous payments to Mrs. Feinberg might constitute a waste of corporate assets.

99. *Id.* at 167. It should be noted, however, that the court did enforce the promise. But it did so on the grounds of section 90 reliance in the absence of consideration.

100. This is a consequence of affirming that consideration is bargain, and bargain is an exchange. If a gift is that which is given freely and is not exchanged for anything, then a gift is no bargain. Therefore, gift promises will be lacking consideration and will be unenforceable. Since this result concerning gift promises is a consequence of the premises deliberately adopted concerning consideration, it must be presumed that the unenforceability of gift promises is an intended effect of the doctrine of bargained for consideration.

101. Bargain takes the form of condition, that is, "I will pay you \$100 if you will paint my house." The problem is that many gifts can take the same form, that is "I will pay you \$100 if you will reach out your hand so as to take the money as I give it to you." In the second case, it is possible that I might have bargained for your holding out your hand (just as Williston's benevolent man could possibly have been bargaining for the tramp's taking a walk), but highly unlikely. So, I suppose, her brother-in-law could have been bargaining with sister Antillico, but the court found otherwise.

102. The Restatement itself shows signs of a struggle over this. But by the time of the Restatement (Second), the drafters endorsed the notion that consideration is a substantial requirement, rather than a formal one. Compare RESTATEMENT SECOND, *supra* note 3, § 71, illustration 4 (A desires to make a binding promise to give \$1,000 to his son. Being advised that a gratuitous promise is not binding, A writes out a false recital of consideration — not binding) and *Id.* § 71, illustration 5 (A desires to make a binding promise to give \$1,000 to his son. Being advised that a gratuitous promise is not binding, A offers to purchase for \$1,000 from his son, as a pretense and with both father and son knowing it to be a pretense, a book worth less than \$1.00 — not binding) with RESTATEMENT, *supra* note 1, § 84, illustration 1 (A wishes to make a binding promise to convey Blackacre to his son. Being advised that a gratuitous promise is not binding, the father writes an offer to sell Blackacre for \$1.00, which his son accepts — A's promise is binding).

103. True enough, the promises made to Ms. Kirksey and to Mrs. Feinberg were held to be without consideration, but it is not beyond the realm of imagination to suppose that a different interpretation of the exact facts of those cases could be made such as to support a

assume that there is no bargain, and address those transaction types, such as the ones just illustrated, in which this is so.

1. *Generalized Section 90 Promises*

Generalized Promissory Estoppel in the Restatement. Although section 90 was justified, and was originally justifiable only, on the basis of certain classes of cases in which there was no consideration: (1) gratuitous promises made within the family, (2) promises to make gifts to charitable institutions, (3) gratuitous promises made by a bailee in possession, (4) promises relating to the conveyance of land which were followed by entry and improvements upon the land, and (5) promises of modification, waiver, and discharge, the formulation of section 90 was not so limited.¹⁰⁴ Thus, under section 90, there *might* be recovery for the hypothetical tramp, and for Mrs. Feinberg¹⁰⁵ (neither of whom are within any of the classes alluded to), as well as for the hypothetical daughter, assuming she hasn't already recovered on the basis of consideration, and for sister Antillico (both of whom are within the class of gratuitous promises made within the family).¹⁰⁶

Section 90 of the original Restatement was positioned, and

finding of consideration, and it is even more clear that it would take only the slightest additional facts to support a solid finding of consideration.

104. See *supra* notes 6167 and accompanying text. While it was not limited to any particularly enumerated class of cases, it was still limited by its own terms.

105. In fact, Mrs. Feinberg did recover on this basis, and the court expressly based the recovery upon § 90 of the original Restatement. *Feinberg*, 322 S.W.2d at 16769. Indeed, her recovery was closely anticipated by illustration 2 to section 90 of the original Restatement ("A promises B to pay him an annuity during B's life. B thereupon resigns a profitable employment as A expected that he might. B receives the annuity for some years, in the meantime becoming disqualified from again obtaining good employment. A's promise is binding."). RESTATEMENT SECOND, *supra* note 3, § 90, illustration 2. In Mrs. Feinberg's case, the disqualifications pressed upon the court were the twin facts of her advancing age, and her supervening diagnosis of cancer. *Feinberg*, 322 S.W.2d at 16869. In turn, Mrs. Feinberg's case became the model for the new illustration 4 to section 90 of the Restatement (Second) ("A has been employed by B for 40 years. B promises to pay A a pension of \$200 per month when A retires. A retires and forbears to work elsewhere for several years while B pays the pension. B's promise is binding"). RESTATEMENT, *supra* note 1, § 90, illustration 4. The new illustration 4 to section 90 of the Restatement (Second) makes no reference to any supervening disqualification suffered by the retired employee. RESTATEMENT SECOND, *supra* note 3, § 90, illustration 4.

Illustration 2 to the original section 90, in turn, seems to have been patterned somewhat loosely upon the case of *Ricketts v. Scothorn*, 77 N.W. 365, 366 (Neb. 1898) (Ms. Katie Scothorn's grandfather had promised her \$2,000 so that she would not have to work any more and because 'none of my grandchildren work'; the court held that the promise had not been bargained for, but enforced it against the executor of the grandfather's estate 'under the doctrine of estoppel.') Unlike the version set forth in illustration 2 to the original section 90, there was, in *Scothorn*, no showing that Ms. Scothorn had become disqualified from obtaining good employment — in fact, though she did quit her bookkeeping job upon her grandfather's promise and remained unemployed for about a year afterward, she later found employment as a bookkeeper with her grandfather's help, and was working at the time of his death, and as of the time the executor refused to pay. *Id.* at 367.

106. For the hypotheticals and cases, see *supra* notes 8199 and accompanying text.

section 90 of the Restatement (Second) is positioned after the sections relating to consideration, and is quite clearly meant to cover at least the situations in which a party has relied upon a promise in the absence of consideration. The structure of the Restatement (Second) makes this plain.¹⁰⁷ From the 1920's on, the general version of section 90 has been used to spin-off new and additional applications to any number of new transaction types, outside of the enumerated and constrained categories that had first existed. This generalized, or free reliance is the subject of this portion of the article.

Section 90 of the original Restatement, and section 90 of the Restatement (Second), contain the general formulations of reliance-based recovery in the Restatement. Since the two section 90's are different, but continue to have substantial language in common, an edited version of the original section 90, marked to show changes, will be helpful to an understanding of both versions (underscored text signifies language added in the 1981 revision; crossed-out text signifies language that was deleted in the 1981 revision).

Section 90 of the Restatement provides as follows:

(1) 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 *or a third person* and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. *The remedy granted for breach may be limited as justice requires.*

(2) *A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.*¹⁰⁸

Analysis of the the first paragraph of section 90 leads to its division into four separate elements, common to both versions of the Restatement. Thus, (1) there must be a promise, (2) the promisor

107. Consideration is treated in RESTATEMENT SECOND, *supra* note 3, §§ 71-81 ('Topic 1. the Requirement of Consideration'). Specific instances of reliance are suggested in §§ 87-89, and the general case of reliance is provided for in § 90; all of these reliance provisions are included in a larger set of provisions, §§ 82-94 ('Topic 2. Contracts without Consideration'), that are meant as exceptions to the requirement of consideration. *See also* *Id.* § 17(2) ("Whether or not there is a bargain a contract may be formed under the rules stated in §§ 82-94").

108. *Compare* RESTATEMENT OF CONTRACTS § 90 (1932) *with* RESTATEMENT (SECOND) CONTRACTS § 90 (1981). The two versions of the main paragraph of section 90 are set forth sequentially at the text accompanying notes 1 & 4, *supra*.

must reasonably expect that the promise will induce action or forbearance, (3) the promise must have induced the expected action or forbearance, and (4) injustice must result if the promise is not enforced.

Beyond those four common elements, there are two other factors that act as counterweights to one another, and which are adjusted differently in the two Restatements. The two factors are (a) the definite and substantial character of the action or forbearance, and (b) the quantum of recovery. The original Restatement set the second factor (quantum of recovery) high, and, accordingly, required that the first factor (definite and substantial action or forbearance) be present as a counterbalance. The Restatement (Second) allows the quantum of recovery to be set lower, and, therefore, dispenses with the necessity of definite and substantial action or forbearance.

The case of the benevolent man and the tramp¹⁰⁹ can serve to illustrate both those common elements of a section 90 analysis, and also the manner in which the Restatement (Second) differs from the original Restatement. The tramp hypothetical presents three of the four elements to recovery that are common to both versions of section 90.¹¹⁰ There is: (1) a promise (I'll buy you an overcoat), (2) the benevolent man should reasonably expect that the promise would induce the tramp to take the action of walking around the corner (he had said to the tramp, "if you go around the corner to the clothing shop . . ."), and (3) the tramp, if he went around the corner to the clothing store in order to get the coat, has been induced by the promise to take the expected action. The only remaining question concerns the fourth element common to both versions, and that question is whether justice requires that the promise to buy the overcoat be enforced. The answer to that last question might depend upon whether we are using the counterbalances of the original Restatement or of the Restatement (Second), and might be expected to differ, depending on our choice.

Assume that the value of the overcoat to the tramp is \$25.00; the "cost" to the tramp of walking around the corner is \$0.25; and that this is not an action which either the tramp or the promisor would consider to be a "substantial" action on the part of the tramp.

109. See *supra* notes 81-85 and accompanying text.

110. *Id.*

The original Restatement was drafted in contemplation that there is either a contract, or there is not.¹¹¹ If there is a contract, then there is a contractual measure of recovery. Accordingly, if there is any recovery at all for the tramp under section 90 of the original Restatement, it ought to be a recovery in the amount of \$25.¹¹² Hence, when the putative remedy is high (as it is in the original Restatement), it seems that the threshold to recovery should be correspondingly high (as it is in the original Restatement's requirement that the reliance be "substantial") before the remedy will lie. Viewed from the perspective of the supposed sense of the rule, it would appear that, when the value of the promised performance is comparatively high, yet the reliance has been quite insubstantial, there is no injustice (an element common to both the original and the second Restatement) that can only be avoided by enforcement of the promise. It would appear that the tramp has no relief under the reliance rule of the first Restatement.

Not so under the Restatement (Second). The Restatement (Second) supposed a power on the part of a court to create a floating remedy to ride the ebb and flow of the justice or injustice of the situation. Because the new section 90 remedy can be adjusted in the interest of justice, it is now possible to hold that the tramp's recovery can be limited to the \$.25 necessary to recompense him for his cost of relying upon the promise.¹¹³ Hence, when the remedy is adjustable downward (as it would be under the Restatement (Second)), it is no longer so necessary to require that the reliance

111. Professor Williston stated:

Either the promise is binding or it is not. If the promise is binding it has to be enforced as it is made. . . . [Instead of section 90, some other provision, perhaps in quasi contract, could have been drafted] so that the promisee under those circumstances shall never recover on the promise but he shall recover such an amount as will fairly compensate him for any injury incurred; but it seems to me you have to take one leg or the other. You have either to say the promise is binding or you have to go on the theory of restoring the *status quo*."

Debate on Section 90, supra note 64-66, at 228.

For a discussion of the difference between a contractual remedy (one that recompenses to the extent of the expectation interest) and a quasi-contractual remedy (one that recompenses to the extent of the restitution interest) *see supra* note 7.

112. This result is indicated by the following example used by Professor Williston: if A promises to convey Blackacre to B, and, the other conditions to section 90 being met, B builds a house on the land, then B is entitled to enforce the promise. Accordingly, B gets, not the value of the house, but Blackacre itself, even if the land is "worth four or five times as much as the house." *Debate on Section 90, supra* note 64, at 227-28.

113. This recovery protects the reliance interest and threads the needle between the expectation interest remedy usually associated with contractual damages (which, at \$25 in this example, might be objectionable as being too high) and the restitution interest remedy often associated with quasi contract (which, at \$0 in this example — the benevolent man gets no benefit from the tramp's walk — might be objectionable as being too low).

be substantial, or even definite (thus the second Restatement dispenses with the requirements of substantiality and definiteness). Accordingly, when the remedy can be flexibly tailored to fit the circumstances, the failure to enforce a promise, at least as so modified in respect of remedy, may be considered an injustice which can only be avoided by the "enforcement" of the promise, if only to the extent of the adjusted remedy.

In conclusion, section 90 requires, in both versions, that: (1) there must be a promise, (2) the promisor must reasonably expect that the promise will induce action or forbearance, (3) the promise must have induced the expected action or forbearance, and (4) injustice must result if the promise is not enforced. Then, if the court can fashion a flexible remedy and adheres to the Restatement (Second),¹¹⁴ it need insist on nothing more, and in particular, it need not insist that the expected action or forbearance be definite and substantial. But, on the contrary, if the court is not free to fashion a flexible remedy, or if it adheres to the original Restatement, then there must be a showing that the expected action or forbearance was definite and substantial.

Responses Outside of Promissory Estoppel. Recharacterization is a response commonly available, outside of promissory estoppel, whereby the promisee can recover. As has already been suggested in this article, if either sister Antillico or the daughter can be characterized as having bargained for the promise, the promise loses the nature of gratuity and takes on the aspect of bargained-for-consideration.¹¹⁵ If such a recharacterization can be accomplished, then each recovers under the presumptive rule,

114. A recent commentator notes that the North Dakota Supreme Court has not answered the question "whether section 90 is an independent cause of action in this state?" Smith, *supra* note 10, at 235. Since the same commentator had already asserted that North Dakota has adopted section 90, perhaps the question can be understood as suggesting simply that the court is prepared to accept section 90 of the original Restatement, but has not indicated whether it is prepared to shift to the 'flexible remedy/no need to show definite and substantial reliance' approach of the second Restatement. *Id.* at 228. That is, if the flexible remedy amounts to a noncontractual recovery (of \$0.25, in the example of the tramp) instead of a contractual recovery (of \$25.00) then, perhaps, it could be said that section 90 of the Restatement (Second) creates an "independent" cause of action — independent, that is, of contract. At the same time, because the remedy of the original section 90 is contractual, it could be said that section 90 of the original restatement created no new or "independent" cause of action — nothing new or independent, that is, of contract.

On this interpretation, it would be consistent to say both that the North Dakota Supreme Court has adopted section 90 of the original Restatement and that the North Dakota Supreme Court has reserved the question "whether [the flexible remedy of] section 90 [of the second Restatement] is an independent cause of action in this state." *Id.*

115. See *supra* notes 38 and 103 and accompanying text.

because there is bargained for consideration, rather than under any doctrine of promissory estoppel.

Murphy v. Hanna,¹¹⁶ an older case which predates the original Restatement of Contracts, is one of the more interesting North Dakota recharacterization cases.

Murphy arose in the context of a demurrer to the complaint.¹¹⁷ The plaintiff, Murphy, was receiver of the Medina State Bank.¹¹⁸ Murphy alleged that the defendants, including Hanna and the First National Bank of Fargo, had promised to loan the Medina bank sufficient cash (upwards of \$20,000) to meet all its obligations and enable it to continue its banking business.¹¹⁹ The Medina bank, however, had not made any return promise to borrow any money from the defendants.¹²⁰ This led the trial court to sustain the demurrers, dismissing the complaint for lack of consideration.¹²¹ The North Dakota Supreme Court reversed, raising the possibility of a recovery after trial on the merits, even though it was compelled to conclude that "as a wholly executory, bilateral contract [the promise] was not enforceable, by reason of a lack of mutuality of obligations,"¹²² and to say of the complaint that it

states no fact from which it can reasonably be inferred that the State Bank of Medina became bound to borrow any money from the defendants, and in so far as it is sought to hold the defendants liable for the repudiation of an obligation to loan money, resting upon a counter obligation to borrow, we find no such corresponding promise or obligation on the part of the plaintiff; nor is there any allegation from which it can be reasonably inferred that any other detriment was suffered, or consideration furnished by the defendants.¹²³

The North Dakota Supreme Court found it significant, however, that the Medina Bank alleged it had selected and turned over to the defendants, as collateral for the loan that defendants had promised, some unpaid bills receivable in the aggregate face amount of "about \$20,000" and that these unpaid bills "constituted the assets" of the Medina Bank which were liquid and could

116. *Murphy v. Hanna*, 164 N.W. 32 (N.D. 1917).

117. *Id.* at 34.

118. *Id.* at 33.

119. *Id.* at 33-34.

120. *Id.* at 34.

121. *Id.* at 35.

122. *Id.*

123. *Id.* at 34-35.

have enabled the Medina Bank "to continue in business."¹²⁴ The court held that the allegations were sufficient to establish that a contractual relationship "sprang into existence by reason of the selection and acceptance by the defendants of the collateral security."¹²⁵ After recharacterizing the facts, the court reasoned that there was consideration pleaded in the complaint.¹²⁶ So read, the case becomes nothing more than a garden variety offer and acceptance case, of little interest to the question of promissory estoppel.

However, *Murphy* may be significant to the question of promissory estoppel in North Dakota because, in it, the court did enforce a promise notwithstanding the apparent absence (prior to recharacterization) of consideration, because the rationale did deal with reliance, and because there is some language in the decision that might be construed as being somewhat suggestive of the rationale of a reliance-based recovery.¹²⁷ The strength of any potential teaching in respect of reliance is diminished, however, by the holding that, after recharacterization, there was consideration.

Ultimately, *Murphy* is a recharacterization case and cannot be treated as good authority for a native, and pre-Restatement prom-

124. *Id.* at 37-38.

125. *Id.* at 37.

126. *Id.* at 37. The court's analysis can be understood as treating the defendants' promise to lend as a continuing, unrevoked offer that Medina Bank accepted by tendering collateral security, thereby obligating the defendants to loan "such a sum of money as would ordinarily be loaned by one bank or individual to another upon such collateral security, under all the circumstances then existing and contemplated by the parties." *Id.*

Williston and Corbin agree in suggesting that there is class of cases in which an attempted bilateral contract, invalid at the time it was sought to be created, becomes (upon some later acceptance) a valid contract. See 1 S. WILLISTON, WILLISTON ON CONTRACTS § 106, at 427-28 (3d ed. 1958) ("[t]he other party to the bargain must be regarded as continuously assenting to receive such performance in return for his own promise, and a valid unilateral contract arises on receipt of such performance"); 1 A. Corbin, *Corbin on Contracts* § 143, at 616 (1963) (a continuing offer to sell goods at a stated price and an order for a specific quantity consummates a bilateral contract). So viewed, *Murphy v. Hanna* is a rather unexceptional situation in which a promise, unenforceable when made (unenforceable because the desired return promise was missing, hence there was no consideration) becomes enforceable (as a containing a continuing, unrevoked offer which becomes binding when accepted) because of subsequent acceptance.

127. The court reasoned that "[a] contract may fail wholly as an executory agreement, carrying mutual obligations of the parties from the time it is made, and yet result in contractual obligations *depending upon what is done in pursuance of it.*" *Murphy v. Hanna*, 164 N.W. at 35 (emphasis added).

That is to say, the result might be said to rest upon an estoppel. At least one court has noted that, despite general agreement on the result in a case such as this, and despite the effort by Professors Williston and Corbin to explain the result by saying that "a binding unilateral contract is forged out of a former, invalid bilateral contract," what has actually occurred is an estoppel. *Hoyt v. Hoyt*, 372 S.W.2d 300, 305 (Tenn. 1963) (referring to the sections of Williston's and Corbin's treatises set forth *supra* in note 126, and then holding that the promisor was estopped from denying the validity of the promise).

issory estoppel doctrine in North Dakota.¹²⁸

In addition to general recharacterization,¹²⁹ North Dakota has several other specific approaches available which increase the number of promises that are enforceable, outside of promissory estoppel. The Field Code, as enacted in North Dakota, expressly provides a reanalysis response, for it provides that an "existing legal obligation resting upon the promisor, or a moral obligation, originating in some benefit conferred upon the promisor or prejudice suffered by the promisee, also is good consideration. . . ."¹³⁰ By recognizing moral obligation as sufficient to sustain a promise, the commissioners of the Field Code intended to change the common law.¹³¹ Moreover, by opening up consideration to include preexisting moral obligations, the Code thereby increased the number of promises that are supported by consideration and correspondingly reduced the number of promises which would otherwise be unenforceable under the presumptive rule. Thus, the Code provides an avenue for recovery outside of promissory estoppel.¹³²

128. As to a native, pre-Restatement promissory estoppel doctrine, see *Kenmare Hard Coal & Brick v. Riley*, 126 N.W. 241 (N.D. 1910). *Kenmare* involved a promise to extend the period of redemption in exchange for a promise to pay a preexisting debt (no consideration). *Id.* In *Kenmare* the promise was not enforced, but the court observed that it might have enforced the promise if (a) actually relied upon in good faith, (b) the promisee was influenced thereby, and (c) the promisee offers clear and convincing evidence of the promise. *Id.* at 244.

129. See, e.g., 1 S. WILLISTON, WILLISTON ON CONTRACTS § 140, at 610 n. 6 (3rd ed. 1957) ("Not infrequently, courts allow juries to find an intent to make a bargain in cases where it is difficult to believe that there was more than detrimental reliance on the gratuitous promise") (citing *Lechler v. Montana Life Ins. Co.*, 186 N.W. 271 (N.D. 1921)).

130. N.D. CENT. CODE § 9-05-02 (1987), FIELD CODE, *supra* note 13, § 781.

131. In their introduction to the Code, the commissioners explicitly draw attention to § 781 as being one that contains changes from the common law. FIELD CODE, *supra* note 13, Introduction, xxxi. The comments to § 781 of the Field Code state that:

The common law does not recognize moral obligations, except in a few cases, as sufficient to sustain a promise. The authorities, however, entirely fail to establish any satisfactory principle upon which to distinguish between the different species of moral obligations. The rule stated in [§ 781] seems to the commissioners to be just and to be, on the whole, as easily reconcilable with the authorities in this state as any other that can be devised.

Id. Most of the Field Code states that have had occasion to consider the question of moral obligation have, apparently, either concluded that § 781, as enacted in their codes, was *not* intended to change the common law or else have ignored the existence of the section altogether. See S. Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts*, 57 VA.L.REV. 1115, 1129-32 (1971) (collecting cases from California, Montana, North Dakota and South Dakota). It seems clear that the courts so holding were not advised of the significance of the code provision, nor of the annotations to it.

132. In addition, North Dakota recognizes "promissory fraud," in more than one context. The Field Code provides that a promise made without any intent to perform it is a species of actual fraud and of deceit, both for purposes of rescinding a contract and for purposes of setting up an independent action. FIELD CODE, *supra* note 13, §§ 757 (actual fraud, as a basis for rescinding a contract for failure of assent), and § 849 (deceit, as a basis for an action in tort). The corresponding N.D. Century Code provisions are §§ 9-03-08, and

No Consideration: Generalized Promissory Estoppel in North Dakota. There are no generalized promissory estoppel cases in North Dakota in which a promisee has recovered because of reliance in the absence of consideration. Indeed, except for two cases touching on the category of modifications, waivers and discharges, there are not even any of the enumerated, pattern cases in North Dakota in which a relying promisee has recovered.¹³³ Because the North Dakota cases touching on the category of modifications, waivers and discharges all deal with promises between persons who are already in an existing contractual relationship, there is no case at all in which the North Dakota Supreme Court has enforced a promise in the absence of consideration where there is no existing contractual relationship between the parties.¹³⁴

A recent case in which the North Dakota Supreme Court declined to enforce a promise accompanied by a claim of reliance in the absence of consideration is *O'Connell v. Entertainment Enterprises, Inc.*¹³⁵

O'Connell was before the North Dakota Supreme Court on O'Connell's appeal from a summary judgment entered against him.¹³⁶ The plaintiff, O'Connell, was attempting to recover his past due salary.¹³⁷ Three sets of parties were involved in the case: (a) Larry O'Connell, the manager of Crown Colony Entertainment Center, (b) Entertainment Enterprises, the owner of Crown Colony Entertainment Center, and (c) First Federal Savings and Loan, and Erin Hotels, which assumed management of Crown Colony for a time.¹³⁸ On April 16, 1980, First Federal assumed from Entertainment Enterprises the management of Crown Colony, which had fallen upon "financial hard times."¹³⁹ On April 19,

9-10-02. *Cf. infra* note 340 and accompanying text (relating to the fraudulent withholding of a writing in respect of a promise within the statute of frauds).

133. That is, not only are there no generalized section 90 cases, but there are also none of the precursor cases involving gratuitous promises made within the family, promises to make charitable subscriptions, promises made by bailees in possession, or promises made by a landowner to one who thereafter enters and makes improvements on the land. The North Dakota modification cases are discussed, *infra* at notes 205 to 245 and accompanying text.

134. There are no cases of garden variety § 90 promissory estoppel between parties who are not already contractually bound to one another. Therefore, the North Dakota cases could be explained narrowly, on the grounds of rejection of the preexisting duty rule.

135. 317 N.W.2d 385 (N.D. 1982).

136. *O'Connell v. Entertainment Enterprises, Inc.*, 317 N.W.2d 385, 386 (N.D. 1982).

137. *Id.*

138. *Id.* The locus of the dispute was the liability for debts incurred by Crown Colony to O'Connell, an employee, in respect of wages earned but unpaid. Entertainment Enterprises, the owner of Crown Colony, appeared to be unable to pay. The issue was whether First Federal or Erin Hotels could be held liable to O'Connell. *Id.*

139. *Id.*

Erin agreed to assume active management of Crown Colony, under First Financial's supervision.¹⁴⁰ On May 28, First Federal and Erin terminated their agreement, and active management of Crown Colony reverted to Entertainment Enterprises on June 30, 1980.¹⁴¹

Meanwhile, O'Connell, to whom Entertainment Enterprises owed almost \$15,000 in unpaid salary pursuant to an oral employment agreement, was placed on a 30 day leave of absence sometime after April 19.¹⁴² He contended that shortly thereafter, First Federal and Erin assured him that if he would return as manager at a slightly reduced salary, all of his unpaid back salary would be paid.¹⁴³ When no payments were forthcoming, he demanded payment and initiated an action against all three operators of Crown Colony (Entertainment Enterprises, First Federal, and Erin Hotels).¹⁴⁴ After winning a summary judgment against Entertainment Enterprises which he was unable to execute, O'Connell continued the action against the remaining defendants.¹⁴⁵

O'Connell argued that he was a third party beneficiary of contracts between First Federal and Entertainment Enterprises, and between First Federal and Erin Hotels; or that First Federal and Erin Hotels were estopped from denying liability for O'Connell's unpaid salary.¹⁴⁶ After deciding against O'Connell on the third party beneficiary theory,¹⁴⁷ the court turned to his estoppel arguments, dealing separately with (a) equitable estoppel, as O'Connell had alleged that he relied upon the defendants' statements to him that their management agreements with Entertainment Enterprises included an assumption by them of the back salary, and (b) promissory estoppel, as O'Connell had alleged that he relied upon the defendants' promise to him that they would pay the back salary.¹⁴⁸

The North Dakota Supreme Court rejected O'Connell's equitable estoppel and promissory estoppel arguments.¹⁴⁹ The court

140. *Id.*

141. *Id.* at 387.

142. *Id.* at 386.

143. *Id.*

144. *Id.* at 387.

145. *Id.*

146. *Id.* The court subsequently noted that O'Connell did not allege that the agreement to pay his back salary was supported by consideration. *Id.* at 389. It would have seemed that the alleged agreement was supported by consideration, but, apparently because O'Connell did not raise the issue, the court declined to address it. *Id.*

147. *Id.* at 387-89.

148. *Id.* at 389.

149. *Id.* at 389-90.

said that O'Connell must show the following elements to invoke promissory estoppel:

- (1) a promise which the promisor should reasonably expect will cause the promisee to change his position, (2) a substantial change of the promisee's position through action or forbearance, (3) justifiable reliance on the promise, and (4) injustice which can only be avoided by enforcing the promise.¹⁵⁰

The court was willing to assume the existence of a promise, but found that the promise did not induce any action or forbearance on O'Connell's part.¹⁵¹ The reasoning is somewhat cryptic. For if the defendants had promised O'Connell that they would pay his back wages if he returned to work at a reduced salary, as O'Connell alleged they did; and if, as seems to be the case, he did return to work, then it would seem that there was a clear action taken by O'Connell which was induced by the promise.¹⁵² Instead, the court appears to have concentrated its attention on O'Connell's own argument that O'Connell 'acted to his detriment by *remaining* an employee at the Crown Colony,'¹⁵³ and decided, quite properly, that this does not demonstrate any action in reliance on the alleged promise.¹⁵⁴ Thus, the plaintiff appears to have

150. *Id.* at 390 (citing *Union Nat'l Bank in Minot v. Schimke*, 210 N.W.2d 176, 181 (N.D. 1973)). *Schimke* is discussed, *infra* at notes 306-18 and accompanying text. The O'Connell court's formulation has four elements (instead of *Schimke's* five, see *infra* note 317 and accompanying text) because it combines *Schimke's* elements 1 and 2 into a single element. While otherwise improving the *Schimke* phraseology, O'Connell remains faithful to its substance, retaining *Schimke's* adherence to the original Restatement standard ("substantial" action or forbearance) as well as the variant element there introduced (the item numbered three in the O'Connell list: "justifiable reliance"). This is an element that recurs in other North Dakota cases. See Chart 2, at A2 to A4 *infra* (repetition of the formulation in North Dakota cases), and see note 182, *infra* (comparison of the North Dakota factors to those of the Restatement, and a discussion of the reasons why it is wrong to say that § 90 requires "justifiable reliance").

151. O'Connell, 317 N.W.2d 385, 390 (N.D. 1982).

152. Moreover, if this is a correct reading of the facts as alleged, the case becomes extraordinarily baffling. These facts, construed for purposes of summary judgment in the manner most favorable to O'Connell, the party opposing summary judgment, seem to make out a prima facie case of bargained-for consideration. That being the case, and since the very concept of bargained-for consideration imports the core idea that the consideration (here, the action on O'Connell's part — 'if you will return to work at a reduced salary') is sought by the promisor (here, First Federal and Erin, who promised 'we will pay your back wages') as the price of the promise, and is given by the promisee (O'Connell) in order to obtain the promise, it follows that the action requested must have been induced by the promise. This is what 'mutual conventional inducement' means. In short, while it may be understandable for the court to refrain from deciding the consideration claim which plaintiff never advanced, it is not at all clear how the plaintiff could have refrained from advising the court of the relevance of the underlying facts to the claims that plaintiff did advance.

153. *Id.* at 390. (emphasis added).

154. *Id.*

been understood to be arguing that, simply by doing what he had already been doing quite apart from the promise, he somehow acted in reliance on the promise. Therefore, O'Connell lost his promissory estoppel argument for failure to show that he was induced to act because of the promise.

O'Connell is important for what it says by implication about the type of action or forbearance necessary to constitute conduct induced by a promise. If *O'Connell* is limited to plaintiff's argument as understood by the court, the result is unexceptional. But if the case be read in light of all the allegations that were presented to the court, and if it be read to stand for the proposition that even these facts are insufficient to make out a 'substantial change of position', the result is profoundly important to an understanding of the meaning of promissory estoppel in this state.

O'Connell may further define promissory estoppel in North Dakota because the court's treatment of the elements of *equitable* estoppel might shed some light on what the variant element ("justifiable reliance") in the *promissory* estoppel formulation is intended to mean.¹⁵⁵ One element necessary to an equitable estoppel is that the person to whom the statement is directed must lack both knowledge and the means of obtaining knowledge of the truth as to the facts in question.¹⁵⁶ Since the court determined that O'Connell could have read the management agreements, and thus, could have ascertained that neither of the defendants did, in fact, assume any obligation to pay, it followed that O'Connell was not entitled to rely upon any false statements¹⁵⁷ made to him by the defendants.

The foregoing equitable estoppel analysis might be important to promissory estoppel by interpreting the otherwise baffling element of the court's formulation of promissory estoppel. Perhaps, under the same rationale, it could have been said that O'Connell would have had to prove, not only that he had relied upon the

155. Justifiable reliance is a phrase more likely to be associated with equitable estoppel than with promissory estoppel. The text of section 90 of the Restatement (Second) never uses the expression 'justifiable reliance,' but the North Dakota cases do use the expression. For further discussion of the potential effect of the variant language, see *infra* note 354 and accompanying text ('justifiable reliance' for purposes of equitable estoppel, as set forth in the North Dakota Century Code, and as elaborated by the North Dakota Supreme Court) and *cf.*, *infra* note 179 (for the specialized context in which "justifiable reliance" is used in comment (c) to § 90 of the Restatement).

156. *O'Connell*, 317 N.W.2d at 389.

157. It should be noted here that the case was before the North Dakota Supreme Court on an appeal from the trial court's grant of summary judgment in favor of the defendants, and so the plaintiff, O'Connell, was entitled to all the inferences "in a light most favorable to him." *Id.* at 389.

promise, but that he had done so neither knowing nor having the means to know that he was relying upon an unenforceable promise. As the lack of knowledge of the truth as to the facts in question is necessary to successful equitable estoppel, so lack of knowledge of the legal consequence of the promise in question might be necessary to promissory estoppel. In this framework, reliance on a promise might be "justifiable" only if the person relying neither knows nor has the means of knowing that the promise is unenforceable and ought not to be relied upon.¹⁵⁸

Finally, *O'Connell* is important because of the court's gloss explaining the purpose of the development of the doctrine of promissory estoppel. The court noted that the doctrine developed to "prevent inequities that may result when an agreement is void or unenforceable because of inadequate consideration or the statute of frauds and one of the parties has acted to his detriment because of a promise made by the other person."¹⁵⁹ Thus *O'Connell* represents an attempt to articulate a purpose for the doctrine of promissory estoppel, and it is possible that this purpose may be considered by the North Dakota Supreme Court in future cases.¹⁶⁰

158. Cf. *infra* note 354 (the equitable estoppel side of "justifiable reliance"). *But see infra* note 179 for a context in which a different meaning could be attached to the term "justifiable" reliance on the promissory estoppel side.

To be sure, these seem to be bizarre meanings to attach to the expression, but they are no more bizarre than the adoption of the expression itself, which might not signify anything at all. Conceivably, the North Dakota Court did not intend to mean anything whatsoever by its use of the term "justifiable reliance" which it seems to have picked up in the first place by chance. In an early North Dakota promissory estoppel case, the North Dakota Court quoted language from a decision of the Supreme Court of the State of Washington, picking up at the same time the Washington Court's apparently inadvertent misparaphrasing of § 90 of the the original Restatement of Contracts. This unfortunate expression has recurred in successive North Dakota cases as each requotes the other. *See infra* note 317 for the genesis of "justifiable reliance," as used in North Dakota, and *see infra*, Table 2 at A2, for the successive requotations of the expression in subsequent North Dakota cases.

159. *O'Connell*, 317 N.W.2d at 389 (without further specifying what "inequities" it had in mind, and thereby suggesting that, if only *O'Connell* had acted to his detriment, *O'Connell* would have recovered). Perhaps the court does not intend to let its gloss swallow its own rule and means to say simply that promissory estoppel developed because, whenever the other conditions to the availability of section 90 are present, "inequity" would result if the promise were not enforced. If this is all, then the gloss is probably only redundant, though not helpful (unless there is somehow some distinction to be made between those situations in which "injustice can only be avoided" by enforcement of a promise and those situations in which "inequities . . . may result" if the promise is not enforced).

160. This generalized notion of the purpose of the doctrine is over broad, and so may not be particularly helpful as a guide to future decisions, which may explain why it has, in fact, not been repeated in the North Dakota cases subsequent to *O'Connell*. Further, aside from *O'Connell*, and possibly *Kenmare Coal*, it appears that there have been in North Dakota (either pre-Restatement or post-Restatement) none of the cases that typically come to mind when one thinks of generalized section 90, and so there would appear to be no basis in fact to say that the doctrine ever developed at all in North Dakota, nor that it was

Russell v. Bank of Kirkwood Plaza,¹⁶¹ another generalized section 90 promissory estoppel case in which the party claiming to have relied upon a promise failed to recover, adds another twist to the "justifiable reliance" element which the North Dakota Supreme Court has added to section 90.¹⁶² In *Russell*, a third party interested in a loan commitment alleged that the Bank had breached its promise to loan money to another.¹⁶³ The Bank had refused to fund the loan because not all of the conditions to its obligation had occurred or could ever occur,¹⁶⁴ but it did so prior to the expiration of the loan commitment, and was subsequently found to have breached its loan commitment by anticipatory repudiation.¹⁶⁵

transplanted here for any particular reason, much less generally to "prevent inequities that may result when an agreement is void or unenforceable because of inadequate consideration."

Perhaps, since relying promisees almost invariably lose in North Dakota, the court is speaking of hypothetical inequities associated with the absence of consideration as it surmises how the doctrine would have developed here, had there been any inequities to remedy. Maybe the doctrine will, in the future, develop in North Dakota so as to solve some fundamental "inequity" created by the doctrine of consideration yet to be identified by the court (though, with the existence of "cause" in the Field Code, there would appear to be a more powerful alternative to consideration already available, *see supra* notes 16 and 20); and perhaps the doctrine has developed or is developing elsewhere to prevent such opened "inequities"; but, given the conventional present understanding of the development of section 90 in the Restatement, *see supra* notes 61-68, it seems to have had a more specific, and modest, purpose which the court might also find to be relevant in deciding future cases.

161. *Russell v. Bank of Kirkwood Plaza*, 386 N.W.2d 892 (N.D. 1986).

162. *See infra* notes 306-18 and accompanying text (discussing *Union State Bank v. Schimke*, 210 N.W.2d 176 (N.D. 1973), the fountainhead North Dakota promissory estoppel case, and the one which first introduced the notion of "justifiable reliance" as an additional element). For a table showing the 'genealogy' of *Schimke*, tracing "justifiable reliance" to its ultimate source, and following its influence on successive North Dakota formulations of the promissory estoppel "rule," *see* Chart 2, at A-2.

163. *Id.* at 893-94. Kirkwood Bank's loan commitment was made to a partnership, East Plaza, which had already recovered against the bank because of the bank's anticipatory repudiation of the loan commitment. *Glatt v. Bank of Kirkwood Plaza*, 383 N.W.2d 473 at 477, 479 (N.D. 1986). Russell's interest in the loan commitment was based upon his status as a partner in another partnership, KRGS, which, in turn, had an indirect interest in the Kirkwood BankEast Plaza loan commitment because of KRGS' relation to the transaction contemplated by the KirkwoodEast Plaza loan. *Russell*, 386 N.W.2d at 893-94.

The Bank of Kirkwood had committed to lend \$1.7 million to the East Plaza partnership in order to develop a project known as Metro Business Park, contingent upon some 23 conditions. *Id.* at 893. One of those conditions was that the KRGS partnership obtain a loan which would allow KRGS to complete a related project which, apparently, would add some value to the contemplated Metro Business Park development. *Id.* Subsequently, KRGS did obtain a loan commitment from another bank (United Bank) in order to develop its project, but KRGS' loan commitment from United Bank was contingent on the reciprocal condition that the other loan (the one between Kirkwood Bank and East Plaza related to the Metro Business Park project) be funded. *Id.* When Kirkwood Bank refused to fund the loan to East Plaza, United Bank refused to fund the loan to KRGS. *Id.* Thus, *Russell*, through KRGS, was asserting an interest in the loan commitment between the East Plaza partnership and the Bank of Kirkwood.

164. *Glatt v. Bank of Kirkwood Plaza*, 383 N.W.2d at 475 (discussing the issue concerning who had the burden of proving "that the developers could not have met the conditions precedent contained in the commitment letter").

165. *Id.* The loan commitment was made in a letter dated July 16, 1982, and was

The Bank had made no express promise directly to Russell,¹⁶⁶ but Russell asserted that he was entitled to rely upon the Bank's loan commitment.¹⁶⁷ After finding that there was no third-party beneficiary basis for recovery,¹⁶⁸ the court turned to Russell's estoppel theory.¹⁶⁹ As a threshold matter, the court had to determine whether it was possible for there to be an estoppel in favor of a third party,¹⁷⁰ and the court held that while third party reliance might be protected in certain circumstances, those circumstances were not present in this case.¹⁷¹ The North Dakota Supreme Court next enumerated the elements of promissory estoppel, stating that:

The elements which must be established before the doctrine can be invoked are: (1) a promise which the prom-

stated to be binding on the Bank for six months. *Id.* After a series of meetings, letters and phone conversations between August 10 and September 8, 1982, it became clear that the Bank had refused to fund the loan. *Id.* (recounting those communications, which culminated in a letter from the Bank to East Plaza's attorney saying that "your . . . clients may sue [us] if they so . . . desire our answer is final that your clients have not met the [conditions of the loan commitment letter] nor does it appear that they are able to. . ."). East Plaza filed its complaint against the bank on September 20, 1982. *Id.* at 475. The court held that the bank had breached by anticipatory repudiation. *Id.* at 479.

166. *See supra* note 163. Neither had the bank made any express promise directly to the KRGS Partnership. *Id.*

167. Russell will be referred to as if he were properly suing in his own name to enforce the alleged liability owed by the bank to the KRGS Partnership. *See Russell*, 386 N.W.2d at 893 n. 2.

168. *Id.* at 895-96. The court had also rejected Russell's claim that because Russell and other partners were partners in both KRGS and East Plaza, that Russell/KRGS was a direct beneficiary of the Kirkwood Bank East Plaza loan commitment in the sense of being a party to whom the Bank made a direct promise. *Id.* at 894-95.

169. *Id.* at 896.

170. In the ordinary promissory estoppel case, A makes a promise to B, on which B relies; here the situation is a promise made by A [the Bank] to B [East Plaza], on which C [Russell/KRGS] has relied. *See* RESTATEMENT SECOND, *supra* note 3, § 90 ("a promise which . . . induce[s] action or forbearance on the part of the promisee or a third person . . . is binding if . . .") (emphasis added). The express recognition of third party reliance in the Restatement (Second) is a change from the original Restatement. *See supra* note 5 and accompanying text. In the Restatement (Second)'s analysis, whether a promisor has reason to expect that a third party will rely upon a promise made to another bears some relation to whether the third party is a beneficiary of the promise. *Id.* § 90 comment c (observing that, while a promisor may be expected to foresee that a beneficiary will rely on the promise, "[j]ustifiable reliance by third persons who are not beneficiaries is less likely, but may sometimes reinforce the claim of the promisee or beneficiary").

171. *See Russell*, 386 N.W.2d at 896 (citing *Farmers' State Bank of Gladstone v. Anton*, 199 N.W. 582 (N.D. 1924)) for the proposition that estoppel may extend in favor of a third party "occupying a relation to the subject matter of the *representation* similar to that of whom they were made," (emphasis added) but holding that Russell's relationship to the East Plaza/Kirkland Bank loan commitment was "not sufficiently similar to that of [East Plaza] to put him in the same position as [it is]". The italicized word in the language quoted by the *Russell* court, together with the fact that the court proceeded, in the immediately following paragraph, to say that "Russell *also* asserts that he should be entitled to recovery under the doctrine of promissory estoppel," indicates that the court considered *Anton* to be an equitable estoppel case, rather than a promissory estoppel case and indicates that the court considered Russell to have presented an equitable estoppel claim as well as a promissory estoppel claim. *Id.*

isor should reasonably expect will cause the promisee to change his position, (2) a substantial change of the promisee's position through action or forbearance, (3) justifiable reliance on the promise, and (4) injustice which can only be avoided by enforcing the promise.¹⁷²

Expressly assuming, for purposes of argument, that there was an allegation of a promise sufficient to meet the first element,¹⁷³ (and implicitly assuming that there *could* be a promissory estoppel in favor of a third party in precisely the same circumstances in which it had just held that there could *not* be an equitable estoppel),¹⁷⁴ the court concluded that neither the second nor third enumerated elements essential to a promissory estoppel recovery were present.¹⁷⁵ The court determined that Russell did not change his position in reliance upon any promise made by the Bank in its loan commitment.¹⁷⁶ Further, the court determined that even if Russell had relied on the loan commitment, it would not have been "justifiable" reliance.¹⁷⁷

If it did nothing else, *Russell* demonstrates the thin line that

172. *Id.* (citing *O'Connell v. Entertainment Enterprises*, 317 N.W.2d 385, 390 (N.D. 1982)). See *supra* notes 135-60 and accompanying text for a discussion of *O'Connell*.

173. *Russell*, 386 N.W.2d at 896. The court does not describe the promise, and the attempt to do so seems to present a dilemma. If the promise is the one given by the bank to East Plaza, then Russell is relying as a third party to that promise, which either contradicts what the court earlier said about third party reliance in estoppel cases or requires a further assumption. See *infra* notes 170-74 and accompanying text. If the promise is one given by the bank to Russell, then the court appears to be accepting, for purposes of argument, the same sort of promise it earlier rejected as involving "tortuous reasoning" when Russell had argued that he was a direct promisee/beneficiary of promise made to him by Kirkwood Bank. *Russell*, 386 N.W.2d at 894.

The easiest, if not the only, way to deal with this dilemma is to avoid it altogether, which can be done by taking the court strictly at its word, and by understanding that the court has assumed the promise only for purposes of argument, and by further understanding that the court has assumed the possibility of third party reliance likewise only for purposes of argument. It is clear, therefore, that the court deliberately intends to base the holding in this case on the failure of Russell to change position as a result of the promise, and on the failure of Russell to show that any change in position constituted "justifiable" reliance. See *supra* notes 168-70 and accompanying text.

174. See *supra* note 171 and accompanying text (no "[equitable] estoppel" in favor of this third party). See also *supra* note 170 and accompanying text (under the rule of the Restatement (Second), there may be a "promissory estoppel" in favor of a third party in certain circumstances).

175. *Russell*, 386 N.W.2d at 896.

176. *Id.* The loan commitment between the bank and the East Plaza partnership was, it is true, conditioned upon the KRGS partnership's obtaining a bank loan (see *supra* note 163 and accompanying text), but the court observed that KRGS needed to obtain a loan for its own purposes, independently of the Kirkwood Bank East Plaza loan commitment, and, moreover, that KRGS was not relying upon the East Plaza loan commitment when it made its own loan application to another bank. *Russell*, 386 N.W.2d at 896.

177. *Id.* at 896-97. This was because the reliance of KRGS/Russell consisted in KRGS' obtaining a loan commitment, thereby coming close to satisfying one of the 23 conditions to Kirkwood Bank's obligation to fund the loan to Plaza West, but there was nothing that KRGS could do about the other 22 conditions. *Id.* at 897. Thus, the court held, even if KRGS/Russell had relied upon its satisfaction of that one condition out of 23 conditions as

might separate recovery from non-recovery in a promissory estoppel case.¹⁷⁸ *Russell* may, in addition, demonstrate the inadvisability of adding elements to promissory estoppel beyond those included in the Restatement of Contracts.¹⁷⁹

Russell creates some doctrinal confusion between competing formulations of the promissory estoppel rule. This confusion exists because the court gave two different versions of promissory estoppel: the court first set forth the elements that it will require to be established before promissory estoppel may be invoked,¹⁸⁰ but it then discussed § 90 of the Restatement (Second) of Contracts with approval, saying that it "sets forth the doctrine of promissory

"the sole predicate to successful completion of the loan" to Plaza West, "it was not a justifiable reliance." *Id.*

178. As has been observed, the court, on the premise that *Russell*/KRGs was relying upon East Plaza to satisfy some twentytwo additional conditions to Kirkwood Bank's obligation to fund the loan, was able to conclude that it was not "justifiable" for *Russell* so to rely. See *supra* notes 176 and 177 and accompanying text. But, under the assumption, also consistent with the facts, that *Russell* was simply relying upon Kirkwood Bank not to breach the loan commitment by anticipatory repudiation, *Russell*'s reliance would seem to be "justifiable." After all, it was Kirkwood Bank's promise embodied in the loan commitment, not East Plaza's efforts to satisfy the conditions to funding, on which *Russell* was relying. Indeed, where East Plaza has already recovered against the Bank for breach of the loan agreement in question without having satisfied all of the conditions to the Bank's obligation to lend, the line that separates East Plaza's recovery from *Russell*'s nonrecovery has to be understood as simply a variation of the question of legal foreseeability of damages for breach of promise. See generally *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. Ch. 1854). The court probably reached the correct result in *Russell*, but it might have reinforced its holding by basing its result on the first element of promissory estoppel, and so concluding that there was no promise made by Kirkwood Bank on which it had reason to expect reliance by *Russell*/KRGs. This would have had the collateral advantage of unifying the third party beneficiary and promissory estoppel analyses.

179. Section 90 of the Restatement of Contracts does not include "justifiable reliance" as an element. See RESTATEMENT SECOND *supra* note 3 and accompanying text. One of the few places in which the expression occurs anywhere in the Restatement (Second) is in comment c to § 90. See *supra* note 170.

Even if it were not settled that the text of § 90 governs in the event of inconsistency between it and its commentary (treating the Restatement as if it were a statute accompanied by drafter's notes), the context of comment c makes it clear that "justifiable reliance," far from constituting a new or additional element, is simply a shorthand expression meant to stand for the circumstances in which a promisor may be expected to foresee that the promisee or a third party will rely upon the promise. *Id.* It should be apparent that if, but only if, the promisor should foresee that a third party will rely upon the promise, then that third party's reliance is "justifiable." *Id.* Conversely, it should be apparent that a third party's reliance is "justifiable" if, and only if, its reliance is something which the promisor should have foreseen. *Id.* Comment c to section 90 means that a promisor may often foresee that a beneficiary of a promise will rely upon it, and that reliance by such a third party is, therefore, "justifiable." *Id.* The comment raises the possibility of "justifiable" reliance by third persons who are not beneficiaries, and can only be understood to do so in terms of whether the promisor could have foreseen reliance by a third party so situated. *Id.*

On a Restatement analysis, the relevant question is not whether the reliance by *Russell* was justifiable, but whether it was foreseeable by Kirkwood Bank. *Id.* Because the court had already held that *Russell* was not a beneficiary of the Bank's promise, it would have been easy to hold, on the same operative facts, that *Russell*'s reliance was not reasonably to be expected by the Bank (thus, unifying its promissory estoppel, equitable estoppel, and third party beneficiary analyses, instead of separating them).

180. See *supra* note 172 and accompanying text.

estoppel, which we have determined is inapplicable in this case."¹⁸¹ The problem is that the court's formulation is not the same as that of section 90 of the Restatement (Second). Section 90 differs from the court's formulation in these respects: (a) the second element of court's formulation requires that there be a substantial change of position, but section 90 of the Restatement (Second) dispenses with the requirement that the action or forbearance be "substantial," instead allowing the court to fix a lower recovery in the event of insubstantial reliance; and (b) the second and third elements of the court's formulation represent a subtle, but material shift in emphasis away from the Restatement's focus upon the expected character of the promisee's action or forbearance and in the direction of emphasis on the unhelpful factors, 'change' and 'justifiable reliance.'¹⁸² It would be much more helpful if the court would either drop its own formulation in favor of the Restatement's, or drop the Restatement's formulation in favor of its own. The differences between the two formulations ought to prevent the use of both at the same time, at least without further explanation.

181. *Russell*, 386 N.W.2d at 897.

182. Compare the Court's elements with the gloss earlier developed on the Restatement (*see supra* notes 10814 and accompanying text for the gloss on the Restatement):

The Court's Elements:

- (1) a promise which the promisor should reasonably expect will cause the promisee to change his position, (2) a substantial change of the promisee's position through action or forbearance, (3) justifiable reliance on the promise, and (4) injustice which can only be avoided by enforcing the promise.

Gloss on the Restatement (Second):

- (1) there must be a promise, (2) the promisor must reasonably expect that the promise will induce action or forbearance, (3) the promise must have induced the expected action or forbearance, and (4) injustice must result if the promise is not enforced. The remedy may be limited as justice requires.

Elements 2 and 3 of the gloss on section 90 tie the cause to the effect. Per element 2, the promisor must reasonably expect that the promise will induce action or forbearance, and per element 3, the promise must have, in fact, induced just that action or forbearance which was expected (and no other).

Elements 2 and 3 of the court's version could disconnect cause from effect. So long as the promisor can expect that promisee might "change" position *somehow* (element 2), it may be enough that the promisee have "justifiably relied" upon the promise by doing or refraining from doing *something* (element 3) — there seems to be no longer any requirement that the promisee change position *in the way that the promisor could have reasonably expected*, just so long as the change is "justifiable."

The Restatement does not use the expression "justifiable reliance." If that expression were inserted into the gloss on the Restatement, the insertion would either be redundant (if it means that reliance is justifiable only if it is precisely the reliance which the promisor had reason to expect — which is already covered by element 3 of the gloss) or wrong (if it means either that reliance might be *justifiable* even if not what the promisor had reason to expect, or might be *unjustifiable* even if exactly what the promisor had reason to expect; and both of these results are contrary to the Restatement). It might, of course, still be good law; and no worse than the Restatement. My point is merely that it is *not* the Restatement.

2. *Family Promises, Charitable Subscriptions, Gratuitous Bailments, Land Promises, Marriage Settlements*

The Restatement. Neither Section 90 of the original Restatement, nor section 90 of the Restatement Second sprung full grown from the brow of any of the drafters.¹⁸³ The original section 90 is a generalized statement of a rule of law thought to be expressive of five particular, enumerated, and recurring transaction types in which promises had frequently been enforced in the absence of consideration.

Since, as observed earlier in this article, it is commonly taught that reliance on a gratuitous promise came to be recognized as a basis for recovery in a few categories of cases,¹⁸⁴ it must be presumed that some or all of these promises: gratuitous promises made within the family; promises to make gifts to charitable institutions; gratuitous promises made by a bailee in possession; and promises relating to the conveyance of land which were followed by entry and improvements upon the land, are eligible for section 90 treatment, provided the other elements to a section 90 recovery are present.¹⁸⁵

North Dakota Annotations. There are no retrievable opinions of the North Dakota Supreme Court involving family promises, charitable subscriptions, gratuitous bailments, land promises or marriage settlements in any context relating to promissory estoppel. Thus, the approach of the North Dakota Supreme Court to gratuitous promises such as these has not been established.

3. *Modification, Waiver and Discharge*

The Restatement. As observed earlier in this article,¹⁸⁶ it is commonly understood that the drafters of the original Restate-

183. The image of Pallas Athena springing from the forehead of Zeus is one that has inspired poets and legal scholars alike. Compare, G. GORDON, LORD BYRON, *Childe Harold's Pilgrimage*, Canto IV, Verse XCVI ("Can tyrants but by tyrants conquered be, / And freedom find no champion and no child / Such as Columbia saw arise when she / Sprung forth a Pallas, armed and undefiled?") with L. LOSS, FUNDAMENTALS OF SECURITIES REGULATION 1 (2nd ed. 1988) ("The Securities Act of 1933 did not spring full grown from the brow of any New Deal Zeus").

184. See *supra* notes 6164 and accompanying text.

185. The elements of a section 90 recovery are these: (1) there must be a promise, (2) the promisor must reasonably expect that the promise will induce action or forbearance, (3) the promise must have induced the expected action or forbearance, and (4) injustice must result if the promise is not enforced. Then, if the court can fashion a flexible remedy and adheres to the Restatement Second, it need insist on nothing more, and in particular, it need not insist that the expected action or forbearance be definite and substantial. On the other hand, if the court is not free to fashion a flexible remedy, or if it adheres to the original restatement, then there must be a showing that the expected action or forbearance was definite and substantial. See *supra* note 114 and accompanying text.

186. See *supra* note 64 and accompanying text.

ment believed that, in addition to the categories of promises already enumerated, many promissory modifications of contractual duties, waivers of conditions, and discharges of contractual duties were enforced in the absence of consideration.

Therefore it can be assumed that section 90, in both its original form and in the modified form of the Restatement (Second), is applicable to the class of promises which consist of modifications of existing duties, waiver of conditions, and discharge of duties. In addition, the Restatement (Second) spells out the specific adaptations of section 90 to each of these particular kinds of promises. These specialized formulations relate to modifications,¹⁸⁷ waivers,¹⁸⁸ and discharges.¹⁸⁹

Modifications

Modifications: Promissory Estoppel in the Restatement. Section 89 of the Restatement (Second) concerns modifications to contractual relationships. Under the presumptive rule, a promise modifying a duty under an existing contract is not enforceable in the absence of consideration.¹⁹⁰ Section 89, however, provides that such promises may be enforceable in three circumstances, one of which is based upon reliance. Section 89 provides that:

A promise modifying a duty under a contract not fully performed on either side is binding

- (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made; or
- (b) to the extent provided by statute; or
- (c) to the extent that justice requires enforcement in view of material change of position in reliance on the promise.¹⁹¹

Section 89(c) is an application of reliance-based recovery to the circumstances of modifications of contractual relations. Upon analysis, a section 89(c) promissory estoppel recovery requires these elements: (1) there must be a promise, (2) the promise must modify a duty under a contract not fully performed on either side, (3)

187. RESTATEMENT SECOND, *supra* note 3, § 89.

188. *Id.* § 84.

189. *Id.* § 273.

190. RESTATEMENT SECOND, *supra* note 3, § 17. Section 17 is set forth *supra* at note 4. See also *Id.* § 73 ("Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of an honest dispute is not consideration; but a similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of bargain.")

191. *Id.* § 89.

there must be a material change of position in reliance on the promise, and (4) justice must require enforcement.¹⁹² Section 89 is new.¹⁹³ The language of section 89(c) is "adapted" from section 2-209 of the Uniform Commercial Code.¹⁹⁴ Under section 89(c), as in section 2-209 of the U.C.C., the original terms "can be reinstated for the future by reasonable notification received by the promisee unless reinstatement would be unjust in view of a change of position" on her part.¹⁹⁵

Modifications: Responses Outside of Promissory Estoppel. It is not always necessary to find a promissory estoppel basis of recovery of the sort typified by § 89(c) of the Restatement (Second) in order to fashion a recovery for the promisee. Of the nonpromissory estoppel responses to the problem of promises modifying contractual duties, the response which overthrows the presumptive rule more nearly distinguishes this class of promises from the other classes of promises.¹⁹⁶

Section 89(b) of the Restatement (Second) recognized that many states have simply done away with the requirement that there be any consideration to reach a binding modification, so long as the statutory substitute for consideration (usually a writing) is present.¹⁹⁷ North Dakota is such a state. The North Dakota Century Code provides separately for the modification of oral and written contracts.¹⁹⁸ Under the Century Code, if the original con-

192. *Id.* (extracting pertinent language from the initial clause and clause (c) of § 89).

193. *Id.* § 89, Reporter's Note.

194. *Id.* § 89, Comment (d). That the language is adapted, rather than simply borrowed is plain. The approach, and language, of Section 2209 of the Uniform Commercial Code differs fundamentally from section 89 of the Restatement. Section 2209 eliminates the requirement of consideration altogether in the case of a modification, stating that "[a]n agreement modifying a contract within this Article needs no consideration to be binding." U.C.C. § 2-209 (1988). The translation to Restatement terms is by way of adaptation — the Restatement does not eliminate the requirement of consideration altogether, but only if the modification is "fair and equitable" in light of unanticipated circumstances, or if there is a statute (such as § 2209 of the UCC) that dispenses with the requirement, or if there has been material reliance. RESTATEMENT SECOND, *supra* note 3, § 89(a), (b) & (c).

195. RESTATEMENT SECOND, *supra* note 3, § 89 comment d. Compare U.C.C. § 2209(5).

196. The three nonpromissory estoppel responses which protect the reliance interest are (a) recharacterization (of the facts), or (b) reanalysis (of the law) so as to permit recovery within the presumptive rule, and (c) overthrow of the presumptive rule (in this case, the requirement of consideration) so as to permit recovery. See *supra* notes 5356 and accompanying text. In the context of the promise modifying a preexisting duty, the recharacterization approach is typified by the search for something which "differs from what was required by the [preexisting] duty in a way which reflects more than a pretense of bargain," Restatement (Second) § 73, or — by what amounts to practically the same thing — the presence of an additional something of substantial value, such as a "hawk, a robe, or a horse." Compare RESTATEMENT SECOND, *supra* note 3, § 73 (more than a pretense) with *Pinnel's Case*, 77 Eng. Rep. 237 (1602) (hawk, horse or robe).

197. RESTATEMENT SECOND, *supra* note 3, § 89.

198. The term "Century Code" is used here to contrast it to the Field Code. The

tract is oral, then a written modification is binding without a new consideration.¹⁹⁹ Moreover, under the Century Code, if the original contract is in writing, then it may be modified "by a contract in writing or by an executed oral agreement and not otherwise."²⁰⁰ Any recovery on the basis of such statutes as these is a recovery which is not based upon promissory estoppel. Instead, these statutes represent a direct overthrow of the presumptive rule that

relevant Century Code provisions were introduced into the 1877 version of the North Dakota code, and they are contrary to the corresponding elements in the Field Code. Compare FIELD CODE §§ 842, 846 with N.D. CENT. CODE §§ 9-09-05, 9-09-06 (1987):

Field Code:

§ 842. A contract not under seal may be altered in any respect by consent of the parties, *upon a sufficient consideration*; and is extinguished thereby to the extent of the alteration.

§ 843. A contract under seal may be altered by an agreement under seal, or by an executed agreement without seal; and not otherwise, except as to the time of performance, which may be extended by any form of agreement.

Century Code:

§ 9-09-05. A contract not in writing may be altered in any respect by consent of the parties *in writing without a new consideration*, and is extinguished thereby to the extent of the alteration.

§ 9-09-06. A contract in writing may be altered by a contract in writing or by an executed oral agreement and not otherwise. An oral agreement is executed within the meaning of this section whenever the party performing has incurred a detriment which he was not obligated by the original contract to incur.

(emphasis added).

199. N.D. CENT. CODE § 9-09-05 (1987). The statute seems to provide that it is the exclusive method by which promises of modification, unaccompanied by new consideration, can be enforced. That is, the statute provides that the parties' *written* consent is binding without consideration; but the modification of an oral contract by the parties' *oral* consent would appear to be binding only "with a new consideration." *Id.*

200. N.D. CENT. CODE § 9-09-06 (1987). Section 9-09-06's meaning is not entirely clear. If § 9-09-06 is read with an emphasis on the modification's being "a contract in writing," then, since an agreement is not a contract unless there is consideration (*see* N.D. CENT. CODE § 9-01-02(4)), this means that a modification of a written agreement is not binding unless the modification is both written and supported by new consideration. If the intent of § 9-09-06 is understood in this manner, following as it does, § 9-09-05, then § 9-09-06 would provide that the rule of § 9-09-05 is limited to modifications of oral contracts and is inapplicable to modifications of written agreements.

But if § 9-09-06 is read with an eye towards the preceding section, § 9-09-05, which provides that oral contracts can be modified either in writing without consideration or orally with new consideration, then a strong argument can be made that the focus of § 9-09-06 (and the only part in which it was intended to differ from § 9-09-05) is the effective moment of the oral modification to the written agreement — the oral agreement (which, presumably, must be accompanied by new consideration, following the apparent rationale of § 9-09-05) is only enforceable if *executed* "and not otherwise." N.D. CENT. CODE § 9-09-06. Hence, an analogy, admittedly imperfect, could be made to accord and satisfaction: the new promise (the executory accord) is, though made with new consideration, not enforceable until performed (that is, until the satisfaction has occurred). Or, the statute might mean that the new, oral promise (the executory accord) does not require new consideration, but still isn't enforceable until performed. In either event, it could be argued that the action in § 9-09-06 is concentrated in the last clause, so that the reference in the first clause to a "contract in writing" might be understood to mean simply a written agreement which, following § 9-09-05, no more requires a new consideration than did the written modification of the oral agreement as set forth in § 9-09-05.

would have required consideration before enforcing a promise to modify a contractual duty.

Perhaps there are some states that have, as suggested by section 89(a) of the Restatement (Second), also done away with the requirement of consideration if the modification is "fair and equitable in view of circumstances not anticipated by the parties when the contract was made."²⁰¹ Indeed, the Uniform Commercial Code can be understood to take a similar approach,²⁰² and there may be states which have extended the principle beyond the UCC.

Only if there is neither consideration, nor compliance with the requisites of any statutory²⁰³ or other²⁰⁴ provisions that would support a promise of modification in the absence of consideration, is promissory estoppel needed as a possible basis for recovery. North Dakota has had at least one such case, and it, and other cases not quite so clearly on point, are discussed below.

Modifications: Promissory Estoppel in North Dakota. The clearest case on point is *Farmer's Bank of Gladstone v. Anton*,²⁰⁵ which was decided in 1924 predating the Restatement of Contracts.²⁰⁶ The more recent cases, *Mitchell v. Barnes*,²⁰⁷ decided in 1984, and *Thiele v. Security State Bank of New Salem*,²⁰⁸ decided in 1986, are both sympathetic to the theory of promissory estoppel but do not constitute square holdings for the plaintiff promisee on the basis of section 89(c), or section 90 reliance.²⁰⁹

201. RESTATEMENT SECOND, *supra* note 3, § 89(a).

202. The Uniform Commercial Code is similar, but not identical. See U.C.C. § 2-209(1) (1988) ("an agreement modifying a contract within this Article needs no consideration to be binding"), and *Id.*, § 2-103 ("every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement"). The two provisions of the UCC, when read together may have the effect of enforcing those promises if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made, if for "good faith" can be read "fair and equitable, etc." However, even if the standard is the same, the burdens of persuasion are reversed between the Restatement § 89(a) (the promisor will not have to perform unless the promisee can show that the promise is "fair and equitable, etc.") and the UCC § 2-209(1) (the promisor will have to perform unless the promisor can show that the promise was extracted in a manner other than by "good faith").

203. A statutory overthrow of the consideration requirement. RESTATEMENT SECOND, *supra* note 3, § 89(b).

204. Some rule of law which permits "fair and equitable modifications in view of circumstances not anticipated by the parties when the contract was made." RESTATEMENT SECOND, *supra* note 3, § 89(a).

205. *Farmer's Bank of Gladstone v. Anton*, 199 N.W. 582 (N.D. 1924).

206. See RESTATEMENT *supra* note 1 and accompanying text.

207. *Mitchell v. Barnes*, 354 N.W.2d 680 (N.D. 1984).

208. *Thiele v. Security State Bank of New Salem*, 396 N.W.2d 295 (N.D. 1986).

209. In *Mitchell*, the promisee recovered because of a statute. *Mitchell*, 354 N.W.2d 680. In *Thiele*, the putative promisee did not recover at all since it was held that there was no promise. *Thiele*, 396 N.W.2d 295. In addition, there is a suggestion of a native,

Anton. Farmer's Bank of Gladstone v. Anton involved a modification to a loan agreement.²¹⁰ Anton's land was encumbered by three mortgages.²¹¹ Anton had defaulted on the second mortgage and a foreclosure sale had occurred, but the redemption period had not yet expired.²¹² The Farmer's Bank, which had no security interest in the real property, but was a preexisting creditor of Anton, promised Anton that it would redeem the premises on Anton's behalf if Anton would execute a mortgage granting it a security interest in the premises to secure the payment of \$1,320, the amount of the preexisting debt.²¹³ Anton executed a mortgage in favor of Farmer's Bank; Farmer's Bank procured an assignment to it of the sheriff's certificate of sale, but, when the period of redemption had passed, it procured a sheriff's deed in its own name, and subsequently sold the property to a third party.²¹⁴ In a quiet title action, Anton asserted that he was ready, willing, and able to redeem the property from Farmer's Bank, and was entitled to do so on the strength of the Bank's promise to him.²¹⁵ The Bank demurred, urging that its promise was not supported by consideration.²¹⁶

The court first held for Anton on the basis of promissory estoppel (without using the word "promissory"), and then held for Anton on the alternative ground that there was consideration.²¹⁷ As to estoppel, the court said simply:

Under the facts as alleged in the answer, it is clear that a promise was made by plaintiff, before the period of redemption had expired, which was relied on by the defendants Anton and wife, with the result that they took no steps to redeem within the statutory period, and the plaintiff is estopped from denying the right to redeem.

preRestatement reliancebased response in the *Kenmare Coal* case, but it is by way of dicta. See *supra* note 128.

210. *Anton*, 199 N.W. at 58283. The suit was a quiet title action brought by the bank after foreclosure. *Id.* Mr. Anton's claim to the land was based upon a promise the bank made to him in connection with a loan agreement. *Id.*

211. *Id.* at 582.

212. *Id.*

213. *Id.* at 58283. Farmer's Bank had a chattel mortgage on Anton's farm stock and machinery. *Id.* at 583.

214. *Id.*

215. *Id.*

216. *Id.* The promise at issue was a lender's promise to allow the borrower to redeem the land from it "at such time as [the borrower] might elect upon payment of the sums paid by [the bank] for such redemption with interest at 8 per cent" and in return for the borrower's promise to grant a mortgage on the land to secure payment of the preexisting debt. *Id.* at 582.

217. *Id.* at 58384.

* * *

For aught that appears in the pleadings, the defendants, after entering into this agreement with the plaintiff and performing their part thereof fully, may, in reliance on that agreement, have ceased to endeavor to raise the money necessary to redeem. The representation and the reliance on thereon are clearly alleged; and surely it would be a fraud on defendants to permit plaintiff now to assert anything to the contrary.²¹⁸

Anton's impact as a pre-section 90 harbinger of promissory estoppel is, however, considerably lessened by the court's immediate observation that there was, in fact, consideration for the promise.²¹⁹ The court stated that Anton suffered a detriment by granting an additional encumbrance in favor of Farmer's Bank which he was not legally bound to suffer and that the bank received an advantage from the additional security.²²⁰ Thus, there was consideration for the promise, and the court held in Anton's favor on that basis.²²¹

Mitchell. *Mitchell v. Barnes* involved a modification to a lease agreement covering 1,840 acres of farmland.²²² The promise at issue was the landlord's promise permitting the tenants to violate certain provisions of the lease, raised as a defense by the tenants in a suit brought by the landlord against them after the lease term had concluded. The landlord alleged that at the expiration of the lease the tenants were to return the land with 355 acres summer-fallowed, 355 acres dug once, and 1,065 acres fall-plowed and dug; but that the tenants did none of the digging and fall plowing required, and left only 152 acres unplanted.²²³ The tenants defended on the basis of a promise they asserted the landlord had made modifying the agreement by eliminating the summer-fallow and fallwork requirements.²²⁴ Once the tenants' version of the facts was accepted, the promise was held to be enforceable because of a statutory provision applicable to modifications with-

218. *Anton*, 199 N.W. at 583, 584.

219. *Id.* at 584.

220. *Id.*

221. *Id.* at 584-85.

222. *Mitchell*, 354 N.W.2d at 681.

223. *Id.* The landlord sought total damages in the amount of \$32,536.28: \$13,367.50 as the cost of summerfallowing, digging and fall plowing; \$1,337.78 as the tenants' share of rock burial; \$3,459 because the landlord leased the land to another tenant on a crop share basis and the yield on the 203 acres that should have been summerfallowed was reduced since barley had to be planted instead of wheat; and \$14,372 by which the tenants were enriched by seeding 203 acres more than they were entitled to seed. *Id.* at 68182.

224. *Id.* at 682.

out consideration.²²⁵ The statute, however, was interpreted as satisfied by detrimental reliance, which was defined in a jury instruction as follows:

If you find that [the landlord] . . . made statements to the defendants which statements would cause the defendants not to fulfill the contract in question as written, and if you further find that the plaintiffs relied upon the statements of [the landlord], and if you further find that the defendants either acted or did not act based upon such statements and that said action was of such a character as to change the position or status of the defendants, [the landlord] cannot enforce that portion of the contract which [the landlord] told the defendants not to perform.²²⁶

The jury instruction was not before the North Dakota Supreme Court on appeal, and thus lacks authority as a statement of the law in North Dakota.²²⁷ The Court took pains to point out that the landlord did "not assert that the instruction incorrectly stated the law," but that the landlord only claimed, instead, that the defendant tenants had not properly pleaded estoppel as an affirmative defense and so had waived it.²²⁸

Thiele. *Thiele v. Security State Bank of New Salem*²²⁹ can be read as a modification to a bank checking account agreement. The Bank had honored overdrafts on the customer's account over a period of years, treating them, in effect as unsecured loans; but this practice was something the Bank had never promised to do, and

225. *Id.* The provision, of course, was § 9-09-06. The case was complicated because the agreement sought to be modified was in writing, and the modification itself was oral. Relying upon the last sentence of § 9-09-06, the court held, in effect, that the statute created a residual promissory estoppel recovery for promisees who, in reliance upon a promise in modification, incurred some detrimental reliance. The statute required that any oral agreement modifying a written agreement be executed, and went on to provide that an oral agreement is "executed" within the meaning of the statute if the party performing has incurred a detriment "which he was not obligated by the original contract to incur." *Mitchell*, 354 N.W.2d at 682. It might have been supposed that this detriment would have been something in the way of performance, but the statute is at least susceptible of the meaning that the detriment could be mere forbearance to act in reliance on the promise. The court, in taking the latter interpretation, thereby turned 9-09-06 into a promissory estoppel rule, equating any sort of detrimental reliance to the performance of "a detriment which [the party performing] was not obligated by the original contract to incur" so as to constitute an "executed" oral agreement within the meaning of the statute. *Id.* at 683. Hence, the tenants' failure to abide by the provisions of the lease was held to be a detriment sufficient to bind the landlord to the promise not to enforce those provisions. *Id.* At this point, § 9-09-06 might as well be § 89(c) of the Restatement.

226. *Mitchell*, 354 N.W.2d at 683.

227. *See generally id.* at 68384.

228. *Id.* On this issue, the court held that, while it did not use the word "estoppel," the answer did give the Landlord fair notice of the nature of the defense, and that was all that it was required to do. *Id.*

229. 396 N.W.2d 295 (1986).

the written account agreement governing the relation between it and the customer expressly provided that the Bank need not, and would not do so.²³⁰ When the Bank stopped honoring overdrafts, and began returning checks for insufficient funds, the customer tried to enforce an alleged promise by the bank.²³¹ The customer asserted that the Bank's prior conduct was, in effect, a promise to treat the customer's checking account as an unsecured, revolving line of credit.²³² The customer lost. The court ruled that the prior course of conduct did not constitute a promise.²³³ Thus, promissory estoppel did not bind the bank—no promise, no estoppel. The Court opined that:

. . . before the doctrine of promissory estoppel may be invoked, the promise or agreement must be clear, definite, and unambiguous as to its essential terms. That feature is lacking in the instant case.²³⁴

Summary of the Modification Cases. The three cases, in two of which there was a recovery for the relying promisee, and in one of which there was no recovery, will be considered together to determine whether they establish a promissory estoppel doctrine in North Dakota.

Cases in Which there Was a Recovery.

In *Anton*,²³⁵ the alternative promissory estoppel holding is based upon (1) a promise, (2) and substantial forbearance in reliance upon it; together with the fact that both the promise and the reliance were clearly alleged.²³⁶ It predated the original Restatement, and therefore stands as authority prior to any formulation of § 90. And yet, the strength of the holding is undercut by the fact that the court also held that there was consideration.

In *Mitchell*,²³⁷ the North Dakota Supreme Court did not formulate a rule for promissory estoppel.²³⁸ The statement of the rule took the form of a jury instruction to which the landlord did not object.²³⁹ The instruction is not, strictly speaking, in the lan-

230. Thiele v. Security State Bank of New Salem, 396 N.W.2d at 296.

231. *Id.*

232. *Id.* Apparently, the imputed line of credit would have had a limit of at least \$510,693.33, the amount of insufficient fund checks drawn by the customer and dishonored by the bank. *Id.*

233. *Id.* at 300-301.

234. *Id.* at 301 (citing Lohse v. Atlantic Richfield Co., 389 N.W.2d 352 (N.D. 1986)). Lohse is discussed *infra* at notes 331-46.

235. Farmer's Bank of Gladstone v. Anton, 199 N.W. 582 (N.D. 1924).

236. *Id.* at 584.

237. Mitchell v. Barnes, 354 N.W.2d 680 (N.D. 1984).

238. *Id.*

239. *Id.* at 683.

guage of the Restatement for it omits entirely the promisor orientation, by which the Restatement inquires whether the promisor could reasonably have expected the promisee to rely, and it omits the inquiry whether "injustice can be avoided" only by enforcing the promise.²⁴⁰ But there is no reason to assume that the North Dakota Supreme Court thereby intended to adopt the trial court's variation on the Restatement; rather, it appears that the issue was not before the Supreme Court.²⁴¹

Cases in Which there Was No Recovery.

In *Thiele*,²⁴² there was no promise made at all. Thus, the case gave the North Dakota Court no occasion to state a rule other than the threshold observation that before promissory estoppel can be invoked, there must be a promise which is "clear, definite, and unambiguous as to its essential terms."²⁴³ As innocuous as this threshold issue may appear, it is at odds with some courts' more aggressive reading of the Restatement, requiring a more definite promise than do they.²⁴⁴ Although this variation merely makes it somewhat more difficult for a promisee to recover in the context here discussed, this innovation would make it impossible for the promisee to recover in one of the upcoming categories soon to be discussed.²⁴⁵

In conclusion, these are cases which are sympathetic to the Restatement's formulation on promissory estoppel in the context of modifications, but which do not embrace the Restatement.

Waivers

Waivers: Promissory Estoppel in the Restatement. Section 84 of the Restatement (Second) concerns waivers of conditions, treating them as promises to perform a duty in spite of the non-occurrence of a condition.²⁴⁶ Under the presumptive rule, such a promise would be unenforceable in the absence of consideration. But section 84(1) provides that, unless the occurrence of the condition was a material part of the agreed exchange²⁴⁷ or was a risk assumed by the promisor,²⁴⁸ "a promise to perform all or part of a

240. See RESTATEMENT SECOND, *supra* note 3, § 90.

241. *Mitchell*, 354 N.W.2d at 683.

242. *Thiele v. Security State Bank of New Salem*, 396 N.W.2d 295 (N.D. 1986).

243. *Id.* at 301.

244. Compare *id.* ("promise must be clear, definite and unambiguous") with RESTATEMENT SECOND, *supra* note 3, § 90 ("[a] promise that the promisor should reasonably expect to induce action").

245. See *infra* notes 32576 (especially note 345) and accompanying text's discussion of reliance in absence of assent and insufficient definiteness.

246. RESTATEMENT SECOND, *supra* note 3, § 84.

247. RESTATEMENT SECOND, *supra* note, § 89(1)(a).

248. *Id.* § 84(1)(b).

conditional duty under an antecedent contract in spite of the non-occurrence of the condition is binding."²⁴⁹ Thus far, the rule of section 84, although it makes a promise enforceable in the absence of consideration, is not directly based upon reliance on the promise — it makes the promise binding in any event, and regardless of whether there has been any reliance.²⁵⁰ But an important qualification, set forth in section 84(2), is based upon reliance. Section 84(2) goes on to provide that the waiver (if not otherwise enforceable, apart from the operation of § 84) can be revoked, and the condition reinstated, if there is timely notice, and if

- (a) the notification is received while there is still a reasonable time to cause the condition to occur under the antecedent terms or an extension given by the promisor; and
- (b) reinstatement of the requirement of the condition is not unjust because of a material change of position by the promisee. . . .²⁵¹

At this point, Section 84 becomes another reliance-based recovery, for the section can be reformulated to provide that a promise to perform a duty in spite of the non-occurrence of a condition is enforceable (and irrevocable) if certain requirements of promissory estoppel are met. These requirements are: (1) there must be a promise, (2) the promise must be to perform all or part of a conditional duty in spite of the non-occurrence of the condition (provided that the occurrence of the condition is neither a material part of the agreed exchange nor a risk assumed by the promisor), (3) there must be insufficient time to cause the condition to occur under the antecedent terms or under an extension, (4) there must be a material change of position by the promisee, and (5) justice must require enforcement.

Waivers: Promissory Estoppel in North Dakota. North Dakota appears to have no retrievable case squarely on point, but there is at least one case which approaches the issue. In *Russell v. Bank of Kirkwood Plaza*,²⁵² a party interested in a loan commitment

249. *Id.* § 84(1).

250. ". . . [the rule of 84(1)] can be thought of in terms of waiver of a defense not addressed to the merits, and rests in large part on the policies against forfeiture and unjust enrichment." *Id.*, § 84 comment (a). However, where the waiver is made while there is still time for the condition to occur, the waiver "may induce nonoccurrence of the condition, and enforcement may also rest on reliance. . . ." *Id.* Likewise, the commentary to § 84 notes that when the waiver is "reinforced by reliance, enforcement is often said to rest on 'estoppel.'" *Id.* § 84, comment (b) (referencing §§ 89 and 90 of the Restatement).

251. *Id.* § 84(2).

252. *Russell v. Bank of Kirkwood Plaza*, 386 N.W.2d 892 (N.D. 1986).

alleged that the Bank had breached its promise to loan money.²⁵³ The Bank had refused to fund the loan because not all of the conditions to its obligation had occurred.²⁵⁴ Had the Bank made any promise to waive the non-occurrence of any of the conditions to its obligation, had the putative borrower relied upon any such promise, and had the case turned on any of those events, this could have been an instance for the court to determine whether to adopt section 84(2) promissory estoppel. But the Bank made no such promise, the borrower relied on nothing more than the hoped-for loan itself, and the reliance of the interested third party simply took the form of its undertaking to cause the occurrence of some of the conditions which were within its control, but which it would have done independently of the promise.²⁵⁵ The case is, therefore, not an example of promissory estoppel being asserted to waive the non-occurrence of a condition.²⁵⁶

Discharges

Discharges: Promissory Estoppel in the Restatement. Consensual discharges of a duty may take any number of forms. Some of the more familiar instances (and terminology) of discharge are: discharge by substituted performance, accord, agreement of rescission, release, and contract not to sue.²⁵⁷ In all these instances, and however termed, a promise to discharge a duty is still a promise. Whether it is presumptively enforceable depends on whether the promise is accompanied by consideration. Section 273 of the

253. *Id.* at 89394. Kirkwood Bank's loan commitment was made to a partnership, East Plaza, which had already recovered against the bank, based upon the bank's anticipatory repudiation of the loan commitment. *Glatt v. Bank of Kirkwood Plaza*, 383 N.W.2d 473, 479 (N.D. 1986). For a detailed discussion of the *Russell* case, see *supra* notes 16177 and accompanying text.

254. *Id.* at 479.

255. *Russell*, 386 N.W.2d at 893. See *supra* notes 16169 and accompanying text.

256. This is, perhaps, an indication of the desirability of using, not the general formulation of § 90, but rather the specific formulation which relates to the specific context at issue. Had there been an attempt to enforce a promise in the face of the nonoccurrence of a condition, it would have been important to invoke the analysis suggested by § 84(2) instead of § 90. Section 84(2), relating to the enforceability of unbargained for promises to waive conditions, forces the promisee to point to a *promise to perform in spite of the non-occurrence of the condition*, and forces the promisee to demonstrate its reliance on *that* promise. RESTATEMENT SECOND, *supra* note 3, § 84(2). An unfocused section 90 analysis, in contrast, may permit a more vacuous and nonsensical argument over the conditioned promise itself, as if that sort of reliance-as-wistful-thinking were sufficient to deprive another party of the condition *it* was entitled to rely upon. See generally, *Russell*, 386 N.W.2d at 897. The prior finding that the Bank had breached by anticipatory repudiation took the failure of conditions out of the case, and the court was careful not to fall into that trap, but its section 90 analysis, coupled with its willingness to grant plaintiff's assumption concerning the existence of a promise (which must be the promise, irrelevant in this context, to fund the loan) apart from a repudiation and apart from a promise waiving a condition could, if not carefully understood, lead to disastrous results in less sure hands. *Id.*

257. See RESTATEMENT SECOND, *supra* note 3, ch. 12, Topic 1, Introductory note.

Restatement (Second) both states the presumptive rule, and provides a particular adaptation of the reliance basis for enforcement. Section 273 provides that:

- . . . an obligee's manifestation of assent to a discharge is not effective unless
- (a) it is made for consideration,
 - (b) it is made in circumstances in which a promise would be enforceable without consideration, or
 - (c) it has induced such action or forbearance as would make a promise enforceable.²⁵⁸

Here is yet another application of the reliance basis for enforcing a promise.

Discharges: Responses Outside of Promissory Estoppel. It is not necessary to find a promissory estoppel basis of recovery of the sort exemplified by § 273(c) of the Restatement (Second) in order to fashion a recovery for the promisee. As in the case of promises modifying a preexisting duty, the presumptive rule itself frequently has been rejected.²⁵⁹

The North Dakota Century Code does away with the requirement of consideration in the case of promises discharging existing duties, so long as the promise is in writing.²⁶⁰

Discharges: Promissory Estoppel in North Dakota. There are no retrievable opinions of the North Dakota Supreme Court involving discharges in the context of promissory estoppel.

Observations Concerning Modifications, Waivers and Discharges

All of these circumstances, modifications, waivers, and discharges of all kinds, have conspired together to create a bewildering array of rule and counter rule in their relationship to the presumptive rule that promises made in the absence of considera-

258. *Id.* § 273.

259. The other responses are those of recharacterization (of fact) or reanalysis (of law). See *supra* notes 5356 and accompanying text. In the context of the promise discharging a preexisting duty, the recharacterization approach is typified by the search for some basis for finding that the duty is either unliquidated or disputed (and so may be the subject of a compromise) or for some way of finding something, however slight, that might constitute a bargain for the release. See RESTATEMENT SECOND, *supra* note 3, § 273.

260. Again, the term "Century Code" is used to contrast it to the Field Code. The relevant Century Code provision was introduced into the 1877 version of the North Dakota statutes, and it is contrary to the corresponding provision in the Field Code. Compare, § 741 of the Field Code with § 9-13-01 of the Century Code:

(Field Code) § 741. An obligation is extinguished by a release therefrom given to the debtor by the creditor, upon a new consideration, or under seal.

(Century Code) § 9-13-01. An obligation is extinguished by a release therefrom given to the debtor by the creditor upon a new consideration, or if the release is in writing, with or without a new consideration (emphasis added).

tion are unenforceable. Indeed, the multiplication of names alone gives evidence of the fecundity with which problems are delivered in these contexts. As if it would be too easy simply to ask, 'where is the consideration?' the issue is framed in terms of a 'pre-existing legal duty rule' when the promise in question is a promise to modify a duty, and in terms of a 'waiver' of a 'right,' when the issue is actually the enforceability of a promise to excuse the non-occurrence of a condition. Moreover, the issue is framed in terms of 'executory accord,' when the issue is actually the enforceability of a promise to accept a different performance in discharge of an existing duty. In a certain sense, it would have been, indeed, too easy simply to ask 'where is the consideration,' for at least some promises of the sort described here have long been enforced without consideration. Further, these promises have been enforced without bargained-for consideration long before there was a section 90 explanation for enforcement. Thus, asking the question might have risked upsetting the attempts to explain the result, for it would force attention upon the answer 'there isn't any bargained-for consideration.'

These cases are generally difficult to reconcile. In order both to hold that a particular promise was enforceable and, at the same time, to hold, in general, that a promise requires consideration, some of the older (pre-restatement) cases in which the promise was enforced frequently seemed to stretch both fact and law (or, perhaps, the older definitions of consideration did not require quite the same bargain element as the modern ones do, and so did not require stretching); other cases represented fairly straight-forward and orthodox interpretations of fact and law where the promise is not enforced; and other cases simply seemed to assume away the general problem by declaring special rules applicable to particular kinds of promises.

Thus, the school cases seem to stand for the propositions that modifications are frequently not enforced, but may be, and, when such promises are enforced, it is sometimes by an unexpected interpretation of the facts that permits a conclusion that there actually was consideration. In cases involving waivers, it seemed as though the solution sometimes was simply to refuse to conceive of the problem as being one that involved the absence of consideration, but rather to assume there was a separate legal compartment for 'waivers.'²⁶¹ Likewise, discharges created further

261. This is hard to do, however, in light of J. EWART, *Waiver Distributed Among the*

opportunities to elect to treat the several problems as though inhabiting several separate departments, in none of which the ordinary rules seemed to apply in quite the same way. Moreover, these cases are generally not related to one another when studied, and the court decisions generally manifest the same lack of relationship.

The Restatement can provide a unifying approach to the reality of these cases. The reality, of course, is that many promissory modifications, waivers and discharges were enforced in the absence of consideration, and were so enforced prior to the promulgation of section 90 of the original Restatement. The original section 90 was intended to apply to such promises, and it is clear that several sections of the Restatement (Second) apply specifically to those promises.

B. RELIANCE IN THE ABSENCE OF ASSENT

General. Three subcategories of reliance in the absence of assent are anticipated by the Restatement (Second). The first two categories relate to instances in which assent is lacking for want of acceptance. The third category has to do with circumstances in which assent is lacking due to the failure of negotiations or to insufficient definiteness in the promise. The subcategories are as follows: (1) reliance, prior to acceptance, on a promise taking the form of an offer that seeks acceptance by performance, (2) reliance, prior to acceptance, on a promise taking the form of an offer that seeks acceptance by promise, and (3) reliance, prior to completion of negotiations, upon a promise not yet made; or reliance upon a promise too indefinite for intelligible enforcement.²⁶²

There is no case in which the North Dakota Supreme Court has awarded a recovery because of reliance upon a promise in any of these categories. There have been no cases of the first category in North Dakota. However, in one case arguably within the second category, and in at least three cases in the third category, the North Dakota Supreme Court has denied recovery, though assuming the existence of a reliance-based rule. Because many of the cases of denied recovery in the third category arose on fact pat-

Departments Election, Estoppel, Contract, Release (1917), cited in E. FARNSWORTH, *CONTRACTS*, 561 n.3 (1982).

262. See *supra* notes 44 and 70 and accompanying text. The relevant Restatement's provisions are §§ 45 (creation of an option contract by beginning performance), 87(2) (reliance on an offer prior to acceptance) and 90 (as applied to reliance on negotiations or on promises too indefinite to be intelligible). *RESTATEMENT SECOND*, *supra* note 3, §§ 45, 87(2) and illustrations 8 and 10 to § 90.

terms that would appear to be at least as compelling as any which the Restatement ever contemplated, it is hard to resist the conclusion that the court has, in fact, consistently and decisively rejected the application of promissory estoppel to (at least) the third category of "reliance in the absence of assent" cases — the ones in which negotiations fail or in which the promise is insufficiently definite.

Before discussing reliance in the absence of assent, it would be helpful to review briefly the implications of the Restatement's position that assent must be manifested before a bargain will be enforced.

Formulation of the Rule (Assent). The Restatement provides, subject to special rules, including the rule set forth in section 90, that the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange; manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance; and the manifestation of mutual assent ordinarily takes the form of an offer or proposal by one party followed by acceptance by the other party.²⁶³ In addition, the Restatement recognizes the difference between an intent to enter into a contract and the intention to begin negotiations, and it also recognizes the need for some degree of certainty.²⁶⁴

Observations and School Cases (Mutual Assent). In order better to understand the reliance issues in the context of mutual assent, Professor Wormser's famous Brooklyn Bridge hypothetical²⁶⁵ and three illustrations based on well known cases will be discussed next. The illustrations are based upon *Drennan v. Star*

263. RESTATEMENT SECOND, *supra* note 3, §§ 17(1), 17(2), 18, 22.

264. The Restatement provides that, "[e]ven though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain." *Id.* § 33(1). This rule reflects the fundamental principle, expressed in § 1 of the Restatement, that a contract is a promise or set of promises for breach of which there is a remedy, or which the law will recognize in some way. Thus, "[i]f the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract." *Id.* § 33, comment a.

This rule of certainty, coupled with the distinction between contract and precontract negotiations, also reflects the fact that the omission of essential terms is often no accident, but might, in a particular case "show that a manifestation of intention is not to be understood as an offer or acceptance." *Id.* § 33(3). And this last observation is explained as a particular example of the rule stated in § 26 of the Restatement concerning preliminary negotiations ("a manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows . . . that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent") — and so, "the more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement." *Id.* § 33, comment c.

265. Wormser, *The True Conception of Unilateral Contracts*, 26 YALE L.J. 136 (1916).

Paving,²⁶⁶ decided by Justice Traynor, and the enigmatic impact cases, *Hoffman v. Red Owl Stores, Inc.*,²⁶⁷ and *Goodman v. Dicker*.²⁶⁸

First, the Brooklyn Bridge hypothetical will be discussed. Professor Wormser put the hypothetical this way:

Suppose A says to B, "I will give you \$100 if you walk across the Brooklyn Bridge," and B walks — is there a contract? It is clear that A is not asking B for B's *promise* to walk across the Brooklyn Bridge. What A wants from B is the *act* of walking across the bridge. When B has walked across the bridge there is a contract, and A is then bound to pay B \$100 . . . A has bartered away his volition for B's act of walking across the Brooklyn Bridge.²⁶⁹

So far, so good, but the matter can become difficult for B. If A is not asking for B's promise, but is asking for her performance, then A is making an offer that seeks acceptance by performance. In circumstances like the one given, performance cannot be accomplished instantly, but must extend over time. Therefore, and in the nature of the transaction, B must, in some sense, rely upon the offer even as she begins the act which, when completed, will constitute the acceptance. She cannot avoid relying upon the offer prior to having accepted it. What if A should revoke the offer, after B has relied by beginning the walk, but before B has accepted by completing the walk?²⁷⁰

Next is an illustration taken from the Restatement (Second) of Contracts, based upon the well known case, *Drennan v. Star Paving*.²⁷¹ The illustration is as follows:

A submits a written offer for paving work to be used by B as a partial basis for B's bid as general contractor on a large building. As A knows, B is required to name his sub-contractors in his general bid. B uses A's offer and B's bid is accepted.²⁷²

266. *Drennan v. Star Paving Co.*, 333 P.2d 757 (Cal. 1958).

267. *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267 (Wisc. 1965).

268. *Goodman v. Dicker*, 169 F.2d 684 (D.C. Cir. 1948).

269. Wormser, *The True Conception of Unilateral Contracts*, 26 YALE L.J. 136, 136 (1916).

270. This is the standard problem which illustrates the first subcategory of reliance in the absence of mutual assent. The Restatement's solution, providing for a recovery based on recharacterization of the facts and reanalysis of the law, is discussed *infra* at notes 289-93 and accompanying text.

271. *Drennan v. Star Paving Co.*, 333 P.2d 757 (Cal. 1958).

272. RESTATEMENT SECOND, *supra* note 3, § 87, illustration 6.

The question is whether A is bound. The difficulty in answering the question can be better understood by making explicit those additional hypothetical facts assumed by the illustration. To make the illustration meaningful, it must be assumed that A's promise to B (a promise in the form of an offer, as "I will do the paving work for \$10,000") is an offer that sought acceptance by a promise — as by understanding that A must be taken to have manifested an intention to this effect: "I will do the paving work for \$10,000 if you will award me the sub-contract"; and understanding further that the expression "if you will award me the sub-contract" means that A insists that B must promise to award the sub-contract to A.

On such assumptions as these, B's difficulty becomes apparent. B has relied upon A's promise by incorporating A's bid into B's own, but A's promise is an offer seeking acceptance by return promise, and B has not, on the face of it, given any sort of return promise. Therefore, like the promisee in the Brooklyn Bridge hypothetical, B has relied upon an offer prior to having accepted it. But, unlike the promisee in the Brooklyn Bridge hypothetical, who had to walk across the bridge in order to accept the promise there, and so faced an unavoidable risk, B could, conceivably, have accepted instantly and so avoided any risk of reliance prior to acceptance.²⁷³ The Restatement's response to this problem is to

273. Unlike the Brooklyn Bridge hypothetical, there is nothing built into this situation which makes it impossible for B to be immediately protected. The mailbox rule is adopted to the purpose of establishing in the offeree a power immediately to conclude a contract simply by dispatching an acceptance prior to relying upon the offer. *See, e.g.,* RESTATEMENT SECOND *supra* note 3, § 63. There may, however, be pragmatic reasons that militate against B's taking advantage of the protection which is available: If B is rushing to evaluate many subbidders on any one subcontract, several of whom may have offered variations on the specifications, or may have combined jobs so as to make direct price comparisons difficult, multiplied over many subcontracts, then B may be fortunate simply to put a general bid together in time to submit it — B might assume that the time necessary to forward acceptances to each of the subbidders is time B doesn't have. B then has the argument that, in some circumstances at least, B stands, as a practical matter, on the same footing as the Brooklyn Bridge offeree, as one who must rely prior to acceptance.

There may be other practical reasons that militate against B's taking advantage of the protection that is available: if B does accept, without condition, then, B runs the risk of having bound itself to the subs even if B's bid is not accepted by the owner; but if B accepts, subject to the condition that the owner award the project to B, and that condition were not part of the offer, then, B runs the risk of having made a purported acceptance which varies the offer made by the subs, and risks the possibility that B has rejected the subs' offers — B might suppose that the care necessary on the part of B's lawyer (B, is, after all, the one who is soliciting the subs' offers and could, therefore, have a hand in determining what those offers will look like), or the expense involved in retaining a lawyer, to design the transaction such that the subs will submit offers conditional upon the award of the job is so difficult as to put B, again, on the same practical footing as the Brooklyn Bridge walker.

There may be yet other reasons, based upon B's calculation of B's own advantage, for B to purposely decline to accept the bids. *See, E. FARNSWORTH, CONTRACTS* 184 n. 34 (1982) (*discussing, Schulz, The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry*, 19 U. CHI. L. REV. 237, 256-82, and p. 285 n. 3 (1952)) (to the effect that general contractors prefer not to be bound themselves, and so prefer not to bind the subs, because

suggest that promissory estoppel is available to B.²⁷⁴

Finally, the problem of reliance on promises that were never made, or were not made with sufficient clarity is set forth in two illustrations to the Restatement (Second), one of which is based upon the notorious case, *Goodman v. Dicker*,²⁷⁵ and the other of which is based upon *Hoffman v. Red Owl Stores, Inc.*²⁷⁶

Here is the illustration based upon Goodman:

A applies to B, a distributor of radios manufactured by C, for a "dealer franchise" to sell C's products. Such franchises are revocable at will. B erroneously informs A that C has accepted the application and will soon award the franchise, that A can proceed to employ sales[persons] and solicit orders, and that A will receive an initial delivery of 30 radios.²⁷⁷

A expends \$1,150 in preparing to do business, but does not receive the franchise or any radios. A's recovery against B is a problem, for A has acted in reliance upon B's statement concerning a promise that C never made. A's difficulty is compounded by the fact that, even had C made the promise, the promise's value is indefinite and problematic, since the franchise purports to be revocable at will. In addition, A's difficulty is redoubled because B (not C, from whom the franchise would be granted) is the one with whom A had dealt, and because B's misrepresentation is presumed to be an innocent one.²⁷⁸

they would rather be in a position to reshop the subbids after having been awarded the main contract, and suggesting, further, that the law's efforts to create an option contract in favor of the general contractor only reinforces the existing imbalance in favor of the general contractor, and that it would be better for the law to leave the situation alone by leaving the bids as revocable offers).

274. This is the standard problem which illustrates the second subcategory of reliance in the absence of mutual assent. The Restatement's solution, providing for a promissory estoppel response, is discussed *infra* at notes 295-305 and accompanying text.

275. *Goodman v. Dicker*, 169 F.2d 684 (D.C. Cir. 1948).

276. *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267 (Wisc. 1965).

277. RESTATEMENT SECOND, *supra* note 3, § 90, illustration 8.

278. It might be conjectured that A could assert against B (a) some action sounding in misrepresentation, or (b) some action based upon an equitable estoppel.

Some difficulties that stand in the way of those actions are these: actionable fraudulent misrepresentation, as traditionally given, requires that there be some showing of "fraud" (scienter). See RESTATEMENT (SECOND) OF TORTS § 526 (1977). Negligent misrepresentation requires that there be some showing that the maker of the statement did so in the course of his business, or in some other transaction in which he had a pecuniary interest. See *id.* § 552. Innocent misrepresentation is confined to certain narrow categories of cases involving sales, rentals or exchanges. *Id.* § 552C. While it is true that an innocent misrepresentation of a material fact is sufficient to rescind a contract, see RESTATEMENT SECOND, *supra* note 3, § 164, it is clear that A is seeking to enforce, not to rescind, a promise, and so would take no comfort from rescission.

As to equitable estoppel, it is sometimes said that it "can block, but it cannot create. It is a barricade . . . not a bulldozer." *Madgett v. Monroe County Mutual Tornado Ins. Co.*,

Here is the illustration based upon *Hoffman v. Red Owl Stores, Inc.*:

A, who owns and operates a bakery, desires to go into the grocery business. He approaches B, a franchisor of supermarkets. B states to A that for \$18,000 B will establish A in a store. B also advises A to move to another town and buy a small grocery to gain experience. A does so. Later B advises A to sell the grocery, which A does, taking a capital loss and foregoing expected profits from the summer tourist trade. B also advises A to sell his bakery to raise capital for the supermarket franchise, saying "everything is ready to go. Get your money together and we are set." A sells the bakery taking a capital loss on this sale as well. Still later, B tells A that considerably more than an \$18,000 investment will be needed, and the negotiations between the parties collapse. At the point of collapse many details of the proposed agreement between the parties are unresolved²⁷⁹

The problem of fashioning a recovery for A is made clear when we examine the "many details" unresolved at the point of collapse. Assume, for example, that the A and B of the illustration were contemplating the same sort of details that Hoffman and Red Owl Stores, Inc. had actually contemplated. Accordingly, assume A and B contemplated that A (Hoffman) would find some third party to purchase land, build a supermarket on it, and lease the building to A on a 10-year lease, with an option in A to renew the lease or purchase the building at the conclusion of the term; and that the terms of that sale and lease back were far from finalized.²⁸⁰ Thus, it can be assumed that A has relied upon a promise relating to a franchised supermarket in the absence of such terms as the size, cost, design and layout of the supermarket building; and the absence of leasehold terms (by which A would lease the as yet unspecified and unbuilt supermarket building) such as rent, maintenance, renewal and purchase options.²⁸¹ All this is in addition to any unresolved matters between A and B relating to the terms of the franchise agreement under which A would operate

176 N.W.2d 314 (Wisc. 1970), cited in E. FARNSWORTH & W. YOUNG, CASES AND MATERIALS ON CONTRACTS, 784 (4th ed. 1988). Thus, according to this view, equitable estoppel would help A, if B were suing A, but would not be of any use in the case given. See *infra* note 354 and accompanying text.

279. RESTATEMENT SECOND, *supra* note 3, § 90, illustration 10.

280. *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267, 274 (Wisc. 1965).

281. *Id.*

the, as yet, nonexistent supermarket. Moreover, all this is in addition to the problem of identifying a promise which B actually made to A in a form that invited acceptance.²⁸²

The Restatement solutions to three types of reliance in the absence of assent, and a discussion of the North Dakota cases which address those problems, follows.

1. *Offeror Wanted Acceptance by Performance; Offeree Relied Without Accepting (the Brooklyn Bridge Problem)*

In the Brooklyn Bridge problem, B, the walker, relied upon a promise which took the form of an offer and acted to her detriment prior to accepting the offer.²⁸³ It is reliance, therefore, in the absence of assent, and in violation of the presumptive rule which requires that there be a manifestation of mutual assent before a promise will be enforced. There is a promissory estoppel solution, but it is one which is frequently invoked too soon.²⁸⁴ The promissory estoppel solution consists in section 90 itself (which, in its generality, nowhere says that it applies only to promises unenforceable because lacking consideration), and in a specialized estoppel provision, section 87(2) of the Restatement (Second). But since the real development in this area of contract law has been outside of promissory estoppel, following the responses of recharacterization and reanalysis,²⁸⁵ those responses will be discussed first. It will be seen that there is very little, if anything, left to be done by way of promissory estoppel.

No Acceptance (Offeror Wanted a Performance): Responses Outside of Promissory Estoppel. Professor Wormser's further elaboration²⁸⁶ of the Brooklyn Bridge hypothetical developed this way:

Let us suppose that B starts to walk across the Brooklyn

282. Can it be that B promises A "I will give you a franchise, if you produce \$18,000, even if you have no supermarket in which to run the franchised operation?" *Goodman v. Dicker and Hoffman v. Red Owl Stores, Inc.* are the standard problem cases which illustrate the third subcategory of reliance in the absence of mutual assent. The Restatement's promissory estoppel solution to *Goodman* and *Red Owl* is discussed *infra* in notes 319-24 and accompanying text.

283. See *supra* note 251 and accompanying text.

284. Compare RESTATEMENT, *supra* note 1, § 90, illustration 3 (a promissory estoppel solution to this kind of problem) with RESTATEMENT SECOND, *supra* note 3, § 45 (a reanalysis approach).

285. Recharacterization and reanalysis are among the classic responses to the reliance problem. See *supra* notes 52-56 and accompanying text.

286. See *supra* notes 251-52 and accompanying text, which set out the Brooklyn Bridge problem.

Bridge and has gone about one-half of the way across. At that moment A overtakes B and says to [her], "I withdraw my offer." Has B any rights against A?

* * *

What A wanted from B, what A asked for, was the act of walking across the bridge. Until that was done, B had not given to A what A had requested. The acceptance by B of A's offer could be nothing but the act on B's part of crossing the bridge. It is elementary that an offeror may withdraw his offer until it has been accepted. It follows logically that A is perfectly within his rights in withdrawing his offer before B has accepted it by walking across the bridge — the act contemplated by the offeror and the offeree as the acceptance of the offer. A did not want B to walk halfway across or three-quarters of the way across the bridge. What A wanted from B, and what A asked for from B, was a certain and entire act. *B understood this.* It was for the act that A was willing to barter his volition with regard to \$100. *B understood this also.* Until this act is done, therefore, A is not bound, since no contract arises until the *completion* of the act called for.²⁸⁷

This is an "either/or" response, rejecting promissory estoppel, and reinforcing the presumptive rule.²⁸⁸ It is possible, however, that B might win either by recharacterization of the facts or by reanalysis of the law. Foreshadowing the sections which are relevant in the Restatement (Second), the recharacterization approach turns upon sections 30 and 32, and the reanalysis approach turns upon section 45(2).

B can win through *recharacterization* by our tampering with the hypothetical just enough so as to be able to deny the premise that A was seeking the act. If we can replace that premise with the premise that A was, after all, 'really' seeking B's promise to walk across the bridge or, at the least, was unclear about whether it was the act or the promise which A sought, thereby giving B the choice of taking it either way, and then imply from the circum-

287. Wormser, *The True Conception of Unilateral Contracts*, 26 YALE L.J. 136, 137 (1916) (footnote omitted, emphasis added).

288. Although Professor Wormser was subsequently to embrace the position of the Restatement (Second) and so came to repent "clad in sackcloth" the views here expressed, he did here advance the classic (and, on its terms, unanswerable) general articulation and defense of the "either/or" response. It is, he said, accompanied by "no injustice whatsoever," and is "logical in theory, simple in application, and just in result." *Id.* at 142 (emphasis in original). For the repentance see *supra* note 273.

stances that B 'really' made a promise to cross the bridge by beginning the walk with knowledge of the offer; then, on the strength of those 'interpretations,' we have solved the problem by assuming it out of existence — we have recharacterized the given offer into a different one. While sections 30 and 32 of the Restatement (Second) clearly provide the tools which can, in the appropriate case, accomplish a recharacterization²⁸⁹ in which at least some person such as 'B' might win by recharacterization of the problem, this is a limited solution because it is ultimately fact based and thus, ultimately, constrained by the facts.

If all or substantially all of the relying promisees in the position of the Brooklyn Bridge walker are to recover, a more important tool will be that of *reanalysis*, which the Restatement provides by way of section 45. Section 45 of the Restatement (Second) of Contracts provides that:

289. It should be observed that there is, of course, a difference between hypotheticals and real cases. The usefulness of hypotheticals consists precisely in their determination (it is simply *given* that A seeks a performance; having so determined, and thus fixed, an otherwise slippery matter of fact, we can now concentrate on what consequences follow from it) and in their malleability (having exhausted the possible consequences from having taken one premise, we are now completely free to take another). As Williston proposed, "I will give you any circumstances that you want." *Debate on Section 90, supra* note 64, at 223). The exercise of shifting from one hypothetical premise to another has the collateral benefit of suggesting how slight the factual distinctions between the two premises might be, and suggesting how just the slightest difference in an actual set of facts might permit that shift of premises. Actual cases, of course, are constrained by their facts. But, if there is a fair reading of the facts which would support a recharacterization of the problem, the Restatement certainly provides the means to this sort of solution.

Under the methodology of the Restatement (Second), the path proceeds, in two steps: (a) does the offer really seek acceptance by performance, or is it, instead, either an offer which seeks acceptance by a promise or one that is unclear as to the mode of acceptance — thus, instead of saying that A insisted upon the crossing of the bridge, can we say that A might have been satisfied with a promise to cross? See RESTATEMENT SECOND, *supra* note 3, § 30(2) ("[u]nless otherwise indicated by language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances"); RESTATEMENT SECOND, *supra* note 3, § 32 ("[i]n case of doubt an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering the performance, as the offeree chooses"), and (b) if the offer does permit acceptance by *either* a promise or performance, what is the effect of part performance — can the beginning of a performance constitute a promise? See RESTATEMENT SECOND, *supra* note 3, § 62 ("[w]here an offer invites an offeree to choose between acceptance by promise and acceptance by performance, the tender or beginning of the invited performance or a tender of the beginning of it is an acceptance by performance. . . . Such an acceptance operates as a promise to render complete performance.") If it should be that the offer permitted acceptance *only* by a promise, then § 62 of the Restatement is unavailable, but § 19 is available. Section 19 provides that conduct may be taken as a manifestation of assent, and so provides the authority, if any be needed, from which to infer from the commencement of B's walk a promise to cross over, which is the promise that serves as acceptance of the offer.

If it should be determined after all reasonable efforts have been made to interpret the offer, that the offer permitted acceptance *only* by the performance, then we have exhausted the possibilities of relief to B under the recharacterization approach. In such an event, B's non-promissory estoppel recovery will be under the reanalysis approach (§ 45 of the Restatement), if at all.

- (1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.
- (2) The offeror's duty of performance under an option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.²⁹⁰

There are three things to be noticed about this formulation.

First, it is fashioned so as to be applicable only to the 'hard' Brooklyn Bridge type of case, the case in which it is finally, and inescapably determined that the offer sought acceptance by performance, and in no other way.²⁹¹

Second, this formulation is not, strictly speaking, a reliance based recovery at all for it is not a recovery predicated directly upon the promisee's reliance on the offer in the absence of acceptance. Instead, though there is recovery, the formulation is by way of three steps: [1] construction of language and other circumstances, leading to the conclusion that there is [2] an option contract, which [3] can be accepted, and is accepted, by the beginning of performance. Such precision in analysis avoids the difficult question of why any person, though reasonably expecting another to rely upon a promise (that is, the promise taking the form of an offer seeking performance), can nevertheless be bound in spite of the qualification, known to both parties, that the promise is not binding unless accepted.²⁹² But, such precision aside, the impression remains that the effect of these pyrotechnics is a promise which certainly looks as if it were enforced because, if only in the

290. RESTATEMENT SECOND, *supra* note 3, § 45.

291. The other, "easier" Brooklyn Bridge type of cases — the ones that can be disposed of by recharacterization of the offer as seeking either promissory acceptance or only promissory acceptance, and recharacterizing the commencement of performance as constituting a promise — might be disposed of without recourse to § 45 analysis. *See supra* note 289.

292. This is the question that a promissory estoppel recovery would, presumably, be required to answer, insofar as it would permit a recovery only where the promisor could reasonably expect reliance, which seems clearly to be the case, and then only if injustice would otherwise result, which is not so clearly the case. The unrepentant views of Professor Wormser, before he recanted, and as expressed in his 1916 article, argue forcefully for the conclusion that there is no injustice in denying a recovery. *See supra* note 269. He repented "in sackcloth," but still based upon a § 45-style reanalysis, in 1950. Wormser, Book Review, 3 J. LEGAL ED. 145, 146 (1950). The comments to § 45 of the original Restatement make it clear that the recovery need not be based on promissory estoppel, but can be based upon the "subsidiary promise, necessarily implied" in respect of which part performance or tender may furnish consideration. RESTATEMENT SECOND, *supra* note 3, § 45 comment b.

sense of *post hoc, ergo propter hoc*, of the reliance on it. Therefore, the discussion properly belongs here, since it is, at least, a doctrine which is closely related to, yet outside of, the promissory estoppel doctrines that we are exploring.

Finally, section 45 only reaches the case where there has been some beginning of the requested performance. It does not apply where there has been nothing other than a preparation to perform, and so does not cover the case of the promisee who has not yet commenced or tendered the commencement of actual performance. In the Brooklyn Bridge case, some of the relevant stages in the promisee's acts are (a) the stage at which B has completed the crossing and reaches the other side (which is acceptance of the offer under any view), (b) any intervening stage, beginning after B takes the first step onto the bridge, and short of completion of the crossing (which is commencement of the performance, and grounds for a certain type of relief under the approach of section 45), and (c) any preliminary stage short of taking the first step, such as getting to the bridge, or buying a pair of sturdy walking shoes (which is only a preparation to perform, not performance itself nor a commencement of performance).

Accordingly, the Brooklyn Bridge hypothetical where A says to B, "I will give you \$100 if you walk across the Brooklyn Bridge," is solved under section 45 as follows: (1) A is properly understood to have made two, several, promises to B. Of the two promises, one, the 'main' promise, 'I will give you \$100 if you walk across the Brooklyn Bridge,' was expressed in so many words, and the other, a 'subsidiary' promise, 'If you seasonably begin and diligently continue the walk, I will leave the main promise open for a reasonable period of time in order that you might complete the walk and so be able to accept the main promise,' was implicit in the facts and circumstances. (2) The subsidiary promise is an option promise, since it is one which promises to leave an offer (the main promise) open. If, as is the case here, the option promise is one that seeks acceptance by bargained for performance, it is an option promise supported by consideration, and is one that will be binding upon acceptance. (3) The subsidiary, option promise can be, and is, accepted when B takes the first step which begins the walk, since that is precisely the action bargained for. As a result, there is a binding option (an option contract) to keep the main offer open. B has, to be sure, not yet accepted the main offer because the completion of performance is still that which was bargained for under the main offer; but B does now have a reasonable period of time to

complete that performance, and A is no longer privileged to revoke the main offer while B is half-way across the bridge.

B is thereby protected, without doing violence to any of the presumptive rules, and without recourse to promissory estoppel. Further, it certainly seems that, in the great run of the cases,²⁹³ neither A nor B would disagree with the result. If there should be any such instance where A should disagree, there appears to be no reason why A should be disabled, as a matter of law, from making it clear to B when making the offer that there is, in fact, no option contract being offered here. By switching the burden to A to disclaim the existence of the subsidiary option promise, and by implying such a promise in all other cases, it would seem that substantial justice is done, and is done in accordance with the intentions of the parties.

No Acceptance (Offeror Wanted a Performance): Promissory Estoppel in the Restatement. Had B not taken the first step across the bridge, but had merely incurred costs in preparation to do so, as by buying a plane ticket from Bismark, North Dakota, to New York, then the case becomes one which cannot be solved in B's favor outside of promissory estoppel by section 45 alone. In this event, the question becomes whether a reliance based rule, like that of section 90, can provide the basis of a recovery. The Restatement contemplates an affirmative answer, and puts it in a separate section, section 87(2), which provides that:

- (2) An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.²⁹⁴

Only at this point, and for the residuum of cases, if any, that remain unsolved after having first exhausted the methods of recharacterization per sections 30 and 32, and of building an option contract by reanalysis per section 45, does a reliance-based rule relevant to reliance upon an offer that sought acceptance by

293. It is, in fact, hard to imagine that there is any "great run" of cases of this type — which paucity of cases may, have accounted for the longevity of Professor Wormser's hypothetical. See E. FARNSWORTH, *CONTRACTS*, § 3.24, at 181 (1982).

294. *RESTATEMENT SECOND*, *supra* note 3, § 87(2). The commentary observes that this subsection "states that application of § 90 to reliance on an unaccepted offer, with qualifications which would not be appropriate in some other types of cases covered by § 90. It is important chiefly in cases of reliance that is not part performance." *Id.* § 87 comment e.

performance need to be considered. Upon analysis, the elements to a section 87(2) recovery are these: (1) there must be a promise which takes the form of an offer, (2) the offeror must reasonably expect action or forbearance before acceptance, (3) the action or forbearance must be of a substantial character, (4) the offer must induce the expected action or forbearance, (5) justice must require enforcement of some option contract, with the scope to vary as justice requires.

Under the reliance based rule of section 87(2), persons in the position of the Brooklyn Bridge pre-walker, the one who buys the walking shoes, but does not take a step prior to revocation of the offer, might win in some cases, and might lose in other cases under an analysis whose application would turn, in light of the particular facts in every case, upon whether there was a 'reasonable expectation' that offeror would have expected the pre-walker to rely on the offer in that way, whether the reliance was 'definite or substantial,' and whether 'injustice would result' if the offer were not enforced, at least to some extent.

No Acceptance (Offeror Wanted a Performance): Promissory Estoppel in North Dakota. There are no retrievable opinions of the North Dakota Supreme Court involving a promissory estoppel response to this sort of reliance.

2. *Offeror Wanted Acceptance by Promise; Offeree Relied Without Accepting (the Drennan Problem)*

The reliance in *Drennan*²⁹⁵ is the type that occurs in relying upon a promise which takes the form of an offer, by acting to one's detriment prior to accepting the offer. It is reliance, therefore, in the absence of assent, and in violation of the presumptive rule which requires that there be a manifestation of mutual assent before a promise will be enforced. The difference between this case and the Brooklyn Bridge case is that, here, the promisor/offeree wanted acceptance by return promise; and a return promise is something that, it would seem, the promisee/offeree is perfectly able to give *prior* to relying on the promise/offeree.²⁹⁶ As in the Brooklyn Bridge situation, which is somewhat analogous, a

295. See *supra* note 266 and accompanying text.

296. If the Brooklyn Bridge walker's situation is viewed in the light of necessity, it is apparent that, where the acceptance is a completed action, and the action must extend over time, the walker must, in the nature of things expose herself to the vulnerability of reliance prior to acceptance. From this vantage, the Drennan offeree might seem much less subject to necessity, and so, to a corresponding extent, much less in need of the law's special solicitude on his behalf. See *supra* note 266.

promissory estoppel solution is frequently introduced into discussion too soon.²⁹⁷ Again, the promissory estoppel solution consists in section 90 itself, which, in its generality, does not explicitly state that it applies only to promises unenforceable because lacking consideration, and in a specialized estoppel provision, section 87(2) of the Restatement (Second).

Since the real development of the law in this context could have, and should have, been done outside of promissory estoppel, following the response of recharacterization and reanalysis,²⁹⁸ those responses will be discussed first. It will be seen that there should be very little, if anything, left to be done by way of promissory estoppel. However, *Drennan* itself was decided on the basis of promissory estoppel, instead of on principles like those of section 45 of the Restatement in which there is implied a subsidiary promise of an option that can be accepted by performance.²⁹⁹ Indeed, it is likely that section 87(2), the specialized promissory estoppel provision applicable to offers, owes its existence, in no small measure, to *Drennan*.

No Acceptance (Offeror Wanted a Promise): Responses Outside of Promissory Estoppel. To revert to the case that the illustration is based upon, the Restatement's illustration will be referred to as 'the *Drennan* hypothetical,' designating B, the general contractor and promisee in the illustration, as '*Drennan*,' and designating A, the paving company and promisor in the illustration, as '*Star Paving*.' To parallel the situation in the Brooklyn Bridge hypothetical, and with apologies to Professor Wormser, whose Brooklyn Bridge analysis is paraphrased here, it may be truly said in this hypothetical version of *Drennan* that

What *Star Paving* wanted from *Drennan*, what *Star Paving* asked for, was the promise that *Drennan* would award the job to *Star*. Until that was done, *Drennan* had not given to *Star Paving* what *Star* had requested. The acceptance by *Drennan* of *Star's* offer could be nothing but the promise on *Drennan's* part that it would award the job to *Star*. It is elementary that an offeror may with-

297. Cf. Bishop, *The Subcontractor's Bid: An Option Contract Arising Through Promissory Estoppel*, 34 EMORY LAW J. 421 (1985) (pointing out the implied option promise, but, insofar as it suggests that the option promise must be enforced because of estoppel rather than the consideration which attaches upon the commencement of performance, seeming to introduce estoppel where it may not be necessary).

298. Recharacterization and reanalysis are among the classic responses to the reliance problem. See *supra* notes 52-56 and accompanying text.

299. *Drennan v. Star Paving Co.*, 333 P.2d 757, 759-60 (Cal. 1958).

draw its offer until it has been accepted. It follows logically that Star is perfectly within its rights in withdrawing its offer before Drennan has accepted it by making a promise to Star — the promise contemplated by the offeror and the offeree as the acceptance of the offer. Star did not [merely] want Drennan to use Star's bid, or to incorporate it in Drennan's own bid. What Star wanted from Drennan, and what Star asked for from Drennan, was a definite and specific promise. *Drennan understood this*. It was for this promise that Star was willing to barter its volition with regard to promising to do the paving work. *Drennan understood this*. Until Drennan's promise is given to Star, therefore, Star is not bound, since no contract arises until the promise is given.

Like the Brooklyn Bridge hypothetical, it is possible that Drennan, the relying promisee in this hypothetical, might win either by recharacterization of the facts or by reanalysis of the law.

Drennan can win through *recharacterization* by our tampering with the hypothetical just enough so as to be able to deny the premise that Star Paving was seeking Drennan's return promise. If we can replace that with the premise that Star was, after all, 'really' seeking Drennan's performance, either Drennan's act of using Star's sub-bid in Drennan's own bid, or Drennan's act of naming Star in Drennan's own bid or, at the least, if we can say that Star was unclear about whether it was the promise or the act which it sought, thereby giving Drennan the choice of taking it either way; then, on the strength of this interpretation, it follows that Drennan has rendered the performance sought by Star, and has accepted the offer.

In the alternative, and still as a matter of recharacterization, Drennan can win in a slightly different fashion. Holding on to so much of the hypothetical as was premised on the assumption that Star insisted upon a promise, we might tamper with the hypothetical just enough to imply from the circumstances that Drennan 'really' made the requested promise. If we can say that Drennan's actions of using Star Paving's sub-bid in its own bid and naming Star as the paving bidder might be fairly taken as implying a promise to award the subcontract to Star, then, on the strength of this 'interpretation,' we have solved the problem by assuming it out of existence — we have recharacterized Drennan's response so as to make it into a different one.

While providing the same tools that were available in solution

to the Brooklyn Bridge hypothetical, and which can, in the appropriate case, accomplish the same sort of recharacterization,³⁰⁰ the Restatement's approach to the Drennan hypothetical differs from its approach to the Brooklyn Bridge in that it does *not* here reanalyze the situation.³⁰¹ Instead, the Restatement recognizes that at least one court has applied a promissory estoppel solution,

300. See *supra* note 289 and accompanying text, both for the application of this method to a Brooklyn Bridge hypothetical, and for a discussion of the limits of the method, which is ultimately constrained by the facts.

Under the methodology of the Restatement (Second), the Drennan path proceeds in either of two ways: (a) assuming that the offer really seeks acceptance by promise, is there any basis for saying that there *was* a return promise — that is, can Drennan's actions be recharacterized so as to constitute a return promise? Section 19 provides that conduct may be taken as a manifestation of assent, and so provides the authority, if any be needed, from which to infer (if the inference can be made) from Drennan's use of Star's subbid a promise on Drennan's part to award the subcontract to Star. Of course, if Drennan's action should be found to constitute a promise, it will be necessary that Drennan communicate it to Star; but the Restatement treats such notice, not as essential to acceptance, but as an event which, should it fail to occur, will discharge the offeror's duty of performance. *Id.* § 56 ("it is essential to an acceptance by promise . . . that the offeree exercise reasonable diligence to notify the offeror of acceptance. . ."). *Id.* § 56 comment a.

(b) On the assumption that Star's offer can be recharacterized as one which is either an offer that seeks acceptance by a performance or one that is unclear as to the mode of acceptance — on the assumption, that is, that instead of Star's insisting upon Drennan's promise that it would award it the job, Star might have been satisfied with Drennan's mere use of Star's subbid, coupled with designation of Star as the subbidder — hasn't there been an acceptance by completion of the act? See RESTATEMENT SECOND, *supra* note 3, § 30(2) ("[u]nless otherwise indicated by language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances.") *Id.* § 32 ("[i]n case of doubt an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering the performance, as the offeree chooses").

If it should be determined after all reasonable efforts have been made to interpret the manifestations of assent, that Drennan made no promise, and that Star did not bargain for Drennan's use of Star's offer, then we have exhausted the possibilities of relief to Drennan under these recharacterization approaches. In such an event, Drennan's recovery will be under the promissory estoppel approach, if at all. As a matter of fact, the actual case included explicit findings that there was no promise, and that Star didn't bargain for Drennan's use of Star's offer; and in the actual case, Drennan did recover under the approach now embodied in § 87(2) (which did not exist at the time), but which *Drennan* articulated as an application of the general reliance recovery of § 90. *Drennan*, 333 P.2d at 760.

301. There should be, but is not yet, an express Restatement solution that corresponds to § 45 (discussed *supra* at notes 290-92 and accompanying text). Such a solution would, where the main promise ("I promise to do the paving work . . . if you will promise the job to me") is one that cannot be accepted immediately, imply a subsidiary promise ("and, if you use my promise in preparing your own bid, I will leave my promise open for a reasonable period of time for you to accept it"). This is a better solution than § 90, because it concentrates on the cutting issues: (a) is the main promise, in fact, one that cannot be accepted immediately so that it must necessarily be thought to include a subsidiary option promise, and (b) did the relying promisee, in fact, accept the subsidiary promise in a reasonably prompt manner (rather than reject it by engaging in bid shaving or like conduct)? While § 90, or § 87(2), can get to the same place (by a finding that the only offer upon which it is reasonable to rely is the offer which cannot be accepted immediately; and by finding that justice only requires enforcement where the offeree attempted to accept promptly), it seems less calculated to do so. Section 45 itself is, by its terms, limited to Brooklyn Bridge-walker cases (by providing, as it does, only for circumstances where an "offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance. . ." it excludes the Drennan type of case, in which the offer does invite a promissory acceptance).

and so invites consideration of a reliance-based alternative, set forth in section 87(2).

No Acceptance (Offeror Wanted a Promise): Promissory Estoppel in the Restatement. The way the Drennan hypothetical is resolved as an illustration under § 87(2) of the Restatement is by making Star's offer irrevocable until Drennan has had a reasonable opportunity to notify Star of the award and Drennan's acceptance of Star's offer.³⁰² Section 87(2) provides that:

- (2) An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.³⁰³

Upon analysis, the elements to a section 87(2) recovery are these: (1) there must be a promise which takes the form of an offer, (2) the offeror must reasonably expect action or forbearance before acceptance, (3) the action or forbearance must be of a substantial character, (4) the offer must induce the expected action or forbearance, (5) justice must require enforcement of some option contract, with the scope to vary as justice requires.³⁰⁴

In fact, the real Drennan did recover.³⁰⁵ Under the reliance based rule of section 87(2), persons in the position of Drennan might win in some cases, and might lose in other cases under an analysis whose application would turn, in light of the particular facts in every case, upon whether there was a 'reasonable expectation' that the offeree would rely on the offer, whether the reliance was definite or substantial, and whether injustice would result if the offer were not enforced, at least to some extent.

No Acceptance (Offeror Wanted a Promise): Promissory Estoppel in North Dakota. Except, perhaps, in cases like *Union National Bank in Minot v. Schimke*,³⁰⁶ which might be considered to reject promissory estoppel, at least by implication, there are no retrievable opinions of the North Dakota Supreme Court involving a promissory estoppel response to this sort of reliance.

302. RESTATEMENT SECOND, *supra* note 3, § 87(2), illustration 6.

303. *Id.* § 87(2). The commentary observes that this subsection "states the application of § 90 to reliance on an unaccepted offer, with qualifications which would not be appropriate in some other types of cases covered by § 90. It is important chiefly in cases of reliance that is not part performance." *Id.* § 87 comment e.

304. *Id.* at § 87(2).

305. *Drennan*, 333 P.2d at 761.

306. *Union Nat'l Bank in Minot v. Schimke*, 210 N.W.2d 176 (N.D. 1973).

Schimke involved a wife's promise to a bank that she would pay her husband's debts if he didn't.³⁰⁷ This case may be relevant for two reasons. First, the court did not enforce the promise, even though there was testimony that the bank relied upon it.³⁰⁸ Second, the court took the occasion to set forth the elements of estoppel.³⁰⁹

Schimke involved a promise that Fern Schimke made on May 28, 1971. Her husband had signed two promissory notes, dated September 18, 1970 and March 10, 1971, and Mrs. Schimke guaranteed payment. The bank was unable to enforce her promise for two reasons: one was the absence of consideration for her promise,³¹⁰ and the other was an absence of notice of acceptance.³¹¹ This later reason might have been determinative of the case, for it followed from a series of provisions in the Field Code, as enacted in North Dakota, which create special rules applicable to guarantees.³¹² If so, this would have been a case involving the absence of assent, for failure of notice of acceptance, and would have been quite close to the *Drennan* type.

Instead, the court seemed to glance off the assent problem and bounce back to the consideration problem, in a way which almost suggests that the court, although citing the statute which requires communication of notice of acceptance, as well as cases applying it, saw but a single problem, and that a consideration problem. The case takes on an even more baffling dimension, at

307. *Id.* at 177.

308. There was testimony by a Bank officer that "the Bank would have called the notes unless the guaranty was signed." *Id.* at 179. As a result, the case can also be considered as one which disapproves of the rule given in § 88(c) of the Restatement Second, which provides a specialized adaptation of promissory estoppel to the circumstances of guarantees. It is significant, perhaps, that § 88(c) is one of the few promissory estoppel provisions in the Restatement which does *not* limit enforceability to circumstances where "justice requires." RESTATEMENT SECOND, *supra* note 3, § 88(c); *id.* comment d ("if the reliance is foreseeable and substantial, no further inquiry is necessary as to whether justice requires enforcement").

309. *Schimke*, 210 N.W.2d at 181.

310. The court observed that "[T]he testimony of the Bank's officer that the Bank would have called the notes unless the guaranty was signed is obviously no forbearance at all unless it is a binding promise made to the guarantor, Fern Schimke, in return for the guaranty." *Id.* at 179. The next passage in the opinion made it clear that the court meant a promisee's forbearance for an indefinite time is not consideration: "As matters stood in this case, the Bank was in no different position after the guaranty was signed than it was before the guaranty instrument was signed. The Bank could have called the notes at any time it deemed itself insecure, and, therefore, the Bank made no promise to Fern Schimke in return for her signing the guaranty." *Id.* at 179-80.

311. *Id.* at 178.

312. Guaranty is one of the particular transactions provided for in Part IV of Division Third of the Field Code. FIELD CODE, *supra* note 13, §§ 1534-57. Section 1539 provides that a "mere offer to guaranty is not binding, until notice of its acceptance is communicated by the guarantee to the guarantor. . . ." The provision is presently codified at N.D. CENT. CODE § 22-01-06 (1986).

least for purposes of understanding promissory estoppel in North Dakota, when, after having determined that there was no consideration to support the promise,³¹³ the court rather summarily rejected the Bank's estoppel argument. The court gave two reasons for this rejection. First, the court stated that "Fern Schimke may have made a promise when she signed the guaranty, but she did not know what the the guaranty contract was nor the reason why the Bank wanted it."³¹⁴ Secondly, and "[m]ore importantly," said the court, the Bank "did not change its position to its irreparable detriment. As previously discussed, the Bank lost none of its rights as a result of the guaranty contract and therefore suffered no detriment at all."³¹⁵ The first reason may be adequate. If the promisor didn't know what the promise meant, and didn't know why the promisee wanted it, then it might be said that this is a promisor who has no reasonable expectation that the promisee will rely upon her promise.³¹⁶ The second reason, however, seems to miss the mark completely. The court seems to have said that the promisee didn't rely upon the promise because it was free to change its mind, and that it wasn't bound to give up any of its rights. If that is what the court meant, then it seems to have read promissory estoppel out of the law — by the nature of the case, had the Bank given a promise by which it limited its freedom of action, there would have been bargained-for detriment on the part of the Bank, there would have been consideration, and there would be no need to consider whether there had been some sort of detrimental reliance in the absence of consideration. If this is a fair reading of the case, then *Schimke* is a fairly decisive rejection of promissory estoppel in North Dakota. The best can be made of the case is that it is doubtful as to its application of facts to the law relating to promissory estoppel, and is, at least to that extent, of questionable validity.

But, as to the law, *Schimke* does contain a statement of the elements of promissory estoppel in North Dakota. Indeed, it is the fountainhead of promissory estoppel in North Dakota. Citing to a case decided by the Supreme Court of Washington in 1969, the North Dakota Supreme Court stated that "we find the elements of promissory estoppel set out" as follows:

313. *Schimke*, 210 N.W.2d at 179-80.

314. *Id.* at 181.

315. *Id.*

316. This is, of course, an intriguingly subjective gloss on what the promisor has "reason to expect."

The requisites of promissory estoppel are: (1) a promise, (2) which the promisor should reasonably expect will cause the promisee to change his position, (3) which does cause a substantial change of position, action or forbearance by the promisee, (4) acting in justifiable reliance on the promise, and (5) injustice which can only be avoided by enforcing the promise.³¹⁷

Embroidering the handiwork of the Washington Court by reference to a digest, the North Dakota Supreme Court observed that it found "further explanation" as follows:

. . . Also, justifiable reliance and *irreparable detriment* to the promisee are necessary factors to enable him to invoke the doctrine of promissory estoppel.³¹⁸

Until *Schimke* is distinguished, limited or explained by the North Dakota Supreme Court, it may have to be considered as having

317. *Schimke*, 210 N.W.2d at 181. It appears that the Washington Court is trying to adhere to § 90 of the original Restatement, but has added an extra element (the item numbered four in the list: "acting in justifiable reliance"). This is an element that recurs in other North Dakota cases. For a discussion of the reasons why it is wrong to say that § 90 of the Restatement requires "justifiable reliance," see *supra* note 182.

The Washington case cited in *Schimke* is Northern State Construction Co. v. Robbins, 457 P.2d 187, 190 (Wash. 1969) (giving the five elements quoted by the North Dakota Court). The authority relied upon by the Washington court in *Northern State Construction* is Central Heat, Inc. v. Daily Olympian, Inc., 443 P.2d 544, 548 (Wash. 1968) (giving the five elements), which, in turn, relies upon *Corbit v. J.I. Case Co.*, 424 P.2d 290, 300 (Wash. 1967). *Corbit*, finally, purports to be based upon § 90 of the Restatement of Contracts. In *Corbit*, after quoting § 90 of the original Restatement, the court observed both that "[w]e have previously cited the Restatement's formulation as being a useful guideline" and that "[i]n effect, § 90 . . . sets out five prerequisites for a recovery in promissory estoppel." *Id.* The court then proceeded, apparently unintentionally, to recast § 90 into the form subsequently quoted by itself, and ultimately by the North Dakota court.

There is no evidence that the Washington court intended to deviate from the language of § 90, nor is there any indication that it even realized it was doing so. As a result, it must be said that the rule currently being articulated in North Dakota owes its genesis to the Washington Supreme Court's apparently accidental editing of § 90 of the original Restatement of Contracts. Cf. generally L. LOSS, FUNDAMENTALS OF SECURITIES REGULATION 726 (2d ed. 1988) (speaking of Rule 10b-5, Loss observed that "[w]hat is more remarkable is that the whole development was unplanned. Like the British Empire, which Eamon de Valera called 'A domain created in a moment of world absentmindedness,' it just happened") (citation omitted). Or, paraphrasing Maitland on the forms of action, it might be said that: "Our typographical errors we have buried, but they still rule us from their graves." Cf. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 1 reprinted in Cambridge 1971 ("The forms of action we have buried, but. . .").

318. *Schimke*, 210 N.W.2d at 181 (emphasis added). Now it appears that we are on the threshold of conflating the elements necessary to issue a preliminary injunction with the elements necessary to invoke promissory estoppel. It seems a mistake to think that irreparable detriment is part of the Restatement's § 90 promissory estoppel analysis. Of course, the court may quite deliberately be giving a clear sign that it does not intend to follow § 90, but rather, some other version of promissory estoppel which makes it more difficult for the relying promisee to recover — and that might serve to explain the otherwise inexplicable fact that *Schimke* cites almost anything but § 90 in a promissory estoppel case. Or *Schimke* may just be one of those "widows and orphans" cases, one that is best taken to mean only that "the widow wins," and otherwise ignored.

something to say about promissory estoppel; and it may have something to say both in the type of case which involves the absence of consideration, and in the type of case which involves the absence of assent. If it does have a promissory estoppel message, it is a negative one. Though discussing promissory estoppel in the context of lack of consideration, *Schimke* refused to enforce the promise. Further, it failed even to mention anything like the possibility of a *Drennan*-type estoppel argument in the context of lack of assent.

3. *No Agreement, or Insufficient Definiteness*

No Assent (No Promise — Failed Negotiations; or Promise Not Sufficiently Definite): Promissory Estoppel in the Restatement (the Goodman and Red Owl Problems). Because these two classes of promises frequently overlap, they will be treated together here. The problems raised are those generally typified by the cases of *Goodman v. Dicker*³¹⁹ and *Hoffman v. Red Owl Stores, Inc.*³²⁰ These cases display two variations on the promissory estoppel theme, still under the heading of reliance in the absence of assent. The first variation is the instance of reliance on a promise that was never made. The second variation is the instance of reliance on a promise that is indefinite by omission of essential terms.

There is no new formulation for either *Goodman v. Dicker* (the radios) or *Hoffman v. Red Owl Stores, Inc.* (the supermarket). Each of those cases is illustrated in the Restatement as an example of the general section 90 rule. It may be recalled that § 90 which, in its generality, does not explicitly say that it applies only to promises unenforceable because lacking consideration, provides for a recovery if these conditions are met: (1) there must be a promise, (2) the promisor must reasonably expect that the promise will induce action or forbearance, (3) the promise must have induced the expected action or forbearance, and (4) injustice must result if the promise is not enforced. Then, if the court can fashion a flexible remedy and adheres to the Restatement Second, it need insist on nothing more, and in particular, it need not insist that the expected action or forbearance be definite and substantial. On the other hand, if the court is not free to fashion a flexible remedy, or if it adheres to the original restatement, then there must be a

319. 169 F.2d 684 (D.C.Cir. 1948).

320. 133 N.W.2d 267 (Wisc. 1965).

showing that the expected action or forbearance was definite and substantial.

The Restatement's solution, under section 90, to *Goodman v. Dicker* is as follows: "B is liable to A for the \$1,150, but not for the lost profit on 30 radios."³²¹

The Restatement's solution, under section 90, to *Hoffman v. Red Owl Stores, Inc.* is as follows:

The assurances from B to A are promises on which B reasonably should have expected A to rely, and A is entitled to his actual losses on the sales of the bakery and grocery and for his moving and temporary living expenses. Since the proposed agreement was never made, however, A is not entitled to lost profits from the sale of the grocery or to his expectation interest in the proposed franchise from B.³²²

Although neither *Goodman* nor *Red Owl Stores, Inc.* resulted in a new formulation, it should be noted that there is a Restatement (Second) formulation which is related. Section 34 of the Restatement, treating the effect of choice of terms, provides that an agreement will not fail for uncertainty even if it empowers one or both the parties to make a selection of terms in the course of performance.³²³ Section 34(3) goes on to provide that "[a]ction in reliance upon an agreement may make a contractual remedy appropriate even though uncertainty is not removed."³²⁴

No Assent, No Promise — Failed Negotiations; or Promise Not Sufficiently Definite: Responses Outside of Promissory Estoppel. These problems can be addressed by a reanalysis response outside of promissory estoppel. For example, the problems could be addressed in terms of fraudulent deceit.³²⁵ These problems can also be recharacterized, if the facts permit, in terms of a subsidiary promise to negotiate in good faith, where "good faith" in this context is understood to mean only a minimal level of honesty in fact

321. RESTATEMENT SECOND, *supra* note 3, § 90, illustration 8.

322. *Id.* § 90, illustration 10.

323. *Id.* § 34.

324. *Id.* § 34(3).

325. See *supra* note 278 and accompanying text. Such an approach may require a recharacterization of the facts so as to fit within the framework of fraudulent deceit. Should the facts simply not fit within that framework, perhaps that is as good a way as any of determining that the plaintiff has no case, and ought not to prevail. Indeed, transferring the matter back to the promissory estoppel response, it would seem that "justice requires" enforcement of a promise in this context if, and only if, the promisor acted with such scienter as would have constituted fraudulent deceit. Cf. *supra* note 132 (promissory fraud).

— without any affirmative duty to disclose, and without any affirmative duty to make 'reasonable' concessions in order to reach an agreement, but only to refrain from injuring the other party by deceit.³²⁶ The subsidiary promise to negotiate in good faith is one which may, itself, be breached, and, if so, there would be a recovery within the presumptive rules.³²⁷

No Assent, No Promise — Failed Negotiations; or Promise Not Sufficiently Definite: Promissory Estoppel in North Dakota. The North Dakota Supreme Court has consistently rejected the application of promissory estoppel in this context. Among the representative cases are *Lohse v. Atlantic Richfield Company*,³²⁸ *Firefighters Local 642 v. City of Fargo*,³²⁹ and *Cooke v. Blood Systems, Inc.*³³⁰

Lohse. *Lohse v. Atlantic Richfield* involved an asserted oral mineral lease agreement covering approximately 4,000 acres owned by Lohse.³³¹ Negotiations between Lohse and Kathy Schroeder and Greg Yates, landmen for Atlantic Richfield Company (ARCO), led to a rapid agreement on the leasehold bonus rental, primary term, and landowner's royalty.³³² Lohse then

326. The meaning of "good faith" in this context is so formulated as to avoid the twin perils of leaving the expression completely undefined, and of defining it so expansively as to create, in effect, a duty to agree. This formulation seeks to set a subsidiary promise that no one would care to deny. Cf. RESTATEMENT SECOND, *supra* note 3, § 205 ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement"). If a court were to go beyond § 205 and extend the duty of good faith to the precontractual relationship, it would follow that the level of performance demanded thereby must be carefully limited. Though this extension of the duty would be a serious step, it would seem to be preferable to the backdoor approach of imposing substantially the same duty under the rubric of a vaguely articulated estoppel. If directly extended as an implied promise to negotiate in good faith, the contents of the duty could at least be determined when the implied promise is articulated, and it seems more likely that the implied promise would bear some recognizable relation to what the parties might have expected than would be the case under an estoppel.

327. This assumes that the other conditions to enforceability are present. The promise should be taken as one which is exchanged for the other party's implied promise likewise to negotiate in good faith, and thus is supported by consideration. Damages for breach of the subsidiary promise to negotiate in good faith should be kept distinct from any question of damages for breach of the main promise to consummate the transaction which is the subject matter of the negotiations, since the main promise, per hypothesis, was never assented to by the parties. A reliance measure of damages in respect of the subsidiary promise, perhaps limited to out of pocket costs incurred during negotiations, would seem to be indicated.

328. *Lohse v. Atlantic Richfield Company*, 389 N.W.2d 352 (N.D. 1986).

329. *Firefighters Local 642 v. City of Fargo*, 321 N.W.2d 473 (N.D. 1982).

330. *Cooke v. Blood Systems, Inc.*, 320 N.W.2d 124 (N.D. 1982).

331. *Lohse*, 389 N.W.2d at 353.

332. The crucial negotiations, with Yates during November 1982, took "not over ten minutes." *Id.* at 353. According to Lohse, Yates said "We are paying \$200 an acre, three-year lease, three-sixteenths royalty," to which Lohse responded "That's a hell of a good lease, I'll take it." *Id.* Lohse described the land to Yates, and asked how long it would take to draw up a contract, and whether he could get the checks before the end of the year ("The reason being," Mr. Lohse testified, "we were talking about approximately \$800,000 in lease money.") *Id.* at 353-54.

waited for ARCO to draft a lease.³³³ Several weeks passed, during which Lohse turned down other offers,³³⁴ while making several phone calls to Yates in ARCO's Denver offices.³³⁵ Yates gave reassurances that the leases were either drafted or were in the mail.³³⁶ Finally, in March 1983, Lohse visited Denver, and called upon Yates only to find out that Yates was no longer employed by ARCO and that ARCO was not interested in leasing anything from Lohse.³³⁷ In the meantime, "the demand for oil and gas leases in the area had declined," and Lohse was unable to lease his mineral rights to anyone.³³⁸

Lohse sued to enforce the promise made to him, but lost.³³⁹ It appears that the North Dakota Supreme Court rejected the assent-based promissory estoppel doctrines that might enforce a promise in the absence of sufficient definiteness. The North Dakota Supreme Court considered ARCO's statute of frauds defense, and rapidly reached the question whether promissory estoppel might bar the assertion of that defense.³⁴⁰ Assuming "for purposes of argument" that promissory estoppel "may" do so, the Court then vaulted into the *Hoffman v. Red Owl Stores, Inc.* and *Goodman v. Dicker* problems, stating that

The elements which must be established before the doctrine of promissory estoppel can be invoked are: (1) a promise which the promisor should reasonably expect will cause the promisee to change his position; (2) a substantial change of the promisee's position through action or forbearance; (3) justifiable reliance on the promise; and (4) injustice which can only be avoided by enforcing the promise,³⁴¹

333. *Id.* at 354.

334. *Id.*

335. The other offers ranged from \$100 to \$175 per acre. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.* at 353.

340. Before doing so, the court considered whether fraud on the part of ARCO might have prevented it from asserting the statute of frauds defense pursuant to N.D. CENT. CODE § 9-06-03, which provides that a party's fraudulent failure to provide a writing prevents that party from using the lack of a writing as a defense. *Id.* at 354-56 (*see supra* note 132 and accompanying text for a discussion of the related North Dakota promissory fraud statutes). The court decided that, since there was no oral contract to begin with (because ARCO's promises were not sufficiently definite and certain), there could be no issue of fraudulent failure to put it into writing. *Id.* at 356.

341. *Id.* at 357. The court did not mention the Restatement, but cited *Russell v. Bank of Kirkwood Plaza*, 386 N.W.2d 892, 896 (N.D. 1986). *See supra* note 182 (discussing the difference between this formulation of promissory estoppel and that contained in the Restatement of Contracts).

the court observed that "the promise . . . must be clear, definite, and unambiguous as to essential terms before the doctrine of promissory estoppel may be invoked to enforce an agreement or to award damages for the breach thereof."³⁴² Because the parties "failed to agree to or even discuss" many of the essential terms, the court concluded that there was not a certain or definite promise.³⁴³ In deciding as it did, the court pointed to the evident reluctance of many courts to enforce incomplete agreements "based upon preliminary negotiations and discussions or upon an agreement to negotiate the remaining terms of a contract in the future."³⁴⁴ In addition, the court cited, and expressly joined the ranks of, those courts that disagree with *Hoffman v. Red Owl Stores*.³⁴⁵ Absent from the opinion is any analysis of potential liability based upon equitable estoppel or misrepresentation.³⁴⁶

Firefighters Local 642. In *Firefighters Local 642 v. City of Fargo*,³⁴⁷ the North Dakota Supreme Court, at least by negative implication, refused to embrace the *Hoffman v. Red Owl* kind of promissory estoppel.³⁴⁸ The Firefighters union and the City of Fargo were renegotiating a labor contract in May and June, 1979, and entered into a labor contract for the fiscal year 1979-80.³⁴⁹ During the course of negotiations, there had been talk of a pay increase for the fiscal year 1980-81, a period not covered in the contract, and, when that increase was not forthcoming, the union brought suit.³⁵⁰ After deciding that the city's negotiator lacked the authority to bind the city, and that the city itself had never entered into any contract covering the second fiscal year,³⁵¹ the court considered the union's estoppel arguments.

The union alleged that it never would have accepted the terms for one year had there not been a promise of increased wages in the subsequent year.³⁵² The union argued "that [it]

342. *Id.* at 357.

343. *Id.* The court had earlier catalogued ARCO's list of missing "essential" terms as including: deferred bonus payments, Pugh clause, pooling and unitization powers, surface damage, and delay rentals. *Id.* at 355.

344. *Id.* at 357.

345. *Id.* at 357.

346. Lohse's affidavit had stated that the defendant's landman had made the false statement that leases were drafted or were in the mail. *Id.* at 354.

347. 321 N.W.2d 473 (N.D. 1982).

348. It was not until *Lohse* that the court explicitly rejected *Red Owl*. See *supra* note 345.

349. *Firefighters*, 321 N.W.2d at 475

350. *Id.* at 475.

351. *Id.* at 475-77

352. *Id.* at 477.

changed [its] position in reliance on the city's alleged promise."³⁵³ The court, however, after having set up what appeared to be a promissory estoppel problem, said no more about promissory estoppel, but discussed equitable estoppel instead.³⁵⁴ The court

353. *Id.*

354. One of the classic, and basic, distinctions between equitable estoppel and promissory estoppel is that the former deals with statements of facts, the later with promises. *See, e.g., O'Connell v. Entertainment Enterprises, Inc.*, 317 N.W.2d 385, 389 (N.D. 1982) and cases collected there. It is generally believed that equitable estoppel (or "estoppel in pais") both predated promissory estoppel, and may have been one of the materials from which promissory estoppel was ultimately fashioned. If a particular jurisdiction has already embraced promissory estoppel, there would seem to be no purpose served in using equitable estoppel instead of promissory estoppel to enlarge the scope of enforceable promises. But if a particular jurisdiction has not embraced promissory estoppel, then equitable estoppel, extended beyond its generally understood purpose, has sometimes served as an awkward (if not illicit) means to accomplish the same end.

Equitable estoppel is codified at N.D. CENT. CODE § 31-11-06. The statute provides that:

[w]hen a party, by his own declaration, act, or omission, intentionally and deliberately has led another to believe a particular thing true and to act upon such belief, he shall not be permitted to falsify it in any litigation arising out of such declaration, act, or omission.

The equitable estoppel provision was adopted in 1897 and it is not contained in the Field Code. Since the Field Code already makes "promissory fraud" (a promise made without intent to perform it) actionable as an independent basis for liability, it would seem to have provided its own tool for covering intentional and deliberate false promising. *See supra* note 132 and accompanying text (promissory fraud).

Beyond the words of the equitable estoppel statutory provision, the North Dakota Supreme Court, in *O'Connell*, and in other cases, has added a gloss (derived from 56 A.L.R.3d 1041, *see Farmers Cooperative Ass'n v. Cole*, 239 N.W.2d 808, 813 (N.D. 1976)) which consists of a two step, three factor test. One step turns upon the conduct of the speaker, the person who makes the statement; the other step turns upon the conduct of the recipient, the person to whom the statement is made.

The speaker's behavior must include these three factors: (1) conduct which amounts to a false representation of, or concealment of, a material fact, or "is calculated to convey the impression" that the [material] facts are otherwise than "those which the [speaker] subsequently attempts to assert," (2) the intention, or expectation that the recipient will be influenced by the speaker's conduct, and (3) knowledge, actual or constructive, by the speaker of the true facts. *O'Connell*, 317 N.W.2d at 389.

In addition, the recipient's conduct must include these three factors: (1) lack of knowledge of the true facts, coupled with the lack of means of discovery of the true facts, (2) good faith reliance upon the speaker's conduct, and (3) action or inaction caused by the speaker's conduct, resulting in a change of the recipient's position to the recipient's "injury, detriment, or prejudice." *Id.*

The court's gloss on equitable estoppel does not turn it into something like promissory estoppel, but rather into something like fraud, insofar as the third factor relating to the speaker's behavior adds scienter to the elements of equitable estoppel, and thus is a step away from promissory estoppel, rather than a step towards it. Furthermore, the gloss seems to add at least one element to the fraud equation which tips the balance in favor of the speaker beyond where the "ordinary" fraud equation is balanced. The first factor relating to the recipient seems to reopen the old style of fraud actions, whereby the speaker is able, in effect, to put the recipient on trial, by showing that the recipient failed to exercise affirmative due diligence to find out the facts, and, at the least, serves to create confusion over why, since there are already at least three kinds of statutory fraud in the Century Code, there is any need to transform equitable estoppel into yet another statutory fraud provision. *See* N.D. CENT. CODE §§ 9-03-08 (contracts; actual fraud), 9-03-09 (contracts; constructive fraud), and 9-10-02 (obligations imposed by law; deceit). *See also* L. LOSS, FUNDAMENTALS OF SECURITIES REGULATION 712-23 (2nd ed. 1988) (on the hornbook "elements" of common law deceit and their permutations); *id.* at 874 n. 129 (on the proper treatment of the recipient's "justifiable reliance" in terms of the recipient's due diligence, or contributory

concluded that (a) there had been no evidence that the city or its negotiator intentionally and deliberately led the union to believe that a pay raise for the subsequent year had been approved, (b) the union's attorney knew that there was a need to comply with statutory requirements in order to bind the city, and (c) the city's negotiator did not possess the power to bind the city, and, even if he did, no contract concerning the subsequent year was ever formed.³⁵⁵

Since *Firefighters* was, conceivably, a case in which a *Red Owl* type of promissory estoppel might have been asserted, it may be significant that the court failed to embrace any such application of the doctrine.³⁵⁶

Cooke. In *Cooke v. Blood Systems*,³⁵⁷ Cooke, a landlord, was negotiating with John Anthonisen, president of Blood Systems, Inc., a prospective new tenant.³⁵⁸ Between May 1, 1979 and May 14, Cooke and Anthonisen agreed on rent, Anthonisen sent Cooke a proposed lease form (not signed by Blood Systems), and Anthonisen turned over his part of the negotiations to Bill Burt, director of property management for Blood Systems.³⁵⁹ Discussions and correspondence, including the exchange of draft leases, continued through about August 10, on which date Blood Systems told Cooke that it had decided not to lease the premises.³⁶⁰

Cooke sued to enforce a leasehold agreement against Blood Systems, but lost.³⁶¹ Once again, the North Dakota Supreme Court rejected the assent-based promissory estoppel doctrines that might enforce a promise in the absence of sufficient definiteness. The court began by determining whether there was mutual assent to the proposed agreement.³⁶² The court decided that the last form of lease sent by Cooke to Blood Systems, was an offer, but Blood Systems never accepted it, either orally or in writing.³⁶³

negligence, or some lower standard). 'Fraud' is treated, as a species of misrepresentation making a contract voidable, in the Restatement (Second) of Contracts at §§ 159-73. "Fraud" is treated, as a species of misrepresentation giving rise to tort liability, in the Restatement (Second) of Torts at §§ 525-49.

355. *Firefighters*, 321 N.W.2d at 477.

356. Any doubt on that score was removed by the court's subsequent decision in *Lohse*, in which North Dakota rejected *Red Owl*. See *supra* note 345 and accompanying text.

357. *Cooke*, 320 N.W.2d 124.

358. *Id.* at 126.

359. *Id.*

360. *Id.* at 127.

361. *Id.* at 130.

362. *Id.* at 128.

363. *Id.* Burt, the property manager for Blood Systems, testified that Cooke called and asked about the lease, but that he (Burt) told Cooke that the decision to lease was one Burt was not authorized to make. *Id.* at 127. Within a day or two later, an officer of Blood Systems called Mr. Cooke and advised him that Blood Systems had decided not to lease the

Accordingly, the court held that there was no assent.³⁶⁴ The court then turned to Cooke's alternate argument, a claim based on promissory estoppel.³⁶⁵ Quoting section 90 of the Restatement (Second) of Contracts,³⁶⁶ and citing to *Hoffman v. Red Owl Stores*,³⁶⁷ the court held that the doctrine of promissory estoppel is "inapplicable because it requires there be a promise or agreement."³⁶⁸ Since there was no such promise, the court found it unnecessary to determine "whether or not promissory estoppel constitutes an independent cause of action."³⁶⁹

Cooke contained more language which may be of importance to understanding the doctrine of promissory estoppel in North Dakota. After determining that there was no contract because there was no assent, and that the doctrine of promissory estoppel was inapplicable (without having determined whether, if applicable, it would have made any difference, since the court reserved the question whether promissory estoppel would constitute a cause of action), the court considered it necessary to deal with the statute of frauds.³⁷⁰ At this point, the court entertained Cooke's argument that the doctrine of promissory estoppel might bar Blood System's assertion of the statute of frauds. Stating that

The elements necessary to establish recovery under the doctrine of promissory estoppel are as follows: (1) a promise which the promisor should reasonably expect will

premises. *Id.* The court concluded that nothing prior to sending the lease form constituted a mutual assent to the transaction, and that nothing after the receipt of the lease form constituted an acceptance. *Id.* at 128-29.

364. *Id.*

365. *Id.* at 129. "The next issue raised by Cooke is that the doctrine of promissory estoppel constitutes a separate cause of action through which relief may be granted to him, and that the facts of this case establish that he was entitled to recover under that doctrine." *Id.*

366. *Id.* See *supra* note 108 and accompanying text (quoting § 90 of the Restatement).

367. *Cooke*, 320 N.W.2d at 129. See *supra* notes 279-81 and accompanying text (discussing *Red Owl*). See also *supra* note 345 (subsequent rejection of *Red Owl* by North Dakota Supreme Court).

368. *Cooke*, 320 N.W.2d at 129. The court apparently cited *Red Owl* for the proposition that some courts "recognize as a separate cause of action the doctrine of promissory estoppel as set forth in Restatement (Second) of Contracts § 90." It did not address the fact that *Red Owl* also seems to stand for the further proposition that the doctrine does *not* require that there be a definite promise or agreement, and so stands for a holding precisely the opposite of that reached by the North Dakota Supreme Court. Any doubts about the status of *Hoffman* in North Dakota were removed a few years subsequent to this case when, in *Lohse*, the North Dakota Supreme Court joined with those jurisdictions which disagree with *Red Owl*, and require that a promise must be "clear, definite and unambiguous" before promissory estoppel will be appropriate. See *supra* notes 342-45.

369. *Cooke*, 320 N.W.2d at 129.

370. Cooke raised the issue that "the doctrine of part performance bars Blood Systems' assertion of the statute of frauds." *Id.* at 129. It might be assumed that since there was no agreement at all, the failure to reduce it to writing would be the least of the plaintiff's problems, and would have been rendered moot by the holdings already reached.

cause the promisee to change his position; (2) a substantial change of the promisee's position through action or forbearance; (3) justifiable reliance on the promise; and (4) injustice which can only be avoided by enforcing the promise,³⁷¹

the court observed that the facts and circumstances did not establish that there was a promise, and therefore held that promissory estoppel would not prevent Blood Systems from raising the statute of frauds as a defense.³⁷²

Summary of the Reliance in the Absence of Assent Cases. In the series of cases beginning with *Cooke*,³⁷³ through *Firefighters Local 642*,³⁷⁴ and culminating in *Lohse*,³⁷⁵ the North Dakota Supreme Court has seen a fair assortment of the *Hoffman v. Red Owl*³⁷⁶ type of reliance cases. These cases, in which there is no promise because of failed negotiations, are ones in which the court is, for good reason, reluctant to embrace the extreme reach of § 90 which might form contracts even in these situations. Finally, in *Lohse*, the court has expressly rejected the premise necessary to a *Hoffman v. Red Owl* recovery, namely, the premise that a recovery in promissory estoppel may be had in cases where the promise would have been fatally defective under ordinary principles. Since the North Dakota Supreme Court requires that the promise be clear, definite and unambiguous, one of the few conclusions that seems safe to draw from the North Dakota reliance cases is that there is no recovery for reliance in the absence of assent

371. *Id.* at 130 (citing to *O'Connell v. Entertainment Enterprises, Inc.*, 317 N.W.2d 385, 390 (N.D. 1982)), the court did not mention the Restatement, which it had just quoted one page earlier. *Id.* In addition, the court did not explain why, one page earlier, it seemed to embrace § 90 of the Restatement (Second) exactly as written, but now, one page later, it reverted to language suggested by the Restatement (First); nor did it explain why it added language that is foreign to either version of § 90. Compare *id.* at 129 with *id.* at 130. *O'Connell* is discussed beginning at note 136, *supra*, and the difference between *O'Connell's* formulation of promissory estoppel and that contained in the Restatement of Contracts is discussed at note 182, *supra*. For the derivation of the *O'Connell* formulation, which traces its origin to an earlier formulation given by the Washington Supreme Court, see *supra* note 317. The derivation is set out in full in Chart 2, pp. A-2 to A-4.

372. *Cooke*, 320 N.W.2d at 130. The wheels seem to spin here, but, perhaps, if there is no promise, then there is no promissory estoppel, and so Blood Systems can raise the statute of frauds as a defense against the enforceability of the promise it made; but it made no promise, so there is no promissory estoppel, and so Blood Systems can raise the statute of frauds as a defense. See G. Stein, AS FINE AS MELANCTHA ("[Civilization begins with a rose.] A rose is a rose is a rose is a rose") reprinted in 4 THE YALE EDITION OF THE WRITINGS OF GERTRUDE STEIN 262 (1954).

373. *Cooke*, 320 N.W.2d at 124.

374. *Firefighters Local 642 v. City of Fargo*, 321 N.W.2d 473 (N.D. 1982).

375. *Lohse v. Atlantic Richfield Company*, 389 N.W.2d 352 (N.D. 1986).

376. *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267 (Wisc. 1965).

where the defect in assent is caused by failed negotiations or insufficient definiteness.

C. RELIANCE IN THE ABSENCE OF A WRITING

General. There are three subcategories of reliance in the absence of a required writing. The first two categories relate to writings required by the statute of frauds. The third category deals with writings required by other statutes. The categories are as follows: (1) reliance, in the absence of a required writing, on a promise within the statute of frauds where the promisor has made a promise to supply the writing,³⁷⁷ (2) reliance, in the absence of a required writing, on a promise within the statute of frauds and in the absence of any promise to supply the writing,³⁷⁸ and (3) reliance, in the absence of a writing, on a promise which lacks consideration but is enforceable without consideration if in writing.³⁷⁹

North Dakota has had no cases of the first category. North Dakota has had several cases of the second and third categories, and in some of them the North Dakota Supreme Court has awarded a recovery, while it has declined to do so in other cases. Even where a recovery is awarded, the grounds seem so broad that it is hard to say that recovery was awarded *because* of reliance upon a promise. Indeed, the court can almost be understood to have held that, so long as a promise can be clearly established, there will be a recovery. If so, this is, in effect, an overthrow of the rules which require a writing.

Before discussing reliance in the absence of compliance with the Statute of Frauds, it would be well briefly to review the typical implications of the usual sort of statute.

The Presumptive Rule: Satisfaction of the Statute of Frauds. The original English Statute of Frauds became effective in 1677, after going through four years in which it suffered "numerous drastic revisions, and accumulated new clauses suggested by a variety of legal experts of the time."³⁸⁰ It provided, in relevant

377. RESTATEMENT SECOND, *supra* note 3, § 139 comment b.

378. *Id.*

379. These are the so-called formality statutes which dispense with the requirement of consideration, provided that there be a writing. See *infra* notes 459-61 and accompanying text for examples of North Dakota statutes so providing.

380. J. DAWSON, W. BURNETT & S. HENDERSON, CASES AND COMMENTS ON CONTRACTS 941 (5th ed. 1987). See also C. HENING, *The Original Drafts of the Statute of Frauds (29 Car. II. c. 3) and Their Authors*, 61 U.P.A.L.REV. 283 (1913) (reprinting the original 1673 draft, documenting the successive revisions, and attributing authorship based on handwriting samples and other extrinsic and intrinsic evidence); 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 379-84 (1924) (discussing the enactment and authorship of the statute of frauds).

part, as follows:

An act for the prevention of Frauds and Perjuries
29 Car. II, c. 3 (1677)

For prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury or subornation of perjury . . .

* * *

Section 4. And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June no action shall be brought (1) whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized . . .

* * *

Section 17. And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June no contract for the sale of any goods, wares and merchandizes, for the price of £10 sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.³⁸¹

The several clauses of Section 4 of the English statute contain the familiar set of provisions: the executor/administrator provision (clause 1); the suretyship provision (clause 2); the marriage provi-

381. Dawson, *supra* note 380, at 942.

sion (clause 3); the land contract provision (clause 4); and the one-year provision (clause 5). In each case, if the promise is "within" the Statute of Frauds, then the Statute must be satisfied. As to the original section 4 promises, the statute is satisfied if there is a writing setting forth the agreement and signed by the party to be charged. Section 4 of the English statute was generally copied in the United States, though some provisions were omitted by a few states.³⁸²

The subject matter of section 17 of the English statute, the sale of goods provision, is now covered by section 2-201 of the Uniform Commercial Code.³⁸³ Section 2-201 is satisfied if there is a writing containing at least a quantity term which is signed by the party to be charged, and may also be satisfied in other ways.³⁸⁴

Observations and School Cases. It is generally, though not universally, assumed that the statute of frauds is an irrational, if not wicked, thing; a trap for the unwary and a trick to be practiced upon the innocent. Three hundred years of judicial hostility makes for good sport, and any commonly used casebook will illustrate that the leading principle throughout the cases is to find some way, if at all possible, to enforce the promise presumptively barred by the statute of frauds. This is done by diminishing the range of the promises within the statute, while at the same time enlarging the domain of the writing and signature sufficient to satisfy the statute.

382. RESTATEMENT SECOND, *supra* note 3, ch. 5, Statutory Note. Maryland and New Mexico have adopted the English statute by judicial decision; all of the other states, except Louisiana, have statutes similar to the English statute. *Id.*

Louisiana's law did not derive from the English. Article 2277 of the Louisiana Code, for example, provides that all agreements relative to movable property, and all contracts for the payment of money, where the value exceeds \$500 must, if not reduced to writing, be proved by "at least one credible witness, and other corroborating circumstances." Louisiana Compiled Code, Art. 2277 (1972). Article 2277 relaxes the requirements of Article 1341 of the Napoleonic Code from which it was derived, for the provision of the 1804 Napoleonic Code required "an act before a notary or under private signature" and set the threshold at 150 francs. *Id.*

In England, meanwhile, all but the suretyship provision and the land contract provision were repealed in 1954. 2 and 3 Eliz. II, c. 34. In recommending repeal, the Law Reform Committee said of those sections whose repeal it urged:

that they had outlived the conditions which generated and, in some degree, justified them; that they operate in an illogical and often one-sided and haphazard fashion over a field arbitrarily chosen; and that on the whole they promote rather than restrain dishonesty.

Law Reform Committee, *First Report*, CMD, No. 8809, at 3 (1953) *quoted in Recent Statute — Statute of Frauds — Part of English Act Repealed*, 68 HARV. LAW REV. 383 (1954).

383. U.C.C. § 2-201 (1987) (contracts for the sale of goods for the price of \$500 or more).

384. *See id.* § 2-201(2) (1987) (between merchants, failure to object to a written confirmation signed by and sufficient against the sender); § 2-201(3)(1) (1987) (specially manufactured goods); § 2-201(3)(2) (1987) (admission in court); § 2-201(3)(3) (1987) (part performance).

However, a point exists at which the creativity of even those legal minds most hostile to the statute must stop — after all this work to avoid the application of the statute, there remains a residuum of cases which are, after all, governed by the statute. No matter, for example, how narrowly a “suretyship” promise is defined, and no matter how generously a “writing” is defined, there will be some instance in which A will make a promise to B which, being a suretyship promise, is within the statute of frauds, and in which A will not have signed a writing sufficient to satisfy the statute of frauds. Even here, some avenue of relief may be available to B under general principles of law: perhaps there is another statutory provision which affords full or partial relief to B, perhaps A has committed an independent tort, such as fraud, elsewhere in the transaction. But, finally, even such avenues as those may be closed by the facts of a particular case.

In that event, we may be, and in the ‘hard’ cases certainly will be, faced with a promise which has every substantive element necessary to enforceability: there will be bargained for consideration (or some reliance-based substitute), and there will be a manifestation of mutual assent to the bargain (or some reliance-based substitute), but the formality of a writing will be lacking. This is a case in which the statute says that B loses. If, at the time A refuses to perform, B has done nothing, B loses her expectation interest. But if B has incurred costs in reliance on the promise, B stands to lose so much of those costs as have conferred no benefit upon A (assuming that B is entitled to the reasonable value of any benefit that B did confer upon A, on a restitutionary basis, and without regard to the enforceability of any promise made by A).

In some cases, this loss suffered by B might be egregious. Here is a hypothetical, based upon a well known case: Christie, the son of Carmen and step-son of Nate, moved to California with Carmen and Nate, who purchased a farm. Seven years later, Christie, then 18 years old, determined to leave home and seek an independent living. Nate and Carmen wanted him to stay with them and participate in the family venture. They made an oral promise to him that if he stayed home and worked, they would convey the farm to him at their death. In performance of the agreement, Christie remained home and worked diligently in the family venture, devoting his life to making the family farm a success. He gave up any opportunity for further education or any chance to accumulate property of his own, receiving only room and board and some spending money. He forbore from demand-

ing any present interest in the farm in reliance upon Nate and Carmen's repeated assurances that, in exchange for his labors, their interest in the farm would pass to him on their death. Upon Nate's death, and after Christie had worked on the farm for some 20 years, it was learned that Nate had left his interest in the farm to Nate, junior, his grand child, and the son of his deceased daughter by his former marriage.³⁸⁵

Christie relied upon a promise presumptively unenforceable because it is within the statute of frauds, and there is no writing sufficient to satisfy the statute. There are two solutions to Christie's dilemma: (1) Christie loses, with an offset in restitution for the reasonable value of the labor he provided, or (2) Christie wins, because of his reliance on the promise.

1. *Statute of Frauds; Reliance Without a Writing Where the Promisor Promised One*

Reliance Against a Promise to Provide a Writing: Promissory Estoppel in the Restatement. Take the basic fact pattern suggested by the case of *Christie Lo Greco*,³⁸⁶ but simplify it by assuming that the promise Christie sought to enforce was this: "if you stay and work on the farm for 20 years, I will convey the farm to you." And then add a slight variant. Assume that there is an additional promise made by the promisor, which is expressed: "and I promise that I will reduce this agreement to writing in a form sufficient to satisfy the statute of frauds." The new hypothetical now has two separate promises with which to work: (1) the "main" promise, the promise to convey the farm in exchange for Christie's staying and working for 20 years, and (2) a "collateral" promise, the promise to reduce the main promise to writing.

As to the enforceability of the main promise, if it can be assumed that Christie did stay and work for 20 years,³⁸⁷ the main

385. Based upon *Monarco v. Lo Greco*, 220 P.2d 737 (Cal. 1950). The California Civil Code includes within its statute of frauds those promises which, by their terms, are not to be performed within the life of the promisor. CAL. CIV. CODE § 1624(6) (1985).

386. See *supra* note 385 and accompanying text.

387. Other assumptions may need to be made (assume, as well, that "the farm" is described with sufficient particularity, assume that any other "essential terms" are included, and so on). In order to simplify, assume that the bare hypothetical is embellished with whatever facts are necessary to present a clean example of a promise enforceable in every other respect, but for the lack of a writing.

Of course, it does not take much imagination to see the sort of complex, or composite, promissory estoppel case into which this might transform itself. Suppose that, after Christie had worked for 17 years, the promisor revoked the offer; Christie may have to stretch just a little bit to establish that he had accepted the offer. For the "reliance in the absence of assent" analysis, see *supra* notes 283-305 and accompanying text. Suppose, if you will, that we don't know what is meant by "the farm;" Christie may have to stretch to establish an

promise is presumptively enforceable in two of three respects. It is a promise that is made in exchange for bargained-for consideration and it is a promise involving a manifestation of mutual assent. But it is a promise within the statute of frauds for it involves an interest in land, and it is also one which cannot be performed within one year of the time it is made. In the absence of the collateral promise here assumed, the main promise, if enforced at all by way of promissory estoppel, would have to be enforced directly because of reliance upon it, the very promise that the statute of frauds was enacted to render unenforceable.³⁸⁸

The enforceability of the collateral promise is another matter. A promise to reduce an agreement to writing is not a promise that is within the statute of frauds. Thus, the collateral promise does not fail for lack of a writing, since no writing is required for its enforceability. The inquiry ends if the collateral promise is bargained for. It is enforceable, and a remedy lies for any breach of that promise. If the collateral promise is not bargained for, then this is merely a garden variety generalized section 90 promissory estoppel case. Although this sort of promise could have been discussed elsewhere, it is included here under the statute of frauds rubric since it is somewhat related to the statute of frauds, and because the Restatement's references to reliance on this sort of promise occur as part of its broader treatment of reliance on promises unenforceable because of the statute of frauds. That is, the Restatement treats reliance on the collateral promise almost as a subset of reliance on the main promise, characterizing this as a more limited approach, taken by courts that would be unwilling to enforce the main promise absent a collateral one.

The Restatement's formulation of a reliance rule applicable in the face of a failure to satisfy the statute of frauds is contained in section 139.³⁸⁹ Section 139 is in two parts. The first part is as follows:

- (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of

offer of sufficient definiteness that it could be accepted. For the 'reliance in the absence of a definite promise' analysis, *see supra* notes 320-27 and accompanying text. Again, it is possible so to structure Christie's arrangements such that the promise he relied upon is presumptively unenforceable under all three presumptive rules, and perhaps for more than one defect under each, so that promissory estoppel would have to do at least triple duty if Christie is to recover. The actual Lo Greco case presents many of these issues, as, indeed, do many of the well-known cases. For now, however, merely assume the simple case.

388. This sort of reliance against the statute of frauds is discussed in the next section of this article.

389. RESTATEMENT SECOND, *supra* note 3, § 139.

the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.³⁹⁰

Upon analysis, it can be seen that this is a fairly close adaptation of section 90, and the elements necessary to support a recovery under section 139(1) are substantially the same as those required under section 90 generally: (1) there must be a promise, (2) the promisor must reasonably expect that the promise will induce action or forbearance, (3) the promise must have induced the expected action or forbearance, and (4) injustice must result if the promise is not enforced. The court is explicitly directed here to fashion a limited remedy, and to extend relief no further than justice requires.³⁹¹

The second part of section 139 adds to the analysis several additional factors, all of which, together, will help to determine whether the fourth element (the avoidance of injustice) is met. Part two of section 139 provides that:

- (2) In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant:
 - (a) the availability and adequacy of other remedies, particularly cancellation and restitution;
 - (b) the definite and substantial character of the action or forbearance in relation to the remedy sought;
 - (c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence;
 - (d) the reasonableness of the action or forbearance;
 - (e) the extent to which the action or forbearance was foreseeable by the promisor.³⁹²

The commentary makes clear that the enumeration of additional factors in section 139(2) beyond any contained in section 90 itself is intended to make recovery in the face of the statute of frauds more difficult than recovery in the more commonplace case of lack

390. *Id.* § 139(1).

391. *See id.* § 90.

392. *Id.* § 139(2).

of bargained for consideration.³⁹³ In addition, the force of the several factors varies in different types of cases.³⁹⁴

The Reporter's Note to section 139 of the Restatement begins by acknowledging that section 139 is "new," and goes on to say that courts "have shown varying degrees of willingness to set aside the Statute of Frauds to avoid injustice."³⁹⁵ The Reporter goes on to observe that, of the courts that have been willing to set aside the Statute of Frauds, some have not gone so far as indicated by the full extent of section 139, but "have permitted reliance to displace the requirement of a writing only in narrowly circumscribed situations, refusing to act unless there has been . . . a failure to carry out a promise to make a memorandum of an oral agreement."³⁹⁶

These cases referred to by the Reporter can be said to turn, therefore, not directly on the promise unenforceable because of the absence of a writing, but, instead, on the subsidiary or collateral promise to make a writing. Thus, it can be said that the promise relied upon is the promise to supply the writing, rather than the original promise itself.

Reliance Against a Promise to Provide a Writing: Responses Not Requiring that Promissory Estoppel be Applied Directly Against the Statute of Frauds. Since the promise relied upon is the promise to supply a writing, this is a collateral promise, not itself within the statute of frauds. Like any other promise, such a collateral one presumptively requires consideration and mutual assent. Should either of those elements be lacking, the responses (both by promissory estoppel, and by other doctrines outside of promissory estoppel) are the same as those otherwise available to promises in general.³⁹⁷

Reliance Against a Promise to Provide a Writing: Promissory Estoppel in North Dakota. There are no retrievable opinions of the North Dakota Supreme Court involving a promissory estoppel

393. "Like § 90 this Section states a flexible principle, but the requirement of consideration is more easily displaced than the requirement of a writing." RESTATEMENT SECOND, *supra* note 3, § 139 comment b. The difference, presumably, results from the fact that in most states, but not in all, consideration is a judicially created requirement, and therefore, one which can be judicially recreated or uncreated, while the requirement of a writing is a creature of statute, subject, indeed, to judicial interpretation, but not subject to wholesale judicial nullification. In North Dakota, however, consideration, too, is a statutory requirement. N.D. CENT. CODE § 9-01-02.

394. RESTATEMENT SECOND, *supra* note 3, § 139 comment c.

395. *Id.* § 139, Reporter's Note "this section is new"; § 139 comment b Reporters Note ("courts have shown varying degrees of willingness. . ." and citing cases).

396. *Id.* § 139 Reporter's Note.

397. See *supra* notes 104-15 and accompanying text for responses to promises lacking consideration, and notes 283-305; 320-27 and accompanying text for responses to promises lacking mutual assent.

response to reliance on a subsidiary or collateral promise to reduce an oral agreement to writing.

2. *Statute of Frauds; Reliance Without a Writing Where the Promisor Promised None*

Reliance Against the Statute of Frauds: Promissory Estoppel in the Restatement. The applicable Restatement provision is section 139. But the acceptance of section 139 in this context is more difficult. These are, by far the 'hardest' of the statute of frauds cases, since they approach judicial nullification of a statute. The Reporter's Note to section 139 reflects this fact, noting, not only cases that adopt or discuss the then — tentative draft of section 139, but also those that (1) emphasize that enforceability of the oral promise actually turns upon "broken promises to make subsequent writings,"³⁹⁸ or (2) emphasize that an oral agreement within the statute of frauds will not be enforced in the absence of "egregious situations,"³⁹⁹ or (3) emphasize that there is a "heavy factual burden" in the way of a successful estoppel argument,⁴⁰⁰ or go so far as to (4) express "hostility" towards any weakening of the statute of frauds at all.⁴⁰¹

Those cases which enforce a promise in the absence of a required writing, and in the absence of a promise to supply the writing, form the next to last of the many promissory estoppel transaction types.

Reliance Against the Statute of Frauds: Responses Outside of Promissory Estoppel. In addition to standard recharacterization responses which recharacterize a promise as one which is not within the statute of frauds at all, the Field Code, as adopted by North Dakota, contains a specialized version of its "promissory fraud" provision,⁴⁰² adapted particularly to the statute of frauds. The relevant statute provides as follows:

When a contract which is required by law to be in writing, is prevented from being put into writing by the fraud of a party thereto, any other party who by such frauds led

398. RESTATEMENT SECOND, *supra* note 3, § 139, Reporter's Note.

399. *Id.* Indeed, *Monarco v. Lo Greco*, 220 P.2d 737 (Cal. 1950), in which Christie, the relying promisee did recover is often so read and hence, is cited as a limiting (rather than as an expansive) reading of promissory estoppel in the context of the statute of frauds. See, e.g., E. FARNSWORTH, CONTRACTS 437 (1982).

400. RESTATEMENT SECOND, *supra* note 3, § 139, Reporter's Note.

401. *Id.*

402. The promissory fraud provisions are discussed *supra* at note 132 and accompanying text.

to believe that it is in writing and acts upon such belief to his prejudice may enforce it against the fraudulent party.⁴⁰³

In addition, North Dakota case law contains the part performance exceptions to the statute of frauds, even though a corresponding provision was deleted from the statute.⁴⁰⁴

Reliance Against the Statute of Frauds: Promissory Estoppel in North Dakota. There are many sorts of statutes which require a promise to be in writing as a condition to enforceability. The statutory writings can be divided into two broad types: one kind which is an aid to enforceability of promises not otherwise enforceable,⁴⁰⁵ and a second kind which is a bar to enforceability of promises that otherwise would have been enforceable. I reserve the appellation "statute of frauds" for those statutes of the second kind.

There are three important statutes of fraud in North Dakota, two of them in the Uniform Commercial Code (carrying forward the old article 17 provisions of the original statute of frauds, as modified),⁴⁰⁶ and one derived from the Field Code (carrying forward the old article 4 provisions of the original statute of frauds, as modified).⁴⁰⁷

403. FIELD CODE, *supra* note 13, § 793; N.D. CENT. CODE § 9-06-03.

404. For the part performance exception, see, e.g., *Keen v. Larson*, 132 N.W.2d 350 (N.D. 1964). See *supra* note 388 for a comparison of the Field Code provision (which included the part performance exception as part of the "real property" clause) to the Century Code provision (which does not include the exception).

405. There are many statutes, for instance, which dispense with the substantive requirement of consideration if there is a writing. Among those in force in North Dakota is: N.D. CENT. CODE §§ 9-09-05 (a writing, without new consideration, sufficient to modify an existing contract). Such statutes provide the kind of formal substitute for consideration as previously was provided by a seal.

406. See *supra* note 333 and accompanying text for article 17 of the original statute of frauds. The two UCC provisions most relevant here are U.C.C. § 2-201 (1987) *codified* at N.D. CENT. CODE § 41-02-08 (1983) (applies to contracts for the sale of goods for the price of \$500 or more) and U.C.C. § 1-206 (1987) *codified* at N.D. CENT. CODE § 41-01-16 (1983) (a gap-filler, which applies to sales of personal property beyond \$5,000 in amount; an important kind of personal property which does not constitute "goods" within the meaning of the UCC, and so is covered by the gap-filler provision, is "general intangibles," including bilateral contract rights and royalty rights).

407. See *supra* note 362 and accompanying text for article 4 of the original statute of frauds. The most relevant provision of the North Dakota Code provides that

The following contracts are invalid, unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged, or by his agent:

1. An agreement that by its terms is not to be performed within a year from the making thereof.
2. A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in section 22-01-05.
3. An agreement for the leasing for a longer period than one year, or for the sale, of real property, or of an interest therein. . .

There has been a lively debate in the North Dakota cases over whether, when, and how the doctrine of promissory estoppel may serve to render enforceable a promise that otherwise would have been unenforceable for lack of a sufficient writing. In the discussion that follows, some of the leading non-UCC cases will be analyzed, and then some of the UCC cases will be examined.

Gulden. James Gulden had a lease with an option to purchase a home owned by Walter Krueger.⁴⁰⁸ Gulden's option exercise price was \$62,400.⁴⁰⁹ Gary Sloan, an acquaintance of Gulden, owned a mobile home and was prepared to pay \$68,400 for the Krueger house.⁴¹⁰ Gulden asserted that he and Sloan came to an agreement involving the mobile home and the Krueger house, orally agreeing, in effect, to exchange Gulden's option for Sloan's mobile home.⁴¹¹ The transaction was expressed as an agreement by which Gulden would forbear exercising the option, Sloan would buy the home from Krueger for \$62,400, and Sloan would transfer his mobile home (apparently valued at \$6,000) to Gulden.⁴¹²

Accordingly, Sloan purchased the Krueger home, and then exchanged residences with Gulden — Sloan and his wife moved out of their mobile home and into the Krueger house; Gulden and his wife moved out of the Krueger house and into the mobile home vacated by the Sloans.⁴¹³ However, Sloan refused to give the Guldens title to the mobile home, and eventually transferred it

4. An agreement or promise for the lending of money or the extension of credit in an aggregate amount of twenty-five thousand dollars or greater.

N.D. CENT. CODE § 9-06-04 (1987).

The North Dakota Century Code provisions differ in several material respects from Field Code. For example, the Field Code version of the "one year provision" omitted the words "from the making thereof," because, in the words of the commissioners, "The commissioners think . . . that the strictness of this provision has worked injustice. Few yearly contracts go into effect instantly." FIELD CODE, *supra* note 13, § 794 comment 6.

In addition, the Field Code version of the "real property" provision added the words "or unless the contract has been partially performed by the party seeking to enforce it, and such part performance has been accepted by the other," in order to retain the equitable doctrines of part performance. *Id.* § 867 comment 3. In retaining the equitable doctrine, the commissioners of the code broadened it by removing the equitable requirement that the party seeking to enforce the contract show that he cannot otherwise be restored to his former position, because they supposed that courts of equity had been reluctant to go so far as the code now went because of the chancellors' consciousness that "the equitable doctrine of part performance was always in contradiction of the letter of the statute," a concern that evaporated with the codification of equitable doctrine. *Id.* § 867 comment 3.

408. *Gulden v. Sloan*, 311 N.W.2d 568 (N.D. 1981).

409. *Id.* at 569.

410. *Id.* at 570.

411. *Id.* Sloan admitted that there had been discussion of terms, but contended that "no formal agreement" was ever reached. *Id.* The trial judge's finding of fact was that the parties had come to an agreement. *Id.*

412. *Id.*

413. *Id.* The couples "helped each other move and exchanged keys." *Id.*

to a third party.⁴¹⁴ At trial, Sloan disputed Gulden's version of the facts, but the trial judge made findings in Gulden's favor, including findings that there was an oral agreement supported by consideration, and that there had been part performance sufficient to satisfy the statute of frauds.⁴¹⁵ These findings were affirmed on appeal.⁴¹⁶

As to part performance and the statute of frauds, the North Dakota Supreme Court noted that neither party had specified which of the three possible statute of frauds provisions might have been applicable.⁴¹⁷ Since the parties had not chosen among the land sale provision,⁴¹⁸ the UCC gap-filler provision,⁴¹⁹ or the UCC sale of goods over \$500 provision,⁴²⁰ the supreme court did not address the issue of which of the three statutes of frauds is applicable.⁴²¹ The court assumed that at least one of the provisions was applicable, and held that part performance was sufficient against any of the three provisions so as either to satisfy the statute of frauds, or to exempt the transaction from the operation of the statute of frauds.⁴²² Finding that there had been part performance, the court concluded that the oral agreement was enforceable notwithstanding the statute of frauds.⁴²³

Part performance cases are somewhat difficult to analyze in

414. *Id.*

415. *Id.*

416. *Id.* at 571-72.

417. *Id.* at 573.

418. N.D. CENT. CODE § 9-06-04(3) (1988), applicable if the transaction be considered a sale of some interest in real property. If the option to purchase be deemed an interest in real property, or if the mobile home had involved an interest in real property, the transaction would be eligible for coverage by this statute of frauds provision. *Id.*

419. N.D. CENT. CODE § 41-01-16 (1986) (UCC § 1-206), which is applicable if the transaction involves the sale of a general intangible beyond \$5,000 in value and is not otherwise covered by the UCC sale of goods provision. *Id.* If the option to purchase be deemed a general intangible sold for \$6,000, the transaction would be eligible for coverage by this statute of frauds provision. *Id.*

420. N.D. CENT. CODE § 41-02-08 (1986) (UCC § 2-201), applicable to the extent that the transaction involves the sale of goods in excess of \$500. *Id.* If the mobile home be deemed "goods," the transaction would be eligible for coverage by this statute of frauds provision. *Id.*

421. *Gulden*, 311 N.W.2d at 573.

422. As to the land sale statute of frauds, The North Dakota Supreme Court noted that it had previously held that part performance "in the form of improvements to property" was sufficient to "take the oral contract for the sale of land out of the statute of frauds." *Gulden*, 311 N.W.2d at 573 (citing *Vasichek v. Thorsen*, 271 N.W.2d 555, 560-61 (N.D. 1978)).

As to the UCC sale of goods provision, § 2-201, it should be noted that it contains its own performance exception. U.C.C. § 2-201 (1987). This section is § 2-201(3)(c), which provides for goods with respect to which "payment has been made and accepted or which have been received and accepted" would seem to cover Gulden's transaction. See U.C.C. § 2-201(3)(c) (1987).

As to the UCC gap-filler provision, § 1-206 has no statutory performance exception, and there had, apparently, been no judicially developed performance exception. See U.C.C. § 1-206 (1987).

423. *Gulden*, 311 N.W.2d at 574.

terms of the reliance interest, or in terms of promissory estoppel. Indeed, there are at least three variations on part performance, ranging more or less close to promissory estoppel: (1) From one point of view, performance certainly is one of the things that a promisee does in reliance on a promise; and so part performance might be expected to lead into a promissory estoppel analysis (could the promisor reasonably have expected that the promisee would act or forbear from acting, and so on). (2) From another perspective, performance is evidence of the existence of the agreement; and if the statute of frauds is conceived of as insisting, not necessarily that there be a writing, but simply that there be trustworthy evidence of the agreement itself, then unequivocal part performance might satisfy the statute by reinforcing the oral testimony as to the existence and terms of the agreement. (3) From yet another vantage, part performance is either based upon specific statutes,⁴²⁴ or is a narrow exception of some antiquity, developed by courts of equity in matters concerning land and historically applied only to that species of "performance" which consists in entry and improvement on real property and is not, strictly speaking, "part performance" at all,⁴²⁵ at least not performance of the land purchase agreement sought to be enforced thereby; so understood, part performance has little or no extension beyond the specific reach of the statutes which permit it, or the 'entry and improvement upon land' cases which authorized it.

Gulden is important because it shows definite movement away from the last of the three enumerated positions.⁴²⁶ *Gulden* embraces the second position, focusing as it does upon a rule of part performance which emphasizes that the test for such performance is to be "precisely directed toward" the "quantum of proof certain enough to remove doubts as to the parties' oral agreement,"⁴²⁷ and holding that there was no explanation for the

424. *E.g.*, the original article 17 Statute of Frauds, sale of goods provisions, carried forward, with modifications into the Uniform Commercial Code. See U.C.C. § 2-201 (1986).

425. On this basis, the action of making valuable improvements, though called "part performance," can be thought of as simply an action in reliance on the promise to convey the land. It is, perhaps, on this basis that the drafters of the original Restatement counted many of the entry-and-improvement-on-real-estate cases as precursors to their § 90.

426. While part performance was the basis of its holding, the court did not ground the result on any improvements on land, nor did it rest its holding upon the statutory part performance exception in the UCC. See *Gulden*, 311 N.W.2d at 573-74.

427. *Id.* at 573 (citing *Buettner v. Nostdahl*, 204 N.W.2d 187, 195 (N.D. 1973)) (quoting *Miller v. McCamish*, 479 P.2d 919, 923-24 (Wash. 1971)) (noting that the "first requirement of the doctrine [of part performance] is that the contract be proven with clear and unequivocal evidence," and that another requirement is that the "acts relied upon as constituting part performance must unmistakably point to the existence of the claimed agreement.")

actions of the Guldens and the Sloans that was more likely than the explanation of Gulden's.⁴²⁸ And the case may be a more significant landmark still if it be understood to have deliberately avoided the more narrow holding that might have been equally possible.⁴²⁹

Jamestown Elevator or Farmer's Cooperative?[?] *Jamestown Elevator v. Hieb*⁴³⁰ and *Farmer's Cooperative v. Cole*⁴³¹ are two cases that were decided within nine months⁴³² of one another: they presented similar facts, but they seem to have resulted in opposite holdings. In the second of the two cases, *Jamestown Elevator*, there was a recovery in favor of the relying promisee; but in the first of the two, *Farmer's Coop*, there was not. Since the cases were decided in the same year, and since the second cites the first, not only without overruling it, but approving it, the cases must stand for the proposition that at least some promises within the statute of frauds will be enforced even if not accompanied by a writing sufficient to satisfy the statute.

In *Jamestown Elevator*, Archie Hieb, a farmer, orally agreed to sell his crop to a grain elevator; and the elevator immediately agreed to resell the same crop.⁴³³ When the farmer refused to perform, the elevator waited, covered, and sued.⁴³⁴ The elevator won at the trial court level, and the judgment was affirmed on appeal.⁴³⁵ The North Dakota Supreme Court noted that North

428. *Id.* at 574. "Although," the court observed, "it is undisputed that James Gulden and Gary Sloan had known each other for 30 years, it doesn't appear that their friendship was so strong and long lasting that it explains [the] Sloans letting [the] Guldens live rent free in their mobile home." *Id.* The court went on to say

The simple explanation that the exchange was made out of friendship does not, in view of the testimony, provide an acceptable explanation of the exchange. We *therefore* hold that the oral contract . . . was excepted from the statute of frauds because of the part performance.

Id. (emphasis added).

429. Instead of taking any of the three statutes of frauds as being potentially applicable, and, thus, holding that all three are satisfied by the evidentiary sort of part performance present in this case, the court might have elected to use the UCC sale of goods provision. If there had been a record sufficient to establish the movability of the mobile home, then the mobile home constitutes "goods" as defined by § 2-105 of the Uniform Commercial Code. See *Schock v. Ronderos*, 394 N.W.2d 697 (N.D. 1986) (risk of loss under article 2 of the UCC, a mobile home being the subject matter of the controversy). Under the UCC sale of goods provision, the statute of frauds is satisfied if payment has been made and accepted, or if the goods have been delivered and accepted — both of which seem to have occurred in *Gulden*.

430. *Jamestown Terminal Elevator, Inc. v. Hieb*, 246 N.W.2d 736 (N.D. 1976).

431. *Farmer's Cooperative Ass'n of Church's Ferry v. Cole*, 239 N.W.2d 808 (N.D. 1976).

432. *Farmer's Cooperative* was decided in February (opinion dated February 25, 1976, rehearing denied, April 5, 1976), and *Jamestown Elevator* was decided in November (opinion dated November 5, 1976).

433. *Jamestown Elevator*, 246 N.W.2d at 738.

434. *Id.* at 739. The amount claimed by the elevator was apparently \$37,500. *Id.*

435. *Id.* at 742.

Dakota Century Code section 41-02-08, covering the sale of goods in excess of \$500 (UCC § 2-201) is part of a statute that permits a court to apply principles of common law, including estoppel.⁴³⁶ Oscillating between equitable estoppel and promissory estoppel,⁴³⁷ the court concluded that the farmer was estopped from invoking the statute of frauds as a defense.⁴³⁸ The estoppel was explained thus:

In the instant case, Hieb conveyed the implication to [the grain elevator] that the sale was complete, knowing that [the grain elevator] would immediately resell the durum wheat; and [the grain elevator] had no method of ascertaining Hieb's true intentions at the time that [it] had to rely upon Hieb's *representation* in order to insure securing the price [the grain elevator] had promised to pay Hieb for his durum wheat.⁴³⁹

The court observed, also, that Hieb's counsel had conceded the point.⁴⁴⁰

436. *Id.* at 740. See N.D. CENT. CODE § 41-01-03 (1986) (UCC § 1-103) (providing that "unless displaced by the particular provisions of this title, the principles of law and equity, including the law relative to estoppel shall supplement its provisions").

437. In the space of a single page, the court referred to both kinds of estoppel without clearly differentiating the transitions from one to another. *Jamestown Elevator*, 246 N.W.2d at 741. As a result, the following observations can be gleaned about the two estoppels.

(a) Equitable estoppel: "[A]nother alternative to the strict application of the Statute of Frauds is the doctrine of *equitable estoppel*." *Id.* (citation omitted, emphasis added). The court went on to quote § 31-11-06, the statutory version of equitable estoppel. *Id.* See *supra* note 354.

(b) Promissory estoppel: "[in a prior case], this court quoted with approval the following statement of the elements of *promissory estoppel* applicable to the sale of goods." *Jamestown Elevator*, 246 N.W.2d at 741 (emphasis added). At this point, instead of giving the elements of promissory estoppel, the court quoted the gloss it had earlier given to the *equitable estoppel* statute. *Id.* (see *supra* note 354 for North Dakota's gloss on equitable estoppel). Finally, the court noted that Hieb's counsel "conceded in oral argument before this court that the elements necessary for application of the doctrine of *promissory estoppel* existed in the instant case." *Id.* (emphasis added).

It seems that the working rule of the case is completely based upon actual elements of equitable estoppel, while merely carrying the label of promissory estoppel. For the difference between promissory estoppel and equitable estoppel, see *supra* note 354. In a carefully reasoned opinion issued six years after *Jamestown Elevator*, the North Dakota Supreme Court affirmed its recognition of the difference. See *O'Connell v. Entertainment Enterprises*, 317 N.W.2d 385, 389 (N.D. 1982) ("Equitable estoppel applies when a person makes a representation as to a present or past fact. . . . Promissory estoppel, on the other hand, applies when a person makes a representation as to future events.")

438. *Jamestown Elevator*, 246 N.W.2d at 741.

439. *Id.* (emphasis added).

440. *Id.* Unfortunately, the concession does not do much to help us determine what the representation was or when it was made. Are we to say, simply, that every promise within the statute of frauds imports an implied representation? If so, then we still must determine what representation, exactly, it is that we are going to imply. Among the representations that might be implied are: (a) "if you need a writing, I will provide one" (being, of course, a promise, rather than a representation of fact, and being, therefore, if implied, the predicate upon which to build a promissory estoppel recovery, based squarely on the promise to provide the necessary writing), or (b) "don't worry, there is no writing

In the earlier of the two cases, *Farmer's Cooperative*,⁴⁴¹ it was alleged that Elmer Cole, a farmer, orally agreed to sell his crop to a grain elevator; and the elevator immediately agreed to resell the same crop.⁴⁴² When the farmer refused to perform, the elevator waited, covered, and sued.⁴⁴³ The elevator lost at the trial court level, and the judgment was affirmed on appeal.⁴⁴⁴ The North Dakota Supreme Court noted that North Dakota Century Code section 41-02-08, covering the sale of goods in excess of \$500 (UCC § 2-201) is part of a statute that permits a court to apply principles of common law, including estoppel.⁴⁴⁵ Dodging back and forth between "yes" and "no" on the question whether estoppel can be applied in the face of the statute of frauds,⁴⁴⁶ the court concluded,

necessary, this promise is enforceable without one" (being the kind of representation which would raise the question of an equitable estoppel, but also being the kind of representation which the recipient must know or have reason to know is false, and so not entitled to rely upon). The opinion does not say what, exactly, the representation was. Neither does the opinion say how, if it is going to create implied representations so broad as those suggested here, and is also prepared to say that the recipient is justified in relying upon them, the court will ever have occasion to hold any promise unenforceable for lack of a writing. Of course, the promisor might have actually said something to this effect: "don't worry, I have already signed a sufficient writing" (being the kind of representation which would raise the question of an equitable estoppel, and be of the sort on which the recipient may be entitled to rely), but this would seem to be a representation that requires proof, and which ought not to be implied. In any event, it did not seem to be a factor in the actual case.

441. *Farmer's Cooperative Ass'n of Church's Ferry v. Cole*, 239 N.W.2d 808 (N.D. 1976).

442. *Id.* at 810.

443. *Id.* at 811. The elevator claimed \$122,800. *Id.*

444. *Id.* at 810.

445. *Id.* at 811. See also N.D. CENT. CODE § 41-01-03 (the supplementary general principles of law provision, UCC § 1-103, providing that "unless displaced by the particular provisions of this title, the principles of law and equity, including the law relative to estoppel shall supplement its provisions"). This is, of course, the same provision that governed the *Jamestown Elevator* case. See *supra* note 436 and accompanying text.

446. *Farmer's Cooperative*, 239 N.W.2d at 812-14. The trial court set up a clean issue for the appeal. The trial court concluded that estoppel did not apply, reasoning that "estoppel to assert the statute of frauds does not arise merely because an oral contract within the statute has been acted upon by the promisee and not performed by the promisor, nor does it arise upon the mere refusal to make a writing as agreed." *Id.* at 812. Indeed, the trial court, quoting *Ozier v. Haines*, 103 N.E. 2d 485, 488 (Ill. 1952), said:

[i]t is true that harsh results . . . may occur . . . but it is a result which is invited and risked when the agreement is not reduced to writing in the manner prescribed by law . . . [the promisee acts on the promisee's own judgment and at its own risk and is] not entitled to an application of the estoppel doctrine.

Id. The North Dakota Supreme Court first acknowledged the trial court's rejection of promissory estoppel. *Id.* It then gave answers that seem both to support and to reject promissory estoppel. *Id.* at 812-13.

On the one hand, it observed that estoppel in North Dakota is limited "for some purposes" by statute and quoted N.D. CENT. CODE § 31-11-06, the equitable estoppel statute (see *supra* note 354 for that statute and its North Dakota gloss). *Id.* at 812. The court noted that if estoppel is applied too broadly, it would accomplish a "complete derogation" of the statute of frauds, but, if applied too narrowly, the statute of frauds might itself become a tool to accomplish "fraud." *Id.* The North Dakota Supreme Court pointed out that it had, in two recent cases, "recognized that estoppel *could* be a bar to the raising of the statute of frauds." *Id.* at 812-13 (emphasis added) (citing *Nelson v. Glasoe*, 231 N.W.2d 766 (N.D. 1975)) (dicta); (citing *Dangerfield v. Markel*, 222 N.W.2d 373 (N.D. 1974)) (dicta). Finally,

at the least, that estoppel did not apply in the instant case.⁴⁴⁷ Subsequently, *Farmer's Cooperative* has been cited for the diametrically opposed propositions that the North Dakota Supreme Court does,⁴⁴⁸ and that it does not,⁴⁴⁹ recognize promissory estoppel as a bar to the assertion of the statute of frauds.

In light of these two cases, neither of which is overruled, it seems safe to say that there is some doubt about the state of the law in North Dakota, but it appears North Dakota does recognize some sort of estoppel, in some circumstances,⁴⁵⁰ against the assertion of the statute of frauds.

In *Dangerfield v. Markel*,⁴⁵¹ the North Dakota Supreme Court

the court gave a statement of the elements necessary for invocation of equitable estoppel. *Farmer's Cooperative*, 239 N.W.2d at 813 (quoting the same A.L.R. annotation it subsequently relied upon in *Jamestown Elevator*, 246 N.W.2d at 741) (*see supra* note 354 for the substance of the A.L.R. annotation, which has become the North Dakota gloss on equitable estoppel and *see supra* note 437 for a discussion of equitable estoppel as applied in *Jamestown Elevator*).

On the other hand, the North Dakota Supreme Court examined § 2-201 of the UCC (N.D. CENT. CODE § 1-02-08) (1986) to determine whether it expressed a legislative intent to permit avoidance of the statute of frauds by invocation of estoppel, and found no such intent. *Farmer's Cooperative*, 239 N.W.2d at 813-14. It concluded, further, that the trial court was "correct" in ruling that there was no evidence of fraud on the part of Elmer Cole, and that the grain elevator "had not established the application of estoppel," and admonished that each case must be evaluated "by its circumstances" when determining whether to employ estoppel to prevent a party from applying the statute of frauds. *Id.* at 814.

It may be wondered whether the court means simply that equitable estoppel is available, but only when the promisor has committed fraud. *See supra* note 354 (suggesting that the court may, indeed, mean to identify equitable estoppel with fraud).

447. *Farmer's Cooperative*, 239 N.W.2d at 813. In a sensible analysis, the court noted that the applicable provision of the statute of frauds was the sale of goods provision of the UCC, § 2-201, and that the statute itself stated certain limited circumstances in which an agreement, though not in writing, might be enforced. *Id.* The court quoted with approval an A.L.R. annotation which admonished that "where there exists, in statute or case law, clearly established means under which a contract . . . may be rendered enforceable notwithstanding the statute of frauds, the court may be hesitant to apply promissory estoppel in such a manner as to enlarge upon those means of avoiding the statute." *Id.* at 813.

448. *Cf. Jamestown Elevator*, 246 N.W.2d at 741 (using *Farmer's Cooperative* in support of its holding that estoppel does apply against the assertion of the UCC's statute of frauds).

449. *See E. FARNSWORTH, CONTRACTS § 6.12* (1982) ("Some courts rejected the Restatement Second rule and adhered to the traditional position that such reliance did not make the farmers' oral promises enforceable," referring to *Farmer's Cooperative* and other cases.)

450. As a matter of the facts of the two cases, it may be relevant that Mr. Hieb, on whose promise Jamestown Elevator relied, may have admitted the existence, if not all of the terms, of the promise, *see Jamestown Elevator*, 246 N.W.2d at 73839 (alternative arguments presented by Mr. Hieb). However, Mr. Cole, on whose asserted promise Farmer's Cooperative relied, denied that he ever made any such promise. *See Farmer's Cooperative*, 239 N.W.2d at 810. If the North Dakota Supreme Court is really committed to the view that the statute of frauds is meant as a non-exclusive method to provide trustworthy evidence of the existence and terms of certain agreements (*see supra* note 427), then there is a clear outline of a reliance based rule in North Dakota. It might be put thus: where there is clear and convincing evidence of the terms of an agreement, and there is reliance, then the agreement will be enforced.

451. *Dangerfield v. Markel*, 222 N.W.2d 373 (N.D. 1974), *after remand*, 252 N.W.2d 184.

did another variation on promissory estoppel against the UCC sale of goods statute of frauds.⁴⁵² The court analyzed this in terms of an enforceable oral modification coupled with waiver of the original terms or an estoppel to assert them.⁴⁵³

Finally, in *Buettner v. Nostdahl*,⁴⁵⁴ a non-UCC case, there was an allegation of part performance sufficient to overcome a statute of frauds defense.⁴⁵⁵ *Buettner* involved an oral undertaking related to management of a sugar beet operation and conduct of a cattle feeding operation; the statute of frauds provisions were those relating to contracts not to be performed within one year, and relating to the sale of an interest in land.⁴⁵⁶ *Buettner* stands for the proposition that where there is part performance (reliance) upon a promise that is within the statute of frauds, there must be (a) proof of the agreement by clear evidence, and (b) performance that is unmistakably in response to that agreement, and not otherwise explainable.⁴⁵⁷ Because there was no clear evidence of the agreement, and because the part performance could as readily been explainable as evidencing merely an employer-employee relationship, there was no recovery.⁴⁵⁸

3. *Non-Statute of Frauds Reliance Without a Writing*

If, by 'statute of frauds,' is meant a statute which requires a writing in the case of promises otherwise presumptively enforceable, then the failure to satisfy the writing requirement of such a statute may result in the failure to enforce a promise that was accompanied by consideration and mutual assent. This is widely viewed as a disappointing result. Some of the attempts to avoid

452. *Dangerfield*, 222 N.W.2d at 377-78. See N.D. CENT. CODE § 41-02-08; (UCC § 2-201)(1987). See note 446 and accompanying text for a discussion of the court's treatment of this same provision.

453. *Dangerfield*, 222 N.W.2d at 376. The matter was before the court on interlocutory appeal of an order which granted a motion to strike portions of defendant's counterclaim, and denying a motion for summary judgment on the same portions of the counterclaim. *Id.* In remanding for further proceedings, the court gave guidance to the trial court, including this:

Another alternative to the strict application of the Statute of Frauds in this case is the doctrine of equitable estoppel. . . . Where one party, [1] in reliance on the other's representation or conduct, [2] changes his position or otherwise suffers an unjust or unconscionable injury or loss, or [3] where one party has accepted performance or benefits to the detriment of the other, the doctrine may be applied.

Id. at 378 (making a passing reference to § 90 of the Restatement (Second) of Contracts).

454. *Buettner v. Nostdahl*, 204 N.W.2d 187 (N.D. 1973).

455. *Id.* at 195.

456. *Id.* at 188.

457. *Id.* at 195.

458. *Id.*

such results and to enforce such promises by way of promissory estoppel were discussed in the previous sections of this article.

This leaves one more kind of statutory writing. Where a promise, not otherwise presumptively enforceable, is made so by the presence of a writing, there is a different policy at work. Here, the failure to satisfy the writing requirement does not have the immediate effect of denying validity to an otherwise enforceable promise (as is the case with a failure to satisfy the statute of frauds), but instead, has the effect of leaving an unenforceable promise in precisely the same state it was in before — unenforceable. Here are three examples of North Dakota statutes having such an effect: promises modifying a preexisting contractual obligation,⁴⁵⁹ promises releasing an existing contractual obligation,⁴⁶⁰ and certain promises having to do with the sale of goods.⁴⁶¹ In all of these cases the writing serves as a substitute for consideration. If present, the writing serves to make enforceable a promise that would otherwise not be enforceable due to lack of consideration.

I refer to this sort of writing requirement as a “nonstatute of frauds” writing. It might be supposed that, where the legislature has provided a method by which a promise may be rendered enforceable despite the lack of consideration, there may be at least some question why it is necessary to enlarge upon those means. The application of promissory estoppel to excuse the lack of a writing, which, in turn, would have excused the lack of consideration is such an enlargement.

Mitchell v. Barnes,⁴⁶² already discussed in its aspect of reliance in the absence of consideration, also illustrates an instance of reliance in the absence of a required writing.⁴⁶³

Summary of the Reliance in the Absence of Required Writing Cases. The series of cases, including the statute of frauds cases (Gulden, Jamestown Elevator, Farmer’s Coop, Buettner, Dangerfield) and the non-statute of frauds case (Mitchell), in which the

459. A modification of an oral contract may be effected by the consent of the parties, without a new consideration, if the modification is in writing. N.D. CENT. CODE § 9-09-05 (1986). A modification of a written contract may be altered by “a contract in writing.” N.D. CENT. CODE § 9-09-06 (1986). See *supra* note 198 and accompanying text.

460. A release of an obligation may be effected, without a new consideration, if the release is in writing. N.D. CENT. CODE § 9-13-01 (1986).

461. For example, § UCC 2-205 creates binding option contracts, without consideration, if there is a signed writing which by its terms gives assurance that an offer will be held open; and, while UCC § 2-209(1) allows for the modification of a contract without consideration, § 2-209(2) requires a signed and written modification to modify a contract if the original contract excludes modification except by a signed writing. N.D. CENT. CODE §§ 41-02-12 (1986) (UCC § 2-205); 41-02-16 (1986) (UCC § 2-209).

462. Mitchell v. Barnes, 354 N.W.2d 680 (N.D. 1984).

463. See *supra* note 225.

court has dealt with the problem of enforceability in the absence of a required writing resist analysis. There are difficulties in the way of understanding these cases as examples of promissory estoppel, or as equitable estoppel, or as an overthrow of the writing requirement, or as traditional part-performance. Accordingly, instead of summarizing the cases under one or more of those headings, the following summary will point to the difficulties of classifying the cases under any one of them.

Promissory Estoppel.

Notwithstanding the circumstance that the court uses the promissory estoppel label in its analysis of several of these cases, there is at least one major difficulty, and two minor difficulties, currently in the way of an unqualified acceptance of promissory estoppel as the holding of any of the cases. The major problem is that the court, in fact, invariably discusses the North Dakota version of *equitable* estoppel, mislabelling it as *promissory* estoppel. This creates a certain ambivalence, and requires a determination whether it is the name or the substance that governs. It is certainly true that the court has said it will consider promissory estoppel as a bar to the assertion by a promisor of the defense of the statute of frauds; and yet it is also true that the court has never, in fact, considered promissory estoppel — instead, it has always considered equitable estoppel. The minor problems are that, if it be granted that the court is ready to apply promissory estoppel, it has not told us what version of promissory estoppel it is applying (that is, whether it is using the egregious and unconscionable sort typified by *Monarco v. Lo Greco*; or whether it is using the qualified version typified by section 139 of the Restatement; or whether it is using the wide open version which would tend to obliterate the statute of frauds altogether, at least where the promisor does not renounce the promise immediately, and prior to the promisee's reliance). These minor problems prevent us from saying, even if we were granted that the court actually is applying promissory estoppel, just what that means.

Equitable Estoppel.

Notwithstanding that the court is applying some form of equitable estoppel in the face of the statute of frauds, there are two difficulties, one having to do with the facts of the cases, the other having to do with the law announced in them. Factually, the court has not pointed to the representations on which the equitable estoppel turns. Legally, the court has not explained why the recipient of the representation is, in light of the gloss it has consistently

applied to equitable estoppel, entitled to rely upon the representation. If it should be said that the cases support the proposition that (a) there is a representation always implied by a promisor who makes a promise within the statute of frauds that the promise is enforceable even without a writing, and (b) there is a presumption that the recipient may always rely upon such a representation, even if not lacking the knowledge or the means of obtaining it, then there is a further difficulty. The court has at least said that its concern is to strike a balance, by which it neither will permit the statute of frauds to perpetrate fraud, nor will it simply nullify the statute. If we were to grant that the court has determined to raise an implied representation in all cases, and to permit reliance in all cases, we would be forced to conclude that the court did not mean to say that it seeks to establish a balance; instead, we would be forced to conclude that the court is prepared to nullify the statute of frauds.

Traditional Part Performance.

If the court is simply seeking to apply traditional doctrines of part performance, it would seem that it has gone further than the traditional doctrine would permit.

Other Factors: Clear and Convincing Proof of the Promise.

If the court is, in fact, basing its results on observations that the statute of frauds will not be followed when the result will be unconscionable, or where there has been unjust enrichment, it can, in future cases, channel its approach into one of the more traditional ones.⁴⁶⁴ If, on the other hand, the court is basing its results on whether the evidence is sufficiently clear to establish that there was, in fact, a promise, the court is leaving behind promissory estoppel, equitable estoppel and part performance. It may well be doing so, but the difficulty in saying so is that the court has, apparently denied that this is the case. Instead, the court has tended to speak in terms of the more familiar doctrines, even though it may, in fact, be conditioning their application upon its finding that there is or is not a clear and definite promise.

464. If it were to limit the invocation of promissory estoppel to cases in which the loss to the relying party were egregious, the court would be moving towards the *Monarco v. Lo Greco* position. See *supra* note 399 for this interpretation of *Monarco*.

If it were to avoid promissory estoppel altogether, and shape recoveries on the noncontractual, and so nonstatute of frauds limited basis, of unjust enrichment, it would be on very traditional grounds. It may need to limit or overrule several cases in order to do so, however.

IV. SUMMARY AND CONCLUSION

A. SUMMARY

It is generally presumed that North Dakota is favorably inclined towards the Restatement's view of reliance based recovery under section 90 and its related provisions,⁴⁶⁵ but there are three problems with that general supposition. In the first place, the cases do not support it.⁴⁶⁶ In the second place, the Field Code probably prohibits it.⁴⁶⁷ In the third place, the Field Code probably renders it superfluous.⁴⁶⁸ This article has been limited to a discussion of the first difficulty only, reserving the others for separate treatment elsewhere.

In assessing the status of promissory estoppel in North Dakota, I have focused on the foundations of promissory estoppel, as established in the Restatements of Contracts. There is a single reliance interest,⁴⁶⁹ but there are three kinds of reliance⁴⁷⁰ and five responses that may be given to each.⁴⁷¹ Of those five responses, only one is promissory estoppel and it has, in the nearly 60 years since the publication of the original Restatement of Contracts matured into several distinct kinds of promissory estoppel.⁴⁷²

The kinds of cases that gave rise to section 90 of the Restatement of Contracts do not seem to have arisen with any great frequency in North Dakota. Perhaps for that reason, the court has never had to be particularly concerned with the formulation of a reliance rule. As a result, it has included traces of at least the following reliance rules in its decided cases: (1) the rule of section 90 of the original Restatement, (2) the rule of section 90 of the Restatement (Second), (3) the "standard" North Dakota formulation of section 90, based on the original Restatement, but materially different from it, and (4) one or more "nonstandard" North Dakota formulations of some sort of nativist promissory or equita-

465. See *supra* note 10 and accompanying text.

466. Except, perhaps, for the statute of limitations cases (see *supra* notes 397; 405-464 and accompanying text). There is, at most, one case of a reliance based recovery in the absence of consideration (see *supra* notes 133-261 and accompanying text), and no cases of a reliance based recovery in the absence of mutual assent (see *supra* notes 306-318; 328-376 and accompanying text). Chart 1 tabulates these cases.

467. See *supra* note 13 and accompanying text.

468. See *supra* notes 16 and 20 and accompanying text.

469. See *supra* notes 7 and 42 and accompanying text.

470. See *supra* notes 42-51 and accompanying text (the three major kinds of reliance: reliance in the absence of consideration; reliance in the absence of mutual assent; and reliance in the absence of a required writing).

471. See *supra* notes 52-58 and accompanying text (the five responses to reliance: either/or; recharacterization; reanalysis; promissory estoppel; and overthrow).

472. See *supra* notes 59-71 and accompanying text.

ble estoppel.⁴⁷³

The reason for the development of the rule(s), if any, is likewise less than clear. The "rule" of promissory estoppel in North Dakota developed, so it is said, to prevent "inequities." But, since the case in which promissory estoppel came into being was one in which the relying promisee did not recover, there must either have been no inequity or only a minor inequity.⁴⁷⁴

B. CONCLUSION

I have surveyed all of the significant promissory estoppel cases decided by the North Dakota Supreme Court. My conclusions must be divided by subject matter, by results, and by formulation.

By Subject Matter. As I have suggested, promissory estoppel is not a unitary subject matter, but contains at least three different categories and several subcategories. Accordingly, there is no single answer to the question whether North Dakota has embraced "promissory estoppel," but rather, a series of answers divided by subject matter. In summary, it is fair to say that North Dakota has (1) entertained a doctrine of promissory estoppel with apparent approval, but not in a way to make any significant difference to the results of any case, when promissory estoppel is asserted as a basis for recovery in the absence of consideration, (2) repeatedly rejected promissory estoppel as a basis for recovery in the absence of mutual assent, and (3) repeatedly applied the label, though not the elements, of promissory estoppel in the course of fashioning recoveries when "promissory estoppel" is asserted as a basis for recovery in the absence of a required writing.

Chart 1 tabulates the cases which support this conclusion. The Chart is divided by the three categories of reliance cases, and further subdivided by the subcategories of each. The following discussion is tied to Chart 1.⁴⁷⁵

In all of the first category, reliance in the absence of consideration, and including the various subcategories in which these cases present themselves, there have been only six cases in which some recognizable version of promissory estoppel (either pre or post

473. See *supra* notes 754-64 and accompanying text. These results are summarized in the charts appended to this article.

474. See *supra* notes 306-318 and accompanying text (discussing *Union Nat'l Bank v. Schimke*, the first known North Dakota case to be recognizably derived from section 90 of the Restatement).

475. The Chart, in turn, is qualified in its entirety by the text and notes in the body of this article that it summarizes. In particular, the article (but not the chart) takes account of hard to classify cases, and yet the chart is useful for its purpose of condensing the cases into manageable form.

restatement) has been asserted by a relying promisee as a basis for recovery. Of these six cases, there were only two instances in which relying promisee recovered. Because four of the six relying promisees did not recover, and because the two who did recover did so either without a direct endorsement of a promissory estoppel rule by the North Dakota Supreme Court,⁴⁷⁶ or would have recovered anyway because of the presence of consideration,⁴⁷⁷ it is hard to say that North Dakota has embraced the doctrine of promissory estoppel as a ground for recovery. Yet, because the court so readily assumes the existence of such a ground for recovery in its most recent decisions, it would be reckless to say that there is no promissory estoppel rule in North Dakota. Accordingly, I conclude simply that the court is favorably disposed towards the use of some formulation of promissory estoppel as a basis for enforcing promises in the absence of consideration.

In the second category, reliance in the absence of mutual assent, only one of the various subcategories has presented itself. In this subcategory, involving reliance in the absence of assent — failed negotiations or promise insufficiently definite — there have been only four cases in which some version⁴⁷⁸ of promissory estoppel has been asserted by a relying promisee as a basis for recovery. Because every one of the relying promisees failed to recover, and because the North Dakota Supreme Court has expressly disapproved the preeminent case⁴⁷⁹ upon which much of the Restatement's version of reliance in this context is based,⁴⁸⁰ it is hard to resist the conclusion that the court has rejected the application of promissory estoppel to create recoveries for relying promisees in the absence of mutual assent, at least where the context involves failed negotiations or insufficient definiteness. Yet, because the four cases reviewed by the North Dakota Supreme Court all

476. The relying promisee recovered in *Mitchell*, but on the strength of an unusual version of promissory estoppel given by the trial judge as a jury instruction which was not before the Supreme Court on its review. See *supra* notes 222-228 and accompanying text.

477. The relying promisee recovered in *Anton*, but on the strength of an alternative rationale that there was, in fact, consideration to support the promise. Indeed, it is only by an aggressive interpretation of the case that I am able to label it as a promissory estoppel case at all. See *supra* notes 210-221 and accompanying text.

478. See *supra* notes 306-18; 328-376 for a discussion of the versions used. See also Appendix, Charts 2 and 3.

479. That case, *Hoffman v. Red Owl Stores, Inc.*, was rejected by the North Dakota Supreme Court in *Lohse*. Its rejection is all the more significant because the North Dakota court had in *Cooke*, an earlier case, both cited *Red Owl* with apparent approval and then refused to apply its rationale, leaving *Red Owl's* status in doubt.

480. It is the subcategory of reliance in the absence of mutual assent — failed negotiations, for which *Red Owl* is preeminent. Since that is only one of three subcategories of reliance in the absence of mutual assent, but is the most notorious of them, it is the most significant from the standpoint of the development of the law.

involve the single subcategory of reliance in the absence of mutual assent where the defect was the absence of any real promise on which few if any promisees could ever reasonably rely (these are cases either of failed negotiations, which break down prior to the point of offer or acceptance, or of terms too indefinite for intelligible enforcement), it remains to be seen what the court might do, were it ever to be presented with one of the less dramatic subcategories involving reliance in the absence of mutual assent. All that can be said at this point is that the court has never fashioned a promissory estoppel recovery in favor of a relying promisee in the absence of mutual assent, and that it has emphatically rejected the attempt to do so by every promisee who has tried to recover on this basis.

In the third category, reliance in the absence of a required writing, the North Dakota cases split. I have tabulated five cases, including three recoveries by the relying promisee in the absence of a writing. If there is any category in which the North Dakota Supreme Court is actually applying promissory estoppel so as to fashion a recovery for relying promisees, it would appear to be here, in this category. But, as has already been seen, and as I will summarize in the next section, the reality of what the court has done in the face of the statute of frauds does not match what it says it has done. Accordingly, while there are some recoveries by relying promisees who have not supplied required writings, there is substantial doubt whether the reason actually has very much to do with any version of promissory estoppel as described either by the North Dakota Supreme Court or as described by the Restatement of Contracts.

Ultimately, the only conclusion that may be reached is that there is substantial uncertainty as to the status of promissory estoppel in North Dakota. If asked, without appropriate qualifications, whether there is promissory estoppel in North Dakota, it could be answered in several ways, no one of which could be considered completely wrong: (1) Yes or No, if the respondent is thinking of the cases of reliance in the absence of consideration ("yes", if the respondent concentrates upon the attitude of the court, but 'no' if the respondent concentrates upon the holdings of the court), (2) No or Can't Say, if the respondent is thinking of the cases of reliance in the absence of mutual assent ("no", if the respondent concentrates upon the holdings of the court, but 'can't say' if the respondent notices the attitude of the court and also observes that, from the court's rejection of the most dramatic of the three subcat-

egories of reliance in the absence of assent, it does not necessarily follow that the court will reject both of the other subcategories), and (3) Yes or No or Can't Say, if the respondent is thinking of the cases of reliance in the absence of a required writing ("yes" if the respondent happens upon the line of cases in which there is a recovery, "no" if the respondent happens upon the line of cases in which there is no recovery, and "can't say" if the respondent happens upon both lines or notices that neither line actually has much to say about promissory estoppel as it is ordinarily understood).

At this point, my own hope is that everyone who contemplates, argues or decides the issues will do so in a way that desynonymizes the term "promissory estoppel." It must be understood that there are at least three different presumptive rules, one which requires consideration, another that requires mutual assent, and yet another that sometimes requires a writing. For as long as there are different reasons, different policies, and different degrees of flexibility related to each of the three different presumptive rules, it will never be helpful simply to talk about promissory estoppel without qualification. The necessary qualification must always include a specification of some one or more of the three contexts: promissory estoppel in the absence of consideration, promissory estoppel in the absence of mutual assent, or promissory estoppel in the absence of a required writing. If the discourse relating to promissory estoppel will come to include discussion of the context, and if, further, there is appropriate sensitivity to the additional distinctions relevant within the subcategories of each of the three contexts, then it will be possible to be guided by the prior cases, to find a reason for them, to be able to predict what the next decision might be, and to be able to discuss the wisdom, legality or prudence of expanding or contracting the promissory estoppel doctrine to any given set of facts. In short, we will be able to practice the law of contracts as law, rather than as an exercise in fortune telling or as entailing a search for judicial motivations by inspiration or revelation.

By Results. As I have suggested, the actual results in North Dakota need to be addressed with reference to other factors, including subject matter (as summarized in the section above) and formulation (which will be summarized in the following section). Depending upon how those other factors are weighted, it is easy to make apparently contradictory statements about promissory estoppel results in North Dakota. Here are some of the permutations: (1) taking reliance in the absence of consideration as the core

subject matter of promissory estoppel, it can be said that, since promissory estoppel has had no effect, or, at best, only a slight impact on the actual decisions of such cases before the North Dakota Supreme Court, and disregarding the rest as dicta, there is no promissory estoppel in North Dakota, or (2) taking the same core, and recognizing that almost all of the excitement in this area over the last 50 years has had to do with the question whether the subject matter of promissory estoppel can be expanded from reliance in the absence of consideration to include reliance in the absence of mutual assent, it still can be said that there is no promissory estoppel in North Dakota; indeed, since the absence of mutual assent cases in North Dakota have led to the rejection of the doctrine in that context, it could even be said that North Dakota is an antipromissory estoppel jurisdiction, or (3) switching orientation completely, and conceiving the subject matter of promissory estoppel to be neither reliance in the absence of consideration nor reliance in the absence of mutual assent, but instead, taking the subject matter to be reliance in the absence of a writing, it could be said that there is something in the nature of a promissory estoppel tradition in North Dakota, but (4) even under this last shift in orientation by subject matter, if results are factored against the formulation of the rule, it might be said that, even though there are recoveries in the face of failure to supply a required writing, since the actual rule applied was not a recognizable promissory estoppel rule, there is, in fact, no promissory estoppel in North Dakota at all.

If all of the foregoing result based analysis, which tends towards the conclusion that there is little or no promissory estoppel in North Dakota, is factored against the ease and facility with which the court formulates promissory estoppel rules, it could be that the result based conclusion must be divided: if by 'result' is meant a holding in favor of a relying promisee accompanied by a recognizable promissory estoppel formulation, then there is no promissory estoppel in North Dakota; but if by 'result' is meant the court's observable tendency, over and over again, to invoke the doctrine of promissory estoppel as if it were a rule of law in the state of North Dakota, then there is a very strong promissory doctrine in North Dakota.

At this level, my own hope is that those who discuss or analyze the issues will do so in a way that makes it clear which results they are noticing. It must be understood that there is much in the cases that resembles dicta, alternative holding, or even mislabeling of

doctrines, that there are points granted *arguendo*, and doctrines applied for purposes of argument without their having been adopted by the court, and that there are relying promisees that, in fact, are losing rather than winning on the 'grounds' of promissory estoppel. Against these results, it can only be an improvement to refine the analysis of the results of North Dakota cases to look beyond whether a 'rule' might have been stated in any one or more of them to the further question whether the supposed rule was essential to the holding of the case. Further, even where the rule was necessary, it will be well to remember that the negative application of a rule teaches very little about the positive reach of the rule.⁴⁸¹ If this is kept firmly in mind, we can make progress in dealing with the past of promissory estoppel as a prelude to its future in this state.

By Formulation. As I have suggested, promissory estoppel must be considered by its subject matter, by results, and also by formulation. When I speak of formulation, I mean the actual words used, since, unfortunately, 'promissory estoppel' does not have that sort of secondary meaning which immediately suggests the same significance to everyone who considers the expression. A moment's reflection will indicate the truth of the preceding statement. To some, 'promissory estoppel' connotes that A promised, *therefore* A is estopped. To others, 'promissory estoppel' connotes that (1) A promised, A had reason to expect that someone else would rely upon the promise, the other did rely in the way expected by A, and injustice can only be avoided by enforcing the promise, *therefore* A is estopped, if but only if (2) A's promise was otherwise unenforceable for lack of consideration, and (3) A is in a jurisdiction which has adopted a promissory estoppel rule. There are other variations as well. But as to the problem of formulation, the question is simply "which form of words is used to express the promissory estoppel doctrine?"

This is, finally, an easy question to answer in North Dakota. My conclusion is that North Dakota applies one of three sets of formulations: (1) that of the Restatement (Second) of contracts, (2) that which it derived from an apparent typographical or other

481. That is, if there is a case (call it case 1) in which it is "held" that promissory estoppel may be part of the law of North Dakota, and that it would be defined in a particular way, but that there is no promise, and hence no need to apply it in the circumstances of case 1, then it should be noticed that case 1 is a rather weak sort of authority for application to the next case (call it case 2). When case 2 is argued on the basis of case 1, as if case 1 "adopted" some law of promissory estoppel, there is a danger of being hyp notized by our own alternative arguments.

error initially committed by the Supreme Court of the State of Washington, and which represents a failed attempt to paraphrase the Restatement (First) of Contracts, or (3) those unconventional glosses or amplifications that seem to have nothing to do with any other version of promissory estoppel and might, instead, represent a version that the court means to create on its own.

Charts 2 and 3 tabulate the information concerning formulations of promissory estoppel by the North Dakota Supreme Court. Chart 2 collects the cases that bear a version of the rule that has a recognizable relation to the version which appears in the Restatement of Contracts (including both First and Second Restatements). Chart 3 collects the cases that include a version not so recognizable.

The standard formulations begin, most recently, with that set forth in *Lohse*. In that case, it will be remembered, Lohse did not recover. But, if he had, it would be presumably because he fit within the scope of a rule that the court there enunciated. The *Lohse* court cited a prior North Dakota case, *Russell*, as authority for its version of a promissory estoppel rule. In that case, it will be remembered, Russell did not recover. But, if he had, it would have been because he fit within the scope of a rule that the court there enunciated. The *Russell* court cited its prior case, *O'Connell*, as authority for its version of a promissory estoppel rule. In that case, it will be remembered, O'Connell did not recover. But, if he had, it would have been because he fit within the scope of a rule that the court there enunciated. The *O'Connell* court cited its prior case, *Schimke*, as authority for its version of a promissory estoppel rule. In that case, it will be remembered, Schimke's promisee did not recover, but if it had, it would have been because it fit within the scope of a rule that the court there enunciated. The rule in *Schimke* comes from a Washington case, *Northern State*, which comes from *Central Heat*, another Washington case, which comes from *Corbit*, another Washington case. The rule in *Corbit*, finally, is derived, erroneously, from the Restatement (First) of Contracts.⁴⁸² So, from a mistake, by way of dicta or negative holding multiplied by successive

482. See *supra* notes 182 and 317 and accompanying text. It will be remembered that the only significance I give to the word "mistaken" is the factual one. It might be argued that the Washington (and North Dakota) versions may be "better" law than the original Restatement (though this is an argument neither court ever made, apparently because neither court intended to alter the Restatement), but it cannot be argued that either of these versions *is* the version of the original Restatement. It is a mistake to say that significantly different things are the same. In this sense, the Washington court mistakenly paraphrased the original Restatement.

dicta or negative holdings, it can be said that there is a standard formulation of a promissory estoppel rule in North Dakota. The string cite, could be as follows: North Dakota has adopted the promissory estoppel rule of the original Restatement of Contracts. *Lohse; Russell; O'Connell; Schimke*. Of course, the court has not adopted the promissory estoppel rule of the original Restatement of Contracts. Instead, it has adopted the Supreme Court of Washington's misstatement of the Restatement rule. Further, it may be fairly argued that the court hasn't even done so much as that. Since the North Dakota Court has never actually applied its announced rule in any case in which a promisee has recovered anything, perhaps it isn't even accurate to say that it has adopted a rule.

If the court has not adopted the rule of the Restatement (First), neither has it adopted the rule of the Restatement (Second). In *Cooke*, a case in which it cites the Restatement (Second) with approval, the court nevertheless quotes the mistaken Washington version of section 90 of the original Restatement instead of quoting section 90 of the Restatement (Second).

Finally, though the North Dakota Court may or may not have adopted section 90, either in the version contained in the original Restatement as misstated by the Supreme Court of Washington, or in the version contained in the Restatement (Second), it may or may not have intended to add further glosses of its own. Chart 3 tabulates other amplifications or glosses that the North Dakota Court has added from time to time, including these: the promise must be "actually relied upon in good faith" and there must be "clear and convincing" evidence of the promise (*Kenmare*, citing no authority for the proposition); the promise must be "relied upon" and there must be clear allegations (*Anton*, citing no authority); there must be "justifiable reliance" and "irreparable detriment" to the promisee (*Schimke*, citing digests); that there may be occasion to apply the doctrine when one party "changes his position or otherwise suffers an unjust or unconscionable injury or loss" or where the other party has accepted benefits (*Dangerfield*, citing digests and the original Restatement of Contracts); that the doctrine developed to "prevent inequities" when an agreement is unenforceable because of "inadequate consideration" or for failure to satisfy the statute of frauds (*O'Connell*, citing no authority); that there must be a "statement" followed by reliance (the trial court's jury instruction in *Mitchell*, which was not challenged on appeal); and that the promise relied upon must be

“clear, definite and unambiguous” (*Lohse*, citing cases applying Texas, Iowa, California and Montana law; *Thiele*, citing *Lohse*).

What, then, is the formulation of promissory estoppel in North Dakota? It is easier to say what it is not than to say what it is. It is not the formulation of the Restatement (Second), nor is it the formulation of the original Restatement. After the negatives, it may be said that it is a formulation that seems to be close to that of the original Restatement. There is no apparent reason why the court has adopted the formulation it has, and it may be that the court intended in the first instance to adopt the formulation of section 90 of the original Restatement. Whether, having not quite captured the formula of the original Restatement, the court will be disposed to adhere to its own version, to adhere to section 90 of the Restatement (First), or to move on to the formulation of section 90 which appears in the Restatement (Second) is a question for prediction, rather than summary. My own conclusion is that the development of the law in this area ought to proceed slowly rather than instantly. Accordingly, I would recommend that the court reconsider the original Restatement before adding the changes made to it by the Restatement (Second). In any event, the court's attempts to solve the problem of formulating a rule can only be aided by the efforts of counsel to make cogent arguments for one form or another of the rule, based upon recognized versions and the reasons that support each.

APPENDIX

Chart 1: Reliance Cases in North Dakota
(classified by category and result)

<i>Type of Reliance (Category)</i>		<i>Restatement Sections</i>	<i>North Dakota Cases (Result)</i>
A. No Con- sideration	1. Generalized Section 90 Promises	§90	<i>Recovery: none</i> <i>No Recovery: (2 cases) O'Connell ; Russell</i>
	2. Family, Charity, Bailees, Land, Marriage	§90	[No Cases]
	3. Modification, Waiver, Discharge	§§89(c), 84(2), 273(c)	<i>Recovery: (at most, 2 cases) Mitchell (statute); Anton (alternate holding)</i> <i>No Recovery: (2 cases) Thiele; Kenmare Coal</i>
B. No Assent	1. No Assent (no acceptance, offeror wanted performance)	§§ 87(2), 90, <i>cf.</i> § 45	[No Cases]
	2. No Assent (no acceptance, offeror wanted a promise)	§§ 87(2), 90	<i>Recovery: none</i> <i>No Recovery: Schimke</i>
	3. No Assent (failed negotiations or promise insufficiently definite)	§90	<i>Recovery: none</i> <i>No Recovery: (3 cases) Lohse; Firefighters; Cooke</i>
C. No Writing	1. No Satisfaction of the Statute of Frauds (restricted to the promise of a writing)	§90	[No Cases]
	2. No Satisfaction of the Statute of Frauds (not restricted)	§139	<i>Recovery: (2 cases) Gulden (part performance); Jamestown (equitable estoppel)</i> <i>No Recovery: (2 cases) Farmers Coop; Buetner</i>
	3. Non-Statute of Frauds writings	n/a	<i>Recovery: Mitchell (written modification enforceable without consideration; no writing, modification enforced anyhow)</i>

Chart 2: Standard Elements in North Dakota Cases
(elements bearing a recognizable similarity to the standard of the Restatement)

<i>Case Name</i>	<i>Type</i>	<i>Result</i>	<i>Formulation</i>	<i>Authority cited</i>
Lohse (N.D. 1986) (standard elements; see Chart 3 for the non-standard elements also mentioned in this case)	No assent (failed negotiations)	No recovery (factor 1)	(1) a promise which the promisor should reasonably expect will cause the promisee to change his position; (2) a substantial change of the promisee's position through action or forbearance; (3) justifiable reliance on the promise; and (4) injustice which can only be avoided by enforcing the promise.	Russell (N.D. 1986)
Russell (N.D. 1986)	No consideration (generalized §90)	No recovery (factors 2 & 3)	same as above	O'Connell (N.D. 1982)
Cooke (N.D. 1982)	No assent (failed negotiations)	No recovery (a) No Recovery (factor 1) (b) No Recovery (no promise)	Two formulations given: (a) same as above, and (b) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.	O'Connell (N.D. 1982); Restatement (Second) of Contracts, §90; Hoffman v. Red Owl Stores

<p>O'Connell (N.D. 1982)</p> <p>(standard elements; see Chart 3 for the non-standard ele- ments also men- tioned in this case)</p>	<p>No consideration (generalized §90)</p>	<p>No recovery (factor 1)</p>	<p>same as (a) above: (1) a promise which the promisor should reasonably expect will cause the promi- see to change his position; (2) a substantial change of the promisee's position through action or forebear- ance; (3) justifiable reliance on the promise; and (4) in- justice which can only be avoided by enforcing the promise.</p>	<p>Schimke (N.D. 1973)</p>
<p>Schimke (N.D. 1973)</p> <p>(standard elements; see Chart 3 for the non-standard ele- ments also men- tioned in this case)</p>	<p>No assent/no communication of acceptance</p>	<p>No recovery (factors 2 & 3)</p>	<p>(1) a promise, (2) which the promisor should reasonably expect will cause the promi- see to change his position, (3) which does cause a sub- stantial change of position, action or forbearance by the promisee, (4) acting in justi- fiable reliance on the pro- mise, and (5) injustice which can only be avoided by enfor- cing the promise</p>	<p>Northern State (Wash. 1969)</p>
<p>Northern State (Wash. 1969)</p>			<p>same as above</p>	<p>Central Heat (Wash. 1968)</p>
<p>Central Heat (Wash. 1968)</p>			<p>same as above</p>	<p>Corbit (Wash. 1967)</p>

<p>Corbit (Wash. 1967)</p>			<p>Two formulations given:</p> <p>(a) same as above, and</p> <p>(b) 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 and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.</p>	<p>attempted para-phrase of the Restatement [First] of Contracts, §90</p> <p>Restatement [First] of Contracts, §90</p>
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Chart 3: Non-Standard Elements In North Dakota Cases
(including glosses and other apparatus not derived from the Restatement)

<i>Case Name</i>	<i>Type</i>	<i>Result</i>	<i>Non-Standard Formulation</i>	<i>Authority cited</i>
Kenmare Coal (1910)	No consideration (modification)	No recovery	(1) a promise actually relied upon in good faith; (2) the promisee was influenced by the promise; (3) the promisee offers clear and convincing evidence of the promise.	None
Anton (1924)	No consideration (modification) Alternate rationale in a case where consideration was found to be present	Recovery	(1) a promise relied upon by the promisee; (2) both the representation and the reliance were clearly alleged	None
Schimke (1973) (non-standard elements; see Chart 2 for the standard elements also mentioned in this case)	No assent/no communication of acceptance	No recovery	The promise which is sought to be enforced must have induced action of a definite and substantial character by the promisee. Also, justifiable reliance and irreparable detriment to the promisee are necessary factors to enable him to invoke the doctrine of promissory estoppel It is essential that the party invoking the doctrine of estoppel should have been misled by the acts or conduct of the party against whom the estoppel is claimed, that he changed his position in reliance thereon, and was justified in so doing, and that he was prejudiced thereby, or that a benefit resulted to the party against whom the estoppel is claimed.	17 Am.Jur.2d, Contracts §89, p. 432 Abbey v. State, 202 N.W.2d 844 (N.D. 1972) (equitable estoppel)

Dangerfield (1974)	No writing	Remanded	The doctrine may be applied where one party, [1] in reliance on the other's representation or conduct, [2] changes his position or otherwise suffers an unjust or unconscionable injury or loss, or [3] where one party has accepted performance or benefits to the detriment of the other.	37 C.J.S. Statute of Frauds §246; [First] Restatement of Contracts §90; 28 Am. Jur. 2d, Estoppel and Waiver, § 25
O'Connell (1982) (non-standard elements; see Chart 2 for the standard elements also mentioned in this case)	No consideration (generalized §90)	No recovery	The doctrine developed to prevent inequities that may result when an agreement is void or unenforceable because of inadequate consideration or the statute of frauds and one of the parties has acted to his detriment because of a promise made by the other person	None
Mitchell (1984)	No consideration (modification)	Recovery	(1) a statement, (2) reliance on the statement, (3) a change in position because of the reliance	Trial court's jury instructions (not challenged on appeal)
Lohse (1986) (non-standard elements; see Chart 2 for the standard elements also mentioned in this case)	No assent (failed negotiations)	No recovery	The promise must be clear, definite and unambiguous	Cases applying Texas, Iowa, California and Montana law and which reject the doctrine of Hoffman v. Red Owl Stores
Thiele (1986)	No consideration (modification)	No recovery	The promise must be clear, definite and unambiguous	Lohse (N.D. 1986)

Table of North Dakota Cases

The following table lists the more important North Dakota cases, including the short name by which the case is referenced in this article, the full citation, and a reference to it (usually the initial reference, sometimes the main reference) in the body of this article.

<i>Short Name</i>	<i>Citation</i>	<i>Reference</i>
Anton	Farmer's State Bank of Gladstone v. Anton, 199 N.W.2d 582 (1924)	note 210
Buettner	Buettner v. Nostdahl, 204 N.W.2d 187 (1973)	note 454
Cooke	Cooke v. Blood Systems, Inc., 320 N.W.2d 124 (1982)	note 357
Dangerfield	Dangerfield v. Markel, 222 N.W.2d 373 (1974)	note 451
Farmers Coop	Farmers Cooperative Association of Churchs Ferry v. Cole, 239 N.W.2d 808 (1976)	note 441
Firefighters	Firefighters Local 642 v. City of Fargo, 321 N.W.2d 473 (1982)	note 347
Funfar	Dakota Bank & Trust Co. v. Funfar, 443 N.W.2d 289 (1989)	note 70
Gulden	Gulden v. Sloan, 311 N.W.2d 568 (1981)	note 408
Jamestown	Jamestown Terminal Elevator, Inc. v. Hieb, 246 N.W.2d 736 (1976)	note 433
Kenmare Coal	Kenmare Hard Coal & Brick v. Riley, 126 N.W. 241 (1910)	note 128
Lohse	Lohse v. Atlantic Richfield Co., 389 N.W.2d 352 (1986)	note 331
Mitchell	Mitchell v. Barnes, 354 N.W.2d 680 (1984)	note 222
Murphy	Murphy v. Hanna, 164 N.W. 32 (1917)	note 116
O'Connell	O'Connell v. Entertainment Enterprises, Inc., 317 N.W.2d 385 (1982)	note 135
Russell	Russell v. Bank of Kirkwood Plaza, 386 N.W.2d 892 (1986)	note 161; 252

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Schimke	Union National Bank in Minot v. Schimke, 210 N.W.2d 176 (1973)	note 306
Thiele	Thiele v. Security State Bank of New Salem, 396 N.W.2d 295 (1986)	note 229

