PROMISSORY ESTOPPEL IN GEORGIA

The classic doctrine of consideration is that " . . . the promise and the consideration must purport to be the motive each for the other in whole or at least in part. It is not enough that the promise induces the detriment or that detriment induces the promise if the other half is wanting."[1] From this established concept of consideration, the doctrine of promissory estoppel is a departure.

Perhaps the best definition of the doctrine, academically, is to be found in Section 90 of the Restatement of Contracts, which states:

> "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."[2]

The doctrine is not a new one, although the name "Promisory Estoppel" is new.[3] The English courts have long recognized the injustice of not binding one to his promise, after the promisee has on faith of the promise been induced to incur expense or rely on it to his detriment. *Moses v. Macferlan*[4] scratched the surface to lay the doctrine, and *Pillans v. Van Mierop*[5] flatly held that in commercial cases among merchants, the want of consideration was not an objection.

The doctrine of promissory estoppel was firmly established in the *Van Mierop* case, though the Court did not so call it. The origin of the doctrine may be found in Roman Law. Vinnius, in his *Commentaries on the Law of Justinian,* said that there was no radical defect in a contract for want of consideration, but it was made requisite, in order to put people upon attention and reflection, and to prevent obscur-

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1. Wisconsin & Michigan R. Co. v. Powers, 191 U.S. 379, 24 S. Ct. 107, 48 L. Ed. 229 (1903).
2. New Eureka Amusement Co. v. Rosinsky, 126 Pa. 444, 191 Atl. 412 (1937); Langer v. Superior Steel Co., 105 Pa. Super. 579, 161 Atl. 571 (1932) (reversed on other grounds).
3. See 1 WILLISTON, CONTRACTS § 139 (Rev. Ed. 1936).
4. 2 Burr. 1005, 97 Eng. Rep. 676 (1760).
5. 3 Burr. 1664, 97 Eng. Rep. 1035 (1765).

ity and uncertainty.[6] Both Grotius and Puffendorf argued that if an undertaking was entered into upon deliberation and reflection, it had activity and such promises were binding,[7] and the first common law lawyer to put such binding promises in the realm of contracts was Bracton.[8] The *Van Microp* case also said that a naked promsie was enforceable if in writing or at least there were no prior cases holding a *nudum pactum* evidenced by writing to be bad.

English courts very early recognized the distinction between a *nudum pactum* and a promise that had induced the promisee to his detriment. For example, if a man promises to buy a house for another and proceeds to pay part of the purchase price, he may decline to finish buying the property and deny the other the benefits of the promise; however, if the other had moved onto the property and on faith of the promise made expenditures, the promise would be enforced.[9] The present day English law on the subject is stated by Chitty:

> " . . . a distinction is to be made between the case of a mere gratuitous promise and that of a promise on the faith of which one party is induced to do some act which, but for such promise, he would not have done."[10]

The English courts have been eager to apply the doctrine to commercial cases, as would behoove a great trading nation; but paradoxically, they have constantly refused to apply the doctrine to subscription promises to charitable institutions.[11]

Conversely, American courts have developed the doctrine mainly by applying it to subscription cases, where a person pledges money to a charitable institution. If the institution

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6. *Ibid.*
7. *Ibid.*
8. *Ibid.*
9. Crosbie v. M'Doual, 13 Ves. 149, 33 Eng. Rep. 251 (1806). Skidmore v. Bradford, L.R. 8 Eq. 134 (1869); Boston v. Boston, 1 K.B. 124 (1904). *Cf.* Coverdale v. Eastwood, L.R. 15 Eq. 121 (1871).
10. CHITTY, CONTRACTS 43 (20th Ed. 1947) (citing Skidmore v. Bradford, *supra* note 9, in support).
11. *In re* Hudson, 54 L.J. Ch. 811, 33 W.R. 819, 1 T.L.R. 447 (1885).

acts to its detriment on the faith of the pledge, the courts will enforce the pledge.[12]

Although the subscription cases almost universally reach the result of enforcing the pledge, or promise, there are three distinct theories upon which enforcement by American courts is predicated. Most courts follow the theory that if the promisee does work, or incurs expense, or acts to his detriment on the faith and in reliance upon a subscription, a consideration is thus furnished to support the promise.[13] A lesser number of courts allowing recovery upon subscription promises proceed in whole or in part upon the theory that the consideration for a subscriber's promise is to be found in the promises of the other subscribers.[14] In *Martin v. Meles*,[15] though recognizing that cases allowing recovery of subscriptions upon the ground of expenditure made, or work done, in reliance upon the subscription usually state the reason in terms of consideration, Holmes, C. J., said,

> "In the later Massachusetts cases more weight has been laid on the incurring of other liabilities and making expenditures on the faith of the promise of the defendant than on the counter-promise of the plaintiff."

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12. Simpson v. Tuttle, 71 Iowa 596, 33 N.W. 74 (1887).
13. Strong v. Eldridge, 8 Wash. 595, 36 Pac. 696 (1894); School District of Kansas City v. Stocking, 138 Mo. 672, 40 S.W. 656, 37 L.R.A. 406 (1897); Brooks v. Owen, 112 Mo. 251, 19 S.W. 723, *rehearing*, 20 S.W. 492 (1892); Koch v. Lay, 38 Mo. 147 (1866); Steele v. Steele, 75 Md. 477, 23 Atl. 959 (1892); Univ. of Des Moines v. Livingston, 57 Iowa 307, 10 N.W. 738, 42 Am. Rep. 42 (1881); Methodist Episcopal Church v. Garvey, 53 Ill. 401, 5 Am. Rep. 51 (1870); Amherst Academy v. Cowls, 6 Pick. 427, 17 Am. Dec. 387 (Mass. 1828); Pitt v. Gentle, 49 Mo. 74 (1871); Richelieu Hotel Co. v. International Military Encampment Co., 140 Ill. 248, 29 N.E. 1044, 33 Am. St. Rep. 234 (1892).
14. Owenby v. Georgia Baptist Assembly, 137 Ga. 698, 74 S.E. 56, Ann. Cas. 1913B 238 (1912); Bryan v. Watson, 127 Ind. 42, 26 N.E. 666, 11 L.R.A. 63 (1891); Allen v. Duffie, 43 Mich. 1, 4 N.W. 427, 38 Am. Rep. 159 (1880); George v. Harris, 6 N.H. 533, 17 Am. Dec. 446 (1829); Irwin v. Lombard University, 56 Ohio St. 9, 46 N.E. 63, 36 L.R.A. 329, 60 Am. St. Rep. 727 (1897); Furman Univ. v. Waller, 124 S.C. 68, 117 S.E. 356, 33 A.L.R. 615 (1923).
15. 179 Mass. 114, 60 N.E. 397 (1901); Sherwin v. Fletcher, 168 Mass. 413, 47 N.E. 197 (1897); Cottage St. M.E. Church v. Kendall, 121 Mass. 528, 23 Am. Rep. 286 (1877).

The Court in *Gans v. Reimensnyder*[16] said,

> " . . . a contract of the kind here involved is enforcible rather by way of estoppel than on the ground of consideration . . . But a subscription to a charity embodies in it no previous consideration; hence . . . it can be operative only by way of estoppel and unless others have been thereby induced to subscribe, or some undertaking has been commenced, or continued on the faith of it, it cannot be regarded as a binding contract."

Using the subscription cases as an example, the lines of theory regarding the doctrine of promissory estoppel were thus drawn during the latter part of the 19th Century and the early part of the 20th. After the use of the term "promissory estoppel" was advocated by Williston[17] and after the publication of the Restatement of Contracts in 1932, American courts became less niggardly in applying the doctrine to commercial cases; and lately it is noted that acceptance of the doctrine is growing, the courts being very careful not to apply it unless no other remedy is available.[18] In *Robert Gordon, Inc. v. Ingersoll-Rand Co.*[19] it was said,

> "Generally the doctrine of promissory estoppel has been applied in subscription cases and in cases where the promise enforced has been non-commercial in character. Courts have not been as generous in applying the doctrine to commercial transactions. . . . In the Baird case[20] the court refused to apply promissory estoppel to enforce a promise in a commercial transaction . . . However, we choose not to follow the Baird case. The mere fact that the transaction is commercial in character should not preclude the use of promissory estoppel."

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16. 110 Pa. 17, 2 Atl. 425 (1885); Beatty v. Toledo Western College, 177 Ill. 280, 52 N.E. 432, 69 Am. St. Rep. 242, 42 L.R.A. 797 (1898); Landwerlen v. Wheeler, 106 Ind. 523, 5 N.E. 888 (1886); Wesleyan Seminary v. Fisher, 4 Mich. 515 (1857); Doane v. Treasurer of Pickaway & Circleville, Wright 752 (Ohio 1834).
17. 1 WILLISTON, CONTRACTS § 139.
18. Stelmack v. Glen Alden Coal Co., 339 Pa. 410, 14 A.2d 127 (1940); Thom v. Thom, 208 Minn. 461, 294 N.W. 461 (1940); Lacy v. Wozencraft, 188 Okla. 19, 105 P.2d 781 (1940).
19. 117 F.2d 654 (7th Cir. 1941).
20. James Baird Co. v. Gimbel Bros., 64 F.2d 344 (2nd Cir. 1933).

And other courts have agreed.[21]

The doctrine today is applied mainly to subscription contracts, but it is also *generally* applied to four other classes of promises:

(1) A gratuitous promise to convey land is binding when the promisee has entered and improved the land.[22]

(2) A promise not to foreclose a mortgage is binding after the promisee has made investments in reliance thereon.[23]

(3) A license is irrevocable after the licensee has changed his position because of the license.[24]

(4) A gratuitous undertaking of a bailee is enforceable if it has been relied upon.[25]

Georgia has followed the doctrine of promissory estoppel in fact, but not in theory. Georgia's Courts do not recognize the term "promissory estoppel," but spell consideration out of the fact that one has relied on a promise to his detriment, such consideration springing up when the detriment occurs to the promisee. This has been the law in Georgia since *Austell v. Rice*.[26]

Georgia has applied its brand of the doctrine in license cases in that after a person has made improvements or invested capital which must have necessarily preceded the enjoyment of the license promised to him, it becomes an agreement for a valuable consideration and the licensee a

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21. *Accord*: Planter's Lumber Co. v. Trinity Universal Ins. Co., 191 Miss. 875, 4 So.2d 300 (1941); Volkwein v. Volkwein, 146 Pa. Super. 265, 22 A.2d 81 (1941); Berry v. Maguire, 162 Pa. Super. 67, 56 A.2d 282 (1948); Klein v. Farmer, 85 Cal. App.2d 545, 194 P.2d 106 (1948); *In re* Jamison's Estate, 202 S.W.2d 879 (Mo. 1947); Hunter v. Sparling, 87 Cal. App.2d 711, 197 P.2d 807 (1949).

22. See Dozier v. Watson, 94 Mo. 328, 7 S.W. 268, 4 Am. St. Rep. 388 (1888).

23. See Faxton v. Faxton, 28 Mich. 158 (1873).

24. See Sheffield v. Collier, 3 Ga. 82 (1847).

25. Siegel v. Spear & Co., 234 N.Y. 479, 138 N.E. 414 (1923).

26. 5 Ga. 472 (1848); Morrow v. Southern Exp. Co., 101 Ga. 810, 28 S.E. 988 (1897); Brown v. Bowman, 119 Ga. 153, 46 S.E. 410 (1903); Strachan v. Buford, 173 Ga. 821, 162 S.E. 120 (1931); Purcell v. Armour Packing Co., 4 Ga. App. 253, 61 S.E. 138 (1908); Peoples v. Citizen's National Life Ins. Co., 11 Ga. App. 177, 74 S.E. 1034 (1912).

purchaser for value.[27] This doctrine has also been applied to a gratuitous promise to convey land, where the promisee has entered upon the land and made improvements.[28]

The case of *McCowen v. McCord*[29] cites the Restatement of Contracts § 90, in support of its decision, but perverts the doctrine by holding that a *consideration* arose with the detriment to the promisee.

However, in the subscription cases Georgia follows the minority opinion of mutual promises supplying consideration each for the other states, Georgia Code § 20-304 states,

> "A promise of another is good consideration for a promise. In mutual subscription for a common object, the promise of others is a good consideration for the promise of each."

That section states the rule which was laid down by case law in *Wilson v. First Presbyterian Church of Savannah.*[30]

In appraising the theory followed by most courts, that detriment supplies consideration, the question arises: Did the parties intend that the detriment to the promisee should be a consideration? If they did not, the detriment cannot be a consideration, because a much older and much more firmly established doctrine is that nothing is consideration for a contract which the parties do not regard as such at the time of entering into the contract.[31] It seems rather incongruous to say that it was the intent of the parties for a consideration to spring up with a detriment to the promisee, and such was the intent when the promise was made. The same doctrine

27. Sheffield v. Collier, 3 Ga. 82 (1847); Mayor of the City of Macon v. Franklin, 12 Ga. 239 (1852); Hiers v. Mill Haven Co., 113 Ga. 1002, 39 S.E. 444 (1901). *Accord*: Rawson v. Bell, 46 Ga. 19 (1872); City Council of Augusta v. Burum, 93 Ga. 68, 19 S.E. 820 (1893); Johnson v. Longley, 142 Ga. 814, 83 S.E. 952 (1914).
28. Beall v. Clark, 71 Ga. 818 (1883); Morris v. Orient Ins. Co., 106 Ga. 472, 33 S.E. 430 (1898).
29. 49 Ga. App. 358, 175 S.E. 593 (1934).
30. 56 Ga. 554 (1876).
31. First Nat. Bank v. Shaw, 260 S.W. 309 (Tex. 1924); Beck v. Sheldon, 259 N.Y. 208, 181 N.E. 360 (1932); Edrington-Minot Corp. v. Murray W. Garsson, Inc., 219 App. Div. 65, 219 N.Y. Supp. 155 (1st Dept. 1926); Comfort v. McCorkle, 149 Misc. 826, 268 N.Y. Supp. 192 (Sup. Ct. 1933); *In re* Brunswick's Estate, 143 Misc. 573, 256 N.Y. Supp. 879 (Surr. Ct. 1932); Philpot v. Gruninger, 14 Wall. 577, 20 L. Ed. 743 (U.S. 1871).

of intent of the parties[32] also applies to the mutual promise theory. Is it the intent of each subscriber that such should be the consideration? If this question can be answered in the affirmative, then, what of the promise of the *first* subscriber? Those promises that produce injury should not be enforced on the basis of an estoppel in pais, for a future promise is not a misrepresentation of a fact and usually is not given with intent to defraud.[33] Such promises are *future promises*, and if they are "binding at all they must be binding as contracts."[34]

It seems that the pure doctrine of promissory estoppel would solve and reconcile the conflicting theories. Courts should firmly set these promises that induce detriment in the field of contracts and flatly state that here is an exception to the rule that future promises unsupported by consideration will not be enforced.

BURT DERIEUX

32. See note 31 *supra*.
33. See: Lacy v. Wozencraft, 188 Okla. 19, 105 P.2d 781 (1940); *In re* Jamison's Estate, 202 S.W.2d 879 (Mo. 1947); Panso v. Russo, 82 Cal. App.2d 408, 186 P.2d 452 (1947).
34. *In re* Watson's Estate, 177 Misc. 308, 30 N.Y.S.2d 577 (Surr. Ct. 1941); Fields v. Continental Ins. Co., 170 Ga. 28, 152 S.E. 60 (1930); Union Mutual Life Ins. Co. v. Mowry, 96 U.S. 544, 24 L.Ed. 674 (1877); *See*: Britain v. Bowden, 188 Ga. 806, 821, 5 S.E.2d 47, 57 (1939).