Michigan Law Review

Volume 50 | Issue 5

1952

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MICHIGAN LAW REVIEW

Vol. 50 MARCH, 1952 No. 5

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THE doctrine of promissory estoppel is an outstanding modern example of the way in which the Anglo-American legal system develops significant rules and principles out of the day-to-day decisions of our courts.

Progress in the law comes about through the formulation and acceptance of generalizations. However, merely stating the results of a number of different instances does not result in clarification and simplification. That comes only when the precedents are studied with a view to discovering the "binding thread of principle that runs through them all."[1] Such a principle, if discovered in the course of the appraisal of a series of cases, will make for a more ready understanding of the cases which have already been decided. Even more important, however, is the future use which can be made of the principle thus discovered. It may thereafter be employed in variant and diverse fact situations to produce workable, logical and rational solutions to problems which had previously been solved only by resort to fiction or by the use of historical anomalies and conceptual distortions. As Cohen has so aptly remarked, "A legal system that works with general principles has powerful instruments . . . [A] generalized jurisprudence enlarges the law's control over the diversity of legal situations. It is like fishing with large nets instead of with single lines."[2]

One such generalization or principle is the doctrine of promissory estoppel. It is thus expressed in the *Restatement of Contracts:* "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

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1 AMERICAN LAW INSTITUTE, CONTRACTS RESTATEMENT, Tentative Draft 1-3, COMMENTARIES, Restatement No. 2, 19-20 (1926). These commentaries were prepared by Professor Samuel Williston who served as Reporter for the Restatement of Contracts for the Institute.

2 Cohen, "The Place of Logic in the Law," 29 HARV. L. REV. 622 at 625 (1916).

binding if injustice can be avoided only by enforcement of the promise."[3] The express formulation of this doctrine is recent,[4] it having received open recognition only in the past thirty years. But some of the cases relied upon to explain and justify the doctrine were decided as long ago as the reign of Queen Anne.[5] If the doctrine is new, not in its application or in its origins, but only in its express formulation,[6] one may inquire as to whether cases of such antiquity may be legitimately employed to explain and justify the doctrine.

In our legal system, where reliance is placed upon precedents derived from litigated cases, one must devise some means by which to interpret the general rule induced from a particular decision. The ambit fixed for a specific precedent depends upon several factors: the decision of the court, the facts, the reasoning employed, and how the rule (obtained by induction from the case) fits into a system containing other rules which, for the time being, have presupposed validity. The formulation of the particular generalization for which the decision is authority is called "determining the *ratio decidendi* of the case."[7] Now any one decision may be subsumed under innumerable principles of varying particularity.[8] How broad a generalization will a judicial opinion support? Citation of precedent in support of a generalization, then, requires that one formulate a policy to determine the limitations imposed by the doctrine of *ratio decidendi*.

There are many cases, for example, where courts have enforced a gratuitous promise which was followed by justifiable reliance on the part of the promisee.[9] How much weight should be given to the factor of "reliance" in formulating a generalization from these particular

[3] AMERICAN LAW INSTITUTE, RESTATEMENT OF CONTRACTS §90 (1932) (hereinafter cited as CONTRACTS RESTATEMENT).

[4] As I have indicated elsewhere [Boyer, "Promissory Estoppel: Requirements and Limitations of the Doctrine," 98 UNIV. PA. L. REV. 459 (1950)], apparently the pioneer use of the term "promissory estoppel" occurs in 1 WILLISTON, CONTRACTS, 1st ed., §139 (1920).

[5] Coggs v. Bernard, 2 Ld. Raym. 909, 92 Eng. Rep. 107 (1703).

[6] Llewellyn, "The Rule of Law in Our Case-Law of Contract," 47 YALE L.J. 1243 at 1252, note 25 (1938): ". . . Is §90 of the Contracts Restatement, or §45, 'new' doctrine? The cases say: Both are rather belated *explicit* doctrine."

[7] Goodhart, "Determining the Ratio Decidendi of a Case," 40 YALE L.J. 161-183 (1930), reprinted in VANDERBILT, STUDYING LAW 493-525 (1945); PATTERSON, LECTURES ON JURISPRUDENCE 87 (1940).

[8] COHEN, LAW AND THE SOCIAL ORDER 214 (1933); Oliphant, "A Return To Stare Decisis," 14 A.B.A.J. 71 at 73 (1928); PATTERSON, LECTURES ON JURISPRUDENCE 87 (1940).

[9] Illustrative are the following: In re Stack's Estate, 164 Minn. 57, 204 N.W. 546 (1925) (adding to buildings); Wolfe v. Wallingford Bank and Trust Co., 124 Conn. 507, 1 A. (2d) 146 (1938) (extensive improvements made to property); Steele v. Steele, 75 Md. 477, 23 A. 959 (1892) (purchase of property in reliance on father's gratuitous promise to contribute to price).

decisions? May such cases be cited as authority for the proposition that reliance is an acceptable substitute for bargain, especially if the court did not make such a factor one of the expressed grounds for its decision? The answer to those questions lies in one's conception of *ratio decidendi.*

PRECEDENTS AND RATIO DECIDENDI

According to Goodhart, the precedent value of a case is to be found by "taking account (a) of the facts treated by the judge as material, and (b) his decision based on them."[10] Hence, Goodhart would not rely on any decision that failed to find such reliance on the promise to be a material fact. In his view, if a proposition involves (as a material fact) any fact that the court did not deem material in deciding the previous case, the previous case should not be cited as authority for the proposition.

Oliphant, on the other hand, contends that the principle for which a case stands is to be discovered from "a consideration of the facts and the decision of the court."[11] He would interpret a precedent as a reaction of the court to the facts of the previous case; he would not limit its authority to what the court *said* was material. Oliphant argues that judicial rulings may be cited as authority for a generalization or "proposition of law which includes existence of facts appearing in the record of the case but which the court did not treat as material."[12] So, according to his view, the cases involving reliance and promissory estoppel mentioned above (where the facts show that there was reliance on a gratuitous promise but the court did not state that reliance was material) could be deemed holdings in support of the general proposition that reliance on a promise is an acceptable reason for its enforcement.

Goodhart's view appeals to the counselor; it affords a more certain basis for prediction as to when the court will accept a proposition as binding—and a precedent as prescriptive of the judicial norm. Oliphant's view, on the other hand, appeals to the advocate; it permits him to cite (particularly where he is urging the adoption of a new legal principle) many more legal precedents than are authoritative under Goodhart's theory of *ratio decidendi.* Oliphant's theory takes

[10] Goodhart, "Determining the Ratio Decidendi of a Case," 40 YALE L.J. 161 at 182 (1930).

[11] Oliphant, "A Return to Stare Decisis," 14 A.B.A.J. 71 (1928); see also PATTERSON, LECTURES ON JURISPRUDENCE 87 (1940).

[12] Oliphant, "A Return to Stare Decisis," 14 A.B.A.J. 71 (1928).

a long view. Thus, it appeals to a writer who attempts to synthesize, simplify and justify a large group of cases. And American courts and legal writers incline to Oliphant's theory.[13] His attitude towards *ratio decidendi* is the one adopted here. So, if in certain cases herein cited the factor of reliance on a promise is present, that element will be treated as material to the decision of the controversy even though the court did not expressly say that the reliance was material.

If this use of cases as precedents is not acceptable, it is still true that such cases demonstrate the worth of the element of reliance in considering the application of the doctrine of promissory estoppel. And they are proof of the adaptability of that doctrine to the realities of litigation and human conduct.

Cases decided prior to the formulation and recognition of the doctrine of promissory estoppel which reach results contrary to it are not necessarily authorities against the doctrine. If, for example, the principles of the doctrine were neither brought to the attention of the court in the arguments and briefs of counsel, nor considered by the court in its written opinion, it would seem erroneous to conclude that a decision which happened to be contrary to the doctrine was authority against it. Who can say what would have been the decision of the court had the particular case been supported by arguments based upon the doctrine? Therefore, in this study, decisions contrary to the doctrine but not taking it into account, though adverted to and examined, are not considered as necessarily opposed to promissory estoppel as a basis for contractual liability.

FRAMEWORK FOR A PRINCIPLE

The American Law Institute adopts a narrow definition of consideration, one based upon the theory of bargain and exchange.[14] At the same time it openly acknowledges that a number of promises do create legal rights and duties even though not bargained for and given in return for an act, a forbearance, a change in legal relation, or a return promise.[15] Thus under the view of the *Restatement,* a promise

[13] PATTERSON, LECTURES ON JURISPRUDENCE 88 (1940).

[14] CONTRACTS RESTATEMENT §75: "(1) Consideration for a promise is (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification or destruction of a legal relation, or (d) a return promise, *bargained for and given in exchange for the promise. . . .*" Emphasis supplied.

[15] CONTRACTS RESTATEMENT, Topic 4, p. 100. Informal Contracts Without Assent or Consideration, §§85-90. Section 86 (promise to pay debt barred by statute of limitations), section 87 (promise to pay debt discharged in bankruptcy), section 88 (promise to perform a duty in spite of non-performance of a condition), section 89 (promise to perform a voidable duty), and section 90 (promise reasonably inducing definite and substantial action) are

accompanied by a bargained-for exchange will create rights and duties; so may certain other promises, though not made in return for an equivalent.

If there has been no attempt to exchange an act, a forbearance, a change in legal relations, or a return promise for the promise for which enforcement is sought, there is no bargain. The promise has not been purchased; it is gratuitous. When asked whether a mere gratuitous promise creates legal rights and duties our law has generally answered in the negative.[16] Though the promisor does not bargain for anything in exchange for his promise, should he nevertheless be bound? One may approach a solution to the question from either of two angles. For example, one may ask how much more than a mere gratuitous promise is necessary to impose liability. Or one may seek to discover how much less than the exchange of a bargained-for equivalent will still find the court enforcing the promise. Between the extremes of the naked promise and the requested equivalent there may be a place for the enforcement of promises which are accompanied by more than the former and by less than the latter. That there is a place for such promises is convincingly demonstrated by the fact that our courts do enforce some promises that are not cast in the mold of bargains.[17] Among the promises so enforced are some which may be classified as examples of the doctrine of promissory estoppel.

The modern statement of the doctrine of promissory estoppel is contained in section 90 of the *Restatement of Contracts*.[18] As there formulated, the doctrine requires the presence of three constitutive elements before enforcement will be given to a promise which has

all accepted by the Institute as instances in which enforcement of the promise is granted, despite the absence of a bargain.

[16] CONTRACTS RESTATEMENT §75, comment *a*: "No duty is generally imposed on one who makes an informal promise unless the promise is supported by sufficient consideration." Corbin in ANSON, CONTRACTS (hereinafter cited as ANSON) §121 (5th Amer. ed. Corbin, 1930): "In each case we must ask, Was anything given in exchange for the promise as its agreed equivalent? If not, the promise is gratuitous, and is not binding unless it is within the exceptions discussed hereafter"; WILLISTON, CONTRACTS (hereinafter cited as WILLISTON), §112 (rev. ed. 1936): ". . . A would not be liable on his promise because it was gratuitous"; CORBIN, CONTRACTS §114 (1950): "An informal promise without consideration, in any of the senses of that term, creates no legal duty and is not enforceable. . . . In every case, however, an informal promise is never enforceable if it stands utterly alone."

[17] See note 15. The *Restatement* adopted the bargain and exchange theory of contracts (§75) and then codified certain out-type promises as exceptions thereto in order to preserve the symmetry of the system. One may properly consider it significant of growth in the law that the doctrine of promissory estoppel (§90) was included in the codification.

[18] For Williston's pioneer discussion see 1 WILLISTON, CONTRACTS, 1st ed., §139 (1920); his latest discussion is found in WILLISTON, §§139-140 (1936). For another recent discussion, see, CORBIN, CONTRACTS (1950) (hereinafter cited as CORBIN) §§194-209.

induced unbargained-for reliance. These include: (1) the making of a promise which the promisor should reasonably expect to induce action of a definite and substantial character on the part of the promisee, (2) action or forbearance of a definite and substantial character induced by the promise, and (3) a determination that injustice can be avoided only by the enforcement of the promise.[19] These elements constitute the framework of the doctrine. It is evident, that this doctrine does not advocate the extreme view that all promises should be enforced, yet it does give flexibility to our concept of contracts by avoiding the narrowness which results from enforcing only bargain transactions.

How can one explain promissory estoppel and its enforcement of unbargained-for promises? Obviously, only by a study of the precedents for the doctrine and by an evaluation of the contribution which each type of precedent makes to the doctrine as a whole. Such an examination may well demonstrate the manner in which we can synthesize a principle or rule of law out of variant cases. By the universalizing of the rules accepted in particular fact situations and their application to analogous, but differing, cases our law has developed and evolved. Promissory estoppel is the most striking recent illustration of such a development.

The precedents which have been employed in constructing the doctrine may be found in at least *five* different fact situations: (1) charitable subscriptions, (2) parol promises to give land, (3) gratuitous bailment, (4) gratuitous agency, and (5) a miscellany including such diversities as bonus and pension plans, waiver, and rent reductions. It is proposed in the remainder of this article to examine and discuss, in turn, each of these categories to determine the circumstances under which gratuitous promises are often enforced. The cases will disclose the origins of the doctrine of promissory estoppel; they will also illustrate the way in which that doctrine was evolved from precedent.

A. *Charitable Subscriptions*

The charitable subscription has long occupied an anomalous position in American contract law. On its face, a promise to make a gift to charity does not purport to be a contract. Gift and contract are antitheticals; the former appears to arise out of generosity, the latter out of bargain and *quid pro quo*. Despite the obvious fact that

[19] See Boyer, "Promissory Estoppel: Requirements and Limitations of the Doctrine," 98 UNIV. PA. L. REV. 459-498 (1950), for an analysis of these elements: (1) The Promise, pp. 461-470; (2) Action-in-Reliance, pp. 470-482; (3) Avoidance of Injustice, pp. 482-494.

one who says he intends to make a gift is not making a bargain,[20] the courts have often treated such a promise as falling within the latter category. In view of the tendency of our legal system to enforce only those promises which have been purchased in exchange for a price, such a treatment of gift promises is understandable.

The charitable subscription has been litigated many times during the past one hundred years.[21] The problem has been discussed at length by the authors of legal treatises[22] and has appealed to writers for the legal periodicals.[23] The cases dealing with charitable subscriptions bulked so large that section 90 of the *Contracts Restatement* was offered as a solution to the technical difficulties confronting a court which is asked to enforce promissory gifts to charity.[24]

As Mr. Williston has pointed out, promises to charities are

[20] BROWN, PERSONAL PROPERTY §4 (1936); WILLISTON, §20; GRISMORE, CONTRACTS (1947) (hereinafter cited as GRISMORE) §59; CORBIN, §4.

[21] One of the earliest cases is Phillip's Limerick Academy v. Davis, 11 Tyng. 113 (Mass. 1814); one of the latest is American University v. Collings, (Md. App. 1948) 59 A (2d) 333. Cases are collected in 33 A.L.R. 615 (1924), 38 A.L.R. 858 (1925), 44 A.L.R. 1333 (1926), 90 A.L.R. 1036 (1934), 95 A.L.R. 1305 (1935), 115 A.L.R. 589 (1938), 151 A.L.R. 1238 (1944). It must be remembered that the English view denies enforcement to charitable subscriptions. Re Hudson, [1885] 54 L.J. Ch. (n.s.) 811. So does the Canadian: Governors of Dalhousie College v. Boutilier, [1934] 3 D.L.R. 593 (S.Ct. of Canada). For complete annotation on the Canadian cases, see Kanigsberg, "Subscription Contracts," [1931] 4 D.L.R. 702. For an interesting variant, see Re Ross, Hutchison v. Royal Institution for Advancement of Learning, [1931] 4 D.L.R. 689 (S.Ct. of Canada) applying the law of Quebec and enforcing such a promise because there was a "lawful cause."

[22] WILLISTON, §§116, 139; GRISMORE, §63; ANSON, §§126, 126a (these sections are Corbin's own work); CORBIN, §198; 1 PAGE, CONTRACTS, 2d ed., §559 (1919); PARSONS, CONTRACTS, 9th ed., *454, *491 (1904); 1 ELLIOTT, CONTRACTS, §228 (1913); POLLOCK, CONTRACTS, 9th ed., 178 (1921); CHITTY, CONTRACTS, 17th ed., 34 (1921); ELLIOTT AND CHAMBERS, THE COLLEGES AND THE COURTS, Part V, Financial Support—Validity of Subscriptions (1936 and 1940 eds.).

[23] A partial list follows. Articles: Billig, "The Problem of Consideration in Charitable Subscriptions," 12 CORN. L.Q. 467 (1927); Page, "Consideration: Genuine and Synthetic," 1947 WIS. L. REV. 483; Sharp, "Promissory Liability," 7 UNIV. CHI. L. REV. 1 and 250 (1939, 1940); Shattuck, "Gratuitous Promises—A New Writ?" 35 MICH. L. REV. 908 (1937). Comments: 39 W. VA. L. Q. 159 (1933); 8 CORN. L. Q. 57 (1922); 13 ST. JOHN'S L. REV. 127 (1938). Indeed, so fruitful has been the field that a number of articles and comments have been published which consider the problem only with regard to a single state. Among these are Taylor, "Charitable Subscription Contracts and the Kentucky Law," 29 KY. L. J. 23 (1940); Rothberg, "Doctrine of Promissory Estoppel in New Jersey," 2 INTRA-MURAL L. REV. 176 (1947); 1 ARK. L. REV. 69 (1946); 4 UNIV. CHI. L. REV. 431 (1937); 5 N.Y. UNIV. L. REV. 153 (1928).

[24] In AMERICAN LAW INSTITUTE, CONTRACTS RESTATEMENT, Tentative Draft 1-3, COMMENTARIES, Restatement No. 2, 14-20 (1926), Mr. Williston, speaking of what was then §88 and now is §90, said, "In a number of cases at the present day, it is still law that reliance on a promise, though there has been no price or consideration paid for it, renders the promisor liable. . . . Charitable subscriptions are generally enforced in the United States at least after action in reliance upon them has been taken. . . . [T]he Section is a useful coordination of the classes of cases enumerated above." In 1906 Mr. Williston had referred to "the anomaly of the charitable subscription." WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 3d ed., 186 (1906).

generally enforced after the promisee has taken action in reliance thereon. But merely stating the result that is reached in charitable subscription cases does not justify that result. Justification requires examination of the facts, as well as the decisions, of the cases which enforce promises to make gifts to charities. In addition it requires that the result be explained in terms of the existing legal system or as an exception thereto.

Grounds given as justification for enforcing charitable subscriptions have been at least *four* in number: (1) the subscription is an offer to enter into a contract which, when accepted, ripens into one; (2) where more than one person subscribes to the charity, the promises of each serve as consideration for the promises of the others; (3) acceptance of the subscription implies a promise on the part of the charity to employ the anticipated funds for the purpose for which they are subscribed, thus providing exchanged promises as consideration; and (4) detrimental action in justifiable reliance upon the promised subscription creates a promissory estoppel which needs no consideration.[25] Of these in their order.

As has been pointed out by Grismore,[26] subscription agreements are either given (1) for business purposes, or (2) for charity. If for business purposes, there is no doubt of a bargain; the usual problem is to find just what was "the precise thing requested as the return or exchange for the promise." With the subscription for charity, however, the problem is much more difficult. The many justifications employed when courts enforce charitable subscriptions indicate the difficulty. Were the difficulty of justification less, the explanations would be fewer in number.

A court may find that a subscription to a charity did contain an offer to enter into a contract with it,[27] that it was part and parcel of a business transaction. The real difficulty is in finding such a fact situation, not in knowing what to do when it is discovered.

If it is decided that the promisor sought an exchange, it is then necessary to determine whether he asked for an act or a promise, i.e., whether the offer looked to a unilateral or a bilateral contract. Several cases have regarded the charitable subscription as an offer which sought a return promise from the charity. If there is such a return promise, there has been an exchange; the promisor has received

[25] WILLISTON, §116; GRISMORE, §63; CORBIN, §198.

[26] GRISMORE, §63.

[27] In Rogers v. Galloway Female College, 64 Ark. 627, 44 S.W. 454 (1898), there was an offer to pay $2,500 in return for locating a college in subscriber's town. The court properly treated the case as a bargain transaction.

legally sufficient consideration, and no technical reason prevents enforcement.[28] In a number of other instances, the promise to make the gift has been regarded as an offer for a unilateral contract. When the charity does the act which the court finds is requested in exchange for the subscription, there is said to be an acceptance which creates a binding obligation on the promisor.[29] Provided the subscriber was seeking such an exchange for his promise, there is no objection to such a result.

But there are flaws in this solution—flaws which have been pointed out before.[30] The charity is not engaged in a commercial transaction and the subscriber does nothing but promise to make a gift. He is trying to bestow a benefaction, not secure a price for his promise. To talk of the consideration for his gift-promise is to employ a paradox.[31] The courts, when faced with such an enigma, often try to solve it by searching for some condition performed by the promisee which can be interpreted as the price requested and given in exchange for the promise to make the gift. Once found, it is easy to say that by its performance the promisee has suffered detriment. Under such treatment "legal" consideration is easily supplied. Such a view ignores the fact that the performance of any particular act may be either a condition or a consideration.[32]

As a variant of this approach, it is to be noted that even when the promise is construed as an offer looking towards a unilateral contract, it is not always necessary that the entire act be completed before liability is incurred. Some courts impose liability if the promisee

[28] Fourth Presbyterian Church v. Continental Illinois Bank, 284 Ill. App. 132, 1 N.E. (2d) 425 (1936) (both parties "had an intention to enter into a binding contract"); Tioga County Hospital v. Tidd, 164 Misc. 273, 298 N.Y.S. 460 (1937) (Here defendant subscribed on condition that the X-ray room be designated in honor of his father. This was based on consideration and there was at least an implied promise to build the hospital).

[29] Stone v. Prescott Special School District, 119 Ark. 553, 178 S.W. 399 (1915). (Here the subscription offer was accepted and the building erected. The act of acceptance bound the subscriber); First Trust and Savings Bank of Pasadena v. Coe College, 8 Cal. App. (2d) 195, 47 P. (2d) 481 (1935) (consideration supplied by setting up the fund); Grand Lodge I.O.G.T. v. Farnham, 70 Cal. 158, 11 P. 592 (1886) ("A promise to pay a subscription to . . . some charitable object is a mere offer, which may be revoked at any time before it is accepted"); McClure v. Wilson, 43 Ill. 356 (1867); McDonald v. Gray, 11 Iowa 508, 79 Am. Dec. 509 (1861); New Jersey Orthopaedic Hospital v. Wright, 95 N.J.L. 462, 113 A. 144 (1921); Barnes v. Perine, 12 N.Y. 18 (1854); Philomath College v. Hartless, 6 Ore. 158, 25 Am. Rep. 510 (1876).

[30] Billig, "The Problem of Consideration in Charitable Subscriptions," 12 CORN. L.Q. 467 (1927).

[31] Notes, 8 CORN. L.Q. 57 at 58 (1922); 24 COL. L. REV. 896 at 899 (1924); 28 COL. L. REV. 642 (1928).

[32] WILLISTON, §112; GRISMORE, §59; CORBIN, §151.

has merely *begun* performance of the act.[33] Such rulings afford a new field for the employment of section 45 of the *Contracts Restatement* in protecting the offeree in offers for unilateral contracts requiring time in performance. The quarrel is not with the employment of section 45, though. It really is with the forced construction which turns a condition attached to a gratuitous promise into the price paid for that promise.

A number of persons desiring the accomplishment of common objects enjoy the privilege of exchanging mutual promises to effectuate that end. In such an agreement, the exchanged promises furnish consideration.[34] American courts have sometimes applied this principle to charitable subscriptions, holding that the promise of each subscriber furnishes consideration for the promises of all the others.[35] But rarely does one of the other subscribers sue to enforce the promise; rather, such suits are instituted by the charity. When it is permitted to recover, the theory of the case must be such as to imply that the charity was a third party donee beneficiary in the "contract" between the subscribers. Actually, of course, there is, in most of the reported cases, no exchange of promises between the subscribers; each really makes a promise to the charity, not to his fellow signers of the pledge. With this as the fact situation, the subscription becomes a promise to give to the charity *because others are giving*, not an exchange of promises *between* subscribers. Motive, socially desirable motive, there is; but not consideration in the bargain sense.[36] Justifying recovery on the so-called "mutual promises" theory is, at best, but a rationalization. Such an explanation accords with neither the facts as commonly found in such cases nor the law.

Other courts enforce charitable subscriptions on the theory of an *implied* promise to devote the proceeds, when paid, to carrying out the purposes for which the charity was organized.[37] Of course, there is

[33] Tioga County Hospital v. Tidd, 164 Misc. 273, 298 N.Y.S. 460 (1937) (defendant cancelled his subscription two days after it was given. Plaintiff in the meantime had *named* the X-ray room in honor of defendant's father); Brokaw v. McElroy, 162 Iowa 288, 143 N.W. 1087 (1913) (college secured other subscriptions and an extension of its charter).

[34] WILLISTON, §§117, 118; GRISMORE, §63.

[35] Christian College v. Hendley, 49 Cal. 347 (1874); Higert v. Trustees, 53 Ind. 326 (1876); Petty v. Trustees of Church of Christ, 95 Ind. 278 (1883); First Presbyterian Church of Mt. Vernon v. Dennis, 178 Iowa 1352, 161 N.W. 183 (1917); Cotner College v. Hyland, 133 Kan. 322, 299 P. 607 (1931); Comstock v. Howd, 15 Mich. 236 (1867); Congregational Society v. Perry, 6 N.H. 164 (1833); George v. Harris, 4 N.H. 533 (1829).

[36] Professor Williston makes the additional point that "the earlier subscriptions would be open to the objection of being past consideration so far as a later subscription was concerned." WILLISTON, §116, p. 407. See Corbin, "Non-Binding Promises as Consideration," 26 COL. L. REV. 550 (1926).

[37] Barnett v. Franklin College, 10 Ind. App. 103, 37 N.E. 427 (1893); American Legion v. Thompson, 121 Kan. 124, 245 P. 744 (1926); Collier v. Baptist Education Soci-

no implied promise in such a situation. There is no material from which to construct one. Here is no wealth of recitals, nor is there any writing "instinct with an obligation"[38] which is usually required to raise such a promise. It is as difficult to find a request for such an implied promise as it is to find the promise itself. And unless the promise is requested, it can not serve as the bargained-for exchange which creates obligation. Even if there were such an implied promise, it would not be legally sufficient as consideration. All that the charity is promising to do is to use its funds as it is already bound to do.[39] And promising to do what one is already under a legal duty to perform, particularly where it is a public duty, is not acceptable as a consideration that will support a bargain.[40] Professor Williston summarily disposes of this theory by saying that "a promise to give a trustee money in trust for another is no more binding than a promise to give the money directly to the beneficiary."[41] It would appear that an incorporated charity has no legal authority to use its resources except in accordance with its charter powers, so one may readily accept this conclusion.

Occasionally cases do arise where the promise is to use the "gift" in a particular, but not required, way in furtherance of the charity's objects. In such a situation, it is proper for the parties to bargain for such use. Naturally, if they have done so, the subscriber's promise has been bought and paid for and is enforced.[42] The only question (if a bargain is requisite to contractual obligation) is whether the parties were bargaining. If they were not, it is erroneous to search for a spurious consideration in an implied promise constructed by a court in the exercise of a vivid imagination.

At least three lines of reasoning (those discussed above) have been employed in an attempt to justify, on a bargain basis, the enforcement of charitable subscriptions. All have been ineffectual, for

ety, 8 B. Mon. 68 (47 Ky. 1847); Trustees of Kentucky Female Orphan School v. Fleming, 10 Bush 234 (73 Ky. 1874); Trustees of Parsonage Fund v. Ripley, 6 Me. 442 (1830); Trustees of Central Institute v. Haskell, 73 Me. 140 (1882); Central Maine General Hospital v. Carter, 125 Me. 191, 132 A. 417 (1926); Ladies Collegiate Institute v. French, 16 Gray 196 (82 Mass. 1860); Albert Lea College v. Brown, 88 Minn. 524, 93 N.W. 672 (1903); Nebraska Wesleyan University v. Griswold's Estate, 113 Neb. 256, 202 N.W. 609 (1925); Baptist Female University of North Carolina v. Borden, 132 N.C. 476, 44 S.E. 47, 1007 (1903).

[38] Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917).

[39] Billig, "The Problem of Consideration in Charitable Subscriptions," 12 CORN. L.Q. 467 (1927); WILLISTON, §116.

[40] CONTRACTS RESTATEMENT, §§76(a), 78; WILLISTON, §130; GRISMORE, §65; ANSON, §137; CORBIN, §180.

[41] WILLISTON, §116, p. 408.

[42] Barnett v. Franklin College, 10 Ind. App. 103, 37 N.E. 427 (1893) (to use only the income for current operating expenses); American Legion v. Thompson, 121 Kan. 124, 245 P. 744 (1926) (to build a particular building).

while they may explain some particular cases, they do not apply to the characteristic charitable subscription where there is no bargain. Dissatisfaction with such rationalizations has led some courts to adopt an alternate approach in deciding the cases. This approach is realistic! It admits that a charitable subscription is not a bargain, that the subscriber (when he made the promise) was not actuated by a desire to obtain an equivalent in exchange. It recognizes the futility of seeking consideration where there is no bargain.

These courts recognize that the promise is to make a *gift* to charity. If the promisee substantially changes his position in reliance upon this promise and the change was foreseeable by the promisor, then the decision is that the promisor is "estopped" to plead a lack of consideration for his promise.[43] Promissory estoppel finds in such decisions an outstanding precedent.

Of prime importance in these cases is the emphasis which the courts place on the detrimental action taken in reliance on the promise. Illustrative instances of action and reliance which have sufficed to bind the promisor include: making purchases connected with the erection of a church,[44] contracting to erect a building,[45] beginning the erection of a building,[46] completing the erection of a building,[47] and buying land, erecting a building thereon and thereafter operating a

[43] Simpson Centenary College v. Tuttle, 71 Iowa 596, 33 N.W. 74 (1887) (Such a note can be defended against unless the donee has made expenditures or entered upon engagements based on such promises, so that he will suffer loss or injury if the note is not paid. "This is based upon the equitable principle that . . . the donor should be estopped from pleading lack of consideration"); Gittings v. Mayhew, 6 Md. 113 (1854); Wesleyan Seminary v. Fisher, 4 Mich. 514 (1857) ("Under such circumstances, no impeachment of the consideration, short of illegality or fraud, could be permitted . . ."); In re Stack's Estate, 164 Minn. 57, 204 N.W. 546 at 547 (1925) ("A third theory is that . . . the promisor comes within the application of the doctrine of promissory estoppel"); School District of Kansas City v. Sheidley, 138 Mo. 672, 40 S.W. 656 (1897) (executors estopped to plead want of consideration); In re Chavez's Estate, 35 N.M. 130, 290 P. 1020 (1930) (there is consideration or an estoppel, whichever is preferred); I. & I. Holding Corp. v. Gainsburg, 251 App. Div. 550, 296 N.Y.S. 752 (1937), affd. 276 N.Y. 427, 12 N.E. (2d) 532 (1938) ("The acts of the hospital . . . in reliance upon pledge made by defendants . . . furnished the consideration . . . and created the promissory estoppel"); Cohen v. Congregation Casseur Israel, 30 Pa. Co. Ct. 623 (1904) ("It is binding . . . upon the principle that the promisor is estopped from denying his liability"); Furman University v. Waller, 124 S.C. 68, 117 S.E. 356 (1922). See annotation, Consideration For Subscription Agreements, 38 A.L.R. 868 (1925), supplemented in 44 A.L.R. 1340 (1926), 57 A.L.R. 986 (1928), 95 A.L.R. 1305 (1935), 115 A.L.R. 589 (1938), and 151 A.L.R. 1238 (1944).

[44] Calvary Presbyterian Church v. Brydon, 4 Cal. App. (2d) 676, 41 P. (2d) 377 (1935).

[45] Trustees of University of Pennsylvania v. Coxe's Exrs., 277 Pa. 512, 121 A. 314 (1923); Hopkins v. Upshur, 20 Tex. 89 (1851).

[46] University of Southern California v. Bryson, 103 Cal. App. 39, 283 P. 949 (1929).

[47] Y.M.C.A. v. Estill, 140 Ga. 291, 78 S.E. 1075 (1913); White v. Scott, 26 Kan. 476 (1881); Presbyterian Society v. Beach, 74 N.Y. 72 (1878).

college for several years.[48] Even Goodhart would agree with Oliphant[49] that such rulings are authority for the proposition that detrimental change of position in foreseeable reliance upon a gratuitous promise results in its enforcement, for those courts say that the reliance is a "material" fact upon which the rulings are based.

The reliance which will impose liability for the charitable subscription is not confined to action directly related to the construction of buildings. Even borrowing money to pay a pre-existing indebtedness has been held sufficient,[50] as has paying money to charities.[51] Consulting an architect and trying to raise funds with which to build a church,[52] as well as holding an election[53] are additional examples. All of them illustrate the generalization to be drawn from the cases: Where a promisee has made expenditures or incurred a legal obligation in reliance on the subscription,[54] as the promisor should have expected, that is sufficient reason to impose liability. When such liability is imposed, the courts are demonstrating that reliance plays a role in determining contract liability as well as does bargain.

The difficulties inherent in the charitable subscription cases are illustrated in the varied explanations offered by those courts which seek to enforce them on the basis of bargain concepts. These difficulties stem from the courts' views as to the basis of contract liability. If one belongs to that school which recognizes only bargain and exchange as a basis for contractual liability, one is likely to be confronted with enigma and paradox when asked to enforce a promise to make a gift. "Unbargained-for" reliance does not slide easily into a frame which has been carpentered to fit the exchange concept. This is evidenced by the theories advanced to justify enforcement. Finding either (1) offers for unilateral or bilateral contracts, or (2) an exchange of promises between subscribers, or (3) a promise by the charity to use donations only for authorized purposes, when what one really

[48] Koch v. Lay, Garnishee of Webster College, 36 Mo. 147 (1866).

[49] See articles cited at notes 10 and 11 supra.

[50] Trustees of Methodist Episcopal Church v. Garvey, 53 Ill. 401, 5 Am. Rep. 51 (1870); United Presbyterian Church v. Baird, 60 Iowa 237, 14 N.W. 303 (1882).

[51] Scott v. Triggs, 76 Ind. App. 69, 131 N.E. 415 (1921).

[52] First M.E. Church v. Howard's Est., 133 Misc. 723, 233 N.Y.S. 451 (1929).

[53] Thompson v. Board of Supervisors of Mercer County, 40 Ill. 379 at 385 (1866) "Who can say [his offer] did not influence [the voters] . . .?" Query: Where the voters "promisees"?

[54] Pryor v. Cain, 25 Ill. 263 (1861); Hudson v. Green Hill Seminary, 113 Ill. 618 (1885); Gittings v. Mayhew, 6 Md. 113 (1854); Trustees of Amherst Academy v. Cowls, 6 Pick. (23 Mass.) 427 (1828); Cottage Street Methodist Episcopal Church v. Kendall, 121 Mass. 528 (1877); Trustees of Christian University v. Hoffmann, 95 Mo. App. 488, 69 S.W. 474 (1902); Rouff v. Washington & Lee University, (Tex. Civ. App. 1932) 48 S.W. (2d) 483.

seeks is a justification for enforcing a gift-promise, all demonstrate "an uneasy judicial conscience."[55] Promissory estoppel relieves this uneasy conscience and provides a satisfactory solution to the problem. It does so because it provides a realistic three-part test of promise, action-in-reliance, and the avoidance of injustice by which to measure the need for imposing liability for a gratuitous promise.[56] In the charitable subscription cases scarcely any question is ever raised as to whether the defendant actually made a promise of a future gift to the charity. Indeed, there is practically always available a subscription blank stating the sum which defendant will give. Again, there is ordinarily no question but that there is reliance on the promise,[57] for the charity has done exactly the things it said it would do when it accepted the subscriber's pledge—it has erected buildings, or awarded contracts, or borrowed money, or continued operations and incurred liabilities. So far as the factor of the avoidance of injustice is concerned, it, too, is usually present in these cases. Ordinarily the injustice which will result to the promisee if there is nonenforcement is apparent; buildings must be paid for, obligations must be met. If the promisor does not provide the means, the promisee will have to do so. And, as between the one who induced the reliance and the one who relied, it is only fair that the promisor be held liable.

One must recognize that there is pressure on the courts to uphold such subscriptions. The charity operates for a laudable purpose and with public approval. To give charitable subscriptions special standing is not objectionable. But, need that be done? Rather, does not promissory estoppel indicate a way in which a discriminating choice can be made between those charitable subscriptions which may justifiably be enforced and those which need not be so regarded?

Promissory estoppel probably received its first open recognition in connection with the enforcement of the charitable subscription. Certainly, many apt illustrations are to be found in this compartment of precedents. The hardship which will be caused the promisee by nonenforcement is quite generally ascertainable in these cases. And, usually, there is no difficulty in discovering the justifiable action which the promisee took in reliance upon the gift-promise. Nor is the

[55] Note, 27 MICH. L. REV. 88 at 89 (1928).

[56] A detailed analysis of the test is described in Boyer, "Promissory Estoppel: Requirements and Limitations of the Doctrine," 98 UNIV. PA. L. REV. 459 (1950).

[57] If there has been no detrimental action-in-reliance on the promise, that factor is missing from the formula and the gift-promise is not enforced. See, for example, Trustees of Foxcroft Academy v. Favor, 4 Me. 382 (1826) (enforcement of gratuitous gift-promise refused because the trustees had not spent money in reliance on the subscription); Wesleyan University v. Hubbard, 124 W.Va. 434, 20 S.E. (2d) 677 (1942); Floyd v. Christian Church Widows and Orphans Home, 296 Ky. 196, 176 S.W. (2d) 125 (1942).

nature of the promise itself ignored. With all of these elements present, it is easy to see why the charitable subscription cases afforded a ready medium for the express formulation and enunciation of the promissory estoppel doctrine. Enforcement of the promised gift to charity shows the problems which courts must decide if reliance on a promise, rather than purchase for a price, is accepted as a measure of contractual liability.

B. *Parol Promises to Give Land*

A parent says to his child, " I now give you Blackacre. It is yours." The child takes possession and makes improvements.[58] The parent never delivers a deed. Who now owns Blackacre?

To answer this question requires a consideration of the Statute of Frauds,[59] and a preliminary discussion of oral *contracts* to convey land as distinguished from oral *promises to make gifts* of real estate. An expressed desire to prevent "many fraudulent practices which are commonly endeavored to be upheld by perjury and subornation of perjury" is contained in the prefatory recitals of that statute. To effectuate this desire, the statute details many situations in which written evidence is required if claimed rights are to be awarded legal recognition.

A number of sections of the Statute of Frauds are of concern to one who seeks to answer our hypothetical question: "Who now owns Blackacre?" Among them are the following:

> *"Section 1.*—All leases, estates, interests of freehold or terms of years, or any uncertain interest of, in, or out of any . . . lands,

[58] Evenson v. Aamodt, 153 Minn. 14, 189 N.W. 584 (1922); Clancy v. Flusky, 187 Ill. 605, 58 N.E. 594 (1900); Royer v. Borough of Ephrata, 171 Pa. 429, 33 A. 361 (1895); Dozier v. Matson, 94 Mo. 328, 7 S.W. 268 (1888); Hardesty v. Richardson, 44 Md. 617, 22 Am. Rep. 57 (1876); Freeman v. Freeman, 43 N.Y. 34 (1870); Kurtz v. Hibner, 55 Ill. 514 (1870); Greiner v. Greiner, 131 Kan. 760, 293 P. 759 (1930); and Seavey v. Drake, 62 N.H. 393 (1882), are among the illustrative cases. See also CHAFEE AND SIMPSON, CASES ON EQUITY, 1st ed., 1156-1159 (1934).

[59] 29 Car. II, c. 3 (1677). The modern English statute is the Law of Property Act 1925, 15 Geo. 5, c. 20, §40. Section 178 of the *Restatement* contains the substance of §4 of the statute. Typical American statutes include Georgia Code of 1933, §20-401; Iowa Code of 1935, §11285; New York Real Property Law, §259; West Virginia Code of 1937, §3523; Mo. Rev. Stat., 1939, §3354. Generally speaking, the American statutes are of two types: those that declare the contract void when the written memorandum is missing, and those that provide that no action shall be brought in its absence. GLENN AND REDDEN, CASES AND MATERIALS ON EQUITY 541 (1946); CHAFEE AND SIMPSON, CASES ON EQUITY, 2d ed., 547 (1946). Pomeroy says, "In many of the states . . . the legislatures . . . have declared the contracts specified by the statute *to be void* unless written. Except in one or two states, however, this change in the phraseology has produced no important change in the judicial interpretation of the provision." POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS, 3d ed., §70, N. (1) (1926).

tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same . . . shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage, to the contrary notwithstanding.

"*Section* 3.—And, moreover, that no leases, estates or interests, either of freehold or terms of years, or any uncertain interests . . . of, in, to, or out of any . . . lands, tenements, or hereditaments, shall be assigned, granted, or surrendered, unless it be by deed or note in writing signed by the party so assigning, granting or surrendering the same . . . or by act and operation of law.

"*Section 4.*—No action shall be brought . . . 4, or upon any contract or sale of lands . . . or any interest in or concerning them, . . . 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. . . ."

These sections of the statute, read together, seem to provide a comprehensive regulation of the manner in which the interests and estates enumerated can be created.[60] And the first section, in particular, indicates clearly that the statute is to apply in equity as well as at law.

But let us return to our hypothetical case. If it is to be solved by a literal application of the Statute of Frauds, our problem is answered —the parent, not the child, has title to Blackacre. There was no writing; there are only words accompanied by possession and the making of improvements. It might be urged that section 4 of the Statute of Frauds does not apply to a parol gift of land. That section says that "no action shall be brought upon any *contract* or *sale* of lands" unless there is a writing. If the action is not upon a *contract* (and, obviously, it is not, for the transaction is here assumed to be a *gift*), then the prohibition of the section would not bar the proceedings. However, this argument will not apply when the first and third sections of the Statute of Frauds are invoked. These sections purport to prescribe the way in which interests in land shall be created, whether by bargain, gift, or otherwise, that is, by deed or writing. Since, in our hypothetical case, there is no deed or writing creating an estate in the child, it would seem that, at best, his interest in Blackacre is no more than an estate at will. Such is not the case. Many courts will hold that the child who

[60] BROWNE, STATUTE OF FRAUDS §437 (5th ed., Bailey, 1895).

has coupled possession of the realty with the making of substantial improvements upon land given to him orally acquires title.[61]

Such rulings result from the application by analogy of the equitable doctrine of part performance. Under this doctrine the Chancellor came to treat instances of performance in reliance on an oral *contract* as an exception to the statute, considering that he should ameliorate many of the inequitable hardships which would follow from its strict application.[62] Equity has always possessed the power of preventing fraud and relieving against it. Hence, the Chancellor did not hesitate to compel specific performance of a contract within the Statute of Frauds if "refusal to execute it would amount to practicing a fraud."[63] If there has been sufficient part performance under the contract, the court of equity accepts that as the equivalent of the writing required by the Statute of Frauds.[64]

As to what will amount to sufficient part performance of a contract to remove the bar of the statute, however, the courts differ widely.[65] Four states refuse to recognize *any* part performance as a substitute for the writing required by the Statute of Frauds.[66] Save for them, the English, as well as the American cases, recognize the efficacy of some kind of part performance in taking an oral contract for the conveyance of land out of the statute.[67]

Thus far the discussion has been of instances where there actually was either an exchange of oral promises between the parties or the

[61] Seavey v. Drake, 62 N.H. 393 (1882). For cases in accord with Seavey v. Drake, see 1 AMES, A SELECTION OF CASES IN EQUITY JURISDICTION 309, note 11 (1904). In Irwin v. Dyke, 114 Ill. 302 at 306, 1 N.E. 913 (1885), Judge Sheldon said, "We think this brings the case within the rule of repeated decisions of this court, that where a father makes a verbal agreement with a son to convey to him a tract of land if the latter will go and live on the same, make expenditures upon and improve it, and this is done in reliance upon the promise, a court of equity will enforce a specific performance of the agreement." *Contra:* Forward v. Armstead, 12 Ala. 124 (1847); Pinckard v. Pinckard's Heirs, 23 Ala. 649 (1853); Usher's Ext. v. Flood, 83 Ky. 552 (1886); Ridley and Wife v. McNairy, 2 Humph. 174 (Tenn. 1840).

[62] McCLINTOCK, EQUITY §55 (1936); WALSH, EQUITY §79 (1930). An excellent discussion of the theory is given by Pound, "Progress of the Law-Equity," 33 HARV. L. REV. 929 at 933-949 (1920).

[63] BROWNE, STATUTE OF FRAUDS §437 (5th ed., Bailey, 1895).

[64] McCLINTOCK, EQUITY §56 (1936); WILLISTON, §494; CONTRACTS RESTATEMENT, §197.

[65] As to the sufficiency, see CHAFEE AND SIMPSON, CASES ON EQUITY, 1st ed., 1111 (1934) for an elaborate note on possession, payment and improvements as part performance in the United States.

[66] These four states are Kentucky [Grant v. Craigmiles, 1 Bibb 203 (1808)], Mississippi [Beaman v. Buck, 17 Sm. & M. 207 (1848)], North Carolina [Albea v. Griffin, 22 N.C. 9 (1838)], and Tennessee [Patton v. McClure, Mart & Yerg 333 (1828)]. See POMEROY, SPECIFIC PERFORMANCE, 3d ed., §97 (1926), for a complete collection of the cases.

[67] See CHAFEE AND SIMPSON, CASES ON EQUITY, 1st ed., 1111 (1934) for the citation of authorities.

performance of an act by the promisee at the oral request of the promisor and in return for his promise. In such a situation the only problem which confronts the court is the application of the Statute of Frauds. The question for decision is whether anything less than a writing "signed by the party so assigning, granting or surrendering" an interest in realty will suffice in inducing the court to enforce the promise. Those courts which recognize the doctrine of part performance answer the question in the affirmative.[68]

But will an oral promise to *give* land be enforced? Here, in contradistinction to the cases just considered, the promisor has not sought anything in return for his promise. He is not trying to make a contract. Rather, he has indicated his intention to bestow something in the future on the promisee. Any court which declares such a gratuitous promise binding must clear a double hurdle; it must find consideration (or its equivalent), and it must discover the requisite ceremony to satisfy the Statute of Frauds.

Some courts do enforce such gratuitous parol promises. When they do, they clear the barrier raised by the Statute of Frauds by exactly the same means which are used in cases of oral *contracts* to convey. A performance which would be sufficient to satisfy the Statute of Frauds in the case of an oral contract to sell will also meet its requirements when the promise is to make a gift of realty. So, if the promisee, in reliance on the promise, has taken possession of the premises and made substantial improvements, he will usually be protected; and the promise is enforced.[69]

There yet remains the second hurdle—the lack of a bargained-for exchange. It is cleared by any one of at least three methods. Some courts regard such a promise, when accompanied by possession and improvements, as analogous to an executed gift. A second solution is to find that taking possession and making improvements is, in equity, sufficient "consideration" for the promise. A third solution enforces

[68] MCCLINTOCK, EQUITY §55 (1936): "In four of the states (Kentucky, Mississippi, North Carolina, and Tennessee) the doctrine of part performance is rejected in its entirety. In the other states it is adopted, but with great difference in the decisions as to what will amount to part performance." *Accord:* WALSH, EQUITY §79 (1930). HANDLER, CASES AND MATERIALS ON THE LAW OF VENDOR AND PURCHASER 27-30 (1933) has a splendid discussion of the problem.

[69] Reid v. Reid, 115 Okla. 58, 241 P. 797 (1925); Roberts-Horsfield v. Gedicks, 94 N.J. Eq. 82, 118 A. 275 (1922), affd. 96 N.J. Eq. 384, 124 A. 925 (1924); Seavey v. Drake, 62 N.H. 393 at 394 (1882) ("Equity protects a parol gift of land equally with a parol agreement to sell it, if accompanied by possession, and the donee has made valuable improvements upon the property induced by the promise to give it. . . . There is no important distinction in this respect between a promise to give and a promise to sell"); Greiner v. Greiner, 131 Kan. 760, 293 P. 759 (1930).

the promise by applying the doctrine of promissory estoppel. Let us consider these solutions in turn.

1. *The Gift Analogy.* An oft-quoted case[70] states that, "a gift may be defined as a voluntary transfer of his property by one to another, without any consideration or compensation therefor." Naturally, the owner of personal property may give it to some one; so may the owner of real property. As a well known authority on the subject points out, however, ". . . the law concerning transfers of real and personal property has developed along entirely different lines."[71]

In the realm of personal property, for a gift to be effective there "are three general requisites. The first of these is that there must be either a deed by the donor transferring the property in question, or in the more common case of the parol gift, a delivery of the subject matter by the donor to the donee, or some other act or course of conduct on the part of the donor, which is accepted by the courts as equivalent thereto. The second requirement is that the donor must possess an intent to give. And the third is that the donee must accept."[72] Of these three elements (delivery, intent to give, and acceptance), the greatest emphasis has been placed upon the first—delivery.[73]

As Professor Philip Mechem has pointed out in his article on the subject,[74] the requirement of delivery serves a useful threefold purpose: (1) the manual tradition (handing over) of the object makes the donor aware of what he is doing; (2) the handing over "is as unequivocal to actual witnesses of the transaction as to the donor himself," and (3) " . . . the fact of delivery gives the donee, subsequently to the act, at least prima facie evidence in favor of the alleged gift."[75] Delivery of the chattel (or its equivalent), then, has come to be re-

[70] Gray v. Barton, 55 N.Y. 68 at 72, 14 Am. Rep. 181 (1873).

[71] BROWN, PERSONAL PROPERTY §37 (1936).

[72] BROWN, PERSONAL PROPERTY §37 (1936). *Accord:* SCHOULER, PERSONAL PROPERTY, 5th ed., §87 (1918).

[73] Note, 20 COL. L. REV. 196 (1920): "The emphasis placed on delivery in effecting the transfer of a chattel by gift is directly traceable to the notion in early law, of seisin as an element in the ownership of chattels as well as of land. To transfer ownership by gift it was necessary to vest the donee with seisin. But if this were accomplished by any of the various devices known to the law and there was the intention to make the donation, the gift became complete [upon acceptance]."

[74] Mechem, "The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments," 21 ILL. L. REV. 341, 457, 568 (1926, 1927).

[75] Id. at 348-349. Parenthetically, one may observe that the manual tradition of the chattel, standing alone, is not exclusively indicative of gift. It is equally consistent with bailment or pledge. In contrast, the handing over of "the twig or bit of earth" that accompanied feoffment could ordinarily have had only one meaning to an on-looker.

quired if a gift of it is to be effective. Absent delivery of the chattel itself, or of a deed to it, there is no gift.[76]

As indicated above, some courts enforce gratuitous oral promises to make gifts of realty upon a theory which treats the relied-upon promise as analogous to an executed gift.[77] In *Evenson v. Aamodt*,[78] for example, the court said, "To constitute a valid transfer of land by verbal gift, *there must be a gift completely executed by delivery of possession* and performance of some acts sufficient to take the case out of the statute of frauds. The performance necessary for this purpose must be an acceptance, a taking of possession under and in reliance upon the gift and the doing of such acts in reliance thereon that it would work a substantial injustice to hold the gift void."[79] Since there had been a delivery of possession and the substantial expenditure of money in reliance upon the promise, the court held the gift effective.

Likewise in *Roberts-Horsfield v. Gedicks*[80] the court expressly relied upon the executed gift analogy saying, "The transaction was a gift pure and simple, and . . . is enforceable in equity. A parol gift of land is invalid, but when the gift is accompanied by possession, and the donee has been induced by the promise of the gift to make valuable improvements of a permanent nature, equity will enforce it." Here the application of the theory is made dependent expressly upon the analogies found in the cases dealing with gifts of chattels.

Some courts which do not employ the gift analogy directly do so by implication; they require that the gratuitous promise contemplate a present (not a future) gift.[81] It is to be noted that before the promise

[76] Id. at 569.

[77] In re Allshouse's Estate, 304 Pa. 481, 156 A. 69 (1931): "To make a valid gift [of personalty] there must be a clear, satisfactory and unmistakable intention . . . to surrender dominion over the subject of the gift with an intention to invest donee with the right of disposition beyond recall, accompanied by irrevocable delivery, actual or constructive.' . . . Where the gift is of real property the same rules apply: There must be an unmistakable intention to . . . surrender complete dominion over the premises, accompanied by an intention to invest the donee with the right of disposition, followed by an irrevocable delivery. . . . If there is no such delivery of a deed, then the gift is incomplete. . . . An exception to this rule is that of a parol gift of real property, to which the statute of frauds is held to be no bar to enforcement if the donee has taken possession of the land and made improvements on it." WILLISTON, §139; MCCLINTOCK, EQUITY §57 (1936).

[78] 153 Minn. 14, 189 N.W. 584 (1922).

[79] Id. at 17. Emphasis supplied.

[80] 94 N.J. Eq. 82 at 84, 118 A. 275 (1922).

[81] Prior v. Newsom, 144 Ark. 593 at 597, 223 S.W. 21 (1920) ("An instruction given to the jury correctly declared the law to be that there could be no valid parol gift unless there was a present conveyance, that is, a conveyance made with the intention that it take effect at once, and not at a future time. . . . [T]here was, therefore, no perfected gift under which the title could and did pass"); Burris v. Landers, 114 Cal. 310 at 313-314, 46 P. 162 (1896)) ("It is an effort simply to enforce a promise to make a gift. . . . [W]here a parol gift of real estate is made *in praesenti*, and the donee has entered . . . and

is considered binding, the donee must, at the very least, have gone into possession under the parol gift.[82]

But the courts which say they enforce the promises on the same theory that applies to gifts of personal property require more than a mere taking of possession on the strength of the oral promise. The almost universal holding is that there must have been "valuable improvements" made by the donee in addition to possession taken.[83] If the personal property analogy fully applied, possession would be enough. The emphasis which is placed on the analogy of gift seems to remove the problem of consideration from these cases. The holding that the transfer of possession accompanied by substantial improvements is equivalent to an executed gift appears to avoid any requirement that the court discover a bargained-for equivalent as a reason for enforcing the promise. It can consider that title has passed. But saying that there has been a gift does not make it so. Indeed, one may well incline to the belief that these courts believe themselves confronted by hard cases; seeking a just solution they strain to find it in an inept analogy that is not even accurately applied.

The grounds stated for these decisions are objectionable. They overlook the formalities which have always characterized the transfers of interests in land and which the Statute of Frauds emphasized when it required a writing.[84]

Despite the objections which may be made to the reasoning of this line of cases, there is merit to be found in their result. The merit is in the court's desire to avoid injustice to a donee who in reliance upon the promised gift has taken possession of realty and made substantial improvements of a permanent character thereon. On a purely

has made . . . improvements . . ., equity will . . . lend its assistance to the perfection of the donee's title"); Hagerty v. Hagerty, 186 Iowa 1329 at 1333, 172 N.W. 259 (1919) ("There must be proof of intent to make a present gift. . . . A gift, to be effectual, must be fully executed . . ."); Bigelow v. Bigelow, 93 Me. 439 at 451, 45 A. 513 (1900) ("The promise . . . must be regarded merely as a voluntary executory promise to make a gift in the future. Such a promise, so long as it remains unexecuted, can not ordinarily be enforced").

[82] Not a single instance has been found, among the many cases examined, in which a donee who had not taken possession was declared to be the owner of the realty allegedly given him. MCCLINTOCK, EQUITY §57 (1936).

[83] Neale v. Neales, 9 Wall. (76 U.S.) 1 at 9-10, 19 L.Ed. 590 (1869) ("And equity protects a parol gift of land, equally with a parol agreement to sell it, if accompanied by possession, and the donee, induced by the promise to give it, has made valuable improvements on the property"). *Accord:* Akins v. Heiden, 177 Ark. 392, 7 S.W. (2d) 15 (1928); Bevington v. Bevington, 133 Iowa 351, 110 N.W. 840 (1907); Evenson v. Aamodt, 153 Minn. 14, 189 N.W. 584 (1922); Roberts-Horsfield v. Gedicks, 94 N.J. Eq. 82, 118 A. 275 (1922); In re Allshouse's Estate, 304 Pa. 481, 156 A. 69 (1931); Davis et ux. v. Douglas, (Tex. Comm. App. 1929) 15 S.W. (2d) 232; Reid v. Reid, 115 Okla. 58, 241 P. 797 (1925); Young v. Overbaugh, 145 N.Y. 158, 39 N.E. 712 (1895).

[84] BROWNE, STATUTE OF FRAUDS §491a (5th ed., Bailey, 1895).

ethical basis, if no other, one may applaud the ruling. And it is in the generalized rule which one may develop from these cases that one finds some of the precedents that go to make up the present-day doctrine of promissory estoppel.

2. *The Finding of Consideration.* A second solution to the problem of the justification for enforcing an oral promise to give land is found in the decision of those courts which hold that the act of taking possession coupled with the making of substantial improvements constitute, in equity, sufficient consideration for the promise.[85]

A typical illustration of this class of decisions is *Lindell v. Lindell.*[86] There a son, in reliance upon his father's promise to give him a farm, took possession of it and erected thereon a house, granary, barn and fences. When the son died, the father brought ejectment. The court said, "A parol promise by an owner to give land to another either by deed or will accompanied by actual delivery of possession, becomes an enforceable promise, when the promisee induced thereby has made substantial improvements upon the premises with knowledge of the promisor. The promise to give is no longer *nudum pactum. It has become a promise upon a consideration.*"[87]

Another court reacted similarly when it held that the promise to make the gift, when accompanied by improvements made in reliance thereon was not a mere naked promise, but was supported by consideration. The expenditure was tantamount to the payment of consideration.[88] And these are not the only examples of this type of solution to the problem of how to enforce the gratuitous promise to give real estate.[89]

What is there in this situation which makes the action-in-reliance by the promisee a "consideration"; what induces the court to enforce the promise? If the definition of consideration adopted by the American Law Institute is accepted,[90] it is clear that the acts of the promisee are

[85] Lobdell v. Lobdell, 36 N.Y. 327 (1867) (reversed on other grounds); Kurtz v. Hibner, 55 Ill. 514 (1870); Bright v. Bright, 41 Ill. 97 (1866); Freeman v. Freeman, 43 N.Y. 34, 3 Am. Rep. 657 (1870); Faxton v. Faxton, 28 Mich. 159 (1873); Clancy v. Flusky, 187 Ill. 605, 58 N.E. 594 (1900); Lindell v. Lindell, 135 Minn. 368, 160 N.W. 1031 (1917).

[86] 135 Minn. 368, 160 N.W. 1031 (1917).

[87] Id. at 371. Emphasis supplied.

[88] Whitsitt v. Trustees of Preëmption Presbyterian Church, 110 Ill. 125 at 131 (1884).

[89] For similar holdings, see Guynn v. McCauley, 32 Ark. 97 at 116 (1877) ("Chancery will not decree . . . performance of a mere voluntary agreement, yet where a donee enters into possession . . . and makes valuable improvements on the land on the faith of the gift it constitutes a consideration on which to ground a claim for specific performance"); Kurtz v. Hibner, 55 Ill. 514 at 521, 8 Am. Rep. 665 (1870) ("Such a promise rests upon a valuable consideration. The promisee acts upon the faith of the promise. We can perceive no important distinction between such a promise and a sale").

[90] CONTRACTS RESTATEMENT §75; see footnotes 14 and 16 supra.

not consideration. They were not "bargained for and given in exchange for the promise," because the parties certainly did not understand that the specific action of the promisee was to be rendered in payment for the promise.[91] Indeed, as Justice Holmes observed, these acts of the promisee "would seem to be no more than conditions or natural consequences of the promise."[92] If the parties did not bargain, what justifies the court in holding that they did?

When courts hold (as they do when they solve the problem by this second method) that the promisee's acts of taking possession and making substantial improvements constitute a consideration, they are subject to criticism. A court which so decides deals with the fact situation on the assumption that there is a *bargain* involved. In truth, the parties did not strike a bargain! Actually, the promisor was trying to (or at least said he would) make a gift—but failed to go through the legal forms requisite to the accomplishment of his intent. Why, then, speak in terms of bargain?

In determining the question of title as between promisor and promisee—actually, that is the ultimate question in these cases—a court might well hold that promises to make gifts of realty, when followed by possession and substantial improvements in reliance on the promise, are the equivalent of a completely executed gift. As indicated above,[93] some courts so rule. To hold instead that they are bargains which have been bought and paid for is to misinterpret the facts. So to rule is to twist the concept of bargain out of its proper setting.

In contrast to such holdings, as will be pointed out, the doctrine of promissory estoppel aids the court in determining whether a gratuitous promise should be enforced. It does this without resort to such fictions as finding a "consideration" in what is but compliance with a condition and without trying to force what was plainly a benefaction into the mold of a bargain.

Whether a court is justified in vesting title to the promised land in the promisee depends upon whether the promise has caused such a radical and detrimental change of position by the promisee that reason and fairness demand that the promise be enforced. To this writer, at least, it seems that the result reached is more in accord with the theory of promissory estoppel than with any other. And it would be preferable for the court to justify it on that basis. Certainly he would not accept

[91] McGovern v. City of New York, 234 N.Y. 377 at 388, 138 N.E. 26 (1923), "Nothing is consideration . . . that is not regarded as such by both parties." One should add—"and so regarded in advance."

[92] Martin v. Meles, 179 Mass. 114 at 117, 60 N.E. 397 (1901).

[93] See discussion on pages 657 to 660 supra.

without criticism a rationalization which says "expenditures made upon permanent improvements upon land with the knowledge of the owner, induced by his promise, made to the party making the expenditure, to give the land to such party, constitute in equity a consideration for the promise."[94]

3. *Promissory Estoppel As An Explanation.* There is a third way in which courts may surmount the obstacle presented by the fact that nothing has been given in exchange for a parol promise to make a gift of land. That way is to apply the doctrine of promissory estoppel. This one court did in *Greiner v. Greiner.*[95]

In that case a son, in reliance on his mother's promise to give him eighty acres of land, gave up a homestead in another county, moved onto the designated land with his family, "made lasting and valuable improvements and other expenditures and lived on the land for nearly a year. Then his mother served notice on him to quit." She next brought an action for forcible detention to which the son countered with a request that she be ordered to convey the land to him. The trial court gave the son the relief sought; on appeal the Supreme Court of Kansas affirmed. Justice Burch who wrote the opinion was content to quote section 90 of the *Restatement of Contracts* and (after summarizing the evidence) to add, " . . . this court cannot say it would not be unjust to deny him a deed and to put him off [the land], and cannot say a money judgment would afford him adequate relief."[96]

The detrimental reliance of the promisee was considered as sufficient, when coupled with the elements of justifiable action and hardship, to cause the court to enforce the oral promise to make a gift of realty. A money judgment would not compensate him for the changes which had occurred in his plan of life. Injustice could be avoided only by enforcement.

There are at least three ways, then, by which courts overcome the objection of lack of consideration in cases involving an oral promise to make a gift of land. Some judges say that consideration is not required because the transaction is a gift, not a bargain; others, resorting to fiction, say that the acts of the promisee (though not bargained for as the price for a promise) furnish consideration; still other judges find a solution in the doctrine of promissory estoppel.

One may question, however, whether it is always necessary in

[94] Freeman v. Freeman, 43 N.Y. 34 at 39, 3 Am. Rep. 657 (1870).

[95] 131 Kan. 760, 293 P. 759 (1930).

[96] Id. at 765. It is worth noting that Justice Burch became a member of the Council of the American Law Institute in 1924 and so served until 1942. 2 PROCEEDINGS A.L.I. 83 (1924) and 19 A.L.I. PROCEEDINGS 2 (1941-42).

these cases for the court to declare title to the realty to be vested in the promisee. Could injustice have been avoided by the use of other legal devices?[97] Might not the courts have held that restitution, such as would be given by reimbursement for the cost or value,[98] should be the relief normally afforded to the promisee who in reliance upon such a promise has made substantial improvements?[99] In many instances the courts would be justified in adopting such a remedy instead of requiring specific performance of the promise. However, when the court does decide to give relief to the gratuitous promisee, performance of the promise seems to be the usual remedy awarded. For this, any one of three reasons may be advanced.

First, it is a matter of common observation that the courts, having solved the substantive law problem, are inclined to treat questions of the relief to be afforded as mere details of procedure.[100] *Second,* the courts may not have been aware of restitution as an alternate remedy. *Third,* they may have been motivated by the fact that the claimant was a meritorious object of the promisor's bounty (as where he was a close relative), and have believed that no harm would be done by enforcing the promise. This latter factor may have great weight where the promisor has died and the claim is against his estate. Unfortunately, in many of the cases considered in this section the degree of kinship existing between the promisor and the promisee does not appear. Therefore, it is impossible to determine whether this third reason is a valid explanation of why performance was required rather than restitution awarded to the promisee. Incidentally, such instances illustrate one of the weaknesses of the Oliphant theory of *ratio decidendi*; courts do not always articulate in their opinions the facts which they regard as legally relevant.

In support of the tendency to require performance of the promise rather than to give the promisee reimbursement, it may be argued that enforcement of the promise, not just restoration of the status quo, is

[97] See discussion in Boyer, "Promissory Estoppel: Requirements and Limitations of the Doctrine," 98 UNIV. PA. L. REV. 459 at 482-494 (1950).

[98] For example, see Vickery v. Ritchie, 202 Mass. 247, 88 N.E. 835 (1909) (builder permitted to recover the fair value of what was furnished, not restricted to the improvement value).

[99] Restitution equal to the value of improvements made by the donee has been allowed in North Carolina [Carter v. Carter, 182 N.C. 186, 108 S.E. 765 (1921)] and in Kentucky [Usher's Executor v. Flood, 83 Ky. 552 (1886)]. See, Fuller and Perdue, "The Reliance Element in Contract Damages: 2," 46 YALE L. J. 373, 405 (1937); WALSH, EQUITY §79 (1930). In Griffin v. Griffin, 206 Ala. 489, 90 S. 907 (1921), the court refused to enforce the oral promise to give land but did allow compensation for the improvements.

[100] Patterson, "Builder's Measure of Recovery for Breach of Contract," 31 COL. L. REV. 1286 (1931).

the normal remedy in equity.[101] Indeed, since specific enforcement satisfies the expectations which have been aroused justifiably, there is additional reason for granting it. Of the three explanations given for the enforcement (despite the Statute of Frauds) of parol promises to give land, only the third (promissory estoppel) involves an extension of contract beyond the bargain concept.

Unless the promisee has acquired a possession which unequivocally evidences a promise to transfer the title and has also made substantial improvements, he usually will be denied relief. An examination of several cases emphasizing this problem may serve to indicate how promissory estoppel can assist in the development of our contract law.

In *Burns v. McCormick,*[102] for example, the plaintiffs gave up their business in another town, moved into the home of the promisor and cared for him until he died; all this in reliance upon his promise that they should have the house upon his death. The court in an opinion by Judge Cardozo, the same judge who five years later wrote the opinion in the *Allegheny College Case,*[103] denied recovery, because plaintiffs did not have *exclusive* possession of the realty promised (the court said they only lived on it as servants).[104]

In cases of parol promises to *give* land, as well as in cases like *Burns v. McCormick* (where there was an actual bargain and the receipt of the consideration requested) insistence on transfer of possession might well be dispensed with where there has been a substantial detrimental change of position in reliance upon the promised gift. The plaintiffs in *Burns v. McCormick* as well as the promisee in *Greiner v. Greiner,*

[101] WALSH, EQUITY §79, note 21, p. 404 (1930) "It [enforcement] is the better remedy as it gives the plaintiff the full advantage of his expenditures, not mere restitution." *Accord:* 4 A.L.I., PROCEEDINGS, App. 95-96, 98-99, 101-104 (1926) (Mr. Williston: "Either the promise is binding or it is not. If it is binding, it has to be enforced as it is made.") But see, Pound, "The Progress of the Law, Equity," 33 HARV. L. REV. 929 at 936 (1920): "The 'equities' of one who has been put in possession . . . call for making him whole for what he is out upon the faith of the contract, so far as a court of equity may do so."

[102] 233 N.Y. 230, 135 N.E. 273 (1922).

[103] Allegheny College v. National Chautauqua County Bank of Jamestown, 246 N.Y. 369, 159 N.E. 173 (1927).

[104] Cases enforcing promises to give land in fact situations similar to Burns v. McCormick include the following: Mannix v. Baumgardner, 184 Md. 600, 42 A. (2d) 124 (1945); Evans v. Buchanan, 183 Md. 463, 38 A. (2d) 81 (1944); Bryson et ux. v. McShane, 48 W.Va. 126, 35 S.E. 848 (1900). It should be noted that one state, Virginia, has enacted a statute to cover this situation. Va. Code of 1942 (Michie) §5141, provides ". . . nor shall any right to a conveyance of any such estate or term in land accrue to the donee of the land or those claiming under him, under a gift or promise of gift of the same hereafter made and not in writing, although such gift or promise be followed by possession thereunder and improvement of the land by the donee or those claiming under him." Prior to the enactment of this statute in 1887, Virginia enforced such oral promises to make gifts. Mann v. Mann, 159 Va. 240, 165 S.E. 522 (1932); GLENN AND REDDEN, CASES ON EQUITY 571-572 (1946).

changed their ways of life. That one found the change accompanied by possession of the promised realty while the other did not seems to have been merely fortuitous. From an ethical viewpoint, that circumstance (of sole possession) alone does not seem sufficient to justify the reaching of opposite results. The proper employment of the doctrine of promissory estoppel would require more attention to the problem of injustice and less to formalities.

The foregoing review of cases enforcing oral gratuitous promises to make gifts of land provides numerous precedents for the doctrine of promissory estoppel. Perhaps it will be appropriate to review their contribution to its elements.

In all of the cases there is a promise to give land. Was it of such a nature that the promisor should reasonably expect the promise to induce action of a definite and substantial character by the promisee? Certainly the promisor has every reason to expect that the promisee will do something with the land he has been told is his. One should not expect the donee to let the land lie fallow. Cultivation and improvement of realty is a natural and foreseeable consequence of the promise. Nor can there be any doubt that the expenditures of time and money were made in reliance on the gift-promise. Thus, the first two elements of the doctrine of promissory estoppel (the promise and action-in-reliance on it) are clearly present. How about the third element: avoiding injustice only by enforcement?

Here there is more difficulty, for often the court could award a money judgment which would reimburse the promisee for his out-of-pocket expenditures as well as his time and effort. But the cases do not usually adopt such a procedure. Instead, they either award the promisee his expectations (enforcing the promise in its entirety) or allow him nothing.[105] Courts generally take the view that whenever injustice to the promisee is serious enough to warrant relief, he should receive all that he reasonably expected.

From the viewpoint of Oliphant, one is justified in stating that all of the instances in which such promises are enforced are precedents for the doctrine. Explicit recognition of the doctrine as a justifiable and reasonable basis for judgment and decision permits the use of these precedents in a synthesis from which an effective and workable principle emerges.

C. *Gratuitous Bailments*

Plaintiff being indebted to J. S. "delivered ten pounds to the

[105]For a detailed discussion of the alternatives to these two solutions, see Boyer, "Promissory Estoppel: Requirements and Limitations of the Doctrine," 98 UNIV. PA. L. REV. 459 at 482-494 (1950).

defendant, to the intent he should pay it to J. S. in part of payment *sine ullâ morâ;* that *in considerationе inde* the dependant assumed, &c. and assigns for breach, that he had not paid."[106] In King's Bench it was argued that there was no consideration for "it is not alleged that he delivered it unto the defendant upon his request"; the acceptance was of no benefit to the defendant, so it was said. But the court refused to arrest the judgment for "he accepted this money to deliver, and promised to deliver it" so it was a good consideration to charge the defendant.

Wheatley v. Low was decided in 1623, yet the reasoning which decided that case could be applied with almost equal force to a judgment rendered in 1923.[107] In *Siegel v. Spear and Co.* plaintiff sued to recover for a loss suffered when his furniture which had been stored in defendant's warehouse was destroyed by fire. The crucial facts were that plaintiff desired to store his furniture and that defendant's agent promised to keep it free of charge. In the conversation the agent discovered that plaintiff carried no insurance and said, "I will do it for you; it will be a good deal cheaper; I handle lots of insurance; when you get the next bill [for installment payments still due defendant on the furniture which had been purchased from it] you can send a check for that [the insurance premium] with the next installment."[108] The furniture was then sent to defendant's warehouse. About a month later it was destroyed by fire. No insurance had been placed on it.

The court held that defendant was liable for the loss, saying, "defendant undertook to store the plaintiff's property without any compensation . . . . the promise [to insure] . . . was linked up with the gratuitous bailment . . . . It was after his statements and promises that the plaintiff sent the furniture to the storehouse . . . . *The defendant . . . entered upon execution of the trust* . . . . As Chancellor Kent said in referring to the earlier cases: '. . . an action on the case lay for a misfeasance, in a breach of trust undertaken voluntarily.' From this aspect of the case we think *there was a consideration for the agreement to insure.*"[109]

The court seems to rest its decision upon two grounds—first, that defendant had entered upon execution of the trust and, second, that

[106] Wheatley v. Low, Cro. Jac. 668, 79 Eng. Rep. 578 (1623).

[107] Siegel v. Spear & Co., 234 N.Y. 479, 138 N.E. 414 (1923). Noted 23 COL. L. REV. 573 (1923).

[108] Siegel v. Spear & Co., 234 N.Y. 479 at 481 (1923).

[109] Id. at 482-483. Emphasis added. *Accord:* Schroeder v. Mauzy, 16 Cal. App. 443, 118 P. 459 (1911).

there was consideration for the promise. The second of these reasons attempts to place the transaction in a bargain context. It considers that the surrender of the goods on the strength of the promise constituted an exchange for it. No one will deny that the surrender of the furniture *could* be made the basis for a bargain. But, on the facts, it was not. Indeed, that *surrender could be a legal detriment* (promisee was under no duty to store with the defendant), but here it actually secured an economic benefit for the plaintiff. By the transaction he obtained a place to store his goods while he was on vacation. There was, at the most, a gratuitous promise to store *and* secure an insurance policy on the goods. There was no bargain and exchange, for the defendant was not to be paid for the promise to secure the insurance.

It may be argued that plaintiff's promise to pay the insurance premiums was the bargained-for exchange for the clerk's promise to procure the insurance. If it was, then the case can be supported on straight contract theory. Such construction seems strained, however. There actually was no "bargain" of a promise for a promise. The case can, however, be supported on a theory of promissory estoppel.

When the court argues that the defendant is liable because it "had entered upon the execution of the trust" it is on firmer ground. Under that argument liability is imposed because defendant, after he undertook (or began) to perform a task, performed it badly. Such an approach places the case in the category of gratuitous bailments.[110]

The leading case in the field of gratuitous bailments is *Coggs v. Bernard*.[111] There the plaintiff delivered a cask of brandy to defendant, a carter. Defendant, in turn, was to transport the brandy to a third party. The carter was to receive no compensation and promised to carry the liquor carefully. Through his neglect, the wine was spilled.

Because the case was thought to be important, it was argued before the whole court. Holt, C. J., in the course of his opinion said that when he [the promisee] intrusts the bailee upon his undertaking to "be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. And a breach of a trust undertaken voluntarily will be a good ground for an action . . . . The owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management.

[110] In Siegel v. Spear & Co. it does not appear that defendant's agent was to receive any commission on the insurance he was to secure for the plaintiff. Apparently the check which plaintiff was to send was to cover his monthly installment payment and the insurance premium. No part of the insurance premium was to go to defendant or to its clerk who made the gratuitous promise. Hence, the case should not be interpreted as the exchange of a promise to pay for a promise to store and insure.

[111] 2 Ld. Raym. 909, 92 Eng. Rep. 107 (1703).

Indeed, if the agreement had been executory, to carry these brandies from the one place to the other such a day, the defendant had not been bound to carry them. But this is a different case, for assumpsit does not only signify a future agreement, but in such a case as this, it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing . . . . And so a bare being trusted with another man's goods, must be taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession."[112]

All of the justices agreed in giving judgment for the plaintiff. Gould, J., said, " . . . the reason of the action is, the particular trust reposed in the defendant, to which he has concurred by his assumption, and in the executing which has miscarried by his neglect." Powell, J., found the *gist* of these actions to be the undertaking, saying, ". . . when I have reposed a trust in you, upon your undertaking, if I suffer, when I have so relied upon you, I shall have my action."

While it might appear that the action should be in tort for negligence, the court approved of recovery in assumpsit and upon the undertaking. Some writers explain the case by saying that since the promisor failed to carry the brandy safely, as he had agreed, a species of deceit had been practiced on the defendant, though this is not acceptable.[113]

Here the carter had promised to use care and had actually begun the transportation of the brandy casks. Should he respond in damages if the goods are damaged through his neglect? If he is to be liable, shall it be in tort or in contract? Since the court believed that the promise had induced the plaintiff to entrust the goods to the defendant, the court allowed recovery in assumpsit even though the promise actually had been gratuitous. Thus it emphasized the origin of the relationship rather than the character of the act which brought about the injury.

Coggs v. Bernard did much to establish the English law of bailments;[114] it is also a precedent for the principle of promissory estoppel.

[112] Coggs v. Bernard, 2 Ld. Raym. 909 at 919-920, 92 Eng. Rep. 107 (1703).

[113] This is the explanation given in BROWN, PERSONAL PROPERTY §80 (1936). "Deceit" seems to be as forced an explanation as "trust." Is not the real ground for the decision the belief that one who actively undertakes, i.e., begins, to do something in relation to another's property is bound to do it carefuly, regardless of whether he has received pay?

[114] Justice Story had an interesting comment on this case: ". . . Lord Holt, with great sagacity and boldness, led the way to some of the most important improvements by his celebrated judgment in Coggs v. Bernard, in which the law of bailments is expounded with

Here all of the elements of the doctrine are present. There is a promise reasonably expected to and which does induce an injurious reliance to the detriment of the promisee. Unless the promise is enforced, the promisee will suffer undue hardship. It is not possible to restore the status quo; the brandy is lost. It seems more just to make the loss fall on the promisor. Since the promisee delivered a chattel into the hands of the defendant, the nature of the reliance is capable of demonstration and evidences "the particular trust reposed" in the defendant. In *Coggs v. Bernard* the court made it clear that there would have been no liability if the carter had refused to perform at all.[115] Because of this, it is authority for those decisions which distinguish between misfeasance and nonfeasance, imposing liability in the former and denying it in the latter case.

It is upon this distinction between nonfeasance and misfeasance that Chancellor Kent's opinion in *Thorne v. Deas*[116] turns. There plaintiff and defendant owned the brig *Sea Nymph*. On the day the vessel sailed they talked about insurance and defendant said he would procure it. Ten days later defendant said they had saved the cost of the insurance and plaintiff, indicating that he thought it had already been obtained, said that if defendant "would not have the insurance immediately made out, he [plaintiff] would have it effected." Defendant then told plaintiff to "make himself easy," for he [defendant] would that day apply to the insurance office, and have it done. The vessel was wrecked; no insurance had been procured. Plaintiff brought an action on the case for defendant's failure to effect the insurance. Defendant moved for non-suit on the ground that the promise was without consideration and void.

Chancellor Kent emphasized the distinction between nonfeasance and misfeasance by saying, " . . . In other words he is responsible for a *misfeasance,* but not for a *nonfeasance,* even though special damages are averred . . . . I have no doubt of the perfect justice of the *Roman* rule, on the ground, that good faith ought to be observed, because the

philosophical precision and fullness. . . . This branch of the law stands now at the distance of more than a century on the immovable foundation where this great man placed it, the foundation of reason and justice." STORY, A DISCOURSE ON THE PAST HISTORY, PRESENT STATE AND FUTURE PROSPECTS OF THE LAW 9 (1835).

[115] Coggs v. Bernard, 2 Ld. Raym. 909, 92 Eng. Rep. 107 (1703) "But if a man undertakes to build a house, without anything to be had for his pains, an action will not lie for nonperformance, because it is nudum pactum" (p. 909); "An action indeed will not lie for not doing the thing, for want of a sufficient consideration; but yet if the bailee will take the goods into his custody, he shall be answerable for them, for the taking the goods into his custody is his own act" (p. 911); "Indeed if the agreement had been executory . . . the defendant had not been bound to carry them" (p. 919).

[116] 4 Johns. (N.Y.) 84 (1809).

employer, placing reliance upon that good faith in the mandatary, was thereby prevented from doing the act himself, or employing another to do it . . . . But there are many rights of moral obligation which civil laws do not enforce, and are, therefore, left to the conscience of the individual, as rights of imperfect obligation; and the promise before us seems to have been so left by the common law . . . ."[117] The court gave judgment for the defendant.

The chief distinction between *Thorne v. Deas* and *Coggs v. Bernard* seems to be that in the latter case the defendant was actually entrusted with a chattel when he gave the promise; in the former nothing was handed over. But there appears to have been as much reliance on the promise to insure as there was on the promise to carry safely the brandy casks. Is it not misleading to make the question of liability depend on whether any chattel was delivered when the promise was made? Suppose that in *Coggs v. Bernard* the carter, after the casks of brandy had been handed to and accepted by him, had failed and refused to carry them but instead had held them at his warehouse. Would this be nonfeasance or misfeasance? Regardless of what it is *called*, the promisee is doomed. And this writer believes he should have a remedy.

The casks of brandy in *Coggs v. Bernard*, the money in *Wheatley v. Low*, and the furniture in *Siegel v. Spear & Co.*, came into the possession of the respective defendants as the result of a promise to do some act with reference to the chattels. But it is difficult to understand why liability on a gratuitous promise should be limited to cases of actively undertaking or beginning to do something with reference to chattels delivered to the promisor. As much hardship can be suffered by the promisee when he does not hand over a chattel to the promisor as when he does. Indeed, in *Thorne v. Deas* the foundering of the ship caused far greater monetary loss than occurred when the brandy was spilled in *Coggs v. Bernard*.

As in the case of gratuitous promises to convey lands where the donee has taken possession, courts confronted with the delivery of a chattel accompanied by the recipient's promise to perform a certain act respecting it are prone to find that there was a bargain with benefit and detriment for both the promisor and promisee.[118] They take delivery as the "consideration" requested for the promise. If this assumption accorded with the facts, such holdings would be unobjectionable. But the assumption is incorrect, for there actually is no bargain.

[117] Id. at 97.

[118] Prince v. Alabama State Fair, 106 Ala. 340, 17 S. 449 (1895) is illustrative. There plaintiff sent a picture for exhibition at the State Fair. It was exhibited and awarded

However, there may be reliance on the promise and the avoidance of injustice may require enforcement.

The relationship of bailor and bailee can arise by contract or by other voluntary act of the parties.[119] If there is such a relationship the law imposes a duty to use care in handling the chattel on the bailee. It is only when recovery from the bailee is sought on grounds other than negligence in caring for it that the courts inquire as to the basis for enforcing the promise. In such cases promissory estoppel may be helpful where there is no bargain but there has been reliance evidenced by an entrusting of a chattel to one who promises to act in a certain way regarding it.

Illustrative cases of the enforcement of the bailee's promise include the broker who was held liable in contract for handing over bonds, gratuitously deposited with him by the plaintiff, to the latter's wife on a forged order,[120] as well as the broker who sends the bonds through the mail where they are lost.[121] Whether a chattel has been handed over to defendant[122] or he promises gratuitously to dispose of property already in his possession in a particular way,[123] contractual liability has been imposed. Occasionally a court has been frank enough to say that it bases liability on the fact that defendant said he would act and that plaintiff relied thereon.[124]

a prize. Unfortunately, it was never returned. The court said the "consideration" for defendant's gratuitous promise to return the picture was the detriment and inconvenience to the sender in transmitting the article. The difficulty with this solution is that the parties didn't bargain; instead there was reliance on a promise. Similar cases include Kay County Free Fair Assn. v. Martin, 190 Okla. 225, 122 P. (2d) 393 (1942) (A crocheted table cloth worth $250); Vigo Agri. Soc. v. Brumfiel, 102 Ind. 146, 1 N.E. 382 (1885) ("The bailment was not a gratuitous one, for the reason that the exhibition of the gun, in response to the . . . advertisement of appellant, constituted a consideration for the undertaking"); Colburn v. Washington State Art Assn., 80 Wash. 662, 141 P. 1153 (1914). See note, 139 A.L.R. 931 (1942).

[119] ANSON, §133.

[120] Kowing v. Manly, 49 N.Y. 192 (1872). *Accord*: Kierce's Admr. v. Farmers Bank, 174 Ky. 22, 191 S.W. 644 (1917) (Gratuitous deposit of three promissory notes with bank by husband and wife, subsequently bank promised wife not to deliver notes or proceeds to husband but did so; *held,* wife was entitled to go to the jury on the theory that the bank was guilty of bad faith). Mis-delivery of a chattel by a bailee is a tort, so the question in such cases is whether a contract remedy is available.

[121] Jenkins v. Bacon, 111 Mass. 373, 378 (1873) (The bailee was held liable regardless of negligence). See also, Baer v. Slater, 261 Mass. 153, 158 N.E. 328 (1927) where defendant delivered plaintiff's merchandise to a third person who posed as an expressman. The goods were never returned to plaintiff who had judgment.

[122] Schroeder v. Mauzy, 16 Cal. App. 443, 118 P. 459 (1911) (defendant who gratuitously undertook to store and *insure* plaintiff's piano, was held liable for non-negligent injuries caused by fire when he failed to insure).

[123] Melbourne and Troy v. Louisville & N. R.R., 88 Ala. 443, 6 S. 762 (1889) (A railroad gratuitously promised to deliver a car of merchandise already in its possession beyond its destination and entered upon performance of said promise, but failed to notify the connecting line; *held,* railroad is liable for damages resulting from the failure to notify and it was error to sustain a demurrer).

[124] Brown v. Ray, 10 Ired. L. (32 N.C.) 72 (1849): Plaintiff brought action on the

One is not to suppose, however, that all courts are willing to impose liability for every gratuitous promise, even when connected with a bailment. Sometimes, as in a case where the bill of lading failed to mention the route by which a barge load of goods was to be shipped but the shipper in reliance on a subsequent oral promise to send via a particular route secured insurance conditioned on shipment by the route promised, the court holds that the parol evidence rule prevents proof of the promise.[125] On other occasions the court has attempted to limit liability by finding that the promisor was, at most, guilty of nonfeasance rather than misfeasance and has denied liability on that ground alone,[126] or has said that the plaintiff could not recover because he had failed to show negligence on the part of the bailee.[127]

An illustrative case refusing relief is *Tomko v. Sharp*.[128] Sharp gratuitously promised plaintiff to drive the latter's automobile to a garage for repairs and then drive it back again. He drove to the garage. After the car was repaired it was left outside in cold weather and defendant failed to bring it back. As a result, the radiator froze and burst while the car was unattended. When plaintiff sought damages, he was refused. There was "a gratuitous bailment . . . for the purpose of taking [the car to the garage] and . . . a gratuitous agreement to become bailee for the purpose of returning it," the court said, and ruled that there was no liability for refusing to become bailee. This was considered mere nonfeasance.

case because defendant refused to measure out 300 bushels of corn which had been sold to plaintiff by the sheriff in an execution against defendant, though at the time of sale defendant promised plaintiff this would be done whenever he called for it. The court relied on Coggs v. Bernard saying defendant "had entered upon the trust." Observe that the liability here is in contract for failure to perform a promise to do something *in the future* with the chattel, not in tort for caring for it negligently.

[125] White v. Ashton, 51 N.Y. 280 (1873). But the parol evidence rule does not apply to agreements made *after* the integration [WIGMORE, EVIDENCE, 3d ed., §2441 (1940)], so the court erred in its reasoning. And the justifiable reliance on the promise certainly harmed plaintiff. He should have recovered.

[126] Newton v. Brook, 134 Ala. 269, 32 S. 722 (1902) (where defendant had agreed with plaintiff to prepare for shipment by particular train, but failed to do so, it was held that recovery could be had only on contract and, because the promise was gratuitous, there was no liability). The promissory estoppel elements are all present here. The recovery should be in contract, but on the basis of promissory estoppel, not on a bargained-for equivalent.

[127] Ridenour v. Woodward, 132 Tenn. 620, 179 S.W. 148 (1915); Altman v. Aronson, 231 Mass. 588, 121 N.E. 505. See notes, 4 A.L.R. 1196 (1919), 26 A.L.R. 1208 (1923), 96 A.L.R. 909 (1935). *Accord:* Commonwealth Portland Cement Co. v. Weber, Lohmann and Co., 91 L.T.R. 813 (1904) (defendant undertook gratuitously to pass goods of plaintiff through the customs. The court said that waiting one day to act did not make him liable for additional taxes due when customs duties were raised in the meanwhile).

[128] 87 N.J.L. 385, 94 A. 793 (1915).

Regarded objectively, was defendant's failure to perform his promise the proximate cause of the damage? If it was not, there could be no recovery in tort; plaintiff's only hope of recovery lay in inducing the court to impose liability for breach of defendant's promise. When the court labeled the case as one of "nonfeasance," it foreclosed any contract remedy save promissory estoppel.

Since all the elements of that doctrine were present, the court might well have affirmed the lower court's judgment for plaintiff in *Tomko v. Sharp*. There is an additional ground for this conclusion because the case shows that when defendant brought the car to the repair shop the foreman asked him to drain the radiator. Instead of doing that, he "smelled" the radiator, said there was alcohol in it and walked away. Is he not guilty of "misfeasance" in that he purported to check on the car's condition but made a mistake in judgment? Has he not actually "undertaken" to guard against the thing feared? There is a basis on which liability could have been imposed even on the court's theory of misfeasance.

In addition, one could say that instead of making two promises, he made only one—to drive the car to the repair shop *and back*. He drove it there, thus entering on the performance of the promised act; but he failed to complete the act because he did not return the car.

A consideration of the opinion in *Tomko v. Sharp* and this analysis indicates the wavering, artificial and dubious distinction between misfeasance and nonfeasance.[129] Already, in the field of torts, there is an inclination to seek a different approach. As Prosser says, if there is an "assumption of control over the situation by which the interests of another are affected more or less directly or an interference with other possible sources of protection" there is a basis for liability. Why should not the same reasoning apply in determining contractual liability for gratuitous promises? One may well hold that just as the negligent performance of a voluntary undertaking can impose liability in tort, so a gratuitous promise detrimentally relied upon may impose contractual liability if it is not performed.[130]

In determining whether a gratuitous promisor is to be held to his promise the court should consider the facts, including the making of the promise, the action taken in reliance on it, and the injustice which might result to either party if enforcement is decreed. Particularly

[129] PROSSER, TORTS §33 (1941).

[130] Hyde v. Moffat, 16 Vt. 271 (1844) (defendant held liable for failure to record a deed where he accepted it and promised to record); Herzig v. Herzig, 67 Misc. 250, 122 N.Y.S. 440 (1910) (demurrer overruled where plaintiff alleged a delivery of a promissory note to defendant, his promise to collect it, and his failure to try to do so).

in a case like *Tomko v. Sharp*, it will be helpful to weigh the *deliberateness* with which the promise was made.[131] It may often be determinative.

From the foregoing it appears that promises made in connection with gratuitous bailments may create contractual liability.[132] Just as with gratuitous promises to give land, so with gratuitous bailments; liability begins with possession.[133] But it is not the possession that creates liability; rather, it is the promise which has induced injurious reliance.

Promissory estoppel has its origins in diverse fields of the law. One of the most fruitful of these fields is that of gratuitous bailment.[134] The analogies which can be drawn from this particular area have been most helpful in the formulation of the doctrine.[135] The enforcement of gratuitous promises in the bailment category illustrates the pervasiveness of the principle on which the doctrine is based. Obvious also is the compartmentalization which has existed in the application of the doctrine. So long as it is applied only when the fact situation fits a preconceived pattern, such as a gratuitous promise to give land, or a gratuitous bailment, its possibilities will not be completely utilized. The restraints of compartmentalization must be overcome if the courts are to recognize that the doctrine of promissory estoppel is one of universal application.

To be concluded.

[131] See, Cardozo, J., in Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922): "The casual response, made in mere friendliness or courtesy may not stand on the same plane, when we come to consider who is to assume the risk of negligence or error, as the deliberate certificate, indisputably an 'act in the law' intended to sway conduct." (tort case against a public weigher who certified false weights).

[132] WILLISTON, §138, p. 490: "It is still the law that a voluntary undertaking may render one liable for the consequences of negligent failure to carry out the undertaking; but in most cases of the sort the cause of action is now regarded as based on a tort. In one class of cases, however, the transaction is still regarded as contractual, namely, gratuitous agency, bailment, or trust." See CORBIN, §207.

[133] See cases cited in notes 120-124 supra. Arterburn, "Liability for Breach of Gratuitous Promises," 22 ILL. L. REV. 161 at 163 (1927): ". . . a gratuitous promise may be enforced if you can find a bailment peg to hang it on. . . . If the gratuitous bailee holds so much as a piece of paper representing a chose in action he may be held to his promise regarding it. . . ."

[134] The following articles will repay examination: Beale, "Gratuitous Undertakings," 5 HARV. L. REV. 222 (1891); Shattuck, "Gratuitous Promises—A New Writ?" 35 MICH. L. REV. 908 at 915 (1937); note, 9 CORN. L.Q. 54 (1923).

[135] PATTERSON AND GOBLE, CASES ON CONTRACTS, 2d ed., 394, note 1 (1941): "The cases of a gratuitous undertaking to do something about the bailor's property, followed by the bailor's delivery of the property and by either negligence injurious to the property or refusal to redeliver it, furnished a backlog of analogies for the development of the modern doctrine of promissory estoppel."