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PROMISSORY ESTOPPEL: PRINCIPLE FROM PRECEDENTS: II

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PROMISSORY ESTOPPEL: PRINCIPLE FROM PRECEDENTS: II*

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FRAMEWORK FOR A PRINCIPLE, *continued*

D. *Gratuitous Agency*

It is ancient learning that a person is free to refuse to accept an appointment as agent but that "acceptance must be followed by execution or prompt resignation."[136] Though such was the law of the Romans of Justinian's time, it has taken our courts many years to reach the same conclusion. Indeed, it was not until the *Restatement of Agency* was published in 1933 that the basis of liability of one who gratuitously undertook to act as agent for another was expressed in approximately the same form.

The Reporters on Agency for the American Law Institute, Professors Mechem and Seavey, stated their rule (in section 378) thus: "One who, by a gratuitous promise or other conduct which he should realize will cause another reasonably to rely upon the performance of definite acts of service to him as the other's agent, causes the other to refrain from having such acts done by other available means is subject to a duty to use care to perform such service or, while other means are available, to give notice that he will not perform."[137]

To lawyers nurtured on the oft-quoted statement that "the promisor is not liable for nonfeasance but is liable for misfeasance,"[138] such a pronouncement may come as a surprise. How does it happen that the American Law Institute was willing to sponsor a principle which ignores the distinction between misfeasance and nonfeasance and makes liability depend on justifiable reliance rather than on payment for the promise or the commencement of performance of the promised act?

When the *Restatement of Agency* was being considered, Professor Seavey published an explanatory note on "Liability of Gratuitous

* Part I appeared in 50 MICH. L. REV. 639 (1952).—Ed.

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136 Inst. III.26.11: It is open to everyone to decline a commission of agency, but acceptance must be followed by execution or by a prompt resignation, in order to enable the principal to carry out his purpose either personally or by appointment of another agent. *Accord:* THE CIVIL LAW, S. P. Scott translation, Vol. 2, p. 129 (1932).

137 AGENCY RESTATEMENT §378 (1933), Gratuitous Undertakings.

138 CLARK, CONTRACTS §§64-65 (4th ed. by Throckmorton and Brightman, 1931); ANSON, CONTRACTS, Patterson ed., §141 (1939).

Agent"[139] which shows the justification for holding a gratuitous agent to his undertaking. He concludes that there are at least five categories of cases which sustain section 378 of the *Restatement of Agency*:

(1) A gratuitous agent who has received possession of something is liable if he negligently or disobediently deals with it;[140]

(2) A gratuitous agent, although not given possession of anything by the principal, is subject to duties of obedience, care, and loyalty in respect of transactions which he undertakes for the principal;[141]

(3) An agent who has received possession of something is liable if he fails to deal with it in accordance with his undertaking;[142]

(4) An agent gratuitously promising to act is subject to liability to the promisee if he has begun to act in accordance with his undertaking and fails to continue to act as he has agreed;[143]

[139] AMERICAN LAW INSTITUTE, RESTATEMENT OF AGENCY, Tentative Draft No. 7, 247-252 (1932). Section 599 of this tentative draft became section 378 in the final arrangement of the restatement.

[140] Jenkins v. Bacon, 111 Mass. 373 (1873); Kowing v. Manly, 49 N.Y. 192 (1872); Maddock v. Riggs, 106 Kan. 808, 190 P. 12 (1920) (gratuitous agent liable for failing to remit premiums on fraternal insurance policy); Criswell v. Riley, 5 Ind. App. 496, 30 N.E. 1101 (1892) (gratuitous procurement of insurance policy followed by negligent failure to pay premiums); First National Bank & Trust Co. v. Evans, 11 N.J. Misc. 19, 163 A. 667 (1932); Shiells and Thorne v. Blackburne, 1 H.Bl. 158, 126 Eng. Rep. 94 (1789) (liability if defendant so negligently handled goods that they were lost); *semble*, Commonwealth Co. v. Weber, 91 L.T.R. (N.S.) 813 (1904) (but no recovery if the gratuitous handler of goods was not negligent); Hyde v. Moffat, 16 Vt. 271 (1844) (liability where gratuitous agent failed to record deed and refused to return it); Melbourne & Gray v. Louisville & N. R.R. Co., 88 Ala. 443 at 449, 6 S. 762 (1889); Sunflower Compress Co. v. Clark, 165 Miss. 219 at 231, 145 S. 617 (1933) (tax collector liable for not cashing check given him by taxpayer); Brewer v. Universal Credit Co., 191 Miss. 183, 192 S. 902 (1940) (finance company liable for not retaining, as promised, automobile of owner who was delinquent in payments).

[141] Johnson v. Jameson, (Mo. 1919) 209 S.W. 919 (evidence insufficient to prove mortgagee agreed to buy at foreclosure sale and permit mortgagor to redeem); Phillips v. Jackson, 240 Mo. 310, 144 S.W. 112 (1911) (mortgagee's gratuitous oral agreement to buy at foreclosure and permit redemption, if made before sale, will be enforced); Tchula Commercial Co. v. Jackson, 147 Miss. 296, 111 S. 874 (1927) (mortgagor recovered $14,600 for mortgagee's breach of gratuitous promise to permit redemption); Waters v. Hall, 218 App. Div. 149, 218 N.Y.S. 31 (1926); Isham v. Post, 141 N.Y. 100, 35 N.E. 1084 (1894) (gratuitous loan agent liable for failure to use diligence promised); Hammond v. Hussey, 51 N.H. 40 (1871) (gratuitous examiner liable to examinee for false report); Kaw Brick Co. v. Hogsett & Woodward, 73 Mo. App. 432 at 438 (1898) (agent who undertook to keep property insured for $7,000 liable for negligently failing to do so). But, there must have been reliance. Frankfort Waterworks Co. v. McBride, 92 Ind. App. 680, 175 N.E. 140 (1931) (customer asked water company to turn off water in freezing weather but tried to do it himself).

[142] For the purposes of this article, the first and third of Professor Seavey's categories may be considered as one. In both instances the promisor receives something from the promisee. In neither case does he deal with it as he has promised, but acts negligently or disobediently. Therefore, cases sustaining this proposition have been listed in note 140 supra.

[143] Wilkinson v. Coverdale, 1 Esp. 75, 170 Eng. Rep. 284 (1793) (one who gratuitously undertakes to obtain insurance but acts so negligently that insured is unable to

(5) A gratuitous promisor who undertakes to serve as agent for another may be held liable for failure to enter upon performance.[144]

Examination of these categories and of the cases supporting them will reveal again the tendency of our courts to deal in "compartmentalized" justice; they emphasize "agency," not action-in-reliance and the avoidance of injustice. It will also demonstrate the validity of the doctrine of promissory estoppel—a doctrine which the Agency Restaters, by the adoption of section 378, have emphasized effectively in a *narrow* field.

recover for loss is liable to the promisee. *Note,* plaintiff was subsequently nonsuited for failing to prove the promise); Elam v. Smithdeal Realty & Ins. Co., 182 N.C. 599, 109 S.E. 632 (1921) (gratuitous attempt to insure may make promisor liable if proper insurance is not obtained); *Accord:* Barile v. Wright, 256 N.Y. 1, 175 N.E. 351 (1931); Warrener v. Federal Land Bank, 266 Ky. 668, 99 S.W. (2d) 817 (1936) [citing AGENCY RESTATEMENT §378 (1933)]; Soule v. Union Bank, 45 Barb. 111, 30 How. Pr. 105 (N.Y., 1865); Evan L. Reed Mfg. Co. v. Wurts, 187 Ill. App. 378 (1914); Baxter v. Jones, 6 Ont. L. Rep. 360 (1903) (defendant obtained the promised additional insurance but failed to notify other insurers as he had promised); Condon v. Exton-Hall Brokerage & Vessel Agency, 80 Misc. 369, 142 N.Y.S. 548 (1913) (judgment for $1,949 affirmed where defendant failed to cancel existing policies); Boyer v. State Farmers Mutual Hail Ins. Co., 86 Kan. 442, 121 P. 329 (1912) (plaintiff recovered face amount of policy even though agent delayed so long in submitting it that loss occurred before policy was issued); Duffy v. Bankers Life Assn., 160 Iowa 19, 139 N.W. 1087 (1913) (recovery in *tort* by insured's representative allowed where insured died during the month that agent delayed forwarding application and first premium); Affleck v. Kean, 50 R.I. 405, 148 A. 324 (1930) (plaintiff recovered in assumpsit from gratuitous agent who misdescribed automobile he volunteered to insure).

144 Carr v. Maine Central R.R., 78 N.H. 502, 102 A. 532 (1917) (recovery allowed in tort against railroad which delayed too long in filing shipper's claim for rebate); Kirby v. Brown, Wheelock, Harris, Vought & Co., 229 App. Div. 155, 241 N.Y.S. 255 (1930) (recovery allowed against real estate broker who promised gratuitously to submit bid on property for plaintiff), reversed on other grounds, 255 N.Y. 274, 174 N.E. 652 (1931). *Accord:* AGENCY RESTATEMENT §378, comment *a,* illustration 1 (1933); First National Bank & Trust Co. v. Evans, 11 N.J. Misc. 19, 163 A. 667 (1932) (mortgagee who promised mortgagor to file proof of fire loss liable for not doing so); Condon v. Exton-Hall Brokerage and Vessel Agency, 80 Misc. 369, 142 N.Y.S. 548 (1913) (defendant liable for failing to cancel insurance policies as promised); Phoenix Ins. Co. v. Thomas, 103 W.Va. 574, 138 S.E. 381 (1927) (agent who failed to cancel insurance cannot escape liability by proving his promise gratuitous); Feldmeyer v. Engelhart, 54 S.D. 81, 222 N.W. 598 (1928) (lack of diligence in procuring requested insurance); Lusk-Harbison-Jones, Inc. v. Universal Credit Co., 164 Miss. 693, 145 S. 623 (1933) (defendant liable for failure to provide insurance it said was carried). Analogous cases include: Lough v. John Davis & Co., 30 Wash. 204, 70 P. 491 (1902) (agent held liable in *tort* to third person where he had assumed control of a building); Merchant's Cotton Press & Storage Co. v. Miller, 135 Tenn. 187 at 196, 186 S.W. 87 (1916) (landlord liable in *tort* to third party where he had promised lessee to repair). *Contra:* Thorne v. Deas, 4 Johns. (N.Y.) 84 (1809); Brawn v. Lyford, 103 Me. 362, 69 A. 544 (1907) (no contractual liability if promisor fails to secure consent of insurance carrier to transfer of interests); Republic Thrift Syndicate v. Atkinson, (Tex. Civ. App. 1929) 21 S.W. (2d) 1102 (one attempting gratuitously to obtain insurance for another but failing to do so not liable for pure nonfeasance); Quincy & Co. Arbitrage Corp. v. Cities Service Co., 156 Misc. 83, 282 N.Y.S. 294 (1935) (one who agrees voluntarily to offer shares of stock for sale, but fails to do so is not liable); National Bank of Fayette County v. Valentich, 343 Pa. 132, 22 A. (2d) 724 (1941) (failure to sell collateral as promised does not create liability).

Some of the cases which illustrate the liability of the gratuitous agent have already been discussed from the viewpoint of the bailment analogy. They are equally fruitful, so far as promissory estoppel is concerned, if they are examined from the viewpoint of principal and agent.

Cases like *Coggs v. Bernard* and *Siegel v. Spear & Co.*, for example, are as likely to be decided in favor of the plaintiff on the ground of misfeasance[145] as on the ground that the promisor induced the promisee to rely on his promise to render specific service.[146] The point to be emphasized is that recovery of damages presupposes breach of an existing duty. The duty can arise out of a promise to perform it which is purchased at a price; if promissory estoppel is employed it can arise where a gratuitous promise induces action in reliance and injustice will result from non-enforcement. Or it can be created by law as an incident to a relationship that is found to exist between the parties. The duty to use care which the law imposes on an *agent* in regard to his principal's chattels does not depend on whether the agent is to be paid for his services. Rather, it depends on whether there is a principal-agent relationship; so, in regard to the duty a bailee owes his bailor. That the promisor was to be paid for his services is some evidence of the relationship. Lack of payment will not prevent the relationship from arising. Thus, in *Siegel v. Spear & Co.*, one may view the promise to insure as exchanged for permission to store plaintiff's goods or as a gratuitous promise to render a definite service. And the failure to insure can be regarded as mishandling the goods. If the court finds that the defendant has violated a duty, he responds in damages.

The gratuitous promise to render a specific service in connection with the obtaining or maintaining of an insurance policy has been a source of much litigation. Numerous cases impose liability on the promisor because his promise induced the insured to stand by and not protect his own interests.

In *Maddock v. Riggs*,[147] the beneficiary of a fraternal insurance policy recovered the amount that would have been due if defendant-promisor had remitted promptly the dues (premiums) which had been paid to him by the insured-promisee. Defendant (also a member of the

[145] Discussed in Part I, 50 MICH. L. REV. 639 at 665-674 (1952).

[146] Other illustrative cases: Jenkins v. Bacon, 111 Mass. 373 (1873); Kowing v. Manly, 49 N.Y. 192 (1872).

[147] 106 Kan. 808, 190 P. 12 (1920). *Accord:* Criswell v. Riley, 5 Ind. App. 496, 30 N.E. 1101, 32 N.E. 814 (1892) (gratuitous procurement of insurance policy followed by negligent failure to pay premium); Feldmeyer v. Engelhart, 54 S.D. 81, 222 N.W. 598 (1928).

fraternal organization) had previously been an authorized collector of dues. Insured had always promptly paid his dues to defendant. When defendant ceased being an authorized collector insured still paid him the monthly dues. Ordinarily, defendant remitted promptly, but in October 1917, he was late in making payment. As a result, Maddock was suspended. Reinstatement was refused unless insured had another physical examination. Maddock was not informed of this and continued to pay his monthly dues to Riggs who deposited them in a special trust fund. When Maddock died in February 1918, he had not yet been told of the suspension. The Kansas Supreme Court held Riggs for the face amount of the policy.

Maddock v. Riggs appears to be a simple bailment case. But it is more than that. There was no question of loss or damage to the subject matter of the bailment—if this is a case of bailment. Indeed, the promisor still had the dues on deposit in the bank. Plaintiff recovered a sum equal to the face amount of the policy, not just the amount of the deposit with interest.

When the court holds the promisor liable for such a sum, it goes far beyond *Coggs v. Bernard* in attaching consequences to a gratuitous promise. Promisor's continued acceptance of the money, his failure to advise insured of the policy's cancellation (though he "couldn't bear to tell him"), and promisee's reliance on performance, seem to be the most important factors in the case. This promisor both expected and induced the insured to rely on the promise. When he did so, the promisor should bear the loss occasioned by his own misconduct.

It is the very element of foreseeability which, in a case like *Maddock v. Riggs*, justifies a court in extracting damages from the gratuitous promisor. The dues were paid to defendant so that he could forward them to the fraternal insurance organization. In the beginning he received them as an official collector. Subsequently he may have accepted them because of the fraternal bond between insured and himself. It may even have been because of inertia or habit. Defendant knew that if he failed to remit on time the policy would lapse. This could cause a severe monetary loss. He could have escaped liability by declining to accept further payments. When he did not decline, he should bear the loss rather than insured or the beneficiary. Assessable damages should depend on "those injuries that the defendant had reason to foresee as a probable result of his breach" when the promise was made.[148] This

[148] CONTRACTS RESTATEMENT §331(2). The application of the rule of Hadley v. Baxendale to promissory estoppel is discussed in Boyer, "Promissory Estoppel: Requirements

defendant could expect his non-performance to cause a monetary loss equal to the face of the policy. That he should make that loss good does not seem unreasonable.

Two recent cases from Mississippi furnish additional illustrations of the liability of the gratuitous promisor. In one of them,[149] a taxpayer gave the tax collector a check in payment of taxes due. The collector held the check for four days after receipt; by then the bank on which it was drawn had closed its doors. Believing that a cause of action had been stated, the court said, "But even should we hold that the appellee (collector) was a mere gratuitous agent, nevertheless he will be liable to the appellant (taxpayer) if it lost its money because of a failure by the appellee to exercise that degree of care and diligence that he should have exercised. This is in accord with practically all of the authorities which hold, in effect, as set forth in Sec. 599, A.L.I. Rest. Agency, Tentative Draft No. 7."[150]

The other Mississippi case is *Brewer v. Universal Credit Co.*[151] There defendant, assignee of an installment purchase-money conditional sales contract, repossessed plaintiff's automobile when his payments were delinquent. It agreed to store the car for thirty days and to allow plaintiff that period in which to pay the past-due installments and regain his car. It did not do so; instead, it sold the car to a third party. In the ensuing action for damages, defendant obtained a directed verdict. On appeal the court reversed, holding that section 90 of the *Contracts Restatement* applied and saying, "We are, therefore, not concerned with . . . whether the agreement to hold the car for thirty days . . . was an agreement supported by a valuable consideration. . . . It was an agreement which was calculated to induce the promisee to expend his efforts to meet the two installments within the thirty days, and he did so. . . ."

These two cases could also have been decided on a bailment theory, but the court elected to go beyond the narrow confines of misfeasance. It fitted the *Sunflower Compress* case into the gratuitous agency mold and the *Brewer* case into that of promissory estoppel.

Hammond v. Hussey[152] indicates the scope of the liability to which

and Limitations of the Doctrine," 98 UNIV. PA. L. REV. 459 at 461-463, 485-488 (1950). See CORBIN, §208.

[149] Sunflower Compress Co. v. Clark, 165 Miss. 219, 144 S. 477, 145 S. 617 (1933).

[150] Id. at 231. Section 599 of Tentative Draft No. 7 became section 378, AGENCY RESTATEMENT (1933).

[151] 191 Miss. 183 at 190, 192 S. 902 (1940).

[152] 51 N.H. 40 (1871).

one may subject himself by a gratuitous undertaking. Defendant promised the school board to examine candidates for admission to school and truthfully to report their qualifications. Plaintiff qualified but defendant reported otherwise. The court permitted plaintiff to maintain an action on the case. It relied on *Coggs v. Bernard* saying, "The analogy is obvious, and the principle involved and by the application of which this case is determined, is, that—the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it. . . ."[153]

As remarked above, insurance litigation provides many illustrations of the enforcement of gratuitous promises. One of the early cases is *Wilkinson v. Coverdale.*[154] Lord Kenyon there held that if a person gratuitously undertakes to obtain an insurance policy for another but conducts himself so negligently in perfecting it that the promisee is not able to recover on the policy when the property is thereafter destroyed, case will lie for the promisor's negligence.

Elam v. Smithdeal Realty and Investment Co.[155] is a modern counterpart. The defendant gratuitously undertook to obtain automobile insurance for plaintiff. He did procure a policy which was delivered to plaintiff. Thereafter the car was damaged in an accident and it was discovered that the issued policy did not cover such loss. On appeal, nonsuit was reversed. In holding that a cause of action had been stated, the court decided that consideration was not necessary where the agent had tried to act as he had promised and that he was bound to use ordinary care in so doing.

Whether the agent has attempted to procure additional insurance[156] or has failed to effect a cancellation of existing policies,[157] courts have imposed liability. They have even permitted recovery, sometimes in

[153] Id. at 50. The court also quoted from Parsons on Contracts to the effect that "if a person makes a gratuitous promise, and then enters upon the performance of it, he is held to a full execution of all he has undertaken." It is of this quotation that Professor Williston wrote, "The quotation from Professor Parsons goes far beyond the rule stated in Section 90, and if literally taken goes beyond anything that can be accepted." AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW OF CONTRACTS, Official Draft, Chapters 1-7, appendix 297 (1928).

[154] Wilkinson v. Coverdale, 1 Esp. 75, 170 Eng. Rep. 284 (1793) (*note,* plaintiff was subsequently nonsuited when he failed to prove the promise).

[155] 182 N.C. 599, 109 S.E. 632 (1921).

[156] Baxter v. Jones, 6 ONT. L. REP. 360 (1903) (insurance agent gratuitously promised to place additional insurance *and* to notify other insurance carriers of the increase. He neglected the notification, thus making the new policy unenforceable).

[157] Condon v. Exton-Hall Brokerage and Vessel Agency, 80 Misc. 369, 142 N.Y.S. 548 (1913). *Accord:* Phoenix Ins. Co. v. Thomas, 103 W.Va. 574, 138 S.E. 381 (1927).

tort and sometimes in contract, where the event intended to be insured against occurs before the policy is issued.[158]

Why is this liability imposed? The reason given often has an ethical basis. One court said, "Defendant's conduct lulled the plaintiff into the position of assuming defendant would carry out what it had undertaken to do, and if this defendant for the purpose either of retaining a client or a premium, took the chance of continuing the policy by not canceling it as directed, and as it undertook to do, it must bear the burden and pay the loss."[159] Judge Cardozo stated the reason most aptly when he wrote, "In such circumstances the defendant is not relieved of liability because in so acting as agent he was serving without pay. . . . He entered upon the business of his agency, took out the promised policy and exacted money from his principal to make him whole for his expense. He could not do these things in performance of the mandate, and win exemption thereafter if performance was remiss or ineffective."[160]

Clearly, these courts have determined that on the facts presented there had been a loss suffered by the promisee, that the activities (or even non-action) of promisor had caused the loss and that justice demands that the promisor be held. Such reasoning, clearly, is an application of the doctrine of promissory estoppel to the specific field of agency.

In the agency cases discussed so far the gratuitous promisor has either received something from the promisee or has begun to do something for him. But what if the promisor refuses to begin his promised performance? Should he then be liable for breach of his gratuitous promise? If the promisor is to be held liable, it should be on reasoning more substantial than a fine distinction between misfeasance and non-

158 Recovery in contract: Boyer v. State Farmers Mutual Hail Ins. Co., 86 Kan. 442, 121 P. 329 (1912) (agent delayed so long in forwarding premium note and application for hail insurance that crop was destroyed before policy issued. The agent "was under a duty to do something. He did nothing"); Affleck v. Kean, 50 R.I. 405, 148 A. 324 (1930) (plaintiff recovered in assumpsit against gratuitous agent who had misdescribed automobile intended to be covered in policy). Recovery in tort: Duffy v. Bankers Life Ins. Assn., 160 Iowa 19, 139 N.W. 1087 (1913) (recovery in tort by intended beneficiary against agent when insured died during month that agent delayed forwarding application and first premium).

159 Condon v. Exton-Hall Brokerage and Vessel Agency, 80 Misc. 369 at 376, 142 N.Y.S. 548 (1913).

160 Barile v. Wright, 256 N.Y. 1 at 5, 175 N.E. 351 (1931). *Accord:* Warrener v. Federal Land Bank, 266 Ky. 668, 99 S.W. (2d) 817 (1936) [citing AGENCY RESTATEMENT §378 (1933)]; Soule v. Union Bank, 45 Barb. 111, 30 How. Pr. 105 (N.Y. 1865); Evan L. Reed Mfg. Co. v. Wurts, 187 Ill. App. 378 (1914).

feasance.[161] There must have been a breach of duty. Was there a duty owed to the promisee by the gratuitous promisor?

Consider the cases of the railroad company that failed to file a rebate claim for a shipper,[162] the real estate broker who failed to hand in a written bid at a property sale,[163] and the mortgagee who, with the fire insurance policy in his possession, promises the mortgagor to file proper proof of loss but does not do so.[164]

The acceptance of the claim papers can be considered as tantamount to a bailment; so might the acceptance of the written bid which is to be submitted at the real estate sale. In both instances promisor receives from promisee documents without which the promised performance can not be given. It is possible, therefore, to treat such examples as illustrative only of the bailment rule on misfeasance. On the other hand, one may treat them as more than that, as demonstrating the creation of liability based on a gratuitous undertaking with the acceptance of the documents evidencing the agreement but not essential to its enforcement.

Will it affect the result if the promisor is already in possession of all the papers necessarily connected with the prosecution of promisee's claim? Illustrative is the instance where the promisor agrees to have indorsements made or claims filed on insurance policies in his care at the time. Should the promisor be held liable if damage is caused to the promisee by reasonable reliance on the promise? In *Brawn v. Lyford,*[165] the promisee was denied recovery of the amount of the policy when promisor failed to perform his gratuitous agreement to have the insurance transferred when the property was sold to plaintiff. The reason given by the court was lack of benefit to the promisor—the injury suffered by plaintiff was overlooked. Save by enforcing this promise, plaintiff's expectations could not be protected. The contrary result has

[161] That a similar problem arises in the Torts field, see PROSSER, TORTS §33 (1941): ". . . But in all these cases the courts have been quick to find some basis to hold that the conduct is after all misfeasance: failure to heat a building becomes mismanagement of a boiler; and an omission to repair a gas pipe is treated as misfeasance in the distribution of gas. . . ."

[162] Carr v. Maine Central R.R., 78 N.H. 502, 102 A. 532 (1917) (recovery allowed in tort for negligence, but as has been pointed out, "the only negligence was a neglect to keep a promise," CORBIN, §207).

[163] Kirby v. Brown, Wheelock, Harris, Vought & Co., Inc., 229 App. Div. 155, 241 N.Y.S. 255 (1930) (recovery allowed), reversed on other grounds, 255 N.Y. 274, 174 N.E. 632 (1931). *Accord:* AGENCY RESTATEMENT §378, comment *a*, Illustration 1 (1933).

[164] Recovery allowed: First National Bank & Trust Co. v. Evans, 11 N.J. Misc. 19 at 20, 163 A. 667 (1932); *Contra:* Brawn v. Lyford, 103 Me. 362, 69 A. 544 (1907).

[165] 103 Me. 362, 69 A. 544 (1907).

been reached in New Jersey[166] in a case in which the mortgagee after promising the mortgagor to have the policy "endorsed in such a manner 'to see that the interest of every one would be properly protected,'" had only its own interest protected. The New Jersey court in overruling a motion to strike based its decision on *Thorne v. Deas* and held that a case of misfeasance had been stated.

If something tangible is handed over to the promisor at the time of the promise, there is then provided additional evidence tending to prove the promise. But the presence or absence of such evidence neither proves nor disproves the fact of reliance or the fact of harm. The elements of deliberateness and foreseeability are more readily proved in the bailment cases than they are in instances where the promisor does not take possession of a chattel at the time he makes the promise. As great an injustice may be done to a promisee who relies upon a gratuitous promise to effect insurance and then finds that he is without a remedy, as will be caused a charity or an occupier of land who incur liabilities or make expenditures in reliance on a donor's gratuitous promise. Recovery should be allowed in both instances, not denied in the former.

Section 378 of the *Agency Restatement* exemplifies the basic promissory estoppel doctrine in a particular field. Cases substantiating the principle embodied in that section indicate a basis for liability in contract for failure to perform a gratuitous promise as well as in tort. Thus, they break down the older view that either consideration for the promise or misfeasance in the performance of a gratuitous act is essential to liability. Instead, the reliance element is stressed. The gratuitous agent should be held because he has "injected himself into the affairs of another by his undertaking or promising, by which reliance has been induced."[167]

Whether or not he actually began performance should not be the controlling factor. The question should be whether his failure to perform has caused harm to one who has been induced to rely upon his promise to render a gratuitous service. If it has, the promisor should respond in damages, if that is the only way to avoid injustice to the promisee. The modern agency cases so hold. When they do so, they are disregarding the distinction between nonfeasance and misfeasance.

[166] First National Bank & Trust Co. v. Evans, 11 N.J. Misc. 19 at 20, 163 A. 667 (1932).

[167] AMERICAN LAW INSTITUTE, RESTATEMENT OF AGENCY, Tentative Draft No. 7, 249 (1932).

At the same time they are furnishing specific precedents which validate the doctrine of promissory estoppel.

E. *Miscellany*

The precedents for promissory estoppel which have been examined thus far (charitable subscriptions, promises to make gifts of land, and gratuitous bailment and agency) are conventionally recognized as furnishing justification for the doctrine. There are at least three other factual situations which are worthy of study for their contribution to promissory estoppel. Included are (1) bonus and pension claims, (2) waiver situations and (3) rent reductions. In all of them the invariable defense to enforcement is a plea that the promise sought to be enforced was gratuitous. But enforcement frequently occurs. When it does, justification can most often be found in the doctrine of promissory estoppel.

1. *Bonus and Pension Plans.* Wholly aside from questions of labor policy, economics and management, cases dealing with attempts to enforce bonus and pension plans present interesting problems to one who studies changing concepts in the field of contract law.

Is a promise to pay a pension or bonus enforceable? Has the employer promised to confer a mere gratuity, or has he bought faithful service for which he must pay? Some cases take the view that promises to pay pensions create no rights, that they involve only gratuities,[168] saying "Such offer was based on motive and not on consideration and cannot be enforced in court."[169]

Everyone is aware of the conflict of authority regarding the enforceability of a promise to pay an additional sum for services the promisee is already under a duty to perform.[170] But the right of an employee to recover a pension or bonus runs afoul of this problem only when the employee has already contracted to serve for the specific time or perform the exact service for which it was promised. If the employee is

[168] Dolge v. Dolge, 70 App. Div. 517, 75 N.Y.S. 386 (1902); Russell v. H. W. Johns-Manville Co. of California, 53 Cal. App. 572, 200 P. 668 (1921); WILLISTON, §130 B. See CORBIN, §153.

[169] Shear Co. v. Harrington, (Tex. Civ. App. 1924) 266 S.W. 554 at 557.

[170] CONTRACTS RESTATEMENT §§76(a), 77; WILLISTON, §§130, 130A; CORBIN, §175. The relation of this problem to promissory estoppel is discussed infra pp. 892 to 898, in connection with Rent Reductions.

free to leave the service, he is free to contract to remain and the promise to pay the bonus has ample consideration.[171] Many of the courts which allow recovery by the employee hold that the promise to pay the bonus or pension constitutes an offer for a unilateral contract and that when the employee, after notice of the promise, continues to work for the employer he thereby accepts the offer.[172]

In numerous instances the employee was induced to remain on the job because of his reliance upon the promise of the bonus or pension. The benefits accruing to an employer who is thus able to reduce his labor turnover are clear.[173] Because of that benefit, there is a tendency on the part of the courts to try to enforce these promises. This tendency is exemplified in statements such as these: "To allow the employer in such a case to repudiate liability on the ground stated [that since the pension plan was established by a corporation by-law, third parties could assert no rights thereunder] would come perilously near conniving at . . . a fraud";[174] "It [the evidence] establishes that plaintiff relied upon the promises of defendant, and continued in its employment . . . and that . . . he declined employment elsewhere . . .";[175] "To disregard the positive promises . . . is to brand the plan as a deceptive gesture of ostensible generosity. . . ."[176] These statements show the possibility of deciding such cases on the basis of the doctrine of promissory estoppel when reliance is coupled with the need to avoid injustice.

Indeed, two cases from Pennsylvania have relied expressly on that doctrine in deciding that promises to pay pensions are enforceable. The first of these, *Langer v. Superior Steel Corporation*,[177] found the court sustaining an action in assumpsit wherein plaintiff sought to hold his former employer to a promise to pay him "$100 per month as long as you live and preserve your present attitude of loyalty to the company and its officers and are not employed in any competitive occupation."

The Common Pleas Court had sustained questions of law raised by the defendant. The real issue was whether the case involved "a

[171] Kerbaugh, Inc. v. Gray, (2d Cir. 1914) 212 F. 716; Haag v. Rogers, 9 Ga. App. 650, 72 S.E. 46 (1911); J. L. Phillips & Co. v. Hudson, 9 Ga. App. 779, 72 S.E. 178 (1911).

[172] Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 N.W. 769 (1912); Fuller Co. v. Brown, (4th Cir. 1926) 15 F. (2d) 672; Roberts v. Mays Mills, 184 N.C. 406, 114 S.E. 530 (1922); Scott v. J. F. Duthie and Co., 125 Wash. 470, 216 P. 853 (1923); Tilbert v. Eagle Lock Co., 116 Conn. 357, 165 A. 205 (1933); Schofield v. Zion's Co-op. Mercantile Institution, 85 Utah 281, 39 P. (2d) 342 (1934); Wilson v. Rudolph Wurlitzer Co., 48 Ohio App. 450, 194 N.E. 441 (1934); Mabley & Carew Co. v. Borden, 129 Ohio St. 375, 195 N.E. 697 (1935); Psutka v. Michigan Alkali Co., 274 Mich. 318, 264 N.W. 385 (1936).

gratuitous promise or an enforceable contract." Judge Baldridge held that the promise could be enforced as a unilateral contract or on the theory of promissory estoppel.[178]

Considered as an offer for a unilateral contract, we may justify the holding because the plaintiff's refraining from working with defendant's competitors is a distinct advantage and benefit. If defendant refrains from working for others, there is likewise a detriment to him. If it is assumed that the promise to pay the monthly pension was exchanged for plaintiff's refraining there certainly is a bargained-for consideration for the promise.[179]

It is the promissory estoppel aspect of the case, though, that is of more interest. The court flatly said the contract was enforceable on the theory of promissory estoppel.[180] As authority, it cited section 90 of the *Contracts Restatement* and *Ricketts v. Scothern*.[181] The court took pains to state that not every gratuitous promise on which one has relied will be enforced, but only those where a detriment of a definite and substantial character has been incurred.

The other Pennsylvania case is *Trexler's Estate*[182] which arose in Orphan's Court. Deceased had, for some time before his death, paid pensions to employees who had previously worked for him for many years. The question for decision was whether the promises to pay pensions were enforceable against the estate. The court held that they were.[183]

The opinion contains a very complete discussion of section 90 of the *Restatement* and relies upon it as authority for enforcing the promise. The employer's promise to pay the pension induced in the minds

[173] Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 N.W. 769 (1912).
[174] Id. at 521.
[175] Fuller Co. v. Brown, (4th Cir. 1926) 15 F. (2d) 672 at 675.
[176] Psutka v. Michigan Alkali Co., 274 Mich. 318 at 320, 264 N.W. 385 (1936).
[177] Langer v. Superior Steel Corp., 105 Pa. Super. 579, 161 A. 171 (1932), reversed (on ground that president did not have authority to make the promise sued on) 318 Pa. 490, 178 A. 490 (1935).

[178] See PATTERSON AND GOBLE, CASES ON CONTRACTS, 2d ed., 439 (1941), Note, "Employee Bonus Cases." See also Fuller, "Williston on Contracts," 18 N.C.L. REV. 1 at 6 (1939).
[179] WILLISTON, §112.
[180] Langer v. Superior Steel Corp., 105 Pa. Super. 597 at 584, 161 A. 571 (1932).
[181] 57 Neb. 51, 77 N.W. 365, 366 (1898).
[182] 27 Pa. D. & C. 4 (1936).
[183] The executors were not directly opposing the claims made by the superannuated employees but, being of the opinion that there was no legal basis for the claim, required an order of court before making payment.

of the employees a sense of security. It was the injustice of suddenly stopping the payments that appealed most strongly to the court. To avoid this injustice the court enforced the promise saying, "All the circumstances show that when General Trexler made the promise, he intended to be bound. Not once during his lifetime did he attempt to recall it. . . . The promise became a solemn covenant between him and the claimants. It was not based on the historical and traditional term of consideration . . . why should the law be astute and bring into the case highly strained technical principles of law requiring consideration, to invalidate a contract which the parties themselves understood to be complete and valid? General Trexler in his lifetime never welshed on his promise; why should his estate?"[184]

The general tendency in recent bonus and pension cases is to enforce the promise against the employer. This is done even though the announcement of the plan contains a statement that no legal rights are created and there is a stipulation of non-enforceability.[185] The cases raise interesting technical questions in the field of consideration. Normally, one will doubt whether there is an intent to make a bargain. But there is no doubt that the promise is relied upon by the employee over a considerable period of time and that his subsequent course of conduct is influenced by the expectations aroused by the promise. It is only the employee who has served for many years who qualifies for any substantial pension. When his reliance is coupled with the injustice that will result from not enforcing the promise it is easy to understand why the courts impose liability. Those that do so and justify their action by the doctrine of promissory estoppel demonstrate the role which reliance is playing in the modern enforcement of promises. They likewise indicate the wide basis for the adoption of that doctrine.

Akin to the pension and bonus cases are instances like *Ricketts v. Scothern*.[186] In that case, as is well known, a grandfather, telling his granddaughter that "None of my grandchildren work and you don't have to," gave her a demand promissory note for $2,000 bearing 6% interest. In reliance on the promise evidenced by the note, she quit her

[184] Trexler's Estate, 27 Pa. D. & C. 4 at 16, 17 (1936).

[185] It is not within the province of this article to consider the effect of a stipulation denying legal effect in an employer's voluntary pension, bonus or death benefit plan. On this see comment by Professor Grismore, 34 MICH. L. REV. 700 (1936), and FULLER, BASIC CONTRACT LAW 381 (1947).

[186] 57 Neb. 51, 77 N.W. 365 (1898).

employment. Thereafter he paid the interest for one year, and excused his failure to do so the second year. After his death, suit was brought against his executor to recover the amount of the note. The defense was want of consideration.

The Supreme Court of Nebraska affirmed a judgment for plaintiff saying, ". . . Ordinarily such promises are not enforceable even when put in the form of a promissory note. . . . But it has often been held that an action on a note given to a church, college, or other like institutions, on the faith of which money has been expended or obligations incurred, could not be successfully defended on the ground of want of consideration. . . . The true reason is the preclusion of the defendant, under the doctrine of estoppel to deny the consideration. When the payee changes his position to his disadvantage in reliance on the promise, a right of action does arise. . . . Having intentionally influenced the plaintiff to alter her position for the worse on the faith of the note being paid when due, it would be grossly inequitable to permit the maker, or his executor, to resist payment on the ground that the promise was given without consideration."[187]

Ricketts v. Scothern appears to be one of the earliest cases embodying the rationale of promissory estoppel. Even a cursory reading of it shows the importance the court attaches to detrimental action in reliance on the promise. The court in emphasizing this element helped pave the way for the express formulation of the doctrine some thirty-five years later.[188]

It will be observed that *Ricketts v. Scothern* did not involve the delivery of a chattel to, or the beginning of performance of any service by, the promisor. Yet the court enforced the promise. In so doing, it extended the scope of contractual liability. Those who agree with this court must ask themselves whether the lack of delivery of something tangible requires a decision of non-liability on breach of the promise.

If a sister-in-law, in reliance on a promise to "let her have a place to raise her family" abandons a homestead and moves her family some sixty miles, should the brother-in-law be liable in damages when he refuses to provide her with a home?[189] If not, the holding must be dis-

[187] Ricketts v. Scothern, 57 Neb. 51 at 54, 77 N.W. 365 (1898).

[188] A modern application of Ricketts v. Scothern is found in Fluckey v. Anderson, 132 Neb. 664, 273 N.W. 41 (1937), which cites §90 of the *Contracts Restatement* and the principal case as authority for allowing recovery on a gratuitous promise.

[189] Kirksey v. Kirksey, 8 Ala. 131 (1845) (denied liability).

tinguished from *Devecmon v. Shaw*[190] where a nephew who spent money in reliance on his uncle's promise to pay the expenses of a trip to Europe was held to have stated a cause of action in contract when he recited these facts. The Maryland court said it was not enforcing a gratuitous promise and that "it was a burden incurred at the request of the other party and was certainly a sufficient consideration for a promise to pay." Going to Europe *could* be sought by the promisor as the exchange for a promise to pay a sum equal to the cost of the trip, but one may well doubt whether there was any intent here to make a bargain. As has been said, "The same thing, therefore, stated as the condition of a promise may or may not be consideration, according as a reasonable man would or would not understand that the performance of the condition was requested as the price or exchange for the promise."[191]

The obvious injustice of the *Kirksey* decision illustrates pointedly the difficulties inherent in a philosophy which utilizes the bargain concept as the only source in explaining the creation of contract liability. Much more preferable is a view which recognizes reliance as a second, even though subsidiary, basis for the enforcement of promises. This the pension and bonus cases do.[192]

2. *Waiver.* The term "waiver" has a number of meanings in our contract law.[193] It often happens that contractual liabilities are made contingent upon the performance of a condition. If claimant's right is subject to an implied or express condition, inquiry must be made to determine whether the condition has been performed. Unless it has, or that performance excused, claimant's right is not perfect. "The possible excuses for failure to perform such conditions are few."[194] Included among the few is waiver. Williston concludes that, in its strict sense, waiver is to be defined as "A promise or permission express or implied in fact, supported only by action in reliance thereon, to

[190] 69 Md. 199 at 201, 14 A. 464 (1888).

[191] WILLISTON, §112.

[192] WILLISTON, §130B, discusses the bonus and pension problem in a general way. He justifies enforcement on one of two theories where the promise is not made to obtain a service already due. The first ground is that there is an offer for a unilateral contract that is accepted by continuing to work. The other ground is promissory estoppel.

[193] WILLISTON, §679, enumerates at least nine of them.

[194] WILLISTON, §676, lists seven of them. Included are (1) impossibility, (2) prevention by promisor, (3) waiver, (4) new contract, (5) acceptance of defective performance, (6) anticipatory breach, and (7) forfeiture and penalty.

excuse performance in the future of a condition or to give up a defense not yet arisen, which would otherwise prevent recovery on an obligation."[195] It is in this narrower sense that the word "waiver" is employed here.

Now examine this narrower meaning to determine the essential elements of a "waiver." There must be an indication that the performance on which the obligation depends is excused. This indication or manifestation may be embodied in a promise or in a permission, express or implied. It must apply to a performance not yet due or to a defense that has not yet become available. And the performance or defense must be such as to defeat the obligation. In a sense, we have here a present surrender of something that is not yet available to the one who gives the promise or permission. So much for the first element. The second element is action in reliance on the promise or permission by the one to whom it is given. If these elements concur the promise or permission is usually binding though without consideration, for the injustice that results in such reliance ordinarily is obvious.

Sometimes it is said that this situation will constitute an "estoppel."[196] There has only been a representation as to *future action* not as to presently existing fact,[197] so the situation should be catalogued as one of *promissory* estoppel. It is properly so placed because, even though no consideration is paid for the promise or permission, it is held binding when detrimental action in reliance upon it has occurred and restoration of the *status quo* is impossible.

Justification for such holdings is readily found when one considers the ethics of the situation. To permit a party to a contract to induce the other to continue preparations for performance in reliance upon a promise to accept regardless of the time performance is tendered, and to permit him then to refuse acceptance and defend on the ground that the condition was not performed, is unjust. Particularly is this so in the "strict" waiver cases where at the time the waiver occurs it is still possible for the performer to fulfill the condition but the representation induces him not to do so.

[195] WILLISTON, §679. *Accord:* Colbath v. H. B. Stebbins Lumber Co., 127 Me. 406, 144 A. 1 (1929).

[196] GRISMORE, PRINCIPLES OF THE LAW OF CONTRACTS §161 (1947), calls it a "pseudo estoppel" and explains the result of the cases on the basis of promissory estoppel.

[197] GRISMORE, §161; WILLISTON, §689.

Classic illustrations of the application of the doctrine of waiver, as used in the strict sense, include the following:

1. Enforcement of promises to accept performance after the due date where the promise is made before that date and the promisee, in reliance thereon, makes his tender within the extended time.[198]

2. Performance of construction work on an oral order though the original contract required written change orders as a condition for imposing liability.[199]

3. Promises to waive presentment and notice of dishonor of negotiable instruments made before maturity become effective when made by the person entitled to such notice.[200]

4. Enforcement of promises to subscribe to corporate stock despite non-compliance with the condition that a call be made when subscriber has indicated that he will not require the call.[201]

Characteristic of these illustrations is the fact that in each instance the promisee has, in reliance upon the promise not to insist upon the performance of the condition, neglected or failed to perform it. Enforcement of the promise to "waive" the condition can be justified only on the basis of promissory estoppel.[202] Moreover, unless the promisee has acted in reliance upon the undertaking to waive the condition, there is no reason why the promisor should not be permitted to plead failure of the conditon as a defense. If there has been no detrimental change in position, the promisee is not harmed by requiring him to perform according to "the letter of the contract." For these reasons, it is usually held that waivers may be recalled and performance of the condition insisted upon if this is done before a change in position has occurred and if an opportunity is given the promisee to perform the reinstated condition.[203]

198 Shallenberger v. Standard Sanitary Mfg. Co., 223 Pa. 220, 72 A. 500 (1908); Parish Mfg. Corp. v. Martin-Parry Corp., 293 Pa. 422, 143 A. 103 (1928); WILLISTON, §§689, 856, lists numerous cases.

199 Saliba v. Zarthar, 282 Mass. 558, 185 N.E. 367 (1933); Causte v. Board of Essex County, 9 N.J. Misc. 2, 152 A. 640 (1930); Belt v. Stover, 157 Okla. 176, 11 P. (2d) 519 (1932); Douglass and Varnum v. Morrisville, 89 Vt. 393, 95 A. 810 (1915); Davis v. La Crosse Hospital Assn., 121 Wis. 579, 99 N.W. 351 (1904).

200 Uniform Negotiable Instruments Law, §§109, 110, and 111; WILLISTON, §1186; Citizen's Nat. Bank v. Jennings, 33 Ga. App. 659, 127 S.E. 657 (1925) (waiver implied from previous dealings); Orthwein v. Nolker, 290 Mo. 284, 234 S.W. 787 (1921) (waiver by agreement).

201 WILLISTON, §689; COOK, CORPORATIONS, 8th ed., §105 (1923).

202 WILLISTON, §689; GRISMORE, §161.

203 CONTRACTS RESTATEMENT §88 (promise to perform a duty in spite of the non-performance of a condition), §297 (excuse of condition by waiver), §308 (waiver of the effect of a condition subsequent), and §311 (re-establishment of a time-limit for performance). See WILLISTON, §689, note 14, for a collection of cases.

Similar to the problem just considered is the one posed by the decision in *Hetchler v. American Life Ins. Co.*[204] The insurance company informed the insured that his policy had a value which would give him paid-up insurance until a specific date. The insured took no steps to procure other insurance. When he died before the date mentioned by the company it sought to defend a suit by the beneficiary by showing that there had been a mistake in figuring the date to which the paid-up insurance would extend. It was not permitted to do so and the company was held liable. Here there could be only one correct answer to the question of how much paid-up insurance could be obtained on this particular policy. The deceased might have determined the date himself or had others do so, though this would involve solution of a technical statistical problem. The insurer just believed what the insurance company told him. It appears from the case that he took no action to obtain insurance elsewhere. But it does not appear that he could have done so even though he had wished to have another policy written. The case, therefore, may be said to lack an essential element for the application of the doctrine of promissory estoppel: the element of harm resulting from action in reliance on the promise. If he could not have obtained other insurance, his reliance caused him no hurt.

If liability is to be imposed in such cases, it rests on a theory which emphasizes representation instead of exchange or reliance. Perhaps the case also indicates that estoppel will be more readily recognized as an excuse for a breach of condition than is estoppel as the basis for liability on a *new* promise. It may well be that courts are more often justified in requiring performance of a promise despite the failure of a condition, where the failure is due to promissor's statement that performance will not be required, than they are in creating liability where none existed before. It may seem more just to require enforcement of a promise to excuse than of a promise to create a legal relationship, but it is submitted that exactly the same elements should be weighed before decision in either case. This the *Hetchler* case failed to do.

Analogous are cases involving waiver of the statute of limitations. Care must be taken when considering this category to distinguish between instances of true bargain and those which actually involve only a promissory estoppel. If restraint in suing on a claim is bargained for as the exchange for promisor's promise or performance there is no occasion to invoke the doctrine.[205]

[204] 266 Mich. 608, 254 N.W. 221 (1934).

[205] Lewis v. Siegman, 135 Ore. 660 at 663, 296 P. 51 (1931), "An agreement by

In the case of "unbargained-for reliance,"[206] though, unless resort is had to the doctrine of promissory estoppel, one is hard pressed to explain and justify the result of the cases.[207] When this is done, a rational basis for decision is provided for courts which desire to avoid the injustices that arise from a strict application of conventional contract rules relating to bargains.

3. *Rent Reductions.* If the lessor and the lessee during the term agree to a reduction in the rent and the tenant pays the smaller sum, may the landlord later recover the difference between the amount paid and the rent specified in the lease?

In support of the landlord's claim it may be said that the payment of the lesser sum by the tenant is not a "legal detriment" to him for he has only paid *less* than he owes; no "legal benefit" accrued to the lessor in accepting less than was due.[208] Hence, there is no consideration to support the promise.

If the debtor merely does less than he is already bound to do by his bargain, should acceptance of such performance prevent the creditor from obtaining the balance originally due him? The weight of authority in England[209] and in the United States[210] is to the effect that neither part payment of a debt presently due nor a promise to make such payment is such consideration as will discharge the debt. The creditor may still collect the unpaid balance by suit.

The requirement of legal detriment to the one who pays or promises to pay as essential to the enforcement of a promise to discharge a

a creditor to forbear . . . and an actual forbearance . . . is a good consideration . . . but a mere forbearance without such a promise, is not." Utica Insurance Co. v. Bloodgood, 4 Wend. 652 (N.Y. 1830); Gaylord v. Van Loan, 15 Wend. 308 (N.Y. 1836).

[206] FULLER, BASIC CONTRACT LAW 363 (1947), so uses the term to describe the fact situation involved.

[207] Illustrative cases of the application of the doctrine include: Armstrong v. Levan, 109 Pa. 177, 1 A. 204 (1885) (defendant estopped to plead statute of limitation because he had promised plaintiff that he would make a loss good if suit was delayed); Holman v. Omaha & C.B. Ry. & Bridge Co., 117 Iowa 268, 90 N.W. 833 (1902) (reliance on a promise not to plead the statute; defendant estopped); Renackowshy v. Board of Water Commissioners of Detroit, 122 Mich. 613, 81 N.W. 581 (1900) (plaintiff can meet defense of statute of limitations by showing his reliance on a promise not to plead it). *Accord:* Stevens v. Turlington, 186 N.C. 191, 119 S.E. 210 (1923); Ellingson v. State Bank of Hoffman, 182 Minn. 510, 234 N.W. 867 (1931) (mortgagees estopped from asserting mortgage against purchaser who bought in reliance on assurance that it would be released); Lacy v. Wozencraft, 188 Okla. 19, 105 P. (2d) 781 (1940); In re Campbell, Campbell v. Corporation of America, (9th Cir. 1939) 105 F. (2d) 197, cert. den. 308 U.S. 593, 60 S.Ct. 1931 (1939).

[208] WILLISTON, §120; ANSON, §§138-140; CORBIN, §175; GRISMORE, §§65, 66 (1947); CONTRACTS RESTATEMENT §76a.

[209] Foakes v. Beer, 9 App. Cas. 605 (1884).

[210] Bender v. Been, 78 Iowa 283, 43 N.W. 216 (1889); Levine v. Blumenthal, 117

liquidated claim has been criticized by a few courts[211] as well as by writers in legal periodicals.[212]

An implicit assumption of those courts which follow the weight of authority is that an obligation, once created, can be discharged only by performance, by an agreement under seal, or by a promise supported by a bargained-for equivalent.[213] However, there seems to be no inherent characteristic of a *liquidated debt* which demands that any one of these be present to accomplish an effectual extinguishment of the debt. It may be argued that "a chose in action, in the language of the common law, lies in grant and not in livery"[214] or that "as it is their (the parties') agreement which binds them, so by their agreement may they be loosed."[215] And the logic of such an argument is difficult to overcome unless one is willing to concede that the law should treat the *extinguishment* of an existing obligation as different from the *creation* of such an obligation.

If a creditor agrees to forgive the entire claim in return for the payment of a part thereof and then sues to recover the balance, the debtor might offer two defenses: (1) that the creditor has agreed not to sue for the balance, and (2) that the original debt has been forgiven.

If the first defense is raised the inquiry will be as to whether consideration or an acceptable substitute therefor was present. If the creditor defends on the second ground the case may turn on whether there has been an effective gift. Both of these defenses arise in connection with promises to reduce rents. A creditor should be able to forgive his debtor and a landlord his tenant. The question may be whether he had that intention or whether he was making the best of a bad bargain when he accepts the lesser sum.

Occasional decisions are found to the effect that acceptance of a reduced rent in accordance with the landlord's oral or written promise to accept it discharges the tenant's obligation to pay the larger stipulated

N.J.L. 23, 186 A. 457, affd., 117 N.J.L. 426, 189 A. 54 (1937). Cases are collected in 20 L.R.A. 785; 11 L.R.A. (n.s.) 1018; L.R.A. 1917A, 719; 119 A.L.R. 1123.

211 Jaffray v. Davis, 124 N.Y. 164, 168, 26 N.E. 351 (1891); Clayton v. Clark, 74 Miss. 499, 510, 21 S. 565, 22 S. 189 (1896) (". . . absurd, irrational, unsupported by reason . . ."); Frye v. Hubbell, 74 N.H. 358 at 377, 68 A. 325 (1907) (". . . contrary to the fact at the present time, . . . is based upon misconception, is not founded in reason . . ."); Rye v. Phillips, 203 Minn. 567 at 569, 282 N.W. 459 (1938) (". . . one of the relics of antique law"). See CORBIN, §175, for additional citations.

212 Ames, "Two Theories of Consideration," 12 HARV. L. REV. 515 at 524 (1899); Corbin, "New Contract By Debtor To Pay His Pre-existing Debt," 27 YALE L.J. 535 (1918); Ferson, "The Rule In Foakes v. Beer," 31 YALE L.J. 15 (1921).

213 WILLISTON, §120, makes the same assumption. See, GRISMORE, §66; ANSON, §413.

214 WILLISTON, §120.

215 ANSON, §411.

sum.[216] The diverse justifications for such decisions range from a theory of a completed gift to a waiver and even to the discovery of a legally sufficient bargained-for exchange.[217] Other courts explain their decisions by saying that the parties have made a settlement[218] of unforeseen contingencies. Unexpected changes due to an economic depression have also been accepted as justifying a modification of a rental agreement.[219]

As already indicated, however, many courts refuse to regard the landlord's promise as preventing his recovery of the difference between what was originally due and what was accepted in discharge of the obligation.[220] They so rule because there is said to be no consideration for the landlord's promise to accept the lesser sum in satisfaction.

To ground a recovery for the landlord on the automatic application of an anachronistic "peculiarity of English law"[221] is to overlook the question of whether any accompanying circumstances should impel the courts to hold the landlord to his promise. The mechanical application of a rule of law never assures the attainment of a fair result. And the rule of *Foakes v. Beer* is only "mechanical jurisprudence" in action. In many instances there are facts present which might well lead to the enforcement of such a promise even though it is admitted that the landlord received no price therefor. The inquiry should be directed to ascertaining whether the landlord's promise induced a substantial change of position by the tenant and whether injustice will result if the promise, gratuitous though it may be, is not enforced. If the tenant has made such a change, the courts may very justly decide that the lack of a bargain equivalent does not prevent enforcement of the promise.

An illustration demonstrates the effective use to which the doctrine of promissory estoppel may be put in such a situation. In *Fried v.*

[216] WILLISTON, §120: "Such a result, however, cannot be made consistent with accepted principles of consideration."

[217] Julian v. Gold, 214 Cal. 74, 3 P. (2d) 1009 (1932) (completed gift); Hurlbut v. Butte-Kansas Co., 120 Kan. 205, 243 P. 324 (1926) (voluntary relinquishment of a known right); Bowman v. Wright, 65 Neb. 661, 91 N.W. 580, 92 N.W. 580 (1902) (lessee's remaining in possession is something not required by lease and constitutes consideration for promise to reduce rent).

[218] Lindeke Land Co. v. Kalman, 190 Minn. 601, 252 N.W. 650 (1934).

[219] Liebreich v. Tyler State Bank & Trust Co., (Tex. Civ. App. 1937) 100 S.W. (2d) 152

[220] Torrey v. Adams, 254 Mass. 22, 149 N.E. 618 (1925); Davis v. Newcombe Oil Co., 203 Minn. 295, 281 N.W. 272 (1938); Levine v. Blumenthal, 117 N.J.L. 23, 186 A. 457 (1936); Haynes Auto Repair Co. v. Wheels, 115 N.J.L. 447, 180 A. 836 (1935).

[221] According to Sir George Jessel, ". . . a creditor might accept anything in satisfaction of a debt except a less amount of money. He might take a horse, or a canary, or a tomtit if he chose, and that was accord and satisfaction; but by a most extraordinary peculiarity of English law he could not take 19 *s.* 6 *d.* in the pound." Couldrey v. Bartrum, 19 Ch.D. 394 at 399 (1881).

Fisher[222] the plaintiff (landlord) had leased a store building to Fisher and one Brill who, as partners, operated a florist shop on the premises. Fisher decided to withdraw and go into a business of his own (this was agreeable to Brill) but did not want to do so unless he could secure a release from the partnership obligations. When inquiry was made, plaintiff said he "was perfectly satisfied if they [Brill & Son] assumed the balance of the lease, as far as I am concerned, just forget about it." Later plaintiff said, ". . . if it is going to help you get started in business, I release you. . . ." Accordingly, Fisher left the partnership and started a new business of his own in a different town. Brill paid the rent to Fried for about eighteen months and then failed in business. Judgment by confession for the amount due under the lease was entered against Fisher and Brill. Then, on Fisher's application, the judgment was opened and a jury found against the landlord. On appeal the Supreme Court of Pennsylvania in an opinion by Stern, J., affirmed the judgment, resting its decision squarely on section 90 of the *Contracts Restatement*.[223]

Analysis shows that the doctrine furnishes a justifiable basis for this decision. The landlord announced that he was abandoning his right to collect rent from Fisher under the lease. He knew at the time Fisher would rely upon the promise—Fisher had said that he was going to start a new business if Fried acquitted him of liability under the partnership lease. Furthermore, Fisher did begin the new business. This latter action necessarily involved his assuming liabilities and making expenditures which otherwise he would not have made. To refuse enforcement of the landlord's promise will result in injustice and hardship to Fisher. The only way to avoid that injustice is to enforce the promise. This the court rightly did, for all of the elements of promissory estoppel were present.[224]

Rent reduction promises have often been enforced. But the theories employed to justify the results reached cannot always be approved.[225] The

[222] 328 Pa. 497 at 498, 499, 196 A. 39 (1938).

[223] Id. at 503: "The facts in the present case present a situation to which the doctrine of promissory estoppel peculiarly applies, because they involve the announcement by plaintiff of the intended abandonment of his right to enforce Fisher's liability for rent, knowing that such announcement would be relied upon by him to the extent of his embarking upon a new business venture."

[224] Note that here reimbursement for expenditures alone will not avoid injustice as it may do in cases of gratuitous promises to make gifts of land. Fisher has changed his way of life.

[225] For an analysis of the cases see the following notes and comments: 50 HARV. L. REV. 1314 (1937); 20 CALIF. L. REV. 552 (1932); 30 MICH. L. REV. 1110 (1932). See also PATTERSON AND GOBLE, CASES ON CONTRACTS, 2d ed., 309-315 (1941); 43 A.L.R. 1451; 93 A.L.R. 1404. For a recent discussion of the cases see, CORBIN, §184.

holding that there has been a gift[226] may be tenable, if the landlord intended to make one, and if that intention is accompanied by what could pass as symbolical of "delivery," e.g., a receipt "in full," as well as an acceptance by the tenant.[227] But all too often it is clear that such was not the landlord's intention. He appeared to be bargaining, not giving. In such a situation the court twists the facts when it rests the decision on gift analogies. Finding that the landlord is bound because the tenant has agreed to do something he was not previously bound to do will meet any possible objection. If the facts justify such classification, all will agree that there is consideration. Here again, and all too often, however, the court strains to fit the facts into a bargain and exchange pattern, when some other solution is required.[228]

Likewise, the argument that consideration is immaterial if the agreement has been fully executed on both sides[229] seems to beg the question. For discharge to be effective, as has been said, there must be either consideration or an effective gift.[230] If there was a promise to discharge, and only that, the need for consideration (or a substitute) has not been obviated. So, too, with the holding that acceptance of the lesser sum constitutes a waiver.[231]

A theory which does seem to justify the decisions enforcing gratuious promises to reduce rents is embodied in yet another group of cases,[232] where it is ruled that adjustments of rent made in times of economic stress will be enforced if they have formed the basis for action by the parties. The emphasis placed upon action in reliance on a business transaction is as apparent and justifiable as was the decision in *Fried v. Fisher*. Advantages in such rulings are found in the avoidance of the strict application of *Foakes v. Beer* and in their agreement with business ethics of the community.

Some states have found the solution to the problem of *Foakes v.*

226 McKenzie v. Harrison, 120 N.Y. 260, 24 N.E. 458 (1890); ANSON, §413; GRISMORE, §206.

227 Gray v. Barton, 55 N.Y. 68, 14 Am. Rep. 181 (1873).

228 Bowman v. Wright, 65 Neb. 661, 91 N.W. 580, 92 N.W. 580 (1902); Industrial Trust Co. v. Cottam, 65 R.I. 401, 14 A. (2d) 687 (1940). Lessee not filing petition in bankruptcy; Melroy v. Kemmerer, 218 Pa. 381, 67 A. 699 (1907); Adams Recreation Palace v. Griffith, 50 Ohio App. 216, 16 N.E. (2d) 489 (1937).

229 Brackett Co. v. Lofgren, 140 Minn. 52, 167 N.W. 274 (1918); Julian v. Gold, 214 Cal. 74, 3 P. (2d) 1009 (1932).

230 WILLISTON, §120; ANSON, §140; GRISMORE, §206.

231 Hurlbut v. Butte-Kansas Co., 120 Kan. 205, 243 P. 324 (1926); Sutherland v. Madden, 142 Kan. 343, 46 P. (2d) 32 (1935).

232 Ten Eyck v. Sleeper, 65 Minn. 413, 67 N.W. 1026 (1896); Liebreich v. Tyler State Bank & Trust Co., (Tex. Civ. App. 1936) 100 S.W. (2d) 152; Lindeke Land Co. v. Kalman, 190 Minn. 601, 252 N.W. 650 (1934); Commercial Car Line v. Anderson, 224 Ill. App. 187 (1922).

Beer in statutory enactments which change the conventional requirement of consideration where modifying agreements are made.[233] Those states which have not done so, may well decide that the application of the doctrine of promissory estoppel can give a just result where otherwise hardship will be imposed. Support for this conclusion is also found in decisions holding that municipal employees who have accepted less than the salaries authorized by law for their positions cannot thereafter collect the deficiency.[234]

Just as they supply precedents for it, so the rent reduction cases afford an excellent opportunity to test the effectiveness of the doctrine of promissory estoppel. If the facts show that a tenant is induced to continue in business through an economic depression, rather than become bankrupt, because of his reliance upon the promise to reduce the rent, his position is an appealing one. To force him now to make up the difference will, in effect, leave him worse off economically than he was before he acted in reliance on the landlord's promise. The landlord's argument (based on *Foakes v. Beer*) does not appeal to our sense of fairness and justice; the tenant's does. If the tenant's change of position was induced by the landlord's promise and was reasonably foreseeable, he may often merit protection. But not all tenants will be able to bring themselves within the doctrine. Before they can do so, they must demonstrate: (1) a promise by the landlord to accept a lesser sum than that agreed upon as rent; (2) action-in-reliance on that promise by the tenant (merely remaining in possession should not be enough —the incurring of new obligations or a substantial change in methods of operation might be); and, finally, (3) that it will be unjust to refuse

[233] PATTERSON AND GOBLE, CASES ON CONTRACTS, 2d ed., 324, n. 3 (1941): "The requirement of consideration for modifying agreements has been changed by statute in twelve states. Aside from differences in wording, these statutes are of three types: (a) Those which make acceptance by the creditor of actual part performance by the debtor (obligor) a valid discharge. Ga. Code Ann. Sec. 20-1204 (Park, 1938); Me. Rev. St., Ch. 96, Sec. 65 (1930); North Carolina Code of 1939, Sec. 895; Va. Code Sec. 5765 (1936). (b) Those which require that the new agreement be in writing and executed by the creditor. Ala. Code, Sec. 5643 (Michie, 1928) . . .; N.Y. Debtor and Creditor Law, Sec. 243 (1936); N.Y. Personal Property Law, Sec. 33(2) (1937), N.Y. Real Property Law Sec. 279 (1936); Ore. Code Ann., Sec. 2-806 (1939); Tenn. Code, Sec. 9742 (Michie, 1938). (c) Those which require both a writing and actual part performance by the debtor (obligor). Cal. Civil Code, Sec. 1524; Mont. Code, Sec. 7459 (1935); N.D. Comp. Laws, Sec. 5828 (1913); S.D. Code, Sec. 47.0236, 1939." And see, The Uniform Commercial Code—Sales, §2-209 (1950 draft) abolishing the need for consideration in agreements to modify contracts.

[234] Phillips, Exec. v. Cleveland, 130 Ohio St. 49, 196 N.E. 416 (1935) (the city acted on the agreement and based its financial expenditures thereon); State ex rel. Hess v. City of Akron, 56 Ohio App. 28, 10 N.E. (2d) 1 (1936), affd. in 132 Ohio St. 305, 7 N.E. (2d) 411 (1937) (if there was no consideration originally, the change of position by the city would supply it. *Contracts Restatement* §90); Lehman v. Toledo, 48 Ohio App. 121, 192 N.E. 537 (1934).

enforcement. If all three elements are present the difficulties inherent in determining the tenant's monetary damages seem to make it appropriate to protect him by the enforcement of the landlord's promise. Doctrinal difficulties may be solved rationally and logically by the application of promissory estoppel to this situation.

SYNTHESIS AND GENERALIZATION

What conclusions are to be drawn from these precedents? Here are numerous examples of gratuitous promises drawn from diverse legal situations. The very diversity of the type-situations discussed test the validity of the general proposition here proposed. If, in only a single instance, it is found that action in reliance upon a gratuitous promise results in enforcement despite the lack of a bargain, all that will follow is a question as to why the court did not apply the stereotyped rule. Even if these instances become quite numerous in a particular field of the law, the reaction may be no more than to recognize an "exception" to the "general" rule. But if on numerous occasions and in multifarious fields instances occur in which to avoid injustice gratuitous promises are enforced when set in a context of detrimental reliance, then one is compelled to examine the cases and correlate the results which follow from the presence of the gratuitous promise and detrimental reliance. When one does so the significant factors appear which permit of synthesis and generalization.

The thread that runs through all the cases is reliance.[235] In this reliance, the doctrine of promissory estoppel has its justification; in these precedents, it has its genesis. The precedents show that the application of the doctrine has secured substantial justice in numerous cases and in many fields of the law. The precedents indicate, too, that the doctrine of promissory estoppel should not be confined to specific small segments in restricted branches of our contract law. It now merits recognition as a generalization of principle; it should be so employed.

[235] WILLISTON, §139; CORBIN, §§193-209 (reliance on a promise as ground for enforcement).