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Promissory Estoppel as a Means of Defeating the Statute of Frauds

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NOTES

PROMISSORY ESTOPPEL AS A MEANS OF DEFEATING THE STATUTE OF FRAUDS

In the past, promissory estoppel has been used only as a substitute for consideration. An increasing number of cases, however, have demonstrated a willingness to employ the theory to defeat the operation of the Statute of Frauds, thereby avoiding the consequences of noncompliance with a writing requirement. The trend has culminated in the codification of this new exception to the Statute in section 217A of the *Restatement Second of Contracts*.[1] Since both the original *Restatement* and the *Restatement Second* have paralleled the theories employed by the courts, this Note will examine the growth of promissory estoppel largely in that framework. The remedies attendant to a recovery based on promissory estoppel will also be considered.

I. DEVELOPMENT OF SECTION 217A

In 1677 the English Parliament passed an Act for the Prevention of Fraud and Perjuries.[2] Of the original twenty-five sections, only the fourth and seventeenth are important for contract purposes,[3] and this Note will examine only the former section. It provided:

> IV. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract [f]or sale of lands, tenements or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not

1. "(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires. (2) In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant: (a) the availability and adequacy of other remedies, particularly cancellation and restitution; (b) the definite and substantial character of the action or forbearance in relation to the remedy sought; (c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence; (d) the reasonableness of the action or forbearance; (e) the extent to which the action or forbearance was foreseeable by the promisor." Restatement (Second) of Contracts § 217A (Tent. Drafts Nos. 1-7, 1973). See generally 1969 ALI Proceedings 369-72.

2. 29 Car. 2, c. 3 (1677). See generally 6 W. Holdsworth, A History of English Law 380-84 (1927) [hereinafter cited as Holdsworth]; Costigan, The Date and Authorship of the Statute of Frauds, 26 Harv. L. Rev. 329 (1913); Hening, The Original Drafts of the Statute of Frauds (29 Car. II c. 3) and Their Authors, 61 U. Pa. L. Rev. 283 (1913).

3. J. Calamari & J. Perillo, Contracts § 282, at 441 (1970); J. Murray, Contracts § 312, at 640 (1974) [hereinafter cited as Murray].

to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.[4]

As the title of the original Act suggests, the Statute of Frauds was enacted to prevent fraud caused by perjury.[5] In 1677, trial by jury was an imperfect procedure at best. There was little control over jury verdicts, and jurors were free to disregard the evidence and base their decision on their own knowledge of the facts.[6] Moreover, the courts were precluded from obtaining information from those in the best position to supply it since no person with any interest in the result of the litigation was considered competent to testify.[7] As the laws of evidence and contracts developed over the years, the controversy concerning the justification for the continued existence of the Statute of Frauds has grown stronger. Although various ingenious methods have been found to avoid the effects of the Statute,[8] the legislatures of virtually every state have maintained their individual statutes paralleling the English original.[9]

Noncompliance with statutory requirements generally results in the unenforceability of a contract due to the Statute of Frauds.[10] However, the courts have developed a number of exceptions to the strict operation of the Statute. Among them are (1) the doctrine of part performance,[11] (2) the imposition of constructive trusts,[12] (3) quasi-contracts,[13] (4) the presence of fraud[14] or

4. 29 Car. 2, c. 3, § 4 (1677) (italics deleted).

5. Willis, The Statute of Frauds—A Legal Anachronism, 3 Ind. L.J. 427 (1928).

6. 6 Holdsworth, supra note 2, at 388; Murray, supra note 3, § 312, at 641; Summers, The Doctrine of Estoppel Applied to the Statute of Frauds, 79 U. Pa. L. Rev. 440, 441 (1931) [hereinafter cited as Summers].

7. Summers, supra note 6, at 441.

8. J. Calamari & J. Perillo, Contracts § 282, at 443 (1970).

9. 2 A. Corbin, Contracts § 275, at 10 (1950) [hereinafter cited as Corbin]; Perillo, The Statute of Frauds in the Light of the Functions and Dysfunctions of Form, 43 Fordham L. Rev. 39, 40 (1974) [hereinafter cited as Perillo]. A table of statutes may be found in 4 S. Williston, Contracts § 567B (3d ed. 1961) [hereinafter cited as Williston].

10. 2 Corbin, supra note 9, § 279, at 21; 3 Williston, supra note 9, § 527, at 709.

11. Part performance as the ground for requiring specific performance of an oral contract has been applied primarily to contracts concerning land. 2 Corbin, supra note 9, § 341; Note, Statute of Frauds—The Doctrine of Equitable Estoppel and the Statute of Frauds, 66 Mich. L. Rev. 170, 172-73 (1967); see 3 Williston, supra note 9, § 533, at 772-73; Note, Part Performance, Estoppel, and the California Statute of Frauds, 3 Stan. L. Rev. 281, 283-88 (1951). This doctrine (applied at its inception exclusively to contracts for the sale of land) originated very shortly after the Statute itself: "[T]he statute's framers were thoroughly familiar with the part-performance problem, and the decisions . . . shortly after the passage of the Statute of Frauds . . . are conclusive evidence that its framers never intended the statute to prevent the giving of equitable relief in the part-performance cases." Costigan, The Date and Authorship of the Statute of Frauds, 26 Harv. L. Rev. 329, 344 (1913).

12. Perillo, supra note 9, at 72.

13. Id. See generally 3 Williston, supra note 9, § 534.

14. 2 Corbin, supra note 9, § 341; Summers, supra note 6, at 444.

mistake,[15] (5) the main purpose rule,[16] (6) the joint obligor rule[17] and (7) equitable estoppel.[18] Recently, another exception—promissory estoppel—has received attention. Promissory estoppel was recognized in the *Restatement of Contracts,* section 90:

A promise which the promisor should reasonably expect to induce action or forebearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.[19]

Section 90 can be interpreted as permitting the assertion of promissory estoppel to bar the defense of the Statute of Frauds. However, the section taken in its context and the early history of promissory estoppel weighed strongly against this interpretation.[20] Courts have taken the position that promissory estoppel applies only as a substitute for consideration.[21] This construction was

15. 2 Corbin, supra note 9, § 341.

16. Perillo, supra note 9, at 72. Where one promises to answer for the duty of another, some courts hold the Statute inoperable if the promisor's "main purpose" or "leading object" is to further his own advantage. See generally Murray, supra note 3, § 316.

17. Perillo, supra note 9, at 72. See generally 2 Corbin, supra note 9, § 361.

18. Du Bois v. Zimmerman, 28 F.2d 173 (3d Cir. 1928), noted in 77 U. Pa. L. Rev. 540 (1929); Imperator Realty Co. v. Tull, 228 N.Y. 447, 127 N.E. 263 (1920), noted in 6 Cornell L.Q. 98 (1920); 2 Corbin, supra note 9, § 422A (Supp. 1971); Murray, supra note 3, § 333; Summers, supra note 6, at 445-46; Note, Statute of Frauds—The Doctrine of Equitable Estoppel and the Statute of Frauds, 66 Mich. L. Rev. 170, 173 (1967).

There are six elements that must be established for an equitable estoppel: "1. There must be conduct—acts, language, or silence—amounting to a representation or a concealment of material facts. 2. These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. 3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, and at the time when it was acted upon by him. 4. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. . . . 5. The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. 6. He must in fact act upon it in such a manner as to change his position for the worse . . . ." 3 J. Pomeroy, Equity Jurisprudence § 805, at 191-92 (5th ed. 1941) italics omitted; see 1 Williston, supra note 9, § 139.

19. Restatement of Contracts § 90 (1932).

20. Note, Statute of Frauds—The Doctrine of Equitable Estoppel and the Statute of Frauds, 66 Mich. L. Rev. 170, 177 (1967); Annot., 56 A.L.R.3d 1037, 1046-49 (1974). A general discussion of the use of promissory estoppel may be found in Boyer, Promissory Estoppel: Principle From Precedents: I & II, 50 Mich. L. Rev. 639, 873 (1952); Boyer, Promissory Estoppel: Requirements and Limitations of the Doctrine, 98 U. Pa. L. Rev. 459 (1950); Henderson, Promissory Estoppel and Traditional Contract Doctrine, 78 Yale L.J. 343 (1969) [hereinafter cited as Henderson].

21. E.g., Kahn v. Cecelia Co., 40 F. Supp. 878 (S.D.N.Y. 1941). As a substitute for consideration it was employed to make gratuitous promises enforceable. See, e.g., Ricketts v. Scothorn, 57 Neb. 51, 77 N.W. 365 (1898); Siegel v. Spear & Co., 234 N.Y. 479, 138 N.E. 414 (1923); Thorne v. Deas, 4 Johns. 84 (N.Y. 1809). It was also used to insure irrevocability of certain offers. See, e.g., Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958) (en banc); cf. Northwestern Eng'r Co. v. Ellerman, 69 S.D. 397, 10 N.W.2d 879 (1943). But see James Baird Co. v. Gimbel Bros., 64 F.2d 344 (2d Cir. 1933).

undoubtedly based on two factors. First, nowhere in section 90 was any reference made to the Statute of Frauds. Secondly, the *Restatement* permitted promissory estoppel to defeat the Statute of Frauds in a completely different section. Comment *f* to section 178 stated:

> A misrepresentation that there has been such satisfaction if substantial action is taken in reliance on the representation, precludes proof by the party who made the representation that it was false; and a promise to make a memorandum, if similarly relied on, may give rise to an effective promissory estoppel if the Statute would otherwise operate to defraud.[22]

Comment *f* deals with two situations. The first is concerned with equitable estoppel[23] and the second with promissory estoppel, but in a context other than that found in section 90. Section 178 required a subsidiary promise to reduce the main promise—the one within the Statute—to writing. A sufficient reliance on the *subsidiary* promise then gave rise to an estoppel. Thus, if *A* orally promised to employ *B* for more than one year, the promise was unenforceable, irrespective of any reliance by *B*, because the promise fell within the Statute of Frauds. If, however, *A* also promised to put the promise into writing, the latter promise could, if properly relied upon, form the basis of an estoppel.[24] Promissory estoppel, though not directly in derogation of the Statute in such cases (since the ancillary promise is not technically within its scope[25]), had indirectly created a large loophole. This was true since the mere addition of a subsidiary promise would permit the enforcement of the principal one which was not otherwise enforceable because it *was* within the Statute.

The origins of section 178 can be found in a 1682 English case which involved an oral contract to assign a lease with the further promise to put the main contract in writing.[26] The Statute of Frauds was held to be no defense due to the presence of the subsidiary agreement.[27] Some later cases decided before section 178 was written, rejected such a result, holding that whenever the main agreement is within the Statute, so too is the subsidiary promise.[28] The weight of authority, however, was to the contrary,[29] and the majority theory was apparently accepted as the basis for section 178.

Argument by analogy to the doctrine of equitable estoppel might prove helpful in justifying the use of promissory estoppel to defeat the Statute of Frauds.[30] The

22. Restatement of Contracts § 178, comment f at 235 (1932).

23. See note 18 supra.

24. See, e.g., Alaska Airlines, Inc. v. Stephenson, 217 F.2d 295 (9th Cir. 1954); Vogel v. Shaw, 42 Wyo. 333, 294 P. 687 (1930); cf. Oxley v. Ralston Purina Co., 349 F.2d 328 (6th Cir. 1965).

25. Obviously, the suretyship, marriage, land, and one-year sections of the Statute do not have any impact on the ancillary promise.

26. Leak v. Morrice, 22 Eng. Rep. 883 (Ch. 1682); see McNeill, Agreements to Reduce to Writing Contracts Within the Statute of Frauds, 15 Va. L. Rev. 553 (1929).

27. 22 Eng. Rep. at 883.

28. Little v. Union Oil Co., 73 Cal. App. 612, 238 P. 1066 (1st Dist. 1925); Green v. Pennsylvania Steel Co., 75 Md. 109, 23 A. 139 (1891); Sarkisian v. Teele, 201 Mass. 596, 88 N.E. 333 (1909).

29. See McNeill, Agreements to Reduce to Writing Contracts Within the Statute of Frauds, 15 Va. L. Rev. 553, 558-59 & n.27 (1929). Further examples may be found therein.

30. The former depends upon a misrepresentation of an existing fact, see note 18 supra, while the latter requires a promise concerning future intent.

use of equitable estoppel to prevent a person from setting up the Statute as a defense is justified by well accepted principles. First, the part performance doctrine, which originated very shortly after the Statute, is itself based on equitable estoppel.[31] Secondly, the prevention of inequitable utilization of the Statute of Frauds through the use of equitable estoppel aids "the ultimate function of the statute in preventing fraud."[32] Thirdly, equity has always abhorred the harsh operation of statutes.[33] These same arguments may, by analogy, be applied to promissory estoppel[34]—the first since part performance is, in fact, a species of promissory estoppel,[35] and the second and third since promissory estoppel is also an equitable doctrine.[36] Acceptance of this position must ultimately lead to the conclusion that promissory estoppel should receive as broad an application as that given to equitable estoppel.

The *Restatement Second,* section 217A,[37] has given support to this view and generally permits promissory estoppel to enforce the main promise, notwithstanding the Statute of Frauds, even in the absence of an ancillary promise to reduce the agreement to writing.[38] The language of this section is nearly identical to section 90 of the original *Restatement*[39] and calls for enforcement "if injustice can be avoided only by enforcement of the promise." However, a comment to section 217A notes that "the requirement of consideration is more easily displaced than the requirement of a writing."[40] Subsection two of section 217A lists five factors to be used in determining whether injustice can be avoided only by enforcement of the promise.[41] "Each factor relates either to the extent to which reliance furnishes a compelling substantive basis for relief . . . or to the extent to which the circumstances satisfy the [various] functions [of the Statute of Frauds]."[42]

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31. F. Pollock, Contracts 521-22 (Winfield ed. 1950); Summers, supra note 6, at 447; cf., e.g., Kinsell v. Thomas, 18 Cal. App. 683, 124 P. 220 (3d Dist. 1912); Zelzer v. Yorkville Park Co., 141 Misc. 190, 192, 252 N.Y.S. 626, 629 (Sup. Ct. 1931).

32. Summers, supra note 6, at 447.

33. Id.

34. But see Note, Statute of Frauds—The Doctrine of Equitable Estoppel and the Statute of Frauds, 66 Mich. L. Rev. 170, 177 (1967).

35. See text accompanying note 105 infra; cf. Summers, supra note 6, at 447 & n.22. However, the part performance doctrine long preceded promissory estoppel, and has its own set of rules. J. Calamari & J. Perillo, Contracts § 327 (1970); Murray, supra note 3, § 333. Arguably, the great overlap between part performance and promissory estoppel, especially as to the reliance element, makes any distinction between the two seem highly arbitrary.

36. Boyer, Promissory Estoppel: Principle from Precedents: I, 50 Mich. L. Rev. 639, 642-44 (1952). For a discussion of the equitable origin of promissory estoppel, see Annot., 48 A.L.R.2d 1069 (1956).

37. See note 1 supra.

38. See text accompanying note 24 supra.

39. See text accompanying note 19 supra.

40. Restatement (Second) of Contracts § 217A, comment b (Tent. Drafts Nos. 1-7, 1973).

41. Id. § 217A(2), supra note 1.

42. Id. § 217A, comment b. The most important functions of the Statute include the following: (a) Evidentiary function—To supply and preserve evidence of the contract; (b) Cautionary function—To give the parties advance warning of the consequences of their agreement; (c) Clarifying function—

A number of cases had taken a stance similar to that of section 217A by holding that the main promise of performance, rather than the ancillary agreement to execute a writing, is the promise which induces reliance.[43]

II. Use of Promissory Estoppel to Defeat the Statute of Frauds

Many courts have refused to employ promissory estoppel to circumvent the Statute of Frauds[44] because of the fear that oral evidence, if not excluded by the Statute, often would be perjurious.[45] However, given the proper circumstances,[46] most jurisdictions now appear willing to protect promisees who, in detrimental reliance upon a promise, have incurred "unconscionable injury."[47]

The "unconscionable injury" test is commonly associated with *Monarco v. Lo Greco*.[48] Cross-complainant's mother and stepfather stated that if he stayed home and worked on the farm, it would be conveyed to him upon the death of the survivor. In reliance upon the promise, he gave up business and educational opportunities. The stepfather reneged on the agreement by leaving his share of the property to his grandson. The grandson was estopped to assert the (testamentary) Statute. The court noted:

> The doctrine of estoppel to assert the statute of frauds has been consistently applied by the courts . . . to prevent fraud that would result from refusal to enforce oral contracts in certain circumstances. Such fraud may inhere in the unconscionable injury that would result from denying enforcement of the contract after one party has been induced by the other seriously to change his position in reliance on the contract, or in the unjust enrichment that would result if a party who has received the benefits of the other's performance were allowed to rely upon the statute.[49]

To permit harmonization of previously unrealized points of disagreement. See generally Fuller, Consideration and Form, 41 Colum. L. Rev. 799, 800-04 (1941); Perillo, supra note 9, at 53-58, 64-69.

43. These cases arose primarily in California, based on Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88 (1909). See, e.g., Monarco v. Lo Greco, 35 Cal. 2d 621, 220 P.2d 737 (1950); Maddox v. Rainoldi, 163 Cal. App. 2d 384, 329 P.2d 599 (1st Dist. 1958).

44. Seavey, Reliance upon Gratuitous Promises or Other Conduct, 64 Harv. L. Rev. 913, 923-24 (1951) [hereinafter cited as Seavey]; see, e.g., Kahn v. Cecelia Co., 40 F. Supp. 878 (S.D.N.Y. 1941); Keller v. Penovich, 262 So. 2d 243 (Fla. Dist. Ct. App. 1972); Tanenbaum v. Biscayne Osteopathic Hosp., Inc., 173 So. 2d 492, 495 (Fla. Dist. Ct. App. 1965); Sinclair v. Sullivan Chevrolet Co., 45 Ill. App. 2d 10, 17, 195 N.E.2d 250, 253 (3d Dist.), aff'd, 31 Ill. 2d 507, 202 N.E.2d 516 (1964); cf. 21 Turtle Creek Square, Ltd. v. New York State Teachers' Retirement Sys., 432 F.2d 64 (5th Cir. 1970), cert. denied, 401 U.S. 955 (1971); Trollope v. Koerner, 106 Ariz. 10, 18, 470 P.2d 91, 99 (1970); Heyman v. Adeack Realty Co., 102 R.I. 105, 108, 228 A.2d 578, 580 (1967).

45. See text accompanying note 5 supra. However, "it has been successfully argued that refusal to admit [oral] evidence causes the Statute of Frauds . . . to be a trap; if the evidence is clear and convincing . . . [it] is admissible . . . . Whether one agrees or disagrees with the result reached very largely depends upon what is thought about the efficacy of the Statute of Frauds . . . as a means of preventing fraudulent swearing." Seavey, supra note 44, at 924.

46. See notes 56-64 infra and accompanying text.

47. Monarco v. Lo Greco, 35 Cal. 2d 621, 220 P.2d 737 (1950).

48. Id.

49. Id. at 626, 220 P.2d at 739-40 (citations omitted).

Both unconscionable injury and unjust enrichment were found to exist.

The vast majority of subsequent cases have employed only the former—unconscionable injury—as the threshold criterion for determining the propriety of the application of promissory estoppel.[50] The latter has apparently been relegated to its traditional role in quasi-contracts.[51]

The remedial guise under which the promisor is estopped to plead the Statute is frequently obscured by decisions which fail to distinguish adequately between promissory estoppel and either equitable estoppel[52] or part performance.[53] Nonetheless, cases may be reliably categorized as being based on promissory estoppel for two reasons. First, equitable estoppel depends upon a representation as to an existing fact,[54] while future intention is the key element in promissory estoppel.[55] Secondly, part performance requires no unconscionable injury in order to operate.

The majority of the cases involving estoppel and the Statute of Frauds have dealt with employment contracts within the one year Statute of Frauds. An example is where an employer has orally promised a job whereupon the employee, in reliance, changes his residence and/or his job. The mere change of residence[56] or job relinquishment will generally prove to be insufficient[57]

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50. See, e.g., Standing v. Morosco, 43 Cal. App. 244, 184 P. 954, 955 (2d Dist. 1919). See also 24 Wash. & Lee L. Rev. 347 (1967).

51. See generally D. Dobbs, Remedies § 4.1 (1973).

52. E.g., Lucas v. Whittaker Corp., 470 F.2d 326 (10th Cir. 1972); Oxley v. Ralston Purina Co., 349 F.2d 328 (6th Cir. 1965); Montgomery v. Moreland, 205 F.2d 865 (9th Cir. 1953); Ruinello v. Murray, 36 Cal. 2d 687, 227 P.2d 251 (1951); McIntosh v. Murphy, 52 Hawaii 29, 469 P.2d 177 (1970); Pursell v. Wolverine-Pentronix, Inc., 44 Mich. App. 416, 205 N.W.2d 504 (1973); Westerman v. City of Carlsbad, 55 N.M. 550, 237 P.2d 356 (1951); Gaines v. Monroe Calculating Mach. Co., 78 N.J. Super. 168, 188 A.2d 179 (App. Div. 1963); St. Louis Trading Co. v. Barr, 168 Okla. 184, 32 P.2d 293 (1934); Stevens v. Good Samaritan Hosp., 264 Ore. 200, 504 P.2d 749 (1972); see Henderson, supra note 20, at 377, 381.

53. At least one jurisdiction has been especially derelict. See, e.g., Norman v. Nash, 102 Ga. App. 508, 116 S.E.2d 624 (1960); Dameron v. Liberty Nat'l Life Ins. Co., 56 Ga. App. 257, 192 S.E. 446 (1937); Alexander-Seewald Co. v. Marett, 53 Ga. App. 314, 185 S.E. 589 (1936).

Part performance is regarded as an extension of equitable estoppel, and in many cases the elements of both exist simultaneously. See 3 Williston, supra note 9, § 533, at 782-83; Summers, supra note 6, at 447 n.22.

The failure of the courts to adequately distinguish promissory estoppel from either equitable estoppel or part performance is due to the fact that equitable estoppel and part performance are much more established in the law, and courts are loathe to establish new exceptions. "The doctrine of [equitable] estoppel is as old as the statute of frauds, and, as such, a part of the law of the land." Taylor v. Zepp, 14 Mo. 339, 346 (1851). See note 11 supra concerning the age of the part performance doctrine.

54. See note 18 supra. But see J. Calamari & J. Perillo, Contracts § 166 (1970).

55. See text accompanying note 19 supra.

56. The employee who changes his residence must not benefit thereby. 24 Wash. & Lee L. Rev. 347, 349-50 (1967); see Standing v. Morosco, 43 Cal. App. 244, 184 P. 954 (2d Dist. 1919) (move from New York City to Los Angeles may have been "an agreeable one"); B.F.C. Morris Co. v. Mason, 171 Okla. 589, 39 P.2d 1 (1934) (per curiam) (Danville to Oklahoma City).

57. Note, Equitable Estoppel and the Statute of Frauds in California, 53 Calif. L. Rev. 590, 601 (1965) [hereinafter cited as Statute of Frauds in California]; see 24 Wash. & Lee L. Rev. 347, 350

"[u]nless it can be shown that the plaintiff's rights under the previous contract were so valuable that unconscionable injury would result if the oral contract were not enforced."[58] Where this has, in fact, occurred, promissory estoppel provides the best basis of relief because the restitutionary remedy of quantum meruit considers only defendant's gain, but not plaintiff's loss due to reliance, which may be called his reliance interest.[59]

A number of other cases have involved contracts to make wills, especially where the defendant promises to make a particular testamentary disposition if the promisee renders services to the defendant, or transfers property (not necessarily inter vivos) to a designated person. Promises of the first type are often remedied by restitution,[60] except where the services are incapable of valuation because they are peculiar or personal as in a family relationship.[61] Since the defendant will not usually be the beneficiary of promises of the second type, restitution is inappropriate, and promissory estoppel is frequently employed to enforce the contract.[62]

With the exception of brokerage cases, where the Statute of Frauds has consistently received strict construction,[63] other types of cases dealing with the applicability of promissory estoppel to other parts of the Statute are too limited in number to serve as a basis for generalization.[64]

(1967); e.g., McLaughlin v. Ford Motor Co., 269 F.2d 120 (6th Cir. 1959); Sinclair v. Sullivan Chevrolet Co., 45 Ill. App. 2d 10, 195 N.E.2d 250, aff'd, 31 Ill. 2d 507, 202 N.E.2d 516 (1964); Westerman v. City of Carlsbad, 55 N.M. 550, 237 P.2d 356 (1951); St. Louis Trading Co. v. Barr, 168 Okla. 184, 32 P.2d 293 (1934). But see, e.g., Sessions v. Southern Cal. Edison Co., 47 Cal. App. 2d 611, 118 P.2d 935 (2d Dist. 1941); Harmon v. Tanner Motor Tours, Ltd., 79 Nev. 4, 377 P.2d 622 (1963).

58. Statute of Frauds in California, supra note 57, at 601; see, e.g., Lucas v. Whittaker Corp., 470 F.2d 326 (10th Cir. 1972) (relinquished fringe benefits and sold custom built house); Ruinello v. Murray, 36 Cal. 2d 687, 227 P.2d 251 (1951) (resigned lifetime job); Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88 (1909) (quit secure job); Pursell v. Wolverine-Pentronix, Inc., 44 Mich. App. 416, 205 N.W.2d 504 (1973); Perry v. Norton, 182 N.C. 585, 109 S.E. 641 (1921). Absent such exceptional injury attendant to a resignation, even the added factor of residence change will not remove the case from the Statute. Marston v. Downing Co., 73 F.2d 94 (5th Cir. 1934); cf., e.g., Tanenbaum v. Biscayne Osteopathic Hosp., 173 So. 2d 492 (Fla. Dist. Ct. App. 1965). But see, e.g., Alaska Airlines Inc. v. Stephenson, 217 F.2d 295 (9th Cir. 1954); Montgomery v. Moreland, 205 F.2d 865 (9th Cir. 1953); Fibreboard Prods., Inc. v. Townsend, 202 F.2d 180 (9th Cir. 1953); Tuck v. Gudnason, 11 Cal. App. 2d 626, 54 P.2d 88 (1st Dist. 1936); McIntosh v. Murphy, 52 Hawaii 29, 469 P.2d 177 (1970); Gaines v. Monroe Calculating Mach. Co., 78 N.J. Super 168, 188 A.2d 179 (App. Div. 1963).

59. See generally J. Calamari & J. Perillo, Contracts § 238 (1970); D. Dobbs, Remedies § 4.1 (1973). But see Perillo, Restitution in a Contractual Context, 73 Colum. L. Rev. 1208, 1212-15 (1973).

60. See, e.g., Kobus v. San Diego Trust & Sav. Bank, 172 Cal. App. 2d 574, 342 P.2d 468 (4th Dist. 1959); Palmer v. Phillips, 123 Cal. App. 2d 291, 266 P.2d 850 (2d Dist. 1954).

61. Statute of Frauds in California, supra note 57, at 599; see, e.g., Monarco v. Lo Greco, 35 Cal. 2d 623, 220 P.2d 737 (1950); Maddox v. Rainoldi, 163 Cal. App. 2d 384, 329 P.2d 599 (1st Dist. 1958).

62. See, e.g., Redke v. Silvertrust, 6 Cal. 3d 94, 98 Cal. Rptr. 293, 490 P.2d 805, cert. denied, 405 U.S. 1041 (1971); Day v. Greene, 59 Cal. 2d 404, 29 Cal. Rptr. 785, 380 P.2d 385 (1963).

63. See, e.g., Pacific Southwest Dev. Corp. v. Western Pac. R.R., 47 Cal. 2d 62, 301 P.2d 825 (1956); Heyman v. Adeack Realty Co., 102 R.I. 105, 228 A.2d 578 (1967). But see United Farm Agency v. McFarland, 243 Ore. 124, 411 P.2d 1017 (1966).

64. For example, the typical suretyship transaction does not induce sufficient reliance to justify

III. Relief Under the Doctrine of Promissory Estoppel

There is a vast body of case law which discusses and applies promissory estoppel in its traditional context as a substitute for consideration.[65] Yet neither these cases nor the ones concerning the Statute of Frauds present any meaningful discussion of what the theory of recovery should be.[66] However, at least one proposition is well settled. The Statute does not preclude a restitutionary recovery of the benefits conferred under an oral contract where the defendant fails to perform his part of the agreement.[67] Beyond restitution, however, the question is whether awards of promisees' reliance or expectation interests are ever proper.[68] Reliance recovery is limited to what generally amounts to actual out of pocket expenses. Its "object is to put [the promisee] in as good a position as he was in before the promise was made."[69] An expectation award would yield full contract damages in an attempt "to put the plaintiff in as

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enforcement of an oral guaranty. Restatement (Second) of Contracts § 217A, comment c (Tent. Drafts Nos. 1-7, 1973). But see John H. Pelt Co. v. American Cas. Co., 513 S.W.2d 128 (Tex. Civ. App. 1974) (promise to provide performance bond relied upon by builder who proceeded to perform under contract).

From the few cases that do appear under the various real property Statutes of Frauds one thing is clear—the mere performance of such acts as are normally attendant upon the closing of the transaction, including making a down payment or taking possession, is not going to constitute such reliance as to estop the promisor from asserting the Statute. See, e.g., National Resort Communities, Inc. v. Cain, 479 S.W.2d 341 (Tex. Civ. App. 1972); Aubrey v. Workman, 384 S.W.2d 389 (Tex. Civ. App. 1964) (mortgagor vacated property in connection with promise by mortgagee to release him from mortgage); Easton v. Wycoff, 4 Utah 2d 386, 295 P.2d 332 (1956) (moved onto premises). Beyond that, the decisions go both ways. Compare Lacy v. Wozencraft, 188 Okla. 19, 105 P.2d 781 (1940) (promissory estoppel might be found to defeat the Statute of Frauds where tenant remodeled premises) with Ravarino v. Price, 123 Utah 559, 260 P.2d 570 (1953) (adjacent tract bought in reliance).

65. See note 21 supra and accompanying text.

66. Note, Promissory Estoppel—Measure of Damages, 13 Vand. L. Rev. 705, 707 (1960) [hereinafter cited as Measure of Damages]; see Henderson, supra note 20, at 378.

67. Fuller & Perdue, The Reliance Interest in Contract Damages (pts. 1-2), 46 Yale L.J. 52, 373, 386-87 (1936-37) [hereinafter cited as Fuller & Perdue]; Restatement of Contracts § 355 (1932). "[I]f [the defendant] fails to perform [his oral contract] he is under an enforceable duty to make restitution of the value received." Id. § 355, comment b. This concept is embodied in the Restatement Second as well. "[T]he remedy of restitution is not ordinarily affected by the Statute of Frauds . . . ." Restatement (Second) of Contracts § 217A, comment d (Tent. Drafts Nos. 1-7, 1973). A similar provision will appear in the revised section 355. See id.

It is interesting to note that even the party in breach may, under certain circumstances, be entitled to a limited restitutionary recovery. See D. Dobbs, Remedies § 13.2, at 964-65 (1973).

68. The two categories are examined in detail in Fuller & Perdue, supra note 67, at 52-57.

69. Id. at 54; Comment, Once More into the Breach: Promissory Estoppel and Traditional Damage Doctrine, 37 U. Chi. L. Rev. 559 (1970) [hereinafter cited as Traditional Damage Doctrine]. This position has been advocated in Shattuck, Gratuitous Promises—A New Writ?, 35 Mich. L. Rev. 908, 942-45 (1937). Some authors have reached this result by analogy to tort principles. See Gardner, An Inquiry into the Principles of the Law of Contracts, 46 Harv. L. Rev. 1, 22-23 (1932) [hereinafter cited as Gardner]; Seavey, supra note 44, at 926. "Estoppel is basically a tort doctrine and the rationale of the section is that justice requires the defendant to pay for the harm caused by foreseeable reliance upon the performance of his promise." Id.

good a position as he would have occupied had the defendant performed his promise."[70]

Theoretically, the Statute does bar any per se recovery of the expectation interest.[71] The doubtful question for many years had concerned the reliance interest. Objection to such recovery had been raised on the ground that neither contract nor tort law provided an appropriate cause of action.[72] Even more important was the argument that reimbursement for reliance on the oral contract would violate the Statute. However, the same theoretical inconsistencies apply with equal force to the application of restitution in circumvention of the Statute. A resolution of this problem may be obtained by considering both the reliance and restitutionary recoveries to be founded upon a rescission of the contract, so that there would be, in effect, no suit "on the contract."[73] This justification for the existence of a reliance recovery may be fine for pure theorists, but judges seem more amenable to a rationale based on need. Courts have recognized a reliance interest recovery when they have considered the injustice which must necessarily beset either plaintiff or defendant if the choice is an all or nothing recovery.[74]

A number of cases seeking to avoid this all or nothing choice have provided reimbursement for reliance under promissory estoppel.[75] For any number of reasons, however, the vast majority of decisions have opted for protection of *expectancies* under promissory estoppel.[76] A number of arguments may be advanced to justify such a result.

70. Fuller & Perdue, supra note 67, at 54; Traditional Damage Doctrine, supra note 69, at 559. See Henderson, supra note 20, 378-79; Comment, The Measure of Damages for Breach of a Contract Created by Action in Reliance, 48 Yale L.J. 1036 (1939); Measure of Damages, supra note 66, at 709.

71. But see notes 76-81 infra and accompanying text. There is little doubt that today, at a minimum, the reliance interest, as strictly construed, is recoverable. See notes 74-75 infra and accompanying text.

72. But see Gardner, supra note 69, and Seavey, supra note 44.

73. Fuller & Perdue, supra note 67, at 387-88.

74. Id. at 418-20. Despite theoretical inconsistencies, courts have generally awarded expectation interests in Statute of Frauds cases, thereby implicitly affirming the contract. See note 76 infra and accompanying text. However, where courts determine the contract to be unenforceable and restitution is not appropriate because the defendant was not unjustly enriched, see note 59 supra and accompanying text, and if reliance interests are not compensable, no recovery would be available.

It has been argued over the years, however, that the concept of restitution, which today protects against defendant's unjust enrichment, was originally intended to, and should in fact, protect the plaintiff's reliance interest. See Perillo, Restitution in a Contractual Context, 73 Colum. L. Rev. 1208, 1219-26 (1973). Promissory estoppel seems to have been necessary to fill this void.

75. See, e.g., Associated Tabulating Serv., Inc. v. Olympic Life Ins. Co., 414 F.2d 1306 (5th Cir. 1969); Perry v. Norton, 182 N.C. 585, 109 S.E. 641 (1921); Cooper Petroleum Co. v. LaGloria Oil & Gas Co., 436 S.W.2d 889 (Tex. 1969).

76. See, e.g., Lucas v. Whittaker Corp., 470 F.2d 326 (10th Cir. 1972); Alaska Airlines, Inc. v. Stephenson, 217 F.2d 295 (9th Cir. 1954); Montgomery v. Moreland, 205 F.2d 865 (9th Cir 1953); Redke v. Silvertrust, 6 Cal. 3d 94, 98 Cal. Rptr. 293, 490 P.2d 805, cert. denied, 405 U.S. 1041 (1971); Monarco v. Lo Greco, 35 Cal. 2d 621, 220 P.2d 737 (1950); Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88 (1909); Sessions v. Southern Cal. Edison Co., 47 Cal. App. 2d 611, 118 P.2d 935 (2d Dist. 1941); McIntosh v. Murphy, 52 Hawaii 29, 469 P.2d 177 (1970); Pursell v. Wolverine-Pentronix, Inc., 44 Mich. App. 416, 205 N.W.2d 504 (1973); Harmon v. Tanner Motor Tours, Ltd., 79 Nev. 4,

At the time of the drafting of the original *Restatement,* Williston felt that full contract damages were appropriate in actions based on promissory estoppel.[77] His view arguably was the one adopted, since nowhere in the section on contract damages in the original *Restatement*[78] is there any suggestion that a different treatment was required for cases involving promissory estoppel,[79] nor do any of its sections appear to regard the reimbursement of reliance damages alone as a proper subject in and of itself.[80] In addition, section 90 is listed under the subchapter "*Contracts* Without Consideration" thereby lending further support to the position that ordinary contract damages should be available. Finally, the bulk of the cases have upheld such grants.[81]

Recoveries in several major cases will be analyzed in an effort to determine whether they truly support protection of expectancies or reliance. Although these cases deal with promissory estoppel in its role as a substitute for consideration, and not in the context of the Statute of Frauds, they should still prove invaluable in determining the courts' attitudes in the latter area.

In *Chrysler Corp. v. Quimby,*[82] plaintiff sought to take over an existing automobile dealership. He was told that the franchise could be obtained if he purchased the assets of the deceased former dealer, thereby discharging Chrysler's moral obligation to the widow. Plaintiff acquired sole control, after which defendant breached. The court awarded full contract damages—not only reliance expenses, but also lost profits.

In *Hoffman v. Red Owl Stores, Inc.,*[83] the prospective grantee of a grocery store franchise bought a small store of his own, during the course of negotiations, in an effort to familiarize himself with this type of operation. He sold the store at the request of the defendant, who subsequently demanded an increased capital

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377 P.2d 622 (1963); Carlsen v. Carlsen, 49 N.J. Super. 130, 139 A.2d 309 (1958); McKay Prods. Corp. v. Jonathan Logan, Inc., 54 Misc. 2d 385, 283 N.Y.S.2d 82 (Sup. Ct. 1967); In re Field's Estate, 11 Misc. 2d 427, 172 N.Y.S.2d 740 (Sur. Ct. 1958); Stevens v. Good Samaritan Hosp., 264 Ore. 200, 504 P.2d 749 (1972).

There is no irreconcilable clash between the cases. Reliance damages will generally be the measure of recovery where the expectancy is too indefinite to prove. See J. Calamari & J. Perillo, Contracts § 210 (1970). Thus, assuming there to be sufficient certainty as to the value of the expectancy interest, the question is whether the court may limit damages to a reliance recovery.

77. 4 ALI Proceedings (Appendix) 98-99 (1926). "Either the promise is binding or it is not . . . . I could leave this whole thing to the subject of quasi-contracts so that the promisee under those circumstances shall never recover on the promise but he shall recover such an amount as will fairly compensate him for any injury incurred; but it seems to me that you have to take one leg or the other. You have either to say the promise is binding or you have to go on the theory of restoring the status quo." Id. at 103-04.

Corbin, however, preferred a more flexible case by case analysis, with an upper limit of the full value of performance. 1 Corbin, supra note 9, § 205. See also Fuller & Perdue, supra note 67, at 401-06.

78. Restatement of Contracts §§ 327-46 (1932).

79. 65 Mich. L. Rev. 351, 352 (1966).

80. Fuller & Perdue, supra note 67, at 401-02.

81. See, e.g., cases cited at note 76 infra.

82. 51 Del. 264, 144 A.2d 123 (1958).

83. 26 Wis. 2d 683, 133 N.W.2d 267 (1965), noted in 51 Cornell L.Q. 351 (1966).

contribution from plaintiff as a condition to acquisition of the franchise. The court granted a monetary award, but on its face the decision appeared to refuse to grant lost profits.[84] However, analysis of the award of reliance damages reveals that the expectancy interests were included in it,[85] and the case may therefore be said to be in accord with *Chrysler*.

Goodman v. Dicker[86] involved a plaintiff applying for a dealer franchise to sell radios. Such franchises were revocable at will. He was informed that his application had been accepted, and was induced to incur expenses. In addition, he was informed that he would receive an initial delivery of at least thirty radios. The defendant was held liable on an estoppel theory for monies spent by plaintiff in preparation for business. However, he was not held liable for any lost profits on the thirty radios because there was not sufficient reliance to create an estoppel.[87] Even if a contract had been formed, the defendant would not have been liable for lost profits since it was uncertain that the radios could have been sold at a profit. Under traditional contract rules there is no recovery for lost profits (i) when a contract is terminable at will, (ii) when a contract involves a new business, the alleged profits of which would have been highly speculative, or (iii) when the plaintiff was placed "in a better position than he would have occupied had the contract been fully performed."[88] Proponents of *Goodman's* apparent "no lost profits" rule found reinforcement in *Wheeler v. White*,[89] where the court, having found no contract to exist, strictly limited plaintiff's possible recovery under promissory estoppel to out-of-pocket expenses.[90]

These cases thus illustrated three potential approaches to the damage question. One approach, following *Chrysler* and *Hoffman*, would reimburse promisees for lost expectancies.[91] A second, as in *Goodman*, would limit recovery to protection of the reliance interest when confronted with contractual infirmities.[92] A third, following *Wheeler*, would deny absolutely recovery for lost profits.[93]

Section 90 of the *Restatement Second* implicitly contrasted *Chrysler* and *Goodman*, emphasizing the fact that in the former, the promisee was deliberately misinformed.[94] Arguably, therefore, the section seemed to support the proposi-

84. 26 Wis. 2d at 700, 133 N.W.2d at 276.

85. Traditional Damage Doctrine, supra note 69, at 585.

86. 169 F.2d 684 (D.C. Cir. 1948).

87. See Terre Haute Brewing Co. v. Dugan, 102 F.2d 425, 427 (8th Cir. 1939).

88. Traditional Damage Doctrine, supra note 69, at 586-87; Measure of Damages, supra note 66, at 709-10.

89. 398 S.W.2d 93, 94-95 (Tex. 1965), noted in 18 Baylor L. Rev. 546 (1966).

90. 398 S.W.2d at 97. Indefiniteness was the particular contractual infirmity at issue.

91. See, e.g., Wroten v. Mobil Oil Corp., 315 A.2d 728, 730-31 (Del. 1973); Hessler, Inc. v. Farrell, 226 A.2d 708, 711 (Del. 1967); Haveg Corp. v. Guyer, 226 A.2d 231, 238 (Del.1967).

92. See Terre Haute Brewing Co. v. Dugan, 102 F.2d 425, 427 (8th Cir. 1939).

93. Cf., e.g., Green v. Helmcamp Ins. Agency, 499 S.W.2d 730 (Tex. 1973); Prince v. Miller Brewing Co., 434 S.W.2d 232 (Tex. Civ. App. 1968); Pasadena Assoc. v. Connor, 460 S.W.2d 473 (Tex. Civ. App. 1970).

94. Restatement (Second) of Contracts § 90, illus. 8 & 9 (Tent. Drafts Nos. 1-7, 1973). Corbin made no reference to this aspect of Chrysler in his analysis of the case. See 1 Corbin, supra note 9, § 205.

tion that reliance damages *only* are the proper measure of recovery, except where the promisor has acted in bad faith, in which case the expectation interest should be the measure.[95]

However, given the nature of promissory estoppel as a substitute for consideration,[96] the expectancy result is more theoretically correct. Where the other necessary elements of a contract are present a contract must then exist with promissory estoppel substituting for the requisite consideration; and therefore full contract damages should be available. In cases which involve promissory estoppel as it affects the Statute of Frauds, however, consideration is assumed to be present.[97] In such cases expectancy damages unquestionably would be awarded, unless there are other policy reasons which would require a different result. The overwhelming majority of decisions apparently have found no such policy justifications to bar an expectancy recovery.[98]

Although the cases provide no insight into the appropriate measure of recovery, the language of the *Restatement Second,* which contains a redraft of the original section 90, may provide some insight. The principal change in section 90 (which change was also incorporated into the newly created section 217A) was the recognition of the possibility of partial enforcement.[99] The requirement set forth in the original section 90 that reliance be of a "definite and substantial character" was deleted. The section was further amended by providing that "[t]he remedy granted for breach may be limited as justice requires." Section 90 now recognizes that

> the same factors which bear on whether any relief should be granted also bear on the character and extent of the remedy. In particular, relief may sometimes be limited [as] measured *by the extent of the promisee's reliance rather than by the terms of the promise.*[100]

It is this language, rather than that emphasizing the good faith-bad faith dichotomy[101] that should serve as the basis for determining whether reliance or

95. See Traditional Damage Doctrine, supra note 69, at 588; 65 Mich. L. Rev. 351, 357 (1966).

96. See note 21 supra and accompanying text.

97. This is so except, perhaps, in the rare instance where promissory estoppel is used both as a substitute for consideration and also to estop the promisor from pleading the Statute. See Henderson, supra note 20, at 381.

98. See note 76 supra and accompanying text. But see Henderson, supra note 20, at 381. "Since it is established doctrine that the Statute of Frauds is to be 'strictly applied,' it would seem to follow that the elements of Section 90 will also be 'strictly applied,' in this context." Id. at n.210. See generally 37 Calif. L. Rev. 151 (1949).

99. Restatement (Second) of Contracts § 90, Reporter's Note (Tent. Drafts Nos. 1-7, 1973).

100. Id. § 90, comment d (emphasis supplied).

This language, indicative of a similar flexible approach when dealing with the Statute of Frauds, also appears in comment d to section 217A.

The extent of reliance required for full enforcement, however, may vary according to the type of situation involved. For example, charitable subscription cases do not require substantial reliance, but suretyship cases do. Id. § 90, comment b.

Further discussion of the ramifications of the flexible approach in section 90 type circumstances would not be appropriate since it has been discussed elsewhere. See generally Henderson, supra note 20, at 352-57; Traditional Damage Doctrine, supra note 69, at 580-82; 65 Mich. L. Rev. 351, 354-55.

101. See notes 94-95 supra and accompanying text.

expectancy damages are proper. This would seem to be true if for no other reason than the fact that the language quoted above appears explicitly in the section and its comments, while the dichotomy is only implied. Moreover, since the expectancy result is theoretically correct, the good faith-bad faith approach is inappropriate in that it limits drastically, and perhaps unreasonably, such awards.

The question that has received no attention until now is whether section 217A was intended by its drafters to provide a more restrictive approach to relief than that which exists under section 90, despite the apparent similarities of the two sections. The only clue that the remedial results were not intended to be co-extensive is lodged in a comment to section 217A which states that the consideration requirement is more easily displaced than is the writing requirement.[102] However, this seems to be more of a threshold question than an operational issue. In other words, the extent of reliance required to invoke section 217A may be somewhat greater, but once that criterion is satisfied, the remedy should be given as freely as it would under section 90.

Another argument that the expectancy interest is appropriate under section 217A is that specific performance is available under that section.[103] Such argument is based on a desire for theoretical consistency. Both the awards of lost profits and specific performance affirm the existence of the contract and protect expectancy interests—one through damages and the other through performance. In fact, there are indications that specific enforcement, when available, is the *preferred* remedy under section 217A.[104]

Further support for the expectancy result is that the remedy of specific performance is based on part performance which is, in reality, a species of promissory estoppel.[105] The conduct which is the subject of part performance has traditionally been required to be "unequivocably referable" to the contract, while reliance under promissory estoppel need satisfy no such requirement. It appears, however, that this is no longer the rule. The wording of section 197 has now been changed to parallel that of section 217A, at least insofar as the kind of conduct in reliance is concerned.[106] Perhaps the drafters of the *Restatement* have

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102. Restatement (Second) of Contracts § 217A, comment b (Tent. Drafts Nos. 1-7, 1973). See text accompanying notes 99-100 supra.

103. See note 104 infra.

104. "[W]hen specific enforcement is available under the rule stated in § 197, an ordinary action for damages is commonly less satisfactory . . . ." Restatement (Second) of Contracts § 217A, comment d (Tent. Drafts Nos. 1-7, 1973).

105. J. Calamari & J. Perillo, Contracts § 101, at 174 (1970), citing Greiner v. Greiner, 131 Kan. 760, 293 P. 759 (1930).

106. Compare the following:

"Where, acting under an oral contract for the tranfer of an interest in land, the purchaser with the assent of the vendor (a) makes valuable improvements on the land, or (b) takes possession thereof or retains a possession thereof existing at the time of the bargain, and also pays a portion or all of the purchase price, the purchaser or the vendor may specifically enforce the contract." Restatement of Contracts § 197 (1932).

"A contract for the transfer of an interest in land may be specifically enforced notwithstanding failure to comply with the Statute of Frauds if it is established that the party seeking enforcement, in reasonable reliance on the contract and on the continuing assent of the party against whom

finally taken into consideration what they themselves have admitted—that the conduct generally required to invoke the part performance doctrine is not that called for under any part of the contract, but is any reasonable conduct indicating a sufficient degree of reliance on a promise.[107] At least one case has reached the same result. In *Steadman v. Steadman,*[108] the defendant agreed to convey her interest in a house to the plaintiff in consideration of £1500, plus £100 for maintenance arrears. Plaintiff sent only the latter amount with a deed of transfer, which defendant refused to sign. The court held the acts sufficient part performance to enforce the oral contract.[109] This new flexibility in the doctrine of part performance, closely following that existing under promissory estoppel, has added weight to the notion that part performance is a species of promissory estoppel. This link is of importance since it appears that part performance as a ground for remedy against a Statute of Frauds defense has evolved to the point where damages as well as equitable relief may be available under that doctrine.[110] Once specific performance is available under the Statute of Frauds, the reasoning appears to be that it is a relatively minor breach in the already cracked wall of the Statute to allow damages.[111] Since part performance is a species of promissory estoppel, and full damages may be available under part performance, it is arguable that such damages should also be recoverable under promissory estoppel.

IV. CONCLUSION

Although section 217A itself has yet to be construed by the courts, the use of promissory estoppel to defeat the Statute of Frauds has become widespread and occurs under a multitude of guises.

Full contract damages have been shown to be justified primarily on the basis of the failure of the *Restatement* to take a contrary approach, the assertions of its draftsmen, the availability of specific performance as an alternative remedy, and the measure of damages recoverable in cases dealing with promissory estoppel as a substitute for consideration.

The increasing availability of full contract damages and/or specific per-

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enforcement is sought, has so changed his position that injustice can be avoided only by specific enforcement." Restatement (Second) of Contracts § 197 (Tent. Drafts Nos. 1-7, 1973). See the language of section 217A at note 1 supra.

Section 197 concerns only contracts for the transfer of an interest in land. However, such contracts constitute by far the largest category to which specific performance has been applied.

107. " 'Part performance' . . . is not a strictly accurate designation of such acts as taking possession and making improvements . . ." when the contract does not provide for such acts, but such acts regularly bring the doctrine into play. Restatement of Contracts § 197, comment b (1932).

108. [1974] 3 W.L.R. 56, noted in 90 L.Q. Rev. 433 (1974).

109. A commentator noted that "[i]t is now necessary to unlearn all the authorities which hold that equivocal acts, and in particular the mere payment of money, cannot suffice . . . ." 90 L.Q. Rev. 433, 434 (1974).

110. See Miller v. McCamish, 78 Wash. 2d 821, 829-30, 479 P.2d 919, 924 (1971), noted in 47 Wash. L. Rev. 524 (1972).

111. 47 Wash. L. Rev. 524, 527-28 (1972).

formance seems to be a well justified development, since reliance damages alone may not always provide sufficient compensation to avoid unconscionable injury, the avoidance of which was of primary importance in the creation of the doctrine of promissory estoppel.

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