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Contracts-Consideration-Promissory Estoppel

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CONTRACTS—CONSIDERATION—PROMISSORY ESTOPPEL—Appellant owned and operated a city water system. Appellee had been a customer of said company for a long time prior to Feb. 11, 1929. On this date the appellee requested appellant to shut off the flow of water by turning the shut-off valve at the appellee's property line, as the house was to be vacated. Appellant then and there agreed to do as requested. Appellee vacated the house, appellant attempted to turn off the water at the property line, but failed to do so because of the frozen condition of the ground. Pipes in the house bursted, and considerable damage resulted. Appellee's complaint was drawn upon the theory that on Feb. 11, 1929, a binding contract was entered into, and that appellant failed to perform its obligation to appellee's damage. Complainant received \$275.00 judgment in the lower court. *Held*, judgment reversed. *Frankfort Waterworks Co. v. McBride*, Appellate Court of Indiana, March 4, 1931, 175 N. E. 140.

The reversal was based solely upon the proposition that there was no consideration for the appellant's promise, that no mutuality existed, and that such promise was thus merely a gratuitous and unenforceable one. Now it is quite evident that as a result of the reliance upon this promise, the appellee suffered considerable damage. A moral duty on the promisor is present, but of course a moral breach is often not a legal one. For more than a century learned jurists interested in the problem of developing legal duties to coordinate moral obligations, have puzzled themselves over the desirability of giving a remedy to one who has incurred expense or disappointment through thinking that the other party was bound by his promise. 63 *American Law Review*, 33; Munroe Smith, *A General View of European Legal History*, 195.

Those who have considered an extension in this direction have been confronted by the fact that the law of contracts is conceded to be a branch of the law wherein a high degree of certainty is desirable. Any development made should be one of fairly uniform and universal application. The doctrine offered as a solution to this present problem is that of "promissory estoppel."

Williston discusses the subject under the heading of "Estoppel as a Substitute for Consideration," and cites several cases in which the principle has been applied to the formation of contracts, where, relying on a gratuitous promise, the promisee has suffered detriment. Williston, *Contracts*,

Sec. 139. There are now several well established situations in which reliance on a promise renders the promisor liable, although there has been no price or consideration paid for the promise.

Specific performance will lie on a gratuitous promise to convey land if the promisee has been given possession or has both been given possession and has made improvements. (See *Restatement, Contracts*, No. 4, Sec. 194.)

Likewise a promise not to enforce or foreclose a mortgage in reliance upon which the promisee has made improvements is binding. Williston, *Contracts*, p. 312, note 39.

Charitable subscriptions are generally enforced in the United States after action in reliance upon them has been taken. Williston, *Contracts*, Sec. 116; *Allegheny College v. National Chautauqua Bank*, 246 N. Y. 369, 159 N. E. 173.

Gratuitous undertakings of bailees have been enforced when relied upon. Williston, *Contracts*, Sec. 138. In *Siegel v. Spear*, 234 N. Y. 479, 138 N. E. 414, a gratuitous bailee promised to obtain insurance on bailed property but failed to do so, and was held liable on the basis of his promise.

Gratuitous promises made in expectation of marriage and justifiably relied upon by the promisee have been universally enforced both in the United States and England. Williston, *Contracts*, p. 312, note 41.

Gratuitous promises of a licensor acted upon to an extent that the licensee has seriously changed his position are enforceable on the doctrine of promissory estoppel, although the cases on this question are not uniform, the probable weight of authority being opposite to the doctrine. Williston, *Contracts*, p. 311. It is difficult to see, however, any rational distinction between a promise to convey the land itself and a promise to allow a license or an easement over it. A few states have definitely enforced the promise of the licensor when injuriously relied upon. *Rerick v. Kern*, 14 S. & R. 267, 16 Am. Dec. 497; *Willis v. Erie City Passenger Railway Co.*, 188 Pa. 56, 66, 41 Atl. 307. The following Indiana cases have held a parol license irrevocable after considerable expenditure in reliance upon its being perpetual. *Messick v. Midland Ry. Co.*, 128 Ind. 81, 27 N. E. 419; *Chamberlin v. Myers*, 68 Ind. App. 342, 120 N. E. 600.

Promises of waiver justifiably relied upon have been enforced, as where a purchaser at judicial sale promises not to set up the statutory period for the redemption of such property sold, but insists upon it after those wishing to redeem have permitted the statutory period to pass. Williston, *Contracts*, Sec. 139.

Thus there are several situations in which the historic theory of injurious reliance has not been supplanted by the so-called Bargain Theory. The American Law Institute in its Restatement of the Law of Contracts, Sec. 90, states the following: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

Applying this statement to the principal case, it is evident that the Waterworks Co. should reasonably expect its promise to induce its customer to forbear from turning off the water, and to leave the situation in the hands of the promisor. Such entrusting of a duty on the execution of which

depended the preservation of real estate is action of a definite and substantial character. The promise actually did induce this identical action or forbearance.

The final proviso is contained in the statement "if injustice can be avoided only by enforcement of the promise." The appellant company is engaged in a public calling, upon which the appellee relied to fulfill its promise to care for the property of the promisee by turning off the water. It might even well be argued that under its duty to furnish adequate facilities, the company was bound to shut off the water when a customer desired to terminate the relationship. As a result of such reliance, the promisee, thus entrusting its property, suffered considerable injury thereto, which can be remedied only by compensation in the form of damages. Injustice can be avoided only by enforcement of the promise.

Probably one of the most glaring examples of injustice resulting from reliance on the gratuitous promise is the case of *Kirksey v. Kirksey*, 8 Ala. 131. There a brother-in-law advised the widow of her brother to sell her lands and come to him, promising that he would give her a place in which to raise her family. The widow gave up her lands, went to the promisor, and was provided for during a short time, but was then requested to get out. Relief was denied on the ground that such a mere gratuitous promise would not be enforced. That case was probably correctly decided in 1845, but as exemplified by the Restatement cited above, there has been considerable development in formulating a workable doctrine of promissory estoppel since that date. Despite this fact, the principal case has been added to the category of *Kirksey v. Kirksey*, *supra*, supporting an archaic view that is inherently unjust.

P. J. D.